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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, *Plaintiff-Appellee*,
v.
ALEX M. AZAR II, et al., *Defendants-Appellants*.

COUNTY OF SANTA CLARA, et al., *Plaintiffs-Appellees*,
v.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., *Defendants-Appellants*.

STATE OF CALIFORNIA, *Plaintiff-Appellee*,
v.
ALEX M. AZAR, et al., *Defendants-Appellants.*

STATE OF WASHINGTON, *Plaintiff-Appellee*,
v.
ALEX M. AZAR II, et al., *Defendants-Appellants.*

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

CITY AND COUNTY OF SAN FRANCISCO'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

INTRODUCTION

As a safety-net healthcare provider for thousands of local residents, the City and County of San Francisco ("City" or "San Francisco") is obligated to provide high-quality medical treatment, while at the same time respecting the religious, ethical, and moral beliefs of its physicians and other staff. The City supports the legitimate conscience rights of individual health care professionals, and respects that an individual's beliefs may make the person reluctant to participate in an aspect of patient care. But the exercise of these individual rights must be balanced against the fundamental obligations of the medical profession and the right of all patients to receive quality health care. San Francisco has thoughtfully engaged in this balancing and created policies that provide accommodations to those providing direct care whenever possible, in full compliance with federal law.

These City policies reflect a deep commitment to basic civil rights *and* patient care—as do the relevant federal statutes. But the Department of Health and Human Services (HHS) seeks to upend this careful balance with a rule that requires the City—in any and all circumstances—to prioritize personnel's religious beliefs over the health and lives of women, lesbian, gay, bisexual, or transgender people, and other medically and socially vulnerable populations. *See Protecting Statutory Conscience Rights in Health Care*, 84 Fed. Reg. 23,170 (May 21, 2019) ("Rule"). Under the Rule, objectors may refuse to provide care without notice, even in life

threatening situations. San Francisco is forbidden from asking an applicant whether they are comfortable performing essential aspects of a job and cannot transfer an employee who refuses to do so. Nurses can refuse to provide information to patients about healthcare options. Staff can refuse to sterilize equipment. Receptionists can refuse to schedule appointments. Ambulance drivers can refuse to transport a patient in urgent need to the hospital. And if San Francisco does not agree to fully comply, it risks losing nearly $1 billion in federal funds that support critical health care services and other vital functions.

None of this is reflected in the underlying statutes that the Rule purports to implement. They are new requirements imposed by agency fiat. And they are invalid for several reasons.

The Rule exceeds HHS's statutory authority. It conflicts with federal laws including Emergency Medical Treatment and Active Labor Act (EMTALA) (which requires federally funded hospitals to provide emergency care) and Title VII (which allows employers to balance an employee's religious objection against the burden on the institution). It is arbitrary and capricious because HHS failed to consider substantial evidence before it or reasonably evaluate the benefits and burdens of the Rule. And it is unconstitutional under Separation of Powers and the Spending Clause.

The Rule is unconscionable and unlawful. The district court correctly struck it down in full. The district court's order should be affirmed in its entirety.

STATEMENT OF THE ISSUES

1. Whether the Rule is a legislative rule that HHS lacks authority to promulgate.

2. Whether HHS exceeded its statutory authority by adopting excessively broad definitions of statutory text.

3. Whether the Rule is contrary to EMTALA and Title VII.

4. Whether HHS acted arbitrarily and capriciously in promulgating the Rule.

5. Whether the Rule violates Separation of Powers or the Spending Clause.

6. Whether the district court properly vacated the Rule under the APA.

STATEMENT OF JURISDICTION

San Francisco agrees with Appellants' statement of jurisdiction.

STATEMENT OF THE CASE

A. Appellants' Asserted Statutory Bases for the Rule.

Over the years, Congress has enacted numerous federal statutes concerning religious objections to providing healthcare. The Rule purports to implement several of these statutes, including the Church Amendments (42 U.S.C. § 300a-7 et

seq.), the Weldon Amendment (*see, e.g.*, Consolidated Appropriations Act of 2009, Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034), and the Coats-Snowe Amendment (42 U.S.C. § 238n(a)) (collectively, the "Refusal Statutes").

1. The Church Amendments

Under the Church Amendments—a series of laws passed in the 1970s—government entities are prohibited from using certain federal funds as a basis to require that individuals "perform or assist in the performance" of any sterilization procedure or abortion if doing so would be contrary to a provider's religious beliefs or moral convictions. 42 U.S.C. § 300a-7. Similarly, receipt of federal funds cannot be used to require entities to make their facilities or personnel available for any sterilization procedure or abortion if the procedure is otherwise prohibited by the entity based on religious beliefs or moral convictions. And entities that receive certain federal funds cannot "discriminate" in employment, promotion, termination, or the extension of staff or other privileges because a provider "performed or assisted in the performance" of a lawful sterilization procedure or abortion or refused to do so on religious or moral grounds. *See id*.

The statute does not delegate rulemaking authority to any agency.

2. The Coats-Snowe Amendment

For 23 years after the Church Amendment was enacted, neither Congress nor any agency took further action with respect to conscience protections. No

agency rules were issued or proposed. No statutes were enacted. "In 1996, however, a new concern surfaced, namely that medical students felt coerced into learning how to perform abortions. Still, no agency acted—but Congress did act." ER36. Senators Coats and Snowe sponsored legislation (the Coats-Snowe Amendment) prohibiting government entities that receive federal financial assistance from discriminating against "health care entities" that refuse to undergo training to perform induced abortions, refuse to provide referrals for induced abortions or induced abortion training, or refuse to make arrangements for those activities. 42 U.S.C. § 238n(a). In the Coats-Snowe Amendment, Congress defined "health care entity" to include "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." *Id*. § 238n(c)(2).

The Coats-Snowe Amendment also required government entities receiving federal financial assistance to accredit health care entities that "would be accredited but for the accrediting agency's reliance upon an accreditation standard[] that requires an entity to perform an induced abortion" or provide training in the performance of "induced abortion." *Id*. § 238n(b)(1). The Amendment provided agencies with rulemaking authority with respect to that specific provision only. *Id*.

3. The Weldon Amendments

The Weldon Amendment is an appropriations rider that was first passed in 2004 and has been included in the Labor, Health and Human Services, Education, and Related Agencies Appropriations Act every year since. It states that none of the funds appropriated in the Act may be made available to government entities that discriminate against any "institutional or individual health care entity" because the entity "does not provide, pay for, provide coverage of, or refer for abortions." *See, e.g.*, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809 (2004).

In the Weldon Amendment, Congress specifically defined "health care entity" to mean "an individual physician or health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* § 508(d)(2).[1]

* * *

[1] In addition, Congress has provided that Medicaid managed care organizations and Medicare Advantage plans cannot be compelled to provide, reimburse for, or cover counseling or referrals that they object to on moral or religious grounds (as long as the organization makes its policy clear to prospective enrollees). 42 U.S.C. § 1396u-2(b)(3)(B). And the conscience provisions of the Patient Protection and Affordable Care Act ("ACA") incorporate the existing Refusal Statutes, rather than provide any new substantive protections. *See, e.g.*, 42 U.S.C. §§ 18023(c)(2)(A), 18113(c). Congress gave HHS rulemaking authority to implement narrow aspects of the Medicare and ACA programs that are not relevant here. *Id.* §§ 1302(a), 1395w-26(b)(1), 18041(a)(1).

San Francisco fully complies with all of these laws. But, as explained below, the Rule vastly expands religious refusals beyond the reasonable scope contemplated by Congress.

B. Regulatory Background.

1. Prior Rulemaking

For more than three decades, no agency issued any rules concerning the Refusal Statutes. In December 2008, however, HHS issued a rule purportedly authorized by the Church and Weldon Amendments allowing it to terminate and/or compel return of certain federal funds from state and local governments that "discriminat[e] on the basis that [a] health care entity does not provide, pay for, provide coverage of, or refer for abortion." 73 Fed. Reg. 78,072, 78,073, 78,074, 78,098-99 (Dec. 19, 2008). Like the current Rule, the 2008 rule included several overly broad definitions of key statutory terms. *See, e.g.*, *id.* at 78,082, 78,097. Several lawsuits were filed challenging the validity of the rule, but they became moot in March 2009, when HHS proposed to rescind the 2008 rule, noting that a new round of rulemaking was underway. 74 Fed. Reg. 10,207 (Mar. 10, 2009).

In 2011, HHS amended the 2008 rule by—among other changes—removing several code sections, including the sections including the definitions. *See* 76 Fed. Reg. 9,968, 9,975 (Feb. 23, 2011). In so doing, HHS expressly confirmed that the

Church, Weldon, and Coats-Snowe Amendments do *not* require "promulgation of regulations for their interpretation or implementation." *Id*.[2]

2. The 2019 Rule

Between 2008 and January 2018, the Office for Civil Rights (OCR) received only 44 complaints related to moral or religious-based objections. 83 Fed. Reg. 3,880, 3,886 (Jan. 26, 2018). Nevertheless, in January 2018, HHS created a new Conscience and Religious Freedom Division within OCR and issued a Notice of Proposed Rulemaking (NPRM) to vastly expand the reach and scope of the Refusal Statutes. *Id.* at 3,880. A broad array of individuals, medical associations, public health experts, state and local governments, providers, and patient groups lodged comments in opposition. Despite the volume of comments, HHS issued the materially identical final Rule in May 2019.

