Nos. 19-4254, 20-31, 20-32 & 20-41

In the United States Court of Appeals
for the Second Circuit

STATE OF NEW YORK; CITY OF NEW YORK; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WISCONSIN; CITY OF CHICAGO; AND COOK COUNTY, ILLINOIS,
Plaintiffs-Appellees,
(*Caption continued on inside cover*)

On Appeal from the U.S. District Court for the Southern District of New York

Brief *Amicus Curiae* of Public Advocate of the United States, Pro-Life Legal Defense Fund, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund in Support of Defendants-Appellants and Reversal

*William J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
Attorney for *Amici Curiae*

May 26, 2020

* Counsel of Record

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, INC.; NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION; AND PUBLIC HEALTH SOLUTIONS, INC.

Consolidated-Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

DR. REGINA FROST AND CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS,

Intervenors-Defendants-Appellants,

ROGER T. SEVERINO, in his official capacity as Director, Office for Civil Rights, United States Department of Health and Human Services; AND OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Consolidated-Defendants-Appellants.

DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Public Advocate of the United States, Pro-Life Legal Defense Fund, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Public Advocate of the United States, Pro-Life Legal Defense Fund, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

ARGUMENT

I. THE DISTRICT COURT INJUNCTION ILLEGALLY NULLIFIED EXECUTIVE BRANCH EFFORTS TO GIVE EFFECT TO A HALF-CENTURY OF CONGRESSIONAL ENACTMENTS TO PROTECT THE CONSCIENCE OF HEALTHCARE WORKERS.

A. The District Court Subordinated the Conscience Principle which Lies at the Center of 30 Congressional Statutes.

It would be difficult to identify another area of public policy in which Senators and Representatives of both political parties have collaborated longer to achieve a common objective than in protecting the conscience of healthcare

---

[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

workers. The ease with which one federal district court judge has negated, through a national injunction, any meaningful Executive Branch enforcement of those many congressional statutes, based on the judge's own policy preferences, reveals a serious and systemic problem in the federal judiciary.

The district court fundamentally misconstrues, and then demeans, the central principle undergirding these numerous federal statutes aw well as the final regulations issued by the Department of Health and Human Services ("HHS"). At its core, this appeal concerns what has been known as the "Law of Conscience," and whether those statutes containing Conscience Provisions were rightly honored and correctly followed by the court below. They were not.

The district court opinion begins by accurately describing the statutes being implemented by the regulations as "Conscience Provisions" — and the rights these statutes protect as "Conscience Rights."

- These consolidated cases involve challenges to a rule entitled "Protecting Statutory **Conscience Rights** in Health Care; Delegations of Authority."
- This section reviews the statutory provisions ... which HHS presents as systematically interpreting and implementing more than 30 statutory provisions that recognize the rights of **conscience-based** objectors in the health care arena....
- HHS promulgated the Rule against the backdrop of numerous federal statutory provisions (the "**Conscience Provisions**").

New York v. United States HHS, 414 F. Supp. 3d 475, 496-97 (S.D. N.Y. 2019) (emphasis added).

As the district court noted, plaintiffs "[e]mphasiz[ed] that they are not challenging the statutory Conscience Provisions themselves..." *Id*. at 512. Rather, the district court describes their challenge as one concerning HHS's use of rulemaking "to add, by regulatory fiat, major new substantive content to these laws [and] enhance[] HHS's enforcement powers...." *Id*. Stated another way, plaintiffs do not object to the Conscience Provisions being on the statute books — so long as they are not enforced by the Executive Branch.

Although the district court employed the word "conscience" over 200 times in its opinion, the court never took time to explore its meaning, as if that meaning didn't matter. As explained below, the protection of conscience by Congress is not a new concept; it invokes a principle with a rich history not just in American law, but also throughout Western Civilization. The Law of Conscience defines a jurisdictional barrier that places certain matters beyond the power of civil government. Rather than directly address the Law of Conscience, the district court rephrased these statutes as a congressional effort "to **accommodate** religious and moral objections to health care services provided by recipients of federal funds." *Id*. at 497 (emphasis added). Cavalierly describing these statutes as a mere

"accommodation" implies that the government could choose to grant or withhold the accommodation as it sees fit. The district court did all it could to avoid the central truth that these 30 statutes reflected Congress' understanding of an inherent limitation on the power of government to intrude into the realm of personal conscience.

