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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff,
vs.
ALEX M. AZAR II, et al.,
Defendants.

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,
Plaintiff,
vs.
ALEX M. AZAR, et al.,
Defendants.

COUNTY OF SANTA CLARA, et al.
Plaintiffs,
vs.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants.

No. C 19-02405 WHA
No. C 19-02769 WHA
No. C 19-02916 WHA

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: October 30, 2019
Time: 8:00 AM
Courtroom: 12
Judge: Hon. William H. Alsup
Action Filed: 5/2/2019

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INTRODUCTION

The Plaintiffs have explained how the Rule compromises our nation's healthcare system. Defendants' response cannot save the Rule from vacatur. They say that the Rule was necessary to provide clarity, but then repeatedly decline to provide guidance on its meaning—deferring to future "case-by-case" decision making. They say that the Rule accomplishes nothing more than the statutes and appropriations policy riders from which it is derived, but then claim to be empowered to design a new legal framework for employment discrimination in the healthcare field. They say that the Rule is consistent with federal law ensuring emergency care, but do not explain how. These assurances will not help a woman needing emergency, life-saving surgery due to an ectopic pregnancy whose nurse refuses to scrub in. Nor will they guide Plaintiffs in staffing their own hospitals and clinics to provide such care.

ARGUMENT

I. THE RULE WAS ADOPTED IN VIOLATION OF THE APA

A. The Rule Exceeds HHS's Statutory Authority

1. HHS Lacks Express Authority to Promulgate the Rule

Defendants fail to explain how any statute authorizes HHS to promulgate regulations that interpret and implement Church, Weldon, or Coats-Snowe ("Conscience Laws"). Tellingly, they do not identify such authority in any provision of these laws.[1] Rather, they argue that other federal laws authorize HHS to promulgate the Rule. *See* Defs. Reply 2-4. They are incorrect.

Defendants first argue that other federal statutes allow HHS to promulgate regulations that "correspond to or supplement" *other* regulations—the UAR and FAR—and that *these* supplemental HHS regulations authorize the Rule. *See id.* at 2-3 (citing 45 C.F.R. §§ 75.300(a), 75.371, and 75.500-75.520). Not so. HHS cannot grant itself, through its own regulations, the power to promulgate legislative rules interpreting and enforcing the Conscience Laws. "[T]he

[1] Contrary to Defendant's assertion, Plaintiffs did not "abandon[] argument" on any points. Defs. Reply 2. Plaintiffs explain how the Rule diverges in substance from the Conscience Laws, *see* Pls. Mot. 29-35, and in scope from the 2011 rule, *see id.* at 3. Unlike the instant Rule, the 2011 rule neither substantively defined a violation of the Conscience Laws nor imposed procedural burdens on Plaintiffs. It simply identified the Office for Civil Rights (OCR) as the HHS department that would "coordinate handling of complaints"—nothing more. *See id.* at 3.

exercise of quasi-legislative authority by governmental . . . agencies must be rooted in a grant of such power by the Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

Defendants also argue that several statutory provisions (10 U.S.C. ch. 137, 40 U.S.C. § 121(c), 42 U.S.C. §§1302, 18023, 18041, 18113, 263a, and 1315a, and 51 U.S.C. § 20113) directly grant HHS the relevant authority. Defs. Reply 2-3, 5. But none of these statutes has the required "nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. Indeed, none are remotely related to the Rule. For example, 51 U.S.C. § 20113 authorizes NASA to promulgate rules governing its operations; 10 U.S.C. ch. 137 governs procurement for the Department of Defense; and 40 U.S.C. §121(c) authorizes the Secretary of HHS to "issue orders and directives . . . necessary to carry out the regulations" issued by the Administrator of General Services—not to issue his own regulations. Moreover, the Supreme Court has held that the "housekeeping statute" (5 U.S.C. § 301) does not authorize "substantive rules." *Chrysler Corp.*, 441 U.S at 310. None of the statutes cited "contemplate[] the regulations issued." *Id.* at 308.

2. *Chevron* Deference Is Not Appropriate or Warranted Here

Defendants argue that the Rule's definitions are entitled to *Chevron* deference. Defs. Reply 4-6. They are not. *Chevron* applies "only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006). Neither the Conscience Laws nor any other statute cited by Defendants endows HHS with the authority to issue such a legislative regulation.

In the absence of any express delegation, Defendants attempt to invoke implicit authority (Defs. Reply 4-6), relying primarily on *Barnhart v. Walton*, 535 U.S. 212 (2002). But in *Barnhart*, the agency undisputedly *had* statutory rulemaking authority (*id.* at 217 217 ("[a]cting pursuant to statutory rulemaking authority")); the question was whether it was acting pursuant to that authority in interpreting the term "disability." *Id.* at 221-22; *see also Sierra Club v. Trump*, 929 F.3d 670, 692-93 (9th Cir. 2019). Here, Defendants lack such statutory authority altogether.

Moreover, even if they were applicable, the *Barnhart* factors would not support an implicit

delegation here. Defendants themselves contend that the definitions "reflect the unambiguous meaning of the terms in the Federal Conscience Statutes," and suggest that these laws are clear. Defs. Reply 4. Therefore, Defendants cannot plausibly contend that the definitions are "interstitial." Nor are the challenged definitions necessary to the administration of the Conscience Laws, which were implemented for decades without the Rule. Further, the regulatory definition at stake in *Barnhart* had been in place for two decades, during which "Congress ha[d] frequently amended or reenacted the relevant [statutory] provisions without chang[ing]" the accompanying regulatory definition, signaling its assent to the agency's interpretation. *Barnhart*, 535 U.S. at 220. The definitions challenged here have no similar tenure.

3. The Rule's Definitions Far Exceed the Underlying Statutes

The interpretation of a statutory provision begins with the plain language. *U.S. v. Lillard*, 935 F. 3d 827, 833–34 (9th Cir. 2019). If the language lacks a plain meaning, courts employ other tools, such as legislative history, to interpret it.[2] *Id.* Here, both plain meaning and legislative history demonstrate that HHS's definitions exceed the terms' statutory meanings.

