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

In the

United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, *et al.*, *Plaintiff-Appellees*,

v.

U.S. DEP'T OF HEALTH & HUMAN SVCS., *et al.*, *Defendants-Appellants*.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 1:19-cv-04676-PAE; The Hon. Paul A. Engelmayer

BRIEF OF *AMICUS CURIAE*
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF DEFENDANTS/APPELLANTS AND REVERSAL

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The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the important principles at issue in this case of freedom of conscience and the separation-of-powers doctrines derived from Congress's Article I, Section 8 Spending power and the parallel restrictions on spending contained in Article I, Section 9. The Center has previously appeared before the Supreme Court of the United States on behalf of parties or as *amicus curiae* in several cases addressing similar issues, including *National Institute of Family and Life Advocates, et al. v. Becerra*, 138 S.Ct. 2361 (2018); *Reisch v. Sisney*, 560 U.S. 925 (2010) (mem.); and *Dep't of Homeland Security v. Regents of the Univ. of California*, No. 18-587 (pending, cert. granted June 28, 2019), and it believes its expertise on the core constitutional issues presented by this case will be of benefit to this Court.

[1] This brief is filed with the consent of all parties, as permitted by Rule 29(a)(2) of the Federal Rules of Appellate Procedure. Amicus further certifies, pursuant to Rule 29(a)(4)(E), that no counsel for a party authored the brief in whole or in part; that no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

On May 2, 2019, the Office for Civil Rights ("OCR") within the Department of Health and Human Services ("HHS") issued a final rule entitled "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority." 84 Fed. Reg. 23,170-01 (May 21, 2019) (codified at 45 C.F.R. pt. 88) (the "Rule" or "2019 Rule"). The Rule interprets and provides for the implementation of more than 25 statutory provisions that recognize the right of an individual or entity to abstain from participation in medical procedures, programs, services, or research activities on account of religious or moral objections. These laws focus largely on abortion, but some also address sterilization procedures, assisted suicide, and advance directives, among other types of medical care.

For some of these laws (such as the Church, Coats-Snowe, and Weldon Amendments as well as Section 1553 of the Affordable Care Act), Congress or the Secretary of HHS had already delegated authority to OCR to receive complaints of discrimination. For other laws, however, there were no implementing regulations and enforcement authority had not been assigned explicitly to any agency.

The substantive provisions of the 2019 Rule largely track the statutory language of these conscience laws, but are mainly founded upon four principal federal conscience provisions: (1) the Church Amendments; (2) the Coats-Snowe Amendment; (3) the Weldon Amendment; and (4) conscience protection

provisions in the Patient Protection and Affordable Care Act. The Rule provides definitional clarity to some key terms—such as "discrimination," "health care entity," and "referral"—and also clarifies that the entities covered by the statute include state governments, federally recognized tribes, hospitals, skilled nursing facilities, home health care providers, doctor's offices, front desk staff, insurance companies, ambulance providers, pharmacists, pharmacies, and many non-health employers that offer insurance to their employees.

The new Rule is largely based on the Rule adopted in 2008 toward the end of the Bush administration, in which the OCR finalized a health care conscience regulation addressing enforcement of the Church, Coats-Snowe, and Weldon Amendments. *See* Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072 (Dec. 19, 2008) ("2008 Rule"). Like the current Rule, the 2008 Rule defined key terms, codified statutory language, and required covered entities to certify compliance with their statutory obligations. In finalizing the 2008 Rule, the Bush administration discussed the lack of awareness of federal conscience protections and the unavailability of remedies for those who face discrimination.

Shortly after taking office, however, the Obama administration issued a notice of proposed rulemaking asking for comment on whether to rescind the

Bush-era regulation in part or in its entirety, noting that OCR was not required to issue regulations to implement the Church, Coats-Snowe, and Weldon Amendments. *See* Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal, 74 Fed. Reg. 10207 (Mar. 10, 2009). In the final Rule adopted in February 2011, HHS largely (but not entirely) rescinded the 2008 Rule. *See* Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9969 (Feb. 23, 2011) ("2011 Rule"). The 2011 Rule eliminated the 2008 Rule's substantive provisions and a part of the 2008 Rule that directed OCR to "implement" the Amendments. The 2011 Rule also amended but substantively maintained a part of the 2008 Rule that designated OCR to receive and investigate complaints under federal conscience laws.

