Consolidated Case Nos. 20-15398, 20-15399, 20-16045, and 20-35044

In the
United States Court of Appeals for the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO, *ET AL.*,
Plaintiffs-Appellees,
v.
ALEX M. AZAR II, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Courts for the Northern District of California and the Eastern District of Washington

Brief *Amicus Curiae* of Public Advocate of the United States, Pro Life Legal Defense Fund, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund in Support of Defendants-Appellants and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, Public Advocate of the United States, Pro Life Legal Defense Fund, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

s/Herbert W. Titus
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INTEREST OF *AMICI CURIAE*[1]

Public Advocate of the United States, Pro Life Legal Defense Fund, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Eagle Forum, Eagle Forum Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

These *amici* filed an *amicus* brief in a similar case in the U.S. Court of Appeals for the Second Circuit, New York v. HHS (No. 19-4254) on May 26, 2020.

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. THE OPINION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IS BUILT ON SAND.

A. This Appeal Cannot Be Resolved by the District Court's Single Hypothetical.

The California district court's "Statement" of the case begins as follows:

> Under the new rule, to preview just one example, an ambulance driver would be **free**, on religious or moral grounds, **to eject a patient en route to a hospital** upon learning that the patient needed an **emergency** abortion. Such harsh treatment would be **blessed by the new rule**. [City & County of San Francisco v. Azar, 411 F. Supp. 3d 1001, 1005 (N.D. Ca. 2019) (emphasis added).]

Really? Does the U.S. Department of Health and Human Services ("HHS") Final Rule "bless" an ambulance driver "ejecting" a patient needing an "emergency" abortion on the side of the road? Obviously, such a statement or principle is nowhere to be found in the Final Rule. It turns out the district court's predicate for this basis for its opinion was a judge having lured a government attorney into a rhetorical trap during oral argument. On the court's view of that one attorney's *ad hoc* response to that hypothetical question, the court grounded its decision to strike down the government's final rulemaking, thereby undermining the enforcement of the Conscience Provisions enacted in dozens of congressional statutes.

The district court asserts the attorney approved an ambulance driver telling a woman with a life-endangering ectopic pregnancy to get out of the ambulance in the middle of the park. San Francisco at 1014. First, the response was ambiguous. It is not at all clear what the government lawyer meant by stating "[t]he rule protects an ambulance driver's ability not to assist in the performance of a procedure…." *Id*. That response does not address the act of dumping off a woman in a park. Second, it is not at all clear that the lawyer knew what an ectopic pregnancy is, and its inherently life-threatening nature, and that dumping such a person in the park could be life-endangering, not life-enhancing. Third, it is not at all clear that the court knew, or wanted to admit, that the consensus pro-life position on ectopic pregnancy supports a physician protecting a woman's life in such circumstances.[2] Fourth, even in a worst-case scenario, a non-responsive comment at oral argument about a bizarre and unlikely[3] hypothetical cannot

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[2] *See* American Association of Pro-Life Obstetricians and Gynecologists, "What is AAPLOG's Position on Treatment of Ectopic Pregnancy?" ("[T]he American Association of Pro-Life Obstetricians recognizes the unavoidable loss of human life that occurs in an ectopic pregnancy, but does not consider treatment of ectopic pregnancy by standard surgical or medical procedures to be the moral equivalent of elective abortion, or to be the wrongful taking of human life.").

[3] *See* Appellants' Opening Brief at 54.

decide a legal issue. The district judge should not be allowed to employ this response to prevent avoid these statutes from being enforced. This challenge to the Final Rule does not rise or fall on the cleverness of a judge tripping up an advocate, but rather based on an evaluation of the regulation's text.

B. The District Court Replaced Statutory Analysis with Interest Balancing.

The issue to be decided in the case, one would have thought, was whether the HHS Final Regulation violated the Conscience Provisions in some 30 federal statutes. However, the California district court's initial "Statement" found a way to empower itself to impose its own policy preference. The district court asserts that "this order holds that the new rule … upsets the **balance** drawn by Congress between [i] protecting conscientious objections versus [ii] protecting the uninterrupted effective flow of health care to Americans." San Francisco at 1005 (emphasis added). And, once there is interest "balancing" to be done — federal judges are empowered to give victory to the interest they personally hold to be most important. Here, the district court first created the preservation of the "uninterrupted effective flow of health care" as an issue and then made that the highest good, allowing it to undermine the statutory conscience provisions.

