Robert W. Ferguson
Attorney General
Jeffrey T. Sprung, WSBA #23607
Paul Crisalli, WSBA #40681
Lauryn K. Fraas, WSBA #53238
R. July Simpson, WSBA #45869
Nathan K. Bays, WSBA #43025
Assistant Attorneys General
Washington Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

NO. 2:19-cv-00183-SAB

NOTICE OF SUPPLEMENTAL AUTHORITY AND PROCEEDINGS IN A RELATED CASE

NOTED FOR: November 7, 2019
With Oral Argument at 10:00 AM
Location: Spokane, Washington

Plaintiff State of Washington hereby notifies the Court of (i) supplemental authority in support of its motion for summary judgment and (ii) proceedings in a related action. Attached hereto as Attachment A is a recent Ninth Circuit decision in *City of Los Angeles v. Barr*, No. 18-56292, __ F.3d __, 2019 WL 5608846 (Oct. 31, 2019), which supports Washington's argument that *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170 (May 21, 2019) (to be codified at 45 C.F.R. Part 88) (the "Rule") exceeds HHS's statutory authority in violation of the Administrative Procedure Act. *See Barr*, 2019 WL 5608846, at *11 ("Because none of DOJ's proffered bases for statutory authority gives the Attorney General or the Assistant AG the power to impose the notice and access conditions, the conditions are ultra vires."); *see id*. at *8–11. Attached hereto as Attachment B for the Court's information is the transcript from the summary judgment hearing before Judge Paul A. Englemayer in a related action challenging the Rule in the United States District Court for the Southern District of New York, *State of New York, et al. v. U.S. Department of Health and Human Services, et al.*, Nos. 19-cv-4676, 19-cv-5433, and 19-cv-5435 (S.D.N.Y.), which took place on October 18, 2019.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

RESPECTFULLY SUBMITTED this 4th day of November, 2019.

ROBERT W. FERGUSON
Attorney General

/s/ Jeffrey T. Sprung
JEFFREY T. SPRUNG, WSBA #23607
PAUL CRISALLI, WSBA #40681
LAURYN K. FRAAS, WSBA #53238
R. JULY SIMPSON, WSBA #45869
NATHAN K. BAYS, WSBA #43025
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
Jeff.Sprung@atg.wa.gov
Paul.Crisalli@atg.wa.gov
Lauryn.Fraas@atg.wa.gov
July.Simpson@atg.wa.gov
Nathan.Bays@atg.wa.gov
Attorneys for Plaintiff State of Washington

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 4th day of November, 2019, at Seattle, Washington.

/s/ Jeffrey T. Sprung
JEFFREY T. SPRUNG, WSBA #23607
Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Attachment A

2019 WL 5608846
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

CITY OF LOS ANGELES, Plaintiff-Appellee,
v.
William P. BARR, Attorney General; Alan R. Hanson, in his official capacity as Acting Assistant Attorney General of the Office of Justice Programs; Russell Washington, in his official capacity as Acting Director of the Office of Community Oriented Policing Services; United States Department of Justice, Defendants-Appellants.

No. 18-56292
|
Argued and Submitted April 10, 2019 Pasadena, California
|
Filed October 31, 2019

Synopsis

Background: City brought action for injunctive relief against Department of Justice (DOJ), seeking to enjoin DOJ's implementation of its requirements that state and local governmental recipients of federal formula grants for criminal justice programs comply with Department of Homeland Security (DHS) requests for advance notice of a detained alien's release date and time, and allow DHS agents access to detained aliens upon request. The United States District Court for the Central District of California, Manuel L. Real, J., 2018 WL 6071072, granted preliminary injunction to city. DOJ appealed.

Holdings: The Court of Appeals, Ikuta, Circuit Judge, held that:

[1] city was likely to succeed on merits of claim that DOJ's requirements for cooperating with federal immigration authorities were not "special conditions" within meaning of Assistant Attorney General's authority;

[2] city was likely to succeed on merits of claim that DOJ's requirements for cooperating with federal immigration authorities were not "priority purposes" within meaning of Assistant Attorney General's authority; and

[3] federal statutes requiring state and local governmental recipients of formula grants for criminal justice programs to report certain programmatic information, and to certify their coordination with affected agencies, did not authorize DOJ's requirements for cooperating with federal immigration authorities.

Affirmed.

Wardlaw, Circuit Judge, filed an opinion concurring in the judgment.

West Headnotes (14)

[1] Federal Courts

The Court of Appeals reviews a district court's grant of a preliminary injunction for an abuse of discretion, and reviews the district court's determination of the underlying legal principles de novo.

[2] Federal Courts

Temporary restraint by Department of Justice (DOJ), which stated that, while the litigation was pending, it would not enforce the challenged requirements, for cooperation with federal immigration authorities, for state and local governmental recipients of federal formula grants for criminal justice programs, was not a voluntary cessation of DOJ's enforcement of challenged requirements, and thus, the case was not moot, on DOJ's appeal from preliminary injunction granted to city in city's action challenging requirements that recipients comply with Department of Homeland Security (DHS) requests for advance notice of a detained alien's release date and time, and allow DHS agents access to detained aliens upon request. 34 U.S.C.A. § 10151 et seq.

[3] Administrative Law and Procedure

When a federal agency is charged with administering a congressional statute, both its power to act and how it is to act are authoritatively prescribed by Congress.

[4] Administrative Law and Procedure

A federal agency literally has no power to act unless and until Congress confers power upon it.

[5] Statutes

Courts presume that Congress makes statutory amendments with a purpose.

[6] Statutes

Generally, it is a court's duty to give effect, if possible, to every clause and word of a statute.

[7] United States

City was likely to succeed on merits, as element for preliminary injunction, as to claim that Department of Justice (DOJ) requirements for cooperating with federal immigration authorities were not "special conditions" within meaning of federal statute requiring Assistant Attorney General (AAG) to exercise vested or delegated authority to place special conditions on criminal justice program grants, and determine priority purposes for formula grants, so that the federal statute addressing AAG's powers did not authorize DOJ to require state and local governmental recipients of formula grants for criminal justice programs to comply with Department of Homeland Security (DHS) requests for advance notice of a detained alien's release date and time, and allow DHS agents access to detained aliens upon request; a "special condition" would be a condition triggered by specific characteristics not addressed by established conditions and therefore would be an individualized requirement for a specific grant, rather than a requirement for all grants. 34 U.S.C.A. §§ 10102(a)(6), 10151 et seq.

[8] Statutes

Statutory construction begins with the language of the statute, and where the statute does not define the relevant terms, the court gives them their ordinary, contemporary, common meaning, and may consult dictionary definitions.

[9] Statutes

In construing specific words in a statute, the court must look to the language and design of the statute as a whole, and read the specific words with a view to their place in the overall statutory scheme.

[10] Statutes

When construing federal statutes, in every case, it is the intent of Congress that is the ultimate touchstone.

[11] Statutes

Under the normal rule of statutory construction, courts presume that identical words used in different parts of the same act are intended to have the same meaning.

[12] United States

City was likely to succeed on merits, as element for preliminary injunction, as to claim that Department of Justice (DOJ) requirements for cooperating with federal immigration authorities were not "priority purposes" within meaning of federal statute requiring Assistant Attorney

General (AAG) to exercise vested or delegated authority to place special conditions on criminal justice program grants, and determine priority purposes for formula grants, so that the federal statute addressing AAG's powers did not authorize DOJ to require state and local governmental recipients of formula grants for criminal justice programs to comply with Department of Homeland Security (DHS) requests for advance notice of a detained alien's release date and time, and allow DHS agents access to detained aliens upon request; notice and access conditions were not included in statutorily recognized purposes for the formula grants, nor were they purposes of either of the predecessor grant statutes. 34 U.S.C.A. §§ 10102(a)(6), 10152(a)(1).

[13] Federal Courts

Where a panel of the Court of Appeals confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes law of the circuit, regardless of whether doing so is necessary in some strict logical sense, and only statements made in passing, without analysis, are not binding precedent.

[14] Federal Courts

Federal statutes requiring state and local governmental recipients of formula grants for criminal justice programs to report certain programmatic information, and to certify their coordination with affected agencies, did not authorize Department of Justice (DOJ) to require state and local governmental recipients of formula grants for criminal justice programs to comply with Department of Homeland Security (DHS) requests for advance notice of a detained alien's release date and time, and allow DHS agents access to detained aliens upon request; notice and access requirements were not themselves a program supported by the formula grants and therefore did not constitute programmatic information, and with respect to cooperation, DHS agents were not part of a program funded by the grants. 34 U.S.C.A. § 10153(a)(4), (a)(5)(c).

Attorneys and Law Firms

Jesse Panuccio (argued), Associate Attorney General; Mark B. Stern, Daniel Tenny, Katherin Twomey Allen, Laura E. Myron, and Brad Hinshelwood, Appellate Staff; Hashim M. Mooppan, Deputy Assistant Attorney General; Nicola T. Hanna, United States Attorney; Joseph H. Hunt, Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellants.

Neema T. Sahni (argued), Mitchell A. Kamin, and Mónica Ramirez Almadani, Covington & Burling LLP, Los Angeles, California; David M. Zionts, Ivano M. Ventresca, and Benjamin L. Cavataro, Covington & Burling LLP, Washington, D.C.; Michael N. Feuer, City Attorney; James P. Clark, Chief Deputy City Attorney; Leela A. Kapur, Executive Assistant City Attorney; Valerie L. Flores, Managing Senior Assistant City Attorney; Michael Dundas, Deputy City Attorney; Office of the City Attorney, Los Angeles, California; for Plaintiff-Appellee.

Margaret L. Carter and Daniel R. Suvor, O'Melveny & Myers LLP, Los Angeles, California, for Amici Curiae 20 Counties and Cities, Metropolitan Area Planning Council, and International Municipal Lawyers Association.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge, Presiding, D.C. No. 2:17-cv-07215-R-JC

Before: Kim McLane Wardlaw, Jay S. Bybee, and Sandra S. Ikuta, Circuit Judges.

Concurrence by Judge Wardlaw

OPINION

IKUTA, Circuit Judge:

This appeal raises the question whether the Department of Justice (DOJ) can require recipients of a formula grant under the Edward Byrne Memorial Justice Assistance Grant

Program (Byrne JAG), 34 U.S.C. §§ 10151–10158, to comply with Department of Homeland Security (DHS) requests for notice of a detained alien's release date and time and to allow DHS agents access to detained aliens upon request. We conclude that DOJ lacks statutory authority to impose these conditions on recipients of Byrne JAG formula grants.

I

Congress established Byrne JAG in 2006 as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006); *see also* 34 U.S.C. § 10151(b)(1). Byrne JAG authorized the Attorney General to make grants to state and local governments for "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice, including for any one or more of" eight programs. 34 U.S.C. § 10152(a)(1). Under this umbrella, eight different types of "programs" can be funded, including, for example, "[l]aw enforcement programs," "[p]rosecution and court programs," and "[d]rug treatment and enforcement programs." *Id.* [1] Congress also established that the Attorney General could make Byrne JAG awards for any purpose that would have been authorized under Byrne JAG's two predecessor programs, the former Edward Byrne Memorial State and Local Law Enforcement Assistance Programs (LEAP) and the Local Government Law Enforcement Block Grants Program, both of which provided funding to state and local governments for various law-enforcement-related purposes. *Id.* § 10152(a)(2); *see also id.* § 10151(b)(1).

Byrne JAG is administered by the Office of Justice Programs (OJP), a DOJ department headed by an Assistant Attorney General for OJP (referred to here as the "Assistant AG") that administers a variety of grant programs. *See id.* §§ 10101, 10110(1). [2] The Attorney General has "final authority over all functions" of OJP, including making grants. *Id.* § 10110(2). Under the Attorney General's final authority, the Assistant AG has responsibility for several grant programs, including Byrne JAG. *See id.* § 10102(a). The Assistant AG must provide criminal-justice-related information to the public and government entities, coordinate efforts between various government organizations, and fulfill a number of other specified responsibilities. *Id.* § 10102(a)(1)–(5). Additionally, the Assistant AG must "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." *Id.* § 10102(a)(6).

***3** Byrne JAG is structured and administered as a formula grant program. In a formula grant program, Congress appropriates a set amount of funding and specifies "how the funds will be allocated among the eligible recipients, as well as the method by which an applicant must demonstrate its eligibility for that funding." Office of Justice Programs, *Grant Process Overview*, http://go.usa.gov/xPmkA (last visited June 28, 2019). Byrne JAG's statutory formula awards fifty percent of allocated funds to states based on their populations relative to the population of the United States, 34 U.S.C. § 10156(a)(1)(A), and the other fifty percent to states based on their relative rates of violent crime, *id.* § 10156(a)(1)(B). Once funding has been allocated to a particular state under the formula, forty percent of that funding is allocated to local governments within the state, [3] while the state itself keeps sixty percent. *Id.* § 10156(b).

The statute authorizes the Attorney General to depart from this formula in certain circumstances. For example, the Attorney General can reserve up to five percent of Congress's total allocation if deemed necessary to address a significant increase in crime or to remedy "significant programmatic harm resulting from operation of the formula." *Id.* § 10157(b). The Attorney General can also retain up to $20 million for use by the National Institute of Justice to help local governments upgrade their technology, and can withhold a separate $20 million to support local governments' antiterrorism training programs. *Id.* § 10157(a). Additionally, a number of federal statutes enacted independently of Byrne JAG provide additional grounds for withholding funds from an applicant. For instance, the Attorney General has discretion to make up to a ten percent reduction of a state's Byrne JAG award if it fails to comply with federal reporting requirements for deaths that occurred in state custody, *id.* § 60105(c)(2), and must reduce a state's award by ten percent if it fails to "substantially implement" the Sex Offender Registration and Notification Act, *id.* § 20927(a).

State and local governments must submit an application for Byrne JAG funding to the Attorney General, who has discretion to dictate the application's form. *Id.* § 10153(a). Some requirements for the application are set out by statute. The application must include specified certifications and assurances, including assurances that the applicant will maintain and report "data, records, and information

(programmatic and financial) as the Attorney General may reasonably require," *id.* § 10153(a)(4), and a certification "made in a form acceptable to the Attorney General" that the program to be funded meets Byrne JAG's requirements, the application's information is correct, "there has been appropriate coordination with affected agencies," and the applicant will comply with all applicable federal law, *id.* § 10153(a)(5). Additionally, applicants must submit a "comprehensive Statewide plan" revealing how Byrne JAG funds "will be used to improve the administration of the criminal justice system." *Id.* § 10153(a)(6).

The Attorney General develops and issues rules to carry out the grant program, *id.* § 10155, and is also responsible for receiving and reviewing applications, *id.* § 10154. Pursuant to these program development responsibilities, the Attorney General has developed a grant award document that includes a long list of requirements and conditions not spelled out in the Byrne JAG statute itself. The grant award document warns recipients that the funding is "subject to such conditions or limitations as are set forth on the attached page(s)." The conditions listed in the grant award document vary from year to year and typically cover a wide variety of subject matter. For example, grant award documents have required recipients to meet specified information sharing and information technology systems requirements, to comply with specified policies relating to human research subjects, and to participate in various training events, technical assistance events, and conferences. Other conditions have related more directly to the use of Byrne JAG funds. For instance, the grant award document provides that recipients can purchase only certain types of body armor with Byrne JAG funds. The Attorney General must comply with general requirements for managing grants, *see* 2 C.F.R. § 2800.101, including "administrative requirements, cost principles and audit requirements," *id.* § 200.100(a)(1).

II

***4** OJP imposed two new conditions for Byrne JAG funding for fiscal year 2017, both of which were included in the grant award documents. The first new condition, referred to as the "notice condition," required a recipient to honor DHS's requests for advance notice of the scheduled release date and time of any detained alien held in the recipient's correctional facilities. [4] The second new condition, referred to as the "access condition," required a recipient to give federal agents access to correctional facilities to meet with detained aliens, or individuals believed to be aliens. [5]

The grant award document stated that these conditions were "an authorized and priority purpose of" the Byrne JAG award and applied "[w]ith respect to the 'program or activity' that is funded" by the award. [6] The document defined "program or activity" by reference to Title VI, a federal civil rights law prohibiting discrimination on the basis of race, color, or national origin in any federally assisted program or activity. 42 U.S.C. § 2000d-4a. In this context, Congress defined "program or activity" to mean, in relevant part, "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government," or of "the entity of such State or local government that distributes such assistance and each such department or agency ... to which the assistance is extended." *Id.* § 2000d-4a(1)(A)–(B). Finally, the 2017 Byrne JAG award document stated that "[f]ailure to comply with any one or more of these award requirements" can result in loss of funding.

***5** The City of Los Angeles applied for a Byrne JAG award for the 2017 fiscal year. Its application included a letter from its deputy mayor stating that Los Angeles "is withholding any commitment to, or confirmation of, its compliance with" the notice and access conditions. On September 29, 2017, Los Angeles filed suit against DOJ, seeking an injunction against implementation of the notice and access conditions. In connection with this lawsuit, Los Angeles stated it had a policy against cooperating with federal immigration enforcement on the ground that "being perceived as a 'cooperating' jurisdiction in the view of the current Administration would harm public safety in Los Angeles" because it would have a negative impact on police relationships with immigrant communities.

Following a brief stay pending the Seventh Circuit's affirmance and subsequent en banc vacatur of a nationwide injunction against the notice and access conditions, *see City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018), the district court entered a preliminary injunction against DOJ's use of the notice and access conditions on September 13, 2018. DOJ appealed, arguing that the district court erred in determining that Los Angeles was likely to succeed on the

merits of its claim that DOJ lacked statutory authority to impose the notice and access conditions.

III

[1] [2] [3] [4] We review the district court's grant of a preliminary injunction for an abuse of discretion, and we review its determination of the underlying legal principles de novo. *See DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011).[7] When an agency is charged with administering a congressional statute, "both [its] power to act and how [it is] to act [are] authoritatively prescribed by Congress." *City of Arlington v. FCC*, 569 U.S. 290, 297, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013). An agency "literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

DOJ advances two possible bases for its statutory authority to introduce the notice and access conditions.

A

DOJ first argues that the notice and access conditions are within the Assistant AG's authority under a 2006 amendment to § 10102(a)(6) enacted by Congress in the Violence Against Women and Department of Justice Reauthorization Act of 2005, § 1152, 119 Stat. at 3113.[8]

***6** From its enactment in 1984 and through 2005, § 10102(a)(6) provided that the Assistant AG shall "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this title or by delegation of the Attorney General." *See* Joint Resolution, Pub. L. No. 98-473, § 102, 98 Stat. 1837, 2078 (1984). In 2006, Congress amended § 10102(a)(6) to add the phrase "including placing special conditions on all grants, and determining priority purposes for formula grants" at the end of the section. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, § 1152, 119 Stat. at 3113. Accordingly, § 10102(a)(6) now provides that the Assistant AG must "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." 34 U.S.C. § 10102(a)(6). DOJ argues that by amending the statute, Congress gave the Assistant AG the authority to impose notice and access conditions as "special conditions" on Byrne JAG awards and to announce the Attorney General's determination that such conditions are "priority purposes" of the awards.

[5] [6] Before considering DOJ's claim, we first address Los Angeles's threshold argument that Congress's amendment to § 10102(a)(6) does not give the DOJ any independent authority or power. Rather, Los Angeles claims, the statute merely describes the Assistant AG's ability to exercise authority specified elsewhere in the relevant chapter (Chapter 101 of title 34). We disagree. Los Angeles has not identified (and we have not found) any language in the chapter giving the Attorney General or the Assistant AG authority to place "special conditions" or determine "priority purposes" for grants.[9] But by amending § 10102(a)(6), Congress affirmatively indicated its understanding that the Assistant AG's powers and functions could include "placing special conditions on all grants, and determining priority purposes for formula grants." 34 U.S.C. § 10102(a)(6). Therefore, Los Angeles's interpretation deprives the 2006 amendment to § 10102(a)(6) of any meaning; in effect, we would have to conclude that Congress amended § 10102(a)(6) for the purpose of expressly authorizing the Assistant AG to exercise certain powers that do not exist. We decline to do so, because we presume Congress makes amendments with purpose, *see Stone v. INS*, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995), and it is generally "our duty to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal quotation marks omitted). Accordingly, we reject Los Angeles's construction of the statute. Consistent with Congress's amendment, we read § 10102(a)(6) as confirming the authority of DOJ to place "special conditions on all grants" and determine "priority purposes for formula grants."

[7] [8] [9] [10] On the other hand, we also disagree with DOJ's argument that its notice and access conditions place "special conditions" on Byrne JAG awards and announce the Attorney General's determination that such conditions are "priority purposes" of the awards. To address this claim, we must first interpret the terms "special conditions" and "priority purposes" in § 10102(a)(6). "Canons of statutory construction help give meaning to a statute's words. We begin with the language of the statute." *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*,

484 U.S. 49, 56, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987)). Where the statute does not define the relevant terms, we give them "their ordinary, contemporary, common meaning," and "may consult dictionary definitions." *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 627 F.3d 1268, 1270 (9th Cir. 2010) (internal quotation marks and citations omitted). In construing specific words in a statute, we must also look to the "language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988), and read the specific words "with a view to their place in the overall statutory scheme." *Wilderness Soc'y*, 353 F.3d at 1060 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)); *see also United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme."). In every case, "it is the intent of Congress that is the ultimate touchstone." *Arizona v. United States*, 567 U.S. 387, 453, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (Alito, J., concurring in part and dissenting in part) (internal quotation marks omitted).

***7** The term "special conditions" is not defined in the statute. Under the dictionary definition, the term "special" means "unusual" or "extraordinary," *Special*, Black's Law Dictionary (9th ed. 2009), or "assigned or provided to meet a particular need not covered under established procedures," *Special*, Webster's New Int'l Dictionary (3d ed. 2002). As this definition of "special" suggests, a "special condition" would be applied "to meet a particular need" for carrying out a program that is not covered by established requirements. [10]

This interpretation of "special conditions" is consistent with the regulatory backdrop against which Congress enacted both § 10102(a)(6)'s "including" clause and the Byrne JAG statutes. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, § 1152, 119 Stat. at 3113. At the time, a regulation setting out "administrative requirements for grants and cooperative agreements to State and local governments" provided a definition of the term "special conditions." *See* 28 C.F.R. § 66.12 (2006). The regulation, titled "[s]pecial grant or subgrant conditions for 'high-risk' grantees," provided that if a grantee was "high-risk," then "special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award." *Id.* § 66.12(a)(5). A grantee could be deemed high risk if it had a history of noncompliance with grant requirements, financial stability issues, or other factors that suggested a propensity toward violation of a grant's terms. *Id.* § 66.12(a). According to the regulation, "[s]pecial conditions or restrictions may include (1) [p]ayment on a reimbursement basis; (2) [w]ithholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period; (3) [r]equiring additional, more detailed financial reports; (4) [a]dditional project monitoring; (5) [r]equiring the grantee or sub-grantee to obtain technical or management assistance; or (6) [e]stablishing additional prior approvals." *Id.* § 66.12(b). Additionally, the regulation required the awarding agency to inform the grantee of the reasons for the special conditions and identify corrective actions the grantee could take to have the special conditions removed. *Id.* § 66.12(c).

This regulatory meaning of "special conditions" is presumed to have informed Congress's use of the term in § 10102(a)(6). *See FAA v. Cooper*, 566 U.S. 284, 292, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." (internal quotation marks omitted)). This conclusion is supported by Congress's use of this term in a different provision, § 10109, in the subchapter of the statutes establishing OJP and Byrne JAG, enacted at the same time Congress established Byrne JAG and amended § 10102(a)(6). In § 10109, Congress provided that an Office of Audit, Assessment, and Management within the OJP would assess and review OJP's grant programs to ensure compliance with program terms and requirements. *See* 34 U.S.C. § 10109(a), (b). When conducting such an audit, the auditing office must "take special conditions of the grant into account and consult with the office that issued those conditions to ensure appropriate compliance." *Id.* § 10109(a)(2). [11] This usage indicates that "special conditions" were understood to be individualized requirements included in a specific grant, as set forth in 28 C.F.R. § 66.12(a)(5) (2006). Otherwise, the auditor would not need to identify the office that issued the condition and engage in consultation on the compliance requirements.

***8** **[11]** Under the "normal rule of statutory construction," we presume that "identical words used in different parts of the same act are intended to have the same meaning." *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994) (internal quotation marks omitted). Accordingly, we may presume that Congress intended the use of "special conditions" in § 10102(a)(6) to have the same meaning as it has in § 10109(a)(2), namely to refer to individualized requirements. Therefore, the inclusion of "placing special conditions on all grants" in § 10102(a)

(6) refers to the power to impose tailored requirements when necessary, such as when a grantee is "high-risk" pursuant to 28 C.F.R. § 66.12(a)(5) (2006). [12]

[12] We next consider the term "priority purposes." 34 U.S.C. § 10102(a)(6). The Byrne JAG statute establishes that the "purpose" of an award is to "provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice," within various programs proposed by applicants. *Id.* § 10152(a)(1). The purposes set forth in the predecessor grant statutes, LEAP and the Local Government Law Enforcement Block Grants Program, include funding "additional personnel, equipment, training, technical assistance, and information systems" for local government criminal justice programs, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 501(b), 102 Stat. 4181, 4329, and funding for purposes including hiring additional officers, establishing drug courts, and setting up task forces consisting of local government and federal law enforcement officials "to prevent and control crime," among others. H.R. 728, 104th Cong. § 101(a)(2) (1995); *see also* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. 1, 110 Stat. 1321, 1321–12 (incorporating H.R. 728 by reference). None of the purposes set forth in § 10152(a)(1) or the predecessor grant statutes corresponds to DOJ's requirement that the recipient honor DHS's requests for advance notice of detained aliens' release dates or allow federal agents access to correctional facilities to meet with detained aliens.

In light of our interpretation of "special conditions" and "priority purposes," it is clear that § 10102(a)(6) does not authorize DOJ to require all recipients of Byrne JAG funding to comply with the notice and access conditions. [13] First, the notice and access conditions are not "special conditions" because they are not conditions triggered by specific characteristics not addressed by established conditions, as was the case for high-risk grantees under 28 C.F.R. § 66.12(a)(5) (2006). Second, priority purposes must be chosen from among the various possible purposes of a Byrne JAG award as set out in § 10152(a). The notice and access conditions are not included as purposes of the Byrne JAG award, nor are they purposes of either of its predecessor grant statutes. Because the notice and access conditions meet neither of these definitions, DOJ lacked statutory authority to impose them under § 10102(a)(6). Therefore, we reject DOJ's argument that § 10102(a)(6) gives it the authority to impose the notice and access conditions.