Assist in the Performance. Where an undefined term has an accepted meaning in the particular area addressed by a statute, the specialized meaning governs. *See, e.g., Sullivan v. Stroop*, 496 U.S. 478, 483 (1990); *U.S. v. Cuomo*, 525 F.2d 1285, 1291 (5th Cir. 1976). "Assist in the performance" has an accepted meaning in the medical field: It refers to a medical professional helping a treating doctor by physically handling instruments or the patient. Chen Dec. ¶¶ 14-16; Zevin Dec. ¶¶ 8-10. In addition to Senator Church's statements disavowing "objection[s] from someone unconnected to the procedure" (Pls. Mot. 32), the congressional record is replete with references to "doctors and nurses" as the types of individuals Congress intended the law to cover. *See, e.g.*, 2nd RJN Ex. G (119 Cong. Rec. S9597, S9598, S9599, S9600, S9601 (Mar. 27, 1973)).[3]

[2] Courts also use all traditional aids of statutory interpretation in a *Chevron* inquiry. *Altera Corp. & Subs v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019). Thus, in the event the Court applies *Chevron*, these arguments also support a ruling for Plaintiffs under that test.

[3] Defendants' assertion that this legislative history is entitled to little or no weight is incorrect. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement of one of legislation's sponsors deserved to be accorded "substantial weight" in interpreting statute); s*ee also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 & n.12 (1987) (the court may review legislative history to resolve the scope of a statute).

Defendants attempt to justify their broader definition of the term by citing the standard dictionary definitions. Defs. Reply 7. But "where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan*, 496 U.S. at 483.[4] Furthermore, the standard dictionary definitions of "assist" and "performance" underscore that Congress intended to require a close and direct nexus to the objected-to activity: "Performance" means "the execution of an action," and to "assist" means "to give support or aid," such as when "another surgeon [assisted] on the operation." Merriam-Webster's Collegiate Dictionary 70,863 (10th ed. 1996).

Referral or Refer for. "Referral," too, has an accepted meaning in the medical field: a provider directing a patient to another provider for care. Merriam-Webster's Medical Dictionary defines "refer" as "to send or direct for diagnosis or treatment." And Stedman's Medical Dictionary for the Health Professions and Nursing (7th ed. 2011) defines "referral" as "health care services that are ordered or arranged." But the definition in the Rule goes far beyond this, sweeping in the provision of any information that could potentially assist a person in receiving an abortion. Merely sharing information about the availability of abortions would be a "referral" under this expansive definition. This is inconsistent with the accepted meaning of the term.

Discriminate or Discrimination. Defendants attempt to deny that HHS's definition of "discrimination" has any meaning at all, suggesting that it merely incorporates the underlying statutes and provides that certain actions do *not* constitute discrimination. Defs. Reply 8. The Rule's preamble tells a different story, explaining that HHS's interpretation requires covered entities "to respect objections based on religious beliefs by accommodating them" but does "not incorporat[e] the additional concept of an 'undue hardship' exception for reasonable accommodations . . . ." 84 Fed. Reg. 23,170, 23,191 (May 21, 2019). It is inconceivable that Congress intended silently to impose an *unlimited* accommodation obligation in the healthcare field—where life or death may be at stake—when just a year earlier it *expressly* imposed a far

[4] Defendants cite *Langandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004) for the proposition that the Ninth Circuit "regularly consults *Merriam-Webster*." Defs. Reply 7. But that case involved e interpretation of the word "when"—not a multi-word medical term of art.

more limited religious-accommodation obligation on all covered employers in Title VII.[5] *See also U.S. v. Davis*, 139 S. Ct. 2319, 2327 (2019); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (statutory terms should be understood in a manner "most compatible with the surrounding body of law into which the provision must be integrated"). Defendants' expansion of "discrimination" to require accommodations that *would* impose undue hardship on the employer's business finds no support in the language of Church, Coats-Snow, or Weldon, and its departure from Congress's intent must be rejected.

Health Care Entity. Defendants attempt to use the word "include" in Coats-Snowe and Weldon to dramatically expand the definition of health care entity. While Congress's statutory language focused exclusively on healthcare professionals and organizations, the Rule's definition extends to all "health care personnel," 84 Fed. Reg. 23,264, which HHS defines as to include clerical, dietary, house-keeping, laundry, security, maintenance, billing, and other staff "not directly involved in patient care." 2nd RJN Ex. C at 1. This defies the basic principle of statutory construction that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Defendants offer no response to this argument. Pls. Mot. 31-32.

The Rule Covers Scenarios Not Covered Under the Conscience Laws. By re-defining the relevant statutory terms in this capacious manner, Defendants have expanded the universe of potential refusers and the breadth of possible refusals far beyond anything contemplated in the underlying statutes. For example—and in response to the Court's question (Dkt. No. 135)—as a result of the expanded definitions, the following illustrative scenarios that were not covered by the Conscience Laws are now covered by the Rule:

- A receptionist refusing to schedule an abortion or housekeeping staff refusing to prepare a

[5] In 1964, Congress enacted Title VII, prohibiting employment discrimination on the basis of religion without defining what constituted "religious discrimination." Later, in a 1972 amendment to Title VII, Congress defined the term "religion," focusing primarily on an employer's obligation to "reasonably accommodate" an employee's religious practices—*unless doing so would impose undue hardship on the conduct of the employer's business*. 42 U.S.C. § 2000e(j). The next year, Congress passed Church. Coats-Snowe and Weldon followed.

room for an abortion (84 Fed. Reg. 23,186-87, 23,263-64 (definitions));

- Nursing staff refusing to provide routine "pre- and post-operative support" in connection with abortion or sterilization procedures (*id.* at 23,187);
- Personnel refusing to drive a patient to an abortion in an emergency (*id.* at 21,188); and
- Billing staff refusing to answer questions about insurance coverage for abortion or sterilization (*id.* at 23,263-64 (definitions)).

