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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. 2:20-cv-00047-SAB DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In its Reply, ECF 14 (Pl.'s Reply), the State of Washington attempts to cast aside decades of foundational administrative law precedent, and to turn Section 1303 into a dead letter. Neither effort succeeds.

Washington seeks to upend *Chevron*, asking this Court to hold that statutory ambiguity *prohibits* agencies from regulating, rather than permitting them to choose among the statute's permissible interpretations. In Washington's hands, Section 1303's silence on how, exactly, issuers must collect "a separate payment" means that HHS *must* accept *any* means of satisfying that requirement that the statute could plausibly permit. That argument directly contradicts *Chevron*.

HHS reasonably determined that the most faithful way to implement Congress's "separate payment" mandate is to have issuers send separate bills seeking separate payments in separate transactions. Even were the Court inclined to agree with Washington that collecting "separate payments" does not necessarily require issues to "demand[] separate payment transactions," Pl.'s Reply at 10, it must still defer to HHS's reasonable interpretation to the contrary.

Washington also invites the Court to turn Section 1303 on its head, by reading its preemption provision so broadly that states could *require* issuers to spend federal funds on non-Hyde abortion services. Washington openly admits that its interpretation would allow states to ignore any federal regulation on "billing plan enrollees and receiving premium payments," despite Section 1303's

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express "separate payment" requirement. And it offers no limiting principle that would prevent the preemption provision from swallowing the rest of Section 1303.

This Court should reject Washington's invitation to take administrative law through the looking glass. Instead, it should hold that the Rule permissibly interprets Section 1303, and that the single-invoice law is preempted because it directly conflicts with the Rule. Even if the Court accepts Washington's preemption argument, however, it should limit relief to Washington alone.[1]

ARGUMENT

I. THIS COURT MUST DEFER TO THE RULE'S VALID CONSTRUCTION OF SECTION 1303

A. Section 1303 is Ambiguous

Washington insists that "[t]he ACA's text is dispositive" and does not contain "*any* statutory ambiguity." Pl.'s Reply 1, 2 (emphasis added). That is wrong. Under *Chevron*, a statute is "ambiguous" if "Congress has [not] directly spoken to the precise question at issue." *Chevron, USA, Inc. v. Natural Resources*

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[1] Washington accuses Defendants of cross-moving in a "transparent attempt to obtain additional unnecessary briefing." Pl.'s Reply at 1 n.1. Defendants moved for partial summary judgment because the Court should enter judgment in their favor on Washington's meritless preemption claims; without a cross-motion, there would be no vehicle to do so. *See* Fed. R. Civ. P. 56(b). Washington does not dispute that Defendants are entitled to a reply brief under Local Civil Rule 7(d).

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Defense Council, 467 U.S. 837, 843 (1984). The precise question here is how issuers must go about "collect[ing] . . . a separate payment." 42 U.S.C. § 18023(b)(2). And Plaintiffs themselves argue that Congress did not answer that question: "Section 1303 does not specify any particular method necessary to comply with the separate payment requirement." Pl.'s Reply 9.

Despite the resulting ambiguity—indeed, *because* of it—Washington sees no room for HHS to interpret the separate-payment requirement. Declining to "specify a single required method," Washington insists, "is not the same as an ambiguity." *Id.* at 9. Instead, according to Washington, HHS *must* accept all possible methods of collecting separate payments. *Id.* at 9–10.

Congress is, of course, free to specify multiple methods to satisfy a statutory requirement, and when it does so, agencies may not promulgate rules requiring only one single method. But when Congress declines to specify *either* one particular method *or* multiple methods, that statutory silence *is itself an ambiguity for the agency to resolve*. An agency may resolve that ambiguity by interpreting the statute to require a particular means of compliance, as HHS did in the Rule at issue here. And having once permitted multiple options does not mean that an agency may not subsequently decide to permit only one.

Chevron itself is directly on point. There, the Supreme Court deferred to the Environmental Protection Agency's interpretation of a provision of the Clean Air Act regulating "stationary sources" of air pollution. *Chevron*, 467 U.S. at 840. The text of the statute did not resolve whether "an existing plant that contains

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several pollution-emitting devices" counted as a single stationary source, or whether each polluting device within the plant counted as a separate stationary source. *Id.* And the EPA itself had employed "varying interpretations of the word 'source,'" and had "consistently interpreted it flexibly." *Id.* at 863. Much like Washington in this case, the environmental organization in *Chevron* thus argued that "the text of the Act *requires* the EPA to use a dual definition" whereby either a component of a plant or a plant as a whole could count as a stationary source. *Id.* at 859 (emphasis added). But the Supreme Court nevertheless deferred to the EPA's "reasonable policy choice" not to employ such a "dual definition." *Id.* at 845.