In May 2019, OCR issued the Rule at issue here, which largely rescinded the 2011 Rule, reinstated and elaborated on the 2008 Rule, and adopted some requirements for covered entities, such as written assurances and certifications, that would facilitate enforcement of the statutory mandates. 84 Fed. Reg. at 23,175-23,180. Under the 2019 Rule, OCR can use its full investigative and enforcement tools to enforce and redress violations of the conscience statutes. 45 C.F.R. § 88.7. The Rule lays out OCR's investigative and enforcement responsibilities in great

detail than either the 2008 or 2001 Rules did: OCR will receive complaints, *id.* § 88.7(b), conduct compliance reviews, § 88.7(c), and initiative investigations whenever it learns of a potential or actual violation of the federal conscience statutes, § 88.7(d). Once OCR determines that the federal conscience statutes have been violated, the Rule instructs it to resolve the matter "by informal means whenever possible. *Id.* § 88.7(i)(2). If OCR cannot secure voluntary corrective action, it could temporarily (and then permanently) terminate federal funding in whole or in part, recoup federal funds that had been distributed contrary to law, or refer cases to the Department of Justice. *Id.* § 88.7(i)(3). Enforcement for federal grantees and contractors will be conducted through typical grant and contract compliance mechanisms. *Id.*

The 2019 Rule was immediately challenged in three parallel lawsuits filed in federal court against HHS and HHS Secretary Alex Azar—one by New York State, New York City and 21 other states and municipalities; and two filed by Planned Parenthood and other healthcare providers. The Plaintiffs/Appellees challenged the Rule under both the Administrative Procedure Act ("APA") and the U.S. Constitution. As to the APA claims, the Plaintiffs/Appellees argued that the Rule exceeded HHS's authority. As to the Constitution, the Plaintiffs/Appellees principally argued that the Rule conflicts with the Spending and Establishment Clauses and violates the Separation of Powers. In November 2019, the U.S.

District Court for the Southern District of New York held that the Rule was invalid on constitutional grounds. Specifically, the court held that the Rule was unconstitutionally coercive because it would allow the U.S. Department of Health and Human Services (HHS) to withhold billions of dollars of funding from hospitals, clinics, universities and other healthcare providers that did not comply. *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 570-71 (S.D.N.Y. 2019) (Special Appendix pp. 129-132).

SUMMARY OF ARGUMENT

First, the 2019 Rule provides clarifying definitions and explains how HHS will take enforcement action, but the Rule is not the source of HHS's enforcement power—the Federal Conscience Statutes themselves obligate and compel HHS to ensure that the Statutes' conditions are met in disbursing HHS funding. Appellees' challenge to the Rule is therefore misplaced. It is Congress—not HHS—that has made the policy determination to protect health care entities against government or government-funded discrimination.

Second, the Rule comports with the Constitution. Appellees' constitutional claims are facial, and therefore to succeed Appellees must show that the Rule is invalid in all or most of its applications—a difficult task given that Appellees' claims rely on a series of farfetched hypotheticals about the results of specific violations of the Federal Conscience Statutes, as well as uninitiated and speculative

enforcement actions by HHS. One of the statutes at issue—the Weldon Amendment—is not even a conditional spending program but an outright prohibition on federal funds. The other Federal Conscience Statutes, which Appellees notably do not challenge, offer recipients a clear and simple deal: federal funding in exchange for non-discrimination. This offer is well within the bounds of the Supreme Court's Spending Clause jurisprudence. If the Statutes themselves do not violate the Spending Clause, then a rule faithfully implementing them also does not. Here, the Federal Conscience Statutes, and the Rule that implements them, simply ensure that the targeted federal funds are not used to disadvantage individuals or entities on the basis of objections to certain health care activities, some of which may be rooted in religion. The Rule is also far from unconstitutionally vague; its requirements are clear, unambiguous, and not coercive.

