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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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, *et al.*,

Defendants.

NO. 1:19-cv-3040-SAB

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Washington challenges a recent regulation issued by the U.S. Department of Health and Human Services (HHS) interpreting Section 1303(b)(2) of the Affordable Care Act (ACA) to require issuers of insurance policies offered on health care Exchanges to bill separately for the coverage of certain abortion services. *See* 84 Fed. Reg. 71,674 (Dec. 27, 2019) (Rule). Washington claims that the Rule conflicts with a Washington state law requiring issuers to provide and collect payment through a single bill for consumers for each billing period (the "single-invoice law") and is therefore invalid. Pl.'s Mot. for Partial Summ. J., ECF No. 6 (Pl.'s Mot.).

Washington's preemption challenge rests on a mis-framing of the question before this Court. In Washington's telling, "the single dispositive issue" is whether "HHS's Double-Billing Rule improperly preempts Washington's Single-Invoice Statute." Pl.'s Mot. at 9. That is wrong. The Rule does not purport to preempt Washington law; instead, it interprets the phrase "shall . . . collect . . . a separate payment" in Section 1303 of the ACA. If the Rule is valid, however, then *Section 1303* itself preempts Washington's single-invoice law.[1]

---

[1] Defendants note that "Double-Billing" is a misnomer. The Rule requires *separate* billing for the cost of providing non-Hyde abortion services; it does not require (or permit) issuers to bill enrollees twice for the costs of those services.

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This Court thus faces two distinct questions: First, whether the Rule's interpretation of the "separate payment" requirement is permissible in light of Section 1303's text as a whole. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006). It clearly is. Indeed, Washington does not directly dispute that point, and, as discussed below, the Supreme Court has definitively rejected Washington's argument that the presumption against preemption requires agencies to pick the one permissible interpretation that creates the least conflict with state law.

That leads to the second question: whether the Rule must give way to Washington's single-invoice law based on the ACA's preemption provisions. Section 1303 makes clear that it need not, because the statute on its face distinguishes between laws regulating payment collection—which are preempted—and laws governing the coverage, funding, or procedural requirements on abortions—which are not. Washington's single-invoice statute regulates payment collection. As a result, it falls squarely within the category of laws the ACA preempts. It must yield to the statutory separate-payment requirement, as validly and authoritatively construed by the Rule. Accordingly, the Court should deny Washington's motion and enter partial summary judgment on Counts I and II in Defendants' favor.

BACKGROUND

A. Relevant Federal Statutes

Since 1976, Congress has included language, commonly known as the Hyde Amendment, in the annual appropriations bill for HHS and certain other

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agencies. *See, e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, §§ 506–07. The Hyde Amendment precludes the use of federal funds to pay for abortion services except in the case of rape, incest, or where the life of the mother is endangered by continuation of a pregnancy. *See Harris v. McRae*, 448 U.S. 297, 300–04 (1980).

In Section 1303 of the ACA, Congress enacted certain rules related to abortion coverage in plans offered through Exchanges, known as qualified health plans (QHPs), that cover abortion services for which public funding is prohibited under the Hyde Amendment—referred to as "non-Hyde abortion services." Subject to state law, QHP issuers may choose to provide coverage for non-Hyde abortion services. 42 U.S.C. § 18023.

The ACA imposes specific obligations on any issuer that chooses to issue a QHP that covers non-Hyde abortion services. The plan issuer may not use federal premium tax credits or federal cost-sharing reductions to pay for such coverage. *Id.* § 18023(b)(2). It must collect from each plan enrollee a "separate payment" for the portion of the premium that pays for coverage of non-Hyde abortion services. *Id.* § 18023(b)(2)(B). It must also collect a "separate payment" for the portion of the premium paid directly by the enrollee for services other than non-Hyde abortion services. *Id.* These separate payments must be deposited by the issuer into "separate account[s]" *Id.* § 18023(b)(2)(B)–(C).

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Section 1303 also provides that "[n]othing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor." *Id.* § 18023(c)(1). Further, as relevant here, Section 1321 of the ACA states that "[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." *Id.* § 18041(d).

B. Prior Rulemaking and Guidance

In 2012, HHS promulgated a regulation implementing section 1303 of the ACA at 45 C.F.R. § 156.280. *See* 77 Fed. Reg. 18,310 (Mar. 27, 2012). In February 2015, HHS published guidance regarding, among other things, acceptable billing and premium collection methods for the portion of the consumer's total premium attributable to non-Hyde abortion services. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750 (Feb. 27, 2015) ("2016 Payment Notice").