Just so here. As in *Chevron*, HHS has changed its interpretation of a statute it administers, but its earlier, more flexible interpretation, like the EPA's, is not "carved in stone." *Chevron*, 467 U.S. at 863. The agency's regulatory flexibility extends to choosing one particular means to satisfy a statutory requirement: "The existence of an alternative means of achieving the goal of a statute, even if the alternative is the 'better' means, is not sufficient to warrant this Court's invalidating an otherwise reasonable regulation." *San Bernardino Mountains Comty. Hosp. Dist. v. Sec'y of H.H.S.*, 63 F.3d 882, 889 (9th Cir. 1995).

For that reason, Washington's efforts to distinguish between "the ACA itself" and HHS's authoritative construction of that text in the Rule fall flat. Pl.'s Reply at 7 & n.3 (cleaned up). The whole point of the *Chevron* doctrine is that "a court may not substitute its own construction of a statutory provision for a

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reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. Thus, Washington's argument that the single-invoice law escapes preemption under Section 1321 because it does not conflict with *Washington's* understanding of Section 1303, is simply irrelevant; the single-invoice law certainly *does* conflict with the Rule's reasonable understanding of the statute, which this Court is bound to follow.

Washington's arguments to the contrary do not withstand scrutiny. Washington relies on *Bond v. United States*, 872 F.2d 898, 900 (9th Cir. 1989), for the proposition that Congress must "employ[] apt language to clearly state this intent" if it means to allow an agency to prescribe a single means of complying with a statutory requirement. Pl.'s Br. 9. That case is inapposite twice over. First, the language Washington quotes held that the statute in question permitted *only one* "reasonable interpretation." *Bond*, 872 F.2d at 900–01. It is thus irrelevant to an agency's construction of ambiguous statutory text, and it does not remotely support Washington's proposed clear-statement rule. Second, the agency in that case had not formally interpreted the relevant statutory language, so even if the agency's interpretation had been *permissible*, the court would still have had to make its own independent determination of the *best* reading of the statute. *See United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

Washington next argues that a single instance of the phrase "billing statement" in the ACA—over the course of almost 1,000 pages, *see* ACA, Pub. L. 111-148—demonstrates that Congress intended to "distinguish between sending

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separate bills and segregating funds into separate accounts." Pl.'s Reply 9. Washington is again misguided. The relevant question is whether Congress unambiguously intended to separate regulation of *billing* from regulation of *payment*. The lone provision Washington cites governs information that issuers must provide to enrollees; it makes perfect sense *in that context* to regulate the billing statement that issuers send rather than the payment they receive. *See* 42 U.S.C. § 18082(c)(2)(B)(iii) (regulating information that the issuer must "include with each billing statement"). But that provision does not even hint that Congress *unambiguously* intended to prohibit HHS from regulating billing statements in the course of its obligation to regulate premium payments.

B. The Rule is Procedurally Proper

As Defendants explained in their opening brief, Congress expressly delegated the power to promulgate regulations governing the operation of the Exchanges and the offering of Qualified Health Plans to HHS. *See* 42 U.S.C. § 18041(a)(1); *Mead*, 533 U.S. at 229. And as explained above, Congress delegated to HHS the authority to interpret the separate-payment requirement. Washington does not appear to dispute that the Rule's interpretation of that requirement, which was the product of notice-and-comment rulemaking, was procedurally (as opposed to substantively) invalid.

But Washington nevertheless insists that "HHS is improperly seeking judicial deference to an expedient litigation position rather than a procedurally proper agency determination," based on the interpretation of Section 1303's

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preemption provision embodied in the Rule and explained in Defendants' opening brief. Pl.'s Reply 3. Washington's challenge to HHS's understanding of Section 1303's preemption provision is both substantively and procedurally defective.

Washington's claim that the Rule did not "purport to interpret" Section 1303's preemption provision is incorrect. Pl.'s Reply 3. As the Rule explains, "the changes we are finalizing do not preempt state law regarding coverage of non-Hyde abortion services." Rule, 84 Fed. Reg. at 71709. The Rule thus expressly interpreted the term "coverage" in Section 1303's preemption provision, concluding that regulation of *payment collection* did not equal regulation of abortion *coverage*. Likewise, the Rule also necessarily rejected any interpretation of Section 1303's preemption provision that would prohibit federal regulation of payment collection based on an overly expansive reading of the word "funding."