In addition, the Rule also appears to cover a hysterectomy performed to treat medical conditions such as cancer or gender dysphoria.[6] Such procedures are not covered by Church's use of the term "sterilization," Ettner Supp. Dec. ¶¶ 8, 16, which in medical parlance refers to procedures undertaken *for the purpose of preventing pregnancy*. *See, e.g.*, *Sterilization*, MAGILL'S MEDICAL GUIDE VOL. 5 (6th ed.) ("Sterilization . . . is a permanent method of surgical contraception."). Indeed, HHS itself defines sterilization to mean "a form of contraception (birth control) that is meant to be permanent." 2nd RJN Ex. D; *see also* Ettner Supp. Dec. ¶ 7. By contrast, treatment for gender dysphoria or cancer may *incidentally* affect reproductive function, but that is not its purpose. Ettner Supp. Dec. ¶ 14. Nonetheless, the Rule indicates that employees could opt out of these procedures for religious reasons. That HHS intends "sterilization" within the meaning of the Rule to cover hysterectomies is evident from the Rule's reference to *Minton v. Dignity Health*, 2019 WL 4440132 (Cal. App. Ct. Sep. 17, 2019)—in which a hospital was sued for refusing to perform a hysterectomy to treat a transgender man's gender dysphoria—as an example of "requir[ing] private religious entities to perform . . . sterilizations . . . ." 84 Fed. Reg. 23,178. And nowhere have Defendants clarified that such procedures are *not* covered. Instead, HHS states that it will make these determinations on a "case-by-case basis"—meaning that in at least some situations, they *will* be covered. 84 Fed. Reg. 23,205; Defs. Reply 24-25.

Finally, the Rule could also be read to cover urgent medical treatment that one might consider to be the termination of a pregnancy, such as surgery to address bleeding due to ectopic pregnancy. 84 Fed. Reg. 23,188. This scenario is not covered by Weldon. *See* 2nd RJN Ex. H

[6] Critically, while *no* gender affirming medical treatment can be considered to be a sterilization procedure, Ettner Supp. Dec. ¶¶ 8, 16, a vast array of gender affirming healthcare does not affect fertility at all (e.g., chest surgery, electrolysis, vocal cord surgery), and some, such as hormone therapy, at most have only an incidental and nonpermanent effect on fertility. *Id.* at ¶¶ 10-11. To the extent that any of these are covered by the Rule, it would represent a dramatic expansion.

(151 Cong. Rec. H177 (Jan. 25, 2005) (Senator Weldon: the law "ensures that in situations where a mother's life is in danger a health care provider must act to protect a mother's life")). It is not covered by Coats-Snowe. *See* 2nd RJN Ex. I (142 Cong. Rec. S2269 (Mar. 19, 1996) (Senator Coats: "[A] resident needs not to have [previously] performed an abortion . . . to have mastered the procedure to protect the health of the mother if necessary")). And it is not covered by Church. 2nd RJN Ex. G at S9601 (Senator Church: "[I]n an emergency situation—life or death type—no hospital, religious or not, would deny such [abortion or sterilization] services.").

But it appears Defendants believe these scenarios are covered by the Rule; thus impacting Plaintiffs' existing policies requiring assistance during an emergency that comply with the underlying statutes but appear to be in conflict with the Rule. Defendants have made no statement that the Rule does not disturb providers' obligations to provide appropriate care in an emergency. And although dozens of comments referenced ectopic pregnancies, the Rule mentions their treatment only once—and *never* says they are not covered. To the contrary, it implies that even transporting someone to the hospital to be treated for an ectopic pregnancy could be covered. 84 Fed. Reg. 23,188. This exceeds the scope of the underlying statutes.

B. The Rule Conflicts With Existing Healthcare Laws

EMTALA. Defendants fail to answer Plaintiffs' citation to multiple instances in the record that show real patient harm from denials of emergency care. Pls.' Mot. 37, n.58. Nor do they address the concerns about emergency care raised in the amicus briefs.[7] After claiming that they are "not aware of any instance" where a facility's entire emergency staff objected to providing care (Defs. Mot. 24), when faced with these concrete examples, Defendants have no retort.

Moreover, Defendants still fail to explain how a rule that does not have exceptions for medical emergencies is to be "read . . . in harmony" with EMTALA's clear directive that a hospital "must" provide appropriate care for emergency-room patients. *Compare* 84 Fed. Reg. 23,183 *with* 42 U.S.C. § 1395dd(a).[8] Defendants' mere assurance that there will be no conflict,

[7] *See, e.g.*, Local Governments Brief, Dkt. No. 119-1 at 13 n.55 (noting that the Rule would have a disproportionate effect on low-income patients seeking ambulance transport).

[8] *See also* Local Governments Brief, Dkt. No. 119-1 at 12 (a minute's delay in some life-threatening cases can have a measurable impact on mortality rates); SEIU Local 1021 Brief, Dkt. No. 99 at 11 (similar); App'x. 16 at 147982 (discussing staffing challenges of emergency rooms).

obscures the agency's analytical path, and does not represent a "thoughtful" or "satisfactory" explanation. Meanwhile, the lives of patients hang in the balance. *California v. U.S.* acknowledged that Weldon can be reconciled with EMTALA because Weldon allows for emergency abortions. 2008 WL 744840, at *4 (N.D. Cal. Mar. 18, 2008). By contrast, the Rule enables refusals of care in emergencies (including abortions), and therefore supports no such balance with EMTALA. 84 Fed. Reg. 23,188 (contemplating refusals for ectopic pregnancies).

ACA Section 1554. In arguing that Plaintiffs' interpretation of Section 1554 would "render meaningless . . . many Federal Conscience Statutes," Defs. Reply 10, Defendants ignore the Section's text, which forbids the HHS Secretary to "promulgate any *regulation*" that "creates," "impedes," "interferes with," "restricts," or "violates" healthcare rights and access. 42 U.S.C. § 18114 (emphasis added). The Rule does all of that. *See* Pls. Mot. 35 (citing Facts III.A-C). Section 1554 bars administrative rulemaking, not preexisting federal conscience laws that have coexisted with Section 1554 since its passage almost a decade ago. Defendants similarly attempt to expand the breadth of 42 U.S.C. § 18023(c)(2), claiming it applies generally to "federal conscience protections," including the Rule. Defs. Reply 11. But the provision applies explicitly to "Federal laws"—i.e., existing federal conscience laws—not to everything tangentially related to federal conscience protections, and certainly not to Defendants' attempt to illegally and unconstitutionally expand the scope of these statutes. *See* 42 U.S.C. § 18023(c)(2).

