19-4254 (L)

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 United States District Court
for the Southern District of New York, Nos. 19-cv-4676, 19-cv-5433, 19-cv-5435
Honorable Paul A. Engelmayer

BRIEF OF THE STATES OF CALIFORNIA, MAINE, NORTH CAROLINA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS–APPELLEES THE STATE OF NEW YORK AND THE CITY OF NEW YORK ET AL.

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August 3, 2020

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

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INTEREST OF AMICI AND SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the States of California, Maine, North Carolina, and Washington (Amici States) submit this brief in support of Plaintiffs-Appellees.

Amici States take seriously their duty to protect their residents' health and welfare through their traditional police powers, including by promoting and safeguarding access to affordable healthcare while respecting the religious beliefs of their residents. To that end, Amici States have carefully tailored their laws and regulations to protect access to healthcare while respecting providers' right to lodge so-called "conscience" objections. Amici States have also worked to ensure that their provider refusal laws are consistent with the numerous federal conscience provisions Congress has enacted. Thus, Amici States have a special interest in ensuring that the U.S. Department of Health and Human Services (HHS) adopts regulations that are consistent with those federal provisions. In adopting the rule at issue here, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23,170 (May 21, 2019) (the Rule), HHS has fundamentally altered their requirements, to Amici States' great detriment.

HHS's new regulation creates a singular, comprehensive exemption to the performance of any healthcare-related service by even the most marginally involved individual or entity. Moreover, it permits a provider to object not just for

religious reasons, but for "moral, ethical, or other" reasons as well. *See* 84 Fed. Reg. at 23,263 (to be codified at 45 C.F.R. § 88.1). The Rule backs up this expanded exemption with draconian penalties. It threatens to withdraw billions of dollars that currently fund public services in the country's most populous states and localities without regard to those states' own "intricate statutory and administrative regimes." *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519, 581 (2012). For Amici States alone, the Rule puts at risk over $100 billion in federal funds.[1] The Rule, quite simply, puts a "gun to the head" of Amici States, and many others. *Id.*

As Plaintiffs-Appellees explain, the district court correctly concluded that HHS's new regulation exceeds the agency's authority, is arbitrary and capricious, and is contrary to federal law and the United States Constitution. Brief for State Plaintiffs-Appellees (State Appellee Br.) 1-4. Amici States write separately to emphasize the severe disruption and financial burdens the Rule threatens. The Rule is not just unlawful, it has real costs: it impedes access to basic healthcare, including reproductive and emergency care; threatens hundreds of billions of

[1] In light of that significant threat, California and Washington each filed its own lawsuit to challenge the Rule. *See California v. Azar*, No. 19-cv-02769 (N.D. Cal. May 21, 2019); *Washington v. Azar*, No. 19-cv-00183 (E.D. Wash. May 28, 2019). Both prevailed in the district court; the appeals have been consolidated before the Ninth Circuit. *See California et al. v. Azar et al.*, Nos. 20-15398 (L), 20-16045, 20-15399; *Washington v. Azar et al.*, No. 20-35044.

dollars in federal funding for healthcare programs and services; and encourages discrimination against vulnerable patient populations, including women, people of color, LGBTQ individuals, and rural and low-income communities.

Amici States urge this Court to affirm the judgment below.

ARGUMENT

I. AMICI STATES HAVE CAREFULLY CRAFTED LAWS AND REGULATIONS THAT RESPECT PROVIDERS' REFUSAL RIGHTS WHILE PRIORITIZING PATIENT HEALTH

Amici States have devoted significant resources to ensuring their residents' access to healthcare. At the same time, Amici States recognize the importance of protecting providers' refusal rights. So Amici States have tailored their state programs and priorities to meet those interests, while assuring that such objections do not compromise patient care and health. In this respect, Amici States are in agreement with Defendants' Amici; "conscience protections and good healthcare can co-exist," and have done so for decades. *See* Amicus Br. of Ohio and 15 Other States (Ohio Br.) at 11.

Amici States' laws exist alongside federal provisions that have, since the 1970s, accommodated providers' refusal rights. The federal provisions in question here, along with HHS's regulations concerning the same, have consistently been narrowly drawn. They are predominantly limited to objections to abortions and sterilizations by doctors and nurses performing the procedures. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience*

Claims in Religion and Politics, 124 Yale L.J. 2516, 2537 (2015) (describing the history of the Church Amendments, which were aimed at professionals directly involved in sterilization and abortion); Olivia Brown et al., *Religious Exemptions*, 20 Geo. J. Gender & L. 397, 414 (2019) (discussing the Coats-Snowe and Weldon Amendments, which are limited to objections related to abortions). As the district court recognized, these federal provisions have aimed, in "discrete contexts," to accommodate religious and moral objections to healthcare services provided by recipients of federal funds, without impeding patients' ability to access the care they need. *See* Special Appendix (SA) 4-5.

