UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff, vs. ALEX M. AZAR, II, in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES; and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Civil Action No. 1:19-cv-01672-GLR

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

ADL (Anti-Defamation League) by and through the undersigned counsel, respectfully submit this Unopposed Motion for Leave to File an *Amici Curiae* Brief in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. ADL files this Motion and Brief attached hereto as Exhibit A pursuant to Standing Order 2018-07 of the United States District Court for the District of Maryland providing that *amicus* briefs in support of Plaintiffs may be filed within seven days of Plaintiff's principal brief. ADL has conferred with counsel for the parties concerning the filing of this Motion, and counsel for all parties have indicated that they consent.

The *amici* on whose behalf ADL files this Motion and the Brief attached hereto as Exhibit A are a coalition of civil rights and religious organizations consisting of ADL; Tanenbaum Center for Interreligious Understanding; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Women of Reform Judaism; Men of Reform

Judaism; Union for Reform Judaism; Interfaith Alliance; Jewish Women International; Keshet; T'ruah: The Rabbinic Call for Human Rights; National Council of Jewish Women; OCA - Asian Pacific American Advocates; Reconstructing Judaism; Reconstructionist Rabbinical Association; The Sikh Coalition; Japanese American Citizens League; Hindu American Foundation; and Auburn Seminary (jointly referred to below as "*amici*").

In support of this Motion, ADL states as follows:

1. There is no Federal Rule of Civil Procedure that controls motions for leave to appear as *amicus curiae* in federal District Court; accordingly, a District Court has discretion regarding whether to accept *amicus* briefs. *See Doyle v. Hogan*, No. CV DKC 19-0190, 2019 WL 3500924, at *4 (D. Md. Aug. 1, 2019); *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 303 F.R.D. 266, 269 (D. Md. 2014). Courts will often grant motions for leave to file *amicus* briefs when the *amici* "provide helpful analysis of the law." *Bryant v. Better Bus. Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996) (citing *Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995)).

2. The Brief attached hereto addresses the limited issue of the application of the Establishment and Free Exercise Clauses of the First Amendment to the motions pending before the Court concerning the Department of Health and Human Services' ("HHS") final rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (the "Final Rule" or "Rule"). *Amici* have unique information and perspectives on this limited issue that would be useful to the Court because they are well-established and long-standing religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions. They share a commitment to religious freedom in America through separation of church and state as effectuated by both the Establishment and Free Exercise Clauses to the First Amendment. *Amici* have unique experience and expertise on these issues that will supplement the efforts of counsel and provide additional assistance to this Court. Furthermore, on September 19, 2019, the Honorable District Judge William Alsup granted the ADL's motion for leave to file a substantively similar *amici curiae* brief in a case

in the United States District Court for the Northern District of California raising similar factual issues. *City and Cty. of San Francisco v. Azar et al.*, No. 3:19-cv-02405-WHA (N.D. Ca. 2019), ECF No. 122.

3. *Amici* are not affiliated with any of the parties to the case captioned above. No party has authored the attached brief in whole or in part, nor has any party contributed money to fund the preparation and/or submission of this brief.

4. **ADL.** ADL was founded in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil rights for all. To this end, ADL is a steadfast supporter of the religious liberties guaranteed by both the Establishment and Free Exercise Clauses, which permit and sometimes require accommodations of the religiously observant. Such accommodations, however, must be balanced with the rights of others. While ADL staunchly believes that the Free Exercise Clause is a critical means to protect individual religious exercise, it should not be used as a vehicle to do harm or discriminate by enabling some Americans to impose their religious beliefs on others. In furtherance of this mission, ADL has filed or joined *amicus curiae* briefs addressing the importance of balancing free religious exercise with the rights of others in many recent cases. *See, e.g.*, Br. of Americans United for Separation of Church and State, ADL, et al. as *Amici Curiae* in Support of Respondents, 138 S. Ct. 1719 (2018) (No. 16-111) (arguing that neither Establishment Clause nor Free Exercise Clause allowed cakeshop to discriminate against LGBT individuals); Br. of *Amici Curiae* of ADL et al. in Support of Appellees, *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (No. 16-60477) (arguing that Mississippi statute protecting religious employees' discrimination against LGBT individuals violated Establishment Clause).