ACA Section 1557. The Rule allows virtually anyone remotely associated with the provision of healthcare to discriminate against women and LGBT people. Pls. Mot. 37. In fact, the Rule singles out these patients for discriminatory denials of care, even in emergency circumstances.[9] This directly conflicts with Section 1557 (42 U.S.C. § 18116), which Congress enacted to prohibit discrimination in healthcare. *Rumble v. Fairview Health Servs.*, 2015 WL 1197415, at *11 (D. Minn. Mar. 16, 2015).[10] Defendants make no effort to reconcile the Rule with these vital anti-discrimination consumer protections enacted by Congress. Instead,

[9] 84 Fed. Reg. 23,176 & n.27, 23,188, 23,251.

[10] *See also Edmo v. Idaho Dep't of Corr.*, 2018 WL 2745898, at *9 (D. Idaho June 7, 2018); *Doe One v. CVS Pharmacy, Inc.*, 348 F. Supp. 3d 967, 981-82 (N.D. Cal. 2018).

Defendants appear to rely solely on 42 U.S.C. § 18023(c)(2); but for the reasons stated immediately above, this argument fails. An agency interpretation that contradicts clear congressional intent or that frustrates the policy Congress sought to implement is contrary to law and cannot stand. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002).

Title X. That clinics may choose whether to provide pregnancy counseling within Title X programs is beside the point; Congress has mandated that all Title X-funded "pregnancy counseling shall be nondirective." Pub. L. No. 115-245, 132 Stat. 2981, 3070-71 (2018). The Rule's massive expansion of definitions creates an absolute right for an individual or entity to refuse to provide *any* information about abortion to Title X patients seeking pregnancy counseling. Defendants also appear to imply that even if one employee refuses to provide Title X service, others in the facility will ensure that services are provided, ignoring that the Rule broadly permits intake staff to turn away patients without informing their employer or coworkers that they have done so, denying other staffers the opportunity to provide the refused service.

C. The Rule Is Arbitrary and Capricious

Impact on Patients. The Rule was promulgated without sufficiently addressing numerous comments demonstrating that the Rule's expansion and prioritization of unfettered religious objections would harm patients. Pls. Mot. 16-20. That same failure is reflected in Defendants' brief. Defendants rely heavily on their ill-founded conclusion that the Rule will encourage more religious people to work in healthcare, but they simply dismiss as unimportant the costs borne by patients who need types of care that objectors will refuse to provide. Defendants contend that the Rule "does not require any entity to refuse to provide care to patients," Defs. Reply 15, but ignore comments explaining that the Rule will create powerful incentives for entities to discontinue offering the types of care likely to garner objections (*see* Pls. Mot. 17-18 & n.32). Defendants also dismiss the myriad concerns raised by commenters as "far-fetched," Defs. Reply 15, but they offer no reasoned response to the many concrete problems that were identified—including the Rule's adoption of an accommodation scheme affording no emergency exceptions, its approval of objections to providing medically necessary information to patients, and its conflicts with providers' longstanding policies for accommodating religious objections while ensuring the

delivery of high-quality care to patients, including in emergencies. Pls. Mot. 19-20; *see supra* Section I.A.3 (providing examples of the Rule's departures from the underlying statutes). Defendants argue that HHS had no obligation to study the likely effects of the Rule on patients' access to care, Defs. Reply 17, but the agency's refusal to credit the evidence presented was arbitrary and capricious.

Impact on Providers. Executive Order 12,866 instructs agencies to consider direct costs, as well as "any adverse effects" the rule might have on "the efficient functioning of the economy, private markets . . . health, safety, and the natural environment." Exec. Order No. 12,866 § 6(a)(3)(C)(ii) (58 Fed. Reg. 51,735 (Oct. 4, 1993)). Defendants failed to consider staffing burdens for employers who must accommodate refusals. *See* 84 Fed. Reg. 23,227, tbl.1 (listing quantified and non-quantified costs that HHS considered).[11] Defendants are also silent as to how providers are supposed to address the conflicts that the Rule creates with established ethical guidelines. *See* App'x 21 at 4. Defendants' focus on exemptions from the assurance and certification requirements also fails, as the number of regulated entities is grossly underestimated. States and counties are counted only once each, meaning that the three public entities, for example, each count the same amount as an individual physician's practice, thus neglecting the many impacted departments and agencies within the State, and the five hospitals and dozens of County- and City-run clinics that must comply. See 84 Fed. Reg. 23,234, tbl.2.

Complaints. Despite conceding that a "large subset of [complaints received concerned] conduct that is outside the scope of the Federal Conscience Statutes and the Rule," Defendants nevertheless continue to maintain that these complaints "illustrate the need for HHS to clarify the scope and effect of the Federal Conscience Statutes." Defs. Mot. 27. Even the complaints attached to Defendants' reply do not justify the Rule's overreach. Defendants' attack on California laws (Exhibit 6) continues to be resolved in the courts in California's favor;[12]

[11] *See also* Institute for Policy Integrity brief, Dkt. No. 107-1 at 4-12; App'x 63 (Santa Clara) at 55812-13; App'x 162 (SFDPH) at 134792-93; App'x 41 (CMA); App'x 16 (Am. C. of Emergency Physicians) at 147982; App'x 128 (Nat'l Fam. Plan. & Reprod. Health Ass'n) at 138111-12.

