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17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**

19
20 CITY AND COUNTY OF SAN FRANCISCO,

21 Plaintiff,

22 vs.

23 ALEX M. AZAR II, Secretary of U.S.
24 Department of Health and Human Services;
25 ROGER SEVERINO, Director, Office for Civil
26 Rights, Department of Health and Human
27 Services; U.S. DEPARTMENT OF HEALTH
28 AND HUMAN SERVICES; and DOES 1-25,

Defendants.

Case No. 3:19-cv-02405-WHA

**BRIEF OF THE ANTI-DEFAMATION
LEAGUE AND OTHER CIVIL
RIGHTS & RELIGIOUS
ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: October 30, 2019
Time: 8:00 a.m.
Judge: Hon. William H. Alsup

STATE OF CALIFORNIA, by and through
XAVIER BECERRA, Attorney General,

Plaintiff,

vs.

ALEX M. AZAR, in his OFFICIAL CAPACITY
as SECRETARY of the U.S. DEPARTMENT of
HEALTH & HUMAN SERVICES; U.S.
DEPARTMENT OF HEALTH AND HUMAN
SERVICES; DOES 1-100,

Defendants.

Case No. 3:19-cv-02769-WHA

COUNTY OF SANTA CLARA, TRUST
WOMEN SEATTLE, LOS ANGELES LGBT
CENTER, WHITMAN-WALKER CLINIC,
INC., d/b/a WHITMAN-WALKER HEALTH,
BRADBURY-SULLIVAN LGBT
COMMUNITY CENTER, CENTER ON
HALSTED, HARTFORD GYN CENTER,
MAZZONI CENTER, MEDICAL STUDENTS
FOR CHOICE, AGLP: THE ASSOCIATION
OF LGBTQ+ PSYCHIATRISTS, AMERICAN
ASSOCIATION OF PHYSICIANS FOR
HUMAN RIGHTS d/b/a GLMA: HEALTH
PROFESSIONALS ADVANCING LGBTQ
EQUALITY, COLLEEN McNICHOLAS,
ROBERT BOLAN, WARD CARPENTER,
SARAH HENN, and RANDY PUMPHREY,

Plaintiffs,

vs.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES and ALEX M. AZAR, II.
in his official capacity as SECRETARY OF
HEALTH AND HUMAN SERVICES,

Defendants.

Case No. 3:19-cv-02916-WHA

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1 *Amici curiae* submit this brief in support of Plaintiffs’ cross-motion for summary judgment
 2 seeking an order setting aside or in the alternative preliminarily enjoining the Department of Health
 3 and Human Services’ (“HHS” or the “Department”) final rule, Protecting Statutory Conscience
 4 Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (the “Rule”).

5 **INTEREST OF *AMICI CURIAE***

6 *Amici* are a coalition of civil rights and religious organizations who are committed to building
 7 a society in which mutual respect for different religious practices and beliefs is the norm in everyday
 8 life: ADL (Anti-Defamation League); Tanenbaum Center for Interreligious Understanding; Bend the
 9 Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Women of Reform
 10 Judaism; Men of Reform Judaism; Union for Reform Judaism; Interfaith Alliance; Jewish Women
 11 International; Keshet; T’ruah: The Rabbinic Call for Human Rights; National Council of Jewish
 12 Women; OCA - Asian Pacific American Advocates; Reconstructing Judaism; Reconstructionist
 13 Rabbinical Association; and The Sikh Coalition. Individual descriptions of *amici* and their interests
 14 is included in the ADL’s Motion for Leave to File this Brief on behalf of *Amici Curiae*.

15 **INTRODUCTION AND SUMMARY OF ARGUMENT**

16 *Amici* are religious and civil-rights organizations that represent diverse beliefs, experiences,
 17 and faith traditions, but share a commitment to religious freedom in America through separation of
 18 church and state effectuated by both the Establishment and Free Exercise Clauses of the First
 19 Amendment. That freedom, however, does not sanction overbroad and preferential religious
 20 exemptions such as the United States Department of Health and Human Services (“HHS”) “Conscience”
 21 Rule at issue in this case. By providing unfettered protections favoring certain religious
 22 beliefs, the Rule unlawfully fosters religion in violation of the Establishment Clause.

23 A clear lens to demonstrate the detrimental impact of the Rule on religious liberty is its
 24 harmful impact on abortion health care services. There is no dispute that there are doctors and nurses
 25 who have strongly held religious objections to providing such services and that those beliefs are
 26 entitled to reasonable accommodation. But there are others in the health care profession who have
 27 equally strong religious beliefs that compel them to abide by a woman’s choices about reproductive
 28

1 health, including the decision to have an abortion.