Amici States' refusal provisions are similarly limited. California's laws, for example, carefully balance providers' right to refuse care based on moral or religious reasons and patients' right to access healthcare. For example, no employer or other person shall require a physician, a registered nurse, a licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion "if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate." Cal. Health & Safety Code § 123420(a). However, to safeguard the needs of the patient who may be in urgent need of care and in recognition that emergency medical care is a vital public service, this provision

does not apply to "medical emergency situations and spontaneous abortions."[2] Cal. Health & Safety Code § 123420(d).[3] Similarly, California law requires that a female survivor of sexual assault be provided with "the option of postcoital contraception by a physician or other health care provider" upon request and at no cost to the victim. Cal. Penal Code § 13823.11. If a hospital is unable to comply, it must have a protocol in place for the immediate referral to a local hospital that complies with these requirements. Cal. Health & Safety Code § 1281.

Other states have adopted similar provisions that allow for conscience objections without compromising patient health. Washington law, for instance, recognizes the "fundamental right to exercise … religious beliefs and conscience," but instructs that the exercise of refusal rights cannot deprive an individual of "coverage" or "timely access to" medical services. Wash. Rev. Code § 48.43.065. Other states specify that medical providers can object to performing or assisting in the performance of abortions or sterilizations, but only with advanced notice, in writing.[4] Like California's refusal laws, these laws are designed to balance

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[2] "Spontaneous abortion is the medical term for miscarriage." *People v. Davis*, 7 Cal. 4th 797, 840 n.14 (1994) (en banc).

[3] *See also* Cal. Health & Safety Code § 1317(a) & (e) (requiring emergency services to a patient at risk of loss of life, or serious injury or illness).

[4] *See, e.g.*, Mass. Gen. Law ch. 112, § 12I (objecting physician or medical staff "shall state in writing an objection to such abortion or sterilization procedure on moral or religious grounds"); Nev. Rev. Stat. § 632.475(3); N.Y. Civ. Rights L.

protections for objectors with the legal and ethical obligation to preserve patient access to health care services.

The Rule, by contrast, contains no similar protections for patient health. Instead, the Rule elevates the interests of objectors over patients, and effectively requires states to forego their tailored provisions for the regime that the Rule demands. As a result, the Rule "upend[s] the legal status quo with respect to the circumstances and manner in which conscience objections must be accommodated," which has the potential to "shape the primary conduct of participants throughout the health care industry." SA 32.

Defendants' Amici disagree. They contend that the mere existence of "broad" refusal provisions, including in Plaintiff and Amici States, undermines any claim to disruptive effects from the Rule. Ohio Br. 9-10, 12. But those refusal provisions are nothing like the ones the Rule mandates. For example, Washington's law (Ohio Br. 9) preserves conscience objections, while also ensuring the rights of patients to access "timely" healthcare as well. Wash. Rev. Code § 48.43.065. Similarly, Maryland law (Ohio Br. 9-10) creates liability for any healthcare provider or hospital whose refusal or failure to refer a patient results in "death or serious physical or long-lasting injury to the patient" and was "otherwise

§ 79-I; 43 Pa. Stat. Ann. § 955.2; 16 Pa. Code §§ 51.41–51.44; R.I. Gen. Laws § 23-17-11.

contrary to the standards of medical care." Md. Code Ann., Health-Gen § 20-214(d). And New York law (Ohio Br. 9) allows a provider to refuse to perform or assist in performing an abortion, but requires notification to the employer in a "prior written refusal." N.Y. Civ. Rights § 79-I. While HHS's prior application of federal law left room for similar protections, the Rule does not. As explained below, the Rule does not merely implement existing conscience refusal provisions. Rather, it upsets Amici States' efforts to safeguard patient health in favor of a regime that does not consider patients at all.

II. HHS'S OVERBROAD AND VAGUE RULE UNDERMINES AMICI STATES' EFFORTS TO PROTECT PATIENT HEALTH

As the district court found, the Rule's expansive scope is "highly consequential," imposing "heretofore unrecognized duties on funding recipients in connection with objections to medical procedures." SA 50, 61. The Rule imposes a number of "costs and burdens" that would force Amici States to choose between enforcing their state laws that safeguard patient health, or losing billions of dollars in federal funding. *See id.*; *see also NFIB*, 567 U.S. at 581–82 (threatened loss of federal funding that left states no real option but to acquiesce constituted "economic dragooning"); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. 2017) (the federal government cannot use its spending power to compel states and local jurisdictions to adopt specific policies).

In particular, the Rule interferes with, creates confusion around, and undermines Amici's ability to enforce laws and regulations concerning: (1) provision of emergency and medically-necessary care, (2) regulation of medical professionals, (3) informed consent, (4) pharmacists' duties to dispense prescriptions, (5) workplace accommodation, and (6) women's access to reproductive healthcare.