***9** Because we interpret the terms "special conditions" and "priority purposes" narrowly, we agree with our sister circuits that § 10102(a)(6) does not give the Assistant AG broad authority to impose any condition it chooses on a Byrne JAG award. *City of Philadelphia v. Attorney Gen. of U.S.*, 916 F.3d 276, 288 (3d Cir. 2019) (concluding that Congress would not hide "such a broad power—the power to place *any* special conditions on all grants—in a statute outlining ministerial duties for an Assistant Attorney General"); *City of Chicago*, 888 F.3d at 286. Such a broad interpretation would be antithetical to the concept of a formula grant, *see City of Chicago*, 888 F.3d at 285 (noting that "the notion of the broad grant of authority to impose any conditions on grant recipients is at odds with the nature of the Byrne JAG grant, which is a formula grant rather than a discretionary grant"), and it would render superfluous Congress's carefully prescribed conditions under which the Attorney General can normally withhold Byrne JAG funding, *see, e.g.*, 34 U.S.C. § 10157(b) (allowing the Attorney General to withhold up to five percent of total allocated Byrne JAG funds to address rapid crime increases or "significant programmatic harm" caused by the normal operation of the funding formula); *id.* § 30307(e)(2) (providing that a state will lose five percent of any grant award made under title 34, including Byrne JAG, if it fails to comply with the national standards set out under the Prison Rape Elimination Act). [14]

In opposition to our interpretation of § 10102(a)(6), the concurrence constructs a strawman argument. It ignores our actual interpretation of § 10102(a)(6), and instead accuses us of adopting a "sweeping characterization" of DOJ's authority, Concurrence at ——, that allows the "essentially limitless" imposition of any conditions desired, Concurrence at —— – —— (quoting *City of Chicago*, 888 F.3d at 287). Based on this strawman argument, the concurrence then accuses us of creating a split with our sister circuits, which have rejected such a broad interpretation. Concurrence at ——, —— – ——, —— – ——, ——, ——.

[13] While the concurrence has an easy time battering its strawman, the concurrence fails to explain how our actual ruling, that DOJ has the limited authority to impose special conditions designed to meet needs for carrying out the Byrne JAG program, could abrogate or "subvert" Byrne JAG's funding scheme. Concurrence at ——. Nor does the concurrence explain how our actual ruling is contrary to our sister circuits, which did not need to consider the viability of a narrowing construction when considering challenges to

DOJ's notice and access conditions. Rather, given the issues raised by the appeals before them, our sister circuits merely rejected DOJ's argument—and the concurrence's strawman—that § 10102(a)(6) gives broad authority to impose *any* conditions DOJ may choose. The Seventh Circuit expressly acknowledged that "special conditions" may be a term of art that "cannot be read as an unbounded authority to impose 'any' conditions generally," as we have concluded, but declined to address that potential interpretation of the term. *City of Chicago*, 888 F.3d at 285 n.2. Rather, it merely rejected DOJ's argument "that the 'including clause' itself is a stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants ...," and it concluded that § 10102(a)(6) did not give "sweeping power to impose *any* conditions on *any* grants." *Id.* at 285; *see also* Concurrence at ——— – ———. Similarly, the Third Circuit considered the argument that § 10102(a)(6) conferred "a broad power—the power to place *any* special conditions on *all* grants" on the Assistant AG, "a sweeping grant of authority." *City of Philadelphia*, 916 F.3d at 288; *see also* Concurrence at ——— – ———. In rejecting this broad interpretation, the court did not have occasion to consider whether the Attorney General possessed, and therefore could delegate through § 10102(a)(6), the more modest power to impose special conditions and designate priority purposes as we understand those terms. *See id.* at 287. Given our agreement with our sister circuits that § 10102(a)(6) does not confer broad authority on the Assistant AG sufficient to effectively abrogate the formula grant program Congress has established, the concurrence is wrong to suggest we are creating a circuit split. Concurrence at ———. [15]

***10** We conclude that the 2006 amendment to § 10102(a)(6) confirms that the Attorney General and the Assistant AG through delegation have the authority to impose special conditions on all grants and determine priority purposes for formula grants, as those terms are properly circumscribed. The notice and access conditions are not special conditions placed on grants to grantees that exhibit certain risk factors or have idiosyncratic issues that must be addressed individually. Nor are they among the statutorily recognized purposes of a Byrne JAG award as set out in § 10152(a). Therefore, DOJ lacked statutory authority to impose them under § 10102(a)(6).

B

[14] We next consider DOJ's argument that the propriety of the notice and access conditions are further supported by provisions in the Byrne JAG statute that authorize the Attorney General to obtain certain information and require coordination with agencies. *See* 34 U.S.C. § 10153(a)(4), (5). [16] According to DOJ, the notice condition is authorized by § 10153(a)(4), which requires a recipient to report certain programmatic information, and the access condition is authorized by § 10153(a)(5)(C), which requires a recipient to coordinate with an "affected agenc[y]."

We disagree. First, § 10153(a)(4) requires the applicant to maintain and report information that is financial and "programmatic." Although the term "programmatic" is not defined in the statute, the dictionary defines it to mean "of, resembling, or having a program." *Programmatic*, Webster's New Int'l Dictionary (3d ed. 2002). Section 10152 sets out types of "programs" that Byrne JAG may fund, including "[l]aw enforcement programs," "[p]revention and education programs," and "[d]rug treatment and enforcement programs." 34 U.S.C. § 10152(a)(1). Given the use of the word "program" elsewhere in the same statutory scheme, the term "programmatic" in § 10153(a)(4) is best read to refer to a program or programs supported by Byrne JAG funding as outlined in § 10152(a)(1), such as a particular law enforcement program or drug treatment program. [17] Accordingly, § 10153(a)(4) merely requires an applicant to maintain and report information relating to the programs funded by a Byrne JAG award. Because DHS requests for notice of the release of a detained alien do not relate to a program funded by Byrne JAG, the notice condition does not require "programmatic" information under § 10153(a)(4).

Moreover, the statute speaks of the maintenance and reporting of data, records, and information "for each fiscal year covered by an application," *id.* § 10153(a)(4), which contemplates yearly reporting. The notice condition's requirement that a recipient have a policy in place requiring the provision of information to DHS on an ad hoc basis—due whenever DHS requests—is inconsistent with this statutory language.

***11** Second, § 10153(a)(5)(C), which requires a grant recipient to certify that "there has been appropriate coordination with affected agencies," does not give the Attorney General authority to impose the access condition. In context, this section requires the grant recipient to certify that it has coordinated with the agencies affected by the program to be funded by the Byrne JAG award. This statutory language does not support DOJ's interpretation that a recipient must

coordinate with DHS agents who are not part of a funded program. Nor does the statutory language (which requires an applicant to certify that "there *has* been appropriate coordination") impose an ongoing obligation on the applicant to coordinate with DHS agents throughout the life of the grant, as required under the access condition. *Id.* § 10153(a)(5)(C) (emphasis added). Therefore, the access condition is not a proper exercise of the Attorney General's authority under § 10153(a)(5)(C).

* * *

Because none of DOJ's proffered bases for statutory authority gives the Attorney General or the Assistant AG the power to impose the notice and access conditions, the conditions are ultra vires. *See City of Arlington*, 569 U.S. at 297, 133 S.Ct. 1863. We affirm the district court. [18]

AFFIRMED.

WARDLAW, Circuit Judge, concurring in the judgment:

We are faced once again with "the Trump Administration's efforts to press state and local police into federal immigration enforcement," *City of Los Angeles v. Barr*, 929 F.3d 1163, 1183 (9th Cir. 2019) (Wardlaw, J., dissenting), this time via an ultra vires attempt to divert Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG) funds from their congressionally authorized purposes. I concur with the majority to the extent it holds that the challenged immigration conditions were not authorized by Congress, and are thus unlawful. But once the majority concluded that the challenged notice and access conditions are not lawful "special conditions" or "priority purposes" and were thus beyond the powers granted by Congress to the Department of Justice, it should have stopped, as in full stop. Everything else the majority writes about 34 U.S.C. § 10102(a)(6) is "unnecessary to the decision in the case and [is] therefore not precedential." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (alteration in original) (quoting *Best Life Assur. Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002)). In other words, the rest of the asides cast by the majority are dicta. In dicta, the majority finds vague, unidentified powers bestowed upon the DOJ in an illustrative 2006 amendment to a "duties and functions" statute in a different subchapter of the Act that established the Byrne JAG program. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006). This putative power grab not only unnecessarily portends a circuit split, its analysis also stands contrary to every other court to have addressed the issue in a reasoned opinion.

As both the Third and Seventh Circuits have held, Congress did not grant the Assistant Attorney General for the Office of Justice Programs any authority independent of that already vested by a different statute or by delegation to the Attorney General to impose special conditions and determine priority purposes in 34 U.S.C. § 10102(a)(6). *See City of Philadelphia v. Attorney Gen.*, 916 F.3d 276, 287–88 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272, 284–87 (7th Cir.), *vacated in part on other grounds*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018). The majority at best misperceives, and at worst, falsely characterizes, these holdings, describing them as rejecting only a "broad interpretation" of § 10102(a)(6) as authorizing the DOJ to impose "any condition it chooses on a Byrne JAG award." Majority Op. at ——. But our sister circuits plainly rejected the notion that § 10102(a)(6) provides *any* independent grant of authority, broad or narrow—a conclusion that the majority suggests is incorrect.

***12** As even the DOJ recognizes, "an agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). The DOJ "does not claim to possess inherent executive authority to impose the grant conditions, and instead recognizes that the authority must originate from Congress." *City of Chicago*, 888 F.3d at 283. Both the Third and the Seventh Circuits rejected outright the argument that the DOJ makes here, that a residual clause of § 10102, which describes the duties and functions of the Assistant Attorney General for the Office of Justice Programs, is such a congressional delegation of power. That section provides in full:

> (a) Specific, general and delegated powers
>
> The Assistant Attorney General shall—
>
> (1) publish and disseminate information on the conditions and progress of the criminal justice systems;
>
> (2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice;
>
> (3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice;

> (4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice;
>
> (5) coordinate and provide staff support to coordinate the activities of the Office and the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention; and
>
> (6) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, **including placing special conditions on all grants, and determining priority purposes for formula grants.**

34 U.S.C. § 10102(a) (emphasis added). [1] The DOJ contends that the bolded language independently authorizes the Assistant Attorney General to impose any special conditions he sees fit, as to any grant administered by the Office of Justice Programs, so long as the condition is "germane" to the grant program or to "law enforcement" more generally. [2] Practically speaking, the DOJ argues that the Assistant Attorney General for the Office of Justice Programs can impose almost any "special condition" on any grant the Office of Justice Programs administers, up to withholding all grant funds due to a grantee's failure to comply with the DOJ's desired policy.

The DOJ's interpretation of § 10102(a)(6) conflicts with the plain language of the statute. *See Gonzales v. Oregon*, 546 U.S. 243, 258, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (stating that "[t]he starting point" for the inquiry as to whether Congress delegated any authority "is, of course, the language of the [alleged] delegation provision itself"). Specifically, it "runs headlong into an obstacle: the word 'including.' " *City of Philadelphia*, 916 F.3d at 287. We have interpreted "including" as "ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle." *Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006); *see Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1, 86 L.Ed. 65 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). [3] Analyzing Congress's use of the word "including" in § 10102(a)(6), the Third and Seventh Circuits came to the same conclusion. *See City of Philadelphia*, 916 F.3d at 287 (reasoning that "including" "is used to denote something that is within a larger whole"); *City of Chicago*, 888 F.3d at 284 ("The word 'including' by definition is used to designate that a person or thing is part of a particular group.").

***13** The Seventh Circuit reasoned that the plain meaning of "including" in § 10102(a)(6)

> is to set forth a subcategory of the types of powers and functions that the Assistant Attorney General may exercise when vested in the Assistant Attorney General either by the terms of this chapter or by delegation of the Attorney General. ... [Because the DOJ] does not even claim that the power exercised here [to impose the notice and access conditions] is authorized anywhere in the chapter, nor that the Attorney General possesses that authority and therefore can delegate it to the Assistant Attorney General ... the [DOJ's] argument is that the "including" clause itself is a stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants in that subchapter or other subchapters even though that authority is not otherwise provided in the chapter and is not possessed by the Attorney General. Because that interpretation is so obviously belied by the plain meaning of the word "including," the Attorney General's position is untenable.

City of Chicago, 888 F.3d at 285. The Third Circuit agreed that

> "including" signifies that the Special Conditions Clause is part of "such other powers and functions *as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General*." 34 U.S.C. § 10102(a)(6) (emphasis added). Therefore, under the plain text of this provision, the [Assistant Attorney General] has the power to place special conditions on grants only to

> the extent that such power has been vested in him or her "pursuant to this chapter or by delegation of the Attorney General." ... [T]he broad authority [the DOJ] urges has not been vested in the Attorney General or the [Assistant Attorney General] in the Byrne JAG statute or anywhere else in the United States Code. Therefore, the Special Conditions Clause cannot authorize this power on its own.

City of Philadelphia, 916 F.3d at 287–88. Here, nothing in the statute evinces a congressional intent to use the word "including" to mean anything other than its ordinary definition.[4] All other courts to consider § 10102(a)(6) have similarly rejected the DOJ's argument that the statute independently authorizes the Assistant Attorney General to impose conditions of any kind on grants.[5]

***14** The DOJ's interpretation of § 10102(a)(6) is at odds with the very structure and purpose of § 10102. *See Gonzales*, 546 U.S. at 273, 126 S.Ct. 904 ("[S]tatutes should not be read as a series of unrelated and isolated provisions." (internal quotation marks omitted)). Section 10102 delineates the "duties and functions" of the Assistant Attorney General for the Office of Justice Programs, much like other "duties and functions" statutes concerning persons who manage agency programs. *See, e.g.*, 34 U.S.C. § 10444 (duties and functions of Director of Violence Against Women Office), § 11293 (duties and functions of the Administrator of the Office of Juvenile Justice and Delinquency Prevention). The first five provisions of § 10102(a) describe the Assistant Attorney General's various administrative duties, from "coordinat[ing] and provid[ing] staff support to coordinate the activities" of other DOJ offices to "maintain[ing] liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice." *Id*. § 10102(a)(1)–(5). The sixth provision, § 10102(a)(6), is a catch-all provision, simply recognizing that the Assistant Attorney General can also exercise such other powers and functions as may be delegated by other authorities—either by Congress in Chapter 101 or by the Attorney General. "The 'including' phrase is tacked on to that." *City of Chicago*, 888 F.3d at 285.

As all other courts have found, it is inconceivable that Congress implicitly intended to delegate any independent powers in this residual clause. "A clause in a catch-all provision at the end of a list of explicit powers would be an odd place indeed to put a sweeping power to impose *any* conditions on *any* grants—a power much more significant than all of the duties and powers that precede it in the listing ...." *Id.* (emphasis in original); *see City of Philadelphia*, 916 F.3d at 288 ("Given the ministerial nature of the powers in the preceding five subsections, we would be hesitant to find such a sweeping grant of authority in the sixth subsection absent clear language to support that interpretation."). Congress does not hide such broad powers in such ancillary provisions. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

The DOJ's interpretation of § 10102(a)(6) also interferes with the Byrne JAG program's formula grant structure. Congress created specific, objective eligibility criteria and a formula to allocate Byrne JAG funds among all jurisdictions that meet that criteria. *See* 34 U.S.C. § 10156. Congress further crafted narrow grounds on which the Attorney General is authorized to withhold grant funds to jurisdictions not supporting specific federal priorities, *id*. §§ 10157(b), 12113(e), 20927(a), 30307(e)(2), 40914(b), 60105(c)(2), while ensuring that jurisdictions would receive a minimum grant allocation, *id*. § 10156(a)(2). Against the backdrop of Congress's precise formula and express limits on the Attorney General's ability to deviate from that formula, "it is inconceivable that Congress would have anticipated that the Assistant Attorney General could abrogate the entire distribution scheme and deny all funds to states and localities that would qualify under the Byrne JAG statutory provisions, based on the Assistant Attorney General's decision to impose his or her own conditions—the putative authority for which is provided in a different statute." *City of Chicago*, 888 F.3d at 286.[6]

***15** "Congress knew how to grant such authority, and explicitly did so in another statute within the same Act that added the 'including' language" to § 10102(a)(6). *Id.* at 286–87 (citing the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006)); *see United States v. Youssef*, 547 F.3d 1090, 1094–95 (9th Cir. 2008) (noting that Congress's omission of a term from one section and inclusion of that term in another "is evidence of Congress's expressed intent not to impose" that requirement on the first section). Congress gave the Attorney General the authority to "impose reasonable conditions on" Violence Against Women Act grants "to ensure that the States meet statutory, regulatory, and other program requirements." 34 U.S.C § 10446(e)(3). Additionally, Congress provided that

the Assistant Attorney General shall establish discretionary grant programs under the Bureau of Justice Assistance, "on terms and conditions determined by the [Assistant Attorney General] to be consistent with part B of subchapter V." 34 U.S.C § 10142(2).[7] In contrast to these explicit grants of authority to impose conditions on specific grants,

> the Byrne JAG statute provides the Attorney General authority over a carefully delineated list of actions, with no such broad authority to impose reasonable conditions. If Congress had wanted to vest such authority in the Attorney General regarding the Byrne JAG grant, one would expect it to include explicit language in the grant statute itself, as it did in the Violence Against Women Act. The Attorney General's argument that such sweeping authority over the major source of funding for law enforcement agencies nationwide was provided to the Assistant Attorney General by merely adding a clause to a sentence in a list of otherwise-ministerial powers defies reason.

City of Chicago, 888 F.3d at 287.

Yet, in dicta, unnecessary to its holding, the majority seems to adopt the DOJ's "independent power" construction of § 10102(a)(6), writing in passing that "the Attorney General and the Assistant [Attorney General for the Office of Justice Programs] through delegation have the authority to impose special conditions on all grants and determine priority purposes for formula grants, as those terms are properly circumscribed." Majority Op. at ——; *see id*. at ——, ——, —— n.14, —— (referring to the Assistant AG's "power" to impose special conditions under § 10102(a)(6)).[8] *See In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007) ("[S]tatements made in passing, without analysis, are not binding precedent."); *see also United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (opinion of Kozinski, J.) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit ...."). While the majority characterizes its discussion as a response to a "threshold argument," it is nothing of the sort. Majority Op. at ——. All that is necessary to decide this case is the conclusion, upon which we all agree, that § 10102(a)(6) does not permit the Assistant AG to impose the notice and access conditions at issue here.

In its digression from the issue at hand, the majority places great weight on its contention that the "including" clause must have been intended as a grant of authority, or else the 2006 amendment adding the clause would have no meaning. Majority Op. at —— – ——. The majority identifies no other support for its suggestion of a grant of independent powers. The majority's concern that a contrary reading of this residual clause would deprive it of meaning rings hollow, given that the majority's interpretative dictum would render superfluous numerous statutes in which Congress expressly authorized the Attorney General to withhold a set percentage of Byrne JAG funds for a specified purpose. *See* 34 U.S.C. §§ 10157(b), 12113(e), 20927(a), 30307(e)(2), 40914(b), 60105(c)(2). As the Third Circuit noted, "[i]f Congress had already given the [Assistant] Attorney General this sweeping authority to withhold all funds for any reason [by imposing special conditions], it would have no need to delineate numerous, specific circumstances under which the Attorney General may withhold limited amounts of funds." *City of Philadelphia*, 916 F.3d at 286. We generally do not interpret such ancillary ministerial provisions to render superfluous Congress's more specific delegations of power. *See Gonzales*, 546 U.S. at 262, 126 S.Ct. 904 ("It would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside 'the course of professional practice,' and therefore a criminal violation of the CSA."). The notion that through this "including" clause Congress granted independent authority to withhold all funds as to a specific grantee is absurd given that elsewhere Congress explicitly gave the Attorney General authority to withhold funds only in limited circumstances. *See City of Chicago*, 888 F.3d at 285 (recognizing that such "a power granted to the Assistant Attorney General ... was not granted to the Attorney General"); *United States v. Wilson*, 503 U.S. 329, 334, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) (noting that statutory interpretation that leads to absurd results is to be avoided).

***16** In contrast, interpreting the "including" clause to illustrate powers already vested in the Assistant Attorney General or the Attorney General is consistent with Congress's precise grants of power over the Byrne JAG program to the Attorney General. And, as the City identified, various statutes in Chapter 101 of Title 34 authorize the Attorney General or the Assistant Attorney General to impose terms and conditions on other grants. *See, e.g.*, 34 U.S.C. §§ 10142(2), 10446(e)(3). The authority to impose conditions clearly includes the authority to impose special conditions. [9] Thus, § 10102(a)(6) makes clear that the Attorney General can delegate such authority to the Assistant Attorney General, and that exercising such authority is part of the Assistant Attorney General's "duties and functions." This interpretation satisfies "our duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section." *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (citation omitted). That the "including" clause may simply "remove doubt" that the Assistant Attorney General can, under some circumstances, impose special conditions and determine priority purposes does not render the clause meaningless. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) (concluding that "the phrase 'and costs' would not be superfluous if Congress included it to remove doubt that defendants may recover costs" under the circumstances set forth in the statute). Even if this interpretation makes Congress's addition of the "including" clause to § 10102(a)(6) somewhat redundant, the addition of incidental language with little meaning does not demonstrate intent to grant the Assistant Attorney General sweeping authority to impose special conditions on all Office of Justice Program-administered grants. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("Redundancies across statutes are not unusual events in drafting ...."). The majority fails to confront the ancillary nature of the "including" clause.

The majority's drift is pernicious because the distinction it seemingly draws is between special conditions imposed on individual Byrne JAG grantees, which it suggests are lawful, as opposed to conditions imposed on all grantees, which are not. *See, e.g.*, Majority Op. at ——("[Section] 10102(a)(6) does not authorize DOJ to require *all recipients* of Byrne JAG funding to comply with the notice and access conditions."). This sweeping characterization is far from a "narrowing construction." Majority Op. at ——. It would subvert Congress's carefully crafted statutory scheme for federal law enforcement grants.

The majority protests that it is only recognizing the DOJ's "limited authority to impose special conditions designed to meet the needs for carrying out the Byrne JAG program." Majority Op. at ——. But what are the limits of that authority? Beyond stating nebulously that "special conditions" refer to "individualized requirements" created in response to "certain risk factors" or "idiosyncratic issues," the majority provides no further guidance. [10] Majority Op. at ——, ——. It therefore opens the door for the Assistant Attorney General to lay down any number of conditions not contemplated or authorized by Congress, as long as they are imposed on an individual basis and can somehow be said to be "designed to meet the needs for carrying out the Byrne JAG program." This essentially limitless authority "is a tremendous power of widespread impact," and, again, "is not the type of authority that would be hidden in a clause without ... explanation, [or] without any reference or acknowledgment of that authority in the statute that actually contains the grant itself." *City of Chicago*, 888 F.3d at 287.

The Byrne JAG program is the primary provider of federal criminal justice funding to state and local governments. [11] Congress's articulated goal for Byrne JAG grants was to provide States and localities with flexibility to address their local criminal justice needs, specifically through funds for "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice." 34 U.S.C. § 10152(a)(1); *see also* H.R. Rep. No. 109-233, at 89 (2005) (stating that the new Byrne JAG program was meant to "give State and local governments more flexibility to spend money for programs that work for them"). The majority's dicta, if it were to become law, would allow any Assistant Attorney General for the Office of Justice Programs to set special conditions or funding priorities on specific grantees, thus thwarting Congress's mandate and furthering its own desired policy goals. This supposed power could be wielded over all congressionally enacted grants administered by the Office of Justice Programs, worth upwards of $1.2 billion in fiscal year 2018. [12]

***17** The enormous impact of such potential authority left our sister circuits firmly convinced that the plain language of § 10102(a)(6) could not support the DOJ's claimed authority. I would join them, and respectfully disagree with the portions of the majority opinion that seemingly find more capacious powers bestowed by the "including" clause within § 10102(a)(6)'s residual clause.

All Citations

--- F.3d ----, 2019 WL 5608846

Footnotes

1 The eight different types of "programs" include (1) "[l]aw enforcement programs," (2) "[p]rosecution and court programs," (3) "[p]revention and education programs," (4) "[c]orrections and community corrections programs," (5) "[d]rug treatment and enforcement programs," (6) "[p]lanning, evaluation, and technology improvement programs," (7) "[c]rime victim and witness programs," and (8) "[m]ental health programs and related law enforcement and corrections programs." 34 U.S.C. § 10152(a)(1).

2 The actual administration of Byrne JAG is carried out by the Bureau of Justice Assistance (BJA), a component organization of OJP. By statute, a BJA director reports directly to the Assistant AG, *see* 34 U.S.C. § 10141(b), but the majority of the BJA director's authority has been transferred directly to the Assistant AG, *see* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, app. A, tit. I, 113 Stat. 1501, 1501A–20 (1999).

3 Like state applicants, local government applicants receive funding based on their relative rates of violent crime. 34 U.S.C. § 10156(d)(2)(A).

4 The notice condition provides:

> With respect to the "program or activity" that is funded (in whole or in part) by this award, as of the date the recipient accepts this award, and throughout the remainder of the period of performance for the award – ... A local ordinance, -rule, -regulation, -policy, or -practice (or an applicable State statute, -rule, -regulation, -policy, or -practice) must be in place that is designed to ensure that, when a local-government (or local-government-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and – as early as practicable ... – provide the requested notice to DHS.

5 The access condition provides:

> With respect to the "program or activity" that is funded (in whole or in part) by this award, as of the date the recipient accepts this award, and throughout the remainder of the period of performance for the award – A local ordinance, -rule, -regulation, -policy, or -(or an applicable State statute, -rule, -regulation, -policy, or -practice) must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given access a local-government (or local-government-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States.

6 The grant award document states:

> Compliance with these requirements is an authorized and priority purpose of this award. To the extent that such costs are not reimbursed under any other federal program, award funds may be obligated (including for authorized reimbursements) for the reasonable, necessary, and allocable costs (if any) of – (1) developing and putting into place statutes, ordinances, rules, regulations, policies, and practices to satisfy this condition, (2) permitting access as described in [the access condition], and (3) honoring any request from DHS that is encompassed [in the notice condition].

7 Although DOJ has stated that it will not enforce the notice and access conditions while this litigation is pending, *see* Office of Justice Programs, FY 2017 and FY 2018 JAG Award Special Notices, https://ojp.gov/funding/Explore/LegalNotices-AwardReqts.htm (last visited June 26, 2019), such temporary restraint does not amount to a voluntary cessation of DOJ's enforcement of the challenged conditions. *See Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018). Therefore, this case is not moot.

8 Section 10102 is contained in subchapter I of chapter 101. This subchapter creates OJP, which oversees the management of all grant programs, both formula and discretionary, including Byrne JAG. (Byrne JAG is contained in subchapter V of the same chapter.) Section 10102(a) provides:

> The Assistant Attorney General shall –
>
> (1) publish and disseminate information on the conditions and progress of the criminal justice systems;
>
> (2) maintain liaison with the executive and judicial branches of the Federal and State governments in matters relating to criminal justice;

(3) provide information to the President, the Congress, the judiciary, State and local governments, and the general public relating to criminal justice;

(4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations relating to criminal justice;

(5) coordinate and provide staff support to coordinate the activities of the Office and the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, the Office for Victims of Crime, and the Office of Juvenile Justice and Delinquency Prevention; and

(6) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants.

34 U.S.C. § 10102(a).

9 Neither of the sections cited by Los Angeles gives the Assistant AG authority to place "special conditions" on or determine "priority purposes" for any grants. Section 10142(2) provides that the BJA may allocate grants "on terms and conditions determined by the [BJA] Director to be consistent with part B of subchapter V [Discretionary Grants]", 34 U.S.C. § 10142(2), and § 10446(e)(3) provides that "[i]n disbursing grants under this subchapter [Grants to Combat Violent Crimes Against Women], the Attorney General may impose reasonable conditions on grant awards to ensure that the States meet statutory, regulatory, and other program requirements," *id.* § 10446(e)(3).

10 The distinction between "special conditions" and established conditions arises in other contexts, as well. For example, the Federal Aviation Administration is empowered to issue a special condition—"a regulation that applies to a particular aircraft design"—when a design's novel features take it outside the scope of otherwise appropriate safety regulations. 14 C.F.R. § 11.19.