After discussing at length the five most significant personal conscience statutes identified by the government, and, in a footnote discussing the rest of the 30 statutes protecting personal conscience identified in the Final Rule, the district court changed topics. The court added a curious section containing a lengthy analysis of a statute not addressed at all in the Final Rule — a statute not at issue in the case: "[s]eparate from the Conscience Provisions, Title VII of the Civil Rights Act of 1964 has long provided qualified protection to employees...." New York at 503. By inserting this irrelevant section, the court attempted to buttress its argument that the real issue was one of reasonable "accommodation" — the standard that Title VII requires from employers toward employees.

At other points in its opinion, the district court substituted for conscience the "right ... to abstain ... from participation ... on account of a religious or moral objection." *Id.* at 496. Although this configuration of the policy undergirding these statutes is more accurate, it still diverts the issue away from conscience, so

as to allow the trial court to position the conflict to be governed by the more malleable Administrative Procedure Act ("APA") statutory standards. *Id.* at 497. In sum, the court produced a 106-page opinion vacating the 2019 rule in full on various APA grounds, including HHS having: (i) exceeded its statutory authority for substantive rulemaking (*id.* at 532); (ii) failed to adopt rules in accordance with law (*id.* at 535); (iii) acted arbitrarily and capriciously (*id.* at 554); and (iv) breached APA procedural requirements (*id.* at 561). According to the trial court's analysis, HHS's effort to honor and give effect to the 30 congressionally enacted statutes protecting individual conscience was so terribly wrong that it violated every possible aspect of administrative law — both substantive and procedural.

In their opening brief, the intervening medical service defendants contend that it is long past time for the Executive Branch to enforce laws designed to protect individual health care workers who — "for decades" — have been denied "the freedom-of-conscience protections enacted by Congress." Intervenor-Defendants-Appellants' Opening Brief ("Intv. Br.") at 1. Such statutory support, indeed, has been unavailing, as employers receiving federal funds have ignored congressional mandates "prohibit[ing] discrimination against health care professionals on the basis of their beliefs." *Id.* Similarly, executive and administrative officers have been lax and ambivalent — even opposed — to laws

respecting freedom of conscience. *Id.* at 1-2. Hundreds of thousands of commenters vocalized opposition to the "rescission" of stronger enforcement measures to realize protection of one's freedom of conscience in the world of health care. *Id.* at 2. The net result of all this, the Intervenors assert, is the realization that "the core of this case is a political dispute, not a legal one." *Id.* at 3. These *amici* fully agree with that characterization of the plaintiffs' assault on the HHS regulations.

B. The Law of Conscience Describes a Jurisdictional Barrier Limiting the Power of the Civil Government over Each Person's Heart and Mind.

The significance of the Law of Conscience was captured and articulated in an 1877 speech entitled, "The History of Freedom in Antiquity," when Lord Acton spoke these compelling words:

> ... when Christ said: "Render unto Caesar the things that are Caesar's, and unto God the things that are God's" ... gave to the civil power, under the protection of **conscience,** a sacredness it had never enjoyed, and **bounds** it had never acknowledged; and they were the repudiation of absolutism and the inauguration of freedom. For our Lord not only delivered the precept, but created the force to execute it.... [Lord Acton, "The History of Freedom in Antiquity: An Address Delivered to the Members of the Bridgnorth Institute," Acton Institute (Feb. 26, 1877) (emphasis added).]

Conscience, then, served as an analytical tool designed to set the boundaries between the between two jurisdictions: the first in which the civil government may

may coerce behavior, and the second in which it may not. As University of Virginia Professor Emeritus Robert Louis Wilken recently observed, John Calvin's "understanding of the two realms and of conscience":

> would prove indispensable to later generations of Christians who faced suppression and persecution. From his writings ... they learned that in matters of faith, kings, princes, and religious leaders are barred from trespassing on God's sanctuary within the human heart. In temporal matters Christians are subject to civil authority, but in matters of faith they are subject only to God. [R.L. Wilken, Liberty in the Things of God at 70-71 (Yale University Press: 2019).]

