IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

The State of Texas; and Mayo Pharmacy, Inc., a North Dakota corporation, *Plaintiffs*, v. United States Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; and United States Department of Health and Human Services Office for Civil Rights, *Defendants*.	**MO:23-CV-00022-DC**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs move for summary judgment in their favor. The Supreme Court held last year that "the Constitution does not confer a right to abortion" and "does not prohibit the citizens of each State from regulating or prohibiting abortion." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279, 2284 (2022). Yet, following *Dobbs*, the Biden Administration has repeatedly attempted to impose through executive fiat a federal right to abortion that does not exist. As part of the Administration's war against *Dobbs*, the President issued Executive Order 14,076 (July 8, 2022), and Defendants (collectively, "HHS") issued a "guidance" document and associated press release (collectively, the "Pharmacy Mandate," or "Mandate"). Together, these edicts require every pharmacy in the country, including those in Texas such as the retail pharmacies of Texas Tech University Health Sciences Center ("TTUHSC"), and those elsewhere like Plaintiff Mayo Pharmacy, Inc. ("Mayo"), to stock and dispense drugs that cause abortion, on pain of losing federal Medicaid and Medicare funding. Dkt. 14-1; Dkt. 14-2. But *Dobbs* properly placed the regulation of abortion within the purview of the states and the "people and their elected representatives," not unelected federal agencies. 142 S. Ct. at 2284.

The Pharmacy Mandate promises "vigorous enforcement" against all pharmacies, including TTUHSC, others in Texas, and Mayo, if they refuse to dispense drugs for abortions. Dkt. 14-2 at 4. But, crucially, no federal statute has ever required pharmacies to dispense drugs for abortions—certainly none of the statutes HHS cites as authority for its Mandate. What's more, HHS issued this novel and consequential mandate without following any of the proper procedures under the Administrative

Procedure Act ("APA"), particularly notice and an opportunity for comment. The Mandate is also an unconstitutional exercise of the federal spending power.

There is no genuine issue of material fact to prevent summary judgment in Plaintiffs' favor. The Mandate violates the APA for exceeding statutory authority and for not being subject to notice and comment, and it violates the Spending Clause of the U.S. Constitution. Thus, Plaintiffs respectfully request that the Court grant summary judgment in Plaintiffs' favor.

II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P 56(a), summary judgment is appropriate if the moving party can show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In an APA case, "[t]he entire case on review is a question of law." *Nat'l Ass'n of Mfrs. v. SEC*, No. MO:22-CV-00163-DC, 2022 WL 17420760, at *2 (W.D. Tex. Dec. 4, 2022) (Counts, J.) (quoting *Permian Basin Petrol. Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 706 (W.D. Tex. 2015)).

"Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The burden then shifts to the nonmoving party to point to "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324.

A nonmovant "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). "Mere denials of material facts . . . or arguments and assertions in briefs or legal memoranda will not suffice to carry this burden." *Coates v. TNT Crane*

& Rigging, Inc., No. MO:22-CV-00018-DC, 2022 WL 18034361, at *1 (W.D. Tex. Dec. 20, 2022) (Counts, J.). Rather, the nonmovant must present "'significant probative' evidence" to defeat a motion for summary judgment. *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5th Cir. 1982) (quoting *Ferguson v. Nat'l Broad. Co.*, 584 F.2d 111, 114 (5th Cir. 1978)).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247–48. A dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

"In deciding whether to grant summary judgment, the court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party." *Graves v. Truex*, No. MO:20-CV-00169-DC, 2020 WL 9763088, at *2 (W.D. Tex. Sept. 28, 2020) (Counts, J.).

III. FACTUAL BACKGROUND

Under *Dobbs*, Texas law regulates abortion in Texas. 142 S. Ct. at 2284. But on the same day the Supreme Court decided *Dobbs*, President Biden announced immediate bureaucratic steps with the express purpose to counter what he called an "extreme" decision.[1] The next day, Defendant HHS Secretary Becerra stated in an

[1] *Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade*, The White House (June 24, 2022), https://www.whitehouse.gov/briefing-

interview that Americans "can no longer trust" the Supreme Court.[2] When asked what he was doing "in response to the Court's decision," Secretary Becerra responded, "we have no right to do mild. And so we're going to be aggressive and go all the way."[3]

Two weeks after *Dobbs*, President Biden issued Executive Order 14,076, titled "Protecting Access to Reproductive Healthcare Services." 87 Fed. Reg. 42,053 (July 8, 2022). That order required HHS to, among other things, "protect and expand access to abortion care, including medication abortion" and "otherwise protect and expand access to the full range of reproductive healthcare services." *Id.*

A. The Pharmacy Mandate

Much of the background pertinent to Plaintiffs' claims has been summarized by the Court's July 12 decision. Dkt. 44. Those facts are summarized here consistent with that order and citing the Amended Verified Complaint, Dkt. 14, which constitutes evidence in support of Plaintiffs' motion.