HHS stated that the issuer could satisfy the separate-payment requirement in one of several ways, including, as relevant here, by sending the enrollee a single monthly invoice or bill that separately itemizes the premium amount for non-Hyde abortion services. *Id.* at 10,840. The 2016 Payment Notice also stated that a

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consumer may make the payment for non-Hyde abortion services and the separate payment for all other services in a single transaction. *Id*.

C. The Challenged Rule

On November 9, 2018, HHS proposed the Rule challenged here. *See* Proposed Rule, 83 Fed. Reg. 56,015 (Nov. 9, 2018) (NPRM). HHS explained in the NPRM that it "believes that some of the methods for billing and collection of the separate payment for non-Hyde abortion services . . . do not adequately reflect what we see as Congressional intent that QHP issuer[s] bill separately for two distinct (that is, 'separate') payments." *Id.* at 56,022. Although HHS recognized that itemizing the amounts that go toward non-Hyde abortion services "arguably identifies two 'separate' amounts for two separate purposes," HHS explained that "the [ACA] contemplates issuers billing for two separate 'payments' of these two amounts (for example, two different checks or two different transactions), consistent with the requirement on issuers in section 1303(b)(2)(B)(i) of the [ACA] to collect two separate payments." *Id.*

On December 27, 2019, after considering public comments, HHS published the final Rule. *See* 84 Fed. Reg. 71,674. As relevant here, the Rule requires QHP issuers, beginning on or before the first billing cycle following June 27, 2020, to send monthly bills to each QHP holder for each of the separate amounts either by sending separate paper bills, which may be in the same envelope or mailing, or by sending separate bills electronically, which must be in separate emails or electronic communications. QHP issuers also must instruct the policy holder to

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pay each of the separate amounts through a separate transaction. *See id.* at 71,685; 71,710–11.

D. This Litigation

Washington passed its single-invoice law on May 13, 2019, requiring QHP issuers to "[b]ill enrollees and collect payment through a single invoice that includes all benefits and services covered by the qualified health plan." Wash. Rev. Code § 48.43.074(2)(a). Washington then filed this suit on January 31, 2020. *See* Compl., ECF No. 1. Pursuant to the Court's scheduling order, ECF No. 5, Washington moved for partial summary judgment on Counts I and II of its Complaint. Those Counts allege that the Rule conflicts with the State's single-invoice statute, and that the Rule is therefore contrary to Sections 1303 and 1321 of the ACA. *See generally* Pl.'s Mot. Defendants oppose Washington's motion and cross-move for summary judgment on Counts I and II.

ARGUMENT

I. THE RULE VALIDLY INTERPRETS THE ACA'S SEPARATE-PAYMENT REQUIREMENT

A. The Rule's Interpretation Is Permissible Under *Chevron*

The first question in this case is whether it is reasonable to interpret the requirement to "collect . . . a separate payment" to mean that issuers must "send a separate bill." It is black-letter administrative law that unless a statute directly answers the precise question at issue, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the

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administrator of an agency." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Because the Rule reasonably interprets Section 1303, its interpretation governs in this case.

The ACA expressly delegates authority to the Secretary to "issue regulations setting standards for meeting the requirements under this title," namely Title I of the ACA, which includes Section 1303, "with respect to (A) the establishment and operation of Exchanges . . . (B) the offering of qualified health plans through such Exchanges . . . and (D) such other requirements as the Secretary deems appropriate." 42 U.S.C. § 18041(a)(1). Such a delegation of rulemaking authority demonstrates that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and requires reviewing courts to analyze the agency's interpretation under the familiar two-step *Chevron* framework. *Chevron*, 467 U.S. at 842–45.

At *Chevron*'s first step, the Court "must determine whether Congress has provided an answer to the precise question at issue." *Medina Tovar v. Zuchowski*, 950 F.3d 581, 587 (9th Cir. 2020) (citing *Chevron*, 467 U.S. at 842–43). If "the court determines Congress has not *directly addressed the precise question at issue*," the Court must go on to decide "whether the agency's answer is based on a permissible construction of the statute," and must defer to the agency if it is. *Id.* (quoting *Chevron*, 467 U.S. at 843) (internal quotation marks omitted).

