

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

JOSEPH H. HUNT
Assistant Attorney General
JAMES M. BURNHAM
Deputy Assistant Attorney General
CHRISTOPHER A. BATES
Senior Counsel to the Assistant Attorney General
MICHELLE R. BENNETT
Assistant Branch Director
REBECCA M. KOPPLIN
BRADLEY P. HUMPHREYS
Trial Attorneys
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W.
Washington, DC 20005
(202) 514-3953
Rebecca.M.Kopplin@usdoj.gov
Counsel for Defendants

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA**

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, in his official
capacity as Secretary of the United
States Department of Health and
Human Services; and UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

Nos. 2:19-cv-0183-SAB

**DEFENDANTS' MOTION TO
DISMISS, OR, IN THE
ALTERNATIVE, FOR
SUMMARY JUDGMENT**

Hearing: November 7, 2019
With Oral Argument: 10:00 AM

TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 LEGAL AND FACTUAL BACKGROUND..... 4

4 I. Statutory History of Relevant Conscience Protections..... 4

5 A. The Church Amendments 6

6 B. The Coats-Snowe Amendment 7

7 C. The Weldon Amendment..... 8

8 D. Conscience Protections in the ACA 9

9 II. Unchallenged Rules that Require Compliance with the Federal

10 Conscience Statutes..... 10

11 III. HHS Conscience Protection Regulations..... 13

12 A. 2008 and 2011 HHS Conscience Protection Regulations 13

13 B. Notice of Proposed Rulemaking..... 14

14 C. Final Rule..... 15

15 IV. This Litigation..... 19

16 ARGUMENT..... 19

17 I. Legal Standard 19

18 II. Plaintiff’s Spending Clause, Establishment Clause Claims Are

19 Unripe..... 21

20 III. Plaintiff’s Claims Lack Merit 26

21 A. The Challenged Definitions Are Reasonable Exercises of

22 HHS’s Statutory Authority. 26

1	1. “Assist in the Performance”	26
2	2. “Discriminate or Discrimination”	28
3	3. “Entity”	30
4	4. “Health Care Entity”	31
5	5. “Health Service Program”	34
6	6. “Referral or Refer For”	35
7	B. Other Provisions of the Rule Are within HHS’s Statutory	
8	Authority	37
9	C. The Rule Is Consistent with Other Provisions of Law	38
10	1. Section 1554 of the ACA	38
11	2. The ACA’s Preventive Care Coverage Requirement	43
12	3. Emergency Medical Treatment and Active Labor Act	
13	(EMTALA)	43
14	4. “Non-Directive” Appropriations Rider	44
15	5. Title VII of the Civil Rights Act of 1964	46
16	D. The Rule Is Neither Arbitrary Nor Capricious	47
17	1. HHS Adequately Explained Why it Changed Course. ...	47
18	2. Reasoned Decision-making Produced HHS’s	
19	Definitions	49
20	3. HHS Reasonably Weighed the Rule’s Costs and	
21	Benefits	51
22	E. The Rule Does Not Violate the Separation of Powers	54

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

F. The Rule Complies with the Spending Clause..... 55

G. The Rule Comports with the Establishment Clause..... 60

H. ANY RELIEF SHOULD BE LIMITED 64

 1. Any Relief Should Be Limited To Plaintiff..... 64

 2. Any Relief Should Be Limited To Specific Provisions. . 65

 3. Any Relief Should Not Affect Ongoing Investigations
 Based on the 2011 Rule or the Federal Conscience
 Statutes. 66

CONCLUSION..... 67

TABLE OF AUTHORITIES

Cases

1

2

3 *Abbott Labs. v. Gardner,*

4 387 U.S. 136 (1967) 65

5 *Am. Bioscience v. Thompson,*

6 269 F.3d 1077 (D.C. Cir. 2001)..... 21

7 *Am. Hosp. Ass'n v. NLRB,*

8 499 U.S. 606 (1991) 50

9 *American-Arab Anti-Discrimination Comm. v. Thornburgh,*

10 970 F.2d 501 (9th Cir. 1991) 23, 24, 25

11 *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,*

12 548 U.S. 291 (2006) 56

13 *Ashcroft v. Iqbal,*

14 556 U.S. 662 (2009) 20

15 *Bell Atl. Corp. v. Twombly,*

16 550 U.S. 544 (2007) 20

17 *California v. Azar,*

18 911 F.3d 558 (9th Cir. 2018) 64

19 *California v. United States,*

20 No. C05-00328 JSW, 2008 WL 744840 (N.D. Cal. Mar. 18, 2008)..... 22, 25

21 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,*

22 467 U.S. 837 (1984) 26, 27

Chrisman v. Sisters of St. Joseph of Peace,

506 F.2d 308 (9th Cir. 1974) 61

1 | *Citizens to Pres. Overton Park, Inc. v. Volpe*,
 2 | 401 U.S. 402 (1971)21, 41, 53, 61

3 | *City & Cty. of San Francisco v. Trump*,
 4 | 897 F.3d 1225 (9th Cir. 2018) 64

5 | *Corp. of Presiding Bishop of Church v. Amos*,
 6 | 483 U.S. 327 (1987) 61, 62, 63

7 | *Council for Urological Interests v. Burwell*,
 8 | 790 F.3d 212 (D.C. Cir. 2015)..... 34

9 | *Cutter v. Wilkinson*,
 10 | 544 U.S. 709 (2005) 63

11 | *Doe v. Bolton*,
 12 | 410 U.S. 179 (1973) 63

13 | *FCC v. Fox Television Stations, Inc.*,
 14 | 556 U.S. 502 (2009) *passim*

15 | *Franklin Nat’l Bank of Franklin Sq. v. New York*,
 16 | 347 U.S. 373 (1954) 46

17 | *Gill v. U.S. Dep’t of Justice*,
 18 | 913 F.3d 1179 (9th Cir. 2019) 47

19 | *Gill v. Whitford*,
 20 | 138 S. Ct. 1916 (2018)..... 64

21 | *Kong v. Scully*,
 22 | 341 F.3d 1132 (9th Cir. 2003), *opinion amended on denial of reh’g*, 357 F.3d
 895 (9th Cir. 2004) 61

Larson v. Valente,
 456 U.S. 228 (1982) 62

1 | *Lee v. Waters,*
 2 | 433 F.3d 672 (9th Cir. 2005) 25

3 | *Madsen v. Women’s Health Ctr., Inc.,*
 4 | 512 U.S. 753 (1994) 64

5 | *Massachusetts v. Mellon,*
 6 | 262 U. S. 447 (1923) 56

7 | *Mayo Found. for Med. Educ. & Research v. United States,*
 8 | 562 U.S. 44 (2011)..... 27, 35

9 | *Mayweathers v. Newland,*
 10 | 314 F.3d 1062 (9th Cir. 2002) 59, 60

11 | *McCrary v. Gutierrez,*
 12 | No. C-08-015292, 2010 WL 520762 (N.D. Cal. Feb. 8, 2010) 21

13 | *MD/DC/DE Broadcasters Ass’n v. FCC,*
 14 | 236 F.3d 13 (D.C. Cir. 2001)..... 66

15 | *Mingo Logan Coal Co. v. EPA,*
 16 | 829 F.3d 710 (D.C. Cir. 2016)..... 52, 54

17 | *Morales v. Trans World Airlines, Inc.,*
 18 | 504 U.S. 374 (1992) 42, 47

19 | *Motor Vehicle Mfrs. Ass’n, Inc., v. State Farm Mut. Auto Ins. Co.,*
 20 | 463 U.S. 29 (1983)..... 21, 47

21 | *Nat’l Cable and Telecomms. Ass’n v. Brand-X Internet Servs.,*
 22 | 545 U.S. 967 (2005) 28, 47

23 | *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Gonzales,*
 24 | 468 F.3d 826 (D.C. Cir. 2006)..... 22, 25

1 | *Nat’l Inst. of Family & Life Advocates v. Becerra*,
 2 | 138 S. Ct. 2361 (2018).....36, 37

3 | *Nat’l Park Hosp. Ass’n v. U.S. Dep’t of the Interior*,
 4 | 538 U.S. 803 (2003)24

5 | *NFIB v. Sebelius*,
 6 | 567 U.S. 519 (2012)56, 57, 58, 59

7 | *Ohio Forestry Ass’n, Inc. v. Sierra Club*,
 8 | 523 U.S. 726 (1998)23, 24

9 | *Pennhurst State Sch. & Hosp. v. Halderman*,
 10 | 451 U.S. 1 (1981).....59

11 | *Perez-Guzman v. Lynch*,
 12 | 835 F.3d 1066 (9th Cir. 2016)28

13 | *Poe v. Ullman*,
 14 | 367 U.S. 497 (1961)25

15 | *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*,
 16 | 566 U.S. 639 (2012)42

17 | *Reno v. Flores*,
 18 | 507 U.S. 292 (1993)44

19 | *South Dakota v. Dole*,
 20 | 483 U.S. 203 (1987)56

21 | *Samantar v. Yousuf*,
 22 | 560 U.S. 305 (2010)33

23 | *San Diego Cty. Gun Rights Comm. v. Reno*,
 24 | 98 F.3d 1121 (9th Cir. 1996)23, 24

1 | *San Luis & Delta-Mendota Water Auth. v. Locke,*
 2 | 776 F.3d 971 (9th Cir. 2014) 51

3 | *Steel Co. v. Citizens for a Better Env’t,*
 4 | 523 U.S. 83 (1998)..... 20

5 | *Tenn. Valley Auth. v. Hill,*
 6 | 437 U.S. 153 (1978) 46

7 | *Texas v. United States,*
 8 | 523 U.S. 296 (1998) 22

9 | *The Lands Council v. McNair,*
 10 | 537 F.3d 981 (9th Cir. 2008) 52

11 | *Toilet Goods Ass’n, Inc. v. Gardner,*
 12 | 387 U.S. 158 (1967) 25

13 | *Trump v. Hawaii,*
 14 | 138 S. Ct. 2392 (2018)..... 65

15 | *United States of Am. v. Sineneng-Smith,*
 16 | 910 F.3d 461 (9th Cir. 2018) 20, 58

17 | *United States v. Salerno,*
 18 | 481 U.S. 739 (1987) 20

19 | *United States v. Stevens,*
 20 | 559 U.S. 460 (2010) 20

21 | *W. E. B. DuBois Clubs of Am. v. Clark,*
 22 | 389 U.S. 309 (1967) 23

23 | *Washington v. Azar,*
 24 | 376 F. Supp. 3d 1119 (E.D. Wash. 2019)..... 45

1 | *Weinberger v. Romero-Barcelo*,
 2 | 456 U.S. 305 (1982) 65

3 | *Western Oil & Gas Ass’n v. Sonoma Cty.*,
 4 | 905 F.2d 1287 (9th Cir. 1990) 24

5 | *Whitman v. Am. Trucking Ass’ns*,
 6 | 531 U.S. 457 (2001) 41

7 | *Yahoo!, Inc. v. La Ligue Contre La Racisme Et. L’Antisemitise*,
 8 | 433 F.3d 1199 (9th Cir. 2006) 22

9 | **Statutes**

10 | 1 U.S.C. § 1 31

11 | 5 U.S.C. § 706(2) 21, 65

12 | 22 U.S.C. § 2151b(f) 5

13 | 22 U.S.C. § 7631(d) 5

14 | 26 U.S.C. § 5000A 5, 10

15 | 29 U.S.C. § 669(a)(5) 6

16 | 42 U.S.C. § 238n *passim*

17 | 42 U.S.C. § 280g-1(d) 5

18 | 42 U.S.C. § 290bb-36(f) 6

19 | 42 U.S.C. § 300a-7 *passim*

20 | 42 U.S.C. § 300gg-13(a)(4) 43

21 | 42 U.S.C. § 1320a-1(h) 6

22 |

1		
2	42 U.S.C. § 1320c-11	6
3	42 U.S.C. § 1395cc(f).....	5
4	42 U.S.C. § 1395dd(b)(1)(A).....	44
5	42 U.S.C. § 1395i-5	6
6	42 U.S.C. § 1395w-22(j)(3)(B)	5
7	42 U.S.C. § 1395x.....	6
8	42 U.S.C. § 1396a.....	5, 6
9	42 U.S.C. § 1396f.....	5
10	42 U.S.C. § 1396s(c)(2)(B)(ii).....	6
11	42 U.S.C. § 1396u-2(b)(3)(B)	5
12	42 U.S.C. § 2000e(j).....	46
13	42 U.S.C. § 5106i(a).....	5
14	42 U.S.C. § 14406.....	5
15		
16	42 U.S.C. § 18023.....	<i>passim</i>
17	42 U.S.C. § 18081.....	5, 10
18	42 U.S.C. § 18113.....	<i>passim</i>
19	42 U.S.C. § 18114.....	39, 41
20	An Act to Extend through Fiscal Year 1974 Certain Expiring Appropriations	
21	Authorizations in the Public Health Service Act,	
22	Pub. L. No. 93-45, 87 Stat. 91 (1973)	61

1	Consolidated Appropriations Act, 2005,	
2	Pub. L. No. 108-447, 118 Stat. 2809	8
3	Departments of Defense and Labor, Health and Human Services, and Education,	
4	and Related Agencies Appropriations Act, 2019,	
	Pub. L. No. 115-245, 132 Stat. 2981	5, 32, 45
5	Consolidated Appropriations Act, 2019,	
6	Pub. L. No. 116-6, 133 Stat. 13,307	5
7		
8	<u>Rules</u>	
9	Fed. R. Civ. P. 56(a)	20
10	Fed. R. Civ. P. 12(b)(1)	19
11	Fed. R. Civ. P. 12(b)(6)	19–20
12	<u>Legislative Materials</u>	
13	Balance Budget Downpayment Act, II,	
14	142 Cong. Rec. S2268 (Mar. 19, 1996).....	7
15	<u>Adminstrative and Executive Materials</u>	
16	2 CFR part 180.....	12
17	2 CFR part 376.....	12
18	42 C.F.R. § 88.2.....	34
19	45 C.F.R. part 16.....	18
20	45 C.F.R. part 75.....	17
21	45 C.F.R. § 75.300(a)	11
22	45 C.F.R. § 75.371.....	12