HHS issued the Pharmacy Mandate in response to Executive Order 14,076. Dkt. 14-1 at 1. Although the Pharmacy Mandate claims to simply remind pharmacies of existing obligations, Dkt. 14-2 at 1, it invents new obligations and imposes them

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room/speeches-remarks/2022/06/24/remarks-by-president-biden-on-the-supreme-court-decision-to-overturn-roe-v-wade/; *see also* President Biden (@POTUS), Twitter (July 8, 2022, 11:39 AM), https://twitter.com/POTUS/status/1545447455558406145.

[2] *HHS Sec'y Becerra talks women's future with abortion following Roe v. Wade decision*, NBC News (June 25, 2022), https://www.nbcnews.com/video/women-s-future-with-abortion-implementing-harmreduction-with-addiction-142836293922, at 1:45.

[3] *Id.* at 2:19, 2:59.

with consequential enforcement threats. As this Court found, the Mandate "requires pharmacies to dispense drugs for abortion purposes." Dkt. 44 at 13.

The Mandate imposes "Obligations" on pharmacies "to Ensure Access to Comprehensive Reproductive Health Care Services." Dkt. 14-2 at 1. The Executive Order and Mandate define "reproductive healthcare services" to include abortion. *See* Executive Order, 87 Fed. Reg. at 42,053 ("The term 'reproductive healthcare services' means medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy."); Dkt. 14-1 at 3 (stating in example of the Administration's response to *Dobbs*, "seeking abortion and other forms of reproductive health care"). The Mandate also prohibits discrimination against "pregnant people on the basis of their pregnancy or related conditions." Dkt. 14-2 at 2. It prohibits pharmacies from "making determinations regarding the suitability of a prescribed medication for a patient" in this context. *Id.* It cites as an example of prohibited conduct refusing to dispense the abortion-inducing drug, methotrexate, to "halt the growing of cells and end the pregnancy." *Id.* at 3.

For noncompliant pharmacies, HHS threatens significant legal action. The Mandate invokes the enforcement power of the HHS Office for Civil Rights ("OCR") that "is responsible for protecting the rights of women and pregnant people in their ability . . . to access reproductive health care, including prescription medication from their pharmacy" and threatens "vigorous enforcement." *Id.* at 2. This "line is not an empty threat." Dkt. 44 at 11. The Mandate also invites any person to submit a

complaint to the HHS OCR for violations of the Mandate. *Id.* at 4. As this Court correctly noted, "that's not solicitation without teeth; HHS has already received the requested complaints and . . . investigat[ed] CVS and Walgreens because of such complaints."[4] Dkt. 44 at 17.

The Mandate claims authority to impose such requirements on pharmacies under Section 1557 of the Affordable Care Act ("Section 1557"), 42 U.S.C. § 18116; the Affordable Care Act's ("ACA's") implementing regulations, 45 C.F.R. part 92; Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794; and Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq*. Dkt. 14-2 at 1. However, none of these statutes even mentions abortion except to disclaim their applicability to abortion. Title IX explicitly states that "[n]othing in this chapter shall be construed to require . . . any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. Similarly, elsewhere in the ACA Congress insisted "[n]othing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions." 42 U.S.C. § 18023(c)(1).

B. <u>The Pharmacy Mandate Injures Plaintiffs</u>.

The Pharmacy Mandate injures Texas' and Mayo's pharmacies by unlawfully requiring conduct HHS lacks authority to require on pain of significant penalties. It deprived Plaintiffs of notice and an opportunity to comment on a binding rule, and by

[4] Dkt. 44 at n. 64.

violating the State of Texas' prerogatives through attempting to preempt state laws and unlawfully exercising Spending Clause authority.