ARGUMENT

I. The Rule Is Well Within HHS's Authority Because It Merely Articulates How HHS Will Enforce The Federal Conscience Statutes.

HHS acted within its statutory authority when promulgating the Rule. First and foremost, the Rule is supported by four principal Federal Conscience Statutes, which prohibit the government and recipients of federal funds from discriminating against entities that decline to participate in certain controversial medical

procedures. The statutes primarily at issue are: (1) the Church Amendments (42 U.S.C. § 300a-7); (2) the Coats-Snowe Amendment (42 U.S.C. § 238n(a)); (3) the Weldon Amendment (see, e.g., Departments of Defense and Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d), Pub. L. No. 115-245, 132 Stat. 2981 at 3118); and (4) conscience protection provisions in the Patient Protection and Affordable Care Act (*i.e.*, 42 U.S.C. § 18113; 42 U.S.C. § 14406(1); 26 U.S.C. § 5000A; 42 U.S.C. § 18081; 42 U.S.C. §§ 18023(b)(1)(A) and (b)(4)). The Rule gives effect to the Federal Conscience Statutes—which collectively are protection provisions put in place by Congress—yet the statutes themselves are not challenged by Appellees.

When Congress required HHS, its programs, and recipients of its Federal funds to comply with the Federal Conscience Statutes, that implicitly included a grant of authority to HHS to take measures to ensure that it administers its programs in compliance with federal law. Thus, the Rule does not alter or amend the obligations of the respective statutes, 84 Fed. Reg. at 23,185, but rather ensures that recipients of federal funds do not violate those statutes. In fact, that HHS is now taking measures to ensure that HHS administers its programs in compliance with federal law is merely something that HHS should have done a long time ago.

Much of the error in Appellees' claims as to HHS's lack of authority stems from the misidentification of the statutes that provide HHS with authority to issue

the Rule. As HHS explained in its rulemaking, *see* 84 Fed. Reg. at 23,183-86, the enforcement portion of the Rule, which allegedly poses the most imminent threat to Appellees' funding, merely sets forth existing internal HHS processes: OCR will investigate complaints and seek voluntary resolutions, and any involuntary remedies will occur through HHS funding components in coordination with OCR, with those components using preexisting grants and contracts regulations processes. *See* 45 C.F.R. § 88.7(i)). Overall, these are housekeeping matters, enacted pursuant to 5 U.S.C. § 301, concerning how HHS is governed and how it administers federal statutes.

The substantive requirements of the Rule on covered entities, codified at 45 C.F.R. § 88.3, do nothing more than reiterate and expound upon the text of the Federal Conscience Statutes themselves and specify, in accord with that text, which entities the statutes affect. And the definitions in the Rule are another housekeeping matter concerning how HHS interprets the Federal Conscience Statutes when it complies and ensures compliance with them.

The statutes were enacted by Congress to protect freedoms of conscience and religious exercise in the health-care context. The Rule gives effect to those statutes, including the three key laws discussed below, and the Weldon Amendment discussed in the section that follows.

- **The Church Amendments.**

Congress enacted the Church Amendments in the 1970s. Three of the Church Amendments' major provisions recognize conscience objections to abortions and sterilizations in the context of entities that receive federal funding from specified sources. Subsection 7(b) provides that no court, public official, or public authority may require that an individual or entity receiving specified federal funds—grants, contracts, loans, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act—perform or "assist in the performance" of a sterilization or abortion, or make facilities or personnel available for such a procedure, if the procedure violates the individual's or the entity personnel's religious or moral beliefs. 42 U.S.C. § 300a–7(b). Subsection 7(c)(1) provides that no entity receiving grants, contracts, loans, or loan guarantees under the same statutes denoted in § 300a-7(b) may "discriminate" in employment, promotion, termination of employment, or privileges given to health care personnel because an individual performed or "assisted in the performance" of, or refused to perform or assist in, an abortion or sterilization; further, the entity may not discriminate more generally based on an individual's religious or moral beliefs regarding the procedure. *Id*. § 300a-7(c)(1). And subsection 7(e) provides that no entity receiving grants, contracts, loans, loan guarantees, or interest subsidies from these sources may "discriminate against any applicant . . . for training or study" because

of the applicant's willingness or reluctance to participate in or assist with abortions or sterilizations. *Id*. § 300a-7(e).

