19-4254(L), 20-31, 20-32, 20-41

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, COOK COUNTY, ILLINOIS,

Plaintiffs-Appellees,

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,

On Appeal from the United States District Court for the Southern District of New York, No. 1:19-cv-04676-PAE (consolidated with 1:19-cv-05433-PAE; 1:19-cv-05435-PAE)

INTERVENOR-DEFENDANTS-APPELLANTS' REPLY BRIEF

(*Caption continued on and counsel listed on inside cover*)

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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INTRODUCTION

Every day, thousands of men and women of faith provide healthcare for other Americans—often while putting themselves at personal risk. Believing that all human life is precious and sacred, they are inspired by their faith to serve anyone in need. Congress has acted to ensure that these healthcare professionals are free to serve others without being forced to participate in certain procedures that they—like millions of other Americans—believe violate their faith. To that end, Congress passed a series of conscience-protection laws that protect healthcare professionals of faith against discrimination, condition federal funding on compliance, and ensure healthcare professionals never have to make the choice between following their conscience and serving those in need.

This litigation reflects Plaintiffs' policy disagreements with the balance struck by Congress in passing those laws, and with HHS in issuing the Rule that implements them. Although Plaintiffs try to translate their policy disagreement into the language of a procedural challenge, they succeed only in making clearer what this litigation is really about. Virtually all of Plaintiffs' arguments about why the Rule runs afoul of the Administrative Procedure Act (and their copycat arguments that the Rule violates the Constitution) are variations on the same theme—that the Rule, just like the conscience-protection laws it implements, doesn't contain a broad hardship exception or an undue-burden framework like some other anti-

discrimination statutes do. But nothing required Congress to take that approach in the conscience-protection laws, and nothing in the APA required HHS to do so in the Rule.

Plaintiffs' real complaint is with the policy choices embodied in the conscience-protection laws, which the Rule faithfully implements—no more, and no less. The conscience-protection laws prohibit *all* discrimination against conscientious objectors—they don't allow an employer *carte blanche* to discriminate if he alleges "undue hardship" or claims there is an "emergency." Congress recognized that forcing healthcare professionals to perform procedures that violate their conscience would effectively prohibit those professionals from practicing. So the conscience-protection laws don't include any exceptions that might allow employers to force healthcare professionals to choose between their conscience and their job.

The agency had before it ample evidence that thousands of healthcare professionals across the country had been threatened with discrimination and would be forced to leave the medical profession if their rights were not protected. *See* Intervenor-Defs.-Appellants' Op. Br. at 13-15, 33-37 (ECF 175).[1] Tellingly, Plaintiffs essentially ignore this evidence, which more than justified the Rule on its

[1] For the Court's convenience, the docket number of a brief is included when it is first cited. All brief pincites are to the brief's internal pagination.

own. Instead, Plaintiffs argue that the Rule upsets their "reliance interests." But the only reliance interest they identify is one based on the unreasonable assumption that HHS would *never* enforce the conscience-protection laws—and that is not a cognizable interest at all. Intervenor-Defs.-Appellants' Op. Br. at 43-44. If anything, Plaintiffs' argument that they have "relied" on their ability to discriminate against healthcare professionals of faith further demonstrates the need for HHS to enforce the conscience-protection laws prohibiting that discrimination.

This argument is, instead, another attempt to mask policy disagreements as procedural objections. But the APA is about process, not policy. Plaintiffs are entitled to disagree with the Rule as a matter of policy. The district court reversibly erred, however, in mistaking that policy disagreement for a basis to invalidate the Rule under the APA.

ARGUMENT

I. The Rule Faithfully Implements the Conscience-Protection Laws.

On their face, the conscience-protection laws (which Plaintiffs have not challenged) ban any and all discrimination on a prohibited basis—they make no exceptions for employer-claimed hardships or "emergencies." Intervenor-Defs.-Appellants' Op. Br. at 6-7; Sen. Coats & Rep. Weldon *Amici* Br. at 9-13, 21-22 (explaining that the conscience-protection laws intentionally deviated from Title VII's framework allowing exceptions for "undue hardship") (ECF 201). The Rule,

faithfully following the plain text of the laws, likewise does not include exceptions to its prohibition on discrimination. 45 C.F.R. § 88.2. Yet Plaintiffs argue that Congress could not have prohibited discrimination in the conscience-protection laws without *also* incorporating the undue-hardship framework from Title VII—and from there, argue that the Rule is invalid because it doesn't use that framework, either. Private Plaintiffs' Br. at 33, 37-39 (ECF 297); State Plaintiffs' Br. at 36 (ECF 299). But the premise of that argument is mistaken. Nothing in Title VII or any other statute required Congress to incorporate Title VII's framework into the conscience-protection laws merely because both statutes address discrimination. *See* Intervenor-Defs.-Appellants' Op. Br. at 27-29.