First, the Mandate conflicts with Texas's Human Life Protection Act, which states that "[a] person may not knowingly perform, induce, or attempt an abortion." Act of May 25, 2021, 87th Leg., R.S., ch. 800, 2021 Tex. Sess. Law Serv. 1887 (H.B. 1280) (codified at Tex. Health & Safety Code Ch. 170A). That Act contains an exception that applies when the woman "has a life-threatening physical condition" arising from a pregnancy that places her "at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed." *Id.* § 170A.002(b)(2). But the Pharmacy Mandate applies to comprehensive reproductive health care services, not just to abortions in situations of life-threatening risk. The Mandate also conflicts with Texas statutes predating *Roe v. Wade*, 410 U.S. 113 (1973), that address abortion. Under the pre-*Roe* laws, any person who causes an abortion is guilty of an offense and shall be confined in a penitentiary, Tex. Rev. Civ. Stat. arts. 4512.1–.4, .6. (2010) (*see* former Tex. Penal Code arts. 1191–1194, 1196 (1925)), and the laws cover attempts and accomplice liability, *id.* at 4512.2–.3. The pre-*Roe* laws do not apply if the abortion is performed under "medical advice for the purpose of saving the life of the mother." *Id.* at 4512.6. The pre-*Roe* laws remain current law in Texas.[5] *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("When a court declares a law unconstitutional, the law remains in place

[5] The Legislature "transfer[red]" the laws from the Texas Penal Code to the Texas Revised Civil Statutes, but they were "not repealed" or altered. *See* Act of May 25, 1973, 63rd Leg., R.S., ch. 399, § 5(a), 1973 Tex. Gen. Laws 883, 995.

unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it."). *But see McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (stating that pre-*Roe* laws have been repealed by implication).

Second, individual pharmacies, including Mayo and TTUHSC pharmacies, are injured by the HHS's illegal agency action. Mayo and TTUHSC pharmacies are objects of the Mandate because they receive federal funds through Medicare and Medicaid. Dkt. 14 ¶¶ 30, 33, 46–50. TTUHSC pharmacies alone receive approximately $700,000 per year from Medicaid and Medicare that are utilized to operate TTUHSC's pharmacies. Exhibit A, Bentley Decl. at ¶¶ 6, 7. If TTUHSC did not receive these funds, it would have to redirect funds from other sources and may have to close its pharmacies. *Id.* at ¶ 6. Pharmacies throughout the State of Texas would be forced to violate state law if they were required to comply with this Mandate.

For Mayo, over 75% of the prescriptions it fills are from patients in Medicaid or who are 65 years or older and therefore Medicare eligible. Exhibit B, Mayo Pharmacy Decl. at ¶ 7. Losing all those patients because of the Mandate would quite simply drive Mayo out of business and deprive its patients of the pharmacy of their choice. If Mayo complies, it would be violating its core convictions and engaging in behavior it opposes, which also constitutes injury. *Id.* at ¶ 9–12 (specifying that Mayo's objections to abortion include, but are not limited to, the Pharmacy Mandate's specific requirements concerning methotrexate); Dkt. 14 at ¶¶ 42–45 (expressing Mayo's religious objections to the Mandate). In restricting Mayo from "making determinations regarding the suitability of a prescribed medication for a patient," the

Mandate also burdens Mayo's ability to exercise its duty to understand and counsel patients on prescriptions. Exhibit B, Mayo Pharmacy Decl. at ¶¶ 13–18. Yet Mayo and pharmacies in Texas face enforcement actions and devastating loss of federal funding for failure to comply with the Mandate. "[B]ecause the Pharmacy Guidance purports to require pharmacies to dispense drugs for abortion purposes contrary to Texas law and Mayo's religious beliefs, . . . Plaintiffs may sue under the APA." Dkt. 44 at 18.

Third, the Pharmacy Mandate was not issued after giving the public notice and an opportunity to comment. Dkt. 14 ¶¶ 51–52. Therefore, as explained below, HHS deprived Plaintiffs of their legal right under the APA to an opportunity to comment on a rule that would impact them in a significant way. *Cf. Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (depriving a regulated party of its right to the opportunity to comment inflicts a cognizable injury).

C. Procedural History.

On February 28, 2023, the State of Texas and Mayo filed an amended complaint challenging the Pharmacy Mandate under the APA and Declaratory Judgment Act. Dkt. 14 ¶¶ 54–68, 76–90, 104. Texas also challenged the Mandate under the U.S. Constitution's Spending Clause. *Id.* ¶¶ 69–75. And Mayo also challenged the Pharmacy Mandate under the Religious Freedom Restoration Act ("RFRA"). *Id.* ¶¶ 91–103.