1. The Rule Interferes with State Laws Protecting Patients Seeking Emergency and Medically-Necessary Care

Unlike existing federal and state law, the Rule contains no exception for patients in need of emergency care. As such, healthcare workers under the Rule could object to providing emergency services, even without giving prior notification to their employer hospital or healthcare entity. This has potentially fatal consequences for patients.

As Appellees explain, this aspect of the Rule conflicts with the Emergency Medical Treatment and Labor Act (EMTALA). *See* Brief for Provider Plaintiffs-Appellees (Provider Appellee Br.) 46-52. It also conflicts with many state laws that similarly mandate emergency treatment. *See, e.g.*, Cal. Health & Safety Code § 1317(a), (e); Wash. Rev. Code § 70.170.060.[5] For instance, as with EMTALA,

[5] *See also* D.C. Mun. Regs. Tit. 22-B, § 2024; Haw. Admin. R. § 11-93-10; 210 Ill. Comp. Stat. 70/1; 210 Ill. Comp. Stat. 80/1; 745 Ill. Comp. Stat. 70/6; Mass. Gen. Laws ch. 272, § 98; Or. Rev. Stat. § 743A.012; 35 Pa. Cons. Stat. pt.

many states require that providers administer emergency care even if they object to performing abortions.[6] Many states and localities further require that survivors of sexual assault be informed about emergency contraception and provided contraception if requested.[7]

The Rule contains none of these safeguards. Indeed, counsel for HHS conceded below that the Rule would permit an ambulance driver to cease driving in the middle of Central Park, "en route to hospital, … upon learning that [the] patient sought emergency care for ectopic pregnancy." SA 76. And counsel further conceded an employer's failure to accommodate that ambulance driver could "result in a loss of [federal] funding." *Id.* These harsh outcomes not only conflict

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VI ch. 81; R.I. Gen. Laws § 23-17-26(a); 18 Va. Admin. Code § 85-20-320; Wis. Stat. § 256.30(2).

[6] *See* Cal. Health & Safety Code § 123420(d); Nev. Rev. Stat. §§ 439B.410, 632.475(3) (requiring the provision of emergency medical care despite objections, including abortions); N.Y. Pub. Health § 2805-b (similar); Va. Code Ann. § 38.2-3445 (similar).

[7] *See* Cal. Penal Code § 13823.11(e)(1), (e)(2), (g)(4)(A), (g)(4)(B); Wash. Rev. Code § 70.41.350; Wash. Admin. Code § 246 320 286 (requiring all hospitals with emergency rooms to provide emergency contraception as a treatment option to any woman who seeks treatment as a result of a sexual assault); *see also* Colo. Rev. Stat. § 25-3-110(2) (information about emergency contraception must be provided to survivors of sexual assault); Conn. Gen. Stat. § 19a-112e(b)(3) (upon request, facility must provide emergency contraception to victim of sexual assault); D.C. Code § 7-2123; Haw. Rev. Stat. § 321-512; Mass. Gen. Laws ch. 111, § 70E; Minn. Stat. § 145.4712; N.J. Stat. Ann. § 26:2H-12.6c; N.M. Stat. Ann. § 24-10D-3; N.Y. Pub. Health § 2805-p; 28 Pa. Code § 117.53; Wis. Stat. § 50.375; N.Y.C. Admin. Code § 6-125(b).

with federal law, they would greatly undermine Amici States' longstanding efforts to ensure that their residents have unobstructed access to emergency care.

2. The Rule Interferes with State Laws Regulating Medical Professionals, Including Prohibitions on Patient Abandonment

The Rule would allow providers to discriminate against patients or refuse to provide care under cover of "conscience."[8] But California laws, like those of many other states, protect patients from discrimination in healthcare through its regulation of licensed healthcare professionals. *See, e.g.*, Cal. Bus. & Prof. Code § 125.6 (a licensed healthcare professional is subject to discipline if he or she refuses or aids in the refusal of licensed activities on the basis of protected status); Cal. Civ. Code § 51(b) (barring business establishments from discriminating in the delivery of services and goods); Cal. Bus. & Prof. Code § 2190.1(c)(1)(D) (requiring doctors meet cultural competency standards including the treatment of LGBTQ patients).[9] Amici States also deter abandonment of patients through

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[8] The Rule provides that some conscience objections will be evaluated on a case-by-case basis: for example, objections to providing information or services to transgender patients seeking sterilization for gender dysphoria (84 Fed. Reg. 23,205); treatment for HIV (*id*. at 23,182); and even providing counseling and referral for an LGBTQ patient (*id*. at 23,189). This case-by-case approach offers little certainty to guide states going forward.

