

1 XAVIER BECERRA
 Attorney General of California
 2 KATHLEEN BOERGERS, State Bar No. 213530
 NELI N. PALMA, State Bar No. 203374
 3 KARLI EISENBERG, State Bar No. 281923
 STEPHANIE T. YU, State Bar No. 294405
 4 1300 I Street, Suite 125, P.O. Box 944255
 Sacramento, CA 94244-2550
 5 Tel: (916) 210-7522; Fax: (916) 322-8288
 E-mail: Neli.Palma@doj.ca.gov
 6 *Attorneys for Plaintiff State of California, by
 and through Attorney General Xavier Becerra*

7 JAMES R. WILLIAMS, State Bar No. 271253
 County Counsel
 8 GRETA S. HANSEN, State Bar No. 251471
 LAURA S. TRICE, State Bar No. 284837
 9 MARY E. HANNA-WEIR, State Bar No. 320011
 SUSAN P. GREENBERG, State Bar No. 318055
 10 H. LUKE EDWARDS, State Bar No. 313756
 Office of the County Counsel, Cty. of Santa Clara
 11 70 West Hedding Street, East Wing, 9th Fl.
 San José, CA 95110-1770
 12 Tel: (408) 299-5900; Fax: (408) 292-7240
 Email: mary.hanna-weir@cco.sccgov.org
 13 *Attorneys for Plaintiff County of Santa Clara*

DENNIS J. HERRERA, State Bar No. 139669
 City Attorney
 JESSE C. SMITH, State Bar No. 122517
 Chief Assistant City Attorney
 RONALD P. FLYNN, State Bar No. 184186
 Chief Deputy City Attorney
 YVONNE R. MERÉ, State Bar No. 173594
 SARA J. EISENBERG, State Bar No. 269303
 JAIME M. HULING DELAYE, State Bar No. 270784
 Deputy City Attorneys
 City Hall, Rm 234, 1 Dr. Carlton B. Goodlett Pl.
 San Francisco, CA 94102-4602
 Tel: (415) 554-4633, Fax: (415) 554-4715
 E-Mail: Sara.Eisenberg@sfcityatty.org
*Attorneys for Plaintiff City and County of San
 Francisco*

LEE H. RUBIN, State Bar No. 141331
 Mayer Brown LLP
 3000 El Camino Real, Suite 300,
 Palo Alto, CA 94306-2112
 Tel: (650) 331-2000, Fax: (650) 331-2060
 Email: lrubin@mayerbrown.com
*Attorneys for Plaintiffs County of Santa Clara, et
 al.*

**Additional Counsel Listed on Signature Pages*

14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, 18 vs. 19 ALEX M. AZAR II, et al., Defendants.
20 STATE OF CALIFORNIA, by and through 21 ATTORNEY GENERAL XAVIER BECERRA, Plaintiff, 22 vs. 23 ALEX M. AZAR, et al., Defendants.
24 COUNTY OF SANTA CLARA, et al. 25 Plaintiffs, 26 vs. 27 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., 28 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
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 Action Filed: 5/2/2019

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1 **INTRODUCTION**

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

12 **ARGUMENT**

13 **I. THE RULE WAS ADOPTED IN VIOLATION OF THE APA**

14 **A. The Rule Exceeds HHS’s Statutory Authority**

15 **1. HHS Lacks Express Authority to Promulgate the Rule**

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

20 Defendants first argue that other federal statutes allow HHS to promulgate regulations that
 21 “correspond to or supplement” *other* regulations—the UAR and FAR—and that *these*
 22 supplemental HHS regulations authorize the Rule. *See id.* at 2-3 (citing 45 C.F.R. §§ 75.300(a),
 23 75.371, and 75.500-75.520). Not so. HHS cannot grant itself, through its own regulations, the
 24 power to promulgate legislative rules interpreting and enforcing the Conscience Laws. “[T]he

25 _____
 26 ¹ Contrary to Defendant’s assertion, Plaintiffs did not “abandon[] argument” on any points. Defs.
 27 Reply 2. Plaintiffs explain how the Rule diverges in substance from the Conscience Laws, *see*
 28 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.