On May 8, 2023, HHS moved to dismiss the entire complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of standing. Dkt. 31 at 20. HHS alternatively moved to dismiss Mayo's RFRA claim under Rule 12(b)(6) for failure to state a claim

and Rule 12(b)(3) for lack of venue. *Id.* On July 12, 2023, the Court denied HHS's motion under Rules 12(b)(1) and 12(b)(6). Dkt. 44 at 25. The Court found that Plaintiffs had standing to challenge the Pharmacy Mandate, that the Mandate is reviewable under the APA, and that Plaintiffs' claims are ripe. *Id.* at 14–23. The Court also granted in part HHS's motion under Rule 12(b)(3) for lack of venue and transferred Mayo's RFRA claim to the District of North Dakota. *Id.* at 25.

IV. ARGUMENT

Plaintiffs are entitled to summary judgment on all of their claims. There is no genuine dispute of material fact that the Mandate violates the APA and the Spending Clause of the U.S. Constitution.

A. The Pharmacy Mandate Violates the APA.

As this Court held, the Pharmacy Mandate is reviewable under the APA because it constitutes final agency action from which legal consequences flow. Dkt. 44 at 18–21. HHS published the Mandate as the agency's final position on the application of nondiscrimination laws to pharmacies, and the Mandate determines legal obligations and imposes legal consequences. *Id.* Since then, HHS has neither rescinded nor changed the Mandate. And HHS has presented no evidence showing that the Mandate is "subject to further Agency review." *Sackett v. EPA*, 566 U.S. 120, 127 (2012). The Mandate explicitly imposes "obligations" on pharmacies and calls the obligations pre-existing. But as this Court determined, the obligations are new and therefore constitute legal consequences imposed by *this* Mandate—not by any pre-existing source. Dkt. 44 at 20–21. The Pharmacy Mandate reflects a "settled agency position," binds HHS in its enforcement standards, and gives "marching orders" to

pharmacies. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *Texas v. EEOC*, 933 F.3d at 441.

Constituting final agency action with legal consequences, the Pharmacy Mandate violates the APA because it exceeds statutory authority, failed to go through notice and comment, and is arbitrary and capricious.

1. The Pharmacy Mandate exceeds statutory authority and is contrary to law.

Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or is issued "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

The Pharmacy Mandate attempts to impose a legal duty on pharmacies to dispense drugs for abortions. Dkt. 44 at 13. But HHS lacks any statutory authority to impose such a duty. Federal agencies only have the powers granted them by Congress. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). HHS asserts two statutory authorities for the Mandate: Section 1557 of the ACA and Section 504 of the Rehabilitation Act, and Title IX. Dkt. 14-2 at 1. Neither section even mentions abortion, much less requires pharmacies to dispense drugs for abortions.

As for Section 504 of the Rehabilitation Act of 1973, it says nothing about abortion, and has never been interpreted to require abortions. HHS also asserts that "discrimination against pregnant people on the basis of their pregnancy or related conditions . . . is a form of sex discrimination," and sex discrimination is prohibited by Section 1557. *Id.* at 2. Conspicuously, Section 1557 says nothing about abortions, much less does it require them. Instead, what HHS fails to acknowledge is that

Congress explicitly carved abortion out of Section 1557. Section 1557 does not itself prohibit sex discrimination—it only incorporates by reference Title IX of the Education Amendments of 1972 to the extent *it* prohibits sex discrimination. 42 U.S.C. § 18116. But Congress explicitly declared that Title IX's prohibition on sex discrimination *cannot* be interpreted to require any entity, public or private, to facilitate abortions. 20 U.S.C. § 1688.

On top of this abortion-carve-out in Title IX, Congress carved abortion out of the ACA (and therefore Section 1557) multiple times. *See, e.g.*, 42 U.S.C. § 18023(c)(1) ("Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions"); § 18023(c)(2)(A) (precluding the ACA from preempting laws that protect entities from being required to facilitate abortions). Elsewhere, Congress explicitly prohibits the federal government from requiring health care entities to perform abortions. 42 U.S.C. § 238n(a) (prohibiting the federal government from penalizing an entity for refusing to perform or make arrangements for abortion); Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. H., Tit. V, § 507(d)(1), 136 Stat. 49 (prohibiting any HHS funding from being used to require health care entities to provide or facilitate abortion).

More fundamentally, when a pharmacy chooses not to dispense drugs for abortions in order to comply with state laws, or for ethical, religious, or business reasons, they are *not* discriminating on the basis of sex or disability. The basis for their conduct is that they do not wish to participate in abortions, *not* that they are

acting because of a person's sex or disability. There is no "but for" causation between a pharmacy's choice not to provide drugs for abortions and the patient's sex or disability. *Cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (applying "but for" causation test to traditional civil rights laws); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) (rejecting the argument that opposing abortion is sex discrimination). Pharmacies that choose not to provide abortions are not discriminating under Sections 1557 or 504.