1		
2	45 C.F.R. §§ 75.372–75.375.....	12
3	45 C.F.R. § 75.374.....	18
4	45 C.F.R. §§ 75.501–75.520.....	12
5	45 C.F.R. § 88.2.....	<i>passim</i>
6	45 C.F.R. § 88.4.....	17
7	45 C.F.R. § 88.5.....	19
8	45 C.F.R. § 88.7.....	17, 37
9		
10	45 C.F.R. § 88.10.....	19, 66
11	48 C.F.R. § 1.103.....	13
12	48 C.F.R. § 2.101.....	12
13	48 C.F.R. Ch. 3.....	13
14	48 C.F.R. part 49.....	13
15	48 C.F.R. § 52.203-13.....	13
16		
17	48 C.F.R. § 52.212-4(q).....	12
18	48 C.F.R. § 352.270-9.....	13
19	Nondiscrimination on the Basis of Race, Color, National Origin, Handicap or	
20	Age in Programs or Activities Receiving Federal Financial Assistance; Final	
21	Rule	
22	68 Fed. Reg. 51,334-01 (Aug. 26, 2003).....	55

1 Ensuring That Department of Health and Human Services Funds Do Not
 2 Support Coercive or Discriminatory Policies or Practices in Violation of
 Federal Law,
 3 73 Fed. Reg. 78,072-01 (Dec. 19, 2008) 14

4 Rescission of the Regulation Entitled “Ensuing That Department of Health and
 Human Services Funds Do Not Support Coercive or Discriminatory Policies
 5 or Practices in Violation of Federal Law”; Proposal,
 6 74 Fed. Reg. 10,207-01 (Mar. 10, 2009) 14

7 Federal Awarding Agency Regulatory Implementation of Office of Management
 and Budget's Uniform Administrative Requirements, Cost Principles, and
 8 Audit Requirements for Federal Awards,
 9 79 Fed. Reg. 75,871-01 (Dec. 19, 2014) 11

10 Regulation for the Enforcement of Federal Health Care Provider Conscience
 Protection Laws,
 11 76 Fed. Reg. 9968-02 (Feb. 23, 2011)..... 14

12 Notice of Proposed Rulemaking, Protecting Statutory Conscience Rights in
 Health Care; Delegations of Authority,
 13 83 Fed. Reg. 3880 (Jan. 26, 2018).....*passim*

14 Protecting Statutory Conscience Rights in Health Care; Delegations of
 Authority,
 15 84 Fed. Reg. 23,170-01 (May 21, 2019)*passim*

16 **Other Authorities**

17 Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections*
 for Healthcare Professionals,
 18 49 Ariz. Stat. L.J. 549 (2017) 52

19 *Merriam-Webster*,
 20 <https://www.merriam-webster.com/dictionary/>.....27, 29, 31, 35

21 Wash. Rev. Code 48.43.065 1

22

INTRODUCTION

1
2 In recognition of the need for tolerance of religious and moral differences
3 in a pluralistic society, Congress has enacted conscience accommodations in a
4 wide range of areas.¹ This case concerns the numerous conscience and anti-
5 discrimination accommodations that Congress has enacted in the health care
6 arena. Collectively, these Federal Conscience Statutes protect individuals and
7 entities with religious, moral, or other views associated with providing (or, in
8 some cases, providing coverage for) certain services in government provided or
9 government-funded health care programs. To name one such provision, the
10 Church Amendments bar the recipients of specific federal funds from, for
11 example, firing a nurse because he or she declines to participate in an abortion
12 for religious or moral reasons. 42 U.S.C. § 300a-7(b). Other Federal Conscience
13 Statutes relate to different health care services, such as assisted suicide, and
14 cover additional health care entities, such as insurers.

15 The Federal Conscience Statutes work by placing conditions on federal
16 funding—those who accept the funds voluntarily accept the anti-discrimination
17 provisions. Plaintiff, the State of Washington, has accepted and plans to continue
18 accepting federal funds subject to the Federal Conscience Statutes. But Plaintiff

19 _____
20 ¹ Cf. Wash. Rev. Code 48.43.065 (“The [Washington] legislature
21 recognizes that every individual possesses a fundamental right to exercise their
22 religious beliefs and conscience.”).

1 | apparently objects to the accompanying federal conditions. Of course, it is
2 | completely routine and unobjectionable for the federal government to encourage
3 | favored conduct through conditions on federal funding—indeed, it is so routine
4 | and unobjectionable that Plaintiff actually cites several of the Federal
5 | Conscience Statutes as examples of appropriate legislation and does not
6 | challenge a single one. Instead, Plaintiff brings a collateral challenge to a recent
7 | regulation issued by the Department of Health and Human Services (HHS), that
8 | describes the agency’s process for enforcing the Federal Conscience Statutes as
9 | to federal funds that HHS administers. Protecting Statutory Conscience Rights in
10 | Health Care; Delegations of Authority, 84 Fed. Reg. 23,170–01 (May 21, 2019)
11 | (the Rule). The Rule provides clarifying definitions and explains how HHS will
12 | take enforcement action, but the Rule is not the source of HHS’s enforcement
13 | power. To the contrary, the Federal Conscience Statutes themselves obligate and
14 | compel HHS to meet the Statutes’ conditions in disbursing HHS funding.
15 | Plaintiff’s challenge to the Rule is therefore misplaced. It is Congress—not
16 | HHS—that has made the policy determination to protect health care entities
17 | against discrimination based on religious, moral, or ethical beliefs.

18 | Even if that were not the case, Plaintiff’s challenge fails on the merits.

19 | *First*, Plaintiff’s cataclysmic predictions about the potential loss of all of
20 | its federal health care funding are not ripe. Before Plaintiff’s fears could possibly
21 | come to pass, multiple speculative events would have to occur. The Court thus
22 | lacks a concrete setting and important factual information to resolve Plaintiff’s

1 claims, such as an alleged violation, the amount of federal funding that Plaintiff
2 stands to lose, and the interaction between any applicable state statutes, the Rule,
3 and the Federal Conscience Statutes.

4 *Second*, the Rule is entirely consistent with the Administrative Procedure
5 Act (APA). The Rule does not change any of the substantive requirements of the
6 Federal Conscience Statutes but simply clarifies HHS’s enforcement process.
7 HHS is acting squarely within its statutory authority to implement the conditions
8 that Congress placed on federal funding. The definitions provided in the Rule,
9 moreover, are consistent with the Federal Conscience Statutes. And the Rule is
10 neither arbitrary nor capricious, because HHS thoroughly considered all of the
11 concerns presented in comments.

12 *Third*, the Rule comports with the Constitution. Plaintiff’s constitutional
13 claims are facial, and therefore to succeed Plaintiff must show that the Rule is
14 invalid in all applications—a difficult task given that Plaintiff’s claims rely on a
15 series of outlandish hypotheticals about HHS’s potential enforcement actions.
16 The Federal Conscience Statutes, which Plaintiff endorses, offer recipients a
17 simple deal: federal funds in exchange for nondiscrimination. This offer is well
18 within the bounds of the Spending Clause. If the Statutes do not violate the
19 Spending Clause, then a rule faithfully implementing them also does not.
20 Moreover, it is beyond dispute that when the government acts to preserve
21 neutrality in the face of religious differences, it does not “establish” or prefer
22 religion.

1 Plaintiff is welcome to structure its own health care systems in the lawful
2 manner of its choice—the Federal Conscience Statutes and the Rule are not
3 universal requirements binding on the world. But the Statutes and Rule do
4 require that, if Plaintiff accepts federal funds, it must extend tolerance and
5 accommodation to objecting individuals and health care entities. These
6 conditions are longstanding. If Plaintiff is unwilling to afford such tolerance to
7 protected parties, or has become unwilling, then it has the straightforward
8 remedy of no longer accepting the conditioned federal funds. What Plaintiff may
9 *not* do is accept the benefit of its bargain, and then balk at fulfilling its anti-
10 discrimination obligations.

11 The Court should dismiss this case or, in the alternative, grant summary
12 judgment to Defendants.

13 LEGAL AND FACTUAL BACKGROUND

14 I. Statutory History of Relevant Conscience Protections

15 Congress has long acted to protect the rights of individuals and entities to
16 maintain the free exercise of their religious, moral, and ethical beliefs in
17 providing government-funded health care. The Rule gives effect to various
18 conscience protection provisions put in place by Congress—known collectively
19 as the Federal Conscience Statutes. The four key laws addressed by the Rule and
20 discussed below, are (1) the Church Amendments (42 U.S.C. § 300a-7); (2) the
21 Coats-Snowe Amendment (42 U.S.C. § 238n(a)); (3) the Weldon Amendment
22 (*see, e.g.*, Departments of Defense and Labor, Health and Human Services, and

1 Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d),
 2 Pub. L. No. 115-245, 132 Stat. 2981, 3118 (Sept. 28, 2018)); and (4) the
 3 conscience protection provisions in the Patient Protection and Affordable Care
 4 Act (ACA) (*i.e.*, 42 U.S.C. § 18113; 42 U.S.C. § 14406(1); 26 U.S.C. § 5000A;
 5 42 U.S.C. § 18081; 42 U.S.C. § 18023(b)(1)(A) and (b)(4)).²

7 ² Other statutes implemented by the Rule include: conscience protections
 8 for Medicare Advantage organizations and Medicaid managed care
 9 organizations with moral or religious objections to counseling or referral for
 10 certain services (42 U.S.C. §§ 1395w-22(j)(3)(B) and 1396u-2(b)(3)(B));
 11 conscience protections related to the performance of advanced directives (42
 12 U.S.C. §§ 1395cc(f), 1396a(w)(3), and 14406(2)); conscience and
 13 nondiscrimination protections for organizations related to Global Health
 14 Programs, to the extent such funds are administered by the Secretary of Health
 15 and Human Services (Secretary) (22 U.S.C. § 7631(d)); conscience protections
 16 attached to federal funding regarding abortion and involuntarily sterilization, to
 17 the extent such funding is administered by the Secretary, (22 U.S.C. § 2151b(f),
 18 *see, e.g.*, the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. F,
 19 sec. 7018, 133 Stat. 13, 307); conscience protections from compulsory health
 20 care or services generally (42 U.S.C. §§ 1396f and 5106i(a)), and under specific
 21 programs for hearing screening (42 U.S.C. § 280g-1(d)), occupational illness
 22

1 **A. The Church Amendments**

2 The Church Amendments, which were enacted beginning in the 1970s,
3 apply to entities that receive certain federal funds and to health service programs
4 and research activities funded by HHS. 42 U.S.C. § 300a–7. The Church
5 Amendments require those entities not to discriminate based on religious beliefs
6 or moral convictions regarding sterilization procedures, abortions, or health
7 service or research activities, including based on an individual’s performance (or
8 assistance in) such a procedure or activity, based on an individual’s refusal to
9 perform (or assist in) such a procedure or activity, and an individual’s religious
10 beliefs or moral convictions about such procedures more generally. *Id.* The
11 Church Amendments contain provisions explicitly protecting the rights of both
12 individuals and entities. *Id.* Examples of discrimination barred by the Church
13 Amendments include the threat of an individual losing his or her job and the
14 threat of an entity being forced to provide abortions as a condition of receiving
15 government funding. *See generally id.* Although the statute codifying the Church
16 _____

17 testing (29 U.S.C. § 669(a)(5)), vaccination (42 U.S.C. § 1396s(c)(2)(B)(ii)), and
18 mental health treatment (42 U.S.C. § 290bb-36(f)); and protections for religious,
19 nonmedical health care providers and their patients from certain requirements
20 under Medicare and Medicaid that may burden their exercise of their religious
21 beliefs regarding medical treatment (*e.g.*, 42 U.S.C. §§ 1320a-1(h), 1320c-11,
22 1395i-5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j-1(b)).

1 Amendments does not define its terms, parts of it apply explicitly to both the
2 “performance” of such procedures or activities and “assist[ing] in the
3 performance of” such procedures or activities. 42 U.S.C. § 300a-7(b)(1), (b)(2),
4 (c)(1)(B), (c)(2)(B), (d), (e).

5 **B. The Coats-Snowe Amendment**

6 Section 245 of the Public Health Service Act, known as the Coats-Snowe
7 Amendment, was enacted by Congress with bipartisan support in 1996. It
8 applies nondiscrimination requirements to the federal government and to certain
9 State and local governments. 42 U.S.C. § 238n. The sponsor of the statute,
10 Senator Snowe, described her goal as to “protect those institutions and those
11 individuals who do not want to get involved in the performance or training of
12 abortion,” while still maintaining adequate medical training standards for
13 women’s gynecological care. Balance Budget Downpayment Act, II, 142 Cong.
14 Rec. S2268 (Statement of Sen. Snowe) (Mar. 19, 1996).

15 Specifically, the Coats-Snowe Amendment prohibits the federal
16 government and any State or local government that receives federal financial
17 assistance from discriminating against a health care entity that, among other
18 things, refuses to perform induced abortions; to provide, receive, or require
19 training on performing induced abortions; or to provide referrals or make
20 arrangements for such activities. 42 U.S.C. § 238n(c)(1). The Coats-Snowe
21 Amendment defines the term “health care entity” as *including* (and, therefore,
22 not being limited to) an “individual physician, a postgraduate physician training

1 program, and a participant in a program of training in the health professions.” *Id.*
2 The Coats-Snowe Amendment also applies to accreditation of postgraduate
3 physician training programs. *Id.* § 238n(b)(1).

4 C. The Weldon Amendment

5 Since 2004, Congress has also included nondiscrimination protections,
6 referred to as the Weldon Amendment, in every appropriations bill for the
7 Departments of Labor, Health and Human Services, and Education. *See, e.g.,*
8 Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Title V,
9 sec. 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004); Pub. L. No. 115-245, Div. B.,
10 sec. 507(d), 132 Stat. at 3118. The Weldon Amendment provides, in pertinent
11 part, that “[n]one of the funds made available in this Act may be made available
12 to a federal agency or program, or to a State or local government, if such agency,
13 program, or government subjects any institutional or individual health care entity
14 to discrimination on the basis that the health care entity does not provide, pay
15 for, provide coverage of, or refer for abortions.” *Id.* The Weldon Amendment’s
16 scope and definitions are broad, defining the term “health care entity” as
17 “includ[ing] an individual physician or other health care professional, a hospital,
18 a provider-sponsored organization, a health maintenance organization, a health
19 insurance plan, or any other kind of health care facility, organization, or plan.”
20 *Id.* The Weldon Amendment is a restriction on HHS’s use of funds, and thus,
21 HHS must abide by the Weldon Amendment in its use and distribution of funds,
22 through grant programs or otherwise.

1 **D. Conscience Protections in the ACA**

2 Congress separately included several conscience protections in the ACA,
3 including:

4 **Section 1553** of the ACA provides that the federal government, and any
5 State or local government or health care provider that receives federal financial
6 assistance under the ACA, or any health plan created under the ACA:

7 may not subject an individual or institutional health care entity to
8 discrimination on the basis that the entity does not provide any
9 health care item or service furnished for the purpose of causing, or
10 for the purpose of assisting in causing, the death of any individual,
11 such as by assisted suicide, euthanasia, or mercy killing.