Although the Rule purports to do nothing more than operationalize the existing Refusal Statutes, it in fact creates a new regime that dramatically broadens prerogatives of religious objectors at the expense of patients and other providers. It does this by defining (or redefining) key statutory terms far more broadly than Congress intended and applying them across-the-board, rather than in the limited

[2] Accordingly, HHS did not rely on these Amendments as authority for issuing the 2011 rule. The rule was issued under the "Housekeeping Statute," 5 U.S.C. § 301, which authorizes the head of an Executive department to issue regulations related to intradepartmental governance. *See* 76 Fed. Reg. at 9,975.

contexts Congress had specified. "*Health care entity*," for example, is defined so broadly as to encompass any entity, program, or activity in the health care, education, research, or insurance fields—even those that do not provide treatment to patients. *See* 45 C.F.R. § 88.2 [84 Fed. Reg. 23,170, 23,264 (May 21, 2019)]. And "*assist in the performance*" includes not only assisting in the performance of procedures, but extends to participation in any other activity with an "articulable connection to furthering a procedure" such as scheduling, transporting a patient, or processing an insurance claim. *Id.* [84 Fed. Reg. at 23,263]. Under these broad definitions, an ambulance driver could eject a patient en route to a hospital upon learning that the patient needed an emergency procedure to resolve a potentially life-threatening ectopic pregnancy,[3] a covered entity could not transfer a receptionist who refuses to schedule appointments for abortion counseling, and a nurse could refuse to assist in a procedure to save a patient hemorrhaging from a pregnancy-related complication even if no other staff were available to assist and the consequences could be fatal.

[3] This despite the fact that treatment of an ectopic pregnancy should not and would not be considered an abortion under the Refusal Statutes—or by most of the medical community—because there was never a viable pregnancy. *See, e.g.*, *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1086 (E.D. Ark. 2017) (vacated on other grounds by *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020)) (distinguishing between an "abortion" and "treatment for spontaneous miscarriage or removal of an ectopic pregnancy"); *Summit Med. Ctr. of Alabama, Inc. v. Riley*, 318 F. Supp. 2d 1109, 1112 (M.D. Ala. 2003) (noting that "women with ectopic pregnancies . . . have no chance of bringing a living child to term").

The penalties for failing to comply with the Rule's broad new requirements are draconian and coercive. Applicants for HHS funds are required to submit an assurance and certification of full compliance with the Rule as "a condition of continued receipt of Federal financial assistance or Federal funds from the Department." 45 C.F.R. § 88.4(a), (b) [84 Fed. Reg. 23,170, 23,269]. Applicants who fail to submit this certification, or fail to fully comply with any aspect of the Rule, face the loss of *all* HHS funding. *Id.* §§ 88.4(b)(8), 88.7 [84 Fed. Reg. at 23,270-72].

C. The Rule Would Cause Significant Injury To San Francisco.

If it went into effect, the Rule would cause significant injury to the City, which would have to either comply with it or risk losing all HHS funds. Either option would cripple the ability of the San Francisco Department of Public Health (SFDPH) to operate as the City's safety-net healthcare provider in the midst of a worldwide pandemic.

The City has established policies and procedures that protect personnel's religious beliefs while safeguarding SFDPH's obligation to provide high-quality inclusive care to all patients. For example, Zuckerberg San Francisco General (ZSFG) policies allow staff to opt out of providing patient care that conflicts with their religious beliefs. But those policies also make clear that "the patient's right to receive the necessary patient care will take precedence over the staff member's

individual beliefs and rights until other competent personnel can be provided." Joint Supplemental Excerpts of Record (SER) 1194, 1640.[4] The City also permits the involuntary transfer of individuals whose religious or moral objections would interfere with their ability to perform critical aspects of these jobs. The City would have to amend these policies to conform with the Rule. Doing so would impede the ability of hospitals and clinics to function efficiently, adversely affecting individual and public health. SER1210-11, 1228-29, 1191.

Compliance with the Rule would severely compromise patient care at SFDPH facilities in several other ways as well. Patients in the emergency room at ZSFG will die if nurses can categorically refuse to provide care. SER1213-14. This is neither hyperbole nor hypothetical. Every day, patients present in the ZSFG emergency room with life-threatening conditions. SER1214. Multiple times every month, those conditions involve serious complications relating to pregnancy or a sexually transmitted disease or infection. *Id.* If team members refuse to participate in treatment, the health consequences will be severe. *Id.*

Moreover, women seeking abortions will be delayed or denied time-sensitive treatment, increasing medical risks and costs with each passing day. SER1228-29. Some transgender people will be deterred from accessing safe

[4] The SER cites are to the Joint SER filed by the State of California in 20-16045.

transition-related care, and will resort to dangerous self-medication like black market hormones or industrial grade silicone injections, which can have serious—even fatal—effects. SER1642-43, 1478. LGBTQ people and other vulnerable populations will delay or avoid seeking care for fear of discrimination. SER1210-11, 1477-78. These delays will lead to worse individual and public health outcomes, and increased costs to the healthcare system. SER1210-11.

But the alternative to compliance—potential loss of all HHS funds—would be devastating. In fiscal year 2017-2018, the City spent approximately $1 billion in HHS funds, representing approximately 10 percent of the City's total operating budget and one-third of SFDPH's budget. SER1548-49, 1638. Loss of these funds would be catastrophic—particularly in the midst of a worldwide pandemic—and would compromise SFDPH's mission to protect and promote health and well-being. SER1207, 1211, 1638, 1214-15, 1582-83. And beyond SFDPH funds, $58 million in Temporary Assistance to Needy Family (TANF) funds, nearly $35 million in Title IV-E Foster Care funds, $10 million in adoption assistance funds, and $8 million in child support enforcement funds also hang in the balance. SER1548. To fully absorb the loss of all HHS funds for even a single year, the City would have to deplete its reserves, suspend capital projects needed to maintain the City's aging infrastructure, and make drastic service cuts in order to maintain a balanced budget, as it is legally required to do. SER1549. All of these actions

would result in significant job losses and the abandonment of key safety net services. *Id.*

D. Procedural History

Given the serious threats to public health and safety created by the Rule, San Francisco filed suit the same day the Rule was issued. SER1878. In November 2019, before the Rule was scheduled to take effect, the district court granted San Francisco's motion for summary judgment and vacated the Rule in its entirety.

The district court invalidated the new Rule on the ground that it unlawfully expanded conscience protections through a "persistent and pronounced redefinition of statutory terms" at the expense of "the effective delivery of health care to Americans." ER45.

First, the court held that the Rule modified the statutory definition of what it means to "assist in the performance" of an abortion or other medical service to cover people outside the time and place of the procedure, not just medical professionals directly involved. Second, the court noted that the new Rule improperly expanded the definition of "health care entity," contravening the Church and Weldon Amendments. The court found the redefinition added "a host of individuals and organizations" not contemplated in the underlying statute, including "pharmacists and other such organizations like pharmacies." ER53. Third, the court ruled that the Rule expanded the definition of a "referral" for

abortions in a manner that "goes beyond the meaning of the term as understood by the very industry HHS purports it is trying to protect." ER59. Finally, the district court held that "Congress has not made any express or implicit delegation of authority for HHS to issue legislative rules" and therefore HHS had no authority to add requirements to the statutes. ER62. The Rule's "expansive definitions" were "in conflict with the statutes and impos[e] draconian financial penalties." ER63.

Two other district courts have considered this Rule, and both agreed that it is invalid. ER8-33; *New York v. HHS*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019).

SUMMARY OF ARGUMENT

The district court properly granted summary judgment to San Francisco. The Rule is invalid and must be set aside for multiple reasons:

I.A. The Rule exceeds HHS's statutory authority. As creatures of statute, federal agencies "literally ha[ve] no power to act . . . unless and until Congress confers power upon" them. *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986). As HHS acknowledged below, the Rule—including each of the definitional provisions—is legislative. And HHS now concedes, as it must, that it has no authority to issue such legislative rules implementing the Refusal Statutes. The Rule can and should be invalidated on that basis alone.

But even if the definitional provisions were interpretive, they would be invalid because HHS exceeded its authority by adopting new definitions of the

terms "discriminate/discrimination," "assist in the performance," "referral/refer for," and "health care entity" that conflict with and dramatically expand the scope of the underlying statutes. This is not a permissible use of an interpretive rule.

I.B. HHS also lacks statutory authority to terminate all of a recipient's HHS funding for a single violation of a Refusal Statute or of the Rule itself. Such draconian punishment is nowhere contemplated in the underlying statutes or any other source of law.

II. This Court should also affirm the district court's decision on the alternative grounds that the Rule is (A) contrary to law, (B) arbitrary and capricious, and (C) unconstitutional.

II.A. The Rule should be set aside as contrary to law because it conflicts with EMTALA and of Title VII of the Civil Rights Act of 1964 ("Title VII"). The Rule would allow providers who are duty-bound under EMTALA to provide stabilizing treatment to people experiencing an emergency condition to refuse them care—even if nobody else were available to step in. And employers who are required by Title VII to provide employees with reasonable accommodations of their religious beliefs, could find that those very accommodations place them in violation of the Rule.