Notably, on this claim the major questions doctrine applies. Like HHS's nationwide ban on evictions, or the Labor Department's nationwide vaccine mandate, or the Education Department's student loan forgiveness, or the EPA's restructuring of the nation's energy industry, imposing a novel abortion mandate on all pharmacies is a matter of "staggering" "economic and political significance" for which Congress has given HHS no "clear" authority. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023). The political significance is transparent in the context of *Dobbs*—the most consequential substantive due process ruling in 50 years—affecting tumultuous abortion policy in every state. The economic significance is likewise massive—subjecting 60,000 pharmacies to the loss of billions of dollars from Medicaid, Medicare, Children's Health Insurance Program, ACA-subsidized "marketplace" health plans, and other sources of health funding. The last thing one can say of Sections 1557 and 504 is that they clearly mandate dispensing drugs for abortions, since neither law mentions abortion, and other laws prohibit such a mandate. "We presume that 'Congress intends to make major policy decisions itself, not leave those

decisions to agencies.'" *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).[6]

2. HHS illegally failed to use notice-and-comment rulemaking.

In general, before an agency can issue a new rule, a "notice of proposed rulemaking shall be published in the Federal Register [and] the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b) & (c). Failure to follow this "procedure required by law" shall lead a court to "hold unlawful and set aside agency action." 5 U.S.C. § 706(2)(D).

It is undisputed that the Pharmacy Mandate did not undergo notice-and-comment. The only issue remaining for summary judgment on Plaintiffs' claim is a legal one: whether the Pharmacy Mandate is the kind of rule subject to the APA's notice-and-comment requirements. It is. The Pharmacy Mandate is a legislative or substantive rule. *See W & T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237 (5th Cir. 2019) ("The APA obligates agencies to subject their substantive rules to notice and comment."). "[S]ubstantive rules are those which 'affect individual rights and obligations.'" *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001) (quoting

[6] Plaintiffs do not believe HHS's implementing regulations for Sections 1557 or 504, which have existed for years without any pharmacy abortion mandate, include such a mandate in their hidden recesses. But in the alternative that HHS argues an abortion mandate does exist in those regulations, Plaintiffs' claims include an alternative request that the Court hold unlawful and set aside those regulations as violating the authority Congress gave HHS in the statutes. Dkt. 14 at ¶¶ 68, 81, 90.

Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979)). Legislative rules are those that have the force and effect of law—including if they modify or add to a legal norm, or are binding on the public. *Flight Training Int'l, Inc. v. Fed. Aviation Admin.*, 58 F.4th 234, 240 (5th Cir. 2023); *Mock v. Garland*, 75 F.4th 563, 578 (5th Cir. 2023).

As this Court held, the Pharmacy Mandate is final agency action that "requires pharmacies to dispense drugs for abortion purposes," Dkt. 44 at 13, and is "intended to carry the chilling threat of legal consequences," *id.* at 20. It follows that the Mandate is a substantive rule. The Court found "legal obligations emanating from the Pharmacy Mandate," and refused to turn a blind eye towards them. *Id.* For similar reasons, the Pharmacy Mandate is a legislative rule. It has the force and effect of law: "Defendants' argument that the Pharmacy Guidance states it has no legal effect is unpersuasive." *Id.* at 21. The Mandate added a new legal norm: what was once a ban on sex and disability discrimination, now (for the first time) "requires pharmacies to dispense drugs for abortion purposes." *Id.* at 13. Because this is both new *and* a mandatory legal norm, it is a legislative rule.

HHS engaged in "an effort to avoid the inevitable judicial review" by "smurfing" its mandates into separate documents and labeling the Pharmacy Mandate "guidance." *Id.* at 12. But courts must "look beyond the label" to the impacts of the issuance on regulated entities to determine if notice-and-comment was required. *Mock*, 75 F.4th at 581 (cleaned up). HHS's insistence on "vigorous enforcement" creates a concrete threat of loss of federal funds if pharmacies do not comply. The effects of either losing federal funds or being required to dispense drugs

for abortions, contrary to a pharmacy's policy and to state laws, are substantial. Where "'the entire guidance, from beginning to end—except the last paragraph—reads like a ukase,'" and "'[i]t commands, it requires, it orders, it dictates,'" it is a rule subject to notice-and-comment. *Id* at 582 (quoting *Appalachian Power Co.*, 208 F.3d at 1023).