2 As applied to reproductive health care, the Rule improperly favors those who oppose abortion
 3 by broadly granting them a near absolute right to refuse to perform any and all services which have
 4 an “articulable connection” to the procedure. These services could range from actual medical
 5 procedures to talking to patients, filling out paperwork, and cleaning or preparing facilities necessary
 6 to perform safe abortions. Not only are the rights to refuse broad, the Rule further prohibits health
 7 care providers from limiting the scope of an accommodation to reasonably consider the availability
 8 of alternate staff, the willingness of a doctor to perform the procedure, or even the safety and life of
 9 the patient in emergency situations.

10 Under this Rule, HHS has created a virtual “veto power” over abortion services that can be
 11 exercised by religious objectors to abortion in derogation of the beliefs and the needs of the patient,
 12 physician, or provider. The overly broad religious exemption created by the Rule thus violates the
 13 Establishment Clause because it harms third parties, as well as constitutes a preference for one
 14 specific religious viewpoint above all others.

15 ARGUMENT

16 I. AMERICANS HOLD A WIDE VARIETY OF RELIGIOUS, MORAL, AND 17 SPIRITUAL VIEWS REGARDING ABORTION.

18 Americans have long held a wide variety of religious beliefs concerning a woman’s right to
 19 terminate her pregnancy.¹ In the majority opinion in *Roe v. Wade*, Justice Blackmun acknowledged
 20 the complexity of the subject, noting “the vigorous opposing views, even among physicians” that it
 21 inspires, and the “wide divergence of thinking on this most sensitive and difficult question.” 410 U.S.
 22 113, 116, 160 (1973). Close to fifty years after that decision, Americans continue to hold diverse
 23 viewpoints on abortion. According to a 2018 Pew Research Center survey, 58% of United States
 24 adults believe that it should be legal in all or most cases, whereas 37% say that it should be illegal in
 25
 26

27 _____
 28 ¹ See, e.g., *Religious Perspectives on the Abortion Decision*, 35 N.Y.U. Rev. L. & Soc. Change 281 (2011).

1 all or most cases.² These beliefs often correspond to a person’s religious affiliation. When surveyed
 2 on the topic of abortion, 90% of self-identified Unitarian Universalists responded that abortion should
 3 be legal in all or most cases, though only 18% of Jehovah’s Witnesses answered the same.³

4 Denominations’ stated positions on abortion also vary greatly. The official positions of some
 5 religions strongly oppose abortion with few or no exceptions, such as the Roman Catholic Church,
 6 the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints.⁴ By contrast,
 7 the Presbyterian Church,⁵ Reform⁶ and Conservative Judaism⁷, and the United Church of Christ⁸ have
 8 taken the position that a woman has the right to choose whether to terminate her pregnancy in most
 9 or all circumstances. Many leaders from religious organizations have been active proponents of
 10 abortion rights for decades. The Clergy Consultation Service on Abortion, for example, was founded
 11

12 ² *Public Opinion on Abortion*, Pew Research Center (Oct. 15, 2018),
 13 <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

14 ³ David Masci, *American religious groups vary widely in their views of abortion*, Pew Research
 15 Center (Jan. 22, 2018), [https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-](https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/)
 16 [groups-vary-widely-in-their-views-of-abortion/](https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/).

17 ⁴ David Masci, *Where major religious groups stand on abortion*,” Pew Research Center (June 21,
 18 2016), [https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-](https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/)
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20 ⁵ Presbyterian Church (U.S.A.) Office Of The General Assembly, *Report of the Special Committee*
 21 *on Problem Pregnancies and Abortion* 11 (1992) at 11,
 22 http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf (“We do not
 23 wish to see laws enacted that would attach criminal penalties to those who seek abortions or to
 24 appropriately qualified and licensed persons who perform abortions in medically approved
 25 facilities”).

26 ⁶ Central Conference Of American Rabbis, *Resolution Adopted by the CCAR On Abortion and the*
 27 *Hyde Amendment*, (1984) <https://www.ccarnet.org/ccar-resolutions/abortion1984/> (stating that “the
 28 Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming
 the right of a woman or individual family to terminate a pregnancy.”); UNION FOR REFORM
 JUDAISM, *Reproductive Rights* (last visited Mar. 13, 2018) [https://urj.org/what-we-](https://urj.org/what-we-believe/resolutions/reproductive-rights)
[believe/resolutions/reproductive-rights](https://urj.org/what-we-believe/resolutions/reproductive-rights).