11 Section 10109(a)(2) provides, in full:

The purpose of the Office shall be to carry out and coordinate program assessments of, take actions to ensure compliance with the terms of, and manage information with respect to, grants under programs covered by subsection (b). The Director shall take special conditions of the grant into account and consult with the office that issued those conditions to ensure appropriate compliance.

34 U.S.C. § 10109(a)(2).

12 Congress contemplated that the Assistant AG could place such conditions on both formula and discretionary grants ("all grants"), but may determine priority purposes only "for formula grants." 34 U.S.C. § 10102(a)(6).

13 Therefore, contrary to the concurrence's characterization of our holding, we do not adopt DOJ's interpretation of § 10102(a)(6). Concurrence at ——— – ———.

14 Moreover, it is unlikely that Congress would recognize such a broad power in § 10102(a)(6), given the ministerial duties described in the rest of the section. *See City of Philadelphia*, 916 F.3d at 288; *City of Chicago*, 888 F.3d at 285. By contrast, our more circumscribed understanding of the power to impose special conditions and determine priority purposes is in accord with the other administrative duties outlined in § 10102.

15 The concurrence's disagreement with our interpretation of § 10102(a)(6) does not make it dicta. Concurrence at ———, ——— – ———, ———. "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (opinion of Kozinski, J.)). Only "statements made in passing, without analysis, are not binding precedent." *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007). In order to resolve the issue on appeal here, we must construe § 10102(a)(6) to determine whether it gave DOJ any authority at all, and if so, whether it gave DOJ authority to impose the notice and access conditions. Our construction of the statutory language, which leads us to conclude that § 10102(a)(6) gives DOJ some circumscribed authority, but not the authority to impose the notice and access conditions, is not dicta under any definition of the term.

16 Section 10153(a) provides that an application for Byrne JAG funding must include:

(4) An assurance that, for each fiscal year covered by an application, the applicant shall maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require.

(5) A certification, made in a form acceptable to the Attorney General and executed by the chief executive officer of the applicant ... that –

...

(C) there has been appropriate coordination with affected agencies.

34 U.S.C. § 10153(a)(4), (5).

17 To the extent DOJ argues that "programmatic" should be read as referring to the definition of "program" set out in 42 U.S.C. § 2000d-4a(1)(A), we disagree. The definition of "program" from federal civil rights law that was incorporated by reference in the 2017 Byrne JAG award letter is not a reasonable interpretation of the word "program" or "programmatic" as used in the statutes authorizing Byrne JAG awards.

18 Because we affirm the district court on the ground that DOJ lacked statutory authority to impose the notice and access conditions, we need not address Los Angeles's alternative arguments raised on appeal.

1 This statute appears in Subchapter I, Chapter 101 of Title 34 of the United States Code. The Byrne JAG statute is in Subchapter V, Chapter 101 of Title 34. *See* 34 U.S.C. §§ 10151–10158.

2 See Recording of Oral Argument, *City of Los Angeles v. Barr*, No. 18-56292 (9th Cir. Apr. 10, 2019), at 6:25–7:22, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015483.

3 Dictionary definitions confirm this understanding of the word "including." *See Include*, Webster's New Int'l Dictionary (3d ed. 2002) ("to place, list, or rate as a part of component of a whole or of a larger group, class, or aggregate"); *Including*, New Oxford Am. Dictionary (3d ed. 2010) ("containing as part of the whole being considered").

4 By contrast, in *United States v. Flores*, 901 F.3d 1150 (9th Cir. 2018), we considered a statute listing a number of aggravated felonies, 8 U.S.C. § 1101(a)(43), conviction of which rendered aliens deportable. 8 U.S.C. § 1101(a)(43)(G) listed "a theft offense (including receipt of stolen property)." Congress's express inclusion of an independent crime requiring separate elements of proof led us to conclude that it was at the least ambiguous as to whether Congress intended "including" to mean "a subset" or intended to add an independent theft-related crime to the expanded list of deportable felonies. *Flores*, 901 F.3d at 1157–58. And, as the Board of Immigration Appeals, to which we deferred under *Chevron*, noted, § 1101(a)(43)(G) "is not the only entry within 1101(a)(43)'s list of aggravated felonies [in which Congress used] the word 'including' 'to cover a broader range of offenses than those previously referenced.' " *Flores*, 901 F.3d at 1158 (quoting *Matter of Alday-Dominguez*, 27 I. & N. Dec. 48, 51 n.7 (B.I.A. 2017)).

5 *See Oregon v. Trump*, —— F. Supp. 3d ——, 2019 WL 3716932, at *11, *13–15 (D. Or. Aug. 7, 2019), *appeal docketed* No. 19-35843 (9th Cir. Oct. 4, 2019); *City of Providence v. Barr*, 385 F. Supp. 3d 160, 163–64 (D.R.I. June 10, 2019), *appeal docketed sub nom. City of Providence v. U.S. Dep't of Justice*, No. 19-1802 (1st Cir. Aug. 19, 2019); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 947 (N.D. Cal. 2018) ("DOJ's interpretation that Section 10102 establishes an independent grant of authority to impose the challenged conditions contradicts the plain meaning of the statute."), *appeal docketed sub nom. City & County of San Francisco v. Whitaker*, No. 18-17308 (9th Cir. Dec. 4, 2018); *States of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 228 (S.D.N.Y. 2018) (holding that § 10102(a)(6) is not a "stand-alone grant of authority to the Assistant Attorney General to attach any conditions to any grants" (quoting *City of Chicago*, 888 F.3d at 285)), *appeal docketed sub nom. City of New York v. Whitaker*, No. 19-275 (2d Cir. Jan. 28, 2019); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 874 (N.D. Ill. 2018); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 941–43 (N.D. Ill. 2017) (subsequent history omitted); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 321 (E.D. Pa. 2018), *aff'd in part, vacated in part sub nom. City of Philadelphia v. Attorney Gen.*, 916 F.3d 276 (3d Cir. 2019); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 616–17 (E.D. Pa. 2017) (subsequent history omitted).

6 Indeed, the DOJ's interpretation of § 10102(a)(6) gives no weight to Congress's choice to make Byrne JAG a formula grant program. "If Congress sought to provide [the DOJ] the ability to exercise its judgment in the selection of the grantees, it would have made sense for it to do so by employing the discretionary grant model rather than the formula grant structure used here." *City of Chicago*, 888 F.3d at 286. Were § 10102(a)(6) to authorize the DOJ "to withhold all funds because a jurisdiction does not certify compliance with [a policy] of the Attorney General's choosing," it would effectively "turn[ ] the formula grant into a discretionary one." *City of Philadelphia*, 916 F.3d at 290.

7 Congress transferred the functions of the Director of Bureau of Justice Assistance to the Assistant Attorney General for the Office of Justice Programs, with exceptions not relevant here. *See* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (note regarding 42 U.S.C. § 3741, which was transferred to 34 U.S.C. § 10141).

8 The majority never identifies any language in § 10102(a)(6), or any other statute, to support its untethered statement that § 10102(a)(6) grants the Attorney General any authority. Majority Op. at ——. While the DOJ argues that § 10102(a)(6) grants the Assistant Attorney General authority, it never suggests that this authority extends to the Attorney General.

9 Because other statutes in Chapter 101 provide the DOJ with authority to impose special conditions, the majority is simply wrong to contend that the City of Los Angeles's reading of the "including" clause would "authoriz[e] the Assistant AG to exercise certain powers that do not exist." Majority Op. at —— – ——.

10 While the majority suggests that Congress's use of the term "special conditions" was informed by a since-repealed regulation, 28 C.F.R. § 66.12(a)(5) (2006), Majority Op. at —— – ——, it conspicuously does not limit the Assistant Attorney General to imposing only the types of conditions provided for by that regulation.

11 *See* Edward Byrne Memorial Justice Assistance Grant Program FY 2017 Local Solicitation, U.S. Dep't of Justice (Aug. 3, 2017).

12 *See FY 2020 Performance Budget*, Office of Justice Programs (U.S. Dep't of Justice), March 2019, at 40, 44, https://www.justice.gov/file/1144566/download (last visited July 29, 2019).

End of Document

Attachment B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

STATE OF NEW YORK, et al.,

Plaintiffs,

v. 19-cv-4676 (PAE)
19-cv-5433 (PAE)
19-cv-5435 (PAE)

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants. Argument

----------x

New York, N.Y.
October 18, 2019
9:32 a.m.

Before:

HON. PAUL A. ENGELMAYER

District Judge

APPEARANCES

LETITIA JAMES
Attorney General of
The State of New York
BY: MATTHEW COLANGELO, ESQ.
AMANDA MEYER, ESQ

PLANNED PARENTHOOD FEDERATION OF AMERICA
BY: DIANA SALGADO, ESQ
-and-
COVINGTON & BURLING
BY: DAVID M. ZIONTS, ESQ

AMERICAN CIVIL LIBERTIES UNION
BY: ALEXA R. KOLBI-MOLINAS, ESQ.

APPEARANCES CONTINUED

U.S. DEPARTMENT OF JUSTICE
BY: CHRIS BATES, ESQ.
BENJAMIN T. TAKEMOTO, ESQ.
VINITA ANDRAPALLIYAL, ESQ.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
BY: SEAN KEVENEY, ESQ.
JEAN-MICHEL VOLTAIRE, ESQ.

GIBSON, DUNN & CRUTCHER
Attorney for Defendant-Intervenor Christian Medical and Dental Association
BY: ROBERT DUNN

BECKET
Attorney for Intervenor Defendants
BY: DANIEL BLOMBERG

(In open court)

THE COURT: Good morning everyone.

I will have some words of introduction in a moment but before I do I want to just take the roll to make sure I understand who is who. Who do I have appearing for the provider plaintiffs?

MS. KOLBI-MOLINAS: Alexa Kolbi-Molinas for plaintiffs National Family Planning Reproductive Health Association and Public Health solutions.

THE COURT: Good morning, Ms. Kolbi-Molinas.

MR. ZIONTS: Good morning, your Honor.

David Zionts for the Planned Parenthood plaintiffs.

THE COURT: Good morning, Mr. Zionts.

Anyone else for the provider plaintiffs?

MS. SALGADO: Yes, your Honor. Diana Salgado on behalf of the Planned Parenthood plaintiffs.

THE COURT: Good morning, Ms. Salgado.

For the New York State and other state plaintiffs.

MS. SALGADO: Good morning, your Honor. Matthew Colangelo from the New York Attorney General's Office on behalf of the governmental plaintiffs.

There are a number of other plaintiffs' counsel in the courtroom but not near a microphone. They include Marie Soueid for the State of New Jersey, Jonathan Burke for Massachusetts, Cynthia Weaver for New York City, Lisa Landau for New York

State and Justin Deabler for New York State.

THE COURT: Good morning, Mr. Colangelo.

I appreciate your putting those names on the record. I take as a given that a number of the people who are here are lawyers who have worked in one way or the other on the case. Solely in the interest of economy, I'm taking appearance only from those in front of the bar but I very much value, as I'll say in a moment, the contributions by everybody here and behind the scenes.

MS. MEYER: Good morning, your Honor. Amanda Meyer on behalf of the governmental plaintiffs.

THE COURT: Good morning to you, Ms. Meyer.

Now for the defense, who do I have for HHS?

MR. BATES: Christopher Bates from the U.S. Department of Justice representing HHS but you're asking about counsel from HHS?

THE COURT: Yes. Well I was asking for the government. Thank you, Mr. Bates. Good morning.

MR. KEVENEY: Good morning, your Honor. Sean Keveney with HHS.

THE COURT: Very good. Good morning, Mr. Keveney. Anyone else for the government?

MR. VOLTAIRE: Jean-Michel Voltaire for HHS.

THE COURT: Very good, it's Mr. Voltaire?

MR. VOLTAIRE: Yes.

THE COURT: Very good. Good morning, Mr. Voltaire.

Anyone else for HHS?

MS. ANDRAPALLIYAL: Vinita Andrapalliyal from DOJ representing HHS.

THE COURT: Good morning, Ms. Andrapalliyal.

Anyone else for HHS?

MR. TAKEMOTO: And Benjamin Takemoto for the Department of the Justice.

THE COURT: Good. Very good. Good morning Mr. Takemoto. All right.

And for the intervenor defendants, who do I have?

MR. DUNN: Good morning, your Honor. Robert Dunn for the Christian Medical and Dental Association.

THE COURT: Good morning, Mr. Dunn.

MR. BLOMBERG: Daniel Blomberg for intervenor defendants.

THE COURT: Good morning, Mr. Blomberg.

You may all be seated.

Let me begin just by welcoming everyone in this courtroom and to the extent there is anybody following in the overflow courtroom, although at this point it doesn't appear necessary, welcome to you as well.

We're here today for argument on a rule promulgated earlier this year by the Department of Health and Human Services. The rule is entitled Protecting Statutory Conscience

Rights in Health Care Delegations of Authority. It is scheduled to take effect on November 22.

In the consolidated lawsuits before me several groups of plaintiffs challenged the rule on various grounds, including based on The Administrative Procedure Act and on several provisions of the Constitution.

Before argument begins I want to take a moment and thank and compliment counsel. I have received, it is safe to say, extensive briefing from the parties. The briefs have been absolutely first rate. Really absolutely first rate. They are as good as it gets. And I have benefited enormously from counsel's thoughtful and close attention to the many complex issues in the case.

I've also received a large number of amicus briefs. They too have been thoughtful and very valuable to me.

So thank you to all of those who worked on the briefs. And I'd ask the lead counsel here to please kindly, on my behalf, acknowledge all of the lawyers and staff on your teams who worked on these briefs and associated materials and please thank them for me for a job very, very, very well done.

In terms of argument, here is how we will proceed. And earlier this week I issued an order to this effect so this will not come as a surprise to the counsel in front.

First of all, I'm going to hear argument from the plaintiffs. I've allocated 75 minutes for that.

Plaintiffs have divided their time and topics according to a letter I received from them among four advocates. The first two are on behalf of the provider plaintiffs, which is to say Planned Parenthood and the National Family Planning and Reproductive Health Association, et al. The second two are on behalf of the governmental or state plaintiffs and are from the New York State Attorney General's office.

As I did in my order, I had asked plaintiffs' counsel to please watch the clock and be sure to leave sufficient time for the later of your four advocates because I expect I'll be active in asking questions that may get you off script. I need you, nevertheless, to be mindful of the time just so that important topics that happen to be batting third and fourth don't get squeezed for time.

After I hear from the plaintiffs, we'll then take a short comfort break and I will then hear from the defendants to whom I've also allocated 75 minutes. Specifically, I've allocated 65 minutes for HHS and ten minutes to the intervenor defendants, specifically counsel for Dr. Regina Frost and the Christian Medical and Dental Association.

I hope afterwards we will have time for rebuttal and follow-up. I certainly expect that I will have a lot of questions for all counsel throughout.

So with that preface, let's begin with the provider

plaintiffs and I understand that I'll hear first from Mr. Zionts.

MR. ZIONTS: Thank you, your Honor.

THE COURT: Go ahead.

MR. ZIONTS: Thank you, your Honor. And good morning. I'm mindful of your Honor's instruction in terms of time allocation. Just to let you know in advance my plan here is to speak for about 15 minutes and each of my colleagues plan to speak for about 20 minutes although, of course, we'll be in your hands in terms --

THE COURT: Thank you. That's helpful to know.

MR. ZIONTS: Your Honor, I'll be spoking about HHS's authority or rather lack of authority to issue this regulation. I'd like to start with a basic but fundamental point.

The heart of HHS's position is that the rule is just housekeeping. The agency says it is just letting everyone know how it interprets the refusal statutes and how it enforces them so it doesn't need any delegation of substantive rule-making authority.

Your Honor, the best answer to this argument is in the text of the rule itself. At every step it is clear from the face of the rule that it is legislative, imposing substantive requirements on regulated parties.

So with the Court's permission, I would like to very briefly walk through the rule's key provisions.

THE COURT: If I may. I know -- I know what the key provisions are. Let me see -- I understand your point that components of the rule are substantive and legislative and I understand those to involve the definitions of discriminate and assist in the procedure and the like.

But let's focus on the other side of the equation. Is there some part of the rule that you would acknowledge is housekeeping and that can properly be done under the housekeeping statute?

MR. ZIONTS: Your Honor, what I would say is there are parts of this rule that could have been done in a way that would be consistent with housekeeping.

For example, if the agency had simply said: Go look at the UAR; we are letting you know that we will follow to the letter the UAR and that is how we will enforce, I think that would indeed be housekeeping.

But the way this rule is structured at every step of the way it's hard to disassociate the pieces of this that impose substantive requirements from other provisions that might for example, if done differently, could be genuine housekeeping.

THE COURT: Well let me pushback on that. You say repeatedly in your briefs that you're not challenging the conscience provisions that are in the statutes, correct?

MR. ZIONTS: Correct, your Honor.

THE COURT: Let's assume for argument's sake, imagine whatever scenario you would concede would be a between-the-eyes blatant violation of those statutes. Right now I take it the law is silent as to remedy.

Imagine a violation of the statutes. Put aside any gloss on those statutes by rule. Just imagine a between-the-eyes violation.

MR. ZIONTS: Right.

THE COURT: What does HHS do without rule-making to explain how the process of adjudicating a violation is and what the consequences would be and is that something that HHS can properly rule-make on?

MR. ZIONTS: Well, your Honor, there was a 2011 rule, that we do not challenge its validity, that provided a complaints mechanism and we don't dispute the agency's power to do that.

THE COURT: Now let's suppose the complaints process results in a finding of a between-the-eyes violation or set of violations. Is there anything out there right now that would set out the consequences?

MR. ZIONTS: Your Honor, we also do not challenge the existing regulatory grant procedure.

So, for example, if OCR, through that 2011 complaint procedure, determined that there was a square violation of the statute -- not the rule, of the statute -- then the agency's

position, and we don't have any problem with this, is that they would go through the ordinary procedures under the UAR. Remedies would be limited to that. There would be notice and due process and there would be -- one key feature of the UAR is the remedy is generally limited to the specific source of funding at issue. And they could do that. We're not disputing that.

THE COURT: So if there were a violation, let's say, of any or all of the ACA, Medicaid, or the other three primary statutes that are our main focus here, you don't dispute that under existing authority the agency, if it crossed its Ts and dotted its Is, it could ultimately get to the place of retracting federal funding limited to the funding stream attributable to that statute?

MR. ZIONTS: Right, your Honor. It would be limited to the funding stream.

And one just additional crucial point would be that in terms of -- I think in this hypothetical we're talking about a square, everyone-would-agree violation. And just one key proviso I would put would be: HHS would have its view of what the statute means and it would go through this procedure and it would be free -- it would be upon the regulated party to potentially go to court and say it doesn't mean this. And there would be no deference at that point. The Court would decide.

THE COURT: Give me an example of something you would agree is a between-the-eyes violation of the conscience statutes.

MR. ZIONTS: Your Honor, I think Ms. Salgado may be able to speak to this a bit more when she addresses discrimination. If, for example, just turning to the Church Amendments, speaking of discrimination of employment because someone performed or refused to perform.

If you had someone who was -- who an employer demanded you must perform an abortion or you'll be fired, there is no hardship to the employer to find someone else to do it. There is really no reason for purposes of patient care. There is no emergency, etc. It's essentially: Person standing there. Do it or you're fired. No good reason, no hardship preventing that. I think we would all agree that that violates the statute.

THE COURT: Under the UAR suppose there's a singular violation, one violation to that effect. But it's absolutely adjudicated perfectly and there is no question that exactly that happened.

If the agency, crosses its Ts and dots its Is, at the end of that possess for that single violation does the existing statute and the existing regulations, do they permit the agency to pull the entity's entire funding under that statute?

MR. ZIONTS: The agency's entire funding, I don't

think so, your Honor.

THE COURT: Under that statutory -- under that one statute?

MR. ZIONTS: Well, your Honor, I think it's not just -- I distinguish between the statute itself.

So, for example, the Church Amendments which might impose obligations across a range of funding stream grants, etc. Generally the way the UAR works is that it speaks of the cost of the specific federal award or activity. So in general if there was -- we're speaking hypotheticals -- if there were to be an actual health care entity that committed this violation and committed a violation, of course, of a particular funding stream, I think what the UAR would say is you could lose that. Of course, there's voluntary remedies. The UAR is phrased a little differently from this rule in that it is intended to escalate and to give various offramps for voluntary remedies and cessation. But ultimately you could lose funding under the particular grant at issue. We don't think anything in the UAR provides for just wiping out all federal funds.

THE COURT: Go ahead.

Sorry. Just explain to me just a little more the meaning of funding stream, as you concede, it could be implicated by a violation. The Church Amendment covers a number of different funding streams. I want to be sure that I understand what you're acknowledging and what you're resisting.

How would HHS ultimately, if we got to the end of the series of enforcement events, how would they go about defining the funding stream that is jeopardized by such a brief?

MR. ZIONTS: Your Honor, I think just looking at the language of Church, and it applies based on receiving a grant contract, loan, or loan guarantee under the Public Health Service Act. So I think you would go grant-by-grant, contract-by-contract. And, again, you would have to see how this would play it, and it could vary depending upon the circumstances. I think you would look at the grant.

THE COURT: Let's look at a big one. Let's suppose it's Medicare or Medicaid. Let's use New York State as an example, although they'll have an opportunity to defend their own perspective on this. But imagine, again, a between-the-eyes violation of the sort that you hypothesize and assuming that no offramp applies or is activated, at the end of the day for one error like that, can New York State lose its entire let us say Medicaid funding?

MR. ZIONTS: Your Honor, I do not want to stand here and bind the State of New York.

THE COURT: Choose some other state.

MR. ZIONTS: Particularly when they are sitting right here.

What I would say, it's an interesting problem that the agency itself has not clarified. Their position here has been

this is all part of existing regulations. And they're fairly specific about the UAR, which is about grants in particular.

THE COURT: Why can't -- go ahead.

MR. ZIONTS: I was going to say with respect to Medicaid, we're actually not sure how the agency believes it would go about withdrawing federal funding; not in terms of the rule, in terms of if it believes it as the existing statute.

So in the part of the rule where it speaks to: For grants, see the UAR; for contracts, see this. For Medicaid, it just says in the rule: See the Social Security Act. They don't point to a provision. They don't point to a regulation. So we're not really sure how they think existing regulations would allow --

THE COURT: Well then that begs the question. It's the agency's existing regulations don't clarify the universe. What is it that prevents the agency, whether in the context of this rule or another, from sharpening up its guidance even if, perhaps, having a more muscular approach to these problems and saying at least in this area where we're talking about violations of religious or moral conscience rights recognized by statute, we're going to have a particularly strong penalty and deterrent. Why can't they do that?

MR. ZIONTS: Your Honor, we think -- well, first of all, the statute itself, just looking at the Church Amendment, Church B-- this may not be a good example because it doesn't

apply to Medicaid funds but Church D may. Church D is simply written as individuals have a right not to do acts. And it doesn't say anything about: Or else you lose X or Y or X, Y, and Z or everything under the sun.

So in our view -- we acknowledge there are things that HHS can do under its existing authorities in a careful step-by-step way, in a way that has been done for as long as these statutes have been on the books and, in particular, under the 2011 Rule.

But when Congress intends the Draconian remedy of you lose all your federal funding, a state loses Medicaid, it says so. Title VI says so. It says agencies have the authority to promulgate regulations, provide for the termination of funding, provide adaptors to process. There's even notice to congressional committees. And it doesn't say anything like this. So while -- we're happy to concede that there is some level in the administration of these grant programs that it can do, it would be quite anomalous if we're -- in Title VI Congress was very explicit in saying you can take money but only up to here and with these protections. Here, the Congress didn't say anything but HHS has free reign to say we can take it all.

THE COURT: Very helpful. I want to give you a chance in a moment just to turn to the more substantive dimensions of the regulation, but one final housekeeping-type question.

The rule has new assurance and certification requirements imposed on recipients. Are those compatible with the housekeeping statutes?

MR. ZIONTS: We don't think so, your Honor. And, again, if you look at the rule, here's how Section 88.6 is written. Parties shall, in quotes, shall. Excuse me. It's 88.4. Requires that the applicant or recipient to comply with applicable federal conscience and discrimination laws and this part, and this part is referring to this part of the CFR.

So, first of all, that certification does not just certify that you comply with the underlying statutes. It's saying what we just added to the CFR, which are substantive legislative requirements, you have to certify --

THE COURT: Fair. Fair point. Strip away the substantive components of the rule and focus just on the violations or not of the statute.

Could HHS under its housekeeping authority require the hospital, state, etc. to comply with assurance and certification if those -- if that's limited to compliance with the statute?

MR. ZIONTS: Your Honor, I think there are -- in the existing UAR there are much more general certifications. This is a bit different in that --

THE COURT: But the UAR is a measure of what the agency can do. It's one thing the agency has done but they may

or may not be able to do more.

MR. ZIONTS: Agreed, your Honor.

The main point I would make is that this is, in our view, a substantive requirement: You shall complete the certification. And that has legal consequences. A certification raises issues under the False Claims Act. You could potentially be sued if someone thinks that you have made a certification for compliance with these statutes and someone believes that that was false and that led to receiving federal funds. And so when an agency legislates and says you must do this -- and when you look at the enforcement provisions as well, 88.7, the enforcement provisions, they say they will take your money away if you violate this part, and that includes certification.

So even if you haven't done anything substantively wrong, if you just don't do the certification the way they say, they say you violated the regulation, we will enforce it, that's a substantive force of law rule.

THE COURT: All right. Let's turn to the substantive parts of the statute. And I think I understand from your briefs the definitions of all the various statutory terms are ones that you intend, and I understand why, are substantive.

MR. ZIONTS: Right. Your Honor, I think I'm about at fifteen minutes. I will just say one word. The -- we do think it is clear when you look at the way this rule is framed,

including with the definitions and the way they work with what the rule calls applicable requirements and prohibitions, this is a federal agency telling regulated third parties: Do this or you will be in trouble. Do this or we will enforce against you.

The one point, just because it's not in the briefing, I wanted to alert your Honor to a decision, fairly recent decision from the D.C. Circuit called Guedes v. ATF. The citation is 920 F.3d 1. It's somewhat similar in the sense that there you had an agency insisting that all it was doing was interpreting, telling people -- this had to do with the bump stocks regulation -- it was just telling people how it interprets this rule.

The agency said: No. It says shall. It's in this CFR. The agency was claiming Chevron deference. Everything about it said legislative substantive rule-making. And the Court said yes. And I think the Court, if you look at the opinion, you'll find a number of parallels. The one difference in that statute was the agency was actually delegated authority to issue a legislative rule. Here, we have all the indicia of a substantive legislative rule. We just don't have any source of authority to do that.

THE COURT: Final point on that. That appears to be so, at least explicitly with respect to Church and Coats-Snowe and Weldon. But under the Affordable Care Act and Medicare and

Medicaid there is some grant of substantive rule-making authority.

Suppose the rule had simply defined terms like discriminate or refer, etc., within the framework of the statutes that do have substantive rule-making authority delegated to the agency. Could the agency have done that, had it confined the definitions to the statutes that have the explicit delegation of rule-making provisions?

MR. ZIONTS: We may have other problems with that, but in terms of statutory authority, we absolutely agree. The ACA says you can regulate on this topic. It can't --

THE COURT: So while you're not happy with the definitions, as it relates to those statutes, the ACA, Medicare, Medicaid, you're not making a lack-of-authority challenge with respect to the definition of those statutory terms for those statutes.

MR. ZIONTS: That's right, your Honor.

THE COURT: Thank you.