For lacking notice-and-comment alone, the Court could and should hold the Mandate unlawful, set it aside, and enjoin its enforcement in Texas or against Mayo.

3. The Pharmacy Mandate is arbitrary and capricious.

Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary and capricious." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if the agency failed "to engage in 'reasoned decisionmaking'" in taking the action, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) ("*DHS v. Regents*") (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015). In particular, agency actions are arbitrary and capricious when they fail to acknowledge the agency's change position, fail to consider the reliance interests of parties subject to previous norms, and fail to consider alternative approaches. *Id.* at 1911–15.

Because this Mandate feigned to be a mere guidance that reiterated existing obligations, HHS violated all three cardinal rules for non-arbitrary rulemaking set forth in *DHS v. Regents*. By definition, HHS fails to acknowledge that the mandate to dispense drugs for abortions under the theory of sex and disability nondiscrimination is new, and therefore is a change in position. Flowing from that error, HHS fails to mention, much less wrestle with, reliance interests. Pharmacies in pro-life states such as Texas, or religious pharmacies such as Mayo, have built

their practices and health care delivery systems based on the lack of any federal mandate to dispense drugs for abortions. "When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account" and "[i]t would be arbitrary and capricious to ignore such matters." *Id.* at 1913 (cleaned up). HHS also failed to discuss alternative approaches to issuing this Mandate. This, again, naturally flows from HHS's posture of trying to avoid judicial review by purporting not to know the document was a new mandate, to which there might be alternative options to achieve the President's and Secretary Becerra's policy goal of opposing *Dobbs*.

Another reason agency action is arbitrary and capricious is if it does "not look to RFRA's requirements or discuss RFRA at all when formulating their solution." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020). The Pharmacy Mandate ignored RFRA, and for that reason violated the APA. HHS has noted that the Mandate discusses another abortion conscience statute, 42 U.S.C. § 300a-7, known as the Church Amendments. But that discussion only highlights HHS's capricious failure to adequately discuss this issue. The Church Amendments protect personnel and individuals (employees and students) in their objections to abortion, but this Mandate runs against pharmacies. In other words, *at best* the Mandate's vague mention of the Church Amendments indicates that maybe individual employees of a pharmacy won't be required to dispense drugs for abortions, *but the pharmacy itself will*. Yet RFRA does not just protect individuals, it also protects organizations and businesses. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S.

682, 708 (2014). The Pharmacy Mandate contains no discussion of RFRA, much less discussion of how it will impact religiously-run pharmacies, such as Mayo. HHS acted capriciously in failing to discuss this issue.

Nor can HHS offer *post hoc* rationalizations to attempt to save these omissions from the Mandate. *DHS v. Regents*, 140 S. Ct. at 1909 ("An agency must defend its actions based on the reasons it gave when it acted."). "The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019). The absence of the Pharmacy Mandate's discussion of these questions is dispositive: nothing HHS can say in its legal briefs in this case can fill those gaps. Nor can the Court itself "supply a reasoned basis for the agency's action that the agency itself has not given." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).

B. The Pharmacy Mandate Violates the Spending Clause.

The Pharmacy Mandate is an unconstitutional exercise of the federal spending power. The central concerns of Spending Clause jurisprudence are federalism and individual liberty. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) ("Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. . . . "[F]reedom is enhanced by the creation of two governments, not one."") (quoting *Bond v. United States*, 564 U.S. 211, 220–21 (2011)). In this case, separation-of-powers concerns are multiplied atop these traditional federalism and individual

liberty concerns by the Executive's unilateral adoption of significant conditions on the recipients of federal funds because "[t]he United States Constitution exclusively grants the power of the purse to Congress." *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018).

The legitimacy of an exercise of the federal spending power "'rests on whether the State voluntarily and knowingly accepts the terms of the "contract."'" *Sebelius*, 567 U.S. at 577 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). This leads courts to "scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence.'" *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). When "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Id.* at 580.

Here, Texas has no "genuine choice whether to accept the offer." *Id.* at 588. Texas pharmacies must either accept the new condition on federal funding or risk losing all Medicare, Medicaid, and other federal funding. TTUHSC pharmacies alone receive approximately $700,000 per year from Medicaid and Medicare recipients. Exhibit A, Bentley Decl. at ¶7. If the TTUHSC loses this funding, the State of Texas will be forced to redirect funding from other sources. *Id.* at ¶ 6. Forcing Texas pharmacies to comply with the Pharmacy Mandate under the threat of the loss of all federal funding is unconstitutionally "coercive"; it is a gun to the head that attempts to compel them to violate State law. *See Sebelius*, 567 U.S. at 580. HHS has no

authority to condition federal funding on such an untenable choice. The Pharmacy Mandate is not a valid exercise of the Spending Power.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant summary judgment in Plaintiffs' favor on all claims, and grant Plaintiffs all relief at law or equity to which it is justly entitled. A proposed form of order is attached.