⁷ The Rabbinical Assembly, *Resolution on Reproductive Freedom*, (June 15, 2011),
<https://www.rabbinicalassembly.org/resolution-reproductive-freedom> (“the Rabbinical Assembly
 urges its members to support full access for all women to the entire spectrum of reproductive
 healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit
 such access.”).

⁸ United Church Of Christ, *General Synod Statements and Resolutions Regarding Freedom of*
Choice (last visited Mar. 13, 2018),
[http://d3n8a8pro7vhm.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-](http://d3n8a8pro7vhm.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedom-of-Choice.pdf?1418425637)
[Freedom-of-Choice.pdf?1418425637](http://d3n8a8pro7vhm.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedom-of-Choice.pdf?1418425637) (“for 20 years, Synods of the United Church of Christ have
 affirmed a woman’s right to choose with respect to abortion.”).

1 in 1967 by twenty-one ministers and one rabbi. It offers women seeking abortions counseling and
2 referrals to safe practitioners.⁹

3 Even within religious denominations officially opposed to the provision of abortion in most
4 cases, there are numerous followers whose beliefs differ from official religious doctrine. According
5 to recent polling, U.S. Catholics are considerably divided on the issue, with a narrow plurality
6 supportive of legal abortion – 48% to 47%.¹⁰ In 1973, Catholics for Choice was founded to serve as
7 a voice for Catholics who believe that the core traditions and teachings of their faith support women’s
8 reproductive autonomy.¹¹ The same polling also shows that 30% of Southern Baptists and 27% of
9 Mormons in the United States believe that abortion should be legal in all or most cases.¹² There can
10 be little doubt that Americans hold a diverse range of sincere religious beliefs regarding abortion and
11 its morality.

12 Consistent with this diversity of viewpoints, U.S. medical providers have a wide variety of
13 positions as to whether they are willing to provide abortion care to their patients. A recent survey of
14 American Obstetrician-Gynecologists (“OBGYNs”) indicated that one in three doctors had personal,
15 moral, or religious objections to performing abortion services.¹³ By contrast, the faith-based views
16 of other doctors lead them to believe in providing and to actually provide the procedure for patients.
17 One Jewish doctor’s study of the Torah, Talmud, and other religious texts led her to devote the latter
18 part of her career to providing abortion care to patients,¹⁴ while a Christian physician in the American
19 South started performing the procedure as part of his belief that the Bible compels him to help people
20

21 ⁹ David P. Cline, *Creating Choice: A Community Responds to the Need for Abortion and Birth*
22 *Control, 1961-1973*, 6-7 (1st ed. 2006).

23 ¹⁰ Masci, *supra* n.3

24 ¹¹ *See About Us*, Catholics for Choice, <http://www.catholicsforchoice.org/about-us/>.

25 ¹² Masci, *supra* n.3.

26 ¹³ Melissa Healy, *OB-GYNs Remain Conflicted About Abortion, Survey Shows, But Pills May Be*
27 *Changing Attitudes* Los Angeles Times (Feb. 8, 2019),
28 [https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-](https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-story.html)
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¹⁴ Hannah Natanson, *This retired doctor spends her time performing abortions and circumcisions. She says her Jewish faith leads her to do both*, Washington Post (Aug. 6, 2019),
[https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-](https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-performing-abortion-circumcisions-she-says-her-jewish-faith-leads-her-do-both/)
[performing-abortion-circumcisions-she-says-her-jewish-faith-leads-her-do-both/](https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-performing-abortion-circumcisions-she-says-her-jewish-faith-leads-her-do-both/).

1 in need.¹⁵ Doctors whose faiths lead them to make abortion care available have described their work
2 as “a ministry,” or a “mitzvah” (which is a commandment in Jewish teaching).¹⁶

3 **II. THE HHS RULE GRANTS ABSOLUTE PROTECTION TO RELIGIOUS**
4 **OBJECTORS TO ABORTION AND OTHER PROCEDURES, WHO REFUSE TO**
5 **PERFORM THEIR WORK REQUIREMENTS.**