The court's recasting of the opinion presents an excellent illustration of the validity of the maxim formulated by one of the most important conservative thinkers, journalists, authors, and political activists of the Twentieth Century — M. Stanton Evans: "He who writes the Resolved Clause, wins the debate."[4]

The district court begins its analysis of the APA claim by boldly announcing what should have been the guiding principle of the case: "Fidelity to the statute is paramount." San Francisco at 1012. However, if fidelity to the conscience statutes had been allowed to be the Resolved Clause of the case, then the HHS regulations would have been upheld. Fidelity to the five key congressionally crafted Conscience Protection provisions and the two dozen other such provisions would have required the court to uphold the Final Rule which finally gave meaning to what have been mere parchment protections for healthcare workers for decades.

On the other hand, to grant relief to plaintiffs, the court would need to find a way to elevate its own values and opinions over the statutory text. This the court did in one paragraph, without citation to any authority, where it assumed that Congress was not really all that serious about the conscience provisions being

[4] M. Stanton Evans (1934-2015), AZ Quotes.

implemented, and those concerns could be overridden if there could be identified competing policy interests. Thus, the court set about to find or create such a competing interest.

> In reading the statutes in question, the Court sees that Congress tried to strike **a balance** between two **competing** considerations. **One consideration** was recognition that, due to religious or ethical beliefs, some doctors, nurses, and hospitals, among others, wanted no part in the performing of abortions and sterilizations, among other medical procedures, and Congress wanted to protect them from discrimination for their refusal to perform them. **The countervailing consideration** was recognition of the need to preserve the effective delivery of health care to Americans, including to those seeking, for example, abortions and sterilizations. Every doctor or nurse, for example, who bowed out of a procedure for religious or ethical reasons became one more doctor or nurse whose shifts had to be covered by someone else, a **burden** on the healthcare system. Congress **struck a balance** between these two **opposing** considerations. [*Id*. at 1012 (emphasis added).]

Thus, the court postulated that the 30 statutory Conscience Provisions somewhere (without specifying where) contained within them a competing interest that could allow them to be disregarded in the name of "the effective delivery of health care." The Resolved Clause was then converted to: "Could the new rule ever, even hypothetically, impair the delivery of healthcare to patients?" If so, the rule could not be allowed.

In creating a conflict between two policy objectives, the district court thus was able to render a decision by employing what Justice Antonin Scalia has called "judge-empowering 'interest-balancing.'" District of Columbia v. Heller, 554 U.S. 570, 634 (2008). As the district court's analysis on the APA claim begins with a fraudulent premise, it is not surprising that it moved on to reach the wrong conclusion.

C. The District Court Created a New Rule of Statutory Construction to Define Congress's Term "Include."

The district court ruled that the HHS Final Rule broadened the application of the Conscience Provisions to individuals and institutions not covered by the congressional text. The district court could reach this conclusion only with sleight of hand, stating:

> The Coats-Snowe Amendment, to repeat, **expressly defined** "health care entity" **as** "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions." Medical laboratories run tests that assist in diagnosing or in analyzing the outcome of certain procedures. They do not fit the statutory definition. [San Francisco at 1016 (emphasis added).]

This is not true. The Coats-Snowe Amendment as currently codified states:

> The term "health care entity" **includes** an individual physician, a postgraduate physician training program, and a participant in a

> program of training in the health professions. [42 U.S.C. § 238n(c)(2) (emphasis added).]

The district court characterized the statute as "expressly defined … as" — which implies that the statute provides a complete list. However, the correct interpretative rule is that "[t]he verb *to include* introduces examples, not an exhaustive list." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (Thomson/West: 2012) at 132. Thus, "the word *including* itself means that the list is merely exemplary and not exhaustive," although there are, as usual, outlier judicial decisions. *Id*. at 133. The district court was forced to admit this truth, but sought then to deny it. As authority for its proposition that "a list still cannot be inflated with terms lacking the defining essence of those in the list" (San Francisco at 1016), the court cites a case[5] analyzing a statute that does not employ the word "including."

But more importantly, the court's assertion that "[m]edical laboratories run tests that assist in diagnosing or in analyzing the outcome of certain procedures" focuses on a factor irrelevant to whether medical labs fall inside or outside the category of "health care entity." There is no reason to exclude a medical lab from the statutory category of "health care entity."

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[5] Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923).

