No. 20-35521

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services; et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Washington

REPLY BRIEF FOR APPELLANT

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SUMMARY OF ARGUMENT

It is a bedrock principle of conflict preemption that a "state law [that] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted, and the federal statute prevails. *Arellano v. Clark Cty. Collection Serv., LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017). Such is the case here. As we explained in our opening brief, Washington law conflicts with section 1303(b)(2)(B)(i) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303, 124 Stat. 119, 897-98 (2010) (ACA), codified at 42 U.S.C. § 18023, and regulations issued by the Department of Health and Human Services (HHS). Whereas the ACA requires that an insurer "collect from each enrollee . . . a separate payment" for the portion of the premium that covers non-excepted abortion services, ACA § 1303(b)(2)(B)(i), Washington law requires insurers to "[b]ill enrollees and collect payment through a single invoice that includes all benefits and services covered by the qualified health plan," Wash. Rev. Code § 48.43.074(2)(a). Washington's statute is therefore preempted.

Contrary to Washington's premise, the ACA's non-preemption provisions do not save state laws that conflict with the requirements of federal law. Washington's arguments misread the statutory text and misapply conflict preemption principles. The district court's decision should be reversed.

ARGUMENT

A. The Washington Law Does Not Fall Within The Scope Of Section 1303's Non-Preemption Clause

As our opening brief explained, the ACA requires that an insurer "collect from each enrollee . . . a separate payment" for the portion of the premium that covers non-excepted abortion services. ACA § 1303(b)(2)(B)(i). By contrast, Washington law requires insurers to "[b]ill enrollees and collect payment through a single invoice that includes all benefits and services covered by the qualified health plan." Wash. Rev. Code § 48.43.074(2)(a). Washington law conflicts with the ACA's substantive requirements and is therefore preempted.

Washington incorrectly argues that its state law is saved by section 1303(c)(1). That provision saves from preemption only those state laws "regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions, including parental notification or consent for the performance of an abortion on a minor." Several states have enacted such laws, such as the various laws that restrict the use of state funding for abortion coverage. *See, e.g.*, Opening Br. 13 (citing examples). By contrast, the Washington law at issue here neither prohibits nor requires abortion coverage or funding. Indeed, it does not relate to prohibition of or the requirement of coverage or funding at all. It thus it does not fall within the ambit of section 1303(c).

Washington's argument that section 1303(c)(1) should be construed to encompass all state laws "relating to" abortion coverage and funding, Wash. Br. 25-26, reads out an important textual limitation in the non-preemption clause. Section 1303(c) saves from preemption only those state laws "regarding *the prohibition of (or requirement of)* coverage, funding, or procedural requirements on abortions." ACA § 1303(c)(1) (emphasis added). Even if a state law—like Washington's—concerning billing for insurance coverage of abortion services might in some way relate to the coverage or funding of abortions, it does not relate to "the prohibition of" or the "requirement of" coverage or funding.

Washington's attempt to tether the state law at issue here to a requirement of coverage or funding is also meritless. The State argues that this statute "furthers the purpose of" a different provision of Washington law, Wash. Rev. Code § 48.43.073, which "directly require[s] coverage for abortion care and prohibits health plans from 'limit[ing] in any way a person's access to [abortion] services.'" Br. 25-26 (quoting Wash. Rev. Code § 48.43.073). Requiring "separate payments" for separate bills, Washington says, will "confuse consumers, increase the risk of inadvertent nonpayment and coverage loss, and effectively penalize insurance carriers for complying with state coverage-parity requirements." Br. 26 n.5.

At most, this argument shows that the law requiring abortion coverage, Wash Rev. Code § 48.43.073, is a law that would be saved by section 1303(c)'s non-preemption provision. It does not make the State's billing statute such a law.

Moreover, Congress clearly did not regard the ACA's "separate-payment" mandate as unduly confusing or burdensome. Section 1303(b)(2)(B)(i) itself mandates that insurers collect a separate payment for the portion of the premium that covers non-excepted abortion services. Washington's quarrel is thus with Congress's judgment as embodied in section 1303, rather than with the HHS regulation. Indeed, the HHS regulation mitigates the risk of coverage loss by prohibiting insurers from terminating an enrollee's coverage or placing the enrollee in a grace period simply because the policy holder makes a combined payment rather than two separate payments. 45 C.F.R. § 156.280(e)(2)(ii)(B). HHS has also stated that it will not take enforcement action against an insurer that adopts a uniform policy of maintaining coverage despite non-payment of the separate amount for non-excepted abortion services, further mitigating any risk that coverage could be lost due to a policy holder's inadvertent failure to pay the separately billed amount for non-excepted abortion services. 84 Fed. Reg. 71,674, 71,685 (Dec. 27, 2019).