5. **Tanenbaum Center for Interreligious Understanding.** Tanenbaum Center for Interreligious Understanding ("Tanenbaum") is a secular, non-sectarian organization dedicated to building a society in which mutual respect for different religious beliefs and

practices is the norm in everyday life. In accordance with these goals, Tanenbaum dedicates its resources to creating practical strategies to protect religious pluralism. Tanenbaum believes that the Establishment and Free Exercise Clauses are invaluable tools for safeguarding the religious liberties sanctified by the United States Constitution. However, the religious accommodations afforded by these Clauses must be balanced against competing rights and should never be used to forcibly impose personal religious beliefs upon others. Conferring special protections to certain faith-based beliefs at the expense of others violates the Establishment Clause and is antithetical to Tanenbaum's mission of protecting and preserving religious pluralism and religious freedom throughout the United States. In pursuit of this goal, Tanenbaum has previously filed *amicus curiae* briefs concerning antidiscrimination and religious accommodation laws. *See, e.g.*, Br. for Tanenbaum Center for Interreligious Understanding as *Amicus Curiae* in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (No.16-111) (2018).

6. **Bend the Arc: A Jewish Partnership for Justice.** Bend the Arc: A Jewish Partnership for Justice ("Bend the Arc") is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans. Bend the Arc joins the *amici* Brief attached hereto as Exhibit A because it believes that the First Amendment would be undermined by the Rule's overly-broad religious exemptions that would harm innocent third parties and constitute a preference for one specific religious viewpoint above all others.

7. **Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism (collectively, "URJ").** URJ consists of: the Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world; and Men of Reform Judaism, who come to this issue out of their longstanding

commitment to the principles of separation of church and state and religious freedom. It is the position of the organizations encompassing URJ that the United States' commitment to religious liberty has allowed religious freedom to thrive throughout its history. At the same time, the URJ organizations believe strongly in protecting fundamental civil and human rights. They are guided by the Jewish value that we are all created b'tzelem Elohim, in the image of God. Their commitment to protecting the civil rights and equality of all stems from this prophetic mandate.

8. **Interfaith Alliance Foundation.** Interfaith Alliance Foundation is a national non-profit organization committed to promoting true religious freedom and strengthening the separation between religion and government. With members from over 75 faith traditions and of no faith, Interfaith Alliance promotes policies that protect personal belief, combat extremism, and ensure that all Americans are treated equally under law.

9. **Jewish Women International.** Jewish Women International ("JWI") is a leading Jewish organization working to empower women and girls. JWI has been an unwavering Jewish voice for comprehensive reproductive health services, and continues to advocate for reproductive justice. As a faith-based organization JWI upholds the importance of protecting religious liberty, but not at the expense of an individual's right to access health care services or information.

10. **Keshet.** Keshet is a national nonprofit organization that strives for the full equality of all LGBTQ Jews and families in Jewish life. Since 1996, this organization has worked to create spaces where all LGBTQ Jewish people feel seen and valued, consistent with Jewish traditions of equality, inclusion, and human dignity. Keshet seeks to equip Jewish organizations, including health and wellness centers, with the skills and knowledge to build LGBTQ-affirming communities.

11. **T'ruah: The Rabbinic Call for Human Rights.** T'ruah: The Rabbinic Call for Human Rights ("T'ruah") brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community to act on the Jewish imperative to respect and advance

the human rights of all people. T'ruah trains and mobilizes a network of 1,800 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action. As an organization of members of a religious minority, T'ruah supports the Brief attached hereto as Exhibit A because it believes that the Rule's overly-broad religious exemption undermines the First Amendment's protection of religious freedom through imposing harm on others and demonstrating a preference for one specific religious viewpoint to the detriment of others.

12. **National Council of Jewish Women.** The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW believes that religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society. It also resolves to work for laws, policies, and practices that protect every woman's right and ability to make reproductive and child bearing decisions. Consistent with its core principles, NCJW joins the Brief attached hereto as Exhibit A.

13. **OCA - Asian Pacific American Advocates.** OCA - Asian Pacific American Advocates is a national non-profit, membership-driven civil rights organization dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders ("AAPIs"). Founded in 1973, OCA – Asian Pacific American Advocates is based in Washington, D.C. with over 50 chapters and affiliates around the country. For decades, OCA has backed the personal rights and health care decisions of AAPIs and all individuals, which is why OCA strongly supports and joins in the Brief attached hereto as Exhibit A.