[12] *See Missionary Guadalupanas v. Rouillard*, 38 Cal. App. 5th 421 (2019); *Skyline v. Cal. Dep't of Managed Health Care*, 313 F. Supp. 3d 1225 (S.D. Cal. 2018); *Foothill Church v.*

successful legal challenges to other state laws (Exhibits 8 & 13) are being resolved by OCR under the current rule;[13] and individual complaints (*e.g.*, Exhibits 7 and 11) are being resolved in the courts or by OCR under the current rule.[14] Finally, the 2005 complaint, Exhibit 14, together with documents produced in response to California's FOIA request, suggests Defendants are grasping to justify their overreach ("Now these are legit cases!" in reference to complaints). 2nd Palma Dec., Ex. D. Indeed, those records show that the complaints were reviewed as an afterthought on the eve of the proposed rule's release on January 19, 2018. *Compare id. with* 2nd Palma Dec., Exs. F & G. The Court is not required to accept a "contrived" justification that is not "genuine." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

Title VII. The Rule greatly expands an employee's ability to refuse to provide healthcare services by requiring that any accommodation be voluntary and by restricting inquiry into whether employees have religious objections to core duties. 84 Fed. Reg. 23,263 (definition of "discrimination"). Defendants attempt to minimize the impact of this change, arguing that Title VII's scope is too sprawling to apply to "the more targeted conscience statutes . . . which are health care specific." Dfs. Reply 18. But the fact that the conscience laws are situated in a healthcare context where employers require staff to address time-sensitive and potentially life-threatening situations heightens, not diminishes, the need to justify a change from the well-established Title VII accommodation process, which has informed decades of implementing these statutes. Pls. Mot. 25-27.

Defendants contend that they were "not required to incorporate *standards* from that separate statute [Title VII]," Defs. Reply 18 (emphasis added), presumably referring to the "undue hardship" exception in 42 U.S.C. § 2000e(j). But it is Defendants' failure to provide even the "minimal level of analysis" to explain how the new accommodation process will work that makes the Rule unlawful. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

Rouillard, 371 F. Supp. 3d 742 (E.D. Cal. 2019). The letter submitted at Dkt. No. 136-2 at 10-11 surmises that the Rule would have "obviated" the need for litigation in *Foothill*—this would have only occurred by the State being forced to abandon its valid law to avoid a loss of funding.

[13] *See, e.g.*, https://www.hhs.gov/sites/default/files/hawaii-ocr-notice-of-resolution-final.pdf.

[14] *See Pedro v. Duke University*, No. 1:17-cv-00985 (M.D.N.C.), Dkt Nos. 1 (Title VII complaint) and 31 (dismissal); https://www.hhs.gov/sites/default/files/uvmmc-nov-letter_508.pdf.

II. THE RULE VIOLATES THE CONSTITUTION

A. Spending and Establishment Clause Claims Are Ripe

Defendants' focus on a purported absence of a concrete enforcement action ignores that the Rule requires Plaintiffs to comply immediately with new restrictions or risk serious penalties. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967) (*overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). [15] Indeed, the Rule requires that Plaintiffs undertake extensive and costly compliance measures that will adversely affect their policies, hiring practices, and patient care.[16] Thus, Defendants' assertion that the Rule is not a "sea change" is disingenuous, and indeed, is flatly contradicted by Defendants' own Factsheet on the Rule[17] and by their estimated implementation costs starting in year one. 84 Fed. Reg. 23,241-42; *see also* Aizuss Dec. ¶¶ 32-33; Dkt. 107-1 at 11-12 (discussing additional implementation costs).

Defendants again rely on *California*, 2008 WL 744840, arguing that California's Weldon challenge did not survive a ripeness defense even though Weldon also mandated a "future course of action." But the Rule imposes onerous compliance requirements not grounded in Weldon. 2nd RJN Ex. G at S9601 ("[Weldon] does not impose any requirements on the hospital"); S9602.

B. The Rule Violates the Spending Clause

Defendants' Spending Clause defense fails wholesale because the Rule is not merely a slight "adjustment" (Defs. Reply 20). *See supra* Section I.A. In *NFIB v. Sebelius*, 567 U.S. 519, 583 (2012), the Supreme Court held that the ACA's Medicaid expansion provisions "expanded the boundaries" of the original Medicaid program by extending eligibility from "four particular categories of the needy" and transforming it into "an element of a comprehensive national plan to provide universal health insurance coverage." The same is true here, where the Conscience Laws

[15] Defendants claim Plaintiffs "have not been the subject of any enforcement action," but overlook evidence of enforcement against California, Pls. Mot. 4-5 & nn.2-3, and the Rule's unlawful expansion of protected entities that attempt to give standing for the complainants of the re-opened complaint to create immediate enforcement threat under Rule. App'x. 396-98; Palma Dec. Ex. B.

[16] Aizuss Dec. ¶¶ 30-35; Buchman Dec. ¶¶ 9-10; Cantwell Dec. ¶¶ 4-12; Chen Dec. ¶¶ 5-13; Cody Dec. ¶¶ 6-10; Colwell Dec. ¶¶ 5-10; Drey Dec. ¶¶ 10-13; Hanna-Weir Dec., Ex. A (Nguyen Dec. ¶¶ 3-9); Harris-Caldwell Dec. ¶¶ 5-16; Hinze Dec. ¶¶ 3-7; Lara Dec. ¶¶ 9-11; Lorenz Dec. ¶¶ 11-21; Miller Dec. ¶¶ 3-7; Nunes Dec. ¶¶ 5-19; Parmelee Dec. ¶ 10; Price Dec. ¶¶ 2-14; Singh Dec. ¶¶ 3-13; Sproul Dec. ¶¶ 3-14; Toche Dec. ¶¶ 2-12; Tullys Dec. ¶¶ 2-14; Weigelt ¶ 4.

[17] 2nd RJN Ex. E (*see* "scope" of changes); 2nd RJN Ex. F (announcing "new protections").

apply only to specific circumstances in which healthcare providers or certain enumerated entities may not be required to participate in abortions, sterilizations, or certain health service programs and research activities, but the Rule creates a singular, "comprehensive" exemption to the performance of any healthcare service by even the most marginally involved individual or entity, without the restraints imposed by laws that ensure safe nondiscriminatory healthcare. The Rule thus accomplishes a shift in kind, not merely degree. *Id*. And the Rule's compliance, assurance, and certification requirements, 45 C.F.R. § 88.4(a)(1), (2), obligate recipients and sub-recipients to comply immediately as a condition of continued funding. 84 Fed. Reg. 23,269. The federal government cannot use its spending power to compel states and local jurisdictions to adopt specific policies. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. 2017).