That leaves Plaintiffs to argue that Congress silently incorporates the undue hardship framework whenever it uses the word "discrimination." Private Plaintiffs' Br. at 38-39 (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)). Not so. The Supreme Court—in a case Plaintiffs cite in support—*rejected* the argument that the word "discrimination" must be interpreted by looking to Title VII. In *Jackson*, where the Court was faced with a similar argument about Title VII and Title IX, it emphasized that "Title VII is a vastly different statute from Title IX," and therefore provided no guidance about Title IX's meaning. 544 U.S. at 175. The same thing is true here—to an even greater degree. The conscience-protection laws

are "vastly different" from Title VII (even more "different" than Title IX), and their meaning is controlled by their own text.

Plaintiffs fall back on policy arguments that Congress didn't really mean what it said when it prohibited all discrimination without exception, because this would subject employers to hardship. Private Plaintiffs' Br. at 36-38; State Plaintiffs' Br. at 39. But this is just another way of saying that they disagree with the policy balance Congress struck in the conscience-protection laws. It is no basis for invalidating a rule that faithfully implements and enforces those laws. *See also* Sen. Coats & Rep. Weldon *Amici* Br. at 2 (explaining that the Conscience Rule simply "ensure[s] that recipients of its federal awards comply with existing federal law."); 78 Current Members of Congress *Amici* Br. at 3 ("[A]ll of the challenged definitions flow directly from the statutory text of the federal conscience protections.") (ECF 259).

The text of the conscience statutes thus forecloses Plaintiffs' argument for adding an "undue hardship" exception: "the statute does not include this language, and we may not 'add words to the law to produce what is thought [by Plaintiffs] to be a desirable result.'" *Kidd v. Thomson Reuters Corp.*, 925 F.3d 99, 106 n.9 (2d Cir. 2019) (quoting *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015)).

II. The Rule Doesn't Conflict with EMTALA.

EMTALA and the conscience-protection laws do not "conflict" in any way—EMTALA requires hospitals to ensure they can provide emergency treatment to patients, and the conscience-protection laws require employers (including hospitals) to ensure they do not discriminate against healthcare professionals based on their conscience. Intervenor-Defs.-Appellants' Op. Br. at 30-32. Nothing prevents a hospital from complying with both requirements. *Id.* And the Rule—which simply enforces the conscience-protection laws according to their terms—doesn't violate EMTALA either. *Id.*

Plaintiffs' argument that the Rule "conflicts" with EMTALA by not including an exception for "emergencies" is really an argument for rewriting the conscience-protection laws to include a hardship or emergency exception that does not exist. Plaintiffs do not (and cannot) dispute that the conscience-protection laws don't contain *any* exception allowing discrimination in "emergencies." Private Plaintiffs' Br. at 48. Yet they argue that such an exception must be read into the laws because otherwise, according to Plaintiffs, healthcare professionals of faith might "withhold stabilizing emergency treatment" from unsuspecting patients. *Id.* at 47. But just as with Plaintiffs' "undue hardship" argument, their argument for writing in an "emergency" exception to the conscience-protection laws is wrong as a matter of

statutory interpretation. Courts cannot rewrite statutes to "add words to the law." *Kidd*, 925 F.3d at 106 n.9.