14. **Reconstructing Judaism.** Reconstructing Judaism is the central organization of the Reconstructionist movement. It trains the next generation of rabbis, supports and uplifts congregations and havurot, and fosters emerging expressions of Jewish life—helping to shape what it means to be Jewish today and to imagine the Jewish future. There are over 100

Reconstructionist communities in the United States committed to Jewish learning, ethics, and social justice. Reconstructing Judaism works to bring about a more just and compassionate world where creative Jewish living and learning guide people toward lives of holiness, meaning, and purpose. Reconstructing Judaism believes in the importance of the separation of church and state to ensure religious freedom, equal rights, and equal dignity for all. It further believes that the reproductive rights of all people must be preserved and protected as well as the equal rights and protections for people who are transgender, nonbinary, and gender nonconforming.

15. **Reconstructionist Rabbinical Association.** The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 400 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on its understanding of Jewish teachings that every human being is created in the divine image, the Reconstructionist Rabbinical Association has long advocated for public policies of inclusion, antidiscrimination, and equality.

16. **Sikh Coalition.** The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception following the tragic events of September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower the Sikh community, to create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has vindicated the rights of numerous Sikh Americans subjected to bias and discrimination because of their faiths. Ensuring the rights of religious and other minorities is a cornerstone of the Sikh Coalition's work. The Sikh Coalition joins the *amici* Brief attached hereto as Exhibit A in the belief that the Establishment Clause is an indispensable safeguard for religious-minority communities. Overly broad religious exemptions, such as the HHS Rule in question, could severely limit the rights of and negatively impact minority faiths. The Sikh Coalition believe

strongly that Sikh Americans across the country have a vital interest in the separation of church and state.

17. **Japanese American Citizens League.** Founded in 1929, the Japanese American Citizens League ("JACL") is the oldest and largest Asian American civil rights organization in the United States. Their mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry. JACL strives to promote a world that honors diversity by respecting values of fairness, equality and social justice.

18. **Hindu American Foundation.** The Hindu American Foundation ("HAF") is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues -- from the portrayal of Hinduism in K-12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. HAF educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Since its inception, HAF has made church-state advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

19. **Auburn Seminary.** Auburn Seminary was founded 200 years ago as a Presbyterian seminary. Today, Auburn is the convening center of the multifaith movement for justice. From local to global, Auburn equips leaders of faith and moral courage and brings together unlikely partners to address today's seemingly intractable challenges. Auburn supports the Brief because it believes that religious freedom must never be a justification for imposing harm or structurally showing a preference for one's religious point of view.

20. The proposed *Amici Curiae* Brief, attached to this Motion as Exhibit A, argues that the overly broad religious exemption created by the Final Rule unlawfully fosters religion in violation of the Establishment Clause. The realities of reproductive healthcare exemplify how the Rule improperly favors those who oppose abortion by broadly granting them a near absolute right to refuse to perform any and all services which have an "articulable connection" with the procedure, while simultaneously prohibiting health care providers from limiting the scope of such accommodations in consideration of additional factors such as the availability of alternate staff, the willingness of a doctor to perform the procedure, or even the safety and life of the patient in emergency situations. Under the Final Rule, HHS has created an overly broad religious exemption for religious objectors to abortion in derogation of the beliefs and the needs of the patient, physician, and provider, violating the Establishment Clause and harming third parties.

CONCLUSION

ADL respectfully requests that the Court grant its Motion for leave to file an *Amici Curiae* Brief and accept for filing the Brief attached hereto as Exhibit A.

DATED: September 26, 2019.

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff, vs. ALEX M. AZAR, II, in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES; and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Civil Action No. 1:19-cv-01672-GLR

BRIEF OF THE ANTI-DEFAMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules and Regulations

Other Authorities

Amici curiae submit this brief in support of Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, seeking an order declaring as unlawful and vacating or in the alternative preliminarily enjoining the Department of Health and Human Services' ("HHS" or the "Department") final rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (the "Rule").

INTEREST OF *AMICI CURIAE*

Amici are a coalition of civil rights and religious organizations who are committed to building a society in which mutual respect for different religious practices and beliefs is the norm in everyday life, including ADL (Anti-Defamation League). Individual descriptions of *amici* and their interests is included in the ADL's Motion for Leave to File this Brief on behalf of *Amici Curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions, but share a commitment to religious freedom in America through separation of church and state effectuated by both the Establishment and Free Exercise Clauses of the First Amendment. By providing unfettered protections favoring certain religious beliefs, the Rule unlawfully fosters religion in violation of the Establishment Clause.