II.B. The rule is arbitrary and capricious because—among other reasons addressed by Santa Clara, California and Washington—HHS ignored regulated

entities' serious reliance interests in developing policies based on EMTALA and Title VII, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016). Further, HHS failed to consider important aspect of the problem, including the costs of the Rule on Providers.

II.C. The Rule is also unconstitutional. Because Congress has not authorized HHS to withhold funding based on violations of the Rule, the Rule violates Separation of Powers. And even if Congress had delegated that authority to HHS, the Rule would violate the Spending Clause, because it imposes funding conditions that are coercive and unrelated to the purposes of the funding.

III. Finally, the district court properly vacated the Rule as provided for by the APA. HHS's unfounded request to limit vacatur to the parties has no basis in the APA or precedent. And in light of the Rule's many flaws and the co-dependent nature of its provisions, no provision of the Rule is severable.

ARGUMENT

I. The District Court Correctly Held That The Rule Exceeds HHS's Statutory Authority.

The APA requires courts to "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The district court correctly declared the Rule unlawful on this basis.

Under the APA, federal agency rules can be legislative[5] or interpretive. It is well-settled that an agency cannot issue legislative rules with the force of law unless and until Congress gives it the power to do so. *See, e.g.*, *La. Pub. Serv. Comm'n*, 476 U.S. at 374. In the district court proceedings in this case—and other similar cases—Appellants expressly represented that the Rule was legislative and that Congress had given HHS authority to issue legislative rules in the Church, Coats-Snowe, and Weldon Amendments. SER1865-67, 1928-30, 1967-69, 1818. Every court rejected this argument.

The New York and Washington courts accepted Appellants' assertion that the Rule was legislative, and found the Rule invalid because HHS lacks substantive rulemaking authority under the Refusal Statutes. *New York*, 414 F. Supp. 3d at 526-27 & n.24; ER30. The district court here concluded—over Appellants' protests—that the Rule had to be deemed interpretive (in most respects) because HHS lacks the authority to issue such legislative rules. But the California court still invalidated the Rule, finding it to be an improper exercise of even its interpretive authority.

Appellants have now abandoned their prior arguments. They no longer argue that the Refusal Statutes authorize them to issue legislative rules. Rather, they contend that (A) the definitional provisions of the Rule are interpretive and

[5] Courts use the terms "legislative" and "substantive" interchangeably.

reflect the best reading of the statutory text, and (B) HHS has authority to issue the enforcement and certification provisions under 5 U.S.C. § 301 and other "existing authorities." Appellant's Opening Brief (AOB) 17. Both arguments fail.

A. The Rule's Definitional Provisions Exceed HHS's Authority.

1. The Definitional Provisions Are Legislative Rules That HHS Lacks Authority To Promulgate.

a. The Definitional Provisions Are Legislative.

"Unlike legislative rules, which 'grant rights, impose obligations, or produce other significant effects on private interests,' interpretive rules merely 'express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities.'" *Zaharakis v. Heckler*, 744 F.2d 711, 713 (9th Cir. 1984) (quoting *Batterton v. Marshall*, 648 F.2d 694, 701–02 (D.C. Cir.1980)). Although the distinction is not always simple to draw, courts have articulated some general principles that aid reviewing courts in making the determination whether a given rule is legislative or interpretative. Under these principles, the Rule and its definitional provisions are legislative.

i. HHS Expressly Characterized The Rule As Substantive.

As a starting point, the agency's own label and intent, though not dispositive, is relevant to the determination. *See Gen. Motors Corp. v.*

Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (cited by *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019)). HHS's own statements about the Rule strongly indicate that it is legislative, not interpretive.

Appellants' current characterization of the Rule directly contradicts the agency's express statements and arguments in district court proceedings (here and elsewhere)—that the Rule is legislative and authorized by statute. SER1865-67, 1928-30, 1967-69, 1818. And though HHS surely knows that "interpretive rules … enjoy no Chevron status as a class" (*United States v. Mead Corp.*, 533 U.S. 218, 232 (2001)), HHS claimed *Chevron* deference for the interpretations in the Rule. *See* SER1969-70. This strategy reflects HHS's intent and understanding that the Rule is legislative. Appellants cannot avoid these clear and reliable indications of the agency's intent by rebuking their original position and asserting an entirely different argument on appeal.

ii. The Rule Imposes Binding Requirements And Obligations On Parties.

An interpretive rule does "not impose any 'legally binding requirements' on private parties." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (citation omitted). It simply states what the administrative agency thinks the statute means, and only "'reminds' affected parties of existing duties." *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 & n.153 (D.C. Cir. 1979); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019), cert.

denied, 140 S.Ct. 789 (2020) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007) (When "statements" in a regulation "embody an effort to directly govern[] the conduct of members of the public, affecting individual rights and obligations. [citation] That is powerful evidence that the [agency] intended the [Rule] as a binding application of its rulemaking authority.").

By its own terms, the Rule imposes legally binding requirements. Section 88.3 of the Rule directly imposes "requirements and prohibitions." 45 C.F.R. § 88.3 [84 Fed. Reg. at 23,264]. The Rule then repeatedly refers back to the requirements imposed by "this part." Section 88.7, for example, prescribes consequences for "failure to comply with Federal conscience and anti-discrimination laws *or this part*." *Id.* § 88.7(i)(3) (emphasis added) [84 Fed. Reg. at 23,271-72]. This was a conscious drafting choice. The proposed version of section 88.7(i)(3)(vi) referred only to obligations "created by Federal law," but "for greater accuracy," HHS replaced that phrase in the final Rule with "under Federal law or this part." 84 Fed. Reg. at 23,223.[6]

Similarly, the "language actually used by the agency," makes clear that HHS "'intended' to speak with the force of law." *Guedes*, 920 F.3d at 18. In response to comments questioning its authority to issue substantive regulations

[6] *See also, e.g.*, 45 C.F.R. §§ 88.4(b)(1), 88.4(b)(4), 88.5(b), 88.6(a), 88.6(b), 88.6(d), 88.6(e), 88.7(c) (all referring to obligations under, or compliance with "this part").

implementing the Refusal Statutes, HHS did not claim that the Rule was merely interpretive. Instead, in the preamble to the Rule, HHS vigorously defended its authority to do so. 84 Fed. Reg. 23,183-88. It also referenced what parties "must" do to comply with the Rule. *See, e.g.*, *id.* at 23,193 ("The definition section must be read in conjunction with other sections of the rule when determining whether any particular entity must comply with any particular provision of the rule.").

Nowhere—prior to its opening brief to this Court—have Appellants *ever* stated, suggested, or used language indicating that the Rule "merely 'express[es] the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities.'" *Zaharakis*, 744 F.2d at 713 (quoting *Batterton*, 648 F.2d at 701-02).

iii. The Rule Purports To "Implement" Statutes.

Both the Supreme Court and this Court have explained that rules that "implement the statute" are considered legislative. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1970); *see also Alcatraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (legislative rules "are usually implementary to an existing law").

Here, HHS expressly states that the Rule is "implementing" the Refusal Statutes. The Rule's stated purpose is "to provide for the implementation and enforcement of the Federal conscience and anti-discrimination laws." 45 C.F.R. § 88.1 [84 Fed. Reg. at 23,263]; *see also id.* § 88.7(c) [84 Fed. Reg. at 23,271]

(addressing "non-compliance" with "this part [of the C.F.R.] or the laws implemented by this part"). And the preamble is replete with similar references. *See, e.g.*, 84 Fed. Reg. 23,197 ("This rule implements underlying statutory requirements and prohibitions set forth by Congress."); *id.* at 23,204 n.91 ("Paragraph 88.3(a)(2)(i) implements subparagraph (b)(1) of the Church Amendments; paragraphs 88.3(a)(2)(ii) and (iii) implement paragraph (b)(2) of the Church Amendments; and paragraph 88.3(a)(2)(iv) implements paragraph (c)(1) of the Church Amendments."). These repeated references to HHS's purported "authority to 'interpret and implement'" statutes confirm that the Rule is "an act of substantive rulemaking." *United States v. Lott*, 750 F.3d 214, 217 (2d Cir. 2014).

iv. The Definitional Provisions Cannot Be Parsed Out From The Rule.

Appellants concede, as they must, that many aspects of the Rule—including the enforcement and certification provisions—are legislative. They try to parse out the definitional provisions alone as interpretive rules. AOB 27. But the Rule is not so easily parsed. The definitions are inextricably intertwined with the Rule's substantive requirements. Each of the challenged definitions—"health care entity," "assist in the performance," "refer," and "discriminate"—appears in one or more substantive requirements. Section 88.3(c)(2), for example, makes it unlawful for covered party to "subject any institutional or individual *health care entity* to

discrimination on the basis that the *health care entity* does not provide, pay for, provide coverage of, or *refer* for, abortion." 84 Fed. Reg. at 23,266 (emphases added). Similarly, Section 88(a)(2)(iv) makes it unlawful for covered parties to "*discriminate* against any physician or other health care personnel . . . because such physician or other health care personnel . . . refused to perform or *assist in the performance* of a lawful sterilization procedure or abortion on the grounds that his performance or *assistance in the performance* of such procedure or abortion would be contrary to his religious beliefs or moral convictions . . . ." 84 Fed. Reg. at 23,265 (emphases added).