Moreover, Washington's argument that Section 1303's preemption provision on its face prevents HHS from regulating premium billing statements is itself procedurally improper. Courts will not "entertain an issue not raised before the agency" unless "exceptional circumstances warrant such review." *Johnson v. Director, Office of Workers' Comp. Programs*, 183 F.3d 1169, 1171 (9th Cir. 1999). Washington submitted a comment on the proposed rule, but it raised only policy-based, rather than legal, objections to it. *See* State of Wash. Comment Letter, AR 81,036–44. That comment specifically mentioned Washington's Reproductive Parity Act, which requires all health plans that cover maternity care or services to also provide coverage for abortion. *Id.* at 81,037–38. But it did not

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argue that the proposed rule would interfere with that statute's coverage and funding requirements. Washington's objection to the Rule based solely on the text of Section 1303 itself is thus forfeited.

C. HHS Permissibly Interpreted Section 1303 in the Rule

Washington does not take issue with HHS's conclusion that separate billing is a permissible means of implementing Section 1303, except for the argument, addressed above, that HHS cannot make it the sole means of compliance. Instead, it devotes the bulk of its reply to HHS's understanding of Section 1303's preemption clause. As Defendants previously explained, there is only one reading of the preemption clause that makes sense of Section 1303 as a whole: HHS sets uniform national standards for payment collection and funding segregation to ensure that federal funds are not used to pay for non-Hyde abortion services, and states remain free to require (or prohibit) coverage and funding of abortion services and to set procedural requirements for such services. In other words, the collection of premium payments, including billing, is categorically and unambiguously distinct from abortion "coverage" or "funding."

Washington agrees that the text is unambiguous but insists that "billing plan enrollees and receiving premium payments" are unambiguously "relate[d] to coverage and funding for health care services" and thus beyond the scope of HHS's authority. Pl.'s Reply 6. But as Defendants pointed out in their opening brief, Washington's approach would make Section 1303 essentially superfluous, because *everything* in Section 1303 "relates to" coverage and funding of abortion,

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if those terms are construed as broadly as Washington proposes. In Washington's telling, "receiving premium payments" is "*obvious[ly]* relate[d] to coverage and funding" for abortion, and is thus off-limits for federal regulation. *Id.* at 6 (emphasis added). Washington thus openly admits that its reading would turn the *express statutory requirement* in Section 1303 of a "separate payment" into, at best, a suggestion to the states that they may take or leave as they see fit.

Washington claims that its reading would preserve Section 1303's "funding segregation requirements" as the sole area for exclusive federal regulation, but it cannot explain why that express statutory requirement would be any more secure than the regulations that it attempts to jettison. Pl.'s Reply 7.

Washington's only answer is its question-begging assertion that Section 1303 "preserves state laws 'regarding' coverage and funding unless they conflict with the ACA." Pl.'s Reply 6–7. That assurance is meaningless in the face of Washington's interpretation of Section 1303's preemption provision, which is so broad that it is difficult to imagine *any* state law regarding any aspect of abortion provision that could conflict with the ACA. The same logic that Washington deploys against the "separate payment" requirement would, for example, permit a state to require issuers to spend federal funds on non-Hyde abortion services: the decision about which funds may or may not be spent on abortion services obviously "relates" to abortion funding and coverage to at least the same extent that billing and payment do. Yet there would be no conflict, because Congress, on Washington's logic—presumably much to its surprise—actually *repealed* the

Hyde amendment for the Exchanges when it reserved all regulation of all aspects of abortion coverage to the states in Section 1303's preemption provision.

The preemption clause cannot stretch so far. The only reading that makes sense of the statute as a whole is that Congress provided for exclusive federal regulation in the areas that Congress itself regulated in the statute. States are thus free to require, or prohibit, issuers to cover and fund abortion, and to impose procedural requirements on abortion services, but any attempts to regulate how issuers collect, segregate, and spend federally subsidized payments to ensure that federal funds do not pay for non-Hyde abortion services are preempted to the extent they prevent the application of federal law.

II. NATIONWIDE RELIEF IS NOT APPROPRIATE

Finally, for the reasons Defendants explained in their opening brief, even if the Court were to agree with Plaintiffs on the merits, any relief should be limited only to Washington. *See* Defs.' Br. at 19–20. Washington failed to address any of Defendants' arguments regarding the appropriate scope of relief, and therefore has conceded them. *See, e.g.*, *Silva v. U.S. Bancorp*, No. 5:10-cv-01854-JHN-PJWx, 2011 WL 7096576, at *3 (C.D. Cal. 2011). In any event, Washington cannot show that nationwide relief is necessary to redress its alleged injuries, or that nationwide relief could be appropriate based on a conflict with a single state's statute.

CONCLUSION

As explained above and in Defendants' cross-motion, Defendants ask the Court to enter judgment in their favor on Counts I and II.

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