As our opening brief explained, Washington's interpretation of section 1303(c)'s savings clause would allow a state to undo the substantive requirements of the ACA itself—including its limitation on the use of federal funds to pay for certain abortions—simply because that state law "relates" to abortion coverage or funding. Washington does not address this argument, and its failure to grapple with the realities of its interpretation should be fatal to its position. As this Court has recognized, a savings provision in a federal law cannot "be interpreted in a way that causes the

federal law 'to defeat its own objectives, or potentially, as the [Supreme] Court has put it before, to destroy itself.'" *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 959 F.3d 1201, 1214 (9th Cir. 2020) (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872 (2000)).

B. The Washington Law Does Not Fall Within The Scope Of Section 1321's Non-Preemption Clause

Washington's reliance on the general non-preemption provision in section 1321(d) of the ACA is equally misplaced. That provision, which the district court did not analyze, states that "Nothing in [Title I of the ACA] shall be construed to preempt any State law that does not prevent the application of the provisions of this title." ACA § 1321(d). As already explained, Washington's law does "prevent the application" of the ACA's separate-payment requirement. Section 1303(b)(2)(B)(i) of the ACA mandates that an insurer "collect from each enrollee . . . a separate payment" for the portion of the premium that covers non-excepted abortion services. Washington law forbids insurers from doing so, by expressly requiring insurers to "[b]ill enrollees and collect payment through a single invoice that includes all benefits and services covered by the qualified health plan." Wash. Rev. Code § 48.43.074(2)(a). Washington's statute thus prevents the application of section 1303(b)(2)(B)(i) of the ACA. It is difficult to imagine a starker conflict.

Tellingly, Washington makes no attempt to explain how an insurer could collect two separate payments when it provides enrollees with only one bill.[1]

Washington's law thus would be preempted even if the 2019 HHS regulations had not been issued. As our opening brief explained, the HHS regulations have from the inception required insurers to "[c]ollect from each enrollee . . . a separate payment" for the portion of the premium that covers abortion services for which federal funding is prohibited. 77 Fed. Reg. 18,310, 18,472 (Mar. 27, 2012) (adding 45 C.F.R. § 156.280). Because the agency's subsequent informal guidance caused confusion, HHS specified through the 2019 regulations that "separate" means "distinct." 84 Fed. Reg. at 71,684. Washington cannot deny that the 2019 amendments "better align with the intent of section 1303 of the PPACA." *Id.* at 71,685. And the Supreme Court's precedents make clear that an agency is always permitted to align its regulations "with [the] statutory language." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)).[2]

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[1] Washington's contention that the government waived the right to address this preemption provision is baseless. The district court's ruling rested on its (incorrect) interpretation of the savings clause in section 1303. The court did not analyze the general preemption provision in Title I. In any event, the government's opening brief showed that Washington law conflicts with the substantive requirements in section 1303. It follows *a fortiori* that the state law is preempted under Title I's general preemption provision.

[2] Washington's contention (Br. 28-29) that *Chevron* deference is not owed to an agency's interpretation of a non-preemption provision is beside the point, because the ACA's substantive provisions preempt Washington law.

Contrary to Washington's contention, this Court's decision in *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), did not call these settled principles into question. In *Oregon*, this Court held that Congress did not "authorize the Attorney General to regulate the practice of physician assisted suicide," and that the Attorney General's directive "exceed[ed] the scope of federal authority" under the Controlled Substances Act (CSA), which was "expressly" limited to the "field of drug abuse." *Id.* at 1125-26. Here, the ACA itself requires that insurers collect a "separate payment" for the portion of the premium that covers non-excepted abortion services, and the HHS regulations accordingly require insurers to collect such payments separately.

Finally, Washington argues that its law is consistent with the "purpose" of section 1303's separate-payment requirement, which Washington describes as ensuring "that insurance companies calculate the premium attributable to coverage for non-federally-fundable abortion care and segregate that amount into a separate account, so that abortion care can be funded from those segregated accounts." Br. 33. Washington emphasizes that its law requires segregation of funds, and claims that its statute has "fully accomplished" "Congress's purpose" "without requiring separate *billing*." Br. 33-34. The problem with this argument is that section 1303(b)(2)(B) requires that insurers *first* "collect from each enrollee . . . a separate payment" and *then* "deposit all such separate payments into separate allocation accounts." A state law that instructs insurers to ignore the first of these requirements is plainly not consistent with Congress's objectives.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1709 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Amanda L. Mundell
Amanda L. Mundell

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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