MR. ZIONTS: In the interest of keeping everything moving, I'll turn things over to Ms. Salgado, unless your Honor has any other questions on the rule-making issue.

THE COURT: No. I think there will be an issue about remedy and severability that is very much implicated by our last exchange. But I think it's better to move on and we'll touch on that later. Very helpful. Thank you.

So next up I think is Ms. Salgado.

MS. SALGADO: May it please the Court, Diana Salgado on behalf of plaintiffs.

Your Honor I'm going to focus my time on two plaintiffs' claims: That the rule is contrary to law and, if time permits, that the final rule is not a logical outgrowth of the proposal.

There are several reasons that the rule is contrary to law but I'd like to start with conflict with the underlying statutes. In promulgating this challenge regulation, not only has the agency given the rule the force of law but it has also stretched the terms of the statutes beyond their limit and far exceed what Congress intended.

Starting with the term discrimination, which is found in nearly all of the underlying statutes, HHS has taken a general prohibition on nondiscrimination and promulgated a regulation that defines the term to mean that health care entities, such as the plaintiffs here, have an absolute duty to accommodate employees who have objections to performing or assisting in the performance of, and depending on the statute, abortion or sterilization and must do so regardless of the burden on employers and the patients they're seeking to serve.

THE COURT: So pause on that for a moment.

Let's focus on the part of the rule that affects employees and employers. I take it your view is that up to

this point the Title VII framework has governed that.

MS. SALGADO: That's correct, your Honor.

THE COURT: And Title VII requires that ultimately at the end of the sequence if there is an undue hardship essentially the employer is allowed to refuse to accommodate the religious objector.

MS. SALGADO: Yes.

Title VII requires that an employer provide a reasonable accommodation unless there is an undue hardship on that employer.

THE COURT: So is the point here then at least as to the employment dimension of the world covered by the rule, we've got a square conflict with a statute, Title VII.

MS. SALGADO: Well, your Honor, we haven't -- that's true. There is -- that the statutes or actually that the agency, in the way that they have interpreted the statutes in this rule, seeks to abrogate Title VII's application.

THE COURT: I have read with great interest your briefs that focus on the emergency care and Title X and whatnot. Why isn't the most explicit example or, as good an example you have, Title VII where since 1972 we have a statute that appears to encode the hardship exception and, therefore, it has much more of a carve-out than the rule does in allowing an employer that needs to exist to insist.

MS. SALGADO: I'm sorry, your Honor. Are you

asking --

THE COURT: It's a softball but it's an important question. But the reason I'm asking is from your briefs I did not get the impression you were pushing nearly as frontally on the conflict with the statute, and a familiar one at that, Title VII, as a basis for your contrary-to-law argument.

MS. SALGADO: Well it is true, your Honor, as you know, we have brought many claims in this case and one specific one is not that the rule itself conflicts with Title VII; rather, that the term discrimination and the way that the agency has interpreted that rule here is not a faithful application of the underlying statutes; that the agency has exceeded what Congress intended when it passed the refusal statutes.

THE COURT: Right. I'm just trying to understand why the argument isn't being made flat-out that at least as to the definition of discriminate it can't stand because that aspect of the rule is contrary to a separate law, not the law under which the agency purports to have but Title VII, which predates even the first of the conscience statutes, has given employers an opportunity -- a hardship basis for refusing to accommodate.

Why isn't the simple answer -- and I'll obviously be eager to hear the government's perspective -- why isn't the simple answer Title VII is law; the agency by regulation can't contravene that?

MS. SALGADO: That is our position. That's absolutely our position, your Honor, is that in interpreting this -- the statutes that the agency has promulgated a definition of discrimination that is in conflict with Title VII.

THE COURT: If I were to agree on that, what part of the rule would be unaffected by it? Would it be the parts that simply don't affect the employment context?

MS. SALGADO: Your Honor, absolutely those parts would be affected. I think that raises a fair question, which is: Are there other applications of the agency's definition of discrimination that are not a faithful application of the statute beyond the employer and employee context.

And as a whole, your Honor, we believe that the term discrimination is always sensitive to context and circumstance. It always considers whether there is a justification for the treatment that's being complained of.

So as a broader matter, the term discrimination that the agency has put forth here in this rule as a whole is not a faithful application of the statutes.

THE COURT: So let's get down to brass tacks. Your agency employs medical professionals, correct?

MS. SALGADO: That's correct.

THE COURT: Pre-rule, if you had a religious objector who didn't want to participate in an abortion, didn't want to hand the forceps over or something like that, how would --

within the Title VII framework and in the real world how does your agency deal with an objector like that?

MS. SALGADO: Well, your Honor, you're correct that we have health care professionals that would be subject to this rule in medical centers all across the country, in every state of this country. And how a religious objections are dealt with are through the Title VII framework.

THE COURT: So a nurse says: I've been on the job for a while. I've now developed a sincere religious view that prevents me from assisting in an abortion. Let's put the nurse in the operating room so we're not dealing with more distended ways of assisting. The nurses says: No can do.

What is it that the -- how does the agency -- how does your -- as an employer, how does your client deal with that problem now within the Title VII framework?

MS. SALGADO: Well, your Honor, it's a hard question to answer because the -- in terms of how a very specific objection would be dealt with, I think it would depend on a number of factors. It would depend on whether the agency or the plaintiffs in this case have a duty to try to reasonably accommodate the nurse.

So the question would be: Is there is a way to accommodate this particular individual's objections by, for example, if abortions were only performed on a certain day then that nurse -- there would be perhaps a conversation about

whether that nurse would be willing to work on the days when abortions are not provided.

THE COURT: You would reallocate responsibility so the nurse worked on non-abortion procedures?

MS. SALGADO: Exactly, yes.

Or there might be a question of whether instead of actually working in a room where abortions are being provided, whether the nurse would actually be -- whether be able to work in a different room.

But all of those decisions have to be balanced with whether accommodating that nurse would impose a hardship.

And if I may, your Honor, just add that the record evidence, what it shows is that the plaintiffs in this case operate several clinics where there is only one medical professional.

THE COURT: That's where I was going to go in the rural hypothetical or the short-staffed hypothetical that appear here. Maybe it hasn't, in fact, arisen in the real world, but how -- under the current framework what would your client do if in the end there wasn't an alternative person to fill in?

MS. SALGADO: Well, your Honor, I do think there is a question of whether -- what the individual has been hired to do as one of their primary or substantial duties to perform, then I think there is a question of whether that individual was

qualified for that position.

THE COURT: Right. And I'm using the hypothetical in which a sincere religious conviction develops after the point of hire. And so we're the actually -- you've got an employee -- is it your view ultimately that under the Title VII framework, in our hypothetical rural hospital, if the person cannot do an essential part of the job and there's nobody else, in the end that could be a basis for something up to discharge?

MS. SALGADO: Depending on the facts and circumstances, yes. I mean I guess I would say that many of Planned Parenthood's affiliates operate several health centers in a particular region. So perhaps there would be -- and not every one of those centers offers abortion so there would be a conversation of whether that person could be transferred to a different health center. And, yes, your Honor, if what the nurse was hired to do was to assist with -- assist in the performance of abortion services or in states that actually allow it provide abortion services and the individual developed a religious objection and was not able to perform the primary duties of their position and was not willing to work on other days or be transferred to another health center, then, yes, your Honor, I think the Title VII framework does allow for consideration of undue hardship.

THE COURT: And under the rule, same hypothetical, if the rule were to take effect, how does it work as you

understand the rule?

MS. SALGADO: I think the rule has no consideration or the term -- the rule's definition of discrimination has no consideration of a balancing of interests, the interests of the employer in seeking to provide care, or the interests of their patients. And it doesn't allow for any consideration of hardship. The only thing that the rule references is, quote, an effective accommodation, which is one that the employee must voluntarily accept. And isn't lost on anyone than an effective accommodation is different than a reasonable accommodation that allows for some consideration of the balancing of interests.

THE COURT: But in the end there is no hardship exception to the rule is your point.

MS. SALGADO: That's correct, your Honor.

I would say as an example of, a real world example, because we've been talking about hypothetical situations, a real world example of how the rule would work, if I may, a reference the Court to the Shelton case.

THE COURT: I was -- I've got that on my list for the defendants.

MS. SALGADO: And in that case the nurse refused to assist in emergency abortions. The second time the patient was standing in a pool of blood and the nurse still refused to perform an emergency abortion. It took the hospital 30 minutes to find another person to fill in. And even after that the

hospital offered the nurse an accommodation to the NICU department. She refused and the hospital had no other option but the terminate her. She brought a Title VII claim and the Court found against her because the hospital had offered a reasonable accommodation.

THE COURT: Your point is under the rule if the rule were law Shelton comes out the other way?

MS. SALGADO: That's right.

And certainly the agency has not said otherwise.

THE COURT: All right. Thank you. Very helpful. I realize I've taken you off topic. Focus on other ways, apart from the Title VII conflict, that the rule is contrary to law.

MS. SALGADO: Yes, your Honor.

So I think the -- as we were just discussing in the context of emergency abortions, the rule has no exception for cases where there is a need to provide emergency treatment. And the parties agree that under the Emergency Medical Treatment and Labor Act there is a duty for providers to provide stabilizing treatments or a transfer, if possible. And defendants don't dispute that in some cases patients need emergency abortions. But the rule doesn't have any exception for that. All the agency has said is that it will -- it will seek to harmonize the statutes to the extent possible. That isn't -- EMTALA doesn't say that it can be applied, quote, to the extent possible. There is no exception.

THE COURT: When was EMTALA enacted, if you know?

MS. SALGADO: I don't, your Honor. I know that it predates -- I am sure that it predates Weldon and I don't know -- I'm being told 1985 or 1986.

THE COURT: So it comes after Church. It comes after the first of the conscience provisions but not some of the later ones. I guess the question is whether there's anything in the legislative history of the later ones that suggested an intention to modify the state of play under EMTALA, emergency statute.

MS. SALGADO: Yes, your Honor. Each of the statutes there was discussion about -- well Weldon specifically Representative Weldon specifically noted that EMTALA forbid health care facilities to abandon patients with medical emergencies and particularly pregnant women. Senator Church also made clear: We're not permitted to shield a hospital from denying services in, quote, in emergency situations, life or death type. And Senator Coats also stressed in his amendment which was, as I've said in the briefing, the Coats amendment was actually focused on abortion training, so it was a little bit more removed, but Senator Coats did stress that the amendment wouldn't prevent physicians from being able to provide -- or being trained to provide emergency treatment.

THE COURT: One thing I'm couldn't quite figure out was the interplay between EMTALA and Title VII under current

law. In other words, in practice is the way EMTALA applied in the use of undue hardship notes from Title VII but in an emergency context the employer has a particular deference, or the hardship concern comes particularly before you can't have somebody, you know, stopping in a transverse on the way to the hospital because they realize they're driving somebody to an abortion.

MS. SALGADO: Absolutely, your Honor. I think the Sheldon case highlights this; is that the hospital, after having two serious incidents in which a nurse was not providing care to a patient that had life-threatening conditions, the hospital had to remove the nurse. I'm not -- honestly, I'm not quite sure whether that decision discusses EMTALA, but I think that is an example where the hospital -- that it would have been an undue hardship for the hospital if -- to keep that staff and not be able to comply with EMTALA.

THE COURT: So I have your points on Title VII and EMTALA. Just come back just for a moment to the ACA.

The ACA does have a substantive ruling provision and it specifically says that nothing in the Act shall be construed to have any effect on federal laws regarding conscience protection.

Given that, what's the contrary-to-law argument you have with respect to the ACA?

MS. SALGADO: Well in the ACA, in Section 1554 of the

ACA specifically, that statute prohibits HHS from promulgating regulations -- or shall not promulgate any regulation that creates any unreasonable barrier, impedes timely access to health services. And specifically Section 1554 of the ACA what it says is: Notwithstanding any other provisions of this Act the Secretary of Health shall not promulgate any regulation that does these six different things.

So, your Honor, I think that it was clear that Section 1554 was meant to trump any other provision of the Act including section -- I think you're referring to Section 1303, 42 U.S.C. 1823. So I think it's clear by the face of the statute that Section 1554 was meant to trump any other provisions of the Act including that provision.

I would also note that in Section 1303 --

THE COURT: In other words, the ACA leaves in place all the conscience provisions that were there by statute. Your issue is that if the agency substantively expands the reach of those provisions, then you're not only -- whatever other rule-making issues there may be, you're now encroaching into a space that the ACA limits the agency's room to run in.

MS. SALGADO: Yes, your Honor. Section 1554 has been on the books for nearly nine years, coexisting with refusal statutes. So our position isn't that 15 -- defense counsel has tried to argue this but our position isn't that 1554 conflicts with the statute. It conflicts with the rule or, better yet,

the rule conflicts with the statute because the rule itself does -- it does create unreasonable barriers to the ability of individuals to obtain appropriate medical care. It does impede timely access to health care services. And the most clear example of that is by not having exceptions for emergency services. But I think that there are other ways in which the rule also violates 1554, right, even outside of emergency care. The rule also restricts full -- requires full disclosure of all relevant information to patients. But through the expansive definition of assist in the performance, which includes referral. And the way in which they have defined referral means that just the mere provision of information if that person believes that it will assist someone in performing an abortion is a referral, that would lead individuals to be able to deny people basic information such as if a patient faced with an unplanned pregnancy asked about abortion --

THE COURT: The rule reaches back to events, days, weeks, months before the procedure, including a phonecall, a conversation -- a chat with a receptionist.

MS. SALGADO: Exactly, your Honor. We think in those ways, by allowing refusals or individuals to refuse to provide basic information is another way in which it violates the clear mandate of Section 1554.

THE COURT: Why don't you in the remaining time just deal with logical outgrowth briefly. Your argument is that the

agency in it's notes and rule-making didn't, among other things, telegraph the possibility that it will be repudiating the Title VII accommodation framework. I get the argument. Nevertheless, a lot of commentators clearly understood that that was in play because a lot of the comments on the rule are addressing just that.

Doesn't that suggest that while the agency could have been more precise it was understood that the accommodation framework was in play in the rule-making process?

MS. SALGADO: Well I have two responses to that, your Honor.

The first is that, as a legal matter, the agency cannot bootstrap notice from the comments; otherwise, that would turn notice into an elaborate treasure hunt of which interested parties would have to search the record for the sort of buried treasure.

But you are right, your Honor. There were several commenters that submitted comments imploring the agency to make clear that it was not taking away the reasonable accommodation undue hardship framework. Those comments came from the plaintiffs in this case but they also came from major medical organizations, American College of Emergency Physicians, The American Medical Association, The American Hospital Association.

But they were in response -- what they were in

response to was the fact that the proposed rule actually -- it only had -- I think it had four sections. But the proposed rule gave a definition of discrimination that just listed out certain types of actions that would be deemed discrimination like the withdrawal of a benefit or termination. And that's all it said.

THE COURT: In other words, the rule was silent about the other side of the equation?

MS. SALGADO: Exactly.

And in response to the comments, where the plaintiffs and other organizations and other medical providers weren't sure what the rule meant, in response to that they submitted comments asking for the reasonable accommodation undue hardship framework, explaining that it would --

THE COURT: But from an administrative law perspective, the fact that the agency is essentially talking about a bright line ban and not talking about an offset, a hardship, a carve-out, an exception, why isn't that notice enough that the agency's not talking about a hardship or an exception; i.e., that's it's rethinking the whole framework?

MS. SALGADO: You're right, your Honor in that the -- we were on notice that the agency was rethinking or might have been, I guess, really, right; that the agency might have been rethinking the framework because our position is that when -- is that the term discrimination in the employment context

inherently requires a balancing of interests; it inherently, certainly in the context of religious accommodation, for decades that term has meant to include the reasonable accommodation undue hardship framework.

So what I would say what the public was on notice of was that the agency may be thinking that it was going to strip away Title VII protections. But what they weren't on notice of was the unusual ground rules that the agency has put into the rule in subsections four through six; not only that, there is this, quote, effective accommodation, which is a term that the agency has made up; but also that you can only ask employees about their objections once perfect calendar year or you can't ask potential hires unless there is persuasive justification. You might be able to post notices but only unless it's adverse action.

The public had no notice of those unusual groundworks.

THE COURT: This shows up in the final rule and not before.

MS. SALGADO: Exactly.

And the reason why I think -- the agency tries to push these away as just details, but at every turn through its briefing it points to those subsections as the agency's -- the framework that it is created and the reason why the rule is justifiable and reasonable. And so we believe that the agency's failure to put the public on notice of this new

framework it created does violate the notice of common procedures and the APA.

THE COURT: Ms. Salgado, I want to come back to contrary law. There's an establishment clause challenge. For argument's sake assume that the Court were to conclude that there was not a facial establishment clause problem here but there are all sorts of imaginable hypotheticals that could give rise to as-applied challenges. Does that then become a basis to argue that the rule is contrary to law or does the fact that any establishment clause problem on my hypothetical conclusion could only be as applied, prior view to the ability to identify the establishment clause violation as contrary to law?

MS. SALGADO: If the Court -- I just want to follow your hypothetical. If the Court found --

THE COURT: There is no facial establishment clause problem but as applied you could have any number of such problems but on its face it's not a violation of the establishment clause, does that prevent you as a matter of Administrative Procedure Act Doctrine, does that prevent you from arguing that on that basis the law is contrary to law -- that the rule is contrary to law?

Do as-applied violations count?

MS. SALGADO: Well, we don't believe this is an as-applied violation. But I will confess that you have stumped me and if I may confer with my colleagues and get back to you.

THE COURT: There will be a chance for -- I expect a chance for rebuttal. That is of interest to me. Thank you, Ms. Salgado. Very helpful.

Next up is Mr. Colangelo.

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from the New York Attorney General's Office on behalf of the plaintiffs. And I will argue the arbitrary and capricious claims for relief in these consolidated challenges.

Your Honor, to meet the standard for reasoned decision making the agency must examine relevant data and articulate a rational connection between the facts found and the choice made. The agency fails this test and its decision must be set aside as arbitrary where its explanation runs counter to the evidence before the agency, the agency entirely failed to consider important aspects of the problem, or the agency doesn't justify its reversible unsettled policy.

Here, HHS fails each of these tests of a rational agency's action, first, because the agency's explanation is counter to the evidence in the administrative record.

In multiple critical respects the agency relied on a factual claim of evidence that examination shows to be either mischaracterized or flatly untrue.

THE COURT: I'm eager to have you get into it in just a moment. One threshold question. It looks as if it has been

ping pong ball between administrations here. You have the 2008 rule, which prefigures part of the current rule. It's retracted to say that at some point the administrative component in 2009 is substituted by a 2011 rule that, again, is more housekeeping and now there's a change of administration and there's a new policy.

To what degree does the agency have to -- let me put it this way. You're arguing that there's a change in effect from the 2011 rule and I appreciate that, but there is some harmony, some extension, but some harmony with the 2008 rule. Why isn't that also a relevant point of comparison here? Why is the only test here how this compares with what the agency had done and thought at the previous chapter which you go back to two administrations ago they're more in sync?

MR. COLANGELO: It doesn't inform the Court's analysis for two reasons, your Honor. First, if we're looking at the chapters in the story, I think the story most reasonably told is that for nearly the entire 46-year history, starting with the enactment of the first Church Amendment in 1973, there was no need at all for any regulatory implementation for any of these statutes. The 2008 rule, published in December of 2008, was the first effort to regulate these statutes at any point and never took effect. So as a practical matter I don't think the 2008 rule is --

THE COURT: Why did it never take effect? It was that

the implementation date was into the next administration and it was tabled or was there an injunction?

MR. COLANGELO: There was an implementation date that was to take effect I believe the day before the inauguration of the new president. The incoming administration suspended effective dates. There was litigation in the District of Connecticut. But then the agency said that it was not -- both not enforcing the regulation and was not completing the paperwork production act process to implement the certification requirement in the 2008 rule. So as a practical matter that rule was never enforced and didn't inform the state of play.

So I think the more realistic assessment of the state of play is that for nearly five decades no regulations had been necessary and, in fact, that's what the agency said in 2011 when it completed the rescission of the 2008 rule.

Your Honor to go to the many ways that this rule is counter to the evidence, there is no specific example where this error is more egregious than with respect to HHS's claim that it relied upon a, quote, significant increase in complaints filed with OCR alleging violations of the laws that were the subject of the 2011 rule. The administrative record makes clear, after we moved to compel its completion, that those assertions are factually false. And a factually false evidentiary claim can't be the basis for reasoned agency decision making. Now for context, your Honor --

THE COURT: There are a lot of complaints but they deal with extraneous matters like vaccinations, right.

MR. COLANGELO: Yes, your Honor.

Nearly 80 percent of the 343 complaints the agency said it relied on deal with vaccinations which the defendants now concede have nothing to do with the underlying statutes. Another 15 percent of the complaints are irrelevant because they either oppose the rule-making. They don't allege prohibitive conduct like the complaint that the state attorney was failing to prosecute a voyeur. They don't cover a protected entity like the complainant who said that the FDA was acting like the Mafia because it required the removal of social media ads for divine cancer care. That leaves just 21 complaints, only six percent of what the agency said in the final rule that they were relying on, that even potentially allege a violation.

Now we quarrel with some of those complaints. But even if you accept them all, to say that you've relied on 343 complaints of discrimination when the record -- the uncontested record shows you relied on at most 20 in a two-year period.

THE COURT: Is there any indication of how many complaints had been there before just by way of comparison?

MR. COLANGELO: So the administrative record shows that the agency received, I believe it was either nine or ten complaints from 2010 to 2016. So the figure that I believe the

agency cites is one or two each year for the years before 2016 and then they claim 343 in fiscal year 2018. In point of fact they received only 20 in a merely two-year period from the November 2016 election until the end of fiscal year 2018.

It's the definition of arbitrary to rest a decision so consequential on claims that are factually untrue or can be so readily disproved. The Second Circuit reached that conclusion three-and-a-half decades ago in the Mizerak v. Adams case. An agency's decision is arbitrary and must be set aside when it rests on a crucial factual premise shown by the agency's records to be indisputably incorrect.

Your Honor, to emphasize, this mismatch between what the agency says they relied on and what the record shows is only known because we sued and only known because after suing we moved to compel completion of the record. It should go without saying that it's not a rational basis for agency decision making to fail to disclose the true facts.

THE COURT: Put another way, the administrative record shows that this is a solution in search of a problem.

MR. COLANGELO: Yes, your Honor. I think that's exactly right.

There are a number of other ways in particular that the record shows that the rule is a solution in search of a problem. So, for example, the harms that the agency identifies, and by their own analysis HHS estimates that this

is a billion-dollar rule, costs more than nine hundred million dollars to implement over the first five years, so nearly a billion-dollar rule in quantifiable costs.

THE COURT: What would make it so costly?

MR. COLANGELO: The most significant component of those costs, your Honor, are the assurance and certification requirements. I believe they estimate about $150 million a year to implement the certification and assurance requirements. And then the additional costs that they quantify are other costs regarding familiarization with the rule and other compliance procedures.

One of the harms that they fail entirely to examine in any adequate way is the overwhelming showing of harm to specific patient populations in particular vulnerable communities like immigrants, poor people, women, people of ill health, the LGBT community. The administrative record includes overwhelming evidence from not only advocacy organizations but the nation's leading medical associations and health care providers that access to care would be undermined by this rule and the agency does not quantify those costs.

THE COURT: Come back for a moment though to your first point which had to do with the falsity in the stated number of complaints.

What should I take away from the fact of not just the falsity but the number of complaints? Why so few complaints?

What does that mean about the world as it's working?

MR. COLANGELO: So, your Honor, I think that the fact that there is so few complaints shows that the fundamental justifications for this rule are not well founded.

Now the agency says that they needed greater enforcement authority and they needed to clear up confusion. And they also make the assertion that the relative absence of complaints before 2016 was really only a function of the prior administration sending the signals that they weren't open for business. They didn't want to hear from complainants regarding violations of conscience rights.

Now, two-and-a-half years after the agency has attempted to send the opposite signal, to receive only ten complaints a year when, remember, your Honor, OCR receives in the last fiscal year for which we have records 30,000 complaints of the other statutes that they --

THE COURT: OCR is Office of Civil rights within HHS?

MR. COLANGELO: Yes, your Honor.

THE COURT: So what would be the paradigm complaint that that office gets?

MR. COLANGELO: So OCR investigates HIPAA complaints for violations of health care privacy. They investigate Title VI complaints for discrimination on the basis of race, color, or national origin which can include complaints regarding a denial of language access. OCR also investigates Title IX

complaints as well as, I believe, Section 504 which relates to disability.

So when the evidence here shows that less than three one-hundredths of a percent of their annual complaint volume relates to the statutes that they are enforce here, your Honor, I think to answer your question directly, I think it shows, again, that this is a solution in search of a problem.

THE COURT: I take your point about the number of complaints. A separate justification which I guess applies more to the enforcement architecture that the rule sets up as opposed to the substantive standard, but focus on that for a moment. Agency says essentially it's opaque. Where do you go and how do you get this enforced?

Does the record reflect any instance in which the agency did an investigation leading to enforcement action of the sort that we see from other federal agencies, whether DOJ, SEC, FCC, FTC. All sorts of agencies have enforcement apparatuses which result in notices of potential violations, evidence gathering, often a pre-allegation of what the charges would be and then ultimately a charge either brought administrative or either in litigation. I'm having difficulty in the record figuring out whether any such complaint ever reached the end line of that.

What have you found?

MR. COLANGELO: Your Honor, the final rule mentions

agency action with regard to a Hawaii state statute that the agency believe violated the Church Amendments. And the Hawaii Attorney General said she would not enforce the statute.

I believe my next example would not be in the record because it's more recent but within the last several months OCR, the Office for Civil Rights, issued a notice of violation regarding employment practices at the University of Vermont Medical Center.

THE COURT: That's based on the complaint at tab 130, right?

MR. COLANGELO: Yes, your Honor.

And then a third example I believe is the instance -- and the agency cites this in connection with litigation by affected employees, but the instance of the nurse at Mount Sinai Hospital here in New York. That nurse's complaint was ultimately resolved by a successful OCR investigation.

THE COURT: I guess the question is I'm trying to figure out whether there has been enough of a developed enforcement process to conclude -- to allow us to conclude whether there is clarity as to how it works and what the rules are so as to bear on the need for enforcement clarification.

MR. COLANGELO: Well I think, your Honor, we don't need to -- we don't necessarily need to look at some significant extant body of investigations and resolutions regarding the conscience protection because the question, as it

pertains to arbitrary and capricious review of the rule, is whether the agency has sufficiently connected the facts they found to the procedures and substantive prohibitions that they're implementing here. And the record does not show anything close to a need for the enforcement procedures and the intrusive mechanisms that they're implementing in this rule.

THE COURT: Even if the number of complaints investigated doesn't get you there, is there any place a person would go pre-rule to explain, for example, what the consequences or the outer bound consequences could be of a violation of one of the conscience statutes.

MR. COLANGELO: Yes, your Honor. I think the 2011 rule which delegates the authority to enforce these statutes to the HHS Office for Civil Rights sets out the assignment and delegation of that authority and someone could go to the Office for Civil Rights with a complaint or an inquiry --

THE COURT: Where would you go if you are a entity that is covered and, therefore, whose conduct could subject somebody to the loss of a funding stream, where would you go that spells out pre-rule what the consequences are of having on your watch an employee of yours or a subrecipient of a grant or whatnot violate a conscience statutory provision.

MR. COLANGELO: I think, your Honor, there are two answers to that question.

The first is that you would go to OCR, which has been

assigned authority to enforce these statutes, and one could request technical assistance. I should say three answers.