12 42 U.S.C. § 18113. In § 1553, Congress again defined the term “health care
13 entity” broadly to “include [] an individual physician or other health care
14 professional, a hospital, a provider-sponsored organization, a health maintenance
15 organization, a health insurance plan, or any other kind of health care facility,
16 organization, or plan.” *Id.* Section 1553 also specifically designates HHS’s
17 Office for Civil Rights (OCR) to receive complaints of discrimination relating to
18 participation in assisted suicide. *Id.*

19 **Section 1303** declares that the ACA does not require health plans to
20 provide coverage of abortion services as part of “essential health benefits.” 42
21 U.S.C. § 18023(b)(1)(A)(i). Furthermore, no qualified health plan offered
22 through an ACA exchange may discriminate against any individual health care
provider or health care facility because of its unwillingness to provide, pay for,

1 provide coverage of, or refer for, abortions. *See id.* § 18023(b)(4). The ACA also
2 clarified that nothing in the Act is to be construed to “have any effect on federal
3 laws regarding—(i) conscience protection; (ii) willingness or refusal to provide
4 abortion; and (iii) discrimination on the basis of the willingness or refusal to
5 provide, pay for, cover, or refer for abortion or to provide or participate in
6 training to provide abortion.” *Id.* § 18023(c)(2)(A)(i)–(iii).

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

14 **II. Unchallenged Rules that Require Compliance with the Federal** 15 **Conscience Statutes**

16 HHS has issued several rules, in addition to the challenged Rule, that require
17 recipients of federal funds to comply with federal law, including the Federal
18 Conscience Statutes. For example, HHS promulgated the Uniform
19 Administrative Requirements, Cost Principles, and Audit Requirements for HHS
20 Awards (UAR), which impose consistent and enforceable requirements for
21 governed recipients. *See* Federal Awarding Agency Regulatory Implementation
22 of Office of Management and Budget’s Uniform Administrative Requirements,

1 Cost Principles, and Audit Requirements for Federal Awards, 79 Fed. Reg.
2 75,872-01, 75,889 (Dec. 19, 2014). These requirements are broad-ranging, and
3 include records retention and management, property, and procurement standards;
4 fiscal and program management standards; and importantly for this litigation,
5 statutory and national policy requirements and remedies for noncompliance. The
6 UAR states, “The Federal awarding agency must manage and administer the
7 Federal award in a manner so as to ensure that Federal funding is expended and
8 associated programs are implemented *in full accordance with U.S. statutory and*
9 *public policy requirements*: Including, but not limited to, . . . prohibiting
10 discrimination.” 45 C.F.R. § 75.300(a) (emphasis added). It also lists remedies
11 for noncompliance:

12 If a non-Federal entity fails to comply with *Federal statutes,*
13 *regulations, or the terms and conditions of a Federal award,* the
14 HHS awarding agency or pass-through entity may impose
15 additional conditions, as described in § 75.207. If the HHS
16 awarding agency or pass-through entity determines that
17 noncompliance cannot be remedied by imposing additional
18 conditions, the HHS awarding agency or pass-through entity may
19 take one or more of the following actions, as appropriate in the
20 circumstances:

18 (a) Temporarily withhold cash payments pending correction
19 of the deficiency by the non-Federal entity or more severe
20 enforcement action by the HHS awarding agency or pass-
21 through entity.

20 (b) Disallow (that is, deny both use of funds and any
21 applicable matching credit for) all or part of the cost of the
22 activity or action not in compliance.

1 (c) Wholly or partly suspend (suspension of award activities)
2 or terminate the Federal award.

3 (d) Initiate suspension or debarment proceedings as
4 authorized under 2 CFR part 180 and HHS awarding agency
5 regulations at 2 CFR part 376 (or in the case of a pass-
6 through entity, recommend such a proceeding be initiated by
7 a HHS awarding agency).

8 (e) Withhold further Federal awards for the project or
9 program.

10 (f) Take other remedies that may be legally available.

11 45 C.F.R. § 75.371 (emphasis added). The UAR also describes how HHS may
12 terminate a federal award. *See* 45 C.F.R. §§ 75.372–75.375. And last, the UAR
13 sets forth standards for auditing nonfederal entities expending federal awards.
14 *See* 45 C.F.R. §§ 75.501–75.520.

15 The Federal Acquisition Regulation (FAR), C.F.R. Title 48, allows the
16 government to enforce contractor compliance with federal law. The FAR applies
17 to all acquisitions, which are defined, in part, as the acquiring by contract with
18 appropriated funds of supplies or services by and for the use of the federal
19 government through purchase or lease. 48 C.F.R. § 2.101. The FAR provides for
20 the inclusion of a contract clause, specifically for the purchase of commercial
21 items, that a “Contractor shall comply with all applicable Federal, State and
22 local laws, executive orders, rules and regulations applicable to its performance
under this contract.” 48 C.F.R. § 52.212-4(q). The FAR also requires inclusion,
for example, of a clause in contracts that requires contractors to promote an

1 organizational culture that encourages ethical conduct and a commitment to
2 compliance with the law. 48 C.F.R. § 52.203-13. The FAR provides a variety of
3 mechanisms that may be used to enforce such contract provisions. 48 C.F.R. Part
4 49.

5 HHS has also issued its own acquisition regulation, the HHS Acquisition
6 Regulations (HHSAR), 48 C.F.R. Ch. 3, pursuant to 48 C.F.R. § 1.103. The
7 HHSAR requires contractors to comply with various aspects of federal law. The
8 HHSAR additionally includes a nondiscrimination clause for conscience
9 objections relating to receiving assistance under section 104A of the Foreign
10 Assistance Act of 1961, the United States Leadership Against HIV/AIDS,
11 Tuberculosis, and Malaria Act of 2003, the Tom Lantos and Henry J. Hyde
12 United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria
13 Reauthorization Act of 2008, or any amendment to the foregoing Acts for
14 HIV/AIDS prevention, treatment, or care, 48 C.F.R. § 352.270-9.

15 **III. HHS Conscience Protection Regulations**

16 **A. 2008 and 2011 HHS Conscience Protection Regulations**

17 In 2008, HHS issued regulations clarifying the applicability of the Church,
18 Coats-Snowe, and Weldon Amendments and designating OCR to receive
19 complaints and coordinate with applicable HHS funding components to enforce
20 the Federal Conscience Statutes. *See* 45 C.F.R. § 88 *et seq.* (2008 Rule);
21 Ensuring That Department of Health and Human Services Funds Do Not
22 Support Coercive or Discriminatory Policies or Practices in Violation of Federal

1 Law, 73 Fed. Reg. 78,072-01 (Dec. 19, 2008). The 2008 Rule recognized (1) the
2 lack of consistent awareness of these statutory protections among federally
3 funded recipients and protected persons and entities, and (2) the need for greater
4 enforcement mechanisms to ensure that HHS funds do not support morally
5 coercive or discriminatory policies or practices in violation of the Federal
6 Conscience Statutes. 73 Fed. Reg. at 78,078–81.

7 In 2011, however, HHS rescinded the 2008 Rule in part and issued a new
8 rule with a more limited scope and enforcement mechanism after noting
9 concerns about whether the 2008 Rule was consistent with the new
10 administration’s priorities. *See* Regulation for the Enforcement of Federal Health
11 Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968-02 (2011 Rule);
12 *see also* Rescission of the Regulation Entitled “Ensuring That Department of
13 Health and Human Services Funds Do Not Support Coercive or Discriminatory
14 Policies or Practices in Violation of Federal Law”; Proposal, 74 Fed. Reg.
15 10,207 (Mar. 10, 2009). The preamble to the 2011 Rule expressed HHS’s
16 support for conscience protections for health care providers and indicated the
17 need for enforcement of the Federal Conscience Statutes. *See, e.g., id.* at 9968–
18 69. Nevertheless, the 2011 Rule created ambiguity regarding OCR’s
19 enforcement tools and removed the definitions of key statutory terms. *Id.*

20 **B. Notice of Proposed Rulemaking**

21 On January 26, 2018, HHS published a Notice of Proposed Rulemaking
22 (NPRM) to revise and expand earlier regulations, in order to properly implement

1 the Federal Conscience Statutes in programs funded by HHS. *See generally*
2 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of
3 Authority, 83 Fed. Reg. 3880 (Jan. 26, 2018). HHS’s stated goals were to (1)
4 “effectively and comprehensively enforce Federal health care conscience and
5 associated anti-discrimination laws[,]” (2) grant OCR overall enforcement
6 responsibility to ensure compliance with these federal laws; and (3) clear up
7 confusion caused by certain OCR sub-regulatory guidance. *Id.* at 3881, 3890. In
8 particular, “there [wa]s a significant need to amend the 2011 Rule to ensure
9 knowledge, compliance, and enforcement of the Federal health care conscience
10 and associated anti-discrimination laws.” *Id.* at 3887. For example, the 2011
11 Rule was inadequate because it covered only three of the Federal Conscience
12 Statutes. Following a sixty-day comment period, HHS analyzed and carefully
13 considered all comments on the NPRM and made appropriate modifications
14 before finalizing the Rule. *See* 84 Fed. Reg. at 23,180.

15 C. Final Rule

16 The Rule implements federal nondiscrimination protections for
17 individuals, health care providers, and health care entities with objections—
18 including religious or moral objections—to providing, participating in, paying
19 for, or referring for certain health care services, and also provides procedures for
20 the effective enforcement of those protections. The Rule clarifies the
21 requirements of the Federal Conscience Statutes, addresses the inadequate
22 enforcement of conscience rights under existing federal laws, and educates

1 individuals and entities who presently lack knowledge of their statutory and civil
2 rights or obligations under HHS-funded or administered programs. 84 Fed. Reg.
3 at 23,175–79. The Rule does not change the substantive law of the Federal
4 Conscience Statutes, as established by Congress. *See* 84 Fed. Reg. 23,256 (“This
5 rule holds States and local governments accountable for compliance with [the
6 Federal Conscience Statutes] by setting forth mechanisms for OCR investigation
7 and HHS enforcement related to those requirements. The Rule does not change
8 the substantive conscience protections or anti-discrimination requirements of
9 these statutes.”).

10 The Rule has five principal provisions.

11 *First*, the Rule sets forth, in a single place, the various statutory
12 conscience protections that apply to particular HHS-funded health programs. *See*
13 45 C.F.R. § 88.

14 *Second*, it defines various terms in the Federal Conscience Statutes in a
15 way that implements the plain text and spirit of those Statutes and fully protects
16 religious and moral conscience objections. Among the statutory terms defined in
17 the Rule are “assist in the performance,” “discriminate or discrimination,”
18 “health care entity,” and “referral or refer for.” *See* 45 C.F.R. § 88.2. Other than
19 “health care entity,” Congress did not define these terms in the relevant statutes.
20 Accordingly, the Rule defines these statutory terms to clarify their scope and to
21 provide adequate enforcement notice to covered entities.
22

1 *Third*, the Rule requires recipients of federal funds to provide assurances
2 and certifications of compliance with the applicable federal conscience
3 requirements. 45 C.F.R. § 88.4. Written assurances and certifications of
4 compliance with the Federal Conscience Statutes must be submitted during the
5 application and reapplication processes associated with receiving federal
6 financial assistance or federal assistance. *Id.* Entities that are already receiving
7 such assistance as of the effective date of the Rule are not required to submit an
8 assurance or certification until they reapply for such assistance, alter the terms of
9 existing assistance, or apply for new lines of federal assistance. *Id.* OCR may
10 require additional assurances and certifications if OCR or HHS has reason to
11 suspect noncompliance with the Federal Conscience Statutes. *Id.*

12 *Fourth*, the Rule establishes enforcement tools to protect conscience
13 rights. 45 C.F.R. § 88.7. OCR will conduct outreach, provide technical
14 assistance, initiate compliance reviews, conduct investigations, and seek
15 voluntary resolutions to more effectively address violations and resolve
16 complaints. *Id.* Where voluntary resolutions are not possible, OCR will
17 supervise and coordinate compliance using existing and longstanding procedures
18 to enforce conditions on grants, contracts, and other funding instruments. *Id.*
19 (citing, *e.g.*, the FAR and 45 C.F.R. Part 75).³ To ensure that recipients of HHS

21 ³ Involuntary remedies—such as the withholding of funds, termination,
22

1 funds comply with their legal obligations, as HHS does with other civil rights
2 laws within its purview, HHS will require certain funding recipients (and sub-
3 recipients) to maintain records and cooperate with OCR’s investigations,
4 reviews, and enforcement actions. *Id.*; NPRM, 83 Fed. Reg. 3881.

5 *Fifth*, the Rule incentivizes, but does not require, recipients and sub-
6 recipients to post a notice summarizing the Federal Conscience Statutes on their
7 website, in employee materials or student handbooks, or in another prominent
8

9 _____
10 suspension, or debarment—will not occur under the Rule itself, but rather, under
11 HHS’s separate regulations governing grants and contracts. 84 Fed. Reg. 23,222;
12 *see also* 45 C.F.R. 75.374 (addressing HHS’s process when a non-federal entity
13 fails to comply with conditions on a federal award, and requiring that “[u]pon
14 taking any remedy for non-compliance, the HHS awarding agency must provide
15 the non-Federal entity an opportunity to object and provide information and
16 documentation challenging the suspension or termination action, in accordance
17 with written processes and procedures published by the HHS awarding agency”
18 and “must comply with any requirements for hearings, appeals or other
19 administrative proceedings to which the non-Federal entity is entitled under any
20 statute or regulation applicable to the action involved”); 45 C.F.R. part 16
21 (describing the procedures of the Departmental Grant Appeals Board, which
22 reviews certain grants disputes as specified in Appendix A to Part 16).

1 location in the workplace. *See* 45 C.F.R. § 88.5.

2 The Rule also includes a severability provision. *See* 45 C.F.R. § 88.10. It
3 states that, if any part of the Rule is held to be invalid or unenforceable, it shall
4 be severable from the remainder of the Rule, which shall remain in full force and
5 effect to the maximum extent permitted by law. *See* 45 C.F.R. § 88.10.

6 **IV. This Litigation**

7 Plaintiff filed suit challenging the Rule and moved for a preliminary
8 injunction. *See* Compl., ECF No. 1; Wash.’s Mot. Prelim. Inj. (PI Mem.), ECF
9 No. 8. Subsequently, the Court granted the parties’ stipulated request to
10 postpone the effective date of the Rule until November 22, 2019, and held
11 Plaintiff’s motion for a preliminary injunction in abeyance. Order, ECF No. 28.
12 The Court then set a briefing schedule for cross-motions for summary judgment.
13 Order, ECF No. 35. Pursuant to the Court’s order, Defendants now move to
14 dismiss or, in the alternative, for summary judgment.⁴

15 **ARGUMENT**

16 **I. Legal Standard**

17 Defendants move to dismiss Plaintiff’s claims in their entirety under Rules
18 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff bears the
19 burden to show subject matter jurisdiction, and the Court must determine

20 _____
21 ⁴ As this is a record-review case, Defendants do not submit a separate
22 statement of material facts not in dispute. LCivR 56(i).