[9] *See also, e.g.*, Mass. Gen. Laws ch. 272, § 98 (hospitals and other healthcare facilities open to the public are prohibited from refusing care, or otherwise discriminating against patients, on the basis of characteristics including

disciplinary sanctions, like revocation of medical licenses. *See Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.*, 62 Cal. App. 4th 1123, 1138 (1998) ("A physician cannot withdraw treatment from a patient without due notice and an ample opportunity afforded to secure the presence of another medical attendant."); *Payton v. Weaver*, 131 Cal. App. 3d 38, 45 (1982) (acknowledging the "general proposition" that a physician who abandons a patient may do so "only . . . after due notice, and an ample opportunity afforded to secure the presence of other medical attendance"); Wash. Admin. Code § 246-840-710 (abandoning a patient without an appropriate transfer constitutes a violation of the standards of nursing conduct and practice).[10]

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sexual orientation and gender identity); 2019 Wash. Sess. Laws, ch. 399, § 1(3), (6) ("all Washingtonians, regardless of gender identity, should be free from discrimination in the provision of health care services, health care plan coverage, and in access to publicly funded health coverage").

[10] *See also* Colo. Rev. Stat. § 12-240-212(1)(n); Colo. Med. Bd. Pol. 40-2; Conn. Gen. Stat. § 19a-580a; 16 Del. C. § 2508(e)-(g); D.C. Code § 3-1205.14(a)(30); Haw. Rev. Stat. § 457-12; Haw. Admin. R. § 16-89-60; 244 Mass. Code Regs. § 9.03(15); 225 Ill. Comp. Stat. 60/22(A)(16); Md. Code Ann., Health Occ. § 14-404(a)(6); 243 Mass. Code Regs. §§ 1.03(5)(a)(3), 2.07(10)(a)-(b); Nev. Rev. Stat. § 439B.410; N.J. Stat. Ann. § 26:2H-62(b), (c); N.M. Stat. Ann. § 61-6-15(D)(24); N.Y. Comp. Codes R. & Regs. tit. 8, § 29.2; 35 Pa. Cons. Stat. § 8121(a)(4); 49 Pa. Code § 21.18(b)(7); 49 Pa. Code § 16.61(a)(17); 49 Pa. Code § 21.148(b)(7); R.I. Gen. Laws §§ 5-37-5.1, 5-37-6.3; Vt. Stat. Ann. tit. 26, §§ 1354(a), 1361; 18 Va. Admin. Code § 85-20-28; Wis. Admin. Code § Med. 10.03(2)(o); *Fortner v Koch*, 272 Mich. 273, 280 (1936).

This Rule leaves no room for such measures. As a result, it creates significant tension with the status quo and these types of state laws, potentially subverting states' efforts to protect patients from abandonment and discrimination.

3. The Rule Interferes with Principles of Medical Ethics, Including Rules Governing Standard-of-Care and Informed Consent

The Rule allows a provider to withhold information from patients and even turn them away without notice and without referring patients for the services the provider refuses to perform. This undermines Amici States' ability to monitor compliance with and enforce their own laws and rules regarding medical ethics and informed consent.

Longstanding medical ethics and standard-of-care principles require providers to ensure patients have adequate understanding of their medical options to give informed consent. In the context of reproductive health in particular, ethical rules require medical practitioners to provide a patient with "pertinent medical facts and recommendations consistent with good medical practice."[11] Many state laws codify such rules. Washington State, for instance, recognizes patients' right to

[11] American College of Obstetricians and Gynecologists, Code of Professional Ethics (2018), available at https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/acog-policies/code-of-professional-ethics-of-the-american-college-of-obstetricians-and-gynecologists.pdf; *see also* American Medical Association, AMA Code of Medical Ethics (2016), available at https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview.

determine the course of their own medical treatment. Under Washington law, providers are under a non-delegable fiduciary duty to obtain a patient's informed consent before engaging in a course of treatment. Wash. Rev. Code § 7.70.050. But consent is not "informed" unless a patient has been provided all the information necessary to make a knowing decision regarding medical care, including anticipated results, risks, and alternative courses of treatment. Wash. Rev. Code § 7.70.060(1).[12] Other states have similar requirements.[13]

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[12] *See also* Wash. Admin Code § 246-330-125 (requiring that ambulatory surgical facilities provide their patients with a copy of their rights which include, among other things, the right to "[b]e informed and agree to their care."); Wash. Admin. Code § 246-320-166(4)(c) (requiring hospitals to include "consent documents" as part of a patient's medical records).