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

3 Defendants also argue that several statutory provisions (10 U.S.C. ch. 137, 40 U.S.C.
4 § 121(c), 42 U.S.C. §§1302, 18023, 18041, 18113, 263a, and 1315a, and 51 U.S.C. § 20113)
5 directly grant HHS the relevant authority. Defs. Reply 2-3, 5. But none of these statutes has the
6 required “nexus between the regulations and some delegation of the requisite legislative authority
7 by Congress.” *Chrysler Corp.*, 441 U.S. at 304. Indeed, none are remotely related to the Rule. For
8 example, 51 U.S.C. § 20113 authorizes NASA to promulgate rules governing its operations; 10
9 U.S.C. ch. 137 governs procurement for the Department of Defense; and 40 U.S.C. §121(c)
10 authorizes the Secretary of HHS to “issue orders and directives . . . necessary to carry out the
11 regulations” issued by the Administrator of General Services—not to issue his own regulations.
12 Moreover, the Supreme Court has held that the “housekeeping statute” (5 U.S.C. § 301) does not
13 authorize “substantive rules.” *Chrysler Corp.*, 441 U.S. at 310. None of the statutes cited
14 “contemplate[] the regulations issued.” *Id.* at 308.

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

16 Defendants argue that the Rule’s definitions are entitled to *Chevron* deference. Defs. Reply
17 4-6. They are not. *Chevron* applies “only ‘when it appears that Congress delegated authority to
18 the agency generally to make rules carrying the force of law, and the agency interpretation
19 claiming deference was promulgated in the exercise of that authority.’” *Gonzales v. Oregon*, 546
20 U.S. 243, 255-56 (2006). Neither the Conscience Laws nor any other statute cited by Defendants
21 endows HHS with the authority to issue such a legislative regulation.

22 In the absence of any express delegation, Defendants attempt to invoke implicit authority
23 (Defs. Reply 4-6), relying primarily on *Barnhart v. Walton*, 535 U.S. 212 (2002). But in
24 *Barnhart*, the agency undisputedly *had* statutory rulemaking authority (*id.* at 217 217 (“[a]cting
25 pursuant to statutory rulemaking authority”)); the question was whether it was acting pursuant to
26 that authority in interpreting the term “disability.” *Id.* at 221-22; *see also Sierra Club v. Trump*,
27 929 F.3d 670, 692-93 (9th Cir. 2019). Here, Defendants lack such statutory authority altogether.

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

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

10 3. The Rule’s Definitions Far Exceed the Underlying Statutes

11 The interpretation of a statutory provision begins with the plain language. *U.S. v. Lillard*,
12 935 F. 3d 827, 833–34 (9th Cir. 2019). If the language lacks a plain meaning, courts employ other
13 tools, such as legislative history, to interpret it.² *Id.* Here, both plain meaning and legislative
14 history demonstrate that HHS’s definitions exceed the terms’ statutory meanings.

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

24 _____
25 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.

26 ³ Defendants’ assertion that this legislative history is entitled to little or no weight is incorrect. *See*
27 *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); *see*
28 *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).

1 Defendants attempt to justify their broader definition of the term by citing the standard
2 dictionary definitions. Defs. Reply 7. But “where a phrase in a statute appears to have become a
3 term of art . . . any attempt to break down the term into its constituent words is not apt to
4 illuminate its meaning.” *Sullivan*, 496 U.S. at 483.⁴ Furthermore, the standard dictionary
5 definitions of “assist” and “performance” underscore that Congress intended to require a close
6 and direct nexus to the objected-to activity: “Performance” means “the execution of an action,”
7 and to “assist” means “to give support or aid,” such as when “another surgeon [assisted] on the
8 operation.” Merriam-Webster’s Collegiate Dictionary 70,863 (10th ed. 1996).

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

17 ***Discriminate or Discrimination.*** Defendants attempt to deny that HHS’s definition of
18 “discrimination” has any meaning at all, suggesting that it merely incorporates the underlying
19 statutes and provides that certain actions do *not* constitute discrimination. Defs. Reply 8. The
20 Rule’s preamble tells a different story, explaining that HHS’s interpretation requires covered
21 entities “to respect objections based on religious beliefs by accommodating them” but does “not
22 incorporat[e] the additional concept of an ‘undue hardship’ exception for reasonable
23 accommodations” 84 Fed. Reg. 23,170, 23,191 (May 21, 2019). It is inconceivable that
24 Congress intended silently to impose an *unlimited* accommodation obligation in the healthcare
25 field—where life or death may be at stake—when just a year earlier it *expressly* imposed a far
26

27 ⁴ Defendants cite *Langandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004) for the proposition that
28 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.