Lesser known, but no less significant, the Catholic Abbess Caritas Pirckheimer who challenged the reformers to practice what they preach. Wilken summed it up this way:

> Pirckheimer's appeal to "conscience" is not merely a rhetorical ploy; it has theological heft. "No one can show us from the Holy Gospel that anyone is to be coerced or put under pressure." Conscience was not an appeal to private judgment, but the invocation of a living intelligence formed by the Scriptures and grounded in the Church's tradition. [*Id.* at 51.]

Indeed, as Wilken has reminded us, the term conscience "enters the vocabulary of Christians in the writings of the apostle Paul" who attests that God's law is written on the hearts of all mankind with the "dual role [of] knowledge and judgment of past actions and tutor of future deeds." *Id.* at 16-17. Building on this foundation, Origen of Alexandria — the first major Christian commentator on the

Bible — concluded that the conscience serves as a "'pedagogue to the soul'" and, therefore, "must be free." *Id.* at 17-18. Echoing this view, Tertullian — a third-century North African Christian writer — explained that conscience is an "inner certainty that comes not from oneself but from God [and, thus] [t]he testimony ... is not about being true to oneself, but about obedience to the voice of God." *Id.* at 18. "Religious freedom [then] rests on a simple truth: religious faith is an inward disposition of mind and heart, and for that reason cannot be coerced by external force." *Id.* at 1.

It is reported in the book of Acts that Peter and John were arrested for and charged with teaching and healing the people in the name of Jesus. *See Acts* 4:1-22. Jailed by their civil and religious leaders, the apostles were ordered to give an account for their authority to teach and heal in His name. In response, Peter invoked the authority of the Church under the Great Commission, to which claim the civil court issued a warning against speaking in the name of Jesus. Peter replied: "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye. For we cannot but speak the things which we have seen and heard." *Acts* 4:19-20. The very next day, emboldened by corporate prayer and a Word from God, Peter and the church continued their ministry of salvation and healing, prompting the rulers to jail not only the apostles but also their disciples.

When the rulers came to bring the offenders to the bar of justice, they found them standing outside the jail ready to be ushered into the presence of the civil and religious magistrates. This time, when the charges of teaching in the name of Jesus were read, all of the apostles answered: "We ought to obey God rather than men." *Acts* 5:29. Thus, the jurisdictional issue was joined, only to be evaded by the ruling of the presiding council which, after a flogging and a lecture, released the entire apostolic assembly from custody. *See Acts* 5:33-40. In sum, the ruling council chose the path of religious toleration, not religious freedom. As Professor Wilken has so ably explained:

> Toleration is forbearance of that which is not approved, a political policy of restraint toward those whose beliefs and practices are objectionable. **[R]eligious freedom,** or **liberty of conscience**, [is] a natural right that belongs to all human beings, **not an accommodation granted by ruling authorities**. [R.L. Wilken at 5 (emphasis added).]

And likewise here, the district court below substituted a judicially formulated policy of accommodation for the fixed jurisdictional line set by conscience. *See supra,* p. 4. But, James Madison wrote in his great Memorial and Remonstrance, the "[r]eligion ... of every man must be left to the conviction and conscience of every man...." J. Madison, "Memorial and Remonstrance,"

reprinted in 5 The Founders' Constitution at 82 (item 43) (P. Kurland & R. Lerner, eds.) (U. of Chi. Press: 1987).

II. THE DISTRICT COURT GAVE NO CONSIDERATION TO THE PECULIAR NATURE OF THE SPECIFIC PROCEDURES COVERED BY THE STATUTORY CONSCIENCE PROVISIONS.

The HHS Final Rule under review summarizes the Conscience Provisions set out in the 30 federal statutes. *See* 84 *Fed. Reg.* at 23170-23174. Most of these provisions fall into just a few categories, as demonstrated by what the Court describes as the five "most central" statutes:

- **Church** Amendments (named after Senator Frank Church (D-Idaho)) (1970s): "abortion, sterilization, and certain other...."
- **Coats Snowe** Amendment (named after Senator Dan Coats (R-Indiana) and Senator Olympia Snowe (R-Maine)) (1996): "abortion provision or training, referral for such abortion or training, or accreditation standards related to abortion...."
- Medicare and Medicaid Advantage (1997): "counseling or referral service" objected to on moral grounds.
- **Weldon** Amendment (named after Congressman David Weldon (R-Florida)) (2004): "abortions...."
- Patient Protection and Affordable Care Act (2010): "assisted suicide, euthanasia, or mercy killing" "abortion" "advanced directives."