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

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

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

ARGUMENT

I. AMERICANS HOLD A WIDE VARIETY OF RELIGIOUS, MORAL, AND SPIRTUAL VIEWS REGARDING ABORTION.

Americans have long held a wide variety of religious beliefs concerning a woman's right to terminate her pregnancy.[1] In the majority opinion in *Roe v. Wade*, Justice Blackmun acknowledged the complexity of the subject, noting "the vigorous opposing views, even among physicians" that it inspires, and the "wide divergence of thinking on this most sensitive and difficult question." 410 U.S. 113, 116, 160 (1973). Close to fifty years after that decision, Americans continue to hold diverse viewpoints on abortion. According to a 2018 Pew Research

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

Center survey, 58% of United States adults believe that it should be legal in all or most cases, whereas 37% say that it should be illegal in all or most cases.[2] These beliefs often correspond to a person's religious affiliation. When surveyed on the topic of abortion, 90% of self-identified Unitarian Universalists responded that abortion should be legal in all or most cases, though only 18% of Jehovah's Witnesses answered the same.[3]

Denominations' stated positions on abortion also vary greatly. The official positions of some religions strongly oppose abortion with few or no exceptions, such as the Roman Catholic Church, the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints.[4] By contrast, the Presbyterian Church,[5] Reform[6] and Conservative Judaism[7], and the United Church of Christ[8] have taken the position that a woman has the right to choose whether to terminate her

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

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

[4] David Masci, *Where major religious groups stand on abortion*," Pew Research Center (June 21, 2016), https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/.

[5] Presbyterian Church (U.S.A.) Office Of The General Assembly, *Report of the Special Committee on Problem Pregnancies and Abortion* 11 (1992) at 11, http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities").

[6] Central Conference Of American Rabbis, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, (1984) https://www.ccarnet.org/ccar-resolutions/abortion1984/ (stating that "the 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-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),

pregnancy in most or all circumstances. Many leaders from religious organizations have been active proponents of abortion rights for decades. The Clergy Consultation Service on Abortion, for example, was founded in 1967 by twenty-one ministers and one rabbi. It offers women seeking abortions counseling and referrals to safe practitioners.[9]

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

Consistent with this diversity of viewpoints, U.S. medical providers have a wide variety of positions as to whether they are willing to provide abortion care to their patients. A recent survey of American Obstetrician-Gynecologists ("OBGYNs") indicated that one in three doctors had personal, moral, or religious objections to performing abortion services.[13] By contrast, the faith-

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http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-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.").

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

[10] Masci, *supra* n.3

[11] *See About Us,* Catholics for Choice, http://www.catholicsforchoice.org/about-us/.

[12] Masci, *supra* n.3.

[13] Melissa Healy, *OB-GYNs Remain Conflicted About Abortion, Survey Shows, But Pills May Be Changing Attitudes* Los Angeles Times (Feb. 8, 2019),

based views of other doctors lead them to believe in providing and to actually provide the procedure for patients. One Jewish doctor's study of the Torah, Talmud, and other religious texts led her to devote the latter part of her career to providing abortion care to patients,[14] while a Christian physician in the American South started performing the procedure as part of his belief that the Bible compels him to help people in need.[15] Doctors whose faiths lead them to make abortion care available have described their work as "a ministry," or a "mitzvah" (which is a commandment in Jewish teaching).[16]

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

The Rule purports to enforce provisions of the Church Amendments which accommodate health care workers who may have religious objections to performing abortions or other procedures such as sterilization. The Church Amendments prohibit providers receiving federal funding from requiring any "***individual*** to ***perform*** or ***assist in the performance*** of" any sterilization procedure, abortion, or other "health service program or research activity" when the individual's "performance or assistance in the performance" of the abortion, sterilization or other program or research activity "would be contrary to his religious beliefs or moral convictions." 42 U.S.C. §

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https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-story.html.

[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-performing-abortions-circumcisions-she-says-her-jewish-faith-leads-her-do-both/.

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

[16] Elizabeth Reiner Platt, *Many doctors are motivated by their moral and religious beliefs to 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.

300a-7(b)(1),(2)(B),(d) (emphasis added); 45 C.F.R. § 88.3(a)(2)(iii), (vi). Those Amendments prohibit providers from "***discriminat[ing]***…against any physician or other health care personnel" when that individual refuses to "perform or assist in the performance" of any lawful sterilization procedure, abortion, or other lawful health service or research activity "on the grounds that his performance or assistance in the performance of such service would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(c)(1)-(2); 45 C.F.R. § 88.3(a)(2)(v).