1 more limited religious-accommodation obligation on all covered employers in Title VII.⁵ *See also*
 2 *U.S. v. Davis*, 139 S. Ct. 2319, 2327 (2019); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504,
 3 528 (1989) (Scalia, J., concurring) (statutory terms should be understood in a manner “most
 4 compatible with the surrounding body of law into which the provision must be integrated”).
 5 Defendants’ expansion of “discrimination” to require accommodations that *would* impose undue
 6 hardship on the employer’s business finds no support in the language of Church, Coats-Snow, or
 7 Weldon, and its departure from Congress’s intent must be rejected.

8 ***Health Care Entity.*** Defendants attempt to use the word “include” in Coats-Snowe and
 9 Weldon to dramatically expand the definition of health care entity. While Congress’s statutory
 10 language focused exclusively on healthcare professionals and organizations, the Rule’s definition
 11 extends to all “health care personnel,” 84 Fed. Reg. 23,264, which HHS defines as to include
 12 clerical, dietary, house-keeping, laundry, security, maintenance, billing, and other staff “not
 13 directly involved in patient care.” 2nd RJN Ex. C at 1. This defies the basic principle of statutory
 14 construction that “[w]here general words follow specific words in a statutory enumeration, the
 15 general words are construed to embrace only objects similar in nature to those objects enumerated
 16 by the preceding specific words.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15
 17 (2001). Defendants offer no response to this argument. Pls. Mot. 31-32.

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

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

25 _____
 26 ⁵ In 1964, Congress enacted Title VII, prohibiting employment discrimination on the basis
 27 of religion without defining what constituted “religious discrimination.” Later, in a 1972
 28 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.

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

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

7 In addition, the Rule also appears to cover a hysterectomy performed to treat medical
8 conditions such as cancer or gender dysphoria.⁶ Such procedures are not covered by Church’s use
9 of the term “sterilization,” Ettner Supp. Dec. ¶¶ 8, 16, which in medical parlance refers to
10 procedures undertaken *for the purpose of preventing pregnancy*. *See, e.g., Sterilization*, MAGILL’S
11 MEDICAL GUIDE VOL. 5 (6th ed.) (“Sterilization . . . is a permanent method of surgical
12 contraception.”). Indeed, HHS itself defines sterilization to mean “a form of contraception (birth
13 control) that is meant to be permanent.” 2nd RJN Ex. D; *see also* Ettner Supp. Dec. ¶ 7. By
14 contrast, treatment for gender dysphoria or cancer may *incidentally* affect reproductive function,
15 but that is not its purpose. Ettner Supp. Dec. ¶ 14. Nonetheless, the Rule indicates that employees
16 could opt out of these procedures for religious reasons. That HHS intends “sterilization” within
17 the meaning of the Rule to cover hysterectomies is evident from the Rule’s reference to *Minton v.*
18 *Dignity Health*, 2019 WL 4440132 (Cal. App. Ct. Sep. 17, 2019)—in which a hospital was sued
19 for refusing to perform a hysterectomy to treat a transgender man’s gender dysphoria—as an
20 example of “requir[ing] private religious entities to perform . . . sterilizations” 84 Fed. Reg.
21 23,178. And nowhere have Defendants clarified that such procedures are *not* covered. Instead,
22 HHS states that it will make these determinations on a “case-by-case basis”—meaning that in at
23 least some situations, they *will* be covered. 84 Fed. Reg. 23,205; Defs. Reply 24-25.

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

26 ⁶ Critically, while *no* gender affirming medical treatment can be considered to be a sterilization
27 procedure, Ettner Supp. Dec. ¶¶ 8, 16, a vast array of gender affirming healthcare does not affect
28 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.

1 (151 Cong. Rec. H177 (Jan. 25, 2005) (Senator Weldon: the law “ensures that in situations where
 2 a mother’s life is in danger a health care provider must act to protect a mother’s life”). It is not
 3 covered by Coats-Snowe. *See* 2nd RJN Ex. I (142 Cong. Rec. S2269 (Mar. 19, 1996) (Senator
 4 Coats: “[A] resident needs not to have [previously] performed an abortion . . . to have mastered
 5 the procedure to protect the health of the mother if necessary”). And it is not covered by Church.
 6 2nd RJN Ex. G at S9601 (Senator Church: “[I]n an emergency situation—life or death type—no
 7 hospital, religious or not, would deny such [abortion or sterilization] services.”).