The district court makes an even more unpersuasive argument in asserting that those required to provide "[p]re-and post-op tasks … such as taking vitals and placing an intravenous line" certainly could never be "included" in the class protected by the Conscience Provisions because such procedures are "generic to surgeries" rather than "specific to abortions." San Francisco at 1014-15. However, the definition of "health care entity" is not limited by whether those medical personnel are performing tasks unique to abortions, sterilizations, or euthanasia. Under the district court's view, the nurse placing the intravenous line in a patient to facilitate the introduction of a life-ending drug would not be participating in euthanasia — an absurd conclusion. And the district court's reliance on a colloquy on the Senate floor to the effect that the conscience provisions would not cover "'a nurse or an attendant **somewhere in the hospital** who objected to it'" demonstrates how far afield the district court had to go to reach its conclusion that the nurse placing the intravenous line should not be protected by the Final Rule. *Id*. at 1014 (emphasis added).

II. THE DISTRICT COURTS GAVE NO CONSIDERATION TO THE PECULIAR NATURE OF THE SPECIFIC PROCEDURES COVERED BY THE STATUTORY CONSCIENCE PROVISIONS.

The HHS Final Rule under review summarizes the Conscience Provisions set out in some 30 federal statutes. *See* 84 *Fed. Reg*. at 23170-23174. The five statutes on which attention has focused are these:

- **Church** Amendments (named after Senator Frank Church (D-Idaho)) (1970s): "abortion, sterilization, and certain other…."
- **Coats-Snowe** Amendment (named after Senator Dan Coats (R-Indiana) and Senator Olympia Snowe (R-Maine)) (1996): "abortion provision or training, referral for such abortion or training, or accreditation standards related to abortion…."
- Medicare and Medicaid Advantage (1997): "counseling or referral service" objected to on moral grounds.
- **Weldon** Amendment (named after Congressman David Weldon (R-Florida)) (2004): "abortions…."
- Patient Protection and Affordable Care Act (2010): "assisted suicide, euthanasia, or mercy killing," "abortion," "advanced directives."

See id.; *see also* San Francisco at 1012-22; Washington v. Azar, 2019 U.S. Dist. LEXIS 203304 at *7-18 (E.D. Wash. 2019); New York v. HHS, 414 F. Supp. 3d 475, 497-503 (S.D.N.Y. 2019).

In addition to those five "most central" laws were an additional 25 laws containing similar conscience provisions. Of these 25, one in particular demonstrates how truly bipartisan these efforts have been — the **Helms-Biden** Amendments of 1978 and 1985 — named after Senator Jesse Helms (R-North Carolina), arguably the most conservative Republican then serving in the U.S. Senate, and Senator Joe Biden (D-Delaware), a liberal Democrat and later Vice President of the United States. The Helms-Biden bipartisan provisions protected the conscience of healthcare workers from being compelled to participate in "abortion and involuntary sterilization…."[6]

Thus, the statutory conscience provisions primarily relate to:

(i) abortion;

(ii) sterilization (voluntary[7] and involuntary); and

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[6] The Helms-Biden Amendments were referenced repeatedly in the Final Rule (at 23170, 23211, 23231, 23263, and 23267), but not referenced at all in the district court opinion.

[7] Although not discussed expressly in the conscience provisions, many transgender surgeries and transgender hormone therapies cause sterilization. *See* P. Boghani, "When Transgender Kids Transition, Medical Risks are Both Known and Unknown," *Frontline* (June 30, 2015) ("[I]f a child goes from taking puberty blockers to taking hormones, they may no longer have viable eggs or sperm at the age when they decide they would like to have children."); S. Allen, "It's Not Just Japan. Many U.S. States Require Transgender People Get Sterilized," *The Daily Beast* (Mar. 22, 2019).

(iii) euthanasia.

The common denominator of these types of procedures is that, traditionally, they were never considered valid medical procedures, but rather were inconsistent with Western norms.

The Hippocratic Oath has governed the practice of medicine in the West from as early as the fifth century B.C. to at least the twentieth century A.D. Although there are different versions of this Oath, the original version of the Hippocratic Oath endorsed by the National Library of Medicine of the National Institutes of Health first lays down the general principle "I will do no harm" and provides specific applications of that principle:

> I will use those dietary regimens which will benefit my patients according to my greatest ability and judgement, and I will **do no harm** or injustice to them.
> I will not give a **lethal drug** to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a **pessary** to cause an **abortion**. [Hippocratic Oath[8] (emphasis added).]

[8] Modern versions of the Hippocratic Oath are being sanitized to remove any reference to physicians performing abortions, for the inclusion of such language would raise questions that abortion proponents would prefer not to address.