Additionally, the fourth and fifth provisions of the Church Amendments are not limited by the same specific funding sources or by the subject matter of abortions and sterilizations. Subsection 7(c)(2) states that no entity receiving a grant or contract for biomedical or behavioral research under any program administered by the HHS Secretary may "discriminate" against any health care personnel because they "refused to perform or assist," in any lawful health service or research activity, or more generally because of their religious or moral beliefs related to the service. *Id.* § 300a-7(c)(2). Similarly, subsection 7(d), although not including an anti-discrimination clause, provides that no individual may be required to perform or "assist in the performance" of any HHS funded health service program or research activity contrary to his religious or moral belief. *Id*. § 300a-7(d).

- **The Coats-Snowe Amendment.**

The Coats-Snowe Amendment (Coats-Snowe) applies nondiscrimination requirements to the federal government and to certain State and local governments. Coats-Snowe was enacted in 1996 to prohibit abortion-related discrimination in training and accreditation among other contexts. *See* 42 U.S.C. § 238n.

Specifically, Coats-Snowe prohibits the federal government, and any state or local government that receives "Federal financial assistance," from discriminating against any "health care entity" because such entity (1) "refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions" or (2) refuses to make arrangements for those activities. 42 U.S.C. § 238n(a)(1)-(2). Coats-Snowe also forbids such governments from discriminating against any "health care entity" that "attends (or attended) a post-graduate physician training program, or any other program of training in the health professions" that does not "perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training." *Id*. § 238n(a)(3).

In addition, Coats-Snowe provides that "[i]n determining whether to grant a legal status to a health care entity" or "to provide such entity with financial assistance, services or other benefits," covered governments "shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard[] that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training." 42 U.S.C. § 238n(b)(1).

- **The Patient Protection and Affordable Care Act**

Congress included conscience protections in the Patient Protection and Affordable Care Act ("ACA"), including in sections 1553 and 1411. Section 1553 of the ACA provides that the federal government, and any State or local government or health care provider that receives federal financial assistance under the ACA, or any health plan created under the ACA, may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing. 42 U.S.C. § 18113.

Section 1553 also specifically designates HHS's OCR to receive complaints of discrimination based on an entity's refusal to cause, or assist in the causing of, the death of an individual. *Id*. Furthermore, no qualified health plan offered through an ACA exchange may discriminate against any individual health care provider or health care facility because of the facility or provider's "unwillingness to provide, pay for, provide coverage of, or refer for abortions." *Id*. § 18023(b)(4). The ACA also clarified that nothing in the act is to be construed to "have any effect on federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness

or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." *Id*. § 18023(c)(2)(A)(i)-(iii).

Section 1411 designates HHS as the agency responsible for issuing certifications to individuals who are entitled to an exemption from the individual responsibility requirement imposed under section 5000A of the Internal Revenue Code, including when such individuals are exempt based on a hardship (such as the inability to secure affordable coverage without abortion), are members of an exempt religious organization or division, or participate in a "health care sharing ministry." 42 U.S.C. § 18081(b)(5)(A); *see also* 26 U.S.C. § 5000A(d)(2).

All of the remedies that OCR may pursue under the Rule in coordination with the relevant HHS component are consistent with the Federal Conscience Statutes' own conditions on federal funding. The Federal Conscience Statutes restrict the use of federal funding, impose conditions on the recipients of federal funds, and govern the participants in federal programs. The Rule merely provides a mechanism for implementing those statutes. Five of the seven remedies that the Rule identifies involve withholding federal funds—precisely what the Weldon Amendment and other Federal Conscience Statutes require. *See* 45 C.F.R. § 88.7(i)(3)(i)-(v).

In brief, because Congress has instructed HHS to withhold federal funds from entities that do not comply with conscience laws, HHS has the authority,

enshrined in 5 U.S.C. § 301 and 40 U.S.C. § 121(c) to ensure that Congress's instructions are carried out. Additionally, HHS's implementing regulations, and various other statutes, have that same authority to ensure that Congress's instructions are carried out. Standard measures for ensuring compliance with Congress's directives, such as complaint investigation or defining relevant terms, do not conflict with that authority.