6 The Rule purports to enforce provisions of the Church Amendments which accommodate
7 health care workers who may have religious objections to performing abortions or other procedures
8 such as sterilization. The Church Amendments prohibit providers receiving federal funding from
9 requiring any “*individual to perform or assist in the performance* of” any sterilization procedure,
10 abortion, or other “health service program or research activity” when the individual’s “performance
11 or assistance in the performance” of the abortion, sterilization or other program or research activity
12 “would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7(b)(1),(2)(B),(d)
13 (emphasis added); 45 C.F.R. § 88.3(a)(2)(iii), (vi). Those Amendments prohibit providers from
14 “*discriminat[ing]*...against any physician or other health care personnel” when that individual refuses
15 to “perform or assist in the performance” of any lawful sterilization procedure, abortion, or other
16 lawful health service or research activity “on the grounds that his performance or assistance in the
17 performance of such service would be contrary to his religious beliefs or moral convictions.” 42
18 U.S.C. § 300a-7(c)(1)-(2); 45 C.F.R. § 88.3(a)(2)(v).

19 The definitions imposed by the HHS Rule go far beyond the statute, expanding the statutory
20 protections to create an absolute right for workers to refuse to do their jobs based on their religious
21 beliefs. “**Discrimination**” prohibited by the Rule is far broader than in the statute. It is defined to
22 include virtually any negative action to “withhold, reduce, exclude from, terminate, restrict, or make
23 unavailable or deny,” any “position,” “status,” “benefit,” or “privilege” in employment. 45 C.F.R. §
24 88.2(1),(2). Providers may offer accommodation to objecting employees, but the employee must

25 ¹⁵ Nicholas Kristof, *Meet Dr. Willie Parker, a Southern Christian Abortion Provider*, New York
26 Times (May 6, 2017), <https://www.nytimes.com/2017/05/06/opinion/sunday/meet-dr-willie-parker-a-southern-christian-abortion-provider.html>.

27 ¹⁶ Elizabeth Reiner Platt, *Many doctors are motivated by their moral and religious beliefs to*
28 *provide abortions. Why doesn't HHS care about their consciences?* Medium (Mar. 27, 2018)
https://medium.com/@PRPCP_Columbia/many-doctors-are-motivated-by-their-moral-and-religious-beliefs-to-provide-abortions-aede31418bed.

1 “voluntarily” accept the accommodation. *Id.* There are no exceptions requiring objecting employees
2 to do their job in emergencies, including when the life of the patient may be at stake. Nor is there
3 any carve-out that allows a health care institution or provider to balance an employee’s religious
4 objection against the financial or logistical burdens of honoring the request, such as the schedules of
5 other employees or lack of available staff.

6 The Rule also expands the scope of the statutory protections to apply to any person or activity
7 even tangentially connected to health care. “**Individual**” may cover any member of an entity’s
8 “workforce,” 84 Fed. Reg. at 23,199, which includes any “employee[], “volunteer,” “trainee[],” or
9 “contractor” subject to the control of that entity, or “holding privileges” with that entity. 45 C.F.R. §
10 88.2. “**Assist in the performance**” means *any* action that “has a specific reasonable, and articulable
11 connection to furthering a procedure or a part of a health service program,” including “counseling,
12 **referral[s]**, and training.” *Id.* (Emphasis added.) “**Referral[s]**” is defined to include “the provision
13 of information’ in any form “where the purpose or reasonably foreseeable outcome of provision of
14 the information is to assist a person in receiving” a particular health service or procedure. *Id.* (2).

15 Read together, the Rule’s provisions give any person whose duties have some “articulable
16 connection” to abortion, sterilization, or other lawful health care procedure the ability to materially
17 burden and inhibit a provider’s capacity to provide those services. For example, a social worker may
18 refuse to provide a pregnant woman with the name of an obstetrician who provides abortions; a
19 receptionist may refuse to schedule the procedure; an administrator may refuse to process a patient’s
20 insurance claim for the procedure; and a janitor may refuse to clean an operating room he thinks will
21 be used for the procedure.

22 The Rule imposes harsh and coercive penalties for providers that do not completely comply
23 with these religious objections. Providers must submit an assurance and certification of full
24 compliance with the Rule and are subject to losing all HHS funding if they fail to comply in any
25 aspect. 45 C.F.R. §§ 88.4(a),(b), 88.7.

26 In the world created by the Rule, abortion providers are presented with an impossible choice
27 when an employee whose job is necessary to the procedure invokes the Rule to refuse to do their job
28

1 on the basis of a religious objection: either the provider can comply with the objection (which may
 2 mean not providing the abortion, including under emergency circumstances, if no other staff is
 3 reasonably available) or, in an emergency situation when no other staff is available, the provider can
 4 perform the procedure and risk losing the entirety of their HHS funding. Under this scheme, the
 5 ultimate consideration as to whether a facility provides health care turns on whether its employees
 6 raise religious objections.