See id.; *see also* New York at 497-503.

In addition to those five "most central" laws were 25 more laws containing similar Conscience Provisions. Of these 25, one in particular, demonstrates how truly bi-partisan these efforts have been — the **Helms-Biden** Amendments of 1978 and 1985 — named after Senator Jesse Helms (R-North Carolina), arguably the most conservative Republican in the U.S. Senate, and Senator Joe Biden (D-Delaware), one of the more liberal Democrats and later Vice President of the United States. The Helms-Biden, bi-partisan provisions protected the conscience of healthcare workers from being compelled to participate in "abortion and involuntary sterilization...." The Helms-Biden Amendments were referenced repeatedly in the Final Rule (at 23170, 23211, 23231, 23263, and 23267), but not referenced at all in the district court opinion.

Thus, the statutory Conscience Provisions primarily relate to:

(i) abortion;

(ii) sterilization (voluntary[2] and involuntary); and

---

[2] Although not discussed expressly in the conscience provisions, many transgender surgeries and transgender hormone therapies, cause sterilization. *See* P. Boghani, "When Transgender Kids Transition, Medical Risks are Both Known and Unknown," *Frontline* (June 10, 2015) ("[I]f a child goes from taking puberty blockers to taking hormones, they may no longer have viable eggs or sperm at the age when they decide they would like to have children."); S. Allen, "It's Not Just Japan. Many U.S. States Require Transgender People Get Sterilized," *DailyBeast* (Mar. 22, 2019).

(iii) euthanasia.

The common denominator of these types of procedures is that, traditionally, they were never considered valid medical procedures, but rather were inconsistent with Western norms.

The Hippocratic Oath has governed the practice of medicine in the West from as early as the fifth century B.C. to, at least, the twentieth century A.D. Although there are different versions of this Oath, the original version of the Hippocratic Oath endorsed by the National Library of Medicine of the National Institutes of Health first lays down the general principle "I will do no harm" and provides specific applications of that principle:

> I will use those dietary regimens which will benefit my patients according to my greatest ability and judgement, and I will **do no harm** or injustice to them.
> I will not give a **lethal drug** to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a **pessary** to cause an **abortion**. [Hippocratic Oath[3] (emphasis added.)]

As recently as the Nuremberg trials after World War II, abortion was viewed as a crime against humanity, as explained by Law Professor Jeffrey C. Tuomala:

---

[3] Modern versions of the Hippocratic Oath are being sanitized to remove any reference to physicians performing abortions, for the inclusion of such language would raise questions that abortion proponents would prefer not to address.

> The crime of abortion played prominently in two international trials held at Nuremberg following World War lI — the *Goering* and *Greifelt* cases. Allied prosecutors made the case that **voluntary and involuntary abortion were war crimes and crimes against humanity**. The *Goering* judgment identified the Political Leadership Corps of the **Nazi Party as a criminal organization, in part because of its policies promoting abortion**.
>
> The *Greifelt* indictment charged ten defendants with **voluntary and involuntary abortion**. The prosecution's case focused in part on the Nazis' removal of the protection of law from unborn children in occupied Poland and unborn children of Eastern workers in Germany that the Nazis considered racially non-valuable. The prosecution argued that **voluntary abortion was punishable because it was a crime against the unborn child**. The prosecution proceeded on the theory that Germany had a duty to afford protection of law to unborn children and that the deliberate failure of high-level officials to do so constituted **crimes against humanity and genocide** by acts of omission. [J.C. Tuomala, "Nuremberg and the Crime of Abortion," 42 U. TOLEDO. L. REV. 283 (2011) (emphasis added).]

Although abortion and infanticide were practiced by pagan civilizations,[4] for 2,500 years, abortion and euthanasia have been expressly condemned, and sterilization has been similarly viewed. That all changed when elements of the theory of Eugenics captured the imagination of those who wished to create a Heaven-on-Earth by improving the human race.[5] Eugenics was designed to purify

---

[4] *See* M.S. Evans, The Theme Is Freedom: Religion, Politics, and the American Tradition at 138 (Regnery: 1994).