Section 88.4 then imposes a duty to certify compliance with the Rule's requirements to, for example, not discriminate against a health care entity that refuses to refer for an abortion—as those terms are defined in the Rule. 84 Fed. Reg. at 23,269. And Section 88.7 sets forth the consequences for failing to comply with those requirements. *Id.* at 23,271. The Rule's definitional provisions cannot reasonably be separated from the substantive provisions they control. It is therefore unsurprising that Appellants point to no case where a rule was broken up in this way, with the definitional part of an otherwise legislative rule deemed interpretive. Such parsing would rarely—if ever—make sense.

Moreover, in defining "discrimination," the Rule uses prescriptive terms to proscribe conduct—stating that covered entities may only ask about an employee's

religious objections after the person is hired and one a year after that, "unless supported by a persuasive justification." 45 C.F.R. § 88.2 [84 Fed. Reg. at 23,263]. It strains credulity to claim that this is no more than HHS's tentative view of the meaning of the statutory term and imposes no binding obligation on regulated entities.

b. HHS Lacks Authority To Issue Such Legislative Rules.

HHS does not even attempt to argue that it has statutory authority to issue the definitional provisions as legislative rules. Nor could it. As explained above (*see* pp. 4-6, *supra*), the Coats-Snowe Amendment, the Medicare/Medicaid laws, and the ACA delegate only narrow limited rulemaking authority to HHS. *See* ER60. The other Refusal Statutes delegate no substantive rulemaking authority whatsoever. And neither do the motley string of other provisions cited in the Rule. *See, e.g.*, 42 U.S.C. § 280g–1(d) (stating that nothing in the section "shall be construed to preempt or prohibit any State law"); 40 U.S.C. § 121(c) (authorizing the Secretary of HHS to "issue orders and directives . . . necessary to carry out the regulations" issued by the Administrator of General Services—not to issue his own regulations). Nor is any claim of implicit authority sustainable. *See Gonzales v. Oregon*, 546 U.S. 243, 264, 267 (2009) (rejecting argument that Congress would grant "broad and unusual authority through an implicit delegation").

Accordingly, if this Court agrees that the definitional provisions are legislative, they must be vacated. *See Pharm. Rsch. & Mfg. of Am. v. HHS*, 43 F. Supp. 3d 28, 45-47 (D.D.C. 2014) (rejecting HHS's assertion that the rule at issue was interpretive rather than legislative and vacating the rule because the agency lacked statutory authority to issue it); *see also, e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1060-66 (D.C. Cir. 2018) (vacating EPA rule for lack of statutory authority); *Motion Picture Ass'n of Am., Inc. v. FCC.*, 309 F.3d 796, 807 (D.C. Cir. 2002) (vacating FCC rules because "the FCC can point to no statutory provision that gives the agency authority to mandate" them).

2. Even If The Definitions Are Interpretive, HHS Exceeded Its Authority By Adopting Excessively Broad Definitions Of Statutory Text.

Even if this Court concludes that the definitional provisions are interpretive, and that rulemaking authority was therefore unnecessary, the definitions are invalid because HHS exceeded its authority by adopting "new definitions of statutory terms that conflict with the statutes themselves." ER44. *See generally Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004) (striking down an interpretive rule because it exceeded the Attorney General's statutory authority).

An executive agency has no authority to expand or alter a statute through its interpretive (or legislative) rules. *Cal. Cosmetology Coalition v. Riley* 110 F.3d 1454, 1460 (9th Cir. 1997) (quoting *Koshland v. Helvering*, 298 U.S. 441, 447

(1936) and *United States v. Calamaro*, 354 U.S. 351, 359 (1957)) ("A regulation may not serve to amend a statute . . . nor add to the statute 'something which is not there.'"). And "[a]mbiguity anywhere in a statute is not a license to the administrative agency that interprets the statute to roam about that statute looking for other provisions to narrow or expand through the process of definition." *Bower v. Federal Express Corp.*, 96 F.3d 200, 208 (6th Cir. 1996). Here, however, HHS improperly engaged in a "persistent and pronounced redefinition of statutory terms that significantly expands the scope of protected conscientious objections." ER45.

Specifically, although the Rule purports to simply implement existing federal law, HHS's definitions of several statutory terms far exceed the substantive bounds of their legislative origins. *See e.g.*, 45 C.F.R. §§ 88.2, 88.3(a)-(c) [84 Fed. Reg. at 23,264-65].

a. "Assist in the Performance"

The Church Amendments were passed in 1973 as a reaction to a federal district court decision in Montana that imposed a temporary restraining order "compelling a Catholic hospital, contrary to Catholic beliefs, to allow its facilities to be used for a sterilization operation." 119 Cong. Rec. S9595 (Mar. 27, 1973). Accordingly, the Church Amendment prohibits government entities from using certain federal funds as a basis to require that individuals "perform or assist in the

performance" of any sterilization procedure or abortion if doing so would be contrary to a provider's religious beliefs or moral convictions. 42 U.S.C. § 300a-7.

The Rule defines "assist in the performance" to include "tak[ing] an action that has a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity." 45 C.F.R. § 88.2. Although the Church Amendment did not define the term "assist in the performance," the text and legislative history make clear that HHS's new definition sweeps far more broadly than Congress contemplated.

Where an undefined term has an accepted meaning in the particular area addressed by a statute, the specialized meaning governs. *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 482-83 (1990); *United States v. Cuomo*, 525 F.2d 1285, 1291 (5th Cir. 1976). The undisputed evidence before the district court established that "assist in the performance" has an accepted meaning in the medical field: a medical professional helping a treating doctor by physically handling instruments or the patient. SER1191-92, 1643.[7]

[7] Appellants attempt to justify their broader definition of the term by citing the standard dictionary definitions of "assist" and "performance." AOB 30-31. But "where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan*, 496 U.S. at 483. Furthermore, the standard dictionary definitions of "assist" and "performance" underscore that Congress intended to require a close and direct nexus to the objected-to activity: "Performance" means "the execution of an action," and to "assist" means "to give support or aid," such as

The legislative history confirms this is what Congress intended. During the floor debate, Senator Church expressly stated that "[t]he amendment is meant to give protection to the *physicians, to the nurses, to the hospitals themselves*, if they are religious affiliated institutions. . . . There is no intention here to permit a frivolous objection from someone unconnected with the procedure to be the basis for a refusal to perform what would otherwise be a legal operation." 119 Cong. Rec. S9595 (Mar. 27, 1973) (emphasis added). In addition to this statement, the congressional record is replete with references to "doctors and nurses" as the types of individuals Congress intended the law to cover. *See, e.g.*, 119 Cong. Rec. S9597, S9598, S9599, S9600, S9601.[8]

Yet, the Rule's definition of "assist in the performance" extends the right of refusal well beyond this narrow scope. It is not limited to individuals who actively participate in medical procedures or services themselves, but rather extends to a universe of individuals who may bear little connection to the actual provision of health care. For example, the following scenarios that are not covered by the Refusal Statutes would be covered by the Rule's broad definition:

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when "another surgeon assisted on the operation." Merriam-Webster's Collegiate Dictionary 70, 863 (10th ed. 1996).

[8] Appellants' assertion that this legislative history is entitled to little or no weight (AOB 32) is incorrect. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement of one of legislation's sponsors deserved to be accorded "substantial weight" in interpreting statute).

- an ambulance driver refusing to take a woman needing emergency treatment for an ectopic pregnancy to the emergency room (SER1819-22);
- a hospital janitor refusing to sterilize an operating room for an emergency surgery treating an ectopic pregnancy (84 Fed. Reg. at 23,186);
- a receptionist refusing to schedule an abortion or a pre-operative consultation for a person considering whether to terminate a pregnancy (*id.*); or
- nursing staff refusing to provide routing "pre- and post-operative support" in connection with abortion and sterilization procedures (*id.* at 23,187).

This unjustified expansion of religious refusals is contrary to the plain language and legislative history of the Church Amendments. Far from being the "best reading" of the statute (AOB 30), the Rule gives an entirely new and different meaning to the term, in violation of HHS's statutory authority.

b. "Referral" or "Refer for"

"Referral" also has an accepted meaning in the medical field: a medical provider directing a patient to another provider for care. Merriam-Webster's Medical dictionary defines "refer" as "to send or direct for diagnosis or treatment." And Stedman's Medical Dictionary for the Health Professions and Nursing (7th ed. 2011) defines "referral" as "health care services that are ordered or arranged." Indeed, HHS itself defines "referral" in this way. *See, e.g.*, Medicare.gov, *Glossary-R*, https://www.medicare.gov/glossary/r (last visited October 5, 2020)

(defining referral as "[a] written order from your primary care doctor for you to see a specialist or get certain medical services"); Ctrs. for Medicare & Medicaid Services, *Glossary*, https://www.cms.gov/apps/glossary/default.asp?Letter=R&Language (last visited October 5, 2020) ("Generally, a referral is defined as an actual document obtained from a provider in order for the beneficiary to receive additional services."); *id*. (a referral is a "written OK from your primary care doctor for you to see a specialist or get certain services").

Nothing in the Refusal Statutes indicates any intent to use the term more broadly. To the contrary, the Coats-Snowe Amendment anchors "refer" and "referral" only to the training of induced abortions, and applies it only to an "individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." 42 U.S.C. § 238n.