Second is that the statutes themselves setout what the contours of the prohibitions are.

THE COURT: Sorry. But that's the contours of the prohibitions. I'm asking about the consequences.

Assume a violation of the statute. Let's use the hypo from the first discussion I had. Is it clear right now to a provider or to a state that receives funding what is in jeopardy, concretely what funding stream is in jeopardy from a violation in a particular area or is that something where clarity could be enhanced by a rule.

MR. COLANGELO: I think -- there are two answers to that question. The first is that OCR has provided guidance regarding what funds are in jeopardy, including through the 2011 rule; but the second and more import answer, your Honor, is that even if it is true that the agency had reason to believe that greater clarity was needed in terms of what funds are at risk, for which violations of which statutes, the agency still has to connect this final rule to that concern. And they haven't done that. The focus of the rule, including on the complaints that they purport are at risk, and as implemented through these Draconian enforcement provisions, the expansion of liability to sub-recipients, the assurance and certification requirements, the recordkeeping obligations and the expanded

definitions of terms like health care entity, assist in the performance of discrimination, none of those mechanisms are necessary or at least not rationally connected in this record to any interest in clarifying what the consequences are of a violation of the statutes that the agency says here that they're implementing.

So I guess a different way to put it, your Honor, is that the agency --

THE COURT: Does the existing rule -- pre-rule, is it clear what the liability would be, for example, for New York State -- for a violation by a subrecipient, some -- you use your Medicare funds or whatnot fund, a hospital and somebody on their watch -- I may have a bad hypothetical, but essentially a subrecipient's violation, does the rule clarify the consequences, for example, to New York State if a subrecipient breaches one of the conscience statutes?

MR. COLANGELO: The 2019 rule does assign responsibility to every recipient for the activity of its subrecipients.

THE COURT: Does anything beforehand clearly speak to that? I'm trying to figure out if there are gaps or lacunas here that could properly be clarified by rule.

MR. COLANGELO: I don't believe the 2011 rule speaks to subrecipient conduct and a recipient's vicarious liability at all, your Honor.

There are, of course, preexisting mechanisms under the general grant-making and acquisition regulations and frameworks where recipients do have some obligation to ensure, for example, anti fraud protections in how a subrecipient uses the funds.

I will say, your Honor, there is no evidence in this administrative record, certainly not that the agency has pointed to, that either recipients or subrecipients or complainants were asking: What are we going to do about a subrecipient violating the conscience statutes?

Your Honor, I think the best way to think about this is that even if one believes that there are other aspects of the implementation of the refusal statutes that could fruitfully be clarified, the agency has articulated a justification that is based on specific claims of evidence that are untrue. And it has implemented specific provisions to enforce particular statutes that prohibit particular kinds of conduct in connection with particular funding with no record that there is any underlying justification for those -- for those prohibitions as to that particular conduct.

THE COURT: One of the points you make in your brief is that the agency didn't properly consider what you call reliance interest.

MR. COLANGELO: Yes.

THE COURT: I couldn't quite tell concretely what you

meant. What reliance interests should the agency have considered that it didn't?

MR. COLANGELO: So, your Honor, and I think the Court touched on this a moment ago with a question to my colleague regarding Title VII. But the regulated entities, which include the states and cities and providers that are plaintiffs in your courtroom this morning, your Honor, regulated entities have conformed their operations around the way HHS has implemented these statutes for nearly five decades in a number of ways. And this is evident both from the administrative record --

THE COURT: Pause on that. You said that HHS has implemented these statutes. The overall portrait I get is that the statutes have existed but that this is an area of relative inactivity. Has HHS done much to enforce these statutes over these decades or have plaintiffs essentially treated Title VII, for example, as applicable but not because HHS has done something but because Title VII is on the books.

MR. COLANGELO: Your Honor, the administrative record shows that the plaintiffs have aligned their policies to the refusal statutes consistent with how HHS has interpreted those refusal statutes.

So, for example, the governmental plaintiffs discuss this in our briefs in connection with how we have organized our personnel practices, the typical requirements for advanced notice of objections, the staffing procedures in terms of what

to do when somebody raises an objection that was unanticipated.

THE COURT: Sure. But I mean that's a matter of changing your procedures. Reliance interest I would think would be more: We've hired a bunch of people whom we thought we had the flexibility to move around and we're now stuck with them as parts that will prevent effective delivery of medicine in particular areas. Is there a reliance interest along those lines that hasn't been considered?

MR. COLANGELO: Yes, your Honor.

There certainly is reliance interest on exactly what the Court just articulated. And, in addition, if one thinks about the expansion of the definitions of health care entity to include nonmedical personnel, including plan sponsors, there is no plaintiff in the courtroom right now, your Honor, that has ever considered a clerk in the billing department, a receptionist at the check-in desk --

THE COURT: What about the ambulance drive?

MR. COLANGELO: The ambulance drivers are not typically considered in most employers' practices someone who assists in the performance, for example, of an abortion if the person they are transporting to the hospital may have a miscarriage that may result in an abortion.

THE COURT: I mean plaintiffs may have conceived of the rule a little differently but -- conceived of the statutes differently. But pre-rule, if you can generalize, how did the

providers and states treat the outer bound systems of performance? Was it in effect within the operating theater? Did it extend beyond that? How was it widely understood pre-rule?

MR. COLANGELO: What the administrative record shows is that, at least as to governmental plaintiffs, assist was widely understood within the rule as providing a typically medical aid in specific connection with and furtherance of a particular procedure. So the medical staff performing a procedure, the nurse assisting the medical stuff or performing procedures themselves, that would be considered assisting. The billing clerk at the insurance company after the fact who sends the bill, that's not -- no plaintiff --

THE COURT: And somebody who is giving patient guidance in the days or weeks beforehand that may inform the decision whether undertake the procedure, was that considered pre-rule assisting the performance?

MR. COLANGELO: Not typically, your Honor, no, it has not been.

THE COURT: And the scheduling -- not the scheduler, no?

MR. COLANGELO: Certainly not, your Honor.

For these reasons the rule is arbitrary and capricious. We're happy to address anymore questions on rebuttal.

THE COURT: Just one moment.

MR. COLANGELO: Yes.

THE COURT: Just explain to me you mentioned disadvantaged populations. What's the reason to infer that this rule would disproportionately affect particular populations?

MR. COLANGELO: So there are two reasons, your Honor. First, there is a documented existing pervasive disparities in health care as to discrete and identifiable populations including people of color, low-income families, the LGBT community, and immigrants.

So the first reason is that any rule that affects the delivery of health care will necessarily bear more heavily on disadvantaged populations. And the administrative record includes a number of examples. Both because those populations are already subject to discrimination in health care, but because in many instances they are also located in areas where the provision of health care is strained by other factors, whether it's rural communities or whether because of lack of financial resources their most common vehicles for delivery of care are in the emergency setting which is also stressed by this rule. So that's one reason why the vulnerable populations are likely to be particularly affected.

And the second reason, as a number of the administrative record comments point out, is that as a

historical matter many of the religious refusals to provide care have arisen in the context of circumstances that distinctly affect vulnerable populations like the LGBT community. So, for example, an objection to gender reassignment surgery or hormone therapy that would likely apply to only a transgender individual --

THE COURT: But your point as to that, and I thought this was in the context I think of one of the complaints, I think it's the Washington State complaint, I thought your point was that procedure is not implicated by these statutes at all.

MR. COLANGELO: Yes, your Honor. In connection with the Washington Department of Corrections complaint, it's pretty clear from the record that there is no connection between that complaint and that complainant's concerns and what the statutes are prohibiting. I'm trying to make a broader point that the record is full of evidence that transgender individuals face significant and extreme discrimination in health care.

THE COURT: Right. But the particular procedures that are implicated by these statutes are primarily abortion and sterilization, right?

MR. COLANGELO: Yes, your Honor.

THE COURT: To what extent do the statutes include, for example, what you're talking about now which is change of gender, procedures, that sort of thing?

MR. COLANGELO: Well, your Honor, there has been

religious objections to that kind of procedure on the ground that it would functionally result in sterilization.

THE COURT: So that's how it becomes within the scope of these statutes?

MR. COLANGELO: Yes, your Honor.

THE COURT: Final question. HHS, as to the issue of denial of access of care, says: No, we did respond to your concerns, you just don't agree with us. Their statement is that by making the health care world a more receptive one to people with strong religious views you'll actually increase the population of people who choose to participate in an area who are right now deterred by the possibility of being in effect stuck performing a procedure to which they object.

Is your objection to that simply that that's unpersuasive or that the agency didn't consider the issue?

MR. COLANGELO: Your Honor, the plaintiffs' objection to that is that its counter to the evidence and that they've failed adequately to consider the issue and although -- although your Honor is correct that the defendants do say, particularly in litigation, that this is simply a policy disagreement and that they have reached a contrary view that we disagree with, I think the fairest reading of what the agency actually said in the final rule was that after considering the overwhelming record evidence regarding access to care, including the agency's own determination just eight years ago

that expansion of the conscience protection rights would affect detrimentally access to care, the agency said, quote, that they should finalize the rule without regard to whether it exists on the effect of access to care.

So although your Honor is correct that the rule purports to walk through some of these analyses, I do think the fairest reading is that they ultimately concluded that the effect on access to care was immaterial.

I think the other reason why that conclusion is irrational is that they discount the record evidence regarding the effect on access to care for the same reasons that they credit record evidence that supports the conclusions that they -- we believe that they have predetermined that they wanted to reach.

So, in other words, they dismiss some of the concerns that your Honor and I have just been discussing regarding risks to the LGBT community, they dismiss those concerns as anecdotal and qualitative but they credit Kellyanne Conway's survey conducted on behalf of the Prison Medical Association as a qualitative survey because they thought it was informative. It's irrational to be internally inconsistent. If you believe qualitative evidence has some persuasive force, you can't dismiss qualitative evidence when it cuts against your --

THE COURT: Thank you, Mr. Colangelo. Very helpful. Finally, I'll hear from Ms. Meyer.

MS. MEYER: Good morning again, your Honor.

THE COURT: Good morning.

MS. MEYER: I want to first address both the ripeness and merits of the governmental plaintiffs --

THE COURT: The last thing you said?

MS. MEYER: Discuss the scope of relief of the plaintiffs.

Plaintiffs' spending clause claim is ripe for judicial review. On November 22 if the rule takes effect plaintiffs will need to adjust their conduct immediately and significantly or face risk -- or risk losing billions of dollars of funds that the rule authorizes HHS to withhold or suspend.

THE COURT: So let's assume the rule takes effect November 22. Right away what are the most primary, most significant transformative things you would need to do to meet the rule?

MS. MEYER: So if the rule takes effect the compliance requirements go into effect immediately because the threat of funding termination springs into effect immediately. So specifically the plaintiffs have submitted over 48 declarations containing hundreds of patients' sworn testimony from preeminent leaders across the country in the health care sector. And these leaders have testified that the harm stemming from the final rule is real and immediate.

For example, plaintiffs' institutions have various

policies and procedures in place that have balanced conscience objections with patient care for decades. For example, many of the institutions require that employees with conscience objections provide their employer with advanced notice in writing so that they can make accommodations in advance based on objections to care.

An employee may not object in real time or abandon a patient in need of care and an employee could face consequences for failing to abide by these critical notice requirements.

THE COURT: The employer could?

MS. MEYER: The employee under plaintiffs' policies exist -- that currently exist, if they do not provide advanced notice of an objection, they could face consequences.

THE COURT: Explain that. In other words, I thought your primary concern was really on the employer, that the employer suddenly has to scramble to meet a new framework and if it doesn't ask questions, for example, of employees to smoke out potential objections, the employer then could be stuck in a situation where it has somebody with a bona fide right to object who the employer has to accommodate in a situation which could affect care. I thought that was the primary argument. I didn't perceive a separate impact on the employee. Can you explain that?

MS. MEYER: Correct, your Honor. That is our primary argument. The only point with respect to the fact that an

employee could be disciplined for not giving an advanced notice requirement is that is a provision that allows employers to enforce these particular notice requirements that are now implicated by the final rule. When the final rule does take effect or if it does take effect on November 22, plaintiffs to comply with this are going to have to overhaul those policies and procedures in significant ways.

THE COURT: Give me a scenario of something that could happen in the first week after the rule takes effect that could affect let's say a funding stream but for the employer's quick adaptation to the rule.

MS. MEYER: Many of our declarants have testified, for example, in the emergency context that a women presenting with an obstetrics problem would face -- would encounter anywhere from 12 to 16 hospital employees. So our declarants have testified that if the final rule goes into effect, they need to be prepared to deal with objections on the spot from those various 12 to 16 employees. And this is because of, for example, the expansion of the definition of discrimination and the expansion of the definition of assisting performance.

THE COURT: Let's focus on the employers' ability under the rule to smoke out, if you will, from employees or applicants what they object. Under the rule what can the employer do in the hiring process to determine, if anything, whether an employee is going to be off limits for certain

procedures?

MS. MEYER: So in the hiring process the employer cannot ask the hire whether there's any objection.

THE COURT: And that's true even in our rural hypothetical even in the situation where accommodating may be impractical.

MS. MEYER: Correct.

Once the employee is hired, the employer may ask once per calendar year or with persuasive justification.

THE COURT: Let's suppose we don't know what persuasive justification is. I take it that's undefined.

MS. MEYER: Correct.

THE COURT: Let's assume that the process of adapting to the rule itself is a persuasive justification; that the fact that there's a new regulatory framework in place almost necessarily allows the employer right out of the gate to ask employees who's eligible for what, on a conscience perspective, for what areas of work.

Assume that the employer is allowed, at least, to ask that and that would clear a persuasive justification bar, what happens next? How is -- how is your primary conduct affected?

MS. MEYER: So assuming that that is a persuasive justification which, frankly, our declarants cannot rely on because they have not received that clarification from HHS so they have to proceed under this regime of one calendar per

year. But assuming that is a persuasive justification, there's still the extreme financial burdens that are imposed on institutions for needing to basically double or triple staff certain departments or going to an employer and asking if they will accept an accommodation like a transfer to a different department. If that employee says no, then our institutions have to have backup or shadows.

THE COURT: Is there anything out there in the world that would guide me in the record as to the number of employees, in fact, who work appertinent to procedures at issue who actually would object in them?

In other words, there are a lot of hypotheticals that have populated everybody's briefs. One thing that's a little less clear is, assuming a widespread regulatory right to object, assuming even a statute that said that, any information out there about in practice what that would mean?

MS. MEYER: The exact number of people who holds religious objections?

THE COURT: Right. Or number of people who both hold those religious objections and are let us say presently in jobs where those objections might be triggered.

MS. MEYER: We don't have those exact numbers in the record, your Honor, but the objections to procedures do exist and this is exactly why these policies and procedures are in place, to make sure that employers can accommodate those

conscience objections while protecting patient care.

THE COURT: Does the rule have any safe harbor, any unramped period in effect where an employer gets some period of time to adapt its procedures without being subject to loss of funding because the procedures have not been fully developed or implemented?

MS. MEYER: No, your Honor. HHS explicitly rejected comments requesting that it allow for compliance in one year after the effective date of the rule or for a one-year safe harbor. So HHS explicitly made this choice. And, in fact, one of the key reasons that HHS issued this final rule was to affect compliance with --

THE COURT: So going back to the hypothetical earlier, in the hypothetical situation in which a subrecipient of a New York Medicaid grant, let us say, breaches the rule by following a Title VII accommodation approach that's now been eclipsed by the rule, if that happens on November 23 subject to how the enforcement process plays out, at the end of that process New York's failure to adapt its subrecipient's policies to the new rule could cost New York its Medicaid funding?

MS. MEYER: Correct, your Honor.

THE COURT: Which is billions of dollars a year.

MS. MEYER: Yes. Yes, it is.

THE COURT: So I take -- I think I take the argument as to ripeness. Let's focus on the merits of the spending

clause point.

MS. MEYER: With respect to the final -- the merits, the final rule violates each of the four limitations placed on the federal government's use of funds in violation of this spending clause. Critically the rule conditions plaintiffs' compliance with HHS's new federal conscience reviews on 192 billion in federal health care funding. Specifically the rule gives the department the authority to withhold funding in the whole or part to deny use of federal financial assistance or funds from the department in whole or part, to wholly or partly suspend award activities, to terminate federal financial assistance or other federal funds from the department in whole or part, or to deny in whole or part new federal funds from the department. This all includes based on any indication that a recipient has failed to comply with the rule and during pendency of good faith compliance efforts or for failure to comply with the new assurance and certification requirements in the rule.

THE COURT: May I ask you. One of the situations that can give rise to a spending clause problem involves a situation where the rule would violate another constitutional provision. I'm going to come back to a question I asked one of your colleagues earlier. Focus on -- one thing that you argue is that the rule would violate the establishment clause. Indulge the hypothetical that it might in some applications but it

doesn't on its face and that that was the Court's determination.

Is the spending clause implicated by that problem in which one can imagine scenarios where you have an establishment clause problem but that on its face the rule doesn't?

MS. MEYER: It is, your Honor, especially in the context of this rule where if liability is imposed on the states for the activity of their staff recipient. So, for example, as a practical matter our declarants have testified that they will have to review their contractual arrangements with various subrecipients to ensure compliance with the final rule because they are now subject to vicarious liability. And in doing so, in reviewing those contracts and imposing conditions if necessary on subrecipients, if those conditions present a constitutional problem, what defendants are subjecting plaintiffs to is imposing those unconstitutional conditions on its recipients.

THE COURT: OK. Another dimension of spending clause analysis involves retroactively. Articulate for me why the rule has a retroactive effect. Right now are you able to hire people -- are you able to ask the conscience question in hiring?

MS. MEYER: We are, your Honor.

THE COURT: And is the retroactive point that you're now stuck with people -- so if -- that doesn't work. In other

words, if you were able to fence out people who simply couldn't do core parts of the job by virtue of asking that in hiring, how is there a retroactive application of the rule, meaning you are getting punished for past conduct or decisions?

MS. MEYER: So one of the prohibitions of the spending clause is retroactivity in the fact that plaintiffs need to knowingly and voluntarily accept the conditions of the funding streams. And when plaintiffs accepted these particular funds they had no idea that HHS would expand their substantive requirements to, for example, broaden definition of discrimination in such a way that it would severely curtail plaintiffs' current policies and procedures.

THE COURT: But you accept funding typically on a year-to-year basis.

MS. MEYER: That's correct.

THE COURT: So we're in right the middle or early part of the fiscal year right now. Suppose on November 23 comes the violation. Suppose it's adjudicated in full on January 1. Presumably the image -- I'm telescoping the process here just for purposes of a hypothetical, I know the world doesn't work that fast, but assuming that it did. If the agency were to cut off your funding from January 1 through the end of the fiscal year, why is that retroactive? Yes. You took the money not knowing that the regulatory world would change, although the notice was out there, but you would only be cutoff

prospectively unless the agency is threatening to clawback the money going back to the beginning of the fiscal year, how is that retroactive?

MS. MEYER: A couple of responses, your Honor.

First, let me clarify that various contracts and grants govern the administration of all of these underlying funds. And so I don't think that it is accurate to say that we renew, for instance, on a yearly basis. I think the underlying funds are governed by various provisions of the grants and contracts.

With respect to why this particular provision is, in fact, retroactive is the obligations that are imposed on day one go into effect on day one. And so the funding streams that are threatened are the funding streams that we currently operate under now and the policies and procedures that we have to change are policies --

THE COURT: You have hired people and engaged subcontractors and the like on the premises that the funding stream is intact at least through the end of that grant or installment whether it's yearly or whatnot. The point is there's an architecture that develops around the expectation that your Medicare grant isn't going to be yanked in the fiscal year.

MS. MEYER: Yes, your Honor. And, in fact, we have declarants that testified as to the expectation of the spending

streams the governs had budgeted for them in 2019 and 2020 and 2021 and so you have those reliance interests as well.

In addition, the written assurances and certifications of compliance with the final rule are new and retroactive conditions that plaintiffs may be subject to immediately. The final rule authorizes HHS to require certification if OCR suspects a violation and it makes that certification an explicit condition of continued receipt. So that's another way in which this rule is retroactive.

THE COURT: I realize there are multiple ways in which the spending clause could be violated but one of the things you say is that -- one of the concerns implicated is that retraction of spending is unrelated to the federal interests at issue.

Assume for argument's sake a small dose of conscience statutory violations. Just put aside the issue whether the rule faithfully implements the statute and just let's take our hypothetical of the no-doubt-about-it violation.

How would one go about narrowing the scope of the financial penalty to get rid of your concern about the penalty being Draconian or unrelated?

Is it literally just the salary of that employee? Is it real -- does the fit have to be that tight as to what the hospital or state uses or is there some broader retraction of funds that it would still be considered in effect related to

the violation?

MS. MEYER: So we think that under current procedures for any type of funding with withholding or suspending or termination that those procedures are tied to specific funding streams. So if a violation came up HHS would look to the specific funding stream that was implicated.

THE COURT: So right now assuming a violation of a conscience statute which is litigated to completion and procedurally sound, you would not contend there's a spending clause problem with the retraction of the entirety of the funds from that funding stream even if you only had one bad act or one bad apple in the hospital?

MS. MEYER: We would -- we would rely on the regulations and provisions that are already in place. So we do not take issue in the underlying statutes that say certain funding --

THE COURT: No. I appreciate that. But I'm trying to understand your constitutional argument based on the spending clause and I understand that you've argued ambiguity, coerciveness, violation of other constitutional provisions.

I'm just focusing now on the problem which you say also exists here of the penalty in effect, the spending clause -- spending retraction being unrelated to the problem.

I think what you're saying to me is that you don't have a problem with that as long as if -- even if the entire

funding stream is taken away on the basis of a single violation of the conscience statutes. Am I hearing you right?

MS. MEYER: So we're not quibbling with the fact that HHS has options through provisions like the UAR at its disposal. But here the amount of funding on which HHS conditions compliance in the final rule is a much larger pool.

THE COURT: Right. Let's suppose there's a Medicaid funding stream. I have the numbers handy somewhere. One moment.

New York received -- well it's not clear. I don't have it broken out by Medicaid. New York received many billions of dollars in health care funding, but certainly billions in Medicare. Let's just take Medicare for a moment.

Is it really your position that all of that could properly be taken away based on a violation of the conscience statutory provision applicable to Medicare by a single violation by a single person? Is that the way we define funding stream? And is that really your view that the spending clause concept of unrelatedness is not offended by that?

MS. MEYER: Your Honor, our view is not that -- that a small violation would jeopardize all of our Medicare funding, which is exactly what the final rule says here.

THE COURT: So, is there a case that helps define the relatedness concept?

If you're saying that there's a separate problem here

that the funding -- that the threat to the funding stream implicated by a singular violation, if what you're saying to me is that presents a spending clause problem of an unrelated penalty, what's the case that helps me with that?

MS. MEYER: So I think that there is a distinction between our relatedness argument which we are saying that the termination scheme plainly violates that requirement because the rule conditions funds on things that have nothing to do with health care like the Department of Labor and Education.

THE COURT: Right. That's your point which is that we're going outside the scope of HHS or going to funding streams not implicated by a particular violation.

MS. MEYER: Yes, your Honor.

THE COURT: But you're not making that argument even if it costs you an entire funding stream that that is a spending clause problem?

MS. MEYER: No, your Honor.

We are arguing separately that this scheme here is coercive; it has combined funding streams. And it also puts the final rule's new provisions and conditions those compliance with new provisions on that funding stream.

THE COURT: Final couple questions just on remedy.

Hypothetically assume that portions of the rule are problematic for one reason or another, including the ones that have been articulated today, but that portions are not,

including ones that sound in a more housekeeping nature, or where the application of a certain term is authorized by a rule-making grant as in ACA or Medicare or Medicaid.

Why shouldn't, given the severability provision in the rule itself, the definitions that are statutorily authorized, assume that we don't have the other APA problems that Mr. Colangelo addressed, why shouldn't those definitions be permitted to stand and why shouldn't the portions of the regulatory administrative structure that I conclude are fair and housekeeping, why shouldn't those stand?

MS. MEYER: The rule's provisions, your Honor, are codependent. So, for example, several sections rely on one another and cross-reference one another. For example, the posting of notices in 88.5 is evidence of compliance for purposes of enforcement in 88.7.

We don't believe that severability is appropriate. So, for example, as to the definitions this rule is already incredibly ambiguous, as we argued in our papers. And the little explanation that HHS gives as to various situations in the preamble is predicated on their understanding of multiple interpretations and definitions in this rule working together. And so where this rule provides very little clarity for plaintiffs on how to comply in the first instance, if the Court were to sever certain definitions but leave others, we would be left with even less clarity.

In terms of the severability clause itself, there are several cases that say -- and we've cited them in our papers -- that the severability clause is not an indication by itself that the rule should not be vacated in its entirety. Instead, we look to the intent of the agency. And the agency made clear here that it was trying to address confusion created by the 2011 rule. The confusion created by the 2011 rule, it claims, stem from the 2011 rule's interpretation of Weldon, Coats-Snowe and the Church Amendments. And so if the Court were to, for instance, strike certain provisions with respect to those statutory provisions, it's not clear at all that HHS would have made the same decision to promulgate this rule absent those core statutes.

THE COURT: Thank you very much.

In a moment we'll take a break. Let me just ask counsel for defendants who will be arguing for each side and who will be arguing first.

MR. BATES: Your Honor, I will be arguing for HHS. Christopher Bates.

THE COURT: That's Mr. Bates. And you'll be going first, I take it?

MR. BATES: Yes your Honor.

THE COURT: Who will be arguing for the intervenor?

MR. DUNN: I will, your Honor.

THE COURT: That's Mister?

MR. DUNN: Dunn.

THE COURT: OK. Very good. We'll take a fifteen-minute comfort break. I'll see you in fifteen minutes. Thank you counsel.

(Recess)

THE COURT: Welcome back. Be seated.

I'll hear now from counsel for the government. That's Mr. Bates.

MR. BATES: Thank you your Honor. Would you like me to speak from here?

THE COURT: Podium, kindly, please.

MR. BATES: Good morning, your Honor.

THE COURT: Good morning.

MR. BATES: HHS promulgated a conference rule, a law that exercises at its core, in order to provide clarity and ensure robust protections for rights of conscience that are protected under federal statute. I'd like to begin with the agency's authority for this rule.

There are expressed delegations of authority to the agency in a number of statutes to ensure compliance with grant conditions, other conditions, and to insure clients under applicable law. There's been some discussion about today there are some limiting authority with regard to Medicare and Medicaid and CHIP, which we have cite in our briefs, 42 U.S.C. 1302. There is limiting authority with regard to the ACA that

applies to implementation of the ACA's conscience provisions which we've cited in our briefs as well. It's in 42 U.S.C. 18 -- these are expressed delegations of authority for the agency promulgated or related to --

THE COURT: But I take it with respect to Church, Weldon and Coats-Snowe it's not disputed that there is no express delegation.

There is not express delegation, you said, for those three?

MR. BATES: That's correct.

THE COURT: The question just to take -- just to focus our discussion. In total, there are about 30 or so statutes that contain conscience provisions. Having looked at the others, each is really targeted to a rather narrow scope type of activity. Can I assume that for the purposes of discussion we're really talking about the several you just mentioned that have express delegation provisions and the three that I just mentioned that do not, that the others are really targeted to small corners of the world?

MR. BATES: So the intersections that do have expressed limiting authority are -- do apply to a more discrete subject.

THE COURT: So for the purpose of this discussion am I safe to really treat us as talking about the ones you identified a moment ago and the three that I identified in my

statement to you?