That fundamental principle alone defeats Plaintiffs' EMTALA argument—but the argument fails on the facts as well. Plaintiffs' hateful accusation that healthcare professionals who follow their conscience will withhold emergency treatment has no basis in the record, and Plaintiffs' speculation is no basis for invalidating the Rule. Intervenor-Defs.-Appellants' Op. Br. at 31-32 (citing *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 524 (2014) (the mere "possibility" that "uncommon particular applications" of a regulation "might exceed" the agency's authority is no basis for invalidating the regulation in its entirety)). As *amici* note, "Plaintiffs' suggestion that conscientious objectors are likely to engage in unprofessional behavior smacks of reflexive mistrust grounded in religious hostility—an invalid reason to invalidate the 2019 rules." American Association of Pro-Life Obstetricians & Gynecologists, *et al.*, *Amici* Br. at 18 (ECF 246).

Plaintiffs' claim that healthcare professionals of conscience will deny emergency care also contradicts decades of experience with *state* conscience-protection laws, many of which have broader protections than the federal laws. As sixteen states explain in their *amici* brief, "all [Plaintiffs'] conjecture is contradicted by hundreds of years of state and federal protections," including "fifty years of conscience protections specifically related to healthcare." State of Ohio, *et al.*, *Amici*

Br. at 15 (ECF 190). Many of these state laws have provided "similar, or greater conscience protections" than those provided by the Rule, and contain no "exception for emergencies" or for "undue hardship." *Id.*; *see, e.g.*, Ohio Rev. Code §4731.91. These state laws have not led to any widespread loss of care for any patients. *See* State of Ohio, *et al.*, *Amici* Br. at 15 (explaining that in Ohio, for example, healthcare has not been adversely affected by the "broad features" of its conscience statute).

In fact, people of faith enter the healthcare profession to care for others, not to withhold emergency treatment from anyone. *See* JA 1490 ("CMDA also believes that physicians should not hinder the continuity of care, even when they object to a particular procedure."); American Association of Pro-Life Obstetricians & Gynecologists, *et al.*, *Amici* Br. at 18 ("*Amici* can attest that conscientious objectors have no desire or intent to abandon patients in true emergencies."). Plaintiffs assert that *some* providers will refuse to provide treatment for an ectopic pregnancy (which they sometimes call an "emergency abortion"). *See, e.g.*, Private Plaintiffs' Br. at 42-43 (claiming a front-desk employee will refuse to direct a patient to treatment for her ectopic pregnancy). But as CMDA and Dr. Frost already explained, this statement has no record support. Intervenor-Defs.-Appellants' Op. Br. at 31 n.7; JA 1491 ("I am aware of no faith group that categorically forbids adherents within the medical profession from treating an ectopic pregnancy[.]").

Rather than relying on the record, Plaintiffs try to support their claim that *some* medical professional might object to *some* emergency procedure by citing a single case: *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000). *See* Private Plaintiffs' Br. at 35, 47. *Shelton* involved a nurse who objected to an extraordinarily broad range of procedures—even objecting to caring for newborns in the Newborn ICU. 223 F.3d at 226. But as CMDA explained, and as the record demonstrates, there is no evidence that *any* faith group shares Shelton's idiosyncratic objections to emergency procedures. Intervenor-Defs.-Appellants' Op. Br. at 31 n.7; JA 1491-93 ¶¶ 20-23; JA 1500 ¶¶ 14-15.

In any event, all that Plaintiffs can cite *Shelton* to support is their argument that it is *possible* that it *might* be more costly for them to comply with both EMTALA and the Rule, because they *might* need to use additional staff to comply with both. Plaintiffs argue that *if* they encounter a hypothetical Shelton-clone who has a hypothetical religious objection to a hypothetical emergency procedure, "[a] hospital would effectively have to double-staff to ensure it could provide emergency care, which is untenable." Private Plaintiffs' Br. at 47.

Even if complying with the Rule would be "especially difficult"—and there is no record evidence that double-staffing is even necessary, much less "untenable"—that would be no basis for invalidating the Rule. If it were, virtually no regulation could withstand APA scrutiny. *See Associated Builders &*

Contractors, Inc. v. Shiu, 773 F.3d 257, 266 (D.C. Cir. 2014) (rejecting argument that new regulations would be "especially difficult to comply with" as a basis for invalidation because it "would doom virtually any regulation that imposes new obligations on regulated entities"); Intervenor-Defs.-Appellants' Op. Br. at 30-31.