But HHS's new definition goes far further, sweeping in the "provision of information" in any form "where the purpose or reasonably foreseeable outcome . . . 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." 45 C.F.R. § 88.2 [84 Fed. Reg. at 23,264]. Appellants now claim that this definition in fact means "actually sending or directing a person for the particular activity." AOB 40. But the language of the Rule is much broader and

potentially extends to the provision of any information by anyone employed in the health care industry. As the district court explained, "[t]his means, for example, that an entity could lose all of its HHS funding if it fired a hospital front-desk employee for refusing to tell a woman seeking an emergency abortion for an ectopic pregnancy which floor she needed to go to for her procedure." ER58; *see* n. 3, *supra*. Similarly, an entity could lose funding if it transferred a health care provider who refused to mention the availability of abortion as an option to a person with a potentially life-threatening condition like severe pre-eclampsia. These scenarios are inconsistent with the plain meaning of the term and far exceeds Congress's intent.

c. "Health Care Entity"

The term "health care entity" is expressly defined in the Coats-Snowe and Weldon Amendments. The Coats-Snowe Amendment defines it to include "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." 42 U.S.C. § 238n(c)(2). And the Weldon Amendment defines it to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." 42 U.S.C. § 18113.

The Rule ignores this plain language, adding several additional categories of individuals and entities. 45 C.F.R. § 88.2 [84 Fed. Reg. at 23,264]. Citing *Samantar v. Yousuf*, 560 U.S. 305 (2010), HHS argues that the use of the word "include" in both Coats-Snowe and Weldon indicates that the specific list of "health care entities" contained in those laws is illustrative, not exhaustive. AOB 37. But *Samantar* does not stand for the proposition that the word "include" should *always* be treated as preceding an illustrative list; merely that it may do so. And certainly, anything added to an "illustrative" list should be similar to the enumerated items. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."). The categories HHS added in the rule are not.

Congress's statutory language focused exclusively on healthcare professionals and organizations. By contrast, the Rule's definition extends to all "health care personnel," which HHS defines as including clerical, dietary, house-keeping, laundry, security, maintenance, billing, and numerous other staff "not directly involved in patient care." SER1650. These entities and individuals have very different roles and functions from those included in the definition by

Congress. Redefining the term to include them is a vast and unauthorized expansion.

d. "Entity"

The Church Amendment does not use the term "health care entity," only "entity." And the district court correctly found that HHS's definition of "entity" conflicts with that law. ER54. The Rule defines the term "entity" extremely broadly as:

> a 'person' as defined in 1 U.S.C. 1; the Department; a State, political subdivision of any State, instrumentality of any State or political subdivision thereof; any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State; or, as applicable, a foreign government, foreign nongovernmental organization, or intergovernmental organization . . . .

45 C.F.R. § 88.2 [84 Fed. Reg. 23,263]. In turn, Section 1 of the U.S. Code defines "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." In other words, HHS's definition of "entity" includes—without limitation—any corporation, company, individual, government, and public agency.

This conflicts with the Church Amendment. Both the Coats-Snowe and Weldon Amendments define "health care entity" to include both individuals and institutions. *See* 42 U.S.C. § 238(n)(c)(2); 132 Stat. 2981, 3117 (Jan. 6, 2018). But in the Church Amendment, Congress carefully distinguished between an "entity" and an "individual," with some provisions applying to entities, some

applying to individuals, and some applying to both. *See, e.g.*, 42 U.S.C. § 300a-7(b) ("The receipt of any grant, contract, loan, or loan guarantee under [the covered Acts] by any individual or entity does not authorize any court or any public official or other public authority to require … (1) such individual to [take certain actions] or (2) such entity to [take certain actions]"); *id.* § 300a-7(c) (imposing requirements on "entities"); *id.* § 300a-7(d) (granting certain protections to an "individual"). It is clear from this language that the term "entity," as used in Church, was intended to exclude individual persons. *See SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). Defining "entity" to include "individuals"—which is "exactly what the Church Amendment avoided" (ER54)—was improper.[9]

e. "Discriminate" and "Discrimination"

Finally, the Rule's definition of "discriminate or discrimination" goes far beyond what Congress intended by placing unprecedented limits on healthcare providers' accommodation policies and preventing them from ensuring patient health and safety. Under the Rule, "[d]iscrimination" means any change to an

[9] Appellants imply that this issue was not presented to the district court. But on November 8, 2019, the district court ordered the parties to provide supplemental briefing on the definition of "entity"—specifically, "the extent to which HHS contends (or has contended) that 'entity' as used in the Church Amendment should be construed to include 'health care entity' as defined in the challenged rule." ER75. In response to this order, both parties submitted briefs to the court. ER266. The plaintiffs' brief expressly argued that HHS's definition of "entity" conflicts with the Church Amendment. Having expressly requested briefing on the subject from all parties, the district court did not err in considering it.

objecting employee's "position," "status," "benefit[s]," or "privilege[s]" in employment, as well as use of any "policies[] or procedures" that subject the objector to "any adverse treatment." 45 U.S.C. § 88.2 [84 Fed. Reg. at 23,263]. The Rule thus encompasses almost any employment action towards religious objectors—including a transfer to a different position, unless the person expressly agrees to the transfer. *Id.* at subsection (4). The Rule also prohibits employers from inquiring about an applicant's potential religious objections prior to hiring them—even if participating in sensitive procedures like abortion are central to the job. *Id.* In other words, San Francisco could not ask an applicant for a nursing position in the ZSFG Women's Options Center, whose mission is to provider "high quality, sensitive and confidential abortion services," whether the applicant has a religious objection to assisting with the performance of abortions. And if the person then refused to participate in abortion procedures based on an undisclosed religious objection—and refused a transfer to another department—the City would have no recourse.

Nothing in the Refusal Statutes contemplates such an outcome. To the contrary, as explained in Section II(A)(2), *infra*, Congress did not intend its prohibition on "discrimination" in the Refusal Statutes to require healthcare entities to put the wishes of religious objectors above the needs of all others. Indeed, it is inconceivable that Congress intended silently to impose an *unlimited*

accommodation obligation in the healthcare field—where life or death may be at stake—when just a year earlier it *expressly* imposed a far more limited religious-accommodation obligation on all covered employers in Title VII.[10] *See generally Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (statutory terms should be understood in a manner "most compatible with the surrounding body of law into which the provision must be integrated").

Appellants seek refuge in the savings clause included in the definition of "discrimination," which states that it applies "as applicable to, and to the extent permitted by, the applicable statute." AOB 34. But "[s]avings clauses are read in their context, and they cannot be given effect when the Court, by rescuing the [validity] of a measure, would override clear and specific language." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1239 (9th Cir. 2018). Here, the Court would have to ignore these precedents and override clear and specific prohibitions in the Rule to give effect to the savings clause.

[10] In 1964, Congress enacted Title VII, prohibiting employment discrimination on the basis of religion without defining what constituted religious discrimination." Later, in a 1972 amendment to Title VII, Congress defined the term "religion," focusing primarily on an employer's obligation to "reasonably accommodate" an employee's religious practices—*unless doing so would impose undue hardship on the conduct of the employer's business*. 42 U.S.C. § 2000e(j). The next year, Congress passed the Church Amendment. Coats-Snowe and Weldon followed later.

B. The Remainder Of The Rule—Including The Enforcement And Certification Provisions—Exceeds HHS's Authority.

Appellants do not dispute that the remainder of the Rule—other than the definitional provisions—is legislative. Accordingly, HHS must "demonstrate that some statute confers upon it the power it purport[s] to exercise." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004). If no statute vests it with authority to promulgate the Rule, the agency's action is "plainly contrary to law and cannot stand." *Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 8 (D.C. Cir. 2002) (internal quotation marks omitted).

Notably, HHS no longer claims that the Refusal Statutes give them statutory authority to issue any part of the Rule. Nor could they given that the Refusal Statutes contain no grant of rulemaking authority whatsoever. *See* Part I(A)(1)(b), *supra*. Instead they argue (1) that the Rule is not as sweeping and draconian as it seems because the agency will not actually terminate all HHS funding; (2) that the agency has authority to issue the sweeping enforcement and certification provisions rules under 5 U.S.C. § 301; and (3) that the Rule does no more than set out HHS's pre-existing authority to enforce conscience rights. AOB 20-26. Appellants are wrong on all counts.

The Rule requires San Francisco, "as a condition of the approval, renewal, or extension of any Federal financial assistance or Federal funds" from HHS to provide "certifications" and "assurances" of its compliance with the underlying

statutes and with the Rule. *See* 45 C.F.R. § 88.4(a)(1)-(2) [84 Fed. Reg. at 23,269]. If San Francisco does not do so, or is found to be in violation of the Rule in any way, the consequences are drastic—HHS could deny the City all current and future HHS funding. *See* 45 C.F.R. § 88.7(i)(3)(iv)-(v) [84 Fed. Reg. at 23,272] (allowing that HHS may "[t]erminat[e] . . . Federal Funds from the Department, in whole or in part" and "[d]eny[] or withold[], in whole or in part, new . . . Federal funds from the Department").