As recently as the Nuremberg trials after World War II, abortion was viewed as a crime against humanity, as explained by Law Professor Jeffrey C. Tuomala:

> The crime of abortion played prominently in two international trials held at Nuremberg following World War II — the *Goering* and *Greifelt* cases. Allied prosecutors made the case that **voluntary and involuntary abortion were war crimes and crimes against humanity**. The *Goering* judgment identified the Political Leadership Corps of the **Nazi Party as a criminal organization, in part because of its policies promoting abortion**.
>
> The *Greifelt* indictment charged ten defendants with **voluntary and involuntary abortion**. The prosecution's case focused in part on the Nazis' removal of the protection of law from unborn children in occupied Poland and unborn children of Eastern workers in Germany that the Nazis considered racially non-valuable. The prosecution argued that **voluntary abortion was punishable because it was a crime against the unborn child**. The prosecution proceeded on the theory that Germany had a duty to afford protection of law to unborn children and that the deliberate failure of high-level officials to do so constituted **crimes against humanity and genocide** by acts of omission. [J.C. Tuomala, "Nuremberg and the Crime of Abortion," 42 U. TOLEDO. L. REV. 283 (2011) (emphasis added).]

Although abortion and infanticide were practiced by pagan civilizations,[9] for 2,500 years, abortion and euthanasia have been expressly condemned, and sterilization has been similarly viewed. That all changed when elements of the

[9] *See* M.S. Evans, The Theme Is Freedom: Religion, Politics, and the American Tradition at 138 (Regnery: 1994).

theory of Eugenics captured the imagination of those who wished to create a Heaven-on-Earth by improving the human race.[10] Eugenics was designed to purify the population, which was closely related to the justification for abortion, particularly by Margaret Sanger, the founder of Planned Parenthood.[11]

In 1907, the State of Indiana enacted its first Eugenics law "for the involuntary sterilization of 'confirmed criminals, idiots, imbeciles and rapists,'" leading to "over 2,300 of the state's most vulnerable citizens" being "involuntarily sterilized" before the law was repealed in 1974.[12] The Eugenics movement spread into many other states. The U.S. Supreme Court did nothing to stop this movement, but rather encouraged it in Buck v. Bell, 274 U.S. 200 (1927), a case that has never been overruled. In that case, the U.S. Supreme Court embraced the legitimacy of the doctrine of Eugenics, upholding a state statute that allowed compulsory sterilization of those deemed unfit. As legal

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[10] *See* W. Johnson, "Eugenics and the American Church," *Leben* (July 20, 2014) ("[Eugenics] dovetailed nicely with the 'heaven on earth' theology then popular among liberal clergy, who had contests for the best pro-eugenics sermons.").

[11] *See id.* ("Early funding for eugenics projects came from such well-heeled Americans as John Rockefeller, J.P. Morgan, and oil magnate and founder of the 3-in-1 Oil Company, James Noah H. Slee, the second husband of Planned Parenthood founder Margaret Sanger.").

[12] *See* Indiana Eugenics History & Legacy 1907-2007.

positivist Justice Oliver Wendell Holmes, Jr. famously rationalized: "[t]hree generations of imbeciles are enough." *Id*. at 207. In his opinion, Justice Holmes relied on the authority of another deeply troubling Supreme Court case that had been decided by a 7-2 vote: "The principle that sustains compulsory vaccination[13] is broad enough to cover cutting the Fallopian tubes." *Id*.

In Roe v. Wade, 410 U.S. 113 (1973), the U.S. Supreme Court manufactured a constitutional right to abortion, which had never before been known, from the Constitution's so-called privacy protections that are nowhere to be found in the text.[14] The U.S. Supreme Court has not, as of yet, found a right to assisted suicide in the Constitution, and indeed, in Washington v. Glucksberg, 521 U.S. 702 (1997), the Court unanimously declined to find such a right in the

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[13] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905). While the Supreme Court case relied on in Buck v. Bell that authorizes coercion over conscience once might have been viewed as an outlier, its legitimacy was recently enthusiastically endorsed by Harvard Law School's Felix Frankfurter Professor of Law, Emeritus, Alan M. Dershowitz. *See* M. Sones, "Dershowitz defends compulsory coronavirus vaccine remarks," Arutz Sheva 7 (May 22, 2020) ("US constitutional lawyer: 'If you refuse to be vaccinated, state has power to take you to doctor's office and plunge needle into your arm.'").

[14] *See* discussion of abortion and eugenics in Amicus Brief of Pro Life Legal Defense Fund, *et al*. at 5-12 (Nov. 15, 2018) in Box v. Planned Parenthood of Indiana, 139 S. Ct. 1780 (2019); *see also* Justice Clarence Thomas's concurring opinion in Box at 1782 (Thomas, J., concurring).