1 whether it has jurisdiction before addressing the merits. *Steel Co. v. Citizens for*
2 *a Better Env't*, 523 U.S. 83, 94–95, 104 (1998). Under Rule 12(b)(6), a court
3 should grant a motion to dismiss if the complaint does not state “enough facts to
4 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
5 550 U.S. 544, 570 (2007). Although factual allegations are viewed in the light
6 most favorable to the plaintiff, the complaint must show “more than a sheer
7 possibility that a defendant has acted unlawfully”—“[t]hreadbare recitals of the
8 elements of a cause of action, supported by mere conclusory statements, do not
9 suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550
10 U.S. at 570). Furthermore, Plaintiff raises only facial challenges to the Rule,
11 which are “the most difficult challenge[s] to mount successfully.” *United States*
12 *v. Salerno*, 481 U.S. 739, 745 (1987). To prevail, Plaintiff must “establish that
13 no set of circumstances exists under which [the statute] would be valid, or that
14 the statute lacks any plainly legitimate sweep.” *United States of Am. v. Sineneng-*
15 *Smith*, 910 F.3d 461, 470 (9th Cir. 2018) (quoting *United States v. Stevens*, 559
16 U.S. 460, 472 (2010)).

17 In the alternative, Defendants ask that the Court enter summary judgment
18 in their favor. Summary judgment is appropriate if “there is no genuine dispute
19 as to any material fact and the movant is entitled to judgment as a matter of
20 law.” Fed. R. Civ. P. 56(a). For claims brought under the APA, a motion for
21 summary judgment is the appropriate vehicle for summary disposition of the
22 case with one significant caveat: “the district judge sits as an appellate tribunal”

1 to resolve issues at summary judgment. *McCrary v. Gutierrez*, No. C-08-
2 015292, 2010 WL 520762, at *2 (N.D. Cal. Feb. 8, 2010) (quoting *Am.*
3 *Bioscience v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)).

4 Under the APA, an agency’s decision must be upheld unless arbitrary,
5 capricious, an abuse of discretion, or otherwise not in accordance with law. 5
6 U.S.C. § 706(2)(A). Under this deferential standard, the agency’s decision is
7 presumed valid, and the Court considers only whether it “was based on a
8 consideration of the relevant factors and whether there has been a clear error of
9 judgment.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416
10 (1971). An agency’s decision may be deemed arbitrary and capricious only in
11 circumstances where the agency “has relied on factors which Congress has not
12 intended it to consider, entirely failed to consider an important aspect of the
13 problem, offered an explanation for its decision that runs counter to the evidence
14 before the agency,” or where its decision “is so implausible that it could not be
15 ascribed to a difference in view or the product of agency expertise.” *Motor*
16 *Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43
17 (1983). The Court may not “substitute its judgment for that of the agency.” *Id.*

18 **II. Plaintiff’s Spending Clause and Establishment Clause Claims Are**
19 **Unripe.**

20 As an initial matter, Plaintiff’s Spending Clause and Establishment Clause
21 claims are not ripe for review, because Plaintiff has identified no specific
22 enforcement action taken against it under the Rule—as indeed, it cannot, given

1 that Defendants have postponed the effective date of the Rule. *See Yahoo!, Inc.*
2 *v. La Ligue Contre La Racisme Et. L'Antisemitise*, 433 F.3d 1199, 1211 (9th Cir.
3 2006). Both claims rely on hypotheses about HHS's enforcement of the Rule
4 that are not yet clearly factually defined. At least two courts have declined to
5 decide similarly premature challenges to the underlying Federal Conscience
6 Statutes on standing and ripeness grounds. *See, e.g., Nat'l Family Planning &*
7 *Reprod. Health Ass'n, Inc. (NFPRHA) v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir.
8 2006); *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840, at
9 *3 (N.D. Cal. Mar. 18, 2008).

10 In particular, Plaintiff's Spending Clause and Establishment Clause claims
11 are not ripe because they rest on "contingent future events that may not occur as
12 anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S.
13 296, 300 (1998) (citation omitted). For example, Plaintiff is concerned that,
14 hypothetically, a person seeking assisted suicide might be stonewalled by a local
15 physician who objects to participating in assisted suicide and delays or refuses to
16 transfer the patient's records to another provider. Compl. ¶ 104. This speculative
17 scenario would require several steps in order to come to fruition. First, a
18 provider would have to object to participating in assisted suicide, and would
19 have to delay or refuse to transfer patient records elsewhere. Next, Washington
20 would have to decide to take action against that provider in violation of the
21 Federal Conscience Statutes. Then, the episode would have to come to the
22 attention of HHS, HHS would have to find Washington's actions to be

1 discriminatory under one of the Federal Conscience Statutes, and HHS would
2 have to take enforcement action under the Rule that would endanger
3 Washington’s funding. Finally, that enforcement action would have to be upheld
4 after exhaustion of all available administrative remedies. *See supra* n.3. The
5 occurrence of any of these steps is far from certain, much less all of them. Thus,
6 judicial resolution of Plaintiff’s Spending Clause and Establishment Clause
7 claims “may turn out to [be] unnecessary.” *Ohio Forestry Ass’n, Inc. v. Sierra*
8 *Club*, 523 U.S. 726, 736 (1998).

9 In addition, this case presents no concrete factual situation in which to
10 evaluate Plaintiff’s Spending Clause and Establishment Clause claims. Courts
11 “should not be forced to decide . . . constitutional questions in a vacuum.” *San*
12 *Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996)
13 (citation omitted); *cf. W. E. B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 311
14 (1967). Because the Rule has never been enforced, and indeed, no funding has
15 ever been withheld under the Federal Conscience Statutes, the contours of any
16 such enforcement action and the scope of funding that may be at risk is
17 unknown. To exercise jurisdiction in advance of any such enforcement action
18 runs the risk of “entangl[ing]” this Court “in an abstract disagreement” over the
19 Rule’s validity before “it [is] clear that [Plaintiff’s conduct is] covered by the
20 [Rule],” and before any decision has been made that “affect[s] [Plaintiff] in any
21 concrete way.” *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970
22 F.2d 501, 511 (9th Cir. 1991).

1 These claims are also unripe because Plaintiff would suffer no hardship
2 whatsoever as to its Spending Clause and Establishment Clause claims if judicial
3 review were postponed. A party suffers no hardship warranting review unless
4 governmental action “now inflicts significant practical harm upon the interests
5 that the [plaintiff] advances.” *Ohio Forestry Ass’n*, 523 U.S. at 733; *see also*
6 *Nat’l Park Hosp. Ass’n v. U.S. Dep’t of the Interior*, 538 U.S. 803, 810 (2003)
7 (noting that a case is not ripe unless “the impact” of the challenged law is “felt
8 immediately by those subject to it in conducting their day-to-day affairs”
9 (citation omitted)).

10 Plaintiff cannot claim hardship based on the mere existence of the Rule.
11 *Western Oil & Gas Ass’n v. Sonoma Cty.*, 905 F.2d 1287, 1291 (9th Cir. 1990) ;
12 *see also San Diego Gun Rights Comm.*, 98 F.3d at 1132-33 (case not ripe where
13 plaintiffs faced no credible threat of enforcement); *AAMC*, 970 F.2d at 511
14 (same). Here, Plaintiff’s many hypothetical enforcement scenarios (*see, e.g.*,
15 Compl. ¶¶ 4, 81, 100, 103–05) illustrate the difficulty of undertaking a quest to
16 resolve Plaintiff’s imagined Spending and Establishment Clause challenges in
17 the absence of any factual context.

18 Nor is Plaintiff in any immediate danger. The “Hobson’s choice” of which
19 Plaintiff complains—between abandoning state health care policy or losing
20 billions of dollars in federal funds—is not an “immediate” one justifying review
21 of Plaintiff’s premature claims. Should Plaintiff discriminate in a fashion barred
22 by the Federal Conscience Statutes, and should HHS take enforcement action

1 under the Rule, and should Plaintiff decide not to comply through informal
2 means, Plaintiff will then have the opportunity, if necessary, to present its
3 constitutional challenges to the Rule to a court. *AAMC*, 970 F.2d at 511. Because
4 no “irremediable adverse consequences [will] flow from requiring [Plaintiff to
5 bring] a later challenge,” *Toilet Goods Ass’n, Inc. v. Gardner*, 387 U.S. 158, 164
6 (1967), there is no need to decide Plaintiff’s Spending Clause and Establishment
7 Clause claims at this time. *See Lee v. Waters*, 433 F.3d 672, 677 (9th Cir. 2005);
8 *see Poe v. Ullman*, 367 U.S. 497, 503 (1961).

9 As noted above, these considerations have caused two courts to decline—
10 on ripeness and standing grounds—to adjudicate similar challenges to the
11 underlying Federal Conscience Statutes. In *NFPRHA*, 468 F.3d 826, plaintiffs
12 brought Spending Clause and vagueness challenges to the Weldon Amendment.
13 The D.C. Circuit dismissed, holding that plaintiff lacked standing, given that it
14 had not been injured by the Amendment and could not show that it was likely to
15 be. *Id.* Similarly, in *California v. United States*, No. C 05-00328 JSW, 2008 WL
16 744840 (N.D. Cal. Mar. 18, 2008), California challenged the Weldon
17 Amendment on Spending Clause and other grounds. The court dismissed the
18 case for lack of ripeness and standing because “whether California will risk
19 losing federal funds pursuant to the Weldon Amendment if it seeks to enforce [a
20 particular state law provision] is contingent upon a series of future events that
21 may not ever occur.” *Id.* at *5. This Court should likewise dismiss Plaintiff’s
22 Spending Clause and Establishment Clause claims as unripe.

1 **III. Plaintiff’s Claims Lack Merit.**

2 **A. The Challenged Definitions Are Reasonable Exercises of HHS’s**
 3 **Statutory Authority.**

4 Plaintiff’s attack on five definitions in the Rule—(1) *assist in the*
 5 *performance*, (2) *discriminate or discrimination*, (3) *entity and health care*
 6 *entity*, (4) *health service program* and (5) *referral or refer for*—is without merit.
 7 As Plaintiff acknowledges, *see*, PI Mem. 23, these claims are governed by
 8 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43
 9 (1984). Under this standard, a court first asks “whether Congress has directly
 10 spoken to the precise question at issue.” *Id.* at 842. If the answer is yes, the court
 11 must give effect to Congress’s intent. If the answer is no—that is, if the statute is
 12 ambiguous—“the question for the court is whether the agency’s answer is based
 13 on a permissible construction of the statute.” *Id.* at 844. For the reasons set forth
 14 below, Plaintiff’s challenge to each definition fails at step one or, in the
 15 alternative, at step two of *Chevron*.

16 **1. “Assist in the Performance”**

17 HHS’s definition of “assist in the performance” is entirely consistent with
 18 the Church Amendments, 42 U.S.C. § 300a-7(d), the only conscience statute that
 19 contains the term. Although the term is used in the Church Amendments, it is
 20 not explicitly defined. The Rule defines the term “assist in the performance” as
 21 follows:
 22

1 to take an action that has a specific, reasonable, and articulable
2 connection to furthering a procedure or a part of a health service
3 program or research activity undertaken by or with another person or
4 entity. This may include counseling, referral, training, or otherwise
5 making arrangements for the procedure or a part of a health service
6 program or research activity, depending on whether aid is provided
7 by such actions.

8 84 Fed. Reg. at 23,263 (to be codified at 45 C.F.R. § 88.2).

9 *I.* Plaintiff’s challenge fails at *Chevron* step one because Congress has
10 directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 842–43.
11 The Court need only open the dictionary, *see Mayo Found. for Med. Educ. &*
12 *Research v. United States*, 562 U.S. 44, 52 (2011) (applying a dictionary
13 definition at step one), which contains the same common-sense definition as the
14 Rule: *Merriam-Webster* defines *assist* as “to give usually supplementary support
15 or aid to,” <https://www.merriam-webster.com/dictionary/assist> (last visited Aug.
16 18, 2019), and *performance* as “the execution of an action,” [https://www.](https://www.merriam-webster.com/dictionary/performance)
17 [merriam-webster.com/dictionary/performance](https://www.merriam-webster.com/dictionary/performance) (last visited Aug. 18, 2019). The
18 Rule’s definition is as close to the dictionary definition of these terms as can be
19 without repeating them verbatim: *assist in the performance* is limited to
20 “specific, reasonable, and articulable” connections between the conscientious
21 objector’s action and the medical procedure. 84 Fed. Reg. at 23,263 (to be
22 codified at 45 C.F.R. § 88.2). “If the connection between an action and a
procedure is irrational, there is no actual connection by which the action
specifically furthers the procedure.” *Id.* at 23,187.

1 2. Even if the Court determines that the term “assist in the performance” is
2 ambiguous, the Court should still uphold HHS’s definition because it is
3 eminently reasonable. “At step two of *Chevron*, [courts] must ‘accept the
4 agency’s construction of the statute’ so long as that reading is reasonable, ‘even
5 if the agency’s reading differs from what the court believes is the best statutory
6 interpretation.’” *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1079 (9th Cir. 2016)
7 (quoting *Nat’l Cable and Telecomms. Ass’n v. Brand-X Internet Servs.*, 545 U.S.
8 967, 980 (2005)).

9 HHS’s definition is reasonable in light of the dictionary definitions of
10 “assist” and “performance” and the Rule’s requirement that “a specific,
11 reasonable, and articulable connection” exist between the conscientious
12 objector’s action and the medical procedure. 84 Fed. Reg. at 23,263 (to be
13 codified at 45 C.F.R. § 88.2); *see also id.* at 23,187 (excluding irrational or
14 excessively attenuated connections). In addition, the Rule furthers the statute’s
15 purpose of protecting individuals and health care entities from discrimination on
16 the basis of their religious or moral convictions by recipients of federal funds;
17 for example, under the Rule, individuals who schedule a patient’s abortion are
18 not outside the scope of the Church Amendments merely because they do not
19 perform the abortion themselves. The Rule recognizes that such individuals too
20 are protected because they provide necessary assistance in the performance of an
21 abortion. *See id.* at 23,188.