At bottom, Plaintiffs' argument that the Rule is invalid because it "conflicts" with Title VII and EMTALA is really a complaint that the conscience-protection laws (and the Rule that implements them) don't contain an emergency exception or an undue-burden framework. But Congress simply made a choice—religious healthcare professionals should not be forced to perform abortions and certain other procedures, even if an employer claims "hardship" or that an "emergency" demands allowing it to discriminate. Plaintiffs may disagree with that choice, but a disagreement over policy is not a conflict between a statute and a regulation. Congress's decision not to include a hardship exception in the conscience-protection laws or to import Title VII's undue-burden framework is entitled to respect. It is certainly no basis for invalidating the Rule.

III. The Rule Is Not Arbitrary and Capricious.

The Rule is supported by ample evidence of the pressing need to enforce the conscience-protection laws and fulfill their promise of a discrimination-free healthcare system, including:

- A survey of 2,865 religious healthcare professionals disclosing that "39% [of the respondents] reported having faced pressure or discrimination from administrator or faculty based on their moral, ethical, or religious beliefs";
- Thousands of complainants HHS received during prior rulemakings that show discrimination remains a problem;
- Several well-publicized incidents over the last decade of nurses being forced to perform abortions;
- Comments received in the most recent rulemaking demonstrating that discrimination in violation of the conscience statutes is still ongoing; and
- Recent litigation attempting to require religious objectors to perform abortions, notwithstanding the conscience statutes.

Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,175-79 (May 21, 2019); Intervenor-Defs.-Appellants' Op. Br. at 13-20. And *amici* have described in detail just a few of the examples of discrimination in the administrative record. *See* American Association of Pro-Life Obstetricians & Gynecologists, *et al.*, Br. at 8-14 (describing instances of nurses being forced to perform abortions and being turned away from jobs for pro-life beliefs).

This evidentiary support is more than enough to rebuff Plaintiffs' APA challenge to the Rule. Under the governing standard, this Court "must uphold [the Rule] if the agency has 'examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.'" *FERC. v. Elec. Power Supply Ass'n* ("*EPSA*"), 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (alterations adopted)). That standard is easily satisfied here, because at a minimum the evidence demonstrates "a rational connection" between the agency's finding that healthcare professionals face widespread discrimination based on their religious beliefs, on one hand, "and the choice made" to enforce the conscience statutes' prohibition on that discrimination, on the other. *Id.*

Plaintiffs ignore all of this evidence, instead advancing an array of arguments under the "arbitrary and capricious" banner. But none provides any basis for invalidating the Rule.

A. The Rule Contains No Mathematical Error—Certainly Not One That Renders the Entire Rule Arbitrary and Capricious.

Plaintiffs argue that the entire Rule is arbitrary and capricious because it miscounts the number of complaints alleging violations of the conscience *statutes*. Private Plaintiffs' Br. at 52-53. Specifically, Plaintiffs point to a statement that "OCR received 343 complaints alleging conscience *violations*" during FY 2018. 84 Fed. Reg. at 23,229 (emphasis added). Plaintiffs argue that OCR did not receive 343 complaints alleging violations of the conscience *statutes* in FY 2018, because many of the 343 complaints alleged conscience violations unrelated to the statutes. Private Plaintiffs' Br. at 53.

But the Rule doesn't say there were 343 complaints of violations of the *conscience statutes*—it says, with undisputed accuracy, that there were "343

complaints alleging conscience violations" *of any kind*. Intervenor-Defs.-Appellants' Op. Br. at 34. So there is no error at all—but even if there were, it wouldn't justify invalidating the entire Rule, particularly given the other ample evidence that HHS relied on to support it. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009) ("superfluous" reasoning, even if not "entirely convincing," is irrelevant under arbitrary-and-capricious review); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) (a "stray statement, which could have had no effect on the underlying agency action being challenged" cannot be grounds to invalidate a rule justified by other evidence).

Plaintiffs' other arguments that the Rule is arbitrary or unsupported are likewise at odds with the record. The State Plaintiffs argue that "HHS has never identified any concrete evidence in the record demonstrating any confusion on the part of regulated entities arising from the 2011 rule." State Plaintiffs' Br. at 62. But in a section entitled "Confusion Exists About the Scope and Applicability of Federal Conscience and Anti-Discrimination Laws," HHS discussed a string of lawsuits by various parties "claiming that Federal or State laws require private religious entities to perform abortions and sterilizations despite the existence of longstanding conscience and anti-discrimination protections." 84 Fed. Reg. at 23,178.