[5] *See* Wayne Johnson, "Eugenics and the American Church," *Leben* (July 20, 2014) ("[Eugenics] dovetailed nicely with the 'heaven on earth' theology then popular among liberal clergy, who had contests for the best pro-eugenics sermons.").

the population, which was closely related to the justification for abortion, particularly by Margaret Sanger, the founder of Planned Parenthood (one of the plaintiffs herein).[6]

In 1907, the State of Indiana enacted its first law "for the involuntary sterilization of 'confirmed criminals, idiots, imbeciles and rapists,'" leading to "over 2,300 of the state's most vulnerable citizens" being "involuntarily sterilized" before the law was repealed in 1974.[7] The Eugenics movement spread into many other states. The U.S. Supreme Court did nothing to stop this movement, but rather encouraged it, in Buck v. Bell, 274 U.S. 200 (1927), a case that has never been overruled. In that case, the U.S. Supreme Court embraced the legitimacy of the doctrine of Eugenics, upholding a state statute that allowed compulsory sterilization of those deemed unfit. As legal positivist Justice Oliver Wendell Holmes, Jr. famously rationalized: "[t]hree generations of imbeciles are enough." *Id*. at 207. In his opinion, Justice Holmes relied on the authority of another deeply troubling Supreme Court case that had been decided by a 7-2 vote: "The principle

---

[6] *See id.* ("Early funding for eugenics projects came from such well-heeled Americans as John Rockefeller, J.P. Morgan, and oil magnate and founder of the 3-in-1 Oil Company, James Noah H. Slee, the second husband of Planned Parenthood founder Margaret Sanger.").

[7] *See* Indiana Eugenics History & Legacy 1907-2007.

that sustains compulsory vaccination[8] is broad enough to cover cutting the Fallopian tubes." *Id*.

In Roe v. Wade, 410 U.S. 113 (1973), the U.S. Supreme Court manufactured a constitutional right to abortion which had never before been known, from the Constitution's privacy protections that are nowhere to be found in the text.[9] The U.S. Supreme Court has not, as of yet, found a right to assisted suicide in the Constitution, and, indeed in Washington v. Glucksberg, 521 U.S. 702 (1997), the Court unanimously declined to find such a right in the Due Process Clause of the Fourteenth Amendment. However, neither has the Supreme Court ruled in a case in a way that would impede the growing trend in state legislatures to authorize such a practice, although physician-assisted suicide does remain criminally punishable in certain states.

---

[8] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905). While the Supreme Court case relied on in Buck v. Bell that authorizes coercion over conscience once might have been viewed as an outlier, its legitimacy was recently enthusiastically endorsed by Harvard Law School's Felix Frankfurter Professor of Law, Emeritus, Alan M. Dershowitz. *See* M. Sones, "Dershowitz defends compulsory coronavirus vaccine remarks," Arutz Sheva 7 (May 22, 2020) ("US constitutional lawyer: 'If you refuse to be vaccinated, state has power to take you to doctor's office and plunge needle into your arm.'").

[9] *See* discussion of abortion and eugenics in Amicus Brief of Pro-Life Legal Defense Fund, *et al.* at 5-12 (Nov. 15, 2018) in Box v. Planned Parenthood of Indiana, 139 S. Ct. 1780 (2019); *see also* Justice Thomas' concurring opinion in Box at 1782.

In sum, the notion that abortion, sterilization, and euthanasia are legitimate medical procedures is a new and highly controversial development, but the district court opinion treated these procedures as if they were routine, life-giving measures that every patient should be able to expect to receive, everywhere and upon demand. Congress's act in incorporating the Hyde Amendment, barring the use of federal funds to pay for abortions, into spending restrictions every year since 1976 demonstrates that Congress does not embrace abortion as a medically necessary procedure. Most assuredly, the three areas in which medical conscience are protected by Congress (abortion, sterilization, and euthanasia) are anything but life-giving, and actually, are better viewed as the opposite.

For most of the history of the West, there was never a dispute over a health care practitioner "refusing to provide" these three procedures. On the contrary, problems arose when a health care practitioner "provided" these procedures. No one should assume that these three procedures would be routinely available upon demand by any patient at any time, as the district court did, and no such duty should be imposed on a health care worker to indulge a patient's wishes at the expense of the professional's own conscience.