22

2. “Discriminate or Discrimination”

1 Plaintiff’s challenge to HHS’s definition of “discriminate or
2 discrimination” is also meritless. The definition, which consists of a three-point
3 list of examples that apply *only to the extent permitted by the Federal*
4 *Conscience Statutes*, is by definition reasonable. Virtually all of the Statutes
5 covered by the Rule employ the term “discriminate” and, as with “assist in the
6 performance,” do not define it. For example, the Coats-Snowe Amendment
7 provides that government recipients of federal funds “may not subject any health
8 care entity to discrimination” on certain bases, such as the “refus[al] to undergo
9 training in the performance of induced abortions.” 42 U.S.C. § 238n(a)(1). But
10 the Coats-Snowe Amendment does not explicitly define “discrimination.”
11 Consistent with the varying types of discrimination that the Federal Conscience
12 Statutes prohibit, the Rule provides a non-exhaustive list of actions that may
13 constitute discrimination. *See* 84 Fed. Reg. at 23,263 (to be codified at 45 C.F.R.
14 § 88.2). This list applies “to the extent permitted by the applicable statute.” *See*
15 *id.* The definition then provides several safe harbors, consisting of actions that, if
16 taken by a regulated entity, would not constitute discrimination. *See id.*

17
18 1. Plaintiff’s challenge to this definition fails at *Chevron* step one. By its
19 terms, the definition does not extend beyond the Statutes to which it applies. *See*
20 45 C.F.R. § 88.2 (defining the term to include actions “as applicable to, and to
21 the extent permitted by, the applicable statute”). Therefore, the definition does
22 not exceed Congress’s intent because it explicitly *cannot* exceed Congress’s

1 intent. Moreover, the common definition of “discrimination” is “to make a
2 difference in treatment or favor on a basis other than individual merit,”
3 *Discriminate*, Merriam-Webster, [https://www.merriam-webster.com/dictionary/](https://www.merriam-webster.com/dictionary/discriminate)
4 discriminate (last visited Aug. 18, 2019), and the Rule merely makes explicit the
5 various manifestations of that broad definition.

6 2. Even if the term is ambiguous, the Court should uphold HHS’s
7 definition at *Chevron* step two. As discussed above, the definition by its terms
8 does not extend beyond the meaning of the Statutes, but rather “must be read in
9 the context of each underlying statute at issue, any other related provisions of the
10 Rule, and the facts and circumstances.” 84 Fed. Reg. at 23,192. To provide
11 guidance on the meaning of discrimination without being under-inclusive, HHS
12 used the word “includes” to establish a non-exhaustive list of examples that
13 could, in the context of the particular underlying Federal Conscience Statute,
14 constitute discrimination. *See id.* at 23,190. And, to ensure that the Rule was not
15 over-inclusive, HHS included three provisions to protect entities that seek to
16 accommodate those with religious or moral objections. *See id.* at 23,263 (to be
17 codified at 45 C.F.R. § 88.2).

18 3. “Entity”

19 Plaintiff’s challenge to “entity,” which it raises in its complaint but not in
20 its preliminary injunction motion, fares no better. The term, in contrast to “health
21 care entity,” discussed *infra*, appears on its own only in the Church
22 Amendments, and that statute does not define the term. The Rule defines it as

1 follows:

2 Entity means a “person” as defined in 1 U.S.C. § 1; the Department;
3 a State, political subdivision of any State, instrumentality of any State
4 or political subdivision thereof; any public agency, public institution,
5 public organization, or other public entity in any State or political
6 subdivision of any State; or, as applicable, a foreign government,
7 foreign nongovernmental organization, or intergovernmental
8 organization (such as the United Nations or its affiliated agencies).

9 84 Fed. Reg. at 23,263.

10 Plaintiff’s challenge to this definition fails at *Chevron* step one. The term
11 “entity” has an exceedingly capacious dictionary definition: “something that has
12 separate and distinct existence and objective or conceptual reality.” *Definition of*
13 *Entity*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/entity>
14 (last visited Aug. 18, 2019). There simply is no way that Congress, in using such
15 a broad term, did not intend to include public agencies, public organizations, and
16 the like. For these reasons, this definition is, at a minimum, a permissible
17 construction of the term “entity.”

18 4. “Health Care Entity”

19 Plaintiff’s challenge to HHS’s definition of “health care entity,” which
20 appears in the Weldon Amendment, the Coats-Snowe Amendment, and the
21 ACA, also fails. The Rule defines “health care entity” in two parts:

22 (1) For purposes of the Coats-Snowe Amendment (42 U.S.C. 238n)
and the subsections of this part implementing that law (§ 88.3(b)), an
individual physician or other health care professional, including a
pharmacist; health care personnel; a participant in a program of

1 training in the health professions; an applicant for training or study
 2 in the health professions; a post-graduate physician training program;
 3 a hospital; a medical laboratory; an entity engaging in biomedical or
 4 behavioral research; a pharmacy; or any other health care provider or
 5 health care facility. As applicable, components of State or local
 governments may be health care entities under the Coats-Snowe
 Amendment; and

6 (2) For purposes of the Weldon Amendment (e.g., Department of
 7 Defense and Labor, Health and Human Services, and Education
 Appropriations Act, 2019, and Continuing Appropriations Act,
 8 2019, Pub. L. 115-245, Div. B., sec. 507(d), 132 Stat. 2981, 3118
 (Sept. 28, 2018)), Patient Protection and Affordable Care Act
 9 section 1553 (42 U.S.C. 18113), and to sections of this part
 implementing those laws (§ 88.3(c) and (e)), an individual
 10 physician or other health care professional, including a pharmacist;
 health care personnel; a participant in a program of training in the
 11 health professions; an applicant for training or study in the health
 professions; a post-graduate physician training program; a hospital;
 12 a medical laboratory; an entity engaging in biomedical or
 behavioral research; a pharmacy; a provider-sponsored
 13 organization; a health maintenance organization; a health insurance
 issuer; a health insurance plan (including group or individual
 14 plans); a plan sponsor or third-party administrator; or any other
 kind of health care organization, facility, or plan. As applicable,
 15 components of State or local governments may be health care
 16 entities under the Weldon Amendment and Patient Protection and
 Affordable Care Act section 1553.

17 84 Fed. Reg. at 23,264 (to be codified at 45 C.F.R. § 88.2).

18 *l.* Beginning with the text, each of these statutes defines the term through
 19 a non-exhaustive list of constituent entities. The Coats-Snowe Amendment
 20 provides that a health care entity “*includes* an individual physician, a
 21 postgraduate physician training program, and a participant in a program of
 22

1 training in the health professions.” 42 U.S.C. § 238n(c)(2) (emphasis added).
2 The Weldon Amendment and the ACA provide that the term “*includes* an
3 individual physician or other health care professional, a hospital, a provider-
4 sponsored organization, a health maintenance organization, a health insurance
5 plan, or any other kind of health care facility, organization, or plan.” 42 U.S.C.
6 § 18113(b) (emphasis added); Pub. L. No. 115-245, § 507(d)(2), 132 Stat. at
7 3118. The term “‘include’ can signal that the list that follows is meant to be
8 illustrative rather than exhaustive.” *Samantar v. Yousuf*, 560 U.S. 305, 317
9 (2010). Furthermore, both statutes contain catch-all phrases: “a participant in a
10 program of training in the health professions” in the Coats-Snowe Amendment,
11 and “other health care professional” and “any other kind of health care facility,
12 organization, or plan” in the Weldon Amendment and ACA. 42 U.S.C.
13 § 238n(c)(2); 42 U.S.C. § 18113(b). Given these features, the statutes plainly
14 contemplate a broader group of health care entities than those explicitly listed.

15 2. Even if the term “health care entity” in the Federal Conscience Statutes
16 were ambiguous, the Rule’s definition is reasonable for the reasons stated above:
17 the statutes explicitly contemplate the inclusion of entities beyond those
18 explicitly listed in the statutes, and Plaintiff has not identified any entity in the
19 Rule’s definition that would not meet the ordinary dictionary definition of
20 “health care entity” or the statutes’ catch-all provisions. Furthermore, the Rule
21 recognizes that the definition of “health care entity” is a flexible one that
22 depends on “the context of the factual and legal issues applicable to the

1 situation.” 84 Fed. Reg. at 23,196. None of the Rule’s definitions apply in all
 2 circumstances. *See id.*

3 5. “Health Service Program”

4 Plaintiff also appears to challenge the definition of “health service
 5 program,” mentioning the Rule’s definition without explaining why it is
 6 unlawful. *See* Compl. ¶ 91. Regardless of this pleading deficiency, the definition
 7 is plainly lawful. The term appears only in the Church Amendments and is not
 8 explicitly defined: “No individual shall be required to perform or assist in the
 9 performance of any part of a *health service program* or research activity funded
 10 in whole or in part under a program administered by the Secretary of Health,
 11 Education and Welfare if his performance or assistance in the performance of
 12 such part of such program or activity would be contrary to his religious beliefs
 13 or moral convictions.” 42 U.S.C. § 300a-7(d) (emphasis added). The Rule states
 14 that a health service program “includes the provision or administration of any
 15 health or health-related services or research activities, health benefits, health or
 16 health-related insurance coverage, health studies, or any other service related to
 17 health or wellness, whether directly; through payments, grants, contracts, or
 18 other instruments; through insurance; or otherwise.” 84 Fed. Reg. at 23,264 (to
 19 be codified at 42 C.F.R. § 88.2).

20 This definition should be upheld at *Chevron* step one. The plain text of the
 21 statute, where the step one inquiry begins and ends, *see Council for Urological*
 22 *Interests v. Burwell*, 790 F.3d 212, 230 (D.C. Cir. 2015), contemplates that the

1 term relates to services or activities “funded in whole or in part under a program
2 administered by the Secretary.” 42 U.S.C. § 300a-7(d). The examples listed in
3 the definition are all such programs. For this reason, the Rule’s definition is also
4 a permissible construction of the Church Amendments at *Chevron* step two.

5 6. “Referral or Refer For”

6 Last, Plaintiff’s challenge to “referral or refer for” is misplaced. As with
7 many of the other definitions in the Rule, “referral or refer for” is not defined in
8 the Weldon Amendment, the Coats-Snowe Amendment, or the ACA, the only
9 statutes in which they appear. The Rule defines “referral or refer for” through a
10 list of activities that qualify as “referral or refer for”: the term

11 includes the provision of information in oral, written, or electronic
12 form (including names, addresses, phone numbers, email or web
13 addresses, directions, instructions, descriptions, or other information
14 resources), where the purpose or reasonably foreseeable outcome of
15 provision of the information is to assist a person in receiving funding
or financing for, training in, obtaining, or performing a particular
health care service, program, activity, or procedure.

84 Fed. Reg. at 23,264 (to be codified at 45 C.F.R. § 88.2).

16 1. The Rule’s definition is consistent with Congress’s intent. Although the
17 statutes do not include a definition of “referral or refer for” and the legislative
18 history is silent on the matter, the ordinary dictionary definition of the term
19 indicates Congress’s intent. *See Mayo Found. for Med. Educ. & Research*, 562
20 U.S. at 52. As HHS explained, “The rule’s definition of ‘referral’ or ‘refer for’ . .
21 . . comports with dictionary definitions of the word ‘refer,’ such as the Merriam-
22

1 Webster’s definition of ‘to send or direct for treatment, aid, information, or
2 decision.’” 84 Fed. Reg. at 23,200 (quoting *Refer*, Merriam-Webster.com,
3 <https://www.merriam-webster.com/dictionary/refer>). The statutes’ structure also
4 makes Congress’s intent clear. The addition of the term “for” following “refer”
5 indicates that Congress did not intend the statutes to be limited to a referral
6 document, but rather to include any referral for abortion (or other health
7 services) in a more general sense. For example, the Coats-Snowe Amendment
8 protects not only a health care entity that declines to refer a patient to an abortion
9 provider, but also a health care entity that declines to refer “for” abortions
10 generally. *See, e.g.*, 42 U.S.C. § 238n(a)(1).

11 2. In the alternative, the Rule’s definition should be upheld at *Chevron*
12 step two. In addition to being consistent with dictionary definitions and the
13 statutes’ structure, the Rule’s definition is faithful to the statutes’ remedial
14 purposes. As HHS explained, defining the term “referral or refer for” more
15 narrowly would exclude forms of coercion that the Federal Conscience Statutes
16 protect against. For example, the Supreme Court recently held that a law
17 requiring health care providers to post notices regarding the availability of state-
18 subsidized abortion likely violated the First Amendment. *See Nat’l Inst. of*
19 *Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378–79 (2018). A
20 narrower definition would not include referrals of this sort, even though they
21 constitute unconstitutional coercion of a health care entity that has a
22 conscientious objection to abortion. The Weldon Amendment, Coats-Snowe

1 Amendments, and the ACA are not this narrow, and HHS acted reasonably when
2 it interpreted the term accordingly.

3 The Rule is reasonable for another reason as well: it uses a non-exhaustive
4 list that “guide[s] the scope of the definition,” recognizing that the terms “take
5 many forms and occur in many contexts.” 84 Fed. Reg. at 23,201. This
6 flexibility means that “the applicability of the rule would turn on the individual
7 facts and circumstances of each case” (*i.e.*, “the relationship between the
8 treatment subject to a referral request and the underlying service or procedure
9 giving rise to the request”). *Id.*

10 **B. Other Provisions of the Rule Are within HHS’s Statutory**
11 **Authority.**

12 Plaintiff’s other statutory authority argument, raised in a handful of
13 perfunctory paragraphs of the complaint and not at all in its motion for a
14 preliminary injunction, *see* Compl. ¶¶ 76–77, 95–96, 113, should be dismissed
15 out of hand. Plaintiff argues that the Federal Conscience Statutes do not permit
16 HHS to impose “financial penalties.” But, as explained *infra*, the Rule does not
17 impose penalties. To the extent that Plaintiff takes issue with the enforcement
18 authority section of the rule, 84 Fed. Reg. at 23,271–72 (to be codified at 45
19 C.F.R. § 88.7), this argument is meritless. As HHS explained, *see* 84 Fed. Reg.
20 at 23,183–86, the enforcement portion of the Rule merely sets forth existing
21 internal HHS processes related to disbursing federal funds: OCR is charged with
22 investigating complaints and seeking voluntary resolutions, and any involuntary

1 remedies occur through coordination between HHS funding components and
2 OCR using preexisting grants and contracts regulation processes. *See* 84 Fed.
3 Reg. at 23,271 (to be codified at 45 C.F.R. § 88.7(i)). And at bottom, it is not the
4 enforcement authority section of the Rule that would cause a loss of federal
5 funds, but the Federal Conscience Statutes themselves, which place conditions
6 on those funds.

7 **C. The Rule Is Consistent with Other Provisions of Law.**

8 Plaintiff also claims that the Rule conflicts with certain provisions within
9 the United States Code. No such conflict exists.