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The separate billing requirements at issue here reflect the agency's interpretation of Section 1303. There, Congress specified that, in the case of a plan that provides non-Hyde abortion services, "the issuer of the plan shall collect from each enrollee in the plan . . . a *separate payment* for each of" the portion of the premium reflecting the actuarial value of covering non-Hyde abortion services and the portion of the premium attributable to coverage for all other services. 42 U.S.C. § 18023(b)(2)(B)(i). Congress then further provided that the issuer "shall deposit all such separate payments into separate allocation accounts." *Id.* § 18023(b)(2)(B). In its proposed rulemaking on this subject, HHS explained that, rather than authorize "simply itemizing these two components of a single total billed amount," as previous guidance had allowed, these statutory provisions appeared to "contemplate[] issuers billing for two separate 'payments' of these two amounts (for example, two different checks or two different transactions)." 83 Fed. Reg. 56,022; *see also* 84 Fed. Reg. 71,685 (adhering to this interpretation).

In its motion, Washington apparently does not dispute that the requirement to "collect . . . separate payment[s]" in Section 1303 can reasonably be read to require sending separate bills. Instead, it argues that the Rule's interpretation is not permissible for two reasons: *First*, because it allegedly conflicts with Section 1303's preemption clause; and *second*, because the presumption against preemption requires HHS to read the statute, if possible, in a way that does not conflict with state law. Neither argument succeeds.

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B. Section 1303's Preemption Clause Does Not Require A Different Interpretation

Washington argues that the Rule "'cannot be squared' with the ACA's multiple non-preemption provisions," because it conflicts with the state's single-invoice statute. Pl.'s Mot. at 13 (quoting *Oregon v. Ashcroft*, 368 F.3d at 1126). That argument confuses matters by conflating two distinct questions: *First*, whether "separate payments" can reasonably be read to require sending separate bills, in light of Section 1303's text as a whole, including the preemption clause; and *second*, whether *the state's single-invoice statute* (rather than the federal "separate payment" statute) concerns one of the areas listed in the preemption clauses. *See Gonzales v. Oregon*, 546 U.S. at 269–70 ("we look to the [federal] statute's text and design" to determine whether a regulatory interpretation is permissible). Only the first of those questions is relevant to the Rule's validity under *Chevron*.

The preemption clause informs the *Chevron* analysis, not based on the particular contents of any given state's laws, but rather by marking the boundary between the areas Congress did and did not intend to regulate. In determining the scope of the Controlled Substances Act, for example, the Supreme Court looked to the statute's preemption clause to confirm that Congress did not "effectively displace[] the State's general regulation of medical practice." *Gonzales v. Oregon*, 546 U.S. at 270. That inquiry turned on the text of the statute, not on the particular state law at issue.

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Section 1303's preemption clause confirms that Congress did not intend to "have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, ..." 42 U.S.C. § 18023(c)(1). But Section 1303's operative clauses confirm that Congress *did* intend to dictate how issuers offering QHPs on the Exchanges may spend federal funds, and how they must collect and segregate payments to comply with those limitations.

The Rule at issue here merely implements the statutory directives of Section 1303. The subject-matter of the Rule thus falls comfortably within the area Congress demarcated for federal regulation, and the preemption clause presents no barrier to the Rule's permissible reading of the statute. Of course, Section 1303's separate-payment requirement and Washington's single-invoice statute operate within the same sphere—one that Congress gave HHS the authority to regulate—and all of the reasons why the single-invoice statute does not fall within any of the areas reserved for the states in the preemption clause, *see* II.B, *infra*, apply equally to the separate-payment requirement.

C. The Presumption Against Preemption Does Not Require A Different Interpretation

Washington alternatively argues that "[e]ven if the agencies' reinterpretation were one *possible* reading of Section 1303," this Court should reject it because a *different* permissible reading would not conflict with

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Washington's single-invoice statute. Pl.'s Mot. at 15. The Supreme Court, however, has repeatedly rejected that argument.