[13] *See, e.g.*, Cal. Code Regs. tit. 9, § 784.29; Colo. Rev. Stat. § 25-3-102(1)(c), 6 Colo. Code Regs. 1011-1 §§ 6.102(3)(c), 6.104(1)(g); Colo. Rev. Stat. § 25-1-121(4); 18 Del. C. § 6852; Haw. Rev. Stat. § 671-3(b)(4)-(6); Haw. Admin. R. § 16-85-25; 410 Ill. Comp. Stat. 50/3; Md. Code Ann., Health-Gen. § 19-342; Mass. Gen. Laws ch. 111, § 70E; Minn. Stat. § 144.651(9); N.J. Stat. Ann. § 26:2H-12.8(d); N.Y. Pub. Health § 2805-d; Or. Rev. Stat. § 677.097; 40 Pa. Stat. and Cons. Stat. Ann. § 1303.504; R.I. Gen. Laws § 23-4.7-2; Vt. Stat. Ann. tit. 12, § 1909(d); *id.*at tit. 18, § 1852(a)(4), (8); Va. Code Ann. § 54.1-2970; 18 Va. Admin. Code § 85-20-28; Wis. Stat. § 448.30; *Logan v. Greenwich Hosp. Ass'n*, 191 Conn. 282, 288 (1983); *Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 439 (D.C. 2007); *Lucas v. Awaad*, 830 N.W.2d 141, 150 (2013); *Gerety v. Demers*, 589 P.2d 180, 192 (N.M. 1978); *Beattie v. Thomas*, 668 P.2d 268, 271 (Nev. 1983).

This Rule ignores these principles altogether, permitting providers to refuse to provide services irrespective of other obligations. In so doing, it inhibits states' ability to enforce these ethical and professional duties and laws.

4. The Rule Interferes with State Laws Requiring Pharmacies to Fill Prescriptions

The Rule also threatens to interfere with Amici States' laws regulating pharmacies. Under the Rule's interpretation of the Coats-Snowe Amendment, individual pharmacists are now among the "health care entit[ies]" who may refuse to a fill a prescription based on ethical, moral, religious, or "other" objection, without any notice to their employers. *See* 84 Fed. Reg. at 23,196, 23,264.

Plaintiffs explain why this expansion is contrary to federal law. *See* State Appellee Br. 46-49. This extension of federal law is also at odds with many state laws, specifically those that require pharmacists to fill prescriptions, or at least limit the circumstances in which they may refuse to do so.[14] In California, for example, a pharmacist "shall not obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient." Cal. Bus. &

[14] *See* Wash. Rev. Code § 18.64.005, 011(11); Wash. Admin. Code § 246-863-095; Wash. Admin. Code § 246-869-010; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1114 (9th Cir. 2009); *see also* Colo. Rev. Stat. § 25-3-110(4); 24 Del. Admin. Code § 2500-3.1.2.4; Md. Code Ann., Health Occ. § 12-501; Minn. R. 6800.2250, subpt. 1; Nev. Admin. Code § 639.753(1); Nev. Rev. Stat. § 639.28075; N.J. Stat. Ann. § 45:14-67.1(a); 49 Pa. Code § 27.103(a); Wis. Stat. § 450.095(2).

Prof. Code § 733(a); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076-1088 (9th Cir. 2015) (rejecting First Amendment challenge to state regulation that requires pharmacists to timely dispense all prescription medications, even if the pharmacist has a religious objection). While pharmacists in California may decline to dispense a prescription drug or device on the basis of an ethical, moral, or religious objection, pharmacists must first notify their employers of the drug or class of drugs to which they object. The employer is required to accommodate the objection only if it can do so without undue hardship and without restricting the patient's timely access to the prescribed drug or device. Cal. Bus. & Prof. Code § 733(b)(3). Washington has similar rules restricting pharmacists' ability to refuse to fill prescriptions. *See* Wash. Admin. Code §§ 246-863-095; 246-869-010. The Rule incorporates none of those features. The Rule is thus transformative and interferes with Amici States' ability to regulate the pharmacy industry in a way that is consistent with their public health priorities.

5. The Rule Hinders Administration and Enforcement of Workplace Accommodation Laws

The Rule also disrupts well-entrenched workplace accommodation regimes. Longstanding Title VII standards envision an ongoing dialogue between employer and employee during an accommodations process. That framework requires employers to make "reasonable" accommodations that do not impose an "undue hardship" on the employer. *See* State Appellee Br. 33-42. Many state laws,

including in Amici States, have similar requirements. California's Fair Employment and Housing Act (FEHA), for instance, like Title VII, requires such a dialogue, as needed, between the employer and the employee, and permits the employer to consider an accommodation's impact on a patient's right to care.[15] Other states and localities maintain undue hardship defenses as well as reasonable accommodation standards, or have otherwise balanced accommodating employees' religious or moral beliefs with employers' obligations to patients, their business, and other employees.[16]

The Rule eliminates both of these protections. *See* 84 Fed. Reg. at 23,264. It also limits an employer's right to ask an employee about potential limitations. The Rule forbids an employer from asking a prospective employee about moral or

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[15] FEHA (which applies to employers with five or more workers) requires that an employer reasonably accommodate an employee's bona fide religious beliefs, including moral and ethical beliefs about what is right and what is wrong. *See* Cal. Gov't Code § 12926 (d) & (q); 29 C.F.R. § 1605.1, *Friedman v. So. Calif. Permanente Med. Group*, 102 Cal. App. 4th 39, 45 (2002); *see also* 29 C.F.R. § 1605.2(c)(1) (defining "reasonable accommodation"); Cal. Code Regs., tit. 2, § 11062(a) (same); Cal. Gov't Code § 12926(u) (defining "undue hardship").