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

16 **B. The Rule Conflicts With Existing Healthcare Laws**

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

22 Moreover, Defendants still fail to explain how a rule that does not have exceptions for
 23 medical emergencies is to be “read . . . in harmony” with EMTALA’s clear directive that a
 24 hospital “must” provide appropriate care for emergency-room patients. *Compare* 84 Fed. Reg.
 25 23,183 *with* 42 U.S.C. § 1395dd(a).⁸ Defendants’ mere assurance that there will be no conflict,

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

28 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).

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

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

19 **ACA Section 1557.** The Rule allows virtually anyone remotely associated with the
20 provision of healthcare to discriminate against women and LGBT people. Pls. Mot. 37. In fact,
21 the Rule singles out these patients for discriminatory denials of care, even in emergency
22 circumstances.⁹ This directly conflicts with Section 1557 (42 U.S.C. § 18116), which Congress
23 enacted to prohibit discrimination in healthcare. *Rumble v. Fairview Health Servs.*, 2015 WL
24 1197415, at *11 (D. Minn. Mar. 16, 2015).¹⁰ Defendants make no effort to reconcile the Rule
25 with these vital anti-discrimination consumer protections enacted by Congress. Instead,

26
27 ⁹ 84 Fed. Reg. 23,176 & n.27, 23,188, 23,251.

28 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).

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

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

14 **C. The Rule Is Arbitrary and Capricious**

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

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

6 ***Impact on Providers.*** Executive Order 12,866 instructs agencies to consider direct costs, as
7 well as “any adverse effects” the rule might have on “the efficient functioning of the economy,
8 private markets . . . health, safety, and the natural environment.” Exec. Order No. 12,866 §
9 6(a)(3)(C)(ii) (58 Fed. Reg. 51,735 (Oct. 4, 1993)). Defendants failed to consider staffing burdens
10 for employers who must accommodate refusals. *See* 84 Fed. Reg. 23,227, tbl.1 (listing quantified
11 and non-quantified costs that HHS considered).¹¹ Defendants are also silent as to how providers
12 are supposed to address the conflicts that the Rule creates with established ethical guidelines. *See*
13 App’x 21 at 4. Defendants’ focus on exemptions from the assurance and certification
14 requirements also fails, as the number of regulated entities is grossly underestimated. States and
15 counties are counted only once each, meaning that the three public entities, for example, each
16 count the same amount as an individual physician’s practice, thus neglecting the many impacted
17 departments and agencies within the State, and the five hospitals and dozens of County- and City-
18 run clinics that must comply. *See* 84 Fed. Reg. 23,234, tbl.2.

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

25 _____
26 ¹¹ *See also* Institute for Policy Integrity brief, Dkt. No. 107-1 at 4-12; App’x 63 (Santa Clara) at
27 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.

28 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.*

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

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

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

25 *Rouillard*, 371 F. Supp. 3d 742 (E.D. Cal. 2019). The letter submitted at Dkt. No. 136-2 at 10-11
 26 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.

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

28 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.

1 **II. THE RULE VIOLATES THE CONSTITUTION**

2 **A. Spending and Establishment Clause Claims Are Ripe**

3 Defendants' focus on a purported absence of a concrete enforcement action ignores that the
 4 Rule requires Plaintiffs to comply immediately with new restrictions or risk serious penalties.
 5 *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967) (*overruled on other grounds by Califano v.*
 6 *Sanders*, 430 U.S. 99 (1977)).¹⁵ Indeed, the Rule requires that Plaintiffs undertake extensive and
 7 costly compliance measures that will adversely affect their policies, hiring practices, and patient
 8 care.¹⁶ Thus, Defendants' assertion that the Rule is not a "sea change" is disingenuous, and
 9 indeed, is flatly contradicted by Defendants' own Factsheet on the Rule¹⁷ and by their estimated
 10 implementation costs starting in year one. 84 Fed. Reg. 23,241-42; *see also* Aizuss Dec. ¶¶ 32-33;
 11 Dkt. 107-1 at 11-12 (discussing additional implementation costs).