Appellants try to minimize how extreme these new powers are. They claim that the enforcement provisions are framed in "permissive terms" and that funding termination will be "rarely impose[d]." AOB 21, 22. They also imply that funding will only be terminated "in whole" if the recipient's "violation . . . extend[s] to each funding stream it receives." AOB 24; *see also id.* at 23. But the government's post hoc assurances that it will narrowly interpret or apply an invalid law does not cure the legal infirmities or obviate the need for judicial relief. Thus, in *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014), for example, this Court held that a "promise from the State that it will use the power appropriately is not sufficient" to save an invalid law. *Id.* at 580-81; *see also United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Appellants then argue that HHS *does* have the authority to issue regulations allowing them to terminate all HHS funds. AOB 20-24. But they do not—indeed cannot—identify a single statutory provision that delegates such broad authority to the agency. As discussed above, the Refusal Statutes give them no such power. *See* Part I(A)(1)(b), *supra*. Nor does 5 U.S.C. § 301. Section 301 is a "housekeeping statute." *Chrysler Corp.*, 441 U.S. at 310. It "grant[s] authority to the agency to regulate its own affairs," but does not authorize "substantive rules." *Id.* at 309-10. The regulation exposes parties to termination of all HHS funding for any and all violations of the Refusal Statutes and the Rule itself. This is not "housekeeping." *See id.* at 310 n.41 (explaining that attempts to use Section 301 as anything more than day-to-day office housekeeping of government departments was "misuse" that "twisted" the statute).

Finally, Appellants claim that the Rule merely outlines the steps that the agency is already allowed to take under preexisting regulations. AOB 22-26. That position is curious given that the stated purpose of the Rule was to remedy "inadequate to non-existent regulatory frameworks to enforce" the Refusal Statutes. 84 Fed. Reg. at 23,228. Regardless, it is also incorrect. Appellants cite the Uniform Administrative Requirements (45 C.F.R. § 75.371) (UAR) in support of their alleged pre-existing authority. AOB 22. There is no dispute that the UAR gives HHS authority to take steps to enforce the Refusal Statutes on a case by case

basis. But the UAR does *not* authorize HHS to terminate all HHS funding—it is limited in reach to the specific funding stream related to the statute at issue. Nor does it authorize HHS to create new requirements and withhold funding for violating those non-statutory obligations. *See generally* 45 C.F.R. § 75.371.

Appellants' reliance on the Federal Acquisition Regulation (45 C.F.R. § 75.300) (FAR) in support of their authority to require the certifications and assurances is similarly misplaced. AOB 25. Nothing in the FAR allows HHS to take steps to ensure funding recipients are in compliance with newly articulated non-statutory requirements. Accordingly, Appellants' assertion that "HHS needs no authority beyond the conscience statutes themselves (and HHS's authority to regulate its internal operations) to require that fund recipients certify they are, in fact, complying with statutory conditions attached to their receipt of federal funds" (AOB 26) is fallacious. The Rule does not merely require covered entities like San Francisco to certify its compliance with the law—it requires them to certify compliance *with the Rule* (which dramatically expands the scope of the underlying laws) and imposes impose draconian penalties for noncompliance. *See* pp. 37-38, *supra* & 54-55, *infra*.

II. The District Court's Judgment Can Be Affirmed On Multiple Alternative Grounds.

Because the district court set aside the Rule on the ground that it exceeded HHS's statutory authority, it did not reach the other grounds for relief raised in

Plaintiffs' Motion. On appeal, however, courts may consider legal theories not reached by the district court as an alternative ground for affirming a judgment. *See, e.g.*, *United States v. Lemus*, 582 F.3d 958, 961 (9th Cir. 2009). This Court should affirm the district court's decision on the alternative grounds that the Rule is (A) contrary to law, (B) arbitrary and capricious, and (C) unconstitutional.[11]

A. The Rule Is Contrary To Law.

The APA requires this Court to "hold unlawful and set aside" agency action that is "not in accordance with law." 5 U.S.C. §706(2)(a). Here, the Rule should be set aside because it conflicts with the language of at least two statutes—EMTALA and Title VII.

1. The Rule Conflicts With EMTALA.

EMTALA requires hospitals with emergency rooms that participate in the federal Medicare and Medicaid programs to screen patients to determine "whether or not an emergency medical condition . . . exists" and, if so, to provide treatment to stabilize the patient. 42 U.S.C. §§ 1395dd(a), (b)(1), (c)(1). There is no dispute that such treatment may include an emergency abortion necessary to stabilize a person experiencing a miscarriage or pregnancy complication, such as an ectopic

[11] San Francisco adopts the arguments made by California, Santa Clara, and Washington that the Rule is contrary to law, arbitrary and capricious, and unconstitutional. To avoid burdening the Court with repetitive presentations of common facts and issues, San Francisco focuses less attention on those issues in this brief.

pregnancy. The Rule, however, allows health care personnel to opt out of such treatment—even if doing so would prevent the hospital from stabilizing the patient and cause serious health consequences or death. This conflicts with EMTALA.

Appellants first argue that this is a hypothetical and non-facial conflict. AOB 44. Not so. The conflict is facial because the Rule categorically places the objector's beliefs over the needs of the patient in *every* instance in which a conflict between them arises. There is *no* scenario under which the Rule "as applied" would allow the life or health of the patient to trump the provider's beliefs. *See Pharm. Rsch. & Mfgs. of Am. v. HHS*, 138 F. Supp. 3d 31, 43 (D.D.C. 2015).

And the conflict manifests concretely at San Francisco's public hospital. Zuckerberg San Francisco General Hospital (ZSFG) is covered by EMTALA. ZSFG must comply with its duties under EMTALA, or else face monetary penalties up to $50,000 per violation. 42 U.S.C. §1395dd(d)(1)-(2). In part to fulfill its duties under EMTALA, ZSFG adopted Administrative Policy 5.15, which provides that the hospital will honor a staff member's request not to participate in an aspect of patient care because doing so would conflict with the person's religious or moral beliefs, as long as it does not negatively affect the quality of patient care. But importantly, if the immediate nature of the patient's needs does not allow for a substitution of personnel, the patient's right to receive the necessary quality care takes precedence over the staff member's individual beliefs and rights

until other competent personnel can be provided. SER1194. This conflict demonstrates that the Rule is irreconcilable with EMTALA: ZSFG's policy, adopted to ensure *compliance* with EMTALA, would place the City in *violation* of the Rule. *Id.*; *see also* SER1640.

Appellants next contend that this is not a real conflict because HHS "'is not aware of any instance where a facility required to provide emergency care under EMTALA was unable to do so because its entire staff objected to the service on religious or moral grounds.'" AOB 44-45 (quoting 73 Fed. Reg. at 78,087). But given the fast pace of emergency medical situations, it is not necessary for an entire staff to object for a patient's health—and life—to be threatened. For example, around the time the Rule was issued, a young woman presented at the ZSFG emergency room who had bled substantially into her abdomen due to an ectopic pregnancy. SER1214. Her condition was critical. *Id.* If any member of the team responsible for her care had opted out of her treatment, the woman would have died before other competent personnel could have been substituted in. *Id.*

Finally, Appellants claim that allowing a patient to die in these circumstances would not violate EMTALA because "EMTALA requires emergency medical care only 'within the staff and facilities available at the hospital,'" and staff who hold moral objections to providing treatment, are not "available." AOB 45. Appellants cite no case for the proposition that a religious

objection renders staff unavailable within the meaning of EMTALA—and fail to mention that the argument was rejected by the Fourth Circuit. *Matter of Baby K*, 16 F.3d 590 (4th Cir. 1994), concerned an anencephalic infant without cognitive awareness who could not "see, hear, or otherwise interact with her environment." *Id.* at 592. "Because aggressive treatment would serve no therapeutic or palliative purpose," the hospital's doctors objected to "provid[ing] emergency medical treatment to Baby K that it deem[ed] medically and ethically inappropriate." *Id.* at 593. But the Fourth Circuit held that EMTALA requires treating physicians to provide stabilizing treatment even if they deem it "ethically inappropriate." *Id.* at 597.

The legislative history of the Refusal Statutes confirms that Congress intended "emergency situation[s]" to take priority over conscience objections. 119 Cong. Rec. S9601 (daily ed. Mar. 27, 1973) (statement of Sen. Church that "no hospital, religious or not, would deny such services"); *see* 142 Cong. Rec. S5166 (daily ed. Mar. 19, 1996) (statement of Sen. Coats); 151 Cong. Rec. H177 (daily ed. Jan. 25, 2005) (statement of Rep. Weldon that when "a mother's life is in danger a health care provider must act to protect" her).

2. The Rule Conflicts With Title VII.

Title VII obligates covered employers to reasonably accommodate an employee's religion unless doing so would constitute an undue hardship. 42

U.S.C. § 2000e(j). For example, if an employee raises a religious objection to performing the duties of their position, the employer is required to offer accommodations—such as a transfer to another position in which the objected-to duties would not be required—unless doing so would impose an undue hardship. Such an offer satisfies the employer's obligation, even if the employee does not want to be transferred. *See Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 226-28 (3d Cir. 2000) (affirming summary judgment in favor of hospital on nurse's Title VII claim due to her "unwillingness" to accept "alternative nursing position" offered by hospital and explaining that a "sufficient religious accommodation need not be . . . the one the employee suggests or prefers, and it need not be the one that least burdens the employee") (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986)). Indeed, the employer's *failure* to offer a transfer as a reasonable accommodation could constitute religious discrimination in violation of Title VII.