[16] *See, e.g.*, Chicago Mun. Code § 2-160-050; 16 Del. C. § 2508(e)-(g); D.C. Code § 31-3834.04(a); D.C. Code § 2-1401.03; Haw. Rev. Stat. §§ 378-2, 378-3(2)-(3) ; Md. Code Ann., State Gov't § 20-606; Mass. Gen. Laws ch. 151B § 4(1A); Minn. Stat. § 363A.08, subd. 2; N.J. Stat. Ann. §§ 2A:65A-1, -2, 26:2H-65(b); N.M. Stat. Ann. §§ 28-1-7(A)-(C); N.Y. Exec. § 296(10); N.Y.C. Admin. Code § 8-107(3)(a), (28); Or. Rev. Stat. §§ 435.475, 435.485(2), 435.225; 16 Pa. Code § 51.44(b)-(c); 216-40-15 R.I. Code R. § 1.15.2; Vt. Stat. Ann. tit. 21 § 495(a); Va. Code Ann. § 18.2-75; Wis. Stat. §§ 253.09(1), 441.06(6), 448.03(5).

religious objections until after the individual is hired and, even then, employers generally may inquire only once a year. *Id.* The Rule does not even require healthcare workers to inform patients of their conscience objections. Together, these features of the Rule diminish the protections Amici States have put in place to balance patient care with the need to accommodate individual employees' refusal right.

6. The Rule Interferes with State Laws Protecting Access to Reproductive Care

The Rule would allow sponsors of health insurance plans (i.e., employers), under the expanded definition of "health care entity" under the Weldon Amendment to assert objections to providing coverage for abortion and some forms of contraception. *See* 84 Fed. Reg. at 23,264. Many states—including Plaintiffs and Amici—have adopted laws that require public and private coverage for maternity services,[17] abortion,[18] and access to contraception.[19] Certain state

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[17] *See, e.g.*, Cal. Health & Safety Code §§ 1345, 1367(i); Cal. Code Regs., tit. 28, § 1300.67; Cal. Ins. Code §§ 10123.865, 10123.866; Wash. Rev. Code § 48.43.041.

[18] *See, e.g.*, Cal. Health & Safety Code § 123462(b); Wash. Rev. Code § 48.43.073.

[19] *See* Cal. Health & Safety Code § 1367.25; Cal. Ins. Code § 10123.196(b)(1); Wash. Admin. Code § 182-532-123; Wash. Rev. Code § 48.43.072(1) (health plans must provide coverage for all contraceptives approved by FDA, voluntary sterilization procedures, and any services necessary to provide the contraceptives); Wash. Rev. Code § 48.43.073(1) (health plans that provide

laws also require coverage of all lawful abortions for enrollees and beneficiaries in both government and private health plans.[20] These laws facilitate access to timely, comprehensive, and effective services, resulting in significant cost savings to the states.[21]

The Rule threatens those protections, undermining Amici States' efforts to protect their residents' access to reproductive care.

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coverage for maternity care or services must "also provide a covered person with substantially equivalent coverage to permit the abortion of a pregnancy"); *see also* Colo. Rev. Stat. §§ 10-16-104(3)(a), 104.2; Colo. Rev. Stat. § 13-22-105; Conn. Gen. Stat. §§ 38a-503e(a); 18 Del. C. §§ 3342A, 3559; 29 Del. C. § 5203A; 31 Del. C. § 526; D.C. Code §§ 31-3834.03, 31-3834.01; Haw. Rev. Stat. § 431:10A-116.6;; 215 Ill. Comp. Stat. 5/356z.4; Md. Code Ann., Ins. §§ 15-826 to 826.2; Mass. Gen. Law ch. 175, § 47W; Mass. Gen. Law ch. 176A § 8W; Mass Gen. Law ch. 176B § 4W; Mass. Gen. Law ch. 176G § 4O; Nev. Rev. Stat. §§ 689A.0418, 689B.0378, 689C.1676, 695A.1865, 695B.1919, 695C.1696; N.J. Stat. Ann. §§ 17B:27A-19.15, 17B:26-2.1y, 52:14-17.29j, 17:48F-13.2, 17:48E-35.29; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16; N.Y. Ins. § 3221(1)(16); Or. Rev. Stat. § 743A.067; R.I. Gen. Laws §§ 27-18-57, 27-19-48, 27-41-59; Vt. Stat. Ann. tit. 8, § 4099c; Va. Code Ann. § 38.2-3407.5:1; H. B. 89 (N.M. 2019), chaptered at Chapter 263, Sec. 9 (signed Apr. 4, 2019).