Dated: September 15, 2023.

Respectfully submitted,

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COUNSEL FOR MAYO PHARMACY, INC.

CERTIFICATE OF SERVICE

We certify that a true and accurate copy of the foregoing document was filed electronically via CM/ECF and is being sent via CMRRR to Defendants.

/s/ William D. Wassdorf
William D. Wassdorf

/s/ Andrea R. Dill
Andrea R. Dill

EXHIBIT A

United States District Court
Western District of Texas
Midland Division

State of Texas *Plaintiff*, v. Xavier Becerra, in his official capacity as Secretary of Health and Human Services; United States Department of Health and Human Services; United States Department of Health and Human Services Office for Civil Rights, *Defendants.*	No. 7:23-cv-0002-DC

DECLARATION OF ERIC BENTLEY

My name is Eric Bentley, and I am over the age of 18 and fully competent in all respects to make this declaration. I have personal knowledge and expertise of the matters stated herein.

1. I am the Vice Chancellor and General Counsel of the Texas Tech University System (TTUS) and have been in my current position since September of 2018. In this capacity, I oversee the legal matters for TTUS and its five component institutions: Texas Tech University (TTU), Texas Tech University Health Sciences Center (TTUHSC), Texas Tech University Health Science Center El Paso (TTUHSC EP), Angelo State University (ASU), and Midwestern State University (MSU).

2. TTUS operates the following health sciences centers, both of which are separate State of Texas institutions of higher education: TTUHSC and TTUHSC EP.

3. TTUHSC operates retail pharmacies in Lubbock and Amarillo that receive Medicaid and Medicare funds.

4. I am aware of the federal government's guidance document titled, "Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services (attached here as Exhibit 1), and the federal government's press release regarding the same titled, "HHS Issues Guidance to the Nation's Retail Pharmacies Clarifying Their Obligations to Ensure Access to Comprehensive Reproductive Health Care Services" (attached here as Exhibit 2) (together, "Pharmacy Mandate").

5. The Pharmacy Mandate conditions federal Medicare and Medicaid funding on compliance with its terms.

6. If TTUHSC's retail pharmacies fail to comply with the Pharmacy Mandate, it could result in the significant loss of federal funds. Medicare and Medicaid funds received by TTUHSC are utilized to operate outpatient pharmacies that service TTUHSC patients, employees, and other community service activities such a vaccination clinics for Veterans Affairs patients or their spouses. If TTHUSC did not receive these funds, the impact would require the School of Pharmacy to allocate funds from other funding sources, including appropriated funds, to cover expenses normally paid from revenue generated, including staff salaries, training and continuing education costs, and could result in closing the pharmacies.

7. The following figures represents the approximate Medicare and Medicaid funding received by TTUHSC at its Lubbock and Amarillo pharmacies for the previous two fiscal years and fiscal year 2023 through May 10, 2023.

    - Fiscal Year 2021 (September 1, 2020 through August 31, 2021): $711,619.23.
    - Fiscal Year 2022 (September 1, 2021 through August 32, 2022): $714,015.06.
    - Partial Fiscal Year 2023 (September 1, 2022 through May 10, 2023): $242,772.25.

8. All the facts and information contained within this declaration are within my personal knowledge and are true and correct. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day, September 2023, in Lubbock, Texas.

ERIC BENTLEY

EXHIBIT B

United States District Court
Western District of Texas
Midland/Odessa Division

State of Texas, and Mayo Pharmacy, Inc., a North Dakota corporation, *Plaintiffs*, v. Xavier Becerra, in his official capacity as Secretary of Health and Human Services; United States Department of Health and Human Services; United States Department of Health and Human Services Office for Civil Rights, *Defendants.*	No. 7:23-cv-00022-DC

DECLARATION OF MAYO PHARMACY, INC.

I, Kevin Martian, PharmD, on behalf of Plaintiff Mayo Pharmacy, Inc. ("Mayo Pharmacy"), state the following:

1. I am a citizen of the United States and a resident of the State of North Dakota. I am competent to make this declaration and I make this declaration based on my personal knowledge.