7 **III. THE ABSOLUTE IMMUNITY GRANTED BY THE RULE TO RELIGIOUS**
 8 **OBJECTIONS IS AN UNLAWFUL FOSTERING OF RELIGION THAT MUST BE**
 9 **INVALIDATED UNDER THE ESTABLISHMENT CLAUSE.**

10 The Establishment Clause of the First Amendment prohibits the government from promoting
 11 or affiliating itself with any particular set of religious beliefs. *Lions Club of Albany, California v.*
 12 *City of Albany*, 323 F. Supp. 3d 1104, 1113 (N.D. Cal. 2018) (citing *Cty. Of Allegheny v. Am. Civil*
 13 *Liberties Union*, 492 U.S. 573. 590 (1989) *abrogated on other grounds by Town of Greece v.*
 14 *Galloway*, 572 U.S. 565 (2014)). In *Engel v. Vitale*, Justice Black detailed the history of the
 15 fundamental American value of the separation of church and state reflected in the Establishment
 Clause:

16 By the time of the adoption of the Constitution, our history shows that there was a
 17 widespread awareness among many Americans of the dangers of a union of Church
 18 and State. These people knew, some of them from bitter personal experience, that
 19 one of the greatest dangers to the freedom of the individual to worship in his own
 20 way lay in the Government's placing its official stamp of approval upon one
 particular kind of prayer or one particular form of religious services The First
 Amendment was added to the Constitution to stand as a guarantee that neither the
 power nor the prestige of the Federal Government would be used to control, support
 or influence the kinds of prayer the American people can say.

21 370 U.S. 421, 429 (1962).

22 The Supreme Court has consistently given the Establishment Clause “broad meaning,” and
 23 invalidated laws that aid one particular religion or specific religious belief. *Everson v. Bd. Of Educ.*
 24 *of Ewing Twp.*, 330 U.S. 1, 14-16 (1947). The Clause ““gives no one the right to insist that in pursuit
 25 of their own interests others must conform their conduct to his own religious necessities.”” *Estate of*
 26 *Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58,
 27 61 (2d Cir. 1953) (Hand, J.)). The state *must* “treat[] religious people, organizations, speech, or
 28

1 activity equally to comparable secular people, organizations, speech or activity.” *American Legion*
 2 *v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

3 At the same time, the Free Exercise Clause “requires government respect for, and
 4 noninterference with, the religious beliefs and practices of our Nation’s people.” *Cutter v. Wilkinson*,
 5 544 U.S. 709, 719 (2005). Consistent with the Free Exercise Clause, the Supreme Court “has long
 6 recognized that the government may (and sometimes must) accommodate religious practices and that
 7 it may do so without violating the Establishment Clause.” *Corp. of Presiding Bishop of Church of*
 8 *Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quotation marks and citation
 9 omitted). But the “principle that the government may accommodate the free exercise of religion does
 10 not supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*,
 11 505 U.S. 577, 578 (1992). The Supreme Court has warned that “[a]t some point, accommodation
 12 may devolve into an unlawful fostering of religion.” *Cutter*, 544 U.S. at 714 (quotation marks and
 13 citation omitted).

14 As explained below, the Rule violates the Establishment Clause for two related reasons. First,
 15 it creates an absolute right of health care workers to refuse to perform their duties, which imposes
 16 substantial burdens on third parties including on doctors and institutions attempting to provide and
 17 patients attempting to receive lawful abortion care. Second, it establishes a clear preference for
 18 religious beliefs opposed to abortion and other health care procedures at the expense of other faith-
 19 based views with different perspectives on such procedures.

20
 21 **A. The HHS Rule Amounts To An Unlawful Fostering Of Religion In That It
 Sanctions Harm To Third Parties.**

22 The Establishment Clause prohibits granting religious accommodations that would have a
 23 “detrimental effect on any third party.” *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729
 24 n.37 (2014); *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722; *see also Holt v. Hobbs*, 574 U.S. 853,
 25 867 (2015) (Ginsburg, J. concurring). This is precisely what the Rule does, however, because it grants
 26 workers, contractors, and even volunteers an absolute right to refuse to perform their duties based on
 27 a religious objection, irrespective of the detrimental effect their refusal might have on the autonomy,
 28

1 health and life of a patient or hospitals' ability to provide timely and effective abortion care.