10 **1. Section 1554 of the ACA**

11 Plaintiff claims that the Rule conflicts with Section 1554 of the ACA. *See*
12 Compl. ¶¶ 117–18; PI Mem. at 24–26. That provision states that,
13 “[n]otwithstanding any other provision of this [the Affordable Care] Act, the
14 Secretary of Health and Human Services shall not promulgate any regulation
15 that” (1) “creates any unreasonable barriers to the ability of individuals to obtain
16 appropriate medical care”; (2) “impedes timely access to health care services”;
17 (3) “interferes with communications regarding a full range of treatment options
18 between the patient and the provider”; (4) “restricts the ability of health care
19 providers to provide full disclosure of all relevant information to patients
20 making health care decisions”; (5) “violates the principles of informed consent
21 and the ethical standards of health care professionals”; or (6) “limits the
22

1 availability of health care treatment for the full duration of a patient’s medical
2 needs.” 42 U.S.C. § 18114.

3 Plaintiff’s claim is meritless. All six subjects of Section 1554’s sub-
4 sections involve the *denial* of information or services to patients. The Rule,
5 however, denies nothing. It merely revises the 2011 Rule to ensure knowledge
6 of, compliance with, and enforcement of, the longstanding Federal Conscience
7 Statutes, in order to ensure that individual and institutional health care entities
8 covered by those laws receive proper protection. At bottom, Plaintiff’s objection
9 is not so much to the Rule as to the Federal Conscience Statutes that the Rule
10 implements. Under Plaintiff’s theory, any time a health care entity that receives
11 federal funds exercises its right under the Federal Conscience Statutes to decline
12 to provide a service to which it objects, HHS would violate Section 1554.
13 Plaintiff’s argument, then, is that Congress essentially abrogated the Federal
14 Conscience Statutes through Section 1554. Plaintiff takes this position even as to
15 the Weldon Amendment, which Congress has readopted every year since the
16 ACA’s passage.

17 The Court should reject Plaintiff’s untenable position. First, Section 1554
18 expressly applies “[n]otwithstanding any other provision *of this Act*,” 42 U.S.C.
19 § 18114 (emphasis added)—that is, the ACA. The great majority of the Federal
20 Conscience Statutes that the Rule implements, of course, are not part of the
21 ACA. Nor are the statutes that give the Secretary authority to award funding
22 grants part of the ACA. Had Congress intended Section 1554 to extend beyond

1 the ACA, it could have simply specified that it applies “[n]otwithstanding any
2 other provision of law[.]” 42 U.S.C. § 18032(d)(3)(D)(i). By its own terms,
3 Section 1554 does not apply to the conscience protection provisions outside of
4 the ACA, and therefore does not undermine the Rule’s validity. Another reason
5 that Section 1554 is of no moment is that the Rule does not create, impede,
6 interfere with, restrict, or violate anything. Instead, it simply limits what the
7 government chooses to fund—*i.e.*, providers that do not engage in
8 discrimination.

9 Putting that threshold point aside, Congress went out of its way in the
10 ACA to make clear that nothing in that statute undermines the Federal
11 Conscience Statutes on which the Rule is based. Specifically, Section 1303(c)(2)
12 of the ACA states that

13 Nothing in this Act [*i.e.*, the ACA, including Section 1554] shall be
14 construed to have *any effect* on Federal laws regarding (i) conscience
15 protection; (ii) willingness or refusal to provide abortion; and (iii)
16 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.

17 42 U.S.C. § 18023(c)(2) (emphasis added). This clear expression of
18 congressional intent fatally undercuts Plaintiff’s argument that Section 1554
19 somehow prevents HHS from giving effect to the Federal Conscience Statutes.

20 It is a basic principle of statutory interpretation, moreover, that Congress
21 “does not alter the fundamental details of a regulatory scheme in vague terms or
22 ancillary provisions—it does not, one might say, hide elephants in mouseholes.”

1 | *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Plaintiff would
2 | have this Court believe that Congress effectively gutted the Federal Conscience
3 | Statutes, without any meaningful legislative history so indicating, when it passed
4 | Section 1554. That proposition is implausible on its face.⁵

5 | Defendants' interpretation of Section 1554 also comports with common
6 | sense. Section 1554's subsections are open-ended. Nothing in the statute
7 | specifies, for example, what constitutes an "unreasonable barrier[.]" "appropriate
8 | medical care[.]" "all relevant information[.]" or "the ethical standards of health
9 | care professionals[.]" 42 U.S.C. § 18114. And there is nothing in the ACA's
10 | legislative history that sheds light on this provision. Under these circumstances,
11 | it is a substantial question whether Section 1554 claims are reviewable under the
12 | APA at all. *See Citizens to Pres. Overton Park*, 401 U.S. at 410 (explaining that
13 | the APA bars judicial review of agency decision where, among other
14 | circumstances, "statutes are drawn in such broad terms that in a given case there

15 |
16 |
17 |
18 | _____
19 | ⁵ Congress also went on to add *additional* conscience protections in the
20 | ACA. *See, e.g.*, 42 U.S.C. § 18113. The ACA, thus, actually adds to and
21 | underscores the importance of the Federal Conscience Statutes, contrary to
22 | Plaintiff's claim.

1 is no law to apply” (citation omitted)).⁶ But even if Section 1554 claims are
 2 reviewable, it is inconceivable that Congress intended to subject the entire U.S.
 3 Code to these general and wholly undefined concepts—and that it did so without
 4 leaving any meaningful legislative history.

5 Other principles point in the same direction. “[I]t is a commonplace of
 6 statutory construction that the specific governs the general,” *Morales v. Trans*
 7 *World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992). “[T]he specific provision is
 8 construed as an exception to the general one.” *RadLAX Gateway Hotel, LLC v.*
 9 *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Thus, even if
 10 Section 1554 applied to regulations implementing the Federal Conscience
 11 Statutes (it does not), and even if Section 1554 and those Statutes were in
 12 conflict (they are not), the Federal Conscience Statutes would prevail over
 13 Section 1554. Section 1554 is at best a general prohibition of certain types of
 14 regulations (very broadly described) and does not speak to conscience objections

15
 16 ⁶ Even within the ACA, HHS routinely issues regulations placing criteria
 17 and limits on what the government will fund, and on what will be covered in
 18 ACA programs. Under Plaintiff’s standardless interpretation of Section 1554, it
 19 is far from clear that the government could ever impose *any* limit on *any*
 20 parameter of a health program—even if the program’s own statute requires it.
 21 Nor is it evident how a court could possibly evaluate challenges brought under
 22 Section 1554 if that provision sweeps as broadly as Plaintiff claims.

1 at all. The Federal Conscience Statutes, by contrast, contain specific protections
2 with respect to specific activities in the context of federally funded health
3 programs and research activities. Section 1554, therefore, must give way to the
4 more specific Federal Conscience Statutes and the Rule interpreting them.

5 **2. The ACA's Preventive Care Coverage Requirement**

6 Plaintiff further claims that the Rule conflicts with the requirement in the
7 ACA that group health plans and health insurance issuers offering group or
8 individual health insurance coverage shall provide coverage for, among other
9 things, certain preventive care. *See* 42 U.S.C. § 300gg-13(a)(4); *see also* PI
10 Mem. at 27-28. As with Plaintiff's claim under Section 1554, this argument fails
11 on its face. Congress was clear that nothing in the ACA should be construed to
12 have "*any effect*" on federal conscience protection. 42 U.S.C. § 18023(c)(2)
13 (emphasis added). And Plaintiff utterly fails to explain how the Rule—which
14 merely implements the Federal Consciences Statutes—runs afoul of the ACA's
15 preventive care requirement, despite Congress's clear direction to the contrary in
16 the ACA itself.

17 **3. Emergency Medical Treatment and Active Labor Act** 18 **(EMTALA)**

19 Plaintiff also argues that the Rule conflicts with EMTALA, which
20 requires hospitals with emergency departments to either (1) provide emergency
21 care "within the staff and facilities available at the hospital," or (2) transfer the
22 patient to another medical facility in circumstances permitted by the statute. 42

1 U.S.C. § 1395dd(b)(1)(A). *See* Compl. ¶ 120; PI Mem. at 28–29. There is no
2 conflict, however. As HHS explained in the preamble to the Rule, OCR “intends
3 to read every law passed by Congress in harmony to the fullest extent possible
4 so that there is maximum compliance with the terms of each law.” 84 Fed. Reg.
5 at 23,183. With respect to EMTALA specifically, HHS indicated that it
6 generally agrees with the explanation in the preamble to the 2008 Rule that
7 fulfilling the requirements of EMTALA would *not* conflict with the Federal
8 Conscience Statutes that the Rule interprets. *See id.*

9 Plaintiff points to potential “uncertainty” created by the Rule, with the
10 “possibility” of sanctions for non-compliance. *See* PI Mem. at 29. But in
11 considering Plaintiff’s facial challenge to the Rule, the Court should not assume
12 that some future, hypothetical conflict between EMTALA and the Rule will
13 come to pass. *See Reno v. Flores*, 507 U.S. 292, 309 (1993). HHS has explained
14 that it is “not aware of any instance where a facility required to provide
15 emergency care under EMTALA was unable to do so because its entire staff
16 objected to the service on religious or moral grounds.” 73 Fed. Reg. 78,087. And
17 in any event, HHS has stated that “where EMTALA might apply in a particular
18 case, the Department would apply both EMTALA and the relevant law under
19 this rule harmoniously to the extent possible.” 84 Fed. Reg. 23,188.

20 4. “Non-Directive” Appropriations Rider

21 Plaintiff also argues that the Rule somehow conflicts with HHS
22 appropriations language requiring that all pregnancy counseling be non-

1 directive. Compl. ¶ 121 (citing Pub. L. No. 115-245, 132 Stat. 2981). And
2 Plaintiff seeks to piggyback on this Court’s decision in *Washington v. Azar*, 376
3 F. Supp. 3d 1119 (E.D. Wash. 2019), which concluded that Washington was
4 likely to succeed on its claim that *different* HHS regulations affecting the Title X
5 program were unlawfully “directive.” *Id.* at 1130; *see also* PI Mem. at 29–30.⁷
6 But the non-directive appropriations language is of no moment here. The Rule
7 does not require funding recipients (of Title X grants or otherwise) to engage in
8 pregnancy counseling at all—much less counseling that directs women to any
9 particular outcome with respect to their pregnancy. Instead, the Rule implements

10
11 ⁷ A unanimous motions panel of the Ninth Circuit correctly rejected the
12 Court’s conclusions and stayed the preliminary injunctions entered in the cases
13 Plaintiff cites. Although the Ninth Circuit ordered the defendants’ appeal to be
14 reheard en banc and instructed that the motions panel’s order not be cited as
15 precedential in the Ninth Circuit, *California v. Azar*, No. 19-15974, Order (9th
16 Cir. July 3, 2019), the motions panel’s order constitutes persuasive authority.
17 The Ninth Circuit also expressly indicated that the motions panel’s order has not
18 been vacated. *California v. Azar*, No. 19-15974, Order (9th Cir. July 11, 2019).
19 The *en banc* Ninth Circuit denied the plaintiffs’ motions for an administrative
20 stay of the motions panel’s order, as well as the plaintiffs’ request for a rehearing
21 of that denial by the full Ninth Circuit, and is now in the process of rehearing the
22 question of a stay of the preliminary injunction pending appeal.

1 the Federal Conscience Statutes. Accepting Plaintiff’s argument that the Rule
2 unlawfully infringes the appropriations rider would require the Court to believe
3 that—despite Congress’s explicit provisions in the Federal Conscience
4 Statutes—Congress effectively repealed those protections in an appropriations
5 rider relating solely to the Tile X program and compelled health care entities to
6 counsel on all pregnancy options, including abortion, even if they have religious
7 or moral objections to providing such counseling. That proposition is wholly
8 implausible and should be rejected. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153,
9 190 (1978).

10 **5. Title VII of the Civil Rights Act of 1964**

11 Plaintiff also argues that, because the Rule does not include the same
12 “undue hardship” exception that Congress included in Title VII, there is a
13 conflict between that statute and the Rule. Compl. ¶ 122 (citing 42 U.S.C.
14 § 2000e(j)). Not so. The Rule implements the substantive requirements of the
15 Federal Conscience Statutes, which, unlike Title VII, contain no such exception.
16 Indeed, that Congress included an “undue hardship” exception in Title VII but
17 declined to do so in the Federal Conscience Statutes is strong evidence that
18 Congress did not intend for such an exception to apply. *Cf., e.g., Franklin Nat’l*
19 *Bank of Franklin Sq. v. New York*, 347 U.S. 373, 378 (1954) (finding “no
20 indication that Congress intended to make [an issue] subject to local restrictions,
21 as it has done by express language in several other instances”). In addition, the
22 Federal Conscience Statutes apply in more specific contexts than does Title VII,

1 and therefore it is reasonable to infer—given the absence of the “undue
 2 hardship” limitation in the Federal Conscience Statutes—that Congress did not
 3 intend for that limitation to apply to these statutes. *See* 84 Fed. Reg. 23,191; *see*
 4 *also Morales*, 504 U.S. at 384–85 (“[I]t is a commonplace of statutory
 5 construction that the specific governs the general.”).

6 **D. The Rule Is Neither Arbitrary Nor Capricious.**

7 Agency action must be upheld in the face of an APA claim if the agency
 8 “examines the relevant data and articulates a satisfactory explanation for its
 9 action[,] including a rational connection between the facts found and the choice
 10 made.” *Motor Vehicle Mfrs. Ass’n, of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,
 11 463 U.S. 29, 43 (1983) (citation omitted); *Gill v. U.S. Dep’t of Justice*, 913 F.3d
 12 1179, 1187 (9th Cir. 2019). Under this deferential standard of review, “a court is
 13 not to substitute its judgment for that of the agency . . . and should uphold a
 14 decision of less than ideal clarity if the agency’s path may reasonably be
 15 discerned.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009)
 16 (citations omitted). The Rule easily satisfies this deferential review.

17 Plaintiff makes several general arguments in support of its claim that the
 18 Rule is “arbitrary” and “capricious.” None is persuasive, and none can overcome
 19 the presumption of validity to which the agency rulemaking is entitled.

20 **1. HHS Adequately Explained Why it Changed Course.**

21 The Rule undeniably revises HHS’s approach to enforcing the Federal
 22 Conscience Statutes. But HHS is permitted to “consider varying interpretations

1 and the wisdom of its policy on a continuing basis, for example, in response to
2 changed factual circumstances, or a change in administrations.” *Nat’l Cable &*
3 *Telecomm. Ass’n v. Brand-X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal
4 citation omitted). As the Supreme Court has explained, there is no heightened
5 standard when an agency changes its policy so long as the agency shows that “the
6 new policy is permissible under the statute, that there are good reasons for it, and
7 that the agency believes it to be better, which the conscious change of course
8 adequately indicates.” *Fox Television*, 556 U.S. at 515. HHS has met that standard
9 here.