Due Process Clause of the Fourteenth Amendment. However, neither has the Supreme Court ruled in a way that would impede the growing trend in state legislatures to authorize such a practice, although physician-assisted suicide does remain criminally punishable in certain states.

Just as slavery was accepted as normal by many in the 18th century, abortion, sterilization, and euthanasia are now viewed as legitimate medical procedures by many in the 21st century. The district court opinion treated these procedures as if they were routine, life-giving measures that every patient should be able to expect to receive, everywhere, upon demand. Congress's act in incorporating the Hyde Amendment, barring the use of federal funds to pay for abortions, into spending restrictions every year since 1976 demonstrates that Congress does not embrace abortion as a medically necessary procedure. Most assuredly, the three areas in which medical conscience are protected by Congress (abortion, sterilization, and euthanasia) are anything but life-giving, and actually, are better viewed as the polar opposite.

For most of the history of the West, there was never a dispute over a healthcare practitioner "refusing to provide" these three procedures. On the contrary, problems only arose when a healthcare practitioner "provided" these

procedures. No one should assume, as the district court did, that these three procedures would be routinely available upon demand by any patient at any time, and no such duty should be imposed on a healthcare worker to indulge a patient's wishes at the expense of the professional's own conscience.

III. AS A LAW OF THE CREATOR, FREEDOM OF CONSCIENCE IS A PREEXISTING DUTY DEFINED AND ENFORCEABLE ONLY BY GOD.

The Conscience Provisions reflect congressional recognition of the sanctity of conscience. Freedom of Conscience is not a new concept. It originated not with the U.S. Congress, the President, or the courts, but with Jesus Christ. Freedom of Conscience is anchored to Christ's teaching that there are certain duties owed exclusively to God outside the coercive power of the State. *See* R.L. Wilken, Liberty in the Things of God at 1-62 (Yale Univ. Press: 2019). These foundational truths were once well known, but have long been ignored, requiring a revisiting of first principles.

A. Freedom of Individual Conscience: The God-Originated First Freedom.

Lord Acton summed up Freedom of Conscience in one superb paragraph in a speech in 1877:

> when said: "Render unto Caesar the things that are Caesar's, and unto God the things that are God's," those words, spoken … gave to the **civil power**, under the **protection of conscience**, a sacredness it had never enjoyed, and **bounds** it had never acknowledged; and they were the repudiation of absolutism and the **inauguration of freedom**. For our Lord not only delivered the precept, but created the force to execute it. To maintain the necessary immunity in one supreme sphere, to reduce all political authority within defined limits, ceased to be an aspiration of patient reasoners, and was made the perpetual charge and care of the most energetic institution and the most universal association in the world. The new law, the new spirit, the new authority, gave to **liberty** a meaning and a value it had not possessed in the philosophy or in the constitution of Greece or Rome before the knowledge of the truth that makes us free. [Lord Acton, "The History of Freedom in Antiquity: An Address Delivered to the Members of the Bridgnorth Institution," Action Institute (Feb. 26, 1877) (emphasis added).]

Ninety-two years before Lord Acton delivered this sterling address to the members of the Bridgnorth Institute, James Madison delivered his 1785 *Memorial and Remonstrance Against Religious Assessments to the General Assembly of the Commonwealth of Virginia* ("*Remonstrance*") (June 20, 1785), reprinted in 5 The Founders Constitution at 82 (item 43) (P. Kurland & R. Lerner, eds.) (U. of Chi. Press: 1987). Although delivered nearly one hundred years apart, on different continents, by those of different nationalities, each man understood that the freedom of conscience was of divine origin. Acton found "the protection of conscience" in the spoken words of Jesus Christ, the second person of the Triune

God, as recorded in the Holy Scriptures admonishing men to distinguish between (i) the things of God and (ii) the things of Caesar.

Madison, in turn, unpacked the "separation of powers" set out in the law of the Creator. Returning to the 1776 Virginia Declaration of Rights, Madison repeated the Declaration's principled distinction between the two realms. As for the realm of "Religion," it encompasses those "'dut[ies] which we owe to our Creator **and** the manner of discharging [them] can be directed **only by** reason and conviction, not by force or violence' … **must** be left to the conviction and **conscience** of every man." *Remonstrance* at 82 (emphasis added). As for contrast to such duties as are also enforceable by "force or violence," they — and they only — are subject to enforcement by Caesar. The line drawn by Jesus Christ's instructions is a matter of jurisdiction. As a duty owed to the Creator, civil governments must give maximum protection to matters of conscience to ensure that citizens exercise obligations to God — as Governor of the Universe (the term in Madison's *Remonstrance*) — without interference from civil rulers.