2 Such a law was invalidated by the U.S. Supreme Court in *Caldor*. In that case, a Connecticut
3 state statute granted employees "an absolute and unqualified right not to work on whatever day they
4 designate[d] as their Sabbath." 472 U.S. at 709. Like the HHS Rule, the Connecticut law allowed
5 Sabbath-observing workers from many different religious traditions to prevail over any other
6 consideration, including the burden imposed on the employer forced to find alternative staff, and non-
7 Sabbatarian employees who would be forced to work the days selected by their religious colleagues.
8 *Id.* at 709-10. The Court held that the statute had "a primary effect that impermissibly advance[d] a
9 religious practice" because it created an "unyielding weight[] in favor of Sabbath observers over all
10 other interests." *Id.* at 710.

11 By contrast, the Court has consistently upheld government action that balances an individual's
12 exercise of their religious beliefs against any detrimental effect that accommodation of that belief
13 might impose on third parties. In *Cutter*, for example, the Court held that provisions of the Religious
14 Land Use and Institutionalized Persons Act allowing for prisoners to practice their religion were valid
15 under the Establishment Clause because there was room for consideration of the "urgency of
16 discipline, order, safety, and security in penal institutions...." 544 U.S. at 723; *see also Holt*, 574
17 U.S. at 867 (Ginsburg, J., concurring) (noting that allowing a prisoner to grow a beard consistent with
18 his Muslim faith was required under RLUIPA because it "would not detrimentally affect others who
19 do not share" that belief). In *Hobby Lobby*, the Court recognized that exempting employers with
20 religious objections from HHS regulations requiring them to provide health insurance covering
21 prescription contraception "need not result in any detrimental effect on third parties," since there were
22 alternative methods of providing the coverage to employees without cost sharing. 573 U.S. at 729
23 n.37.

24 In this case, the Rule vests employees opposed to abortion on religious grounds with an
25 unqualified right to refuse to perform any aspect of their job duties having an articulable connection
26 to the procedure but fails to give *any* consideration of the substantial burden imposed on health care
27 institutions and doctors wishing to provide and patients wishing to receive lawful abortion care. The
28

1 Rule allows no room for considering a religious worker’s objection against other concerns, such as
2 the availability of other staff or the urgency of the situation. The Rule also allows religious objections
3 to certain types of health care like abortion to override other faith-based and spiritual views, such as
4 the views of a patient that a procedure is religiously appropriate, or the beliefs of the doctor or facility
5 that an abortion should be performed consistent with their faith-based views regarding a mother’s
6 autonomy in making reproductive health care decisions, or because their faith prioritizes the
7 responsibility to save the mother’s life. The burden on third parties created by the Rule is especially
8 significant given the wide swath of workers and contractors whose job duties may have an articulable
9 connection to abortion care (and thus are entitled to protection under the Rule’s expansive
10 definitions), such that the Rule may effectively bar many hospitals from providing otherwise lawful
11 abortion care in the first place.

12 The Rule utterly ignores these significant, detrimental effects on third parties in the name of
13 protecting and accommodating religious workers’ exercise of their beliefs, and allows those workers
14 to determine whether and how abortion care is provided to patients. Because the Establishment
15 Clause “gives no one the right to insist that in pursuit of their own interests others must conform
16 their conduct to his own religious necessities,” the Rule must be invalidated as an unlawful fostering
17 of religion. *Caldor*, 472 U.S. at 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d
18 Cir. 1953).

19 HHS and its *amici* raise several arguments to downplay the significant burden the Rule
20 imposes on patients, health care providers, and doctors, none of which are persuasive. HHS argues
21 that *Caldor* is distinguishable because “any adverse effects . . . result from the conscience decisions
22 of health care entities, not the government.” (Defs.’ Mot. for SJ at 34-35 (citing *Corp of Presiding*
23 *Bishop of Church v. Amos*, 483 U.S. 327, 338 (1987).) In *Amos* the Supreme Court held that
24 exempting religious organizations from Title VII’s prohibition against employment discrimination on
25 the basis of religion did not violate the Establishment Clause. 483 U.S. at 338. The Court noted that
26 the exemption from Title VII *furthered* the separation of church and state because it “allieviat[e]d
27 significant governmental interference with the ability of religious organizations to define and carry
28