The State Plaintiffs argue that this evidence is irrelevant, because lawsuits by Planned Parenthood and other advocacy groups "do not demonstrate confusion *on*

the part of providers about their obligations." State Plaintiffs' Br. at 63. But the scope of HHS's concern was not so narrow—the agency was (justifiably) concerned that "the *public* has sometimes been confused" about the reach of the conscience-protection laws, so the Rule strives to dispel that confusion and protect healthcare professionals against the infringement of their rights through ignorance (or worse). 84 Fed. Reg. at 23178 (emphasis added). The State Plaintiffs' argument that HHS was prohibited from doing this unless there was affirmative evidence that *providers themselves* did not understand their rights makes little sense.

Similarly, Plaintiffs argue that "the record does not support" the Rule's purpose of clarifying HHS's enforcement powers. State Plaintiffs Br. at 64. But the record is replete with examples of healthcare professionals suffering discrimination based on their "moral, ethical, or religious beliefs," including the survey response of over a thousand healthcare professionals who reported facing discrimination. *See* 84 Fed. Reg. at 23,175-79. This extensive evidence is more than sufficient under deferential arbitrary-and-capricious review.

B. HHS Adequately Explained Its Decision to Depart from the Prior Administration's Rule.

In promulgating the Rule, HHS made a "conscious change of course," explaining why it disagreed with the 2011 Rule's bare-bones approach to protecting conscience rights and laying out HHS's reasons for abandoning that rule's "minimalistic regulatory scheme." *E.g.*, 84 Fed. Reg. at 23,228. An agency's

change in policy generally will survive arbitrary-and-capricious review so long as (1) "the new policy is permissible under the statue," (2) "there are good reasons for it," and (3) "the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox Television*, 556 U.S. at 515. The Rule satisfies all three requirements. *See* Gov. Op. Br. at 20-37 (the Rule is permissible under the Conscience Laws) (ECF 157); *supra* pp. 10-14 (HHS provided adequate justification for the Rule).

Plaintiffs argue that HHS failed "to provide a 'detailed justification'" for its change in policy. State Plaintiffs Br. at 65-66 (quoting *Fox Television*, 556 U.S. at 515). As an initial matter, a "detailed justification" is only required where the "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Fox Television*, 556 U.S. at 515. Plaintiffs haven't identified any contradictory factual findings or reliance interests triggering the heightened justification requirement. But even if they had, HHS provided the requisite detailed justification for its policy change.

First, Plaintiffs argue that HHS made a contradictory factual finding in 2011 that rules, like this one, which define terms in the conscience-protection laws have

an adverse impact on access to care.[2] State Plaintiffs Br. at 66. Specifically, the 2011 rule expressed the then-administration's "concern[]" that the definition of statutory terms used in the 2008 rule "may negatively affect the ability of patients to access care *if interpreted broadly*." *Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws*, 76 Fed. Reg. 9968, 9974 (Feb. 23, 2011) (emphasis added). But this "concern[]" about how "broadly" the conscience-protection laws should be interpreted is not a *factual* finding. Intervenor-Defs.-Appellants' Op. Br. at 38-42. If the Rule's statutory definitions are legally valid—and they are, *see* Gov. Op. Br. at 26-37—then HHS was free to promulgate them, without providing a "detailed justification" about why it disagreed with the prior administration's choice to refrain from defining statutory terms. *Fox Television*, 556 U.S. at 515.

Even if the 2011 Rule's statements about access to care were *factual* findings, HHS provided a sufficiently detailed explanation for its departure from them. Contrary to Plaintiffs' assertion, the Rule did not fail to "address—or even mention—these findings from the 2011 Rule." State Plaintiffs' Br. at 66. The Rule directly addressed them, citing post-2011 studies demonstrating "that there is insufficient evidence to conclude that conscience protections have negative effects

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[2] Plaintiffs don't defend the district court's determination that HHS made a contradictory factual finding regarding whether defining terms in the Conscience Laws would increase confusion. SA 92-94; *see* State Plaintiffs Br. at 65-68; *see also* Intervenor-Defs.-Appellants' Op. Br. at 38-40.

on access to care." 84 Fed. Reg. 23,180 & n.45. HHS provided a detailed justification for determining that enforcing and clarifying the law would not reduce access to care.