MR. BATES: So in terms of rule-making as it pertains to those three conscience statutes that you mentioned.

THE COURT: The heart -- the rule covers a broad set of conduct. It, to be justified, would have to be justified saving those discrete areas' conduct by one of either the statutes you mentioned, Medicare, Medicaid, ACA, or the ones that I identified to you as lacking express rule-making authority. We're not for the most part relying on any of the other three.

MR. BATES: For the other three conscience statutes, that's correct, your Honor. There's also the other housekeeping statute which we point to as authority for the rule here. I would note for the Court's information that the general housekeeping statute is the authority for the UAR; it is, in fact, the only statute that the agency cites as authority for the UAR. UAR is a comprehensive regulatory scheme. It governs the agency's administration of grants and processing the AG uses for ensuring compliance with grants. It is a comprehensive scheme set for the UAR. The statute ability for the UAR is solely general housekeeping statutes. That doesn't indicate that the housekeeping statute does provide broad authority in terms of assuring compliance.

THE COURT: Has HHS ever taken away anybody's funding for violation of a conscience statute?

MR. BATES: Agency counsel informed me no.

THE COURT: Has HHS ever threatened to do that?

MR. BATES: HHS has issued notice. It has issued warning letters, notices of enforcement, has taken enforcement actions under the conscience statutes. In terms of the --

THE COURT: What actions has it taken that are -- if it's never taken away somebody's funding, what enforcement action has it taken?

MR. BATES: So, your Honor, I'm looking over here at agency counsel now for specifics.

THE COURT: Rather than your looking, agency counsel, if there's an answer to the question that you want to furnish, Mr. Bates, would write it out rather than our going --

MR. BATES: Certainly in the vast majority of instances, conscience statutes, civil rights statutes as well, the resolution that is reached is a voluntary resolution that's worked out throughout informal processing, informal means between the agency and the -- its only in instances where those informal processes do not result in voluntary compliance that further enforcement action is taken. As to the specifics of -- I'll wait for --

THE COURT: I'm eager to come back to get a quantification as to the number of full enforcement actions in this area. If it's not something you're immediately facile with it, we'll come back to it, but it is of interest to me.

Go ahead.

MR. BATES: So the general housekeeping statute is as well exclusive authority for HHS's actions here. And then there is also, as HHS explained in the rule, there is inherent in Congress's adoption of the conscience statutes to require recipients of federal funds from the department to comply with statutes, the authority of the department to take measures to ensure compliance with those statutes. The Supreme Court has been clear that delegations of authority to --

THE COURT: Let me ask you this. The very last page of your regulation -- and I take it this must be justified with your housekeeping statute -- states that as a remedy for a violation the agency can -- the remedies include, quote, terminating federal financial assistance or other federal funds from the department in whole or in part.

Putting aside what you say in the briefs, that appears to be stating that for a singular violation of a conscience statute, as interpreted in the rule, an entity such as New York could lose all of its federal funding from HHS and perhaps from other agencies.

Is there -- does the housekeeping statute UAR authorize a rule like that, a consequence like that?

(Continued on next page)

MR. BATES: So in terms of the last point about funds from HHS for other entities, HHS has been clear in the rule that the funding streams that are impacted by the rule are only funds that are administered through HHS. So it would not subject funding through other agencies for violations.

THE COURT: Does the rule say that?

MR. BATES: So, it says -- let me just turn to my notes here. There are a number of places where it says that the funds that are at issue in the rule are tied to specific funding streams.

So I can provide a couple of quotes here for the court's information. Page 23223: "The only funding streams threatened by a violation of the conscience statutes are the funding streams that such statutes directly implicate."

On page 23192: "The prohibition discrimination is always conditioned on and applied in the context of violating a specific right of protection, and each protected right is typically associated with the particular federal funding stream or streams."

THE COURT: Those are comments. The actual reg itself on the last page, on its face, it has no limitation as to funding stream. I appreciate that it can be read not to implicate policies of the Department of Education or of Labor. But on the face of it, what I just read to you seems to say that, for a singular violation by New York State, it could lose

the entirety of, let's say, the $46.9 billion it got from HHS in healthcare funding in fiscal year 2018. In the face of the reg itself, where does it limit the threatened consequence to a particular funding stream?

MR. BATES: So this is not a way in which the regulation is different from the UAR, your Honor. The UAR also uses somewhat broad language here, as well. HHS --

THE COURT: Does the UAR use the language that I quoted to you from the last page?

MR. BATES: So the UAR does not use identical language, but the UAR speaks about terminating funding in whole or in part.

THE COURT: It says here "other federal funds from the department." It's hard to read the words "other federal funds from the department" as, given that it is unlimited, as unlimited.

MR. BATES: So, again, your Honor, the agency made clear in the preamble to the rule.

THE COURT: Preamble is not the rule. The text of the rule appears, on an unlimited basis, to leave open the possibility that, in an extreme case, the -- the agency could seek to terminate all federal funds from the department. It doesn't have any limitation in there. Would the UAR permit that? Would the UAR permit as a matter of housekeeping the agency to enforce the conscience statute so as to, without

limitation to a particular funding stream, deprive a recipient of the entirety of HHS funding for a singular violation?

MR. BATES: So, your Honor, I'm going to look to agency counsel now to answer --

THE COURT: You have to stop looking at HHS counsel. In baseball we call that sign stealing. You have to give me the answer. This is a fundamental question. It is all over the briefs. Yes or no: Do the funding statutes authorize you to adopt a rule that on its face threatens the entirety of HHS funding for a single violation? I take it the answer might be different for a particular funding stream, but I'm reading the text of the regulation now.

MR. BATES: So first point, your Honor, is that the regulation would not do that. For the purposes -- for the terms of the UAR, my understanding is that the UAR would not do that either. The rule is similar to the UAR here in the sense that it is tied to the specific funds that are at issue with regard to the specific statute that the agency has found a potential violation.

THE COURT: All right. So if I am understanding you right, so we can proceed with the balance of the discussion, your position, at least in this litigation, is that "all" that is in jeopardy -- quote/unquote around "all" -- is the specific funding stream implicated, right?

MR. BATES: That's correct, your Honor.

THE COURT: So if, hypothetically, within the scope of activity under Medicaid, there was a singular violation, you would reserve the right or HHS would reserve the right to withdraw the entirety of the Medicaid funding scheme, but that wouldn't extend to, let's say, Medicare.

MR. BATES: That's correct, your Honor. And in practice, HHS's practice is to tie or limit those enforcement mechanisms to the specific grant report or funding stream that's at issue.

THE COURT: But that's never happened in the context of the conscience statute. It's happened in other contexts, right?

MR. BATES: Yes.

THE COURT: How often does HHS terminate funding midstream for a violation, civil rights violation?

MR. BATES: So my understanding, your Honor, is that it is not common. My understanding is that there are approximately 12 to 13 enforcement actions that are taken each year, that this is under the civil rights statutes as well as under the conscience statutes and HIPAA as well, which OCR also administers. And agency counsel just confirmed that they have never -- that they have never terminated funding for a violation.

THE COURT: For a violation of this statute or anything else?

MR. BATES: Of any of them.

THE COURT: So HHS has never terminated funding of any recipient for any civil rights violation?

MR. BATES: That's correct, your Honor.

THE COURT: So this would be a first if that were -- if what is threatened here, whatever the scope, were to transpire?

MR. BATES: If HHS took an enforcement action under the rule that resulted in the termination of funds, that would be the first time that the agency had done that. But the agency has authority, under other statutes, to do it in other instances as well. So that is not unique to the rule or to the conscience statutes.

THE COURT: May I ask you, do any of the conscience statutes say anything about a remedy?

MR. BATES: I'm sorry. Say that again.

THE COURT: Do any of the conscience statutes say anything about the remedy for a violation?

MR. BATES: So the conscience statutes provide that -- that none of the funds made available in the funding streams that are specified in the various conscience statutes may be used or made available to an entity that engages in discrimination or other prohibited acts under the statute in terms of what the -- a specific remedy for such violations are. The conscience statutes themselves, or at least the three

statutes that you identified, setting aside other conscience statutes that you have more detailed -- the three that you have identified do not specify those remedies. And so, again, for purposes of that aspect of this, we would look to the housekeeping statute and to other statutes that provide authority for ensuring compliance with applicable laws.

THE COURT: Why is it that -- and I am now going -- I have a question beyond conscience statute violations, but to other civil rights violations that are within the ambit of OCR, why is it that none of them ever reached a point by way of a remedy of retraction of funding? What are the lesser remedies that tend to be deployed?

MR. BATES: The funding component in HHS?

THE COURT: Right. In other words, I am now asking you, beyond conscience statutes, you have told me that for no violation has the department ever retracted or cut off funding. What do they do to a violater?

MR. BATES: So under the UAR, there are various remedies that are set off. The first point, again, your Honor, I think, would be that it is uncommon for there to be a formal enforcement remedy actually imposed. The vast majority of these are worked out between the agency and the regulated entity. And so at least in terms of the context of the UAR, so the UAR sets out various penalties or enforcement mechanisms that could come into play, such as temporarily withholding

payments --

THE COURT: Has that ever happened?

MR. BATES: -- disallowing matching funds.

THE COURT: Sorry. I took you to be saying essentially that there hasn't been a financial hit for violations. Maybe I misread you. Has there been some lesser financial consequence to violaters of any of these conscience statutes?

MR. BATES: So agency counsel informed me no.

THE COURT: Let's deal with the enforcement part of our argument now, and we will get back to the authorization.

To what degree has HHS ever investigated complaints of violations of the conscience statute? How often does that happen?

MR. BATES: So there are obviously more investigations per year than there are, you know, further action or further enforcement actions taken. I know that in this most recent year there were three enforcement actions that were brought. I believe that those were mentioned earlier.

In terms of the number of investigations beyond that, obviously the answer is higher. HHS does review complaints when they come in, institutes investigations of those complaints.

And in terms of a discrete number, with your Honor's indulgence, I'm going to wait for if agency's counsel has a

specific number to give me on that. I do know that the number --

THE COURT: Would it be useful just to take a moment and have agency counsel at the podium? Because I am interested in, in practice, how enforcement works and how it has worked. That's an important backdrop here. You tell me, but at some point I want to have that discussion about the history of enforcement of these statutes within HHS. If that's not something that you are familiar with, but agency counsel is, would that make sense?

MR. BATES: Yes, your Honor.

THE COURT: Let's just take a moment. I will come back to you, because I realize there are many categories and topics for us to discuss, but I would welcome briefly to hear from agency counsel.

MR. TAKEMOTO: Can we pause for a moment so that we can converse with --

THE COURT: No. No. You have prepared for months. Let's get agency counsel. Come on.

MR. KEVENEY: Sean Keveny, your Honor, with HHS.

THE COURT: Sorry, that is Mr.?

MR. KEVENEY: Keveney, your Honor.

THE COURT: Mr. Keveney.

Just tell me about the history of the actual enforcement of these statutes. How often does HHS investigate

a complaint for a violation of these statutes?

MR. KEVENEY: With the caveat that I have only been at HHS for about eight months, your Honor --

THE COURT: But you were the counsel assigned to this important case.

MR. KEVENEY: Correct, your Honor, and I have asked these questions within the agency.

There are approximately 35,000 complaints per year that come into OCR. Those cover the full range of areas for which OCR has enforcement authority, traditional civil rights cases, Title VI, Title IX, 504 of the Rehabilitation Act, HIPAA, and the conscience statutes.

THE COURT: Focusing on the conscience statutes, how many investigations have been undertaken, if you know, of the violations -- alleged violations of the conscience statutes?

MR. KEVENEY: It is my understanding, your Honor, that there are approximately 20 open investigations. It is my understanding that in the last three years there have been four formal or informal notices of violation issued in connection with the conscience statutes, including in Hawaii, Mt. Sinai Hospital here in New York, Vanderbilt University, and most recently the University of Vermont Medical Center.

THE COURT: That's the one that trips off of the complaint that I referenced earlier, the UVM one.

MR. KEVENEY: That's correct, your Honor.

THE COURT: How often has a violation been found by OCR of a conscience statute?

MR. KEVENEY: A formal finding has only occurred in the University of Vermont Medical Center.

THE COURT: Over the course of what period of time?

MR. KEVENEY: Over, to my knowledge, the last three years. But it is important to distinguish, too, your Honor, the difference between formal findings of violation and informal communication of concerns or potential violations to a covered entity -- and, by way of analogy, to put this in helpful light, I will point the court to the Justice Department's enforcement of Title VI the 1964 Civil Rights Act. That's been on the books for years, it covers a wide range of federal funding, and the Justice Department has never pulled federal funding for a violation of the '64 Act.

THE COURT: Tell me, with respect to the investigations of conscience violations, how many times has the agency determined that there was a violation even if it is not in an informal way?

MR. KEVENEY: To my knowledge, there are the four that I referenced, your Honor.

THE COURT: Over what period of time?

MR. KEVENEY: Over the last three years.

THE COURT: All right. And was there, in the course of that work, was there -- did the agency encounter problems

presented by limited enforcement authority or ambiguous enforcement authority, did the agency have any hiccups in doing its work.

MR. KEVENEY: Yes. I can point the court specifically, and I hesitate because we are in ongoing negotiations with the University of Vermont, so to the extent some of those negotiations may had been covered by the rules of evidence, but the University of Vermont specifically --

THE COURT: As of the date the rule had been promulgated here --

MR. KEVENEY: Yes.

THE COURT: -- what, if any, problems had the agency encountered in the enforcement of the conscience provisions?

MR. KEVENEY: I can tell your Honor the University of Vermont particularly challenged the agency's authority to enforce any of these statutes, and that is an issue over which we are engaged in ongoing discussions.

THE COURT: Was the University of Vermont experience or your experience with the University of Vermont a reason for this regulation? Does the rule say that; and, if not, is there a basis on which to represent that that was a reason for this rule?

MR. KEVENEY: Yes and no. So the rule, again, obviously wouldn't specifically refer to the situation with the University of Vermont, because it hadn't come up yet; but the

concerns that arose in dealing with the University of Vermont were very much on the agency's mind.

So, specifically, your Honor, the university, understandably, has questioned what the procedures are, what the procedures are for withdrawing funds, which portion -- which component of HHS would be ultimately responsible for withdrawing any particular grant funds that the university receives. Those are questions that this rule answers.

THE COURT: Prior to the University of Vermont issue, and I'm not eager to get into anything that's confidential in that case, but had the agency experienced any practical problems investigating or enforcing allegations of violations of conscience statutes?

MR. KEVENEY: Without knowing the details of the Mt. Sinai investigation, your Honor, I can't answer that definitively.

THE COURT: Can you answer it nondefinitively? I'm trying to understand whether any part of this rule has its anchor in learned experience from enforcing the statutes.

MR. KEVENEY: So I can tell you, your Honor, that much of this rule is anchored in OCR and the federal government's experience enforcing civil rights protections generally. Obviously the rule draws upon the Title VI enforcement framework and the federal government has -- and across the federal government, including at HHS, has long experience

enforcing Title VI. And it obviously has been useful over the years to make sure the covered entities are aware of the procedures the agencies will follow. The Justice Department has its Title VI manual available online for covered entities to see, so they are aware of what the potential consequences of violations are. So in that sense, the agency's long experience of enforcement does inform the architecture of this rule.

THE COURT: All right. In a moment I will let Mr. Bates get back, but this question, you mentioned that there are currently four notices of violation pending. How does that compare to the previous three-year period or the three-year period before that? Is the number four greater, lesser, or about the same?

MR. KEVENEY: Greater.

THE COURT: It grew to four from what?

MR. KEVENEY: There was approximately, as is set forth in the preamble of the rule, one complaint per year prior to the issuance of the MPRM that is increased by a thousand percent. There are approximately ten complaints per year.

THE COURT: That has happened since the notice of rule-making in this case.

MR. KEVENEY: That's correct.

THE COURT: And without going out on a limb, is it safe to assume that it was the notice of rule-making by the agency itself that may have been causative in the increase in

complaint.

MR. KEVENEY: That is certainly the agency's view, setting aside difficulties --

THE COURT: All right.

MR. KEVENEY: -- in cause and effect generally.

THE COURT: So prior to the notice of rule-making was there any empirical data that suggested an increase in complaints actually made to the agency in this area?

MR. KEVENEY: Not that I am aware of.

THE COURT: I think if --

MR. KEVENEY: I think the answer is no.

THE COURT: If there is no one else in the room who would be more aware of it, is the answer to that no?

MR. KEVENEY: I think the answer is no, your Honor. I hesitate because there very may well have been statements from the agency that it intended to start enforcing these statutes. The Office of Civil Rights stood up a new unit, and I think that predated the issuance of the MPRM.

THE COURT: All right. Mr. Keveney, I appreciate your help. Is there anything else responsive to what I have asked so far that you, given your familiarity as agency counsel, wish to clarify?

MR. KEVENEY: No, your Honor.

THE COURT: Thanks very much. I appreciate you didn't come here today expecting to argue, and I appreciate the

helpful answers under fire.

MR. KEVENEY: Absolutely. You're welcome, your Honor.

MR. TAKEMOTO: Your Honor, may I say one thing? I just want to formally object to the record just on the basis of APA case are limited to the record and not based off of agency testimony.

THE COURT: I appreciate that, so why don't we turn to the record?

Mr. Bates, let's go to what Mr. Colangelo was saying about the number of complaints. The record that Mr. Colangelo recites suggests that the number of complaints that were presented to the agency was not nearly the quote/unquote significant increase that the agency represented. Factually, over the course of your briefs, the number has gotten smaller and smaller and smaller.

How many complaints does the agency say it received in the ramp-up to this rule?

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

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

MR. BATES: So it is a smaller number, your Honor. We have cited a number of them in our reply brief. I believe that we cited about ten in the reply brief, and I know that

plaintiffs have stated that they believe that there are about 20 or 21. In terms of the exact number of complaints, there are -- we didn't cite all the ones in our reply that we would say fall in here, but it would be something probably relatively similar to the number that the plaintiffs provided.

THE COURT: So you are not directionally disagreeing with Mr. Colangelo's numeric representations.

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

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

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

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

MR. BATES: Yes. In that ballpark, your Honor.

THE COURT: Now, your brief, your brief ultimately, I think it is your reply, identifies actually three at one point that you say are responsive. I took a look at the three and, unless I am missing something, two of the three aren't even responsive.

There is a complaint from a law firm on behalf of an adequacy group -- this is at tab 129 -- that doesn't cite any specific instance of discrimination. There is a complaint at tab 27 from the doctor at the Washington State Department of Corrections that deals with the sex transformation procedure, but there's no HHS funding that appears to be implicated. And the third one seems actually to fit the paradigm here, and that's the nurse at the University of Vermont who says she was coerced into participating in an abortion. Am I misreading you as to those three?

MR. BATES: So we also cited some additional complaints in our reply brief, your Honor. That's at page 26, note 5.

THE COURT: I have got that. But at one point you highlighted those three. Am I right that two of the three actually drop away?

MR. BATES: Two of the three would not implicate violations of the conscience statutes. Those complaints I believe would have alleged violation of the conscience statute; and, in part, the rule here, as the agency explained in the

preamble, was to help to increased understanding and awareness of the rights that are protected under the conscience statute. So the fact that there may have been complaints filed did not actually implicate is still relevant here, because it shows some confusion about what the statutes do cover.

THE COURT: All right. I took you off script. I know you wanted to talk initially about authority and rule-making authority. Thank you. Go ahead.

MR. BATES: So turning back to my notes here, so I think that I also, as we explain in our briefs, in addition to the express delegations of authority, there are also implicit delegations that are relevant. The Supreme Court has made clear that delegations of authority can be both explicit and implicit, and in the process of enacting the conscience statutes and imposing obligations on regulated entities, placing obligation on the agency to ensure compliance with those statutes, there was implicit delegation to the agency to ensure that the agency complies with requirements of those statutes. And so that is relevant --

THE COURT: What is the basis for arguing implicit delegation for the three statutes I mentioned earlier that would substantively define, for example, a term like "assist in the performance" to capture, for example, the range of services or acts that are covered? That seems substantive. That deals with the range of people whose primary conduct implicates the

rule. What's the basis for arguing that implicitly Congress meant HHS to fill that gap and define that?

MR. BATES: So HHS is the agency that's tasked with ensuring compliance with the statutes. So in the process of ensuring compliance, HHS has authority to set forth definitions for what those terms are in the statute.

THE COURT: But, so you say. I mean, isn't the other way to look at it that if Congress was able to affirmatively give you substantive rule-making authority for Medicare, Medicaid, ACA for terms like "discrimination" or "aid and assist in the performance," as the case may be, its silence on that, as to the Church and Weldon and Coates-Snowe amendments, implies that it wasn't intended to give, other than housekeeping, rule-making authority to the agency.

MR. BATES: So, again, delegations can be both explicit and implicit. The various statutes you have discussed here, they were passed at different times by different Congresses as parts of different public laws. So attempting to engage in some sort of intertextual comparison among the different statutes passed at different times doesn't necessarily show that --

THE COURT: Be that as it may, what's your affirmative evidence that when Frank Church put forward the Church amendment, after *Roe*, he intended HHS to rule-make? 1972, the year before Title VII adopts the accommodation framework with

the hardship exception, allowing the employer to insist on somebody's performance of the task. Frank Church was presumably well aware of that, as was Congress. They passed the Church amendment. There was not word one about Title VII and there is not one word about delegating to the agency the ability to rule-make in this area, let alone to supervene Title VII. What's the basis for implying that intention on Congress's part? It's the very next year.

MR. BATES: Well, that's, I think, the nature of an implicit delegation, your Honor. That there is not --

THE COURT: No, but that is circular. Give me something that suggests that HHS, in Congress's eyes, was free to roam around and define those terms, including in a way that would supervene a statute that Congress passed the previous year. I mean, you keep saying it is implied, but implied from what? Otherwise it is just a say-so. What's the evidence?

MR. BATES: Well, in terms of the question of supervening Title VII, your Honor, again, conscience statute, Church amendment was passed after Title VII. Congress chose not to include certain aspects of Title VII in the Church amendment. So that doesn't necessarily --

THE COURT: That doesn't mean that they disagree with it. Maybe they liked what they had previously done. I mean, in Title VII, as of 1972, you have an amendment that, at least in the context of the religion protection in Title VII, as

opposed to morality-based conscience objections, explicitly deals with this problem at a level of greater specificity than does Church or Coates-Snowe or Weldon. What is the basis for inferring in those very short conscience provisions that post date the 1972 amendment of Title VII that Congress was *sub silentio* saying, you know, be done with this hardship exception?

MR. BATES: So there is a difference in the statutory text there, your Honor. And I apologize, I have lost my train of thought here for a moment.

THE COURT: I'm focusing -- look, I want to engage with you on the basis for implying that -- for implying an intent on Congress's part to allow the agency to substantively rule-make here, let alone substantively rule-make in a way that would cover what were a different outcome and a different test, what Congress itself had dealt with the previous year in Title VII.

MR. BATES: I think that what you are speaking to here, your Honor, may be a statutory gap. So this question of how Congress set forth the scene in Title VII, how that's going to interact here with the conscience statute, that may be an example of a statutory gap that then is left for the agency to fill.

THE COURT: But it's not -- it would be perhaps a gap if there weren't conflict. But let's engage, then, with the

issue of how the rule intersects with the area of conduct covered by Title VII. So let's focus just on the employment context as opposed to, for example, benefits situations. In the context of employment, do you disagree with the way that plaintiffs portrayed, pre-rule, the operation of the hardship exception?

MR. BATES: In terms of?

THE COURT: How it worked.

MR. BATES: In terms of its application here?

THE COURT: How an employer, presented with an employee who asserted an objection to, let's say, assisting in an abortion. Do you disagree with the portrait, given by plaintiffs, as to how the dynamic worked under Title VII, that there would be an attempted accommodation, but in the end, if there was a -- forgive me, I'm forgetting the adjective modifying hardship. Undue hardship. Thank you. Do you agree that that was the standard that applied in terms of an employer's latitude to insist on an employee's performance of a task under Title VII?

MR. BATES: So that may have been the standard that the -- that employers of the plaintiffs were applying. That exception does not apply in the text of the conscience statutes.

THE COURT: No, no, no, no. Do you disagree that under Title VII the employer was able to overcome in effect a

religious-based objection to a procedure based on undue hardship?

MR. BATES: Under Title VII, yes.

THE COURT: Okay. So had any court ever held that the conscience statutes in the context of employment overcame that framework, the Title VII framework?

MR. BATES: I am not sure that that issue ever had been presented, your Honor.

THE COURT: Except in the *Shelton* case, which goes the other way, Third Circuit, right? That's exactly the Third Circuit. The Third Circuit in *Shelton* is an employment context involving the nurse who refuses to participate in the abortion and declines the accommodation, gets fired, sues, and loses, essentially based on the Title VII hardship framework, right?

MR. BATES: So, that question would then depend, your Honor, on if the plaintiff in that case raised the conscience statutes and what the court decided about the interplay of the conscience statute for Title VII in that case.

THE COURT: In other words, *Shelton*, you think, would have come out differently if the lawyer in that case had had the wisdom to invoke the conscience statute as having *sub silentio* overcome the Title VII framework.

MR. BATES: That the conscience statutes are more specific and address a more discrete instance, which is conscience protections in the healthcare arena, and that

therefore they apply there in that instance.

THE COURT: But the conscience statutes don't get to this level of granularity. They use words like "discriminate," which, by the way, is also used in Title VII. But beyond the words like "discriminate," they don't get granular as to the operation of the statute as applied to workplace context. They don't say there is or isn't an undue hardship. They just say "don't discriminate," right?

MR. BATES: Yes, that's correct.

THE COURT: So what is the basis for inferring in that that they meant discriminate in some way other than by then the very familiar Title VII framework? I understand that might have been preferred by some, but the statute itself just doesn't say that.

MR. BATES: Congress chose not to include an undue hardship exception in the conscience statutes.

THE COURT: When did they choose that? They use a general term, but they don't -- they simply don't spell out the details. But on what basis can you say that Congress affirmatively chose Frank Church and all the others to not afford an undue hardship exception? Was it a choice or was it simply silence?

MR. BATES: I mean, they knew that that provision was in Title VII. They could have included that provision in the conscience statutes if they chose to --

THE COURT: And they could have indicated in some way in the legislative history or a committee report or the text a disagreement with the existing framework and didn't do that either.

The point is, it seems like it's an *ipse dixit* to say that their silence means that they chose to quietly overcome this very familiar framework. I am looking for some dollop of evidence beyond your say-so that that's what Congress intended. Do you have anything?

(Pause)

MR. BATES: I am just turning to my notes here, your Honor.

THE COURT: Go ahead.

MR. BATES: So the absence in the text is a point, your Honor. As I also mentioned, there are also differences between what Title VII covers and what the conscience statutes cover. And Congress may have determined based on difference in scope not to include the exception there.

THE COURT: They might have done a lot of things. The issue is what they actually did. To a large degree, the conscience statutes cover the employment world, *i.e.*, the world covered by Title VII. I'm asking you, last time, if there is any reason to think, anything specific you can point to that indicates that anybody at Congress intended to overcome the Title VII framework with the conscience statutes in the area

the Title VII framework otherwise applies to.

MR. BATES: Just in the statutory text, your Honor.

THE COURT: May I ask you, up until this rule, I know that the Bush era 2008 rule doesn't define "discrimination," so it didn't seek to overcome the Title VII framework, correct?

MR. BATES: So I have here the rule in front of me, your Honor, the 2008 rule. I would need to review that specific provision of the rule. I will take your Honor's --

THE COURT: Well, it doesn't define "discriminate." It defines other terms, but it doesn't do that, right?