To the extent that Rule's enforcement mechanism for any particular statute exceeded the bounds of *that* statute, the district court should only have struck the offending portion of the Rule. The court instead struck the regulation in its entirety and determined that the proper remedy was to revert back to the Obama-era version of the Rule. But the 2011 Rule employed the same enforcement mechanisms, including the termination of funding, that the court held rendered the 2019 Rule unconstitutional. After providing that "[e]nforcement of the statutory conscience protections will be conducted by staff of the Department funding component, in conjunction with the Office for Civil Rights, through normal program compliance mechanisms," the 2011 Rule provided that "compliance is not achieved, the Department will consider all legal options, *including termination of funding*, return of funds paid out in violation of health care provider conscience protection provisions under 45 CFR parts 74, 92, and 96, as applicable."

Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9972 (Feb. 23, 2011) (emphasis added).

The enforcement mechanism provided in the 2011 Rule (like the one provided in the current 2019 Rule) furthers the statutory purpose by withholding federal funding for entities that discriminate. The 2011 Rule reads, "The conscience provisions contained in 42 U.S.C. 300a-7 (collectively known as the 'Church Amendments') were enacted at various times during the 1970s to make clear that receipt of Federal funds did not require the recipients of such funds to perform abortions or sterilizations." 76 Fed. Reg. at 9969. "Furthermore: the Federal health care provider conscience protection statutes, including the Church Amendments, the PHS Act Sec. 245, and the Weldon Amendment, require, among other things, that the Department and recipients of Department funds (including state and local governments) refrain from discriminating against institutional and individual health care entities for their participation in certain medical procedures or services, including certain health services, or research activities funded in whole or in part by the Federal government." *Id.* at 9975. The 2011 Rule therefore, like the present Rule, describes the receipt of federal funds generally and appears to not be limited to individual funding streams.

In short, the court found the Trump agency's error so problematic that it invalidated the entire Rule and replaced it with an earlier Rule that suffers from the

same ostensible constitutional infirmity. The judgment invalidating the one while reverting back to the other therefore appears to be grounded in something other than law.

II. Both the 2019 Rule and the Statutes It Seeks to Enforce Are Within Congress's Recognized Constitutional Authority

A. The Weldon Amendment Is Not A Conditional Spending Program, But An Article I, Section 9 Ban On Funding.

Congress has included the Weldon Amendment in every appropriation bill for the Departments of Labor, Health and Human Services, and Education since 2005. *See, e.g.*, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Title V, § 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004); Pub. L. No. 115-245, Div. B., sec. 507(d), 132 Stat. at 3118; Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, div. A., § 507(d)(1), 133 Stat. 2534, 2607 (2019).

The Weldon Amendment provides, in pertinent part, that "[n]one of the funds made available in this Act may be made available to a federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Pub. L. No. 116-94, div. A., § 507(d)(1), 133 Stat. at 2607. The Weldon Amendment's scope and definitions are broad, defining the term "health care entity" as "includ[ing] an individual physician or other health care professional, a hospital, a provider-sponsored

organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* § 507(d)(2). The Weldon Amendment is a restriction on HHS's use of funds, and thus, HHS must abide by the Weldon Amendment in its use and distribution of funds, through grant programs or otherwise.

Based on its clear statutory language, the Weldon Amendment is actually a prohibition on spending, not a conditional spending program. Thus, the Weldon Amendment must be assessed, not under the conditional spending analysis set out in *South Dakota v. Dole*, 483 U.S. 203 (1987), but under Article I, Section 9's requirement that "No money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. Art. I, § 9, cl. 7. Appellees and the District Court all erroneously overlooked the Article I, Section 9 mandate underlying the Weldon Amendment. But because Congress has prohibited the allocation of HHS funds to federal, state, or local governments, agencies, and programs that discriminate against health care entities that do not "provide, pay for, provide coverage of, or refer for abortions," HHS is obligated to ensure that federal monies do not get paid out in violation of the restrictions of that amendment. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424-25 (1990); *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937); *Reeside v. Walker,* 52 U.S. (11 How.) 272, 291 (1851). The remedial provisions of the Rule merely

identify how HHS is going to perform its duties on that score and the impact the Appellees challenge is merely that of Article I, Section 9, to which they as well as HHS are constitutionally bound.