1 out their religious missions.” *Id.* at 335. Though allowing a religious organization to fire an employee
2 on the basis of religion impinged upon the employee’s freedom of choice in religious matters, “it was
3 the Church . . . and not the government, who put him to the choice of changing his religious practices
4 or losing his job.” *Id.* at 338 n.15. By contrast, the absolute right of refusal created by the Rule’s
5 expansive definitions undermines the separation of church and state by “giv[ing] the force of law to
6 the employee’s” religious refusal to perform their duties and requires “accommodation by the
7 employer regardless of the burden which that constitute[s]” for health care providers, doctors,
8 patients, or other employees. *See id.*

9 HHS and the *amicus* brief of the American Center for Law & Justice (“ACLJ”) also argue that
10 the Rule creates no burden at all because providers may choose to either comply with the Rule or not
11 receive federal funding from HHS. (Defs’ Mot. for SJ at 35; ACLJ *Amicus* Br. at 9.) HHS cites no
12 authority for this proposition, and the cases cited by the ACLJ are inapposite. In one, the Court
13 actually *invalidated* a condition for receiving federal funds as unduly coercive and because it
14 infringed upon grant recipients’ First Amendment rights. *Agency for Int’l Dev. v. All. for Open Soc’y*
15 *Int’l, Inc.*, 570 U.S. 205, 208 (2013) (federal government could not require NGO recipients of
16 HIV/AIDS funding to adopt a policy expressly opposing abortion). In *Maher v. Roe*, the Court held
17 that Connecticut did not violate the Equal Protection Clause of the 14th Amendment by choosing to
18 fund expenses incident to childbirth, but not certain, discrete abortion-related expenses. 432 U.S.
19 464, 472 (1977).

20 In this case, the Rule is unduly coercive because providers who do not come in full compliance
21 with the Rule risk losing the entirety of their HHS funding as opposed to an insubstantial sum. *See*
22 45 C.F.R. § 88.7(i)(3). That consequence would be catastrophic for providers such as Zuckerberg
23 San Francisco General Hospital, which receives nearly 40% of its budget from HHS. (*See* San
24 Francisco Mot. for Prelim. Inj. at 23-24.) The Supreme Court has rejected such conditioning of
25 federal funds because they are “much more than ‘relatively mild encouragement, [but rather] a gun
26 to the head.’” *Nat’l Fed’n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 581-82 (2012) (condition that
27 would impact 10% of States’ budgets was unduly coercive and violated Spending Clause).
28

1 Finally, the ACLJ argues in its *amicus* brief that any burden imposed under the Rule on
 2 patients' ability to receive and doctors' ability to provide lawful abortion care is irrelevant because
 3 the Rule protects objections based on both "[s]ecular moral convictions" and religious beliefs. (ACLJ
 4 *Amicus* Brief at 8 (citing *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 (1970) and
 5 *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988).) The cases cited by the ACLJ involve the propriety of
 6 extending federal funding or tax exemptions to religious organizations, which is an issue completely
 7 inapposite to whether the absolute right of refusal created by the Rule is permissible under the
 8 Establishment Clause. In *Walz*, the Supreme Court held that a New York property tax exemption
 9 extended to religious organizations did not violate the Establishment Clause because the exemption
 10 also applied to "a broad class of property" owned by various other non-profit groups. 397 U.S. at 672-
 11 73. And in *Bowen*, the Court held that granting federal funds to religious organizations for teenage
 12 sexuality services did not run afoul of the Clause because funds were also allocated to non-sectarian
 13 organizations and the funded activities were not specifically religious. 487 U.S. at 608-13.¹⁷

14 None of the cases cited by the ACLJ support the proposition that the fostering of religion
 15 created by the Rule's absolute right of refusal is somehow neutralized merely because individual
 16 secular, moral views are also included. Here, the Rule requires hospitals, patients, and doctors to
 17 "conform their conduct" to individual workers' religious objections. *See Caldor*, 472 U.S. at 710. It
 18 must be invalidated as an unlawful fostering of religion.

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 20
 21 ¹⁷ The ACLJ brief also cites to a line of cases standing for the proposition that a regulation does not
 22 violate the Establishment Clause because "it happens to coincide or harmonize with the tenants of
 23 some or all religions." (ACLJ *Amicus* Brief at 10 (citing *Harris v. McCrae*, 448 U.S. 297, 319
 24 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Newdow v. Rio Linda Union Sch. Dist.*,
 25 597 F.3d 1007, 1034 (9th Cir 2010).) But each of those cases involved government action involving
 26 a specific secular purpose that also happened to coincide with views of certain religions. *Harris*, 448
 27 U.S. at 319 (restrictions on allocation of certain federal funds for abortion care did not violate
 28 Establishment Clause merely because restrictions coincided with Catholic teachings on abortion);
McGowan, 366 U.S. at 442, 445 (law prohibiting retailers from operating on Sundays permissible to
 "provide a uniform day of rest for all citizens"); *Newdow*, 597 F.3d at 1034 (public school inclusion
 of "under God" in voluntary pledge of allegiance permissible under Establishment Clause because of
 secular purpose of reflecting history of the nation's founding). None of these cases stand for the
 proposition that doctors and health care institutions must conform how and whether they provide
 abortions and other procedures based on individual workers' religious or moral views without regard
 to the burdens placed on them.