MR. BATES: I -- I'll -- I'll take your Honor's correct on that.

THE COURT: As you understand here now, can you think of any time prior to the promulgation of this rule when HHS, either in the context of a rule-making or in the context of the application of the conscience statutes to a particular scenario, ever took the position prior to this rule-making that the Title VII framework didn't apply to conscience objectors covered in the employment setting?

MR. BATES: I'm not aware of HHS having previously taken that position, your Honor.

THE COURT: So if Congress intended *sub silentio* to overcome Title VII, it was first discovered in or about 2019? Is that the point?

MR. BATES: That?

THE COURT: All those people have been dead for a while who passed -- it's the early parts of the statutes. What's the basis in 2019 for saying that archeology discovers that the framers of these statutes going back to 1973 intended to override Title VII?

MR. BATES: I mean, I, I, I, I apologize. It seems to be the same back-and-forth here, your Honor. It is based on the statutory text. There is a difference in the statutory text. Title VII explicitly has the exception that is not present in the statutory text in any of the conscience amendments which were passed at various times across various Congresses and various public laws. There were multiple times that Congress considered rights of conscience and in none of those instances did they incorporate an undue hardship exception.

THE COURT: Congress was surely aware with the second and third and fourth and all of those up to the 30 conscience statutes that there was apparently no authority out there that read the conscience statutes as intentioned with Title VII or as overcoming it. Given that Congress is presumed to be aware of the facts on the ground, wouldn't one have expected in conscience statutes 2 through 30 to then circle back and say, hey, wait a minute, you know nothing of our work, you don't know what we -- we obviously meant the first of these statutes to override Title VII. You have misread us, so we are going to

be clearer in each of the ensuing statutes.

Isn't there some mileage we can get out of the fact that they didn't do that?

MR. BATES: I mean, it would depend on the extent to which the issue had been brought to Congress's attention, your Honor. I mean, the fact that Congress, time after time, has enacted conscience statutes without this protection -- I suppose one could draw the inference both ways. Here in the text, we would say that the absence in the text, you compare Title VII -- and I apologize if we are just going round and round here, your Honor, but it is a difference in the statutory text, and the question is, what is the inference that you draw from the absence in the statutory text?

THE COURT: What inference do you draw from the fact that the ACA, Affordable Care Act, 2010 says that it doesn't conflict with Title VII?

MR. BATES: What do you mean, your Honor?

THE COURT: Doesn't the ACA, isn't the ACA, doesn't it contain the explicit language harmonizing itself with Title VII?

MR. BATES: It also says that nothing in the act -- let me just turn to. . .

THE COURT: That's one of your examples of substantive rule-making authority. But the ACA, it is hard to read that as, given its reference to Title VII, overcoming Title VII.

MR. BATES: The ACA also says that nothing in the act shall be construed to have any effect on federal laws regarding conscience protection.

THE COURT: Sure. But that assumes the conclusion. If you assume the conscience provisions overcame Title VII, I suppose that's right. If you start with the opposite conclusion, that Congress, in referencing Title VII, presumably, if it intended to override Title VII, would have said something different than it said, you come up to a very different place.

All right. Let's go back to other issues of authorization, unless there is something else you want to tell me about Title VII.

MR. BATES: Just one point. To the extent there is an issue you have identified here, your Honor, I think that it would apply to that specific aspect of the definition of "discrimination." And so to the extent that you find an issue here, that is not a basis to sort of go beyond that specific issue in terms of the scope of relief with regard to plaintiffs' challenge.

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

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

THE COURT: Give me a concrete example in which that difference would result in a different outcome.

MR. BATES: So the Title VII framework says that the employer has to provide a reasonable accommodation unless doing so would result in undue hardship. And so some of the examples we have talked about, where an employee raises an objection to a procedure and the employer offers an accommodation or the employee seeks an accommodation and the employer determines that the accommodation would be, you know, problematic, would result in the employer having to spend some more money or complicate their staffing decisions --

THE COURT: Let's be concrete. Suppose an employee now says she has been a nurse or he has been a nurse assisting in abortions and does not want to do so anymore, develops that objection, and the employer says, fine, you are now going to no longer be working in OB-GYN, but you can work in orthopedics, you can work in pediatrics, you can work in neonatal; and the employee says -- and same pay, same title, same perks -- and the employee says, no, I insist on staying in OB-GYN. Under the statute, under the rule, who wins?

MR. BATES: Under the conscience rule, your Honor?

THE COURT: Yes.

MR. BATES: So that will depend on whether that reassignment constitutes discrimination.

THE COURT: But doesn't discrimination -- if the

employee rejects the accommodation and the employee is being transferred because of the religious objection to performing a particular procedure in his or her department, doesn't that, under the rule, constitute discrimination?

MR. BATES: So the rule says that the acceptance of the accommodation, that that does not itself -- so it creates a safe harbor. It says the accommodation is not itself discrimination. It doesn't necessarily -- they will set in place the converse or --

THE COURT: Right.

MR. BATES: -- that's going to be a fact-dependent scenario depending on what the assignment entails that's going to be a question for the agency in the first instance to determine what the difference is between the responsibilities and --

THE COURT: In my scenario, here, though, the OB-GYN nurse is transferred to neonatal work, and every other mete and bound of the employment is the same, and the only reason for the transfer is, from the employer's perspective, it is functionally a challenge to have somebody there who is saying on a procedure-by-procedure basis, yes, I can, no, I can't. You would rather have somebody who is available for all procedures that come through the department. You can understand the functional reasons for that.

But if the employee refuses to get out of that

department than be transferred to another equally estimable reputable department, isn't that, under the rule, in terms of discrimination, there is nothing in the rule that gives the employer comfort that in doing so they are not jeopardizing their federal funds, correct?

MR. BATES: So again, your Honor, it is fact specific, and it is going to be a determination by the agency based on the facts of the scenario what the outcome is.

THE COURT: In the hypothetical I gave, though, does that mean that the employer could be, depending on how the agency views that problem, the employer could have violated the conscience statutes as interpreted by the agency under my scenario?

MR. BATES: Yes, your Honor.

THE COURT: Whereas, if, under the Title VII framework, there was an undue hardship determination, the employer would be free to do what it did, right? Undue hardship is no longer something the employer can trot out under this rule as a defense.

MR. BATES: That's correct, your Honor.

THE COURT: All right. So what defense does the employer have if it's being candid in saying, yeah, of course it is your objection to this procedure that is causing you to be moved, it is nothing else, but we have a job to do and it is much more functional to have somebody who is reporting for duty

for all aspects of the job to be in that department, we honor your work, we honor your religious conviction, but you are a better fit for pediatrics and neonatal than for handling an ectopic pregnancy. What defense does the employer have under the rule?

MR. BATES: What do you mean by defense, your Honor?

THE COURT: Well, if you claim that it was a violation and the employer admitted that the reason for the transfer was because of the conscience objection and what it -- the complications it presented for the workplace, under Title VII the complications in the workplace have a doctrinal home. It's called undue hardship. Maybe you meet it, maybe you don't. But under the rule, is there anything that the employer can point to to avoid liability for that behavior, for that transfer?

MR. BATES: Not in terms of the possibility of an undue hardship. The question would come down to what the nature of the reassignment is and whether the nature of the reassignment falls within the definition of the --

THE COURT: Right, but doesn't the rule essentially say that in the event -- the rule doesn't say that only a diminution of responsibility or a diminution of salary, or something like that, constitutes discrimination. It is the transfer itself, the accommodation itself, if it isn't accepted by the employee, that is the discrimination. I'm asking you,

can you point to something in the rule that you would, if you were the general counsel or the employer, point to and say, ah-ha, we have comfort. We can move this valued employee to an area in which he can do equally valued and equally paid work and not complicate our mission. Is there anything in the rule that gives the employer a legal hook to hold on to?

MR. BATES: So the rule sets forth what constitutes discrimination. The rule does not say *per se* that reassignment is discrimination. It talks about adverse impact and those sorts of things. I think that in the scenario that you posit, the best practice might be to contact the agency and discuss the situation with the agency and seek the agency's guidance.

THE COURT: I see. How long does that take?

MR. BATES: It could vary, your Honor. I mean, there is information on the agency's website about how to get in contact with the agency. I would presume it would vary depending upon the complexity of the question and those sort of things.

THE COURT: Would *Shelton* come out the other way under your reading if the rule were determinative?

MR. BATES: So in terms -- so if you had a scenario where you had a nurse who objected to performing an abortion and did not accept a reassignment to another unit, the question is --

THE COURT: And got fired.

MR. BATES: So it would depend on, your Honor, whether that reassignment constitutes discrimination.

THE COURT: No, it would be whether the termination constitutes discrimination. Remember in *Shelton* she gets fired and she sues for being fired after refusing the accommodation. And I am asking you, under the rule, isn't it clear that *Shelton* would come out the other way as long as providing the employee made the right argument under the rule.

MR. BATES: Well, it does depend on whether the reassignment is discrimination. Because if the employee were terminated for refusing to accept something that is not discrimination, then that wouldn't come within the ambit. There has to be discrimination in order for the rule to be --

THE COURT: Maybe this is circular, but I'm trying to figure out, it is HHS that has defined "discrimination." I'm trying to figure out what in the definition of "discrimination" gives the employer some latitude in dealing with this type of problem.

MR. BATES: So the definition sets forth what can constitute discrimination. It talks about -- let's see here. It talks about withholding, reducing, excluding, terminating employment, title, position, utilizing criterion, method of administration.

THE COURT: So there is terminating employment. *Shelton* nurse terminated employment. It is checkmate, isn't

it, under the rule?

MR. BATES: Not if the reassignment itself was not discrimination. So if the employer --

THE COURT: If the employee doesn't like being in pediatrics or neonatal and says no, under the rule, isn't it discrimination?

MR. BATES: Only if -- the reassignment. So the termination in this hypothetical is triggered by the rejection of the reassignment.

THE COURT: Right.

MR. BATES: So if the reassignment is discrimination, the consequence that follows from that would also be discrimination.

THE COURT: And under the rule, isn't the fact that the reassignment is triggered by the refusal to accommodate a -- it's triggered by the refusal to allow the morally objecting or religiously objecting nurse to stay in his or her job, isn't that itself an act of discrimination?

MR. BATES: I'm sorry. Can you repeat that, your Honor?

THE COURT: Let me put it this way. You are, I take it, at this point unprepared to give an answer to the question under the *Shelton* scenario, which is the case and the case law that is the most clear, how it would come out under the rule. You certainly can't assure me to come out the same way.

MR. BATES: No, your Honor.

THE COURT: Throughout your brief, you repeatedly tell the court that this is just about housekeeping. Is it really the agency's position that there is no substantive component to any part of this rule?

MR. BATES: No, your Honor. The agency does take the position that the rule is substantive, that it does impose obligations on regulated entities.

THE COURT: Is that a change from what was said in the brief? I think we collected about ten sound bites that say the opposite. I'm not going to waste your time reading them to you, but it was housekeeping, housekeeping, housekeeping throughout the brief. I think this dialogue explores and demonstrates that, for better or worse, there are substantive changes in the sense that the law applies different or potentially different consequences to the same primary conduct.

MR. BATES: And there are different elements at play here, your Honor, so I think with regard to the definitions, there are some substantive elements there. With regard to compliance and enforcement of grant conditions and those sorts of things, which, like the UAR, the agency has taken pursuant to the housekeeping statute, those are housekeeping matters.

THE COURT: Okay. There certainly are some housekeeping matters in here, but the brief depicted the rule as entirely housekeeping.

Let me continue to understand how this rule would apply in some workplace context.

Let's take a clinic that unwittingly hires a receptionist who objects to abortions. The clinic largely does work that includes a lot of abortions. The receptionist refuses to schedule abortions and refuses to switch jobs. Business slows to a halt. Can the clinic fire the receptionist without potentially breaching the rule?

MR. BATES: So in the rule, the agency said that scheduling an abortion can constitute assistance in the performance, so that would then bring this action within the ambit of the rule.

THE COURT: Right.

MR. BATES: So that therefore the agency could not -- I'm sorry, not the agency -- the employer could not discriminate on the basis of that which would include termination.

THE COURT: Meaning that the termination, then, would appear to be a violation of the rule.

MR. BATES: That's correct, your Honor.

THE COURT: All right. A pregnant woman takes an ambulance across Central Park to Mt. Sinai Hospital and, midway through, from conversation with the ambulance driver, it becomes clear that she is headed there to terminate an ectopic pregnancy. The driver tells her to get out in the middle of

the park, and the employer fires the ambulance driver for that. Is the ambulance driver assisting in the performance of the procedure if the ambulance driver takes her to the hospital?

MR. BATES: So the agency did say in the rule that transporting an individual to a hospital for the purpose of having a procedure that falls within the ambit of the rule, that that would constitute performance.

THE COURT: So the --

MR. BATES: I think that that might implicate other issues as how the ambulance driver dealt with that situation.

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

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

THE COURT: So play out for me what is supposed to happen in that scenario under the rule, if the ambulance driver simply says, I'm breaching my convictions to get to the other end of Central Park.

MR. BATES: So employers have an obligation, under EMTALA, to provide sufficient staffing and recourse in the event of emergencies that are implicated so the agency -- or,

sorry, I keep saying "agency" when I mean to say "employer" -- so the employer, under EMTALA, should already have in place procedures to handle that situation, and so therefore would put into place whatever --

THE COURT: Right now --

MR. BATES: -- ambulance procedures were and would have had the ability to ask the ambulance driver about his objections, so that they would then be aware to know what the proper way would be to deal with that situation.

THE COURT: So the employer, you are saying, would have known before the ambulance mission began -- the employer is allowed to ask the ambulance driver in the driver's employment whether or not he objects to any particular procedures, such as abortion, on religious grounds --

MR. BATES: Yes.

THE COURT: -- or other moral grounds.

And if the driver has said yes, then the employer is allowed to task the driver with nonabortion ambulance drives? I'm trying to understand just how this works.

MR. BATES: The employer would need to have in place a procedure to handle a situation just as your Honor has posited.

THE COURT: And now, look, we are talking about emergencies. It is a bleeding ectopic pregnancy, and the driver realizes in the middle of the park what the nature of this is. It's not, by the nature of emergency, something which

calm deliberation or all facts are brought to bear at the outset. So in the middle of the transverse in the park, the driver realizes what is going to happen when the ambulance hits the hospital, and the driver then says "no can do" and refuses to drive any further. Can the employer take action against the ambulance driver under this rule or is the employer risking its federal funding by taking action against the driver?

MR. BATES: So, again, the employer should have had in place procedures to deal with this, whether it be another driver in place or something in place to deal with this situation, and then to the question of what then happens to the driver, the driver would be protected under the rule because it would have had a right, under the conscience statutes, not to assist in the performance of a procedure as to which the driver has objection.

THE COURT: And in my scenario in which the -- we have an emergency situation that pops up in the middle of the drive that we have this problem, in other words, it can't be anticipated at the outset, the employer cannot say to the driver: We have somebody who is bleeding. You have to get to the hospital. Sorry. The employer can't do that, you are saying. The employer has to, quote, accommodate in the crucible.

MR. BATES: So the employer has to accommodate, that's correct, under the rule. HHS also made clear that if it

intends to read EMTALA harmoniously with the requirements under the rule, so that if it came to questions of enforcement by the agency, working out sort of what to do in the scenario, that's not necessarily to say, then, that the most extreme measures are necessarily going to come into play because the agency has said it intends to read them as harmoniously as possible.

THE COURT: Right. What that means is the agency may, in its grace, choose not to cut off billions of dollars of funding, but it also might, it still reserves the right to do so, correct?

MR. BATES: The rule would not prohibit that, but the agency is clear that it intends to read them harmoniously wherever possible, that it will begin -- it says it will begin with informal enforcement, informal communications, and only take further action when voluntary compliance cannot be reached. So there is a long series of events that has to take place before any of these more extreme eventualities come into play, and --

THE COURT: When, under the new rule, can the employer even ask about these matters? I gather once a year or if there is a persuasive justification, but not on a more regular basis, right?

MR. BATES: Yes. After hiring, and once a year, unless there is a more -- absent a persuasive justification.

THE COURT: What about the rural hypothetical? That's

the classic example that's given for undue hardship, where you have got a very limited number of personnel. You really need to have somebody there who is a full spectrum, you know, nurse, scheduler or whatnot. It is not realistic to have a substitute in the wings or something like that. How does the rule apply in that setting?

MR. BATES: It applies the same as it applies in other settings, your Honor. It sets forth the various responsibilities for employers. It doesn't create an exception or other conditions that apply in rural instances.

THE COURT: Okay. So meaning that essentially if there is an employee there who asserts religious objections to a range of procedures and it is economically impractical, you know, to have a platoon situation for objectionable and non-objectionable procedures, where you have different employees filling that role, the employer is -- simply has to find a way to pay for a second job there, even if it is impractical, right? The employer intends to continue performing that service and the one person who works there, the one scheduler, the one operating room nurse, that sort of thing, the employer is stuck.

MR. BATES: So with regard to the specific discrete service or discrete procedure that the employee may have an objection to, yes, the employer would in that instance not be able to force the employee to perform the procedure; and so if

the employer wished to continue providing that service, it would need to find an alternative way to do so.

THE COURT: Let's pivot now from discrimination, which has been largely the focus of this line of hypotheticals and questions, to "assist in the performance."

From your perspective, substantively, how does the rules definition of "assist in the performance," insofar as it spells out the range of people who are assisting in some sense with a medical -- with an abortion, just to be direct, how does it change, in your view, from prior definitions or understandings? There really wasn't a definition of "assist in the performance," but I take it the agency had never acted so as to apply the term to people, for example, who did something the day before a procedure. Is that correct?

MR. BATES: I believe so, your Honor.

THE COURT: So in what ways does "assist in the performance" expand the scope of that term from what was previously applied or understood?

MR. BATES: So in terms of the relationship between the term and the statute, we have argued in our briefs that the term is consistent, claiming in the statute, in terms of how HHS has applied that term in the past. I think that is a question that goes to prior enforcement actions.

THE COURT: So in any prior enforcement action, has HHS ever even investigated somebody for -- where the objection

was made by somebody who had a role in a procedure that didn't involve the same day?

MR. BATES: So, your Honor, I don't want to ask to bring agency counsel back up here, so I am going to say --

THE COURT: I'm sure agency counsel doesn't want to come back up either, but --

MR. BATES: So I'm going to say no, with the caveat that I would ask agency counsel to correct me if that's incorrect.

THE COURT: You would say what?

MR. BATES: I would say no with the caveat that agency counsel would correct me.

THE COURT: Agency counsel, if you have got an example in mind where there was a -- an enforcement action or interpretation taken where the conscience objection was to something on a day other than the date of the procedure, I would welcome your letting me know.

MR. BATES: No, your Honor.

THE COURT: I will construe silence that at least offhand you don't have such an example.

That is a not inconsequential change. Whether or not it is linguistically supportable by the text of the conscience statutes, you will agree that that is a consequential change in the way going forward these statutes would be applied, would you not?

MR. BATES: So your question is would that be -- to the extent that HHS has not brought an enforcement action in that scenario previously --

THE COURT: Or to the extent it is not announced that people who perform previous-day or post-day support roles are covered by the conscience statute, yeah, I mean, in other words, whether or not it can be linguistically supported by the text of the conscience statutes and the words "assist in the performance of," it is a newly articulated interpretation that doesn't have its anchor in anything that's been articulated or acted upon before. Is that much correct?

MR. BATES: Not previously by the agency.

THE COURT: Well, by anybody else? Who else?

MR. BATES: Well, there is the text of the statute which sets forth the term "assisted performance." HHS administers that statute. So insofar as HHS has not taken enforcement action pursuant to that scenario then --

THE COURT: Do you know if HHS has even been presented with the scenario before in all the years of these statutes, where somebody who was distressed about the possibility of non-same day steps or assistance towards an abortion felt that that religious objection, that conscience objection wasn't being respected, has the agency even been presented with that as a problem in any of the complaints presented?

MR. BATES: Not to my knowledge, your Honor, and we

would be happy to submit briefing to the court about these sort of specifics.

THE COURT: Let me ask you, you were relying on all these vaccination complaints. Did any one of those complaints even involve somebody who was scheduling a vaccination or doing something as to even a vaccination other than on the day of the vaccination?

MR. BATES: I don't know the answer to that, your Honor, not to my knowledge.

THE COURT: In terms of the rule-making process here and the factual basis, you heard me engage with Mr. Colangelo about the number of complaints. Can you point to a single complaint that the agency has ever gotten in connection with a failure to accommodate somebody whose connection to the abortion or sterilization procedure was other than on the day in question? Is there a single example of that?

MR. BATES: In terms of the complaints, not that I am aware of, your Honor.

THE COURT: So how can the agency be said to have a factual basis for that dimension of its work?

MR. BATES: Because "assistance in the performance," that term --

THE COURT: No, no, no, no. I understand that if we are playing the textual game that one can use -- one can construe "assist" in a variety of ways, and I understand the

linguistic basis for saying that assistance goes all the way back to, you know, a person who paid for the nursing school of the nurse, I get all that, you can do that. I am asking you factually why the rule was enacted? The agency said we have got the significant number of complaints. Well, that's all fine and good, but how does that sync up to the broadened definition of "assist in the performance"? Even if you had a lot of complaints, that might justify rule-making in the area of the ambit of the complaints, but if there literally wasn't anybody who complained that their conscience rights were being offended by participating in some non-same day way, I'm trying to understand if there is any factual way to prompt for that, for engaging in this space? Why rule-make on that point?

MR. BATES: So an agency does have authority and ability to use its expertise to engage in rule-making and set forth definitions, and I don't believe it is the case your Honor that, in setting forth the definition in this context or in another context, an agency must sync up every single individual piece of a definition that sets out with some complaint or a piece of evidence that was brought. It doesn't have to rate some massive chart where it is linking up all of the definitions with all of the complaints or evidence that was brought forward to the agency.

THE COURT: But arbitrary and capricious review turns, as Mr. Colangelo pointed out, on a factual basis. I am trying

to test the factual basis for this consequential part of the rule. That's all. And I take it the answer is that although there is a textual justification, there is not a factual basis for rule-making on that point.

MR. BATES: On the point that action taken a day before a procedure can constitute assistance in the performance of the procedure, so on that discrete point, there is not, to my knowledge, a complaint that addresses that issue.

THE COURT: Is the agency aware of any receptionist, ambulance driver, elevator repairman, anybody, who ever complained that their ancillary work, other than on the day of the procedure, was violating their conscience rights?

MR. BATES: Not that I'm aware of, your Honor.

THE COURT: All right. Is this statute consistent with EMTALA or not?

MR. BATES: May I add one point, your Honor?

THE COURT: Please go ahead.

MR. BATES: Getting back to that hypothetical you have identified a specific scenario, that doesn't necessarily then mean the definition itself as a whole is invalid. You have identified sort of one application that, to the extent it raises issues, may be a potential issue, but that would go to the application as to that specific factual scenario, like an as-applied challenge as opposed to a facial challenge, which is what we face here.

THE COURT: It would be facial as to parts of the definition but not to, perhaps, parts of the definition that involve the nurse handing over the forceps, right? In other words, it is not that -- it is not that the distant, remote assistance is in any scenario justified by an empirical basis before the agency, it is that there are parts of the definition that are not made problematic by that failure of evidence, *i.e.*, the nurse who is immediately in the operating theater.

MR. BATES: That's correct.

THE COURT: Just briefly, counsel for the plaintiffs says that, on the contrary to law point, the statute is inconsistent with EMTALA, the Emergency Medical Act.

Putting aside the agency's promise to do its best to harmonize them, on the face of the rule how is the rule -- is the rule, on its face, consistent with EMTALA?

MR. BATES: On this question, the rule is, like the conscience statutes themselves, the conscience statutes themselves do not discuss the interaction of those statutes with EMTALA. So this question applies equally to the conscience statutes themselves. And the agency said it intends to read them harmoniously. It applies both to the rule and to the conscience statutes.

THE COURT: Isn't there all sorts of legislative history, including Weldon and Church, that, if we consider it, makes clear they had no intention of compromising the execution

of emergency medicine? I recognize there are issues about the extent to which one can consider legislative history, but put that aside for a moment, doesn't the legislative history to the extent that it exists make clear that emergency medicine was intended to be cordoned off from the impact of the conscience statute.

MR. BATES: So there is legislative history indicating that the individuals who made those statements did not -- were not expecting for the conscience statutes to impact the requirements to provide emergency services under EMTALA.

THE COURT: Like Frank Church.

MR. BATES: That's correct.

THE COURT: All right.

MR. BATES: And the rule implements those statutes, and so the interaction between the statutes and EMTALA is going to be the same as the interaction between the rule and EMTALA.

THE COURT: It depends how one construes the statute. Has the agency -- prior to the rule, had the agency been presented by any complaint from anybody practicing emergency medicine?

MR. BATES: So there were complaints. There were complaints by various nurses. I don't know that those complaints specified whether the nurse participated in emergency services or not.

THE COURT: Why -- what was the agency's basis for

interpreting the rule so as not to carve out the emergency situation? Given that EMTALA is out there as a federal statute, what was the agency's reasoning in not correspondingly carving out the emergency space in terms of the ambit of the rule?

MR. BATES: I think it was consistent with the conscience statutes, which don't explicitly do that either. It was implementing the conscience statutes. Conscience statutes don't have that explicit carveout. So, again, it is a question of the interaction between the rule and EMTALA is going to be the same as the interaction between the statutes and EMTALA. So I don't think the agency found it necessary to carve that out because it wasn't in the statutes either, and the interaction is going to be the same between the two of those.

THE COURT: *Shelton*, of course, applies in the emergency context. It is at once a Title VII case and an emergency medical case. Did the agency consider *Shelton* explicitly in its rule-making as a federal appellate court application of these concepts in the Title VII context? Did it engage with that? What was its reasoning for, in effect, coming up with a different framework?

MR. BATES: So I believe that the agency did cite *Shelton* at some point in the footnotes. I don't know the exact footnote that that was at, your Honor.

But getting to your question about, again, the

interaction between the rule and EMTALA, again, I apologize if I am repeating myself, I think the agency determined reasonably that the interaction between the rule and EMTALA would be the same between the interaction between the conscience statutes and EMTALA, and so that it wasn't necessary, then, to provide an explicit carveout because the extent that there is tension there, it is the tension with the conscience statutes as well, so that resolving that tension is the same between the statutes and the rule, and so it wasn't necessary to provide a carveout that wasn't in the statutes that was implementing itself.

THE COURT: All right. Go ahead. I have taken you off. I think we have covered a lot of what I am sure you intended to cover, but I want to make sure that you have enough air time for the points you wanted to make to me.

MR. BATES: Thank you, your Honor. How much time do I have remaining?

THE COURT: I have taken you off script. You have got what you need.

MR. BATES: So let me just go through my notes here, your Honor.

So we talked about the evidence that the agency can serve. We talked about the complaints. I noted that, as we did cite in our reply, that a number of the complaints did implicate violations of the conscience statutes. So there was, before the agency, evidence of the complaints, as agency

counsel mentioned, that there was an increase in complaints, even setting aside the vaccination complaints, they went from, like, one year to around ten or so a year, so there was a substantial increase.

THE COURT: But that was after the notice of rule-making. Prior to the notice of rule-making, which presumably was prompted by -- I mean it is a Heisenberg principle you have here, right? Where you -- once you throw out the notice of rule-making, you are stirring the pot. Prior to the notice of rule-making, was there any increase in complaints?