In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Supreme Court rejected the argument that the presumption against preemption "in effect trumps *Chevron*, and requires a court to make its own interpretation of [the relevant statutory provision] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743–44. As the Court explained, that argument "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." *Id.* at 744. As in this case, the issue before the Supreme Court was "simply the meaning of a provision that does not . . . deal with pre-emption, and hence does not bring into play the considerations petitioner"—and Washington—raise. *Id.*

Similarly, in *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519 (2009), the Supreme Court unanimously agreed that *Chevron* provided the framework to analyze an agency regulation interpreting an express preemption provision. *Id.* at 525 ("Under the familiar *Chevron* framework, we defer to an agency's reasonable interpretation of a statute it is charged with administering"); *id.* at 538 (Thomas, J., concurring in part and dissenting in part) (the regulation "falls within the heartland of *Chevron*."). Although the Court ultimately rejected the agency's interpretation, it did so only because the regulation in question pushed beyond the "outer limits" of the statute. *Id.* at 525. That is not the case here.

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And in *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190 (2017), the Supreme Court made clear that preemption concerns are not dispositive in choosing between competing permissible statutory interpretations. Specifically, the Court agreed with an agency's construction of an express preemption provision, even though that construction created substantially more conflict with state laws than an alternative interpretation that the Supreme Court itself had previously deemed "plausible." *Id.* at 1197 (citation omitted).

The lone case Washington relies on is not to the contrary. In *California Insurance Guaranty Ass'n v. Azar*, 940 F.3d 1061 (9th Cir. 2019), the Ninth Circuit considered whether a California state entity fit within a decades-old regulatory definition of a "primary plan" under the Medicare statute and concluded that it did not. *Id.* at 1069–71. When the court invoked the presumption against preemption, it did so only to buttress its *own* determination about the best reading of a *regulation*, not to determine if the agency had offered a reasonable interpretation of a *statute*, nor to comment upon the scope of an agency's authority to issue interpretive regulations. *Id.* at 1071. The case the court cited in doing so, meanwhile, involved a private party's invocation of statutory preemption as a defense against another private party's state-law cause of action. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). That case likewise required the Supreme Court to determine the single *best* interpretation of an *express preemption* clause; it has no relevance to whether an agency's construction of a *substantive* clause is *reasonable*.

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In short, there is no requirement for agencies to choose a plausible but less persuasive statutory reading that minimizes conflict with state law over the agency's best interpretation of the statute, even when construing an express preemption provision. That is all the more true in cases like this, where an agency interprets the substantive meaning, rather than the preemptive effect, of a statute it is responsible for administering.

Congress delegated the authority to define ambiguous terms such as "separate payment" in the ACA to HHS. The agency's interpretation of that term is reasonable, and thus authoritative. Despite Washington's insistence that "the text of the ACA itself" does "*not* require separate bills or consumer transactions," Pl.'s Mot. at 13, 15, this court must defer to HHS's reasonable interpretation that the statute does indeed require separate bills.

II. THE ACA PREEMPTS WASHINGTON'S SINGLE-INVOICE STATUTE

Section 1303, as validly and authoritatively construed in the Rule, requires relevant issuers to send one bill to policy holders for the portion of their premium payment that covers the actuarial costs of providing non-Hyde abortion services, and a separate bill for the remainder of their premium payment. *See* Rule, 84 Fed. Reg. at 71,710–11. Washington's single-invoice statute requires those issuers to bill and collect payment through a single invoice that includes all plan services. Washington state law thus irreconcilably conflicts with federal law, and nothing in the ACA protects it from preemption.

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A. The Single-Invoice Statute Directly Conflicts With The Separate-Payment Requirement

As Washington acknowledges, Congress has broad power to displace state law under the Supremacy Clause. *See* Pl.'s Mot. at 9. In the ACA, Congress chose to exercise that power narrowly, disclaiming any intention "to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d). But exercising a power narrowly does not mean declining to exercise it at all. As multiple courts have held, Section 1321's preemption provision means that state laws that "actually conflict with" the "mandates of the ACA" are preempted. *E.g.*, *Hunter v. Kaiser Found. Health Plan, Inc.*, No. 19-cv-01053, 2020 WL 264330 (N.D. Cal. Jan. 17, 2020).

The manifest incompatibility between the single-invoice statute and Section 1303's separate payment requirement, as interpreted by the Rule, presents a textbook case of so-called "conflict preemption," where "it is impossible for a private party to comply with both state and federal requirements." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Washington requires a single bill; federal law requires two. An insurer that obeys one instruction necessarily defies the other. Under Section 1321, the single-invoice statute is preempted.