B. The Other Conscience Protection Statutes, And The Rule That Implements Them, Are Clearly Valid Under The Supreme Court's Conditional Spending Jurisprudence.

i. The Rule is unambiguous and expounds upon clear statutory conditions.

As noted above, the Church Amendments, Coats-Snowe Amendment, and the Affordable Care Act each attach conditions on the receipt of federal funds that further the protection of individuals' religious and moral beliefs. They clearly define what type of conduct constitutes the discriminatory behavior and to whom Congress intended the protection from such behavior to apply. These conditions are explicit and unambiguous. In accepting any funding that is restricted by relevant provisions in these Federal Conscience Statutes, recipients of those funds exercised their choice, cognizant of the consequences of receiving those funds.

As to Appellees' claims that the conditions set out in the Rule itself are ambiguous, the substantive requirements of the Rule do nothing but reiterate the text of the Federal Conscience statutes themselves, which are not challenged by Appellees. The enforcement portion of the Rule, which allegedly poses the most imminent threat to Appellees' funding, merely articulates how HHS will deal with violations of the conditions imposed by the Federal Conscience statutes

themselves. It empowers OCR to use its full investigative and enforcement tools to enforce and redress conscience violations, including as a last resort terminating federal funding in whole or in part if OCR cannot secure voluntary corrective actions of violations that recipients have committed.

In other words, the Rule simply provides guidance and enforcement protocols about requirements already existing in the Conscience Statutes that Appellees have not challenged as ambiguous. Both the statutes and the Rule easily satisfy the "unambiguous" requirement for conditional spending under the existing jurisprudence, therefore.[2]

ii. The rule is not coercive and it places no more funding at risk than the unchallenged federal conscience statutes do.

A. Mere threat of a potential withdrawal of federal funds does not invalidate the rule on a facial challenge, since a majority of the rule's implementation would be valid.

Appellees facially challenge Section 88.7(i)(3)(iv) on the ground that the termination of federal funding is unduly coercive. Such a facial challenge requires that Appellees prove that "no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987);

[2] In *South Dakota v. Dole,* 483 U.S. 203 (1987), the Court identified four criteria. The conditions placed on federal grants to States must (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) be germane "to the federal interest in particular national projects or programs," and (4) not "induce the States to engage in activities that would themselves be unconstitutional." In addition, the conditional spending cannot be unduly coercive. Only the "unambigious" and "not coercive" criteria are at issue in this case.

accord United States v. Le, 902 F.3d 104, 117 n.12 (2d Cir. 2018). That a law or regulation "might operate unconstitutionally under some conceivable set of circumstances" is insufficient to support facial invalidation. *Salerno*, 481 U.S. at 745.

The Rule easily survives Appellees' facial challenge. It seeks compliance of the Federal Conscience statutes through the employment on a case by case basis of several enforcement steps that only culminate in termination of federal funding as a last resort. The Rule requires OCR to initiate a compliance review if it "suspect[s]" noncompliance, and mandates that the OCR make a prompt investigation and "[u]se fact-finding methods including site visits; interviews with the complainants, Department component, recipients, sub-recipients, or third-parties; and written data or discovery requests." 45 C.F.R. §§ 88.7(c), (d). Subjecting potential violators to a thorough, lengthy investigation and then, upon finding a violation, determining the appropriate enforcement action that could remedy the violation before having to resort to withholding or terminating funds, is not "facially" coercive. Rather, it is an approach that gives optimal opportunity for the violator to cure its violation first before any federal funds are terminated at all.