10 Contrary to Plaintiff’s claim, Compl. ¶ 125, HHS did acknowledge that it
11 was changing its policy in promulgating the Rule, including its policy with respect
12 to assurance and certification requirements. Further, it provided a “cogent
13 rationale” and an “evidentiary basis” for doing so. *See* Compl. ¶ 125. As HHS
14 explained in the preamble to the Rule, it determined that the preexisting regulatory
15 structure was insufficient to protect the statutory rights and liberty interests of
16 health care entities. *See* 84 Fed. Reg. at 23,228. HHS reasonably judged that the
17 2011 Rule lacked adequate measures to enforce the Federal Conscience Statutes
18 and promoted confusion, not clarity, about the scope of those statutory
19 protections. The 2011 Rule related to just three of the many Federal Conscience
20 Statutes and did not provide adequate incentives for covered entities to “institute
21 proactive measures to protect conscience, prohibit coercion, and promote
22 nondiscrimination.” *Id.* at 23,228. Moreover, the 2011 Rule failed to provide

1 sufficient information concerning the scope of the various Federal Conscience
2 Statutes, especially regarding their interaction with state laws, including state laws
3 adopted since the promulgation of the 2011 Rule. *Id.*; *see also* NPRM, 83 Fed.
4 Reg. at 3889. HHS also relied, in part, on complaints it received of alleged
5 violations of the Federal Conscience Statutes. *See* NPRM, 83 Fed. Reg. at 3886;
6 84 Fed. Reg. at 23,229. The increase in complaints is, of course just “one of the
7 many metrics used to demonstrate the importance of this rule.” *Id.* The increase
8 in complaints was both real and significant. Many of these complaints allege
9 violations of religious and conscience-based beliefs in the medical setting, and
10 while a large subset of them complain of conduct that is outside the scope of the
11 Federal Conscience Statutes and the Rule,⁸ some do implicate the relevant
12 statutes, *see, e.g.*, Admin. Record (AR) 544188–207 (Ex. A); 544516 (Ex. B);
13 544612–23 (Ex. C). Further, the complaints overall illustrate the need for HHS to
14 clarify the scope and effect of the Federal Conscience Statutes.

15 2. HHS’s Definitions Were the Product of Reasoned 16 Decisionmaking.

17 As discussed above, HHS crafted each definition in the Rule in a reasonable
18 exercise of its statutory authority. The defined terms are also neither arbitrary nor

19
20 ⁸ For example, many complaints were from patients and/or parents who
21 criticized the vaccination policies at schools and medical offices, *see, e.g.*, AR
22 542458 (Ex. D).

1 capricious. Plaintiff claims that the definitions of “assist in the performance,”
2 “discrimination,” “health care entity,” and “referral” “create an unworkable
3 situation . . . by dramatically expanding the universe of protected personas and
4 prohibited conduct.” PI Mem. at 32; *see also* Compl ¶¶ 80–93. In support of this
5 argument, Plaintiff offers various uncertainties and hypothetical examples of
6 potential outcomes of the Rule. *See* PI Mem. at 32–33; Compl. ¶¶ 80–93. But
7 again, Plaintiff’s rule challenge is facial, and the fact that it can “point to a
8 hypothetical case in which the rule might lead to an arbitrary result does not render
9 the rule ‘arbitrary or capricious.’” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 619
10 (1991).

11 HHS weighed comments that argued that the proposed definitions did not
12 go far enough and others complaining that the definitions were overbroad, and
13 provided thoughtful, detailed explanations for why each of the challenged
14 definitions correctly interpreted the relevant statutes. *See generally* 84 Fed. Reg.
15 23,186–203; *e.g., id.* at 23,194 (declining to explicitly incorporate “social workers
16 and schools of social work” into the definition of “health care entity” because “[i]t
17 is unclear in many circumstances [whether] such entities deliver health care”); *id.*
18 at 23,191 (explaining that HHS would not incorporate into the rule the “undue
19 hardship” exception for reasonable accommodations under Title VII because
20 Congress did not adopt such an exception in the Federal Conscience Statutes). The
21 agency also modified each challenged definition in response to the comments it
22 received, including narrowing and clarifying each definition in significant

1 respects. *See id.* at 23,181–203; *e.g., id.* at 23,186–89 (reviewing several
2 categories of comments asserting that the proposed definition of “assist in the
3 performance of” was overbroad, agreeing in part, and narrowing the definition
4 from “to participate in any activity” with an “articulable connection[,]” to “to take
5 an action that has a specific, reasonable, and articulable connection,” among other
6 changes and clarifications). HHS thus satisfied its APA obligations.

7 **3. HHS Reasonably Weighed the Rule’s Costs and Benefits.**

8 In addition to HHS’s purpose of improving knowledge about and
9 enforcement of the Federal Conscience Statutes, HHS identified four primary
10 benefits of the Rule in its cost-benefit analysis: (1) increasing the number of health
11 care providers; (2) improving the doctor-patient relationship; (3) eliminating the
12 harm from requiring health care entities to violate their consciences; and (4)
13 reducing unlawful discrimination in the health care industry and promoting
14 personal freedom. 84 Fed. Reg. at 23,246. To the extent that HHS relied on a
15 limited 2009 poll to reach this conclusion, the agency did not act unreasonably in
16 considering it. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d
17 971, 995 (9th Cir. 2014) (Even “if the only available data is “‘weak,’ and thus not
18 dispositive,” an agency’s reliance on such data “does not render the agency’s
19 determination ‘arbitrary and capricious’” (citation omitted)). HHS’s policy
20 determination relied on its own analysis, the comments it received in response to
21 the NPRM, anecdotal evidence, and, yes, the 2009 poll. 84 Fed. Reg. at 23,247.
22 There was nothing unreasonable, arbitrary, or capricious in HHS considering the

1 poll among other non-empirical evidence. *See Fox Television*, 556 U.S. at 521
2 (“[E]ven in the absence of evidence, the agency’s predictive judgment (which
3 merits deference) makes entire sense. To predict that complete immunity for
4 fleeting expletives, ardently desired by broadcasters, will lead to a substantial
5 increase in fleeting expletives seems to us an exercise in logic rather than
6 clairvoyance.”).

7 Moreover, HHS scarcely assigned controlling weight to either the 2009
8 survey or the ramifications of that survey: HHS ultimately concluded that it lacked
9 sufficient data to quantify the theoretical effect but that the available data was
10 adequate “to conclude that the rule will increase, or at least not decrease, access
11 to health care providers and services.” 84 Fed. Reg. at 23,247; *The Lands Council*
12 *v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (“[W]e are to conduct a “particularly
13 deferential review” of an “agency’s predictive judgments about areas that are
14 within the agency’s field of discretion and expertise” (citation omitted)).

15 HHS also considered other potential benefits of the Rule for health care
16 entities, such as the reduction in “harm that providers suffer when they are forced
17 to violate their consciences.” 84 Fed. Reg. 23,246 (citing, among other sources,
18 Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for*
19 *Healthcare Professionals*, 49 Ariz. Stat. L.J. 549, 565 (2017)).

20 Whether the Rule would increase or decrease the number of providers is a
21 difficult policy assessment that should be left to the entity with responsibility for
22 making those assessments—HHS. Indeed, “[w]hether [the Court] would have

1 done what the agency did is immaterial,” so long as the agency engages in an
2 appropriate decisionmaking process. *Mingo Logan Coal Co. v. EPA*, 829 F.3d
3 710, 718 (D.C. Cir. 2016). The court asks only whether the decision “was based
4 on a consideration of the relevant factors and whether there has been a clear error
5 of judgment.” *Citizens to Preserve Overton Park*, 401 U.S. at 416. Here, HHS
6 assessed the available evidence and reasonably concluded that the Rule would
7 “increase, or at least not decrease,” the number of providers. 84 Fed. Reg. at
8 23,247.

9 Plaintiff separately argues that HHS inadequately considered the effect of
10 the Rule on healthcare access, PI Mem. at 34–35; *see also* Compl. ¶ 126. But HHS
11 received no data that would “enable[] a reliable quantification of the effect of the
12 rule on access to providers and to care,” 84 Fed. Reg. at 23,250. Absent reliable
13 data from which to quantify the effects, HHS was scarcely arbitrary in relying on
14 the data it did have—and that data indicated that, if anything, the Rule would
15 increase the number of available providers, which can reasonably be predicted to
16 improve patient care. *See id.* at 23,180; *see also Fox Television*, 556 U.S. at 521.

17 Furthermore, HHS explicitly sought comments on “whether this final rule
18 would result in unjustified limitations on access to health care.” 84 Fed. Reg. at
19 23,250; NPRM, 83 Fed. Reg. at 3900 (request for comment). Ultimately, and as
20 HHS explained, the majority of the comments it received in response to that
21 request focused on preexisting discrimination in health care and did not attempt
22 to answer the question of how the Rule itself would affect access to health care.

1 84 Fed. Reg. at 23,250. HHS studied academic literature relating to preexisting
2 statutes, but found “insufficient evidence to conclude that conscience protections
3 have negative effects on access to health care.” *See id.* at 23,251 & n.345. HHS
4 also considered a report with anecdotal data on discrimination against LGBT
5 patients in states with religious freedom laws. 84. Fed. Reg. at 23,252. But, as
6 HHS explained, that report contained only anecdotal accounts—thus making it
7 unfit for extrapolation—and made no attempt to establish a causal mechanism
8 between religious freedom laws and the discrimination it reported. *Id.*

9 Many of these questions—the precise effect of the Rule on patient care, the
10 effort that will be required to comply with a new policy—are difficult to answer.
11 Plaintiff’s view seems to be that an agency cannot take an action until it has
12 commissioned or executed studies on every potential repercussion of that action.
13 While that might be a technocrat’s dream, it is not what the APA requires. Instead,
14 the APA commits these decisions to the agency’s expertise. “Whether [the Court]
15 would have done what the agency did is immaterial[,]” so long as the agency
16 engages in an appropriate decisionmaking process. *Mingo Logan Coal Co.*, 829
17 F.3d at 718. Where, as here, HHS assessed the available evidence on a subject,
18 and reached a reasonable conclusion, this Court should not accept Plaintiff’s
19 invitation to second-guess the agency’s policy conclusions.

20 **E. The Rule Does Not Violate the Separation of Powers.**

21 Plaintiff asserts that the Rule violates the separation of powers because an
22 agency cannot “refuse to disburse money appropriated by Congress.” Compl.

¶ 137; *see also* Compl. ¶¶ 135-38. But the Rule is not such a refusal—rather the Rule *complies* with congressional dictates. *See, e.g.*, Pub. L. No. 115-245, Div. B, § 507(d)(1), 132 Stat. at 3118 (Weldon Amendment, providing that “[n]one of the funds made available in this Act may be made available to [a recipient that] 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.”). As explained above, the Rule does not change the substantive law. 84 Fed. Reg. at 23,256. Agencies commonly enact such regulations implementing Congress’s funding conditions. *See, e.g.*, Final Rule, 68 Fed. Reg. 51,334-01 (a regulation by twenty-two agencies implementing Title VI, the Rehabilitation Act, and the Age Discrimination Act).

F. The Rule Complies with the Spending Clause.

Plaintiff alleges that the Rule violates the Spending Clause. Compl. ¶¶ 128-34. More specifically, Plaintiff alleges that the Rule is ambiguous, that the Rule is coercive, and that the Rule’s requirements are insufficiently related to the purpose of the Federal Conscience Statutes. All of these contentions are wrong.

As an initial matter, although Plaintiff purports to object to the *Rule*, its true objection is to the Federal Conscience Statutes, which originated the conditions on the government’s offer of funds. The Rule does not alter the Statutes’ substantive conscience requirements. *See* 84 Fed. Reg. 23,256. Nor can Plaintiff show that the Rule deviates from the Statutes in an unconstitutional

1 way, because many of its arguments—for example, that the amount of funding at
2 stake is coercively large—apply equally to the Rule *and* the Statutes. In other
3 instances, the Rule is clearly *less* susceptible to attack than the statutes—for
4 example, Plaintiff argues that the conditions on federal grants are ambiguous,
5 but the Rule provides greater clarity than the conscience statutes themselves.

6 Furthermore, Plaintiff’s specific objections under the Spending Clause fail
7 on their merits. Congress’s Article I authority to “set the terms on which it
8 disburses federal money to the States” is “broad,” and these conditions fall
9 within that authority. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548
10 U.S. 291, 296 (2006); *see also, e.g., South Dakota v. Dole*, 483 U.S. 203, 206
11 (1987) (noting that Congress has “repeatedly employed the [spending] power to
12 further broad policy objectives by conditioning receipt of federal moneys upon
13 compliance by the recipient with federal statutory and administrative directives.”
14 (citations omitted)).

15 ***Coercion*** - A conditional offer of federal funds will be found to be unduly
16 coercive only in the unusual case—“[i]n the typical case we look to the States to
17 defend their prerogatives by adopting ‘the simple expedient of not yielding’ to
18 federal blandishments.” *NFIB v. Sebelius*, 567 U.S. 519, 579 (2012) (Roberts,
19 C.J.) (quoting *Massachusetts v. Mellon*, 262 U. S. 447, 482 (1923)). Comparing
20 this case to *NFIB* shows that no unconstitutional coercion has occurred. In *NFIB*,
21 the Supreme Court concluded that an ACA provision that conditioned all
22 Medicaid funds on a state’s agreement to expand its Medicaid program violated

1 the Spending Clause by “transform[ing]” Medicaid into a new program. 567
2 U.S. at 583. The Federal Conscience Statutes and the Rule are quite different.

3 First, unlike in *NFIB*, where states were provided with a binary choice—
4 either expand their Medicaid programs, or lose all of their Medicaid funding—it
5 is far from clear that noncompliance with the Federal Conscience Statutes and
6 the Rule would impact *all* of the funding sources identified by Plaintiff. HHS
7 has a variety of enforcement options when the conditions for its grants are not
8 met, and the Rule clarifies that HHS will always begin by trying to resolve a
9 potential violation through informal means. 84 Fed. Reg. at 23, 271 (“If an
10 investigation or compliance review indicates a failure to comply with Federal
11 conscience and antidiscrimination laws or this part, OCR will so inform the
12 relevant parties and *the matter will be resolved by informal means whenever*
13 *possible.*” (emphasis added)); *see also supra* note 3 (discussing HHS’s
14 enforcement procedures). Far from the “gun to the head” at issue in *NFIB*, 567
15 U.S. at 581, this series of informal enforcement proceedings is not unduly
16 coercive. Plaintiff’s apocalyptic (and hypothetical) scenarios of complete
17 funding loss—scenarios that have not remotely come to pass in the decades that
18 many of the Federal Conscience Statutes have been in effect—are of no help.
19 Plaintiff cannot succeed on its facial challenge by identifying a handful of
20 implausible and speculative circumstances in which the operation of the Federal
21 Conscience Statutes and the Rule *might* have a coercive effect; instead, it must
22 show that the Rule has *no* constitutional applications. *United States v. Sineneng-*

1 | *Smith*, 910 F.3d 461, 470 (9th Cir. 2018). And, the further factual context that
2 | would be available if such a scenario did occur would be helpful to the Court in
3 | evaluating Plaintiff’s Spending Clause claims, thus highlighting the lack of
4 | ripeness at this time.