[20] *See, e.g.*, Cal. Health & Safety Code §§ 1345, 1367(i); Cal. Code Regs. tit. 28, § 1300.67; *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421 (2019) (healthcare plans in California cannot refuse to cover legal abortions under the Knox-Keene Act); Wash. Admin. Code § 182-532-123; *see also* N.Y. Codes R. & Regs. tit. 11, § 52.16; Or. Rev. Stat. § 743A.067.

[21] *See, e.g.*, Guttmacher Institute, Publicly Supported Family Planning Services in the United States (Oct. 2019), https://www.guttmacher.org/sites/default/files/factsheet/publicly-supported-fp-services-us.pdf.

III. THE RULE THREATENS CONCRETE HARM TO AMICI STATES AND THEIR RESIDENTS

The Rule's interference with carefully tailored state laws threaten severe, concrete harm to Amici States and their residents in at least two critical respects. First, the Rule poses a serious threat to residents' access to basic healthcare, including reproductive and emergency care. And second, the Rule poses real economic harm, placing at risk billions of dollars in federal funds. Amici and Plaintiff States identified these harms when HHS proposed its new rule. *See, e.g.*, JA 1066-71 (California Attorney General Comment); JA 1058 (California Insurance Commissioner Comment); JA 1021 (State Attorneys General Comment); JA 1562 (Washington Department of Health Comment). HHS ignored those concerns. *See, e.g.*, 84 Fed. Reg. at 23,182 ("The Department finds that finalizing the rule is appropriate without regard to whether data exists on the competing contentions about its effect on access to services."); *see also* SA 95 (finding that HHS "did not once address its intervening 2011 finding that access to care would diminish were the rescinded terms of the 2008 Rule in place").

As the district court recognized, the Rule will have lasting, long-term consequences for many states, which must now "incur great expense to comply with" its requirements, or "risk 'potentially even greater' consequences for non-compliance." SA 121. Unlike the federal provisions it purports to interpret, the Rule permits any individual, entity, or provider—from doctors to front office

staff—to deny patients basic healthcare, including reproductive and emergency care, based on religious, moral, ethical, or any "other" reason. 84 Fed. Reg. at 23,263. The Rule also broadly interprets "assist in the performance"—a term previously undefined by the federal conscience provisions—to include numerous individuals outside of the operating theater, such as those "[s]cheduling an abortion or preparing a room and the instruments for an abortion." *See id*. at 23,186-87. As ample evidence before the agency suggested, these expansive definitions are likely to exacerbate existing health disparities and curb access to healthcare.

As it is, there are already "significant challenges in access to constitutionally-protected abortion services, particularly for low-income women and women of color." Human Rights Watch, *Letter to U.S. Secretary of Health and Human Services Alex Azar* (Mar. 27, 2018).[22] Studies show that "[p]oor women are five times more likely than higher income women to have an unintended pregnancy, and rates of unintended pregnancy among women of color are more than twice the rates for white women." *Id.* The Rule threatens to increase the number and types of providers who refuse abortion services. By further restricting access, the Rule will exacerbate existing racial and socio-economic health disparities for women.

[22] Available at https://www.hrw.org/news/2018/03/27/human-rights-watch-letter-us-secretary-health-and-human-services-alex-azar.

Other vulnerable populations will also suffer disproportionate impacts from the Rule. For example, "LGBTQ populations experience a significant rate of discrimination in health care settings, and also experience negative health outcomes compared with the overall population." JA 1016 (citing studies). Indeed, even before this Rule, "more than half" of 5,000 LGBT respondents to one survey reported some form of discrimination in care. JA 1099 (citing Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* (2010)). In another, 33% of transgender patients "reported having at least one negative experience related to being transgender such as verbal harassment, refusal of treatment, or having to teach the health care provider about transgender people to receive appropriate care." JA 1063 (citing Nat'l Ctr. For Transgender Equality, *Report of the 2015 U.S. Transgender Survey* (2016)).