And contrary to Defendants' assertion, the switch from the word "shall" to "may" in 45 C.F.R. § 88.6(a) does not resolve ambiguities about sub-recipient liability. The Rule's preamble states in no uncertain terms "that recipients are responsible for their own compliance with Federal conscience and anti-discrimination laws and implementing regulations, *as well as for ensuring their sub-recipients comply with these laws*." 84 Fed. Reg. 23,180 (emphasis added). It also says that states and local governments may be liable for the conduct of any entity they contract with. *Id.* at 23,207. And if OCR determines that there is noncompliance, the Rule authorizes it to terminate, deny, or withhold federal funds. 45 C.F.R. § 88.7(i)(3)(iv)-(v).

The Rule thus violates the Spending Clause, as it requires states and local governments to create a costly bureaucratic structure to ensure that the Rule's unlawful provisions are complied with, including by any downstream sub-recipients, whether public or private.[18] *NFIB*, 567 U.S. at 578. But even if such a structure could be implemented, it still would not be enough to assure compliance given the Rule's vagueness. The administrative burdens and costs (which will also affect providers, patients, and insurers) are unnecessary because existing laws already protect conscience rights, while also balancing patients' rights of access to lawful medical care. The Rule also creates ambiguities where none existed, despite claims of greater clarity. *See supra*

[18] Cantwell Dec. ¶¶ 6-8; Ghaly Dec. ¶ 11; Lorenz Dec. ¶¶ 12-13; Nunes Dec. ¶¶ 6-8, 13-14.

Section I.A.3. For example, the Rule protects against "discrimination" against *any* "health care personnel" who denies medical care (or refuses to perform any action that has an "articulable connection" to furthering a procedure, including a referral) on the basis of "ethical[] or other reasons." 84 Fed. Reg. 23,263-64. This indefinite language fails to describe the ceiling or the floor. Plaintiffs do not have the fair notice they need to ensure compliance with the Rule. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hr'g*, 903 F.2d 635, 646 (9th Cir. 1990) ("broad interpretations of ambiguous language" in a condition of funding violate the Spending Clause).

Defendants also fail to explain how a rule intended to robustly enforce Weldon does not implicate funding for labor and educational programs (in addition to HHS funding).[19] This ambiguity violates the Spending Clause because it is impossible for regulated entities to know the scope of funding that is potentially threatened. Thus, *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) does not save the Rule because the "existence of the condition" is not "explicitly obvious." Because all such funding is at risk, the Rule's conditions are wildly unrelated to conscience objections. *See* Pls. Mot. 42.

C. The Rule Violates the Establishment Clause

1. The Rule Burdens Third Parties, Including Plaintiffs and Patients

Plaintiffs do not argue that *any* burdens on third parties violate the Establishment Clause—only that *material* burdens do. Pls. Mot. 43. The cases that HHS cites do not hold otherwise.[20]

[19] *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. B, § 507(d)(1), 132 Stat. 2981, 3118 (none of the funds in this "Act" may be made available to a federal agency or program, or to a state or local government found in violation of Weldon); see also § 3, 132 Stat. at 2981 (defining "Act" to refer to provisions affecting funding for the Departments of Labor, Health & Human Services, and Education).

[20] *Amos* does not conflict with but underscores this constitutional principle. Pls. Mot. 45 & n.67. Justice Kennedy's separate concurrence in the judgment in *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet* acknowledges that "[t]here is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment." 512 U.S. 687, 725 (1994) (Kennedy, J., concurring). And *Gillette v. United States*, 401 U.S. 437, 448–54 (1971), holds only that the statutory conscientious-objector exemption from the draft did not unconstitutionally discriminate between similarly situated religious objectors. *Gillette* did not present the question whether the exemption impermissibly harmed identifiable nonbeneficiaries, which it did not, as an objector's excusal adds no meaningful burden for any identifiable individual, *see, e.g.*, Geddicks & Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.–C.L. L. Rev. 343, 364 (2014).

And HHS's position that burdens on third parties alone are never sufficient to violate the Establishment Clause is irreconcilable with *Cutter v. Wilkerson*, 544 U.S. 709, 720 (2005), *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989), and *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). The Rule requires employer hospitals to privilege their employees' religious beliefs above the employers' own organizational missions and staffing needs. *Caldor*, 472 U.S.at 710. This Court need not identify the precise threshold beyond which accommodations become unconstitutional religious preferences because the burdens here are far greater than those that *Caldor* and *Texas Monthly* struck down. *See* Pls. Mot. 43–44.

2. The Rule Impermissibly Favors Religion and Some Religious Beliefs

Governmental action also violates the Establishment Clause if its "ostensible object" or primary effect is to advance religion, regardless of whether it also serves additional secular aims. *E.g.*, *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860, 863 (2005); *Texas Monthly*, 489 U.S. at 14–16. HHS cannot evade these constitutional restrictions by writing the Rule in purportedly neutral terms. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 699 ("identification here of the [favored] group . . . in terms not expressly religious" "does not end" the inquiry into whether the law affords unconstitutional religious preferences); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–33 (1993) (explaining that the Establishment Clause "extends beyond facial discrimination" and "forbids subtle departures from neutrality"). Tacking on "moral" objections does not alter this basic reality: The Rule is designed to, and will, favor some people's religion over patients' lives and the public health.[21] The Rule's primary purpose and primary effect are to advance religion and the particular religious beliefs that overwhelmingly supply the objections the Rule is designed to address. HHS has been transparent about its goal: "The rule will promote protection of religious beliefs and moral convictions. . . . As James Madison . . . wrote, 'The Religion then of every man must be left to the conviction and conscience of every man . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be

[21] "Moral objections" likely count as religious objections, thus still favoring religion. *See Welsh v. United States*, 398 U.S. 333, 340 (1970) ("deeply and sincerely [held] beliefs that are purely ethical or moral in source and content" may be entitled to religious accommodation).

acceptable to him.'" 84 Fed. Reg. 23,246.