B. The California District Court's Treatment of Conscientious Objections Is Both Historically Short-Sighted and Shallow.

As discussed in Section I.B., *supra*, from its beginning hypothetical to its final ruling, the district court assumed its assigned role to be that of a referee in a

great contest between "protecting conscientious objections versus protecting the uninterrupted effective flow of health care to Americans." San Francisco at 1005. In one corner of the ring is the champion — persons and other entities with "religious, moral, or other conscientious objections [who] refuse to provide abortions and certain other medical services." *Id*. In the other corner — the challenger who "fear[s] losing important federal grants as a result of their inability to comply with the new rule." *Id*. At stake is whether the fight will continue under the newly promulgated agency regulations interpreting the statutory provisions. *Id*. at 1012.

To reach its decision, the district court weighed two competing considerations: some healthcare providers, "due to religious or ethical beliefs … **wanted no part** in the performing of abortions and sterilizations," while other such providers have no such qualms. *Id*. at 1012 (emphasis added). It then found for the challenger, as follows:

> In reading the rule in question, the Court sees a persistent and pronounced redefinition of statutory terms that significantly expands the scope of protected conscientious objections … com[ing] at a cost — a burden on the effective delivery of health care to Americans in derogation of the actual balance struck by Congress. [*Id*. at 1012.]

The district court began its analysis of the relevant federal "Conscience Statutes" with the 1973 Church Amendment, noting that it singled out those healthcare providers who would be required to "perform or assist in the performance of any sterilization procedure or abortion contrary to his religion or conscience." *Id.* at 1006. Thereafter, the court promiscuously substituted for the two statutory terms other phrases — like "religious beliefs or moral convictions," as if they are legal and constitutional equivalents. They are not.

Instead, both religion and conscience are inextricably intertwined both historically and textually in the 1776 Virginia Declaration of Rights. *See* Reynolds v. United States, 98 U.S. 145, 162-63 (1878) and J. Madison, *Remonstrance* at 82. The conscience is placed by God into the heart of every man, "serv[ing] as a 'pedagogue to the soul, a guide and companion … to admonish it to do better or to correct and convict it of faults." Robert Wilken, Liberty in the Things of God at 18 (Yale Press: 2019). Indeed, as Virginia University Professor Emeritus Robert Louis Wilken has astutely observed:

> It was early Christian teachers who first set forth ideas of the freedom of the human person in matters of **religion**; it was Christian thinkers who contended that **conscience** must be obedient only to God…. [*Id.* at 187.]

The district court disregards any limit on the authority of government, disregarding the test of conscience and using an open-ended judicial balancing of "competing considerations," in which "conscientious objections" are disregarded to facilitate "uninterrupted provision of health care for Americans."

C. The California District Court Has No Jurisdiction to Control Conscientious Objectors in America's Healthcare System.

In the California district court's opinion, the new HHS rule — "Protecting Statutory Conscience Rights in Health Care" — goes too far. It "defines various nouns, verbs, and phrases in the conscience statutes in an expansive way, so as to **inflate the scope** of protections for **conscientious objectors**." San Francisco at 1009 (emphasis added). The court found that the drive to expand the list of eligible objectors is so "persistent and pronounced" that it would impose an impermissible "burden on the effective delivery of health care to Americans." *Id*. at 1012. However, by so ruling, the court has breached the jurisdictional line separating matters of individual conscience (subject only to reason and conviction) from government funded healthcare (subject also to force or violence). As Madison put it in his *Remonstrance*, "matters of Religion [are] wholly exempt from [the] cognizance" of civil society.

But this does not mean that civil society is outside the cognizance of God. As Lord Acton attests, Christ inaugurated the system of two jurisdictions and "created the force to execute it." That force, in turn, he described variously as "[t]he new law, the new spirit, the new authority" but may be summed up as the ministry of the Holy Spirit. *See John* 14:8-17, 26; 15:26-27; 16:5-15.

The Conscience Provisions reflect this historic understanding preventing federal dollars being used to require healthcare workers to violate their conscience and their duty to God. The district court, demonstrating no understanding of these foundational truths, wrongly neuters all of these Conscience Provisions.

IV. THE FINAL RULE VIOLATES NEITHER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 NOR THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT.