Under the Rule, however, unless an objecting employee "voluntarily" accepted a transfer to a different position, this very accommodation would *constitute* discrimination. 45 C.F.R. §88.2(1), (4) [84 Fed. Reg. at 23,263]. The Rule thus prohibits what Title VII allows, and requires employers to shoulder "undue hardships" that Title VII does not require them to bear by forcing them to

allow employees who refuse to perform vital job functions to remain in their positions. It thus conflicts with Title VII.

Appellants claim there is no conflict because the lack of express undue hardship or reasonable accommodation provisions in the Refusal Statutes shows that Congress "chose *not* to include the Title VII defenses in this context." AOB 43. Appellants misconstrue the legislative context and intent.

The undue hardship provision of Title VII—which was adopted in 1972 (*see* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103)—predates each of the Refusal Statutes. It is implausible that the enactment of these subsequent laws *sub silentio* superseded Title VII, displacing its application to the entire health care industry. And all the while, religious accommodations in healthcare employment contexts have been analyzed under Title VII. *See, e.g.*, *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1201 (W.D. Wash. 2012); *Grant v. Fairview Hosp. & Healthcare Servs.*, No. CIV. 02-4232JNEJGL, 2004 WL 326694 (D. Minn. Feb. 18, 2004); *Mereigh v. N.Y. Presbyterian Hosp.*, No. 16-CV-5583 (KBF), 2017 WL 5195236 (S.D. N.Y. Nov. 9, 2017); *Noesen v. Med. Staffing Network, Inc.*, 232 Fed. App'x 581 (7th Cir. 2007); *Bruff v. N. Miss. Health Servs. Inc.*, 244 F.3d 495, 500 (5th Cir. 2001).

In short, the Refusal Statutes did not in any way repeal Title VII; rather, it is the Rule that conflicts with nearly 50 years of established employment law. The

APA "'does not permit [an] agency to regulate away' rights and defenses which were 'granted by Congress'" in this way. *New York*, 414 F. Supp. 3d at 537 (quoting *Nat'l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985).

B. The Rule Is Arbitrary And Capricious.

The APA requires courts to "hold unlawful and set aside" agency action that is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). Appellants rely on this Court's recent decision in *California ex rel. Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) (en banc), to characterize review under this provision as "'narrow and deferential.'" AOB 47 (quoting *California v. Azar*, 950 F.3d at 1096). But that decision did not heighten the APA's arbitrary and capricious legal standard—nor could it. As this Court recognized in *California v. Azar*, the bounds of APA review are established by such Supreme Court precedent as *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

The Supreme Court has recently confirmed that these cases remain controlling. In *Department of Homeland Security v. Regents of the University of California*, the Court applied *State Farm* to set aside DHS's decision to rescind the DACA program. 140 S. Ct. 1891, 1913 (2020). In doing so, the Court held that the acting secretary's "'fail[ure] to consider [an] important aspect of the problem,'"

standing alone constituted an "omission . . . render[ing] [her] decision arbitrary and capricious." *Id.* at 1913 (quoting *State Farm*, 463 U.S. at 43). The Court further found the decision arbitrary and capricious for the additional, independent reason that it "ignore[d]" the "'serious reliance interests that must be taken into account'" when "chang[ing] course" from "'longstanding policies.'" *Id.* (quoting *Encino Motorcars*, 136 S. Ct. at 2126). Here, too, HHS failed to consider substantial reliance interests and "offered an explanation for its decision that runs counter to the evidence before [it].'" *State Farm*, 463 U.S. at 43.

1. HHS Failed To Consider Regulated Entities' Reliance On Longstanding Interpretations Of Title VII And EMTALA.

Even if, as HHS asserts, the Rule does not conflict with the statutory language of Title VII or EMTALA (*see* Part II(A), *supra*), the agency cannot dispute that various funding recipients have made hiring and staffing decisions based on their understanding of Title VII's requirements (and EMTALA's, in emergency medicine). *See New York*, 414 F. Supp. 3d at 554. In particular, San Francisco has made hiring decisions, entered into employee contracts and collective bargaining agreements, chosen staffing arrangements, and adopted policies and practices based on its understanding of the pre-2019 Conscience Provisions. As other courts have noted, the Rule upends that common understanding. *Id.* at 552; *see e.g.*, SER1194, 1640.

For instance, the Rule upends the longstanding assumption that reasonable accommodation and undue hardship standards apply to employees expressing a religious objection to a job task. As discussed above, the Rule abandons that framework by requiring that any accommodation be "effective" and "voluntary." 84 Fed. Reg. at 23,191. Further, the Rule prohibits covered entities from making any pre-hiring inquiry into whether job applicants have religious objections to core duties. 45 C.F.R. § 88.2 [84 Fed. Reg. at 23,263]; *see also* ER56 (discussing *Hellwege v. Tampa Family Health Ctrs.*, 103 F. Supp. 3d 1303, 1306 (M.D. Fla. 2015) ("wherein a pro-life nurse applied for employment at a Title X health center")). Under the Rule, an employer may only make such an inquiry *after* hiring a person, and no more than once per calendar year thereafter except with "persuasive justification." 84 Fed. Reg. at 23,263. The Rule thus creates a distinct personnel process for regulated entities with regard to religious objections—a process that jeopardizes care and impedes providers' efficient management of the workforce. SER1191.

Further, as discussed above, for more than 30 years EMTALA has required HHS funding recipients to provide emergency care to anyone who presents at their emergency departments. Many providers submitted comments educating HHS about their reliance on their long-standing obligation to provide assessment and

care in an emergency in developing their existing budgets and attendant staffing capacity. *See, e.g.*, SER122.

The *New York* decision appropriately likened these concerns "to the reliance interests the Supreme Court recognized in *Encino Motorcars*: 'decades of industry reliance' on an agency's 'prior policy,' where the agency's 'new position could necessitate systemic, significant changes' with those who fail to comply facing 'substantial . . . liability,' 'even if this risk of liability' could be diminished by potentially applicable statutory exemptions or defenses." 414 F. Supp. 3d at 553 (quoting *Encino Motorcars*, 136 S. Ct. at 2126). Rather than acknowledging the serious reliance interests at stake, and providing the heightened justification required to impinge on them, HHS "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

2. Appellants Failed To Take Into Account Costs Of The Rule On Providers.

HHS also offered explanations and justifications for its decision that run counter to the evidence before it. In addition to the many examples of this cited in the briefs of the other Appellees, HHS's conclusion about the burden of the Rule on providers is not supported—indeed is contradicted—by the evidence in the administrative record.

HHS concluded that the Rule's burden on regulated entities would be minimal: an average of four hours to update, implement, and disseminate revised policies and procedures. 84 Fed. Reg. at 23,240. This, despite the fact that it would require the creation of new hiring and emergency care policies that differ from those based on Title VII and EMTALA. *See supra* Sec. II.B.1.

But in reaching this conclusion, HHS ignored a multitude of comments from major medical associations, provider groups, and experts who explained that the Rule would be exceedingly costly. *See, e.g.*, SER127.

HHS also ignored comments from major medical institutions and governmental entities about the Rule's administrative burdens. The California Medical Association (CMA), for example, explained that the proposed rule failed to consider "the significant time and resources it [would] take[] to continuously implement and enforce" the Rule. SER200. CMA further explained that these proposed "[e]xcessive administrative tasks" would "divert time and focus from providing actual care to patients." *Id*.; *see also* SER126, 132 (AMA stating "it remains unclear why OCR would require physicians to make two separate attestations of compliance to the same requirements")].

Finally, several entities told HHS that the increased regulatory burden of the Rule would impact providers' practices. For example, the American Health Care Association and National Center for Assisted Living stated that the Rule's burdens

on long term and post-acute care providers could detract from the time necessary to provide high-quality patient care. SER121. Numerous other providers stressed that the Rule ran contrary to codes of ethics and other state and federal laws, making it impossible for entities to comply. *See, e.g.*, SER133-34.

Appellants failed to respond to these "significant points raised during the public comment period." *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000).

C. The Rule Is Unconstitutional.

In addition to violating the APA, the Rule also violates the Constitution and should be struck down on this ground as well.

1. The Rule Usurps The Power Of Congress And Violates Separation Of Powers Principles.

Appellants give two reasons why the Rule is consistent with Separation of Powers principles: first, that the Rule and HHS's actions operate within the metes and bounds of existing law; and second, that the "district court did not and could not" identify any additional constitutional violations that would give rise to Separation of Power concerns. AOB 57. Appellants' arguments misconstrue the district court's order.

The district court declined to reach all of San Francisco's constitutional claims once it had determined that vacatur of the Rule was warranted under the

APA. ER64. The court stated that because it was vacating the Rule, it "need not reach the remaining constitutional claims." *Id.* The district court did not, as Appellants suggest, decline to identify or affirmatively reject San Francisco's other constitutional arguments.