5 | Second, unlike in *NFIB*, Plaintiff cannot plead surprise because the
6 | Federal Conscience Statutes and their conditions have existed for decades. *See*,
7 | *e.g.*, 42 U.S.C. § 300a-7 (first Church Amendments enacted in 1973); 42 U.S.C.
8 | § 238n (Coats-Snowe Amendment, enacted in 1996). The ACA provisions at
9 | issue in *NFIB* required the states to adopt an entirely new Medicaid expansion.
10 | *Cf. NFIB*, 567 U.S. at 584 (Roberts, C.J.) (criticizing the Medicaid expansion as
11 | an attempt to “enlist[] the States in a new health care program” and “surpris[e]
12 | participating States with postacceptance or ‘retroactive’ conditions” (citation
13 | omitted)). If anything, the Rule should be an improvement from Plaintiff’s
14 | perspective because the Rule provides additional clarity, transparency, notice,
15 | and insight into HHS’s enforcement processes.

16 | Plaintiff suggests that “the expanded scope” of the Rule, PI Mem. at 41,
17 | motivates its challenge, but this argument is a retread of Plaintiff’s statutory
18 | authority claim (which, for the reasons described above, fails), and in any event
19 | there is no Spending Clause barrier to clarifying the terms on which an entity
20 | may receive federal funding. *Cf. NFIB*, 567 U.S. at 582–83 (holding that the
21 | Medicaid statute authorized Congress to modify its terms without creating
22 |

1 Spending Clause problems, so long as the modifications did not rise to the level
2 of creating a new program).

3 ***Ambiguity*** - Plaintiff makes no attempt to argue that the terms of the
4 *Federal Conscience Statutes* are ambiguous, likely because each clearly
5 provides unambiguous notice to funding recipients of the Statutes' anti-
6 discrimination provisions. The Rule—which adds additional clarification and
7 interpretation on top of that are already provided in the statutes—is necessarily
8 clearer and less ambiguous than the statutes. Both are more than adequate to
9 pass the ambiguity analysis, which focuses on whether or not potential recipients
10 are aware that the federal government has placed conditions on federal funds,
11 rather than on whether every detail of such conditions has been set forth. *See,*
12 *e.g., Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002)
13 (“[C]onditions may be ‘largely indeterminate,’ so long as the statute ‘provid[es]
14 clear notice to the States that they, by accepting funds under the Act, would
15 indeed be obligated to comply with the conditions.’ Congress is not required to
16 list every factual instance in which a state will fail to comply with a
17 condition. . . . Congress must, however, make the existence of the condition
18 itself . . . explicitly obvious.” (quoting *Pennhurst State Sch. & Hosp. v.*
19 *Halderman*, 451 U.S. 1, 24–25 (1981))).

20 ***Nexus*** - Plaintiff’s allegation that the Rule is not adequately related to the
21 purpose of the targeted funding, Compl. ¶ 133, fails because it is the Federal
22 Conscience Statutes—not the Rule—that establish the linkage between

1 conscience protections and federal funding. Further, the governmental purpose
2 of the statutes is to ensure that federal funds do not subsidize discrimination
3 against individual and institutional health care entities on the basis of their
4 moral, religious, or other beliefs about certain care (or coverage), in service of
5 the government’s interests in protecting the free exercise of religion and in
6 encouraging and overseeing a robust health care system. *See Mayweathers*, 314
7 F.3d at 1066–67 (upholding the Religious Land Use and Institutionalized
8 Persons Act (RLUIPA) against a Spending Clause challenge because “by
9 fostering non-discrimination, RLUIPA follows a long tradition of federal
10 legislation designed to guard against unfair bias and infringement on
11 fundamental freedoms”). Plaintiff objects that the funding for its “labor and
12 educational programs,” PI Mem. at 43, might also be at risk, but offers no
13 evidence to support this claim. The Rule applies only to funds administered,
14 conducted, or funded by HHS. Plaintiff should not succeed on its *facial*
15 challenge on the speculative theory that the Rule would somehow affect funds
16 provided other departments.

17 **G. The Rule Comports with the Establishment Clause.**

18 Plaintiff argues that the Rule violates the Establishment Clause, Compl.
19 ¶¶ 139-42, but under its theory, it would be the *preexisting* Federal Conscience
20 Statutes that violate the Establishment Clause by creating supposed “favoritism
21 toward religious beliefs.” Yet Plaintiff does not challenge the Federal
22 Conscience Statutes themselves and even endorses several of them. *See, e.g., PI*

1 *Mem.* at 4. And as explained above, the Rule does not change the substantive
2 law that Congress established in the Federal Conscience Statutes. *See* 84 Fed.
3 Reg. 23,256.

4 Indeed, for all of the same reasons that the Federal Conscience Statutes
5 are in harmony with the Establishment Clause, the Rule is too. *See, e.g., Kong v.*
6 *Scully*, 341 F.3d 1132 (9th Cir. 2003), *opinion amended on denial of reh’g*, 357
7 F.3d 895 (9th Cir. 2004) (upholding several of the Federal Conscience Statutes
8 against an Establishment Clause challenge); *Chrisman v. Sisters of St. Joseph of*
9 *Peace*, 506 F.2d 308, 311 (9th Cir. 1974) (upholding a provision of the Church
10 Amendments—Pub. L. No. 93-45, 87 Stat. 95 § 401—against an Establishment
11 Clause challenge because Congress was seeking to “preserve the government’s
12 neutrality in the face of religious differences” rather than to “affirmatively
13 prefer[] one religion over another.”). “[T]here is ample room for accommodation
14 of religion under the Establishment Clause.” *Corp. of Presiding Bishop of*
15 *Church v. Amos*, 483 U.S. 327, 338 (1987). The Rule serves the legitimate
16 secular purpose of alleviating potential burdens of conscience on individual and
17 institutional health care entities, just as the Federal Conscience Statutes do.
18 Additionally, the Rule neither promotes nor subsidizes any religious message or
19 belief; rather, it explains the enforcement processes for existing federal statutes.
20 Finally, the Rule, like many of the Federal Conscience Statutes, is generally
21 neutral between various religions and between religion and non-religion. *Cf.*,
22 *e.g.*, 42 U.S.C. § 238n (Coats-Snowe Amendment, the applicability of which

1 does not turn on a religious belief); Pub. L. No. 115-245, Div. B., § 507(d)
 2 (Weldon Amendment, the applicability of which does not turn on religious
 3 belief); 42 U.S.C. § 300a-7 (Church Amendments, which equally protect health
 4 care providers from discrimination based on religious beliefs or moral
 5 convictions).⁹

6 ***Burden on third parties*** - Plaintiff's argument that the Rule impermissibly
 7 burdens third parties, PI Mem. at 44-45, fails because the Establishment Clause
 8 does not bar religious accommodations that could have an adverse effect on
 9 others. For example, in *Corporation of the Presiding Bishop of the Church of*
 10 *Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme
 11 Court held that Title VII's religious exemption to the prohibition against
 12 religious discrimination in employment was consistent with the Establishment
 13 Clause even though it allowed an employer to terminate the plaintiff's
 14 employment. While the plaintiff was "[u]ndoubtedly" adversely affected, "it was
 15 the Church[,] . . . not the Government" that caused that effect. 483 U.S. at 337
 16 n.15. Similarly, in *Doe v. Bolton*, the Supreme Court characterized a state statute
 17 that allowed hospitals, physicians, and other employees to refrain from

18 _____
 19 ⁹ Plaintiff unpersuasively refers to a "strict scrutiny" test, PI Mem. at 44
 20 (citing *Larson v. Valente*, 456 U.S. 228 (1982)), which applies only to
 21 *denominational* preferences. *Larson*, 456 U.S. at 246. But the Rule contains no
 22 sectarian preference.

1 participating in abortions as “appropriate protection [for] the individual and []
2 the denominational hospital.” 410 U.S. 179, 197–98 (1973).

3 Here, the Federal Conscience Statutes (and, therefore, the Rule) do not
4 directly burden anyone; instead, they simply encourage entities not to
5 discriminate. If any adverse effects occur, they thus result from the conscience
6 decisions of health care entities, not the government. *See Amos*, 483 U.S. at 337
7 n.15 (noting that plaintiff “was not legally obligated” to take the steps necessary
8 to save his job, and that his discharge “was not required by statute”). Finally, to
9 the extent it is appropriate to consider the burdens on third parties in the
10 Establishment Clause context and determine if they “override other significant
11 interests,” *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005), Congress has
12 already struck this balance by conditioning federal health care funds on
13 compliance with the Federal Conscience Statutes.

14 ***Coercion*** - Plaintiff’s argument that the Rule coerces religious exercise,
15 PI Mem. at 45-46, is nonsensical. The Rule (and the Federal Conscience
16 Statutes) protects health care entities (and others) in determining whether to
17 participate in providing (or covering) certain care. The Federal Conscience
18 Statutes and the Rule do not “dictate” to anyone, PI Mem. at 45; rather they offer
19 conditioned federal funds for recipients to accept or not. If Plaintiff wishes to
20 engage in the discrimination prohibited by the Federal Conscience Statutes, then
21 it is free to decline HHS funds and make its own unfettered decisions.
22

1 **H. Any Relief Should Be Limited.**

2 **1. Any Relief Should Be Limited To Plaintiff.**

3 For the reasons discussed above, the Court should dismiss this case or, in
4 the alternative, grant summary judgment to Defendants and deny Plaintiff’s
5 forthcoming motion for summary judgment. But even if the Court were to
6 disagree, in accordance with the Court’s constitutionally prescribed role, any
7 relief should be limited to redressing the injuries of the parties before this Court.
8 *See Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933–34 (2018). Equitable
9 principles likewise require that any relief “be no more burdensome to the
10 defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v.*
11 *Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

12 Here, Plaintiff fails to show that nationwide relief is necessary to redress
13 its alleged injuries. To start, Plaintiff’s choice to bring a facial constitutional
14 challenge does not justify nationwide relief. *See City & Cty. of San Francisco v.*
15 *Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018) (vacating nationwide scope of
16 injunction in facial constitutional challenge to executive order). Nor does
17 Plaintiff’s decision to bring APA claims necessitate a nationwide remedy. *See,*
18 *e.g., California v. Azar*, 911 F.3d 558, 582–84 (9th Cir. 2018) (vacating
19 nationwide scope of injunction in facial challenge under the APA). A court
20 “do[es] not lightly assume that Congress has intended to depart from established
21 principles” regarding equitable discretion, *Weinberger v. Romero-Barcelo*, 456
22 U.S. 305, 313 (1982), and the APA’s general instruction that unlawful agency

1 action “shall” be “set aside,” 5 U.S.C. § 706(2), is insufficient to mandate such a
2 departure. The Supreme Court therefore has confirmed that, even in an APA
3 case, “equitable defenses may be interposed.” *Abbott Labs. v. Gardner*, 387 U.S.
4 136, 155 (1967). Accordingly, the Court should construe the “set aside”
5 language in Section 706(2) as applying only to the named Plaintiff, especially
6 given that no federal court had issued a nationwide injunction before Congress’s
7 enactment of the APA in 1946, nor would do so for more than fifteen years
8 thereafter, *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J.,
9 concurring).

10 Nationwide relief would be particularly harmful here given that three
11 other district courts in California, New York, and Maryland are currently
12 considering similar challenges. If the government prevails in all three other
13 jurisdictions, nationwide relief here would render those victories meaningless as
14 a practical matter. It would also preclude appellate courts from testing Plaintiff’s
15 factual assertions against the Rule’s operation in other jurisdictions.

16 **2. Any Relief Should Be Limited To Specific Provisions.**

17 Similarly, should the Court decide to set aside or enjoin any portion of the
18 Rule, the Court should allow the remainder to go into effect. In determining
19 whether severance is appropriate, courts look to both the agency’s intent and
20 whether the regulation can function sensibly without the excised provision(s).
21 *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

22 Here, the intent of the agency is clear: Section 88.10 of the Rule provides

1 that, if a provision of the Rule is held to be invalid or unenforceable, “such
2 provision shall be severable,” and “[a] severed provision shall not affect the
3 remainder of this part.” 84 Fed. Reg. at 23,272; *see also id.* at 23,226. Nor is
4 there any functional reason why the entire Rule must fall if the Court agrees with
5 Plaintiff’s attacks on particular provisions. The Rule implements a variety of
6 statutory provisions protecting conscience, but Plaintiff has not alleged harms
7 stemming from compliance with the Rule with respect to each and every one of
8 those statutes. Moreover, the various definitions in Section 88.2 that Plaintiff
9 challenges can operate independently of one another, as can the other provisions
10 in the Rule. And there is certainly no logical basis for setting aside or enjoining
11 the entire Rule if the Court agrees with only some of Plaintiff’s challenges.

12 **3. Any Relief Should Not Affect Ongoing Investigations**
13 **Based on the 2011 Rule or the Federal Conscience Statutes.**

14 Finally, if the Court does set aside the Rule or enter an injunction, the
15 Court should make clear that this relief does not prevent HHS from continuing
16 to investigate violations of, and to enforce, federal conscience and anti-
17 discrimination laws under the prior 2011 Rule or the Federal Conscience
18 Statutes themselves. Such investigations are independent of the Rule that is the
19 subject of this lawsuit, and require the investment of significant resources, and
20 therefore HHS should not be prevented from continuing to pursue them, or from
21 acting under its existing statutory or regulatory enforcement authority, even if
22 the Court were to otherwise set aside or enjoin the Rule.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CONCLUSION

For the reasons stated above, Defendants respectfully ask that the Court dismiss this case or, in the alternative, enter judgment in Defendants' favor.

Dated: August 19, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JOSEPH H. HARRINGTON
United States Attorney

JAMES M. BURNHAM
Deputy Assistant Attorney General

CHRISTOPHER A. BATES
Senior Counsel to the Assistant
Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Rebecca Kopplin
REBECCA KOPPLIN
(California Bar No. 313970)
BRADLEY P. HUMPHREYS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs
Branch
1100 L Street, NW
Washington, DC 20005

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Tel: (202) 514-3953
Fax: (202) 616-8470
Email: Rebecca.M.Kopplin@usdoj.gov

Counsel for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Rebecca Kopplin
REBECCA KOPPLIN
Trial Attorney
U.S. Department of Justice