The definitions imposed by the HHS Rule go far beyond the statute, expanding the statutory protections to create an absolute right for workers to refuse to do their jobs based on their religious beliefs. "**Discrimination**" prohibited by the Rule is far broader than in the statute. It is defined to include virtually any negative action to "withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny," any "position," "status, "benefit," or "privilege" in employment. 45 C.F.R. § 88.2(1),(2). Providers may offer accommodation to objecting employees, but the employee must "voluntarily" accept the accommodation. *Id.* There are no exceptions requiring objecting employees to do their job in emergencies, including when the life of the patient may be at stake. Nor is there any carve-out that allows a health care institution or provider to balance an employee's religious objection against the financial or logistical burdens of honoring the request, such as the schedules of other employees or lack of available staff.

The Rule also expands the scope of the statutory protections to apply to any person or activity even tangentially connected to health care. "**Individual**" may cover any member of an entity's "workforce," 84 Fed. Reg. at 23,199, which includes any "employee[], "volunteer," "trainee[]," or "contractor" subject to the control of that entity, or "holding privileges" with that entity. 45 C.F.R. § 88.2. "**Assist in the performance**" means ***any*** action that "has a specific reasonable, and articulable connection to furthering a procedure or a part of a health service

program," including "counseling, **referral[s]**, and training." *Id.* (Emphasis added.) "**Referral[s]**" is defined to include "the provision of information' in any form "where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving" a particular health service or procedure. *Id.* (2).

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

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

In the world created by the Rule, abortion providers are presented with an impossible choice when an employee whose job is necessary to the procedure invokes the Rule to refuse to do their job on the basis of a religious objection: either the provider can comply with the objection (which may mean not providing the abortion, including under emergency circumstances, if no other staff is reasonably available) or, in an emergency situation when no other staff is available, the provider can perform the procedure and risk losing the entirety of their HHS funding. Under this scheme, the ultimate consideration as to whether a facility provides health care turns on whether its employees raise religious objections.

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

The Establishment Clause of the First Amendment prohibits the government from promoting or affiliating itself with any particular set of religious beliefs. *Cty. Of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 590 (1989) *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565 (2014). The Supreme Court has consistently given the Establishment Clause "broad meaning," and invalidated laws that aid one particular religion or specific religious belief. *Everson v. Bd. Of Educ. of Ewing Twp.*, 330 U.S. 1, 14-16 (1947). The Clause "'gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'" *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)). The state ***must*** "treat[] religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech or activity." *American Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

At the same time, the Free Exercise Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Consistent with the Free Exercise Clause, the Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quotation marks and citation omitted). But the "principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 578 (1992). The Supreme Court has

warned that "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Cutter*, 544 U.S. at 714 (quotation marks and citation omitted).

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

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

The Establishment Clause prohibits granting religious accommodations that would have a "detrimental effect on any third party." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014); *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722; *see also Holt v. Hobbs*, 574 U.S. 853, 867 (2015) (Ginsburg, J. concurring). This is precisely what the Rule does, however, because it grants workers, contractors, and even volunteers an absolute right to refuse to perform their duties based on a religious objection, irrespective of the detrimental effect their refusal might have on the autonomy, health and life of a patient or hospitals' ability to provide timely and effective abortion care.

Such a law was invalidated by the U.S. Supreme Court in *Caldor*. In that case, a Connecticut state statute granted employees "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." 472 U.S. at 709. Like the HHS Rule, the Connecticut law allowed Sabbath-observing workers from many different religious traditions to prevail over any other consideration, including the burden imposed on the employer forced to find alternative staff, and non-Sabbatarian employees who would be forced to work the days selected

by their religious colleagues. *Id.* at 709-10. The Court held that the statute had "a primary effect that impermissibly advance[d] a religious practice" because it created an "unyielding weight[] in favor of Sabbath observers over all other interests." *Id.* at 710.