MR. BATES: So not prior to the notice of the rule-making, but the rule-making, to the extent it did increase its knowledge or awareness of these rights --

THE COURT: But it's not laboratory conditions. In other words, if you say, We are open season for new complaints, you can't then treat the new complaints as reflecting that concern over an area as growing. You are responding to the invitation.

MR. BATES: Well, it could also be an indication that when individuals are made aware of these issues, that they will then respond by filing complaints. So, yes, there may have been a causal relationship between the MPRM and the complaints, but the fact that complaints were then filed and people were made aware may indicate that there had been problems going on

for a while, but just folks weren't aware of their rights. So once they were made aware of their rights by the MPRM that they then sought to bring them to the attention of the agency.

THE COURT: You said there were ten complaints after the notice of rule-making. With as much specificity as possible, what scenarios did they implicate?

MR. BATES: So among the ones that we cite in our reply, it depends on the level of specificity that is included in the complaints themselves. There was a nurse who was placed on administrative leave by a hospital on the ground -- she alleges this -- that she was placed on administrative leave by a hospital on the ground that she sought a religious accommodation for having to perform abortions.

THE COURT: The actual performance, in other words, operating theater apparently.

MR. BATES: She had not gone to that level of granular detail, but performance of abortions.

Complaint by a nurse alleging that she was terminated from a hospital for her unwillingness to participate in the provision of abortion-related services.

Complaint by a nurse alleging she was --

THE COURT: Do we know what that means, what services those were?

MR. BATES: She does not spell that out in the complaint.

Complaint by a nurse alleging that she was coerced into performing an abortion after previously notifying her employer of religious objections to performing abortions.

Complaint by a nursing professor alleging that she was not hired for a full-time faculty position because of her views on abortion.

So these are just a few examples, your Honor, that do show that there are instances where employers are not abiding by their obligations under the conscience statutes, and so this is evidence before the agency that there were problems and --

THE COURT: What would the reason be, if any, for an uptick if one was to credit that in disrespect for conscience-based -- sincere conscience-based objections? In other words, if the premise is this is a growing problem in our country, can you theorize why that would be? We are dealing with a quite small numbers here, so I am not blind to that. But if one accepts the premise that there had been a consequential increase not generated by the notice of rule-making, any idea why?

MR. BATES: So the fact that -- it is not necessarily going to be the case that there was an uptick in the actual violations of rights under the statute, although that might be the case, it may have been the case that there were -- even if the amount was consistent, going back 20 or 30 years, the folks were not aware of their obligations under the statute so that

they were not aware of their rights under the statutes, then that would be equally a problem as if there was a change in how employers dealt with requests --

THE COURT: So why not just have a public awareness campaign? Why not if you see something say something? Why isn't that the answer if people don't understand their rights? Why do we need this whole apparatus of the rule?

MR. BATES: That could have been one way that the agency could have addressed the problem, your Honor. The agency, in the exercise of its expertise, in the exercise of its authority, after having reviewed the situation, decided that, in addition to the notice requirements under the rules that would advise individuals of their rights, that the best way to address the problem was through the policy as implemented in the rule. The agency has the authority and the ability to, in the exercise of its expertise, to decide what the best way is to address a policy, and the court, upon review, need not agree with the agency that it was the best policy or even that it was better than the alternative policies, but merely that the agency gave a -- considered the relevant data and gave an explanation -- rational explanation for -- in connection between the data and the decisions that it made.

THE COURT: Can I come back "to assisting in the performance," that definition. Am I right that that is

actually only in the Church amendment or is that somewhere else?

MR. BATES: So I'm just comparing here Church, Coates-Snowe, and Weldon, because I know those are the ones we have been talking most about. So in those three, that is the only -- that is the only --

THE COURT: And that has no substantive rule-making delegation explicit.

MR. BATES: Church does not.

THE COURT: All right. I want to make sure I give a little time to our intervenors. Is there anything further you wanted to say to me? If not, I have got one or two more questions.

MR. BATES: I think I might just note, there was not a great deal of discussion today about the establishment clause. I would just point to -- point your Honor to our argument about the state or forum is distinguishable here.

And in terms of the scope of relief --

THE COURT: Yes. That's what I was going to get to.

MR. BATES: Okay. Just real quickly there, your Honor, plaintiffs have asserted that sort of a standard procedure when a court finds a rule invalid is vacatur of the rule in its entirety in nationwide application. I believe they cited some D.C. Circuit cases to that effect. We cited the California case, *California v. ASR*, out of the Ninth Circuit,

that vacated the nationwide scope of an injunction under a facial challenge under the APA.

Just for your Honor's information, in that *California v. ASR* case, that cites another Ninth Circuit case, *Havens Hospice*, which is relevant here and there is also a Fourth Circuit case, *Virginia Society for Human Life*, that I think has some very helpful language about in a similar instance where a plaintiff made an argument that, under the EPA, the standard remedy is vacatur in the entirety, nationwide relief, and the Fourth Circuit rejected that argument there.

So to the extent plaintiffs are saying that the normal -- the usual practice, there is authority out of both the Ninth and Fourth Circuits saying that is not in fact --

THE COURT: So there are two questions. One is severability and one is if there were an injunction, whether it applies on a more limited basis. Let's just take the second one. What is your view as to the proper geographic scope of any injunction or any relief in this case?

MR. BATES: So it would be the scope necessary to afford relief to the parties in this case, so there are various state and various municipal plaintiffs in this case. So it would be --

THE COURT: There are 23 states, right?

MR. BATES: 23 states and municipalities. I don't know that all of the government plaintiffs are states.

THE COURT: All right. But, in other words, by your lights, if the court were to rule against the government in whole or in part, and let's move out of the world of injunctions and focus on the merits, the summary judgment dimension, is it your view that that should be -- invalidation should only be as to those 23 states and as to the activities of the named plaintiffs in other states?

MR. BATES: That's correct, your Honor.

THE COURT: So the rule would still stand in 27 states, plus territories, less -- but not as applied to, for example, Planned Parenthood to the extent that it has a presence in those 27 states. Is that what you are saying?

MR. BATES: So it depends on who the plaintiffs are. So -- and that depends on sort of the relationship between Planned Parenthood writ large and its -- I don't know the exact terminology to use here, your Honor, but the sub-entities that it contracts with and sort of who are plaintiffs in the case and who are not, but our position would be that the remedy should be limited to the plaintiffs in this case. So it would be --

THE COURT: So other people in New York State who haven't joined the lawsuit could still have the rule enforced against them. Even if I found that it was arbitrary and capricious, contrary to law, all of that stuff, other people in New York State could still have the rule applied because they

didn't join this lawsuit.

MR. BATES: Other --

THE COURT: I thought what you were saying was 23 states it is invalid, 27 states somebody has got to sue in those states. I think you are now actually saying that unless this turned into a class action or an opt-in class involving every medical entity in the United States, you haven't actually sued in this case, you can't get the benefit of relief. Is that what the United States is telling me?

MR. BATES: That the relief should be limited to the plaintiffs as the regulated parties here.

THE COURT: So.

MR. BATES: To the extent New York is a regulated entity --

THE COURT: Right. You are telling me that to get relief, let's suppose, just indulge the hypothetical, that the rule is found by the court to be for one reason or another invalid. Is what you are really telling me is to get the benefit of that rule there now have to be follow-on lawsuits by every hospital and doctor and clinic and, you know, farmhouse, you know, to get relief as opposed to the invalidation of the rule having operation of law across the board? Is that really what the United States thinks is the right approach here? I get the problems with nationwide injunctions, but you are going way beyond that. You are telling me that you actually have to

be a party to the case to get relief. Was there thought given to that position before this argument began?

MR. BATES: So, your Honor, we have cited to the court the *Gill* case of the Supreme Court that instructed that the remedy should be limited to the inadequacy that produced the injury, tailored to redress the plaintiffs' particular injury. The remedy here should be tied to the injury that the plaintiffs have alleged. And my understanding is that the states and municipalities have brought this suit in their capacity as regulated entities.

THE COURT: Is there any reason why the arguments that have been made today and in the briefs apply any differently to the other 27 states or to medical providers in -- to covered entities by the rule in any -- in the 23 states who haven't filed suit or anywhere in the 27? The rule -- the infirmities that have been alleged about the rule rise or fall without respect to the identity of the plaintiff who sues, no?

MR. BATES: In terms of the arguments about why the rule is legally invalid in terms -- the harms that are alleged against the rule, those do relate to what services regulated entities provide, what policies those regulated entities have in place in terms of the alleged harms that are --

THE COURT: But that's more of a preliminary injunction notion, and I get that. That's a little different. But in the context of the relief that the parties reciprocally

seek on summary judgment, it is a unitary calculation. Regardless of whether you are affected a little or a lot, the rule either is valid or it is not, correct?

MR. BATES: Yes.

THE COURT: Okay. All right. Thank you very much. Appreciate the helpful argument under substantial fire. Thank you.

All right. I will hear now from Mr. Dunn.

MR. DUNN: Thank you, your Honor. Robert Dunn for defendant intervenors. Thank you for granting us intervention and the chance to present argument today.

THE COURT: As you know, the reason I granted intervention was substantially on the basis that the case might need to be resolved as a preliminary injunction and, as such, I wanted to make sure there was a voice given to parties who could be harmed by an injunction stopping the rule. I don't know whether or not we will go in that direction, but the unique value that the intervenors add is in bringing to bear in a real world sense the experiences of the people whose rights are affected by the rule.

MR. DUNN: Understood, and appreciate that. Hopefully our briefing contributed to that.

THE COURT: It did very much.

MR. DUNN: So a couple of points on that and then we can pivot to discussing the definition of discrimination which

might be helpful as well.

But the two quick points I want to make and advance, with respect to CNDA and its members, they treat patients of every religion, every race, every gender, sexual orientation, etc. There have been some insinuations in the brief that the rule is essentially a cloak or a cover for the expression of animus and bigotry, and I hope that plaintiffs' counsel will confirm that that's not the case, but the briefing suggests that --

THE COURT: I don't think plaintiffs' counsel said anything like that, and I take the conscience statutes as directed at protecting very valid interests, which is the legitimate desire of people, in good faith, for moral or religious reasons, not to participate in various procedures. I don't think that's at issue, and I appreciate as well your point that renaming the statutes, the refusal statutes may be seen by some as not fully respecting the legitimate conscience interests. I read that. I understood what you were saying.

MR. DUNN: So we are all agreed this is about protecting folks who have objections to specific procedures, not patients. With that in mind, our position is that the rule is important. I think there has been some discussion of is it a solution in search of a problem? In the rule-making, on pages 23175 to 179, I think the agency does a good job of looking back at some of the prior comments that were submitted

both in the 2008 and the 2011 and the current rule-making. Beyond complaints filed at OCR, these are comments from healthcare providers -- doctors, nurses in the profession -- who have personally experienced discrimination or pressure. There was some of discussion in the briefing about the 2008 CMDA survey. In that survey, the respondents -- we are talking about doctors and nurses primarily -- 40 percent of them said I have experienced personal pressure or some form of discrimination.

THE COURT: And I read that with interest. What was less clear to me was what their experiences had been in front of HHS.

MR. DUNN: And from what I gather, most do not proceed in front of HHS.

THE COURT: Is that because they are unaware of their legal right to do so?

MR. DUNN: I think it is probably because HHS cannot do much for them. There is no private right of action. HHS cannot get them reinstated, cannot provide them damages.

THE COURT: But your co-counsel, counsel for HHS, says that to the degree that there have been cases, in effect, some solution, some accommodation has often been worked out, whether in this or other civil rights areas, short of an ultimate adjudication in which simply reporting to the agency gets the mighty HHS on the side of the objector and often results, in

practice, in getting relief. And what was striking to me from what you submitted was not the number of people who say that they have had discomfort in the workplace because their conscience objections haven't been treated seriously, but any argument that the regulatory apparatus is not up to the task or that they have had bad experiences with it. Can you help me with that?

MR. DUNN: Yeah. I think that from the comments submitted to the agency, the uniform theme of those comments are there are no teeth in the actual existing regulation.

THE COURT: Has any member of CMDA -- there are 20,000 -- brought a complaint before the agency?

MR. DUNN: Not to my knowledge.

THE COURT: So maybe they should try. In other words, how can they say the agency is not up to the task if they haven't given it a whirl.

MR. DUNN: If you uphold the rule, I am sure they will.

THE COURT: But with respect, the justification for the rule is a greater number of complaints. I have heard about that. But that somehow or other there is a -- the agency has proven toothless or incapable of action. If this is a concern of your membership and none of them has ever gone to the agency, how do we know if that is true?

MR. DUNN: Well, I mean, you look at the existing

rule, the 2008 rule that was, you know, a blip in time, and the 2011 rule, which essentially, you know, wiped out all of the substantive provision of the 2008 rule --

THE COURT: But, sorry, it is your co-counsel who says the statutes are the source of all this authority and that the application by the agency is merely explaining what Congress meant by the rule, by the statutes. If you buy that, if you believe that, all along the statutes have had meaning consistent with what is being articulated today. That was an invitation for somebody to go before the agency and say, I shouldn't have had to hand over that forceps, I should have been respected when I said I didn't want to do it, or even other ways of assisting. I'm having difficulty with the premise that there is an enforcement gap here that is demonstrated other than stated. Is there anything you can point to?

MR. DUNN: Yeah. I think what it comes down to is if you are a physician or a nurse and you have been discriminated against or terminated or transferred, you have to put your career a little bit on the line to run to HHS and sort of flag yourself as a thorn in the side of a hospital that wants to provide these types of services. You are kind of putting your career in jeopardy. Once you have done that, you basically can be blacklisted essentially from the profession, and it is unclear what HHS can do for you, you know, absent the rule. So

you can run to HHS and say, hey, the Church amendment says they can't do this if they receive federal funds, and my understanding is my employer received federal funds, do something for me.

THE COURT: But HHS says that in the limited number of cases it has done something for people, just as it says it has done so with respect to other civil rights violations. Is the problem a public education problem? Do your clients know of either the conscience statutes or the existence of HHS or that there is a remedial place, procedure and a place to go? Do the members of the organization, Dr. Frost and the other 20,000, do they know about all this?

MR. DUNN: I'm quite certain that there is an information problem and that this is not something that is well known both for the employers and the employees. I think there were comments submitted to the effect that even in the enforcement proceedings some of the hospitals were made aware of the statutes and said, We didn't even know about these statutes. So I think there is a lack of awareness of the statutes themselves and certainly lack of awareness of HHS's role in them.

THE COURT: Am I correct to assume that most of your members probably fit into the employment box?

MR. DUNN: Almost all of them.

THE COURT: So what has their experience been with the

Title VII framework? How does that work for them?

MR. DUNN: Unclear. I think an employer who is fired probably has -- there have been undoubtedly Title VII claims in that context, you know, less clear when we are talking about transfers or other types of hiring, you know, I didn't get hired, difficult to --

THE COURT: Are they finding that the undue hardship exception, if you will, under Title VII has been applied to capaciously so as to, in effect, unneedlessly override legitimate conscience objections? Is that what they are saying?

MR. DUNN: I think that's a concern that's been expressed. It puts the burden quite heavily on them to prove that it wasn't an undue hardship. Because the employer can invoke the undue hardship standard and it is difficult for an employee to combat that.

I think the bigger concern is that many of these instances sort of evade Title VII, where people are feeling like they are pressured to do something, they do it, don't feel like they have a recourse under Title VII when they have sort of done it, and part of the thing that the rule provides is it gives them a recourse with the agency.

THE COURT: But they haven't -- but the -- they have had recourse, even the 2011 rule which you are not pleased with gave the recourse and presumably it was there before, but it

certainly is clear who you call, right? The rule is consequential here because of its interpretation of discrimination, aid in the performance, and referral and the like, but can it really be said that, after the 2011 rule, members of your organization didn't know where to go if they were concerned that their statutory conscience rights were being infringed?

MR. DUNN: Well, there are sort of two answers to that. The first is, I think there was probably a lack of confidence in the agency administering the rule at that point, and that's an issue of sort of, as you mentioned, the political ping-ponging, how serious is the administration and the agency taking conscience protections. You know, we had litigation all over the country regarding the contraception mandate and the agency was taking positions there that indicated it was not terribly sympathetic to, you know, sort of rights of conscience and religious freedom. So that I think probably plays a role. And I think the other part is just you go to the agency for what? And it is a big step for someone to sort of invoke the power of the federal government if you don't know what you are going to get or what the agency can do for you.

THE COURT: But isn't that exactly what the rule does? It just gives the agency -- it broadens, perhaps, the scope of the prohibitions beyond certainly what was previously understood and it may give the agency more muscle if you accept

the face of the rule that said all HHS funding is in play, but in the end there is still no private right of action. The statute still doesn't allow you to go to court if you are the ambulance driver or the nurse in *Shelton*. You have to bring your lawsuit under something else, like Title VII. The rule still directs you to the agency. So to the extent that that is a deterrent, what's changed?

MR. DUNN: Well, the specific power that HHS has invoked to step in and address funding streams, you know, regardless of how broadly you construe that, there is an extreme. You can cut off funds that the Labor Department supposedly administers. That would be an extreme version. But even if it was just a narrow funding stream to the specific offending employer, that's muscle.

THE COURT: It's because the agency is putting at risk, at least -- depending on how we construe this, at least the funding stream that the rule has teeth you were saying.

MR. DUNN: Yes. I think that's more or less it.

THE COURT: Doesn't that help plaintiffs on their spending clause argument?

MR. DUNN: They have to still prove all of the retroactivity and the unexpected nature of it, and we have addressed that in our briefing. But there is a spending element here. The agency specifically invoked its spending power, so I think the fact that it is putting spending at

risk --

THE COURT: The agency says that essentially under the UAR it had the same authority with or without the statute to implicate the spending stream.

MR. DUNN: But nobody knew that.

THE COURT: That's public education, right? There is a remedy other than a statute for that, than a rule.

MR. DUNN: If that's true, then the challenge to HHS's authority to strip funding under this rule is also irrelevant, because if they had that power all along, what are we talking about?

THE COURT: Understood. I get that.

From your perspective as an advocate for the religious or moral objector, what do we do with the *Shelton* scenario? What's the right answer to that?

MR. DUNN: I think that's a great question. I think I read the rule slightly differently than plaintiffs' counsel. Possibly I read the rule differently than DOJ. I don't think so. The way I look at it, if you take a look at the definition of discrimination in 88.2, you have to prove some sort of adverse treatment or some sort of penalty to even say this is discrimination. But paragraph 4, the point of paragraph 4, notwithstanding paragraphs 1 through 3, is to basically incentivize employers to provide reasonable or effective accommodations to provide them. Now there is a safe harbor if

it is accepted, so that's one thing. Provided it is accepted, there is no issue here.

THE COURT: But in *Shelton*, the nurse refuses to be transferred.

MR. DUNN: Yes. And I take the next sentence to basically say "in determining whether any entity has engaged in discriminatory action with respect to any complaint or compliance review under this part, OCR will take into account the degree to which an entity had implemented policies to provide effective accommodations for the exercise of protected conduct," etc., etc.

THE COURT: But it doesn't say we will take into account the impact on the entity of continuing the employee in the present job. In other words, it removes the Title VII undue hardship. It focuses on something else.

MR. DUNN: It does. But to the extent that, in *Shelton*, the accommodation offered appeared to be in effect an accommodation that appeared to be offered in good faith.

THE COURT: And was rejected.

MR. DUNN: And was rejected. I take the rule to say OCR will take that into consideration when even deciding if there was discrimination, and it might well decide in that particular situation that there was no discrimination.

THE COURT: Well, we don't know.

MR. DUNN: We don't know.

THE COURT: We can't.

Final question for you, and I realize this is a hypothetical, but the rural hypothetical and the ambulance in Central Park hypothetical, how does your client base view those?

MR. BATES: Sorry, say --

THE COURT: How would your client base view those scenarios where, in a very real world sense, there are adverse health consequences to patients from the Central Park driver refusing to bring the bleeding ectopic patient to the hospital because of an objection or in the rural scenario where the person refuses an accommodation and is essentially occupying a singular position.

You know, it is easy in the real world to understand adverse medical or treatment availability consequences. I welcome your view as an advocate for the people with religious objections, how you view those scenarios? I appreciate they are extreme, but they are out there in the briefing.

MR. DUNN: So with the ambulance hypothetical, that one strikes me as about as extreme as you can get, because nobody calls 911 and says, I am having an ectopic pregnancy. They say, I am having abdominal pain with bleeding. So the driver isn't going to ascertain what's going on, what the treatment is on the back end and make the decision to kick the person out. It's hard to deal with something quite that

extreme.

But the rural situation, that, I think, is a real issue, because you could have a doctor, the only physician in a hospital that itself permits abortions to be provided, and he or she objects and says --

THE COURT: And Title VII framework would presumably permit the person to be screened to allow the hiring of somebody who is able to do the full job or the termination of somebody who refuses to do a good portion of it in those circumstances. Just from a human perspective, how does your client -- do you object to the Title VII framework application to that scenario? Is there something problematic about that?

MR. DUNN: I don't object to the Title VII application, but with respect to the rule, I mean, I think the consequence of that is to say, well, you know, Christian doctors or religious doctors can never serve in those positions. So I think that would have some real world effects, too, if you are going -- and nurses, like no nurse can serve in a rural hospital if she has a religious objection to abortion. And I recognize this is a balancing, and there are winners and losers on both sides, but clinics closing down, nurses leaving their profession, doctors leaving the profession, that has an adverse impact on patients as well, and I think the agency tried to balance that.

THE COURT: All right. Thank you. Very helpful. I

appreciate the very thoughtful briefing as well.

Is there any rebuttal from plaintiffs?

MR. ZIONTS: Your Honor, we are very conscience of the time, and I think a couple of us have very, very few points to make, subject to any questions that you have.

THE COURT: Go ahead.

MR. ZIONTS: In terms of regulatory authority, really just two points, your Honor.

One, we have heard a lot of assurances this morning. We really aren't going to do that. The agency is not going to go that far. It's not going to take every last dime of New York's $45 billion in Medicaid. The rule says what it says. It says "terminating federal financial assistance from the department in whole or in part" and our clients can't say, well, in open court a lawyer from the Department of Justice did say they are probably not really going to do it. Our clients have to adjust their conduct based on what it says in the C.F.R.

The only other point I would make, your Honor, in terms of where the agency gets this implicit authority that it believes it has to issue substantive rules with authoritative interpretations, I think the closest we heard to something was essentially inferring it from their enforcement role, you know, they have to enforce these statutes so that, by implication, they bootstrap onto that the idea that they need to issue

substantive rules and authoritative interpretations.

Respectfully, your Honor, that is just flat out inconsistent with how Title VII and the EEOC have operated for half a century. It's been very clear, the Supreme Court has said it multiple times, EEOC obviously has a role to play in the enforcement of Title VII. But Congress did not delegate a substantive rule-making authority. It can issue binding force-of-law interpretations. that doesn't mean that agency is toothless. It issues guidance. It issues interpretive opinions. It tells -- you know, your Honor mentioned public awareness campaigns. The EEOC has no shortage of ways to let it be known how it views Title VII.

The exact same thing could be said of HHS here. HHS and other agencies, all the time they issue guidance documents. They have a big box at the front that says: This is not binding, a court may interpret this differently, but this is how we see the world, this is how we see is the statutes, this is how we are going to interpret it. There is nothing preventing HHS from doing that. It just didn't do it.

THE COURT: All right. Thank you. Anything else from plaintiffs?

MS. SALGADO: Yes, your Honor.

THE COURT: Go ahead.

MS. SALGADO: Your Honor, I wanted to get back to the question that you asked me, the last question you asked me.

There was some confusion about what the court was concerned about, but the question is whether, here, if the court believes that there is a constitutional violation, but that it is as applied to the plaintiffs --

THE COURT: It was that one could imagine constitutional applications that would be unconstitutional but that the rule was not facially invalid under the establishment clause. That was the hypothetical.

MS. SALGADO: Right. And I think here plaintiffs have shown that the rule is unconstitutional as to plaintiffs here because it does require plaintiffs to put above all other interests the day the rule takes effect those of religious beliefs that were put into this rule. So just take as a concrete example, on the day the rule takes effect, plaintiffs are required to change their hiring practices. The record shows they have open positions, they are hiring, and the record shows that through that process they ask questions. The rule prohibits that from doing so because it -- because -- well, I'm not really sure why the rule does that, but it prohibits covered entities from asking prospective employees whether they have religious objectives to performing the services that they are being hired to do. So in that example, your Honor, we believe that the rule is putting above all other interests those of religious beliefs and does violate the establishment clause. So the question about whether there is an as

applied -- the question about as applied versus facial --

THE COURT: Your premise is not that it is in fact an as-applied violation as to your client. That was not what I was -- I was not so finding but, rather, just positing that there are possible applications that could be unconstitutional. That was the question. If that's all we have got, is it contrary to law?

MS. SALGADO: The relief under the APA is under its nature the relief must be set aside.

THE COURT: Thank you.

MS. SALGADO: The only other question I wanted to -- oh, and just one last point about the question about as applied versus facial is that, even setting that aside, your Honor, I just wanted to say that the canon, the constitutional avoidance would still prohibit the agency from defining the term "discrimination" in the way that it has here.

THE COURT: All right. Thank you.

MS. SALGADO: Thank you.

THE COURT: Anything else from plaintiffs?

(Continued on next page)

MR. COLANGELO: Thank you, your Honor.

The justice department made a number of arguments attempting to pare back the Draconian scope of the enforcement provisions here and in particular mentioned the intent to pursue voluntary compliance efforts.

I want to point out that the rule itself expressly disclaims any need to wait for the resolution of voluntary compliance efforts before funds can be terminated. That's at 88.7(i)(2).

Attempts to resolve matters informally shall not preclude OCR from simultaneously pursuing any action described in the other paragraphs.

Your Honor, my second point. There has been considerable discussion regarding Title VII and the import for the Court's analysis of the rule's departure from the Title VII framework.

One argument that we just wanted to point out, your Honor, is the particularly on-point case that we've cited in our papers is Chamber of Commerce v. United States Department of Labor. This is a Fifth Circuit case from 2018 where the Court held that it was arbitrary for the Labor Department to interpret a long extant statute, in that case ERISA which was enacted in 1974, more or less contemporaneously with the amendments we're talking about here.

It was arbitrary for the Department of Labor to

interpret ERISA to regulate in a new way the thousands of people and organizations working in that market or to discover in a long extant statute an unheralded power to regulate a significant portion of the economy.

So for all the reasons the Court has been discussing, the concerns about Title VII bear directly on the arbitrary and capricious analysis.

Finally, your Honor, the agency has conceded in this courtroom that the complaint -- the volume of complaint evidence it was looking at was ten complaints a year, not 343. And of those ten complaints a year the agency has deemed only three or four complaints worthy of investigation.

That alone is fatal to the final rule. It is unsupportable for the agency to claim that this rule is necessary to enforce in a context where they've only pursued three or four a year and where it's not the explanation that they gave.

Thank you.

THE COURT: Thank you.

Ladies and gentlemen, we're going to adjourn now but before we do I just want to say something for the benefit of all the people out here which is you have all had the privilege of seeing some truly excellent lawyers all around and I think we judges don't often give shout-outs, not often enough. But the quality of the briefs I got in this case was extraordinary

and the quality of the advocacy I've gotten here was extraordinary and invaluable to me in making sense of what is really a series of complicated problems.

So thank you very much for the excellence of the advocacy and all the hard work.

We stand adjourned.

(Adjourned)