And with good reason. The Rule threatens to withhold federal funds—which *Congress* has allocated, conditioned, and granted to entities like San Francisco—if covered entities fail to comply with the Rule. Conditioning funding on statutory compliance, without Congressional authorization, violates Separation of Powers principles. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987). The power of the purse belongs exclusively to Congress, not to executive branch agencies. *See In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013). Here HHS's efforts impermissibly and unconstitutionally impinge on Congress' role. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

2. The Rule Violates The Spending Clause.

Under the Spending Clause, U.S. Const. art. I, § 8, cl. 1, Congress may not impose conditions on federal funds that are (1) so coercive as to compel States to comply, (2) ambiguous, (3) retroactive, or (4) unrelated to the federal interest in a particular program. *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*Sebelius*"), 567 U.S. 519, 575–82 (2012); *Dole*, 483 U.S. at 206–08. The Rule violates at least two of

these prohibitions. Accordingly, even Congress could not impose the enforcement conditions HHS purports to impose here.

a. The Rule Is Unconstitutionally Coercive.

While the federal government "may use its spending power to create incentives for States," the spending power may not be used to "exert a power akin to undue influence." *Sebelius*, 567 U.S. at 577 (opinion of Roberts, C.J.) (internal quotation and citation omitted). Thus, when "pressure turns into compulsion, the legislation runs contrary to our system of federalism." *Id.* at 577-78 (internal quotation omitted).

The Rule crosses that line by threatening $1 billion in HHS funds, constituting approximately 10.2 percent of San Francisco's total FY 17-18 annual operating budget of $10.1 billion, and approximately 20.1 percent of its total FY 17-18 General Fund budget of $5.1 billion. SER1549. HHS funds comprise approximately one-third of SFDPH's budget, and include 100 percent of funding for certain programs, such as Medicare, that are critical to the lives of San Francisco's residents. SER1638, 1848. It would be catastrophic for San Francisco to lose all of these funds. SER1210, 1638, 1214-15.

A threat of this magnitude "crosse[s] the line distinguishing encouragement from coercion." *Sebelius*, 567 U.S. at 579 (opinion of Roberts, C.J.) (quotation omitted). In *Sebelius*, the impending loss of over 10 percent of a state's budget

was deemed "economic dragooning that leaves the States with no real option but to acquiesce." *Id.* at 582. The same analysis applies here. As in *Sebelius*, the Rule's enforcement mechanisms "much more than 'relatively mild encouragement'—[they are] a gun to the head." *Id.* at 581.

And the similarities to *Sebelius* do not end there. In *Sebelius*, the Supreme Court held that the ACA's Medicaid expansion provisions "expanded the boundaries" of the original Medicaid program by extending eligibility from "four particular categories of the needy" and transforming it into "an element of a comprehensive national plan to provide universal health insurance coverage." *Id.* at 583. The Rule operates in much the same way. The Rule creates a singular, comprehensive exemption to the performance of any healthcare service by even the most marginally involved individual or entity. *See* pp. 25-34, *supra*. And the Rule permits HHS the ability to withhold all federal funds that it administers if covered entities fail to comply with any of its terms. 45 C.F.R. § 88.7(i)(3) [84 Fed. Reg. at 23,272].

HHS itself previously recognized the constitutional problem that would arise if, in the name of enforcing long-standing and carefully limited federal conscience laws, the federal government asserted sweeping new authority to strip states of funding, as it has done here. SER855-59. This Court should recognize the same and hold that the Rule is unconstitutionally coercive.

b. The Conditions On Funding Are Unrelated To Conscience Objections.

The Spending Clause also requires that funding conditions "bear some relationship to the purpose of the federal spending," *New York v. United States*, 505 U.S. 144, 167 (1992), and be "reasonably calculated" to address the "particular . . . purpose for which the funds are expended." *Dole*, 483 U.S. at 208-09. The Rule places various federal funding streams—such as those for Medicaid, HIV prevention, prevention of child abuse and neglect, foster care placement and adoptions assistance, TANF, energy assistance for low-income, elderly and disabled individuals, and many others—at risk. SER1548. There is no nexus between these public benefits and the protection of conscience objections, as the Spending Clause requires.

3. The Rule Violates The Establishment Clause.

Finally, the Rule violates the Establishment Clause by favoring objectors' religious beliefs over all other concerns. Under the Constitution, governmental accommodations of religion are permissible only if they do not detrimentally affect third parties. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014); *Cutter v. Wilkerson*, 544 U.S. 709, 720 (2005). Yet here, the Rule will impose burdens on San Francisco as an employer, on patients, and on personnel who work with objectors.

San Francisco manages complex health networks with thousands of employees. The Rule wreaks havoc on its ability to serve the public health by effectively "reliev[ing] [workers] of the duty to work" if doing so offends their beliefs, "no matter what burden or inconvenience this imposes on the employer or fellow workers." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985). In *Caldor*, the Supreme Court invalidated a state law similar to the Rule in that it "command[ed] that . . . religious concerns automatically control over all secular interests at the workplace." 472 U.S. at 709. The Rule likewise offends the Establishment Clause because its definition of and prohibition on discrimination, *see* 45 C.F.R. §§ 88.2, 88.3(a)(2)(v), requires absolute accommodation of religious and moral objections. The Rule thus benefits religion even as it places San Franciscans' health in jeopardy. *Larson v. Valente*, 456 U.S. 228, 252 (1982). This is true even though the Rule equates secular "moral" beliefs with religious ones. *See Welsh v. United States*, 398 U.S. 333, 340 (1970), *contra New York*, 414 F. Supp. 3d at 573-74.

Under this and other frameworks argued below, the Rule violates the Establishment Clause. San Francisco is cognizant, however, that although the district court found the Establishment Clause claim to be ripe (ER 42-43), it was the only claim raised by San Francisco whose merits were not explicitly reached by either the California or Washington district court. Accordingly, with respect to the

Establishment Clause claim only, Appellees suggest that if necessary, the Court remand for consideration of this claim in the first instance, as Judge Alsup suggested. *See* ER32.

III. Complete Vacatur Of The Rule Is Appropriate And Justified.

The APA requires courts to "hold unlawful and set aside" agency action that violates the law's requirements. 5 U.S.C. § 706(2). Despite this plain language, Appellants argue that even if the Rule is invalid, the district court erred in granting vacatur of the Rule "against all persons and in its entirety." AOB 65. Appellants are wrong in both regards.

Appellants ask this Court to import the standing requirements and equitable principles associated with nationwide injunctive relief to the vacatur context. But Appellants' arguments find no support in case law or reason.[12] An injunction orders that a party perform, or abstain from performing, a particular act. Vacatur operates differently. It does not directly dictate a particular party's actions, but instead sets aside administrative rules and agency actions that are tainted by constitutional, procedural, or legal infirmities. Despite these obvious differences,

[12] Appellants further claim that broader vacatur will interfere with the ability of cases to percolate in the various courts, and encourage venue shopping and races to the courthouse. AOB 67. The remedy of vacatur does not prevent courts in different districts and circuits from reaching different conclusions on the validity of the underlying agency rule. And there is no impediment to appellate courts or the Supreme Court addressing any splits in decision that might occur.

Appellants claim the two remedies should be treated identically. Appellants argue that San Francisco lacks standing to secure nationwide vacatur, relying on cases such as *Madsen v. Women's Health Ctr., Inc*. to argue that like injunctions, vacatur can be no broader than what is "necessary to provide complete relief to the plaintiffs." 512 U.S. 753, 765 (1994). But Appellants do not identify a single case that applies this standing framework in a vacatur context. Nor could they.

The few courts that have considered this novel argument have rejected it, finding it to be "both at odds with settled precedent and difficult to comprehend." *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019); *see also New Mexico Health Connections v. HHS*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018). And this makes sense. The vacatur remedy springs from the language of the APA itself and applies when agency action is found to be unlawful or unconstitutional. The scope of the remedy is not tethered to the identity of the parties, but rather to the validity of federal agency action.

If vacatur under the APA were limited to the status of the parties, the result would create an inconsistent patchwork of federal agency rules, which despite their uniform application, would potentially operate in radically different ways across the country. As the district court pointed out, limiting vacatur of an unlawful rule "would be illogical given the fact that the APA violations found here would apply

with equal force for any other plaintiff to whom the rule could apply." ER64. This Court should not be the first in the Nation to limit relief under the APA in this way.

As a last resort, Appellants argue that instead of vacating the entire Rule, the invalid portions of the Rule should be severed to allow the lawful portions to remain extant. Severability here is impractical and amorphous. The district court's decision strikes down significant substantive aspects of the Rule and the legitimacy of its funding consequences. Appellee's challenge eviscerates the Rule, striking at its very heart and operation. Little would survive severance. Even Appellants' can only point to a scant number of definitional terms as well as the delegation of enforcement authority to OCR as examples of provisions within the Rule that might survive severance. The district court addressed severance, albeit briefly, and determined that when a "rule is so saturated with error, as here, there is no point in trying to sever the problematic provisions." ER63.

The APA provides for a specific, statutory remedy when federal agency action is unwarranted, unsupported, or unlawful. *See* 5 U.S.C. § 706(2). And "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). There is no reason or justification to stray from ordinary, standard practice here. Here, it is clear that the Rule is contrary to law, exceeds

statutory authority, and violates the Constitution. There is no rule of law or reason that justifies abandoning the statutorily directed remedy of vacatur in this case.

CONCLUSION

This Court should affirm the decision of the district court.

Dated: October 13, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Case numbers 20-15399, 20-16045 and 20-35044 have been consolidated with this case.

Dated: October 13, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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/s/ MARTINA HASSETT
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