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

16 **B. The Rule Violates the Spending Clause**

17 Defendants' Spending Clause defense fails wholesale because the Rule is not merely a
 18 slight "adjustment" (Defs. Reply 20). *See supra* Section I.A. In *NFIB v. Sebelius*, 567 U.S. 519,
 19 583 (2012), the Supreme Court held that the ACA's Medicaid expansion provisions "expanded
 20 the boundaries" of the original Medicaid program by extending eligibility from "four particular
 21 categories of the needy" and transforming it into "an element of a comprehensive national plan to
 22 provide universal health insurance coverage." The same is true here, where the Conscience Laws

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

26 ¹⁶ Aizuss Dec. ¶¶ 30-35; Buchman Dec. ¶¶ 9-10; Cantwell Dec. ¶¶ 4-12; Chen Dec. ¶¶ 5-13;
 27 Cody Dec. ¶¶ 6-10; Colwell Dec. ¶¶ 5-10; Drey Dec. ¶¶ 10-13; Hanna-Weir Dec., Ex. A (Nguyen
 28 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").

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

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

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

27
 28 ¹⁸ Cantwell Dec. ¶¶ 6-8; Ghaly Dec. ¶ 11; Lorenz Dec. ¶¶ 12-13; Nunes Dec. ¶¶ 6-8, 13-14.

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

8 Defendants also fail to explain how a rule intended to robustly enforce Weldon does not
 9 implicate funding for labor and educational programs (in addition to HHS funding).¹⁹ This
 10 ambiguity violates the Spending Clause because it is impossible for regulated entities to know the
 11 scope of funding that is potentially threatened. Thus, *Mayweathers v. Newland*, 314 F.3d 1062,
 12 1067 (9th Cir. 2002) does not save the Rule because the “existence of the condition” is not
 13 “explicitly obvious.” Because all such funding is at risk, the Rule’s conditions are wildly
 14 unrelated to conscience objections. *See* Pls. Mot. 42.

15 C. The Rule Violates the Establishment Clause

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

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

19
 20 ¹⁹ *See* Department of Defense and Labor, Health and Human Services, and Education
 21 Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. B,
 22 § 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).

23 ²⁰ *Amos* does not conflict with but underscores this constitutional principle. Pls. Mot. 45 & n.67.
 24 Justice Kennedy’s separate concurrence in the judgment in *Bd. of Educ. of Kiryas Joel Vill. Sch.*
 25 *Dist. v. Grumet* acknowledges that “[t]here is a point . . . at which an accommodation may impose
 26 a burden on nonadherents so great that it becomes an establishment.” 512 U.S. 687, 725 (1994)
 27 (Kennedy, J., concurring). And *Gillette v. United States*, 401 U.S. 437, 448–54 (1971), holds only
 28 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.*,
 Geddis & Van Tassell, *RFRA Exemptions from the Contraception Mandate: An*
Unconstitutional Accommodation of Religion, 49 Harv. C.R.–C.L. L. Rev. 343, 364 (2014).

1 And HHS’s position that burdens on third parties alone are never sufficient to violate the
2 Establishment Clause is irreconcilable with *Cutter v. Wilkerson*, 544 U.S. 709, 720 (2005), *Texas*
3 *Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989), and *Estate of Thornton v. Caldor*, 472 U.S. 703,
4 709 (1985). The Rule requires employer hospitals to privilege their employees’ religious beliefs
5 above the employers’ own organizational missions and staffing needs. *Caldor*, 472 U.S.at 710.
6 This Court need not identify the precise threshold beyond which accommodations become
7 unconstitutional religious preferences because the burdens here are far greater than those that
8 *Caldor* and *Texas Monthly* struck down. See Pls. Mot. 43–44.

9 **2. The Rule Impermissibly Favors Religion and Some Religious Beliefs**

10 Governmental action also violates the Establishment Clause if its “ostensible object” or
11 primary effect is to advance religion, regardless of whether it also serves additional secular aims.
12 *E.g.*, *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860, 863 (2005); *Texas Monthly*, 489 U.S. at
13 14–16. HHS cannot evade these constitutional restrictions by writing the Rule in purportedly
14 neutral terms. See, *e.g.*, *Kiryas Joel*, 512 U.S. at 699 (“identification here of the [favored] group
15 . . . in terms not expressly religious” “does not end” the inquiry into whether the law affords
16 unconstitutional religious preferences); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,
17 508 U.S. 520, 531–33 (1993) (explaining that the Establishment Clause “extends beyond facial
18 discrimination” and “forbids subtle departures from neutrality”). Tacking on “moral” objections
19 does not alter this basic reality: The Rule is designed to, and will, favor some people’s religion
20 over patients’ lives and the public health.²¹ The Rule’s primary purpose and primary effect are to
21 advance religion and the particular religious beliefs that overwhelmingly supply the objections
22 the Rule is designed to address. HHS has been transparent about its goal: “The rule will promote
23 protection of religious beliefs and moral convictions. . . . As James Madison . . . wrote, ‘The
24 Religion then of every man must be left to the conviction and conscience of every man . . . It is
25 the duty of every man to render to the Creator such homage, and such only, as he believes to be
26