Moreover, it is not until after there is failure to achieve voluntary compliance to remedy a violation that OCR would resort to withholding or terminating funds. At that point, compliance *may* be sought by either "(i)

Temporarily withholding Federal financial assistance or other Federal funds, in whole or in part, pending correction of the deficiency; (ii) Denying use of Federal financial assistance or other Federal funds from the Department, including any applicable matching credit, in whole or in part; [or] (iii) Wholly or partly suspending award activities." 45 C.F.R. § 88.7. The district court failed to recognize that the complete and permanent termination of federal funds was only a discretionary "last resort." Even if that last step were itself unduly coercive—and for the reasons set out below, it is not—the prior steps are all permissible means of enforcing the Conscience Statutes. Therefore, the *facial* challenge to the entire enforcement provision of the Rule necessarily fails.

Whether such a claim could succeed in an as-applied challenge—*e.g.*, to the implementation of the Rule in a particular setting—is not at issue. However, speculating on circumstances that could conceivably emerge, the Rule contains provisions guiding its construction: It "shall be construed in favor of broad protection" of religious and moral convictions "to the maximum extent permitted by the Constitution and the terms of the Federal conscience and anti-discrimination laws." 45 C.F.R. § 88.9. If this Rule allows broad protection, to the maximum extent permitted by the Constitution, it is clear that even in the scenario of a specific circumstance, HHS would be enforcing compliance and or punishment through routes that are constitutionally permitted. Upon a compliance review,

HHS has the authority to decide which compliance alternatives are appropriate in relation to the violation.

B. The potential withdrawal of federal funds at issue here is not coercive under *NFIB*, in any event, because the loss of funds would be for the program to which the conditions were attached, not other pre-existing programs.

The district court also relied on *NFIB* to hold that the Rule was unconstitutionally coercive because a State violating a conscience statute might lose all of its funding. However, the violation of a conscience statute gives rise, at most, to termination of the funding implicated by the violation, not all of a recipient's HHS funding regardless of source. The Rule operates, moreover, in a fundamentally different way from the Medicaid expansion at issue in *NFIB*—the only controlling precedent that has ever found a federal spending condition unconstitutionally coercive.

At issue in *NFIB* was Congress's threat in the Affordable Care Act to terminate a State's *existing* Medicaid funding if the State did not expand its health care coverage. The Supreme Court held that was "much more than 'relatively mild encouragement'—it [was] a gun to the head." *NFIB*, 567 U.S. at 581. In reaching that conclusion, the plurality explicitly distinguished between two types of spending conditions that Congress might conceivably impose: 1) conditions on the use of federal funds; and 2) conditions that threaten to take away federal funds for other programs. According to the plurality, the former is constitutionally

permissible: "We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" *Id.* at 580.

Contrary to Appellees' assertions, this case falls on the permissible side of the *NFIB* coercion line. In *NFIB*, there were other, prior spending programs put at risk if a state refused to accept the condition of the Affordable Care Act, and it was that fact that led the Supreme Court to hold that the Act was unduly coercive. *Id.* at 583. Here, in contrast, it is the very HHS spending programs to which the statutory conditions are themselves attached that are affected. Though that may be a lot—Medicare and Medicaid included—*NFIB* addressed a different kind of problem, and outside of that case, the Supreme Court has *never* held a spending program was invalid as coercive.

Second, the Supreme Court's decision in *NFIB* does not undermine the longstanding understanding that Congress can impose conditions in exchange for its funds, and if *Congress* can impose conditions, the agencies tasked with enforcement surely can enforce those conditions as well. Not even the joint dissent suggested that the mere possibility of a threat to withhold funds was coercive. *Id.* at 633.

The Rule provides for enforcement of unchallenged conscience provisions that have been in place for years, if not decades. The district courts reliance on *NFIB's* reasoning relating to the efforts to induce States to participate in a "new health care program," *id*. at 584, thus has no relevance here.

CONCLUSION

For the reasons stated above, the Rule is a valid exercise of HHS's authority to enforce Federal Conscience Statutes, and both the Rule and the Statutes it implements are within constitutional bounds recognized by the Supreme Court. The Rule is, moreover, an important elaboration on and enforcement of the Federal Conscience Statutes, which are important efforts by Congress to further our nation's historical practice of honoring the rights of conscience.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 5,670 words.

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Date: May 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on May 4, 2020. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *John C. Eastman*