Additionally, the Rule privileges religious beliefs that oppose certain procedures over those that require the procedures or support the provision of care consistent with patients' autonomy—a denominational preference that cannot survive strict scrutiny under *Larson v. Valente*, 456 U.S. 228, 244–46 (1982). And as already explained, Pls. Mot. 45-46, because HHS is lifting burdens on religious exercise not of its own making, the Rule impermissibly elevates favored religious beliefs over other people's beliefs, rights, and interests. *Caldor*, 472 U.S. at 709–10.[22]

D. The Rule Violates Patients' Equal Protection and Due Process Rights

Defendants now concede that physicians who provide reproductive healthcare may assert third-party standing on behalf of their patients. Defs. Reply 23. Contrary to Defendants' assertions, Dr. McNicholas *does* provide "full-spectrum reproductive healthcare, including second-trimester abortions, medical and surgical abortions in the first trimester." *Id*. at 23-24; McNicholas Dec. ¶ 6. Moreover, Defendants do not counter that doctors have standing to represent the interests of patients seeking gender-affirming care. Defs. Reply 25, n.14.[23]

Defendants misconstrue the harms to the patients of the nongovernmental Santa Clara Plaintiffs [24] as "potential downstream effects." Defs. Reply 25. These Plaintiffs have demonstrated, and Defendants do not deny, that the Rule will immediately empower a broad class of individuals to delay or deny access to abortion, contraception, and gender-affirming care—deterring these patients from seeking these services and creating strong incentives for providers to

[22] In contrast, Title VII's religious-accommodation provision ameliorates burdens on employees' religious exercise imposed by the statute's nondiscrimination provisions, which otherwise would arguably bar employers even from *voluntarily* accommodating religion, for that is different treatment based on religion. And by not requiring accommodations that impose more than *de minimis* costs on employers or other employees, *see, e.g.*, *Trans World Airlines v. Hardison*, 432 U.S. 63, 81, 84 (1977), Title VII avoids materially burdening nonbeneficiaries.

[23] *See* Carpenter Dec. ¶¶ 5-8 (LA LGBT Center cared for a transgender woman suffering from life-threatening medical conditions resulting from outside providers denying her medical care and delaying her treatment); Bolan Dec. ¶¶ 5-9; Henn Dec. ¶¶ 6-8; Pumphrey Dec. ¶¶ 5-8; Ettner Dec. ¶¶ 21-22 (studies show a 41%-43% rate of suicide attempts among transgender patients and patients suffering from untreated gender dysphoria have greater life-threatening health risks).

[24] Contrary to Defendants' suggestion, Defs. Reply at 23, Plaintiffs assert their equal protection and due process claims on behalf of the patients of the non-governmental *Santa Clara* Plaintiffs—medical providers, associations, and physicians. Pls. Mot. at 47-51. Plaintiffs' free speech claim is asserted on behalf of transgender patients specifically. *Id.* at 51-52.

eliminate these services, in violation of their patients' due process rights.[25] Pls. Mot. 49-50. The evidence demonstrates that religious and moral refusals have *already* harmed patients across the country in need of this care. *Id*. at 16-20. The harm is inherent in the Rule itself, is not dependent on any enforcement by HHS, and is described in detail by Plaintiffs' declarants.[26] Indeed, HHS acknowledges these harms in the Rule itself. 84 Fed. Reg. 23,251 (describing harm to patients that will result from denials of care under the Rule, including lack of access to services and emotional harm); *id*. at 23,207 (empowering healthcare institutions to eliminate services based on financial constraints created by moral or religious objection).

In sum, Plaintiffs have established that the Rule enables individuals and entities to delay, deny, and otherwise obstruct patient access to abortion, contraception, and gender-affirming care in violation of their Due Process rights. *See Planned Parenthood of the Great Nw. & the Haw. Islands v. Wasden*, 2019 WL 3325800, at *5 (D. Idaho July 24, 2019) (plaintiffs stated a claim where they alleged that a state law interfered with patients' access to abortion care by constricting the pool of providers; *Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075, 1090 (D. Ariz. 2016) (plaintiffs stated a claim where a state law imposed requirements on physicians that interfered with informed consent prior to an abortion).

Moreover, the Rule targets Plaintiffs' transgender patients via its discriminatory mischaracterization of medically-necessary healthcare procedures sought by transgender patients to treat gender dysphoria as "sterilization," inviting religious and moral objections to providing such lifesaving-care. *See supra* Section I.A.3. Defendants attempt to evade their purposeful discrimination via misleading arguments that they never defined the term "sterilization" and would consider the Rule's application to transition-related healthcare on a "case-by-case basis." Defs. Reply 24-25; *but see* 84 Fed. Reg. 23,178, 23,205. Equating treatment for gender dysphoria with "sterilization" is medically inaccurate, contrary to the plain meaning of the term, and ignores

[25] Plaintiffs have addressed why this challenge is not foreclosed by *Rust v. Sullivan*, 500 U.S. 173 (1991), which does not preclude a finding that a particular funding condition imposes an undue burden on patients' right to abortion or other due process violation. Pls. Mot. 50-51.

[26] *See* Barnes Dec. ¶¶ 28-31; Burkhart Dec. ¶¶ 23-25; Ettner Dec. ¶¶ 13-23, 48-56; McNicholas Dec. ¶¶ 19-47; Phelps Dec. ¶¶ 14-28, 34-35, 42-44.

that procedures undertaken for the purpose of sterilization are distinct from procedures undertaken for other purposes that only incidentally affect reproductive function (such as a prostatectomy for prostate cancer). *See* Ettner Supp. Dec. ¶¶ 6, 8, 14, 16; Ettner Dec. ¶ 46; Valle Dec. ¶ 13. The Rule targets transgender patients and treats them unequally by misapplying the term "sterilization" to invite providers to deny care to transgender patients.

E. The Rule Violates Plaintiffs' Patients' Free Speech Rights

Defendants continue to misstate Plaintiffs' Free Speech claims and their reliance on *Rust* is inapposite. *Rust* was about compelled speech, whereas Plaintiffs here bring a chilled-speech claim because the Rule prevents Plaintiffs' patients from disclosing their transgender status, gender identities, and medical histories, and from engaging in gendered expression, out of fear of being denied treatment.[27] Defendants do not dispute that the Rule exacerbates transgender patients' fear and has the "inevitable effect of burdening," *Doe v. Harris*, 772 F.3d 563, 574 (9th Cir. 2014), LGBT patients' speech and expression. It does not matter that this chilling depends on both governmental and nongovernmental actors (the objecting employees), because the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 463, 465 (1973). The Rule cannot satisfy the rigorous First Amendment scrutiny required because there is no sufficient justification for its significant harms, especially when there is a readily available, workable alternative—the policies put in place under the narrower statutes enacted by Congress.