27 ²¹ “Moral objections” likely count as religious objections, thus still favoring religion. See *Welsh v.*
28 *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).

1 acceptable to him.” 84 Fed. Reg. 23,246.

2 Additionally, the Rule privileges religious beliefs that oppose certain procedures over those
3 that require the procedures or support the provision of care consistent with patients’ autonomy—a
4 denominational preference that cannot survive strict scrutiny under *Larson v. Valente*, 456 U.S.
5 228, 244–46 (1982). And as already explained, Pls. Mot. 45-46, because HHS is lifting burdens
6 on religious exercise not of its own making, the Rule impermissibly elevates favored religious
7 beliefs over other people’s beliefs, rights, and interests. *Caldor*, 472 U.S. at 709–10.²²

8 **D. The Rule Violates Patients’ Equal Protection and Due Process Rights**

9 Defendants now concede that physicians who provide reproductive healthcare may assert
10 third-party standing on behalf of their patients. Defs. Reply 23. Contrary to Defendants’
11 assertions, Dr. McNicholas *does* provide “full-spectrum reproductive healthcare, including
12 second-trimester abortions, medical and surgical abortions in the first trimester.” *Id.* at 23-24;
13 McNicholas Dec. ¶ 6. Moreover, Defendants do not counter that doctors have standing to
14 represent the interests of patients seeking gender-affirming care. Defs. Reply 25, n.14.²³

15 Defendants misconstrue the harms to the patients of the nongovernmental Santa Clara
16 Plaintiffs²⁴ as “potential downstream effects.” Defs. Reply 25. These Plaintiffs have
17 demonstrated, and Defendants do not deny, that the Rule will immediately empower a broad class
18 of individuals to delay or deny access to abortion, contraception, and gender-affirming care—
19 deterring these patients from seeking these services and creating strong incentives for providers to

20
21 ²² In contrast, Title VII’s religious-accommodation provision ameliorates burdens on employees’
22 religious exercise imposed by the statute’s nondiscrimination provisions, which otherwise would
23 arguably bar employers even from *voluntarily* accommodating religion, for that is different
24 treatment based on religion. And by not requiring accommodations that impose more than *de*
25 *minimis* costs on employers or other employees, *see, e.g., Trans World Airlines v. Hardison*, 432
26 U.S. 63, 81, 84 (1977), Title VII avoids materially burdening nonbeneficiaries.

27 ²³ *See* Carpenter Dec. ¶¶ 5-8 (LA LGBT Center cared for a transgender woman suffering from
28 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.

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

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

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

26 ²⁵ Plaintiffs have addressed why this challenge is not foreclosed by *Rust v. Sullivan*, 500 U.S. 173
27 (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.

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

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

6 **E. The Rule Violates Plaintiffs’ Patients’ Free Speech Rights**

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

20 **F. The Rule Violates Separation of Powers**

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

27 _____
 28 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.

1 III. THE COURT MAY CONSIDER EXTRA-RECORD EVIDENCE

2 Defendants raise standing and ripeness challenges to several of Plaintiffs' claims, yet object
 3 to the entry of evidence establishing their justiciability. Plaintiffs are permitted to demonstrate
 4 standing and ripeness with extra-record evidence. *See California v. Azar*, 911 F.3d 558, 571-73
 5 (9th Cir. 2018) (states have standing based on declarations showing challenged regulation would
 6 cause them economic harm); *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502,
 7 627 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Commerce v. New*
 8 *York*, 139 S. Ct. 2551 (2019). The evidence meets these standards. *See* Pls. Mot. 4-11, 47-51.²⁸

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

19 Moreover, because Plaintiffs' constitutional challenges are reviewed independent of the
 20 APA, the "court is entitled to look beyond the administrative record." *Grill v. Quinn*, 2012 WL
 21 174873, at *2 at n.8 (E.D. Cal. Jan. 20, 2012).³⁰

22 ²⁸ Courts also permit plaintiffs to submit extra-record evidence on the merits of their
 23 constitutional claims under § 706(2)(B). *See, e.g., Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D.
 24 Va. 2008) ("When a court is reviewing the constitutional validity of agency action pursuant to 5
 25 U.S.C. § 706(2)(B), it should make 'an independent assessment of a citizens' claim of
 26 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).