III. THE FINAL RULE VIOLATES NEITHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 NOR THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT.

Plaintiffs claimed that the Final Rule violates the APA provision which states: "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." 5 U.S.C. § 706(2)(A). The district court identified two federal statutes that are violated by the Final Rule.

The district court first turned to a law administered by the U.S. Department of Labor — Title VII of the Civil Rights Act of 1964. Just as it had earlier in its opinion when it invoked Title VII in its discussion of "conscience" statutes, here too, the district court invoked Title VII where it did not apply.[10] *See* discussion in Section I, *supra*.

The difference between the standards established by Title VII and the conscience statutes is clear. Unlike the prohibition in the Conscience Provisions, employers covered by Title VII, as amended in 1972, are only required to make

---

[10] It is not clear why the district court asserted its power to invalidate a rule that was lawful when issued, if it was inconsistent with law at the time of the court's review of the challenged rule. For this proposition, the district court cited one district court opinion — Georgetown Univ. Hospt. v. Bowen, 698 F. Supp. 290, 297 (D.D.C. 1987), *aff'd* 862 F.2d 323 (D.C. Cir. 1988). That one district court case involved a rule which it determined violated an intervening "final and binding court precedent," which is not present in this case.

"reasonabl[e] accommodat[ions]" to the religious views and practices of employees without "undue hardship on the conduct of the employer's business" (42 U.S.C. § 2000e-2(a)(1)-(2)) to avoid civil liability. The district court pointed to no such standard in any of the conscience statutes that the Final Rule implements. Rather, the conscience statutes contain an absolute protection for employees of certain employers which accept federal funds.

Clearly, Title VII and the Conscience Provisions provide different degrees of protection for health care workers, but a difference is not the same as an inconsistency. "[A] law is to be construed as a whole (including later-added and later-revised provisions), and ... laws *in pari materia* (including later-enacted laws) are to be interpreted together." A. Scalia & B. Garner, Reading Law (Thomson/West: 2012) at 330. Within the scope of the Conscience Provisions, the employee has absolute protection from being penalized by his employer, even though he may not be able to sue his employer for money damages under Title VII. As the Government's Brief explained, "the conscience statutes were enacted *after* Congress added Title VII's undue-hardship and reasonable-accommodation defenses. Thus, Congress would have known how to provide those defenses had it wished to." Brief for Defendants-Appellants ("Gov. Br.") at 39.

In truth, the district court's opinion reveals its view that the conscience statutes conflict with Title VII, and that the earlier enacted Title VII should be given primacy — striking down the rule enforcing the Conscience Provisions. That is not how statutes are to be interpreted. As the Intervenor-Defendants' brief concludes: "a rule that *did* incorporate [a "reasonable accommodation/undue burden"] framework would be invalid — because it would be contrary to the clear language of the conscience statutes." Intv. Br. at 29.

The only other statute relied on by the district court was the Emergency Medical Treatment and Active Labor Act ("EMTALA"). That law primarily was focused on preventing Medicare-funded hospitals from having emergency rooms reject patients due to their citizenship, legal status, or ability to pay. Medical screening and stabilization is required, but the statute does not identify the particular services that are required. The EMTALA certainly does not by its terms require that emergency departments perform abortions, sterilizations, or euthanasia. As discussed in Section II, *supra*, it is a commentary on how far the society has moved to think that a patient could walk into any emergency department and demand any treatment he may desire.

IV. PLAINTIFFS CHALLENGE THE FINAL RULE FOR VIOLATING THE SPENDING POWER, BUT ASSERT NO SUCH CHALLENGE TO THE UNDERLYING STATUTES.

The district court struck down the Final Rule, *inter alia*,[11] based on its view that the remedial provisions of the Rule violated the limitations on Congress's Spending Clause power under Article I, Section 8 of the U.S. Constitution because the sanctions imposed are: (i) ambiguous and retroactive; and (ii) impermissibly coercive. *See* New York at 567-71. No similar challenge to the underlying Conscience statutes was brought by plaintiffs. Plaintiffs' failure to challenge the underlying statutes creates a threshold issue as to whether the district court was authorized to consider a challenge based on the Spending Clause to the regulations alone. The district court opinion failed to establish that it had authority to reach the merits of the Spending Clause argument.[12]

First, the limitations on the Spending Clause apply to Congress's power to legislate, but here the challenge was to an agency's implementing regulations. (Since the underlying statutes that the Final Rule implements were not challenged, they must be presumed to be valid and constitutional.) However, it is not at all clear that a Spending Clause challenge can be brought to regulations, or that a

---

[11] The district court's finding that the Final Rule violated the Separation of Powers was responded to by the Government. *See* Gov't Br. at 52.

