NY v. HHS and the Challenge of Protecting Conscience Rights in Healthcare

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Other Views:

• New York v. United States HHS, No. 19 Civ. 4676 (PAE), 2019 U.S. Dist. LEXIS 193207 (S.D.N.Y. Nov. 6, 2019), *available at* https://s3.amazonaws.com/becketnewsite/CMDA-ruling.pdf.

• *Recent Case: New York v. Department of Health and Human Services*, Harv. L. Rev. Blog, Nov. 18, 2019, https://blog.harvardlawreview.org/recent-case-_new-york-v-department-of-health-and-human-services_/.

• Mary Anne Pazanowski, Shira Stein, and Paige Smith, *Trump Health-Worker Religious Rule Is Tossed by Federal Judge*, Bloomberg Law, Nov. 6, 2019, https://news.bloomberglaw.com/health-law-and-business/new-york-federal-judge-tosses-trump-health-worker-religious-rule.

• Benjamin Weiser and Margot Sanger-Katz, *Judge Voids Trump-Backed 'Conscience Rule' for Health Workers*, N.Y. Times, Nov. 6, 2019, https://www.nytimes.com/2019/11/06/upshot/trump-conscience-rule-overturned.html.

• Tanya Albert Henry, *Why the HHS conscience-rights rule was blocked in court*, American Medical Ass'n, Dec. 11, 2019, https://www.ama-assn.org/health-care-advocacy/judicial-advocacy/why-hhs-conscience-rights-rule-was-blocked-court.

While debates about *Roe v. Wade* and the legalization of abortion have long divided the nation, for decades there was bipartisan consensus that pro-life doctors, nurses, and other medical professionals should not face discrimination for refusing to personally participate in abortions. This consensus was reflected in the twenty-five federal laws providing conscience protections to people and entities with a religious or moral objection to certain medical procedures—primarily abortion, sterilization, and euthanasia. Without laws like these, individuals risk losing their jobs or being driven from the medical profession because of their ethical positions on controversial medical procedures.

However, existing federal statutory protections have not always been enforced by the federal government, and some of these laws offer no private right of action. Consequently, some medical professionals who have been illegally coerced into participating in procedures they object to, such as abortions, can neither turn to the government agency charged with protecting them nor bring a lawsuit to vindicate their rights.

To ensure that existing laws were enforced, President George W. Bush's Department of Health and Human Services (HHS or the Department) issued a final rule in 2008 enabling the agency to enforce three key federal conscience provisions.[1] President Barack