Washington's argument to the contrary invites this Court to read the "separate payment" requirement out of Section 1303. In Washington's view, the purpose of Section 1303 is to prohibit the use of federal funds for non-Hyde abortion services, and Congress "implement[ed] that principle" by requiring that

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"issuers must establish allocation accounts and segregate funds into those accounts to ensure they remain separate." Pl.'s Mot. at 19. Conspicuously missing from that description is any mention of the statute's distinct requirement of "a separate payment." 42 U.S.C. § 18023(B)(i). Washington notes that "[t]here is no dispute" that it "complies with the[] funding segregation requirements." Pl.'s Mot. at 19. But nothing in the ACA gives Washington license to decide that compliance with only some of the statute's requirements is good enough, even if the state complies with what it views as the law's "underlying principle." *Id.* Agencies "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994). Congress chose its means as well as its end in Section 1303, and the single-invoice statute's direct conflict with one of those means is subject to preemption.

B. Section 1303's Preemption Clause Does Not Exempt The Single-Invoice Statute From Preemption

Washington argues that its single-invoice statute "is a state law 'regarding' abortion coverage and funding addressed by Section 1303's non-preemption provisions." Pl.'s Mot. at 14. It does not further elaborate on that argument, except to note that the term "regarding" in the preemption clause "should be read broadly," and to assert that, in light of "Congress's intent to preserve broad categories of state laws," the single-invoice statute "falls, almost by definition, squarely within the relevant non-preemption provisions." *Id.* at 14, 15.

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The "purpose of Congress is the ultimate touchstone" in determining the scope of a statute's preemption provision. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted). That purpose, however, "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it," in light of the "structure and purpose of the statute as a whole." *Id.* at 486 (citation omitted).

Congress's purpose in Section 1303's operative provisions is evident: to ensure that federal funds do not pay for non-Hyde abortion services, and to do so by requiring separate payments and separate accounts for funds that may be spent on non-Hyde abortion services. Its purpose in the preemption clause is equally clear: to ensure that the ACA would affect neither the states' authority to determine whether and on what terms to prohibit or require issuers on the Exchanges to cover and fund abortion services, nor their authority to prescribe regulations on abortion itself.

The only reading of Section 1303 as a whole that respects each of those purposes is to read payment collection and allocation as being categorically distinct from coverage, funding, or procedural requirements on abortions. To read that term more broadly would produce absurd results: States would be able to override Congress's express requirements for payment collection and segregation at will simply by passing their own contrary laws. In effect, Section 1303 would merely be a default rule and a suggestion to the states about the use of federal funds, rather than the prohibition that Congress enacted. The absurdity would be

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even more striking if the Court were to accept Washington's throwaway assertion that the single-invoice statute—which exclusively governs billing arrangements—counts as a law "'regarding' abortion coverage." Pl.'s Mot. at 14.

Washington's effort to turn a limited clarification of Section 1303's preemptive scope into a blunderbuss disclaimer of virtually all preemptive effect also risks undermining the allocation of powers between the states and the federal government. If Congress may not fine-tune the scope of a statute's preemptive force and rely on courts to respect its choices, its only recourse to ensure that federal law remains effective would be to fully occupy the fields in which it acts.

The text of the preemption clause confirms that it should not be read to blot out the rest of Section 1303. In both common and legal usage, "funding" means "[t]he provision of financial resources to finance a particular activity or project." FUNDING, Black's Law Dictionary (11th ed. 2019). That definition is also consistent with the term's usage throughout the ACA, *see, e.g.*, 42 U.S.C. § 300gg-93(e) (providing "initial funding" of $30,000,000 for grants to states to establish health insurance consumer assistance or ombudsman programs), and the U.S. Code as a whole, *see, e.g.*, 42 U.S.C. § 3545(a)(4)(C)(iii) (defining a "funding decision" as a "decision of the Secretary to make available grants, loans, or any other form of financial assistance"); *id.* § 1395i(k)(8)(A)(i) (providing "additional funding" for a Health Care Fraud and Abuse Control Account of $95,000,000 for fiscal year 2011).

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In short, state laws "regarding . . . funding" of abortion services concern the amount of money issuers spend on abortion, not the means by which issuers collect premiums for such expenditures, nor whether such premium payments come in one check or two. That reading harmonizes all of Section 1303's parts and makes sense of the statute as a whole. Washington's reading, in contrast, puts Section 1303 at war with itself, and risks rendering the entire section precatory. The single-invoice statute is a payment regulation, not a funding regulation, and nothing in the ACA shelters it from preemption.