F. The Rule Violates Separation of Powers

The Rule need not change the amount of money or funding sources that the Conscience Laws affect in order to violate the separation of powers. Many aspects of the Rule—the challenged definitions; the enforcement provisions—substantively depart from the statutory appropriation scheme adopted by Congress. The Rule changes what a regulated entity must do to comply with the Conscience Laws and thus to receive funds that Congress has appropriated for them. Defendants do not, and cannot, argue that this comports with the Constitution.

[27] *See* Bolan Dec. ¶¶ 8-10; Carpenter Dec. ¶ 11; Harker Dec. ¶ 14; Henn Dec. ¶ 5; Manley Dec. ¶ 8; Shanker Dec. ¶¶ 11-12; Vargas Dec. ¶ 14.

III. THE COURT MAY CONSIDER EXTRA-RECORD EVIDENCE

Defendants raise standing and ripeness challenges to several of Plaintiffs' claims, yet object to the entry of evidence establishing their justiciability. Plaintiffs are permitted to demonstrate standing and ripeness with extra-record evidence. *See California v. Azar*, 911 F.3d 558, 571-73 (9th Cir. 2018) (states have standing based on declarations showing challenged regulation would cause them economic harm); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 627 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). The evidence meets these standards. *See* Pls. Mot. 4-11, 47-51.[28]

Defendants concede a court may consider extra-record evidence to determine whether an agency considered all relevant factors and adequately explained its decision. Defs. Reply 27; *see also Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (it is often "impossible" for a court to determine whether the agency considered all relevant factors unless it looks outside the record); *Wilson v. CIR*, 705 F.3d 980, 991 (9th Cir. 2013). Plaintiffs' evidence shows that Defendants failed to consider all relevant factors (for example, by cherry-picking medical articles (Chavkin Dec. ¶¶ 23-24)), or to explain how their decision is supported by the record (by relying on complaints purportedly but not actually supporting the Rule (Chance Dec. ¶¶ 6-15)).[29] As the Court "tries to make sense of complex technical testimony," *see* Sept. 24 Order, it may consider explanatory declarations. *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977).

Moreover, because Plaintiffs' constitutional challenges are reviewed independent of the APA, the "court is entitled to look beyond the administrative record." *Grill v. Quinn*, 2012 WL 174873, at *2 at n.8 (E.D. Cal. Jan. 20, 2012).[30]

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[28] Courts also permit plaintiffs to submit extra-record evidence on the merits of their constitutional claims under § 706(2)(B). *See, e.g., Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008) ("When a court is reviewing the constitutional validity of agency action pursuant to 5 U.S.C. § 706(2)(B), it should make 'an independent assessment of a citizens' claim of constitutional right.") (quoting *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979)); *Nat'l Med. Enters., Inc. v. Shalala*, 826 F. Supp. 558, 565 n.11 (D.D.C. 1993) (allowing plaintiffs to submit additional declaration not in administrative record); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (allowing plaintiffs to submit two additional affidavits).

[29] Defendants also take umbrage at the Cummings and Henn declarations, asserting the declarants should have submitted comments concerning harm to LGBT people. They did. App'x 179; Supp. App'xd 406. Defendants simply chose to disregard this harm.

[30] *See also Webster v. Doe*, 486 U.S. 592, 604 (1988) (party is entitled to discovery related to a

Finally, Defendants argue that the remedy must be tailored to redress the Plaintiffs' particular injury, Defs. Reply 30, but seek to prohibit Plaintiffs from submitting evidence of that injury, *id.* at 27-29. Defendants cannot have it both ways.

IV. THE COURT SHOULD VACATE THE ENTIRE RULE

Plaintiffs' challenges encompass both the Rule as a whole and many of its individual provisions. *See* Pls. Mot. 55; *cf.* Def. Reply 30. Defendants fail to identify any part of the Rule that could be considered "lawfully promulgated," Defs. Reply 30, if Plaintiffs prevail. This Court should not attempt to rewrite the Rule to render it lawful. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 884–85 & n. 49 (1997).

Apparently conceding that vacatur is the appropriate remedy, Defendants next argue that relief should be limited to the parties. Defs. Reply 30. But they do not cite a single case in which a final judgment setting aside a federal regulation has been confined in this way. Nor could they: the few courts that have considered this novel argument have rejected it, finding it to be "both at odds with settled precedent and difficult to comprehend." *O.A. v. Trump*, 2019 WL 3536334, at *29 (D.D.C. Aug. 2, 2019); *see also Desert Survivors v. US Dep't of the Interior*, 336 F. Supp. 3d 1131, 1134 (N.D. Cal. 2018); *New Mexico Health Connections v. HHS*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018).[31] This Court should not be the first in the nation to limit relief under the APA in this way.

CONCLUSION

The Court should grant Plaintiffs' motion, vacate the Rule, and deny Defendants' motion.

constitutional claim even in a case with an APA claim); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990); *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 327-28 (D.P.R. 1999); *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at *5 (N.D. Cal. Oct. 5, 2011); *Bolton v. Pritzker*, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016); *Carlsson v. U.S. Citizenship and Immigration Servs.*, 2015 WL 1467174, at *13 (C.D. Cal. Mar. 23, 2015); *J.E.F.M. v. Lynch*, 2015 WL 9839679, at *1 (W.D. Wash. Aug. 27, 2015).

[31] In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the plaintiffs claimed that their voting rights were affected by partisan gerrymandering. The Supreme Court held that the remedy "require[d] revising only such districts as are necessary to reshape the voter's district" (*id.* at 1921), but never suggested the revisions would apply only to the parties.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **State of California v. Alex M. Azar, et al.** No. **3:19-cv-02769-WHA**

I hereby certify that on October 10, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PLAINTIFFS' SECOND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

SECOND DECLARATION OF NELI N. PALMA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

SUPPLEMENTAL DECLARATION OF DR. RANDI C. ETTNER, PH.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

PLAINTIFFS' SUPPLEMENTAL APPENDIX IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 10, 2019, at Sacramento, California.

Ashley Harrison	*/s/ Ashley Harrison*
Declarant	Signature

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