1 **B. The Rule Is Not Neutral To Religious Views As Required By The Establishment**
 2 **Clause Because It Confers Special Protections To Particular Faith-Based**
 3 **Beliefs.**

4 “The clearest command of the Establishment Clause is that one religious denomination cannot
 5 be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Clause
 6 “compels the state to pursue a course of ‘neutrality’ toward religion, favoring neither one religion
 7 over others nor religious adherents collectively over nonadherents.” *Board of Educ. of Kiryas Joel*
 8 *Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (citation omitted). A constitutional
 9 accommodation of religion must “confer[] no privileged status on any particular religious sect” and
 10 must be “administered neutrally among different faiths.” *Cutter*, 544 U.S. at 720, 724. As an
 11 illustration, in *Larson*, the Court invalidated a Minnesota law that imposed certain reporting and
 12 registration requirements on religious organizations receiving fifty per cent of their funds from non-
 13 members, because it granted clear sectarian preferences to “well-established churches,” at the expense
 14 of “churches which are new and lacking in constituency . . . which, as a matter of policy, may favor
 15 public solicitation . . .” 456 U.S. at 246 n.23 (quotation marks and citation omitted). And in *Kiryas*
 16 *Joel*, the Court held that New York school district lines violated the Establishment Clause because
 17 those lines created a special district for a highly religious community that excluded all but the
 18 members of that community. 512 U.S. at 704-05. Because the state’s creation of the special school
 19 district effectively delegated civic authority to one specific religious group without extending a
 20 similar benefit to other religious and non-religious groups, it violated the Clause’s “requirement of
 21 government neutrality.” *Id.* at 705.

22 In this case, HHS has provided a special benefit of refusing to participate in and effectively
 23 blocking certain abortion-related and other health care activities without conferring a similar benefit
 24 to those who have a different religious perspective, including doctors who believe that in making
 25 abortions available to women, they are performing a “ministry” or a “mitzvah.” To illustrate the
 26 disparate treatment of religious viewpoints regarding abortion, consider a Jewish hospital with a
 27 policy of making abortions available consistent with the Reform or Conservative Jewish viewpoint
 28 that a woman has the right to terminate her pregnancy, including when necessary to save the woman’s

1 life. The Rule authorizes virtually any Catholic employee or contractor at that hospital with a
2 religious opposition to abortion to refuse to do any part of their duties that has “a specific reasonable,
3 and articulable connection” to the procedure. The Rule prohibits the hospital from disciplining these
4 employees or moving them to a different position where they would have no duties involving
5 abortions, unless the employees voluntarily agreed to that arrangement. By contrast, a Catholic
6 hospital with a policy of not providing any abortions or abortion-related services, such as referrals,
7 has no obligation to accommodate the religious views of Jewish employees whose religious beliefs
8 conflict with that policy, such as an OBGYN whose faith requires her to perform the procedure in
9 order to save the woman’s life. The Rule requires *no* accommodation of the Jewish doctor’s religious
10 objection to the hospital’s anti-abortion policy. The only protection to the doctor’s religious beliefs
11 is that the Catholic hospital cannot fire or otherwise take adverse action towards the Jewish OBGYN
12 if she provided an abortion at a different facility.

13 There is no doubt that in either of these instances, honoring the Catholic or Jewish employees’
14 religious objections to their employers’ abortion policies impose a substantial burden on the facility
15 that otherwise would provide or not provide the procedure. But the Rule grants the ability to
16 commandeer whether and how their employer provides abortions *only* to workers with anti-abortion
17 religious views without according similar protections to workers whose views require them to make
18 the procedure available to women.

ATTESTATION OF FILER

I, Gilbert R. Serota, am the ECF user whose identification and password are being used to file **BRIEF OF THE ANTI-DEFAMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**. Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that all other signatories to this document concurred in its filing.

DATED: September 12, 2019

/s/ Gilbert R. Serota

GILBERT R. SEROTA

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