2. I am the owner of Mayo Pharmacy, Inc.

3. From April 1, 2022 to March 31, 2023, Mayo Pharmacy filled 132,645 prescriptions.

4. 7,390 of those prescriptions were filled for patients paying with Medicaid.

5. 94,081 of those prescriptions were filled for patients who are 65 years old or older.

6. The extreme majority of Mayo Pharmacy's patients who are 65 years old or older pay with Medicare; only a select few use commercial insurance.

7. Based on the above numbers, I estimate that 76.5% of the prescriptions Mayo Pharmacy filled from April 1, 2022 to March 31, 2023 were filled for patients paying with Medicaid or for patients who are 65 years old or older. That percentage will likely be similar for the fiscal year that began on April 1, 2023.

8. Mayo Pharmacy could not continue to operate if it did not fill prescriptions for patients who pay using Medicaid or Medicare.

9. I religiously and ethically oppose myself and Mayo Pharmacy dispensing drugs in circumstances where they could cause the demise of an unborn human life after conception/fertilization (including in the zygotic or embryonic stage).

10. My objection includes but is not limited to instances where methotrexate is dispensed in the situation of an ectopic pregnancy where the baby's life has not been confirmed to have expired.

11. My objection includes situations where the abortion is either intended or has a reasonable risk of occurring.

12. In exercising my conscience in operation of Mayo Pharmacy, I try to ensure my judgments fall on the side of avoiding any participation in the destruction of unborn human life when possible.

13. In my ordinary practice as a pharmacist at Mayo Pharmacy, I would generally know the typical FDA-approved and common off-label uses for each drug I stock or dispense.

14. Generally speaking it is inappropriate for a licensed pharmacist, and I consider it inappropriate for myself and my pharmacy, to dispense drugs without knowing the indication or purpose of the prescription and the underlying physical condition of the patient, because otherwise the pharmacist cannot counsel on the prescription or assess the propriety of the dose.

15. For example, if dispensing amoxicillin for a child, a pharmacist would need to know the type of infection, because the dosing is generally higher for ear infections as compared to strep throat.

16. The ICD 10 code (diagnosis code) provides the pharmacist with this information the vast majority of the time. Most EMRs (electronic medical records) also attach a diagnosis code to the electronic prescription to give some information about the health circumstances and purposes of the prescription.

17. Consequently, I consider it my professional duty, and it is my regular practice, to know the purpose and health circumstances of the prescriptions I dispense and to know the approved and common off-label uses of drugs I stock.

18. Based on my ethical concerns relating to abortion, I take these duties particularly seriously for drugs that are prescribed for, can be used for, or can cause abortions or contraceptive effects, including drugs encompassed by the Pharmacy Mandate.

I hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 12th day of September, 2023, in Bismarck, North Dakota.

Kevin Martian, PharmD, on behalf of Plaintiff
Mayo Pharmacy, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

The State of Texas; and Mayo Pharmacy, Inc., a North Dakota corporation, *Plaintiffs*, v. United States Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; and United States Department of Health and Human Services Office for Civil Rights, *Defendants*.	**MO:23-CV-00022-DC**

PROPOSED ORDER

Before the Court is Plaintiffs State of Texas and Mayo Pharmacy, Inc.'s Motion for Summary Judgment ("Motion"). After considering the Motion, the response and reply thereto, the pleadings on file, and the arguments of counsel, the Court finds that there is no genuine dispute as to any material fact and therefore the relief requested in the Motion should be **GRANTED**.

It is therefore **ORDERED** that:

(1) Plaintiffs' Motion for Summary Judgment is **GRANTED**;

(2) the Pharmacy Mandate is declared unlawful and set aside;

(3) Defendants are permanently enjoined from enforcing the Pharmacy Mandate, either in the State of Texas or against Mayo Pharmacy, Inc.; and

(4) Defendants are permanently enjoined, either in the State of Texas, or as to Mayo Pharmacy, Inc., from enforcing the Pharmacy Mandate's interpretation that Section 1557 of the ACA or Section 504 of the Rehabilitation Act require pharmacies to dispense drugs for abortions.

It is **FURTHER ORDERED** that this is a final appealable judgment that disposes of all parties and all claims.

It is **FURTHER ORDERED** that any petition for attorneys' fees and expenses by the Plaintiffs shall be filed no later than 30 days after this entry of judgment.

SIGNED this ___ day of _____, 2023.

_____
DAVID COUNTS
UNITED STATES DISTRICT JUDGE