The State of Washington claimed that the Final Rule violates the APA provision which states: "[t]he reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … not in accordance with law." 5 U.S.C. § 706(2)(A). Washington based this claim on two federal statutes that allegedly are violated by the Final Rule. In striking down the Final Rule, the Washington district court did not expressly adopt that portion of the

New York district court's ruling in New York v. HHS, which held the Rule is "not in accordance with law" because of Title VII of the Civil Rights Act of 1964 and the Emergency Medical Treatment and Active Labor Act ("EMTALA"). However, should the Washington district court decision be read to rule on this issue, these *amici* offer an opposing view.

The New York district court first based its opinion on a law administered not by HHS, but by the U.S. Department of Labor — Title VII of the Civil Rights Act of 1964. Just as it had earlier in its opinion when it interjected Title VII in its discussion of "conscience" statutes, here too the district court invoked Title VII where it did not apply.[15]

Unlike the prohibition in the Conscience Provisions, employers covered by Title VII (as amended in 1972) are only required to make "reasonabl[e] accommodat[ions]" (42 U.S.C. § 2000e-2(a)(1)-(2)) to the religious views and practices of employees without "undue hardship on the conduct of the employer's

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[15] It is not clear why the New York district court asserted its power to invalidate a rule that was lawful when issued, if it was thought to be inconsistent with law at the time of the court's review of the challenged rule. For this proposition, the district court cited one district court opinion — Georgetown Univ. Hospt. v. Bowen, 698 F. Supp. 290, 297 (D.D.C. 1987), *aff'd* 862 F.2d 323 (D.C. Cir. 1988). That one district court case involved a rule which it determined violated an intervening "final and binding court precedent," which is not present in this case.

business" (41 C.F.R. § 60-50.3) to avoid civil liability. The New York district court pointed to no similar standard in any of the conscience statutes that the Final Rule implements. Rather, the Conscience Provisions provide an absolute protection for employees of certain employers which accept federal funds.

Clearly, the earlier-adopted Title VII and the Conscience Provisions provide different degrees of protection for healthcare workers, but a difference is not the same as an inconsistency. "[A] law is to be construed as a whole (including later-added and later-revised provisions), and … laws *in pari materia* (including later-enacted laws) are to be interpreted together." A. Scalia & B. Garner, Reading Law at 330. These laws can be readily reconciled. Under the Conscience Provisions, the employee has absolute protection from being penalized by his employer even though he may not be able to sue his employer for money damages under Title VII. As the Government's Brief in the New York litigation[16] explained, Congress enacted the conscience statutes "*after* [it] added Title VII's undue-hardship and reasonable-accommodation defenses. Thus,

[16] State of New York, *et al.* v. U.S. Department of Health and Human Services; Alex M. Azar II, U.S. Court of Appeals for the Second Circuit, Nos. 19-4254, 20-31, 20-32 & 20-41.

Congress would have known how to provide those defenses had it wished to." Brief for Appellants in New York litigation ("N.Y. Gov't Br.") at 39.

In truth, the New York district court's opinion reveals its view that the conscience statutes conflict with Title VII, and that the earlier enacted Title VII should be given primacy. That is not how statutes are to be interpreted. As the Intervenor-Defendants in New York concluded in their brief: "a rule that *did* incorporate [a "reasonable accommodation/undue burden"] framework would be invalid — because it would be contrary to the clear language of the conscience statutes." Intervenor-Defendants-Appellants' Opening Brief in the New York litigation ("Intv. Br.") at 29.

The only other statute relied on by the New York district court to find illegality was the "EMTALA." That law primarily was focused on preventing Medicare-funded hospitals from having emergency rooms reject patients due to their citizenship, legal status, or ability to pay. Medical screening and stabilization is required, but the statute does not identify particular services that must be performed. The EMTALA certainly does not by its terms require that emergency departments perform abortions, sterilizations, or euthanasia. The district court's eagerness to find in EMTALA a duty for every emergency

department to provide such services upon request (procedures traditionally considered heinous in civilized countries, as discussed in Section II, *supra*), tells us much about the district court's political agenda, but tells us nothing about the purpose for which EMTALA was enacted.

V. THE WASHINGTON DISTRICT COURT HELD THAT THE FINAL RULE VIOLATES THE SPENDING POWER, BUT FAILED TO CONSIDER WHETHER THE UNDERLYING STATUTES COMPLY WITH THE SPENDING POWER.

The Washington district court struck down the Final Rule, *inter alia*,[17] adopting the New York district court's reasoning and conclusion that the remedial provisions of the Rule violated the limitations on Congress's Spending Clause power under Article I, Section 8 of the U.S. Constitution because the sanctions imposed are: (i) ambiguous and retroactive; and (ii) impermissibly coercive. *See* Washington at *31-32; New York at 567-71. Although plaintiffs challenged the **Final Rule**, no similar challenge to the underlying conscience **statutes** was brought by plaintiffs or addressed by either the Washington or the California district court.