27 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.

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

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

4 **IV. THE COURT SHOULD VACATE THE ENTIRE RULE**

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

10 Apparently conceding that vacatur is the appropriate remedy, Defendants next argue that
11 relief should be limited to the parties. Defs. Reply 30. But they do not cite a single case in which
12 a final judgment setting aside a federal regulation has been confined in this way. Nor could they:
13 the few courts that have considered this novel argument have rejected it, finding it to be "both at
14 odds with settled precedent and difficult to comprehend." *O.A. v. Trump*, 2019 WL 3536334, at
15 *29 (D.D.C. Aug. 2, 2019); *see also Desert Survivors v. US Dep't of the Interior*, 336 F. Supp. 3d
16 1131, 1134 (N.D. Cal. 2018); *New Mexico Health Connections v. HHS*, 340 F. Supp. 3d 1112,
17 1183 (D.N.M. 2018).³¹ This Court should not be the first in the nation to limit relief under the
18 APA in this way.

19 **CONCLUSION**

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

21
22
23 constitutional claim even in a case with an APA claim); *Rydeen v. Quigg*, 748 F. Supp. 900, 906
24 (D.D.C. 1990); *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp.
25 2d 310, 327-28 (D.P.R. 1999); *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at *5 (N.D.
26 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).

27 ³¹ In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the plaintiffs claimed that their voting rights were
28 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.

1 Respectfully Submitted,

2 Dated: October 10, 2019

3 XAVIER BECERRA
4 Attorney General of California
5 KATHLEEN BOERGERS
6 Supervising Deputy Attorney General

7 /s/ Neli N. Palma

8 NELI N. PALMA
9 KARLI EISENBERG
10 STEPHANIE T. YU
11 Deputy Attorneys General
12 *Attorneys for Plaintiff State of California, by
13 and through Attorney General Xavier Becerra*

14 Dated: October 10, 2019

15 By: /s/ Lee H. Rubin

16 LEE H. RUBIN
17 *lrubin@mayerbrown.com*
18 Mayer Brown LLP
19 Two Palo Alto Square, Suite 300
20 3000 El Camino Real
21 Palo Alto, California 94306-2112
22 Tel: (650) 331-2000

23 MIRIAM R. NEMETZ*
24 *mnemetz@mayerbrown.com*
25 NICOLE SAHARSKY*
26 *nsaharsky@mayerbrown.com*
27 ANDREW TAUBER*
28 Mayer Brown LLP
1999 K Street, Northwest
Washington, DC 2006-1101
Tel: (202) 263-3000
*Counsel for Plaintiffs County of Santa Clara,
Trust Women Seattle, Los Angeles LGBT
Center, Whitman-Walker Clinic, Inc. d/b/a
Whitman-Walker Health, Bradbury Sullivan
LGBT Community Center, Center on Halsted,
Hartford Gyn Center, Mazzoni Center,
Medical Students For Choice, AGLP: The
Association of LGBT+Psychiatrists,
American Association of Physicians For
Human Rights d/b/a GLMA: Health
Professionals Advancing LGBT Equality,
Colleen McNicholas, Robert Bolan, Ward
Carpenter, Sarah Henn, and Randy Pumphrey*

Dated: October 10, 2019

DENNIS J. HERRERA
City Attorney
JESSE C. SMITH
RONALD P. FLYNN
YVONNE R. MERÉ
SARA J. EISENBERG
JAIME M. HULING DELAYE
Deputy City Attorneys

By: /s/ Sara J. Eisenberg

SARA J. EISENBERG
Deputy City Attorney
*Attorneys for Plaintiff City and
County of San Francisco*