Second, Plaintiffs argue (for the first time on appeal) that HHS in 2008 actually endorsed applying Title VII's undue hardship framework to the conscience-protection laws, and that HHS didn't acknowledge its departure from this purported 2008 position. State Plaintiffs' Br. at 67 (arguing the 2008 Rule took the position that "the federal conscience statutes' prohibition on 'discrimination' should be understood by reference to . . . Title VII"). But that argument rests on a mischaracterization of the 2008 Rule. On the page of the 2008 Rule cited by Plaintiffs, HHS merely said that "[t]he term 'discrimination' is widely understood, and significant federal case law exists to aid entities in knowing what types of actions do or do not constitute unlawful discrimination." *Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law*, 73 Fed. Reg. 78,072, 78,0778 (Dec. 19, 2008). The 2008 Rule said nothing about interpreting the term discrimination to incorporate Title VII's undue-hardship framework.

To the contrary, the 2008 Rule was explicit that HHS did "*not* believe that it is necessary or appropriate to incorporate elements of Title VII jurisprudence into this provider conscience regulation" principally because the conscience-protection

laws "contain[] none of the reasonable accommodation or undue hardship language Congress elected to include in Title VII." 73 Fed. Reg. at 78,084 (emphasis added); *see also id.* at 78,085 ("As a result, we believe it is a reasonable interpretation of the statutes that Congress sought to ensure provider conscience protections that are distinct from, and extend beyond, those under Title VII."). HHS's decision not to incorporate these elements of Title VII into the current Rule is in complete accord with the 2008 Rule (not to mention with the conscience-protection laws themselves).

C. HHS Didn't Ignore Serious Reliance Interests.

Agencies are obligated to explain why they are disrupting "serious reliance interests" that they themselves have created—when, for example, they first promulgate a rule that provides a narrow interpretation of a statute, but then broaden that interpretation later. *See Fox Television*, 556 U.S. at 515. Here, however, there is no colorable argument that the Rule could have upset any reliance interests created by HHS itself. *Cf. id.* Before the Rule, HHS simply declined to interpret the conscience-protection laws at all. *See* Intervenor-Defs.-Appellants' Op. Br. at 43. No employer could have reasonably relied on the agency's earlier decision not to endorse or condemn any particular behavior, because there is no prior agency action on which any employer could have detrimentally relied. *Id.*

Yet Government Plaintiffs vaguely refer (at 69) to supposed "common understandings" of the scope of the conscience-protection laws that the Rule

purportedly upsets, but they provide no citation establishing what this "common" understanding is or where they found it. Private Plaintiffs assert just as vaguely that HHS's "historical view" allowed employers to "conform to a uniform and established legal framework" that supposedly differs from the framework in the current Rule—but all they cite in support of this argument is a comment to the Rule by former EEOC employees, who made no claim about knowing or relying on HHS's historical views of the regulation. Private Plaintiffs' Br. at 58 (citing JA2680).

The Private Plaintiffs then fall back on their Title VII refrain, arguing that "HHS did not explain why the existing Title VII framework was insufficient to protect healthcare workers." Private Plaintiffs' Br. at 59. But it was *Congress* that decided "the existing Title VII framework was insufficient to protect healthcare workers" and chose to pass the conscience-protection laws, not HHS. And the Private Plaintiffs do not explain—nor could they—what caused them to "seriously rely" on the expectation that HHS would ignore the conscience-protection laws and *only* enforce Title VII instead.

D. HHS Considered Important Aspects of the Problem.

A rule will only be invalidated for failing to consider an important aspect of the problem, *State Farm*, 463 U.S. at 43, when the Court is "very confident" that the agency "overlooked something important," *New York v. DOJ*, 951 F.3d 84, 122 (2d

Cir. 2020) (quotation marks omitted). Contrary to Plaintiffs' assertions, HHS didn't "overlook" Plaintiffs' objections that the Rule (in their view) restricts access to care and burdens employers—it considered and rejected those objections, concluding that the benefits of enforcing the conscience statutes outweighed these supposed costs. *Id.*; Intervenor-Defs.-Appellants' Op. Br. at 44-45. Plaintiffs' real complaint is with HHS's *policy* decision to strike that balance—but disagreement with an agency's "policy balance" doesn't "reflect a failure to consider relevant factors." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 211 (D.C. Cir. 2007); Intervenor-Defs.-Appellants' Op. Br. at 44-45.