Nor does the Rule itself exempt the single-invoice statute from preemption. Washington seizes on a single line from the preamble stating that "[t]his final rule does not . . . preempt state law," Pl.'s Mot. at 18 (quoting 84 Fed. Reg. 71709), but that stray sentence fragment cannot bear the weight Washington ascribes to it. As Washington acknowledges, its single-invoice statute did not pass until May 2019. Pl.'s Mot. at 6. The deadline for comments on the proposed rule was January 8, 2019. *See* 83 Fed. Reg. at 56015. Washington submitted a comment on that deadline, but it did not mention any intention to enact contrary state law. *See* State of Washington Comment Letter, AR 81,036–44.

The APA requires agencies to publish a notice of proposed rulemaking, "to give interested parties an opportunity to participate in the rulemaking," and to "adopt a rule after consideration of the relevant matter presented." *Hall v. EPA*, 273 F.3d 1146, 1163 (9th Cir. 2001). It does not require agencies to conduct rolling 50-state surveys in case a state passes a relevant statute and declines to

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inform the agency. Washington knew how to submit comments to HHS, but it decided not to do so after the passage of the single-invoice statute. It is thus entirely improper for Washington to now attempt to "play 'gotcha,'" *Rogue Valley Med. Ctr. v. Sebelius*, 696 F. Supp. 2d 37, 43 n.8 (D.D.C. 2010), based on a single, out-of-context sentence in the Rule's preamble. As the preamble goes on to explain, "the changes we are finalizing do not preempt state law *regarding coverage of non-Hyde abortion services* or otherwise attempt to coerce states into changing those laws." *Id.* That statement was and remains accurate.

Washington's invocation of Executive Order 13132 is similarly misplaced: That Order "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person." Exec. Order 13132 § 11; *see, e,g., Cal.-Almond, Inc. v. USDA*, 14 F.3d 429, 445 (9th Cir. 1993) (such language evinces a "'clear and unequivocal intent'" that agency compliance with an Executive Order "'not be subject to judicial review'") (citation omitted).

III. THE SCOPE OF ANY RELIEF SHOULD BE LIMITED

For the reasons discussed above, the Court should deny Washington's motion and enter judgment on Counts I and II in favor of Defendants. But even if the Court were to disagree, any relief should be limited to redressing the injuries of the party before it. *See Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933–34 (2018).

Here, Washington has failed to show that nationwide relief is necessary to redress its alleged injuries. Indeed, it identifies no instance in which a court has

vacated a rule nationwide based on a conflict with a single state's statute. Instead, Washington concedes that this Court may "craft a narrower remedy in the form of a declaration that the Rule has no force or effect in Washington." Pl.'s Mot. at 20. Although Washington also suggests that the Court should vacate the Rule nationwide, *id.*, its decision to bring APA claims does not necessitate a nationwide remedy, *see, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664–66 (9th Cir. 2011) (vacating nationwide injunction in challenge under the APA). A court "do[es] not lightly assume that Congress has intended to depart from established principles" regarding equitable discretion, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), and the APA's general instruction that unlawful agency action "shall" be "set aside," 5 U.S.C. § 706(2), is insufficient to mandate such a departure, *see Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967).

Nationwide relief would be particularly harmful here given that two other district courts in California and Maryland are currently considering similar challenges. If the government prevails in the other two jurisdictions, nationwide relief here would render those victories practically meaningless and would also preclude appellate courts from testing challenges to the Rule in other jurisdictions.

CONCLUSION

As explained above, Defendants ask the Court to deny Washington's motion and enter judgment in Defendants' favor on Counts I and II.

Dated: March 20, 2020 Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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, *et al.*,

Defendants.

No. 2:20-cv-00047-SAB

[PROPOSED] ORDER

The Court, having considered Defendants' motion for partial summary judgment, Plaintiff's opposition, and the entire record, orders as follows:

IT IS ORDERED that Defendants' motion is GRANTED and judgment is entered in Defendants' favor as to Counts I and II of Plaintiff's Complaint.

Dated: _____

_____
Hon. Stanley A. Bastian
U.S. District Court Judge