The link between refusal provisions and discrimination against LGBTQ individuals is already well documented. In one case, a woman was denied infertility treatment because she is a lesbian. It took the California Supreme Court to hold that doctors' religious beliefs do not exempt them from state laws prohibiting discrimination. *N. Coast Women's Care Med. Group, Inc. v. San Diego Cty. Superior Court*, 44 Cal. 4th 1145, 1159-60 (2008). In similar ways, conscience "protections" have allowed transgender individuals to be denied

reproductive services, family members to be prohibited from visiting ill loved ones, same-sex couples to be denied counseling, and individuals living with HIV to be denied medical care. JA 1101-05 (citing survey responses and cases such as *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (counseling student objected to providing relationship counseling to same-sex couples); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539-540 (W.D. Ky. 2001) (physician sought to screen applicants on the basis of sexual orientation); *Stepp v. Review Bd. Of Indiana Emp. Sec. Div.*, 521 N.E.2d 350, 352 (Ind. 1988) (lab technician refused to process lab specimens from persons with HIV)). This kind of discrimination involving sexual orientation, gender identity, or HIV status will only increase in frequency given the broad scope of the Rule, further exacerbating existing health disparities.

The Rule also threatens significant harm to Amici States' residents in need of emergency healthcare. Already, providers across the country have invoked personal beliefs to deny patients the emergency care they need. In one case, for example, a Michigan woman experienced a miscarriage at 18 weeks of pregnancy. *Means v. United States Conference of Catholic Bishops*, 836 F.3d 643, 646 (6th Cir. 2016). "Despite the gravity of [the woman]'s condition, which created serious risks to herself and her baby" and the certainty that the baby would not survive, the religiously-affiliated hospital "sent her home with some pain medication." *Id.* at

646-47. The woman had to return twice more before she was treated, only when she was experiencing "extremely painful contraction[s]" and had already begun to deliver. *Id.* at 647.

In another case, a Catholic hospital in Arkansas refused to provide a sterilization procedure to a woman who requested one at the time she delivered her baby because "becoming pregnant again presented a danger to her health." Nat'l Women's L. Ctr., *Refusals to Provide Health Care Threaten the Health and Lives of Patients Nationwide* (August 2017).[23] Although undergoing the procedure at the time of cesarean delivery "presents fewer risks and is more cost effective," the hospital refused based on "religious-based prohibitions on sterilization procedures." *Id.* And in another case, an HIV-positive patient was repeatedly denied emergency room treatment after suffering seizures, leading to his hospitalization for gastrointestinal hemorrhaging, pneumonia, a staph infection, and AIDS. *Id.* While Amici States have attempted to protect their residents from this type of harm, the Rule guarantees that such injuries will proliferate notwithstanding Amici States' best efforts.

The Rule threatens to eliminate billions of dollars in federal funds should states refuse to surrender to the Rule's provisions, either through actual or even

[23] Available at https://nwlc.org/wp-content/uploads/2017/08/Refusal-to-Provide-Care.pdf.

"threatened" violations. *See* State Appellee Br. at 77-78. Indeed, the Rule forces an untenable (and coercive) "choice": either accept the costs and burdens of complying with federal law—including the immeasurable cost of diluting standards of care and access the Amici States have long prioritized—or relinquish the right to federal funds. *See* 84 Fed. Reg. at 23,226 ("States can decline to accept Federal funds that are conditioned on respecting Federal conscience rights and protections"). But those funding streams represent hundreds of billions of dollars for Amici States that support state agencies in a wide range of sectors.

Defendants' Amici accuse the district court of engaging in mere "conjecture" with respect to this risk of losing billions of dollars in federal funding. Ohio Br. 14-15. But the threat is far from speculative. Indeed, the Office for Civil Rights recently issued a Notice of Violation to California that "implicates funding" from 2018 through 2020, even though OCR previously concluded that remedial action was not warranted.[24] The loss of this funding would be devastating and would affect a panoply of programs ranging from emergency preparedness to chronic and infectious disease prevention (including vaccinations) to

[24] *See Letter from Dir. Roger T. Severino to California Attorney General Xavier Becerra* (Jan. 24, 2020), https://www.hhs.gov/sites/default/files/ca-notice-of-violation-abortion-insurance-cases-01-24-2020.pdf; *see also* 84 Fed. Reg. at 23,178-79.

environmental health programs, among others. The choice the Rule offers Amici States is, in reality, no choice at all. *See NFIB*, 567 U.S. at 581.

For decades, Amici States have "relied on" and "shaped their conduct around" the federal provisions concerning refusal of care, which "have never been read as the [] Rule reads them." SA 99. By upsetting those reliance interests, Defendants have not only acted unlawfully, they have done so at significant cost to Amici States.

CONCLUSION

The district court's ruling should be affirmed.

Dated: August 3, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5), because it contains 5,991 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface requirements of Rule 32(a)(5) because it has been prepared in 14-point Times New Roman font.

August 3, 2020 *<u>/s/ Stephanie T. Yu</u>*

CERTIFICATE OF SERVICE

I certify that on August 3, 2020, the foregoing Brief of the States of California, Maine, North Carolina, and Washington as Amicus Curiae in Support of Plaintiffs–Appellees was served electronically via the Court's CM/ECF system upon all counsel of record.

August 3, 2020 */s/ Stephanie T. Yu*