[17] The district court's finding that the Final Rule violated the separation of powers was addressed by the Government in New York v. HHS. *See* N.Y. Gov't Br. at 52.

Plaintiffs' failure to challenge the underlying statutes creates a threshold issue for this Court to determine whether the district court was authorized to consider a challenge to the regulations alone based on the Spending Clause. The New York district court opinion failed to demonstrate why it had authority to reach the merits of the Spending Clause challenge to the Final Rule.[18] And the Washington district court opinion added nothing to the New York district court's analysis of the spending clause challenge.

First, the Spending Clause limits apply to Congress's power to legislate, but here the challenge was to an agency's implementing regulations. Since the underlying statutes that the Final Rule implements were not challenged, they are presumed to be valid and constitutional. It is not at all clear that any Spending Clause challenge ever can be brought to regulations, and even less clear that a Spending Clause challenge can be brought to regulations alone where the underlying statutory provisions are not challenged, as here.

To support its conclusion that regulations implementing a constitutional statute can violate the Spending Clause, the New York district court relies exclusively on four decisions — none of which involved challenges to

[18] The district court did address a different threshold issue — ripeness.

regulations, but rather all involved challenges to statutes. In NFIB v. Sebelius, 567 U.S. 519 (2012), the challenge was to the Medicaid provisions in the Affordable Care Act. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) involved an interpretation of the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400, *et seq*.). South Dakota v. Dole, 483 U.S. 203 (1987) involved a statute which reduced the amount of federal highway funds to states which had a drinking age below 21. And in Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), the issue was the constitutionality of the Developmentally Disabled Assistance and Bill of Rights Act of 1975. None of these cases provide authority for the district court enjoining a **regulation** when the underlying **statute** is assumed by the plaintiff to be constitutional.

In a footnote, the New York district court asserted that "[a]n agency which Congress has tasked with implementing a statute that imposes spending conditions is also subject to the Clause's restrictions," citing only Lau v. Nichols, 414 U.S. 563, 569 (1974), which it described as "evaluating Spending Clause challenge to regulation implemented pursuant to Title VI of the Civil Rights Act of 1964." New York at 566, n.70. But that case did not involve a direct challenge to either the statute or the regulations. Instead, Lau was a case brought by students

against their school district for failing to comply with federal requirements that were imposed on the school district as a condition of receiving federal funding. The Court in Lau evaluated both the statute and the implementing regulations, and determined summarily that, "[w]hatever may be the limits of [the Spending] power … they have not been reached here." Lau at 569. Lau is the only authority provided by the district court for its application of the Spending Clause jurisprudence to a regulation where no challenge was made to the underlying statutes, and the district court provided no other rationale for such an application.

Moreover, it is not clear how the district court even could have reached the merits of a Spending Clause challenge in this case. If the regulations were found to be contrary to the statutes, the court would never reach the issue of whether the regulation violates the limitations on the Spending Power because of the constitutional-avoidance doctrine.[19] That is exactly what the California district court did in stating: "In light of the fact that the rule is vacated in its entirety,

[19] *See generally* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). If the district court below had omitted its analysis of the Spending Clause, it would have reached the same outcome.

this order will and need not reach the remaining constitutional claims." San Francisco at 1025.

However, if the regulations are found to be consistent with the statute, the failure to challenge the **statute** on Spending Clause grounds would appear to be fatal to a challenge to the **regulations**. *See* N.Y. Gov't Br. at 61-63.

Lastly, even if a Spending Power challenge could be brought, the failure of one prior administration — or even multiple successive administrations — to enforce certain aspects of law does not bind every succeeding administration into inaction. This administration gave ample notice of the renewed focus on enforcing these provisions of the applicable statutes, setting forth the proposal to notice-and-comment rulemaking, and then publishing a final rule with a prospective implementation date sufficient to address any reliance issues. Obviously this notice was sufficient to enable various plaintiff groups around the country to prepare and file lawsuits seeking a preliminary injunction.[20]

CONCLUSION

The judgments of district courts should be reversed.

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[20] At all times, plaintiffs were free to choose not to receive federal funding so that they would be allowed to discriminate against those with conscience objections, as Planned Parenthood chose to do with respect to Title X funding. *See* Letter from counsel for Planned Parenthood to Ninth Circuit.

Respectfully submitted,

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IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Defendants-Appellants and Reversal, was made, this 22nd day of June 2020, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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FOR THE NINTH CIRCUIT

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