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

In this case, the Rule vests employees opposed to abortion on religious grounds with an unqualified right to refuse to perform any aspect of their job duties having an articulable connection to the procedure but fails to give ***any*** consideration of the substantial burden imposed on health care institutions and doctors wishing to provide and patients wishing to receive lawful abortion care. The Rule allows no room for considering a religious worker's objection against other concerns, such as the availability of other staff or the urgency of the situation. The Rule also allows religious objections to certain types of health care like abortion to override other faith-based

and spiritual views, such as the views of a patient that a procedure is religiously appropriate, or the beliefs of the doctor or facility that an abortion should be performed consistent with their faith-based views regarding a mother's autonomy in making reproductive health care decisions, or because their faith prioritizes the responsibility to save the mother's life. The burden on third parties created by the Rule is especially significant given the wide swath of workers and contractors whose job duties may have an articulable connection to abortion care (and thus are entitled to protection under the Rule's expansive definitions), such that the Rule may effectively bar many hospitals from providing otherwise lawful abortion care in the first place.

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

HHS raises several arguments to downplay the significant burden the Rule imposes on patients, health care providers, and doctors, none of which are persuasive. HHS argues that *Caldor* is distinguishable because "any adverse effects . . . result from the conscience decisions of health care entities, not the government." (Defs.' Mot. for SJ at 57-58 (citing *Corp. of Presiding Bishop of Church v. Amos*, 483 U.S. 327, 338 (1987).) In *Amos* the Supreme Court held that exempting religious organizations from Title VII's prohibition against employment discrimination on the basis of religion did not violate the Establishment Clause. 483 U.S. at 338. The Court noted that the exemption from Title VII ***furthered*** the separation of church and state because it "allieviate[d]

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

HHS also argues that the Rule creates no burden at all because providers may choose to either comply with the Rule or not receive federal funding from HHS. (Defs' Mot. for SJ at 58.) HHS cites no authority for this proposition and ignores that the Rule is unduly coercive: providers who do not come in full compliance with the Rule risk losing the entirety of their HHS funding as opposed to an insubstantial sum. *See* 45 C.F.R. § 88.7(i)(3). That consequence would be catastrophic for providers such as the Baltimore City Health Department, which receives nearly 50% of its budget from HHS. (*See* Baltimore Mot. for Prelim. Inj. at 33.) The Supreme Court has rejected such conditioning of federal funds because they are "much more than 'relatively mild encouragement, [but rather] a gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 581-82 (2012) (condition that would impact 10% of States' budgets was unduly coercive and violated Spending Clause).

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

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The

Clause "compels the state to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (citation omitted). A constitutional accommodation of religion must "confer[] no privileged status on any particular religious sect" and must be "administered neutrally among different faiths." *Cutter*, 544 U.S. at 720, 724. As an illustration, in *Larson*, the Court invalidated a Minnesota law that imposed certain reporting and registration requirements on religious organizations receiving fifty per cent of their funds from non-members, because it granted clear sectarian preferences to "well-established churches," at the expense of "churches which are new and lacking in constituency . . . which, as a matter of policy, may favor public solicitation …." 456 U.S. at 246 n.23 (quotation marks and citation omitted). And in *Kiryas Joel*, the Court held that New York school district lines violated the Establishment Clause because those lines created a special district for a highly religious community that excluded all but the members of that community. 512 U.S. at 704-05. Because the state's creation of the special school district effectively delegated civic authority to one specific religious group without extending a similar benefit to other religious and non-religious groups, it violated the Clause's "requirement of government neutrality." *Id.* at 705.

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

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

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

CONCLUSION

For these reasons, *amici* respectfully submit that this Court should grant Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment.

DATED: September 26, 2019.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff, vs. ALEX M. AZAR, II, in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES; and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Civil Action No. 1:19-cv-01672-GLR

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF ANTI-DEFAMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

On September 26, 2019, ADL (Anti-Defamation League) filed an Unopposed Motion for Leave to File an *Amici Curiae* Brief on Behalf of the Tanenbaum Center for Interreligious Understanding, Bend the Arc: A Jewish Partnership for Justice, Central Conference of American Rabbis, Women of Reform Judaism, Men of Reform Judaism, Union for Reform Judaism, Interfaith Alliance, Jewish Women International, Keshet, T'ruah: The Rabbinic Call for Human Rights, National Council of Jewish Women, OCA - Asian Pacific American Advocates, Reconstructing Judaism, Reconstructionist Rabbinical Association, Sikh Coalition, Japanese American Citizens League, Hindu American Foundation, and Auburn Seminary in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment.

Having considered the papers and pleadings on file, the Court GRANTS the Motion and ORDERS that the *Amici Curiae* Brief submitted by ADL be filed.

IT IS SO ORDERED

Date: _____, 2019

_____
HONORABLE GEORGE LEVI RUSSELL, III
Judge, United States District Court