The Plaintiffs insist that HHS didn't "meaningfully address" how the Rule would affect care in emergency situations, and complain that HHS didn't sufficiently "grapple with" this purported harm. *See* State Plaintiffs' Br. at 70-74; Private Plaintiffs' Br. at 60-62. But they don't deny that HHS *did* address these arguments—again, the agency simply struck a policy balance with which Plaintiffs disagree. *See* Intervenor-Defs.-Appellants' Op. Br. at 44-45.

Similarly, the Government Plaintiffs assert (at 74) that HHS didn't give "*serious*" consideration to comments asserting that the Rule conflicts with standards governing medical ethics—yet again implicitly conceding that HHS *did* consider these comments, it just didn't agree with them. They also fault HHS (at 73) for placing weight on the fact that disruptions to emergency care have "never happened

in the past," arguing that "the past was not governed by this Rule." But that argument ignores that the Rule merely implements the conscience-protection laws, which have existed for decades. Plaintiffs can hardly fault HHS for relying on the agency's own experience with the conscience-protection laws when it evaluated the effects of a Rule implementing those laws.

Plaintiffs' arguments that HHS didn't "serious[ly]" or "meaningfully" consider their arguments is really just a complaint that the agency didn't adopt their preferred policy balance. It is no basis for invalidating the Rule. *See EPSA*, 136 S. Ct. at 782 ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives."); *State Farm*, 463 U.S. at 43 ("[A] court is not to substitute its judgment for that of the agency.").

E. The Final Rule Is a Logical Outgrowth of the Proposed Rule.

The Private Plaintiffs argue that the Rule isn't a "logical outgrowth" of the proposed rule because it didn't inform them of HHS's intention *not* to incorporate Title VII's undue hardship framework. Private Plaintiffs' Br. at 62-64. This is just another variation on Plaintiffs' theme that the conscience-protection laws somehow silently imported that framework, and it falls flat just the same. HHS wasn't required to address Title VII in the notice of proposed rulemaking for the simple reason that Title VII doesn't govern the Rule. HHS had only to provide notice of the "subjects and issues" of the rulemaking, and it easily cleared that bar. *Cooling Water Intake*

Structure Coal. v. U.S. Envtl. Prot. Agency, 905 F.3d 49, 61 (2d Cir. 2018); Intervenor-Defs.-Appellants' Op. Br. at 46.

IV. The Conscience Rule Doesn't Violate the Spending Clause or the Separation of Powers.

Plaintiffs' Spending Clause and separation-of-powers arguments repackage their contention that the Rule goes beyond what the conscience-protection laws authorize. Plaintiffs contend that the Rule violates the Spending Clause because it "impos[es] new conditions and obligations beyond those authorized by Congress" and "leaves the government plaintiffs with no 'legitimate choice' as to whether to comply," State Plaintiffs' Br. at 77-78 (quoting *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012)). But the Rule just implements prohibitions on discrimination that are *already* in the conscience-protection laws—defining statutory terms according to their ordinary meaning, and clarifying existing enforcement mechanisms. *See* Gov. Op. Br. at 20-37.

By merely implementing the conscience-protection laws according to their ordinary meaning, the Rule doesn't impose any additional funding restrictions in violation of the Spending Clause. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (statutory terms are presumed "to carry their ordinary, contemporary, common meaning"); *State v. Dep't of Justice*, 951 F.3d 84, 106 (2d Cir. 2020) (when a word "is not statutorily defined," "it is properly construed according to its contemporary dictionary definition").

Plaintiffs' separation of powers argument similarly rests on the notion that "the Rule exceeds HHS's authority" under the conscience-protection laws. State Plaintiffs' Br. at 79. But because the laws do, in fact, authorize the enforcement mechanisms set out in the Rule, there is no separation-of-powers problem. *See* Gov. Op. Br. at 23-24.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and rendered for appellants.

Dated: August 31, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(ii) and Local Rule 32.1(a)(4)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 5,089 words.

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Date: August 31, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 31, 2020. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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