[12] The district court did address a different threshold issue — ripeness.

Spending Clause challenge can be brought to regulations where the underlying statutory provisions are not challenged, as here.

To support its conclusion that regulations implementing a constitutional statute can violate the Spending Clause, the district court relies exclusively on four decisions — none of which involved challenges to regulations, but rather all involved challenges to statutes. In NFIB v. Sebelius, 567 U.S. 519 (2012), the challenge was to the Medicaid provisions in the Affordable Care Act. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) involved an interpretation of the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400, *et seq*.). South Dakota v. Dole, 483 U.S. 203 (1987) involved a statute which reduced the amount of federal highway funds to states which had a drinking age below 21. And in Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), the issue was the constitutionality of the Developmentally Disabled Assistance and Bill of Rights Act of 1975. None of these cases provide authority for the district court enjoining a regulation when the underlying statute is assumed by the plaintiff to be constitutional.

In a footnote, the district court asserted that "[a]n agency which Congress has tasked with implementing a statute that imposes spending restrictions is also subject to the Clause's restrictions," citing only Lau v. Nichols, 414 U.S. 563, 569

(1974), which it described as "evaluating Spending Clause challenge to regulation implemented pursuant to Title VI of the Civil Rights Act of 1964." New York at 566, n.70. But that case did not involve a direct challenge to either the statute or the regulations. Instead, Lau was a case brought by students against their school district for failing to comply with federal requirements that were imposed on the school district as a condition of receiving federal funding. The Court in Lau evaluated both the statute and the implementing regulations, and determined summarily that, "[w]hatever may be the limits of [the Spending] power ... they have not been reached here." Lau at 569. Lau is the only authority provided by the district court for its application of the Spending Clause jurisprudence to a regulation where no challenge was made to the underlying statutes, and the district court provided no other rationale for such an application.

Moreover, it is not clear how the district court even could have reached the merits of a Spending Clause challenge in this case. If the regulations were found to be contrary to the statutes, the court would never reach the issue of whether the regulation violates the limitations on the spending power because of the constitutional-avoidance doctrine.[13] However, if the regulations were found to be

[13] *See generally* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). If the district court below had omitted its analysis of the Spending Clause, it would have reached the same outcome.

consistent with the statute, the failure to challenge the statute on Spending Clause grounds would appear to be fatal to a challenge to the regulations. *See* Gov't Br. at 56-58; Intv. Br. at 46-47.

Lastly, even if a Spending Power challenge could be brought, the failure of one prior administration — or even multiple successive administrations — to enforce certain aspects of law does not bind every succeeding administration into inaction. This administration gave ample notice of the renewed focus on enforcing these provisions of the applicable statutes, setting forth the proposal to notice-and-comment rulemaking, and then publishing a final rule with a prospective implementation date sufficient to address any reliance issues. Obviously this notice was sufficient to enable plaintiffs to prepare and file lawsuits seeking a preliminary injunction.[14]

CONCLUSION

For the foregoing reasons, and for the reasons stated in the briefs for appellants, the judgment of the district court should be reversed.

---

[14] Additionally, plaintiffs could choose not to participate in receiving the federal funding so that they could discriminate against those with religious conscience objections, as Planned Parenthood chose to do with respect to Title X funding. *See* Letter from counsel for Planned Parenthood to Ninth Circuit.

Respectfully submitted,

/s/ William J. Olson

*William J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, Virginia 22180-5615
(703) 356-5070
Attorney for *Amici Curiae*

May 26, 2020

* Counsel of Record

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amicus Curiae* of Public Advocate of the United States, *et al.* in Support of Defendants-Appellants and Reversal complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 5,288 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae* Public Advocate of the United States, *et al.*
Dated: May 26, 2020

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Defendants-Appellants and Reversal, was made, this 26th day of May 2020, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae* Public Advocate of the United States, *et al.*