Dated: October 10, 2019

By: /s/ Mary E. Hanna-Weir

JAMES R. WILLIAMS
County Counsel
GRETA S. HANSEN
Chief Assistant County Counsel
LAURA S. TRICE
Lead Deputy County Counsel
MARY E. HANNA-WEIR
SUSAN P. GREENBERG
H. LUKE EDWARDS
Deputy County Counsels
mary.hanna-weir@cco.sccgov.org
Office of the County Counsel,
County of Santa Clara
70 West Hedding Street, East Wing, 9th Floor
San José, California 95110-1770
Tel: (408) 299-5900
Counsel for Plaintiff County of Santa Clara

1 Dated: October 10, 2019

2 By: /s/ Richard B. Katskee

3 RICHARD B. KATSKEE*
4 *katskee@au.org*
5 KENNETH D. UPTON, JR.*
6 *upton@au.org*
7 Americans United for Separation
8 of Church and State
9 1310 L Street NW, Suite 200
10 Washington, DC 20005
11 Tel: (202) 466-3234
12 *Counsel for Plaintiffs Trust Women Seattle,*
13 *Los Angeles LGBT Center, Whitman-Walker*
14 *Clinic, Inc. d/b/a Whitman-Walker Health,*
15 *Bradbury Sullivan LGBT Community Center,*
16 *Center on Halsted, Hartford Gyn Center,*
17 *Mazzoni Center, Medical Students For*
18 *Choice, AGLP: The Association of*
19 *LGBT+Psychiatrists, American Association*
20 *of Physicians For Human Rights d/b/a*
21 *GLMA: Health Professionals Advancing*
22 *LGBT Equality, Colleen McNicholas, Robert*
23 *Bolan, Ward Carpenter, Sarah Henn, and*
24 *Randy Pumphrey*

15 Dated: October 10, 2019

16 By: /s/ Genevieve Scott

17 GENEVIEVE SCOTT*
18 *gscott@reprorights.org*
19 RABIA MUQADDAM*
20 *rmuqaddam@reprorights.org*
21 Center for Reproductive Rights
22 199 Water Street, 22nd Floor
23 New York, NY 10038
24 Tel: (917) 637-3605
25 *Counsel for Plaintiffs Trust Women Seattle,*
26 *Los Angeles LGBT Center, Whitman-Walker*
27 *Clinic, Inc. d/b/a Whitman-Walker Health,*
28 *Bradbury Sullivan LGBT Community Center,*
Center on Halsted, Hartford Gyn Center,
Mazzoni Center, Medical Students For
Choice, AGLP: The Association of
LGBT+Psychiatrists, American Association
of Physicians For Human Rights d/b/a
GLMA: Health Professionals Advancing
LGBT Equality, Colleen McNicholas, Robert
Bolan, Ward Carpenter, Sarah Henn, and
Randy Pumphrey

28 SA2019501805 // 14181311.docx

Dated: October 10, 2019

By: /s/ Jamie A. Gliksberg

JAMIE A. GLIKSBERG*
jgliksberg@lambdalegal.org
CAMILLA B. TAYLOR*
ctaylor@lambdalegal.org
Lambda Legal Defense and
Education Fund, Inc.
105 West Adams, 26th Floor
Chicago, IL 60603-6208
Tel: (312) 663-4413

OMAR GONZALEZ-PAGAN*
ogonzalez-pagan@lambdalegal.org
Lambda Legal Defense and
Education Fund, Inc.
120 Wall Street, 19th Floor
New York, NY 10005-3919
Tel: (212) 809-8585

PUNEET CHEEMA*
pcheema@lambdalegal.org
Lambda Legal Defense and
Education Fund, Inc.
1776 K Street NW, 8th Floor
Washington, DC 20006
Tel: (202) 804-6245, ext. 596
Counsel for Plaintiffs Trust Women Seattle,
Los Angeles LGBT Center, Whitman-Walker
Clinic, Inc. d/b/a Whitman-Walker Health,
Bradbury Sullivan LGBT Community Center,
Center on Halsted, Hartford Gyn Center,
Mazzoni Center, Medical Students For
Choice, AGLP: The Association of
LGBT+Psychiatrists, American Association
of Physicians For Human Rights d/b/a
GLMA: Health Professionals Advancing
LGBT Equality, Colleen McNicholas, Robert
Bolan, Ward Carpenter, Sarah Henn, and
Randy Pumphrey

* Admitted pro hac vice

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

Declarant

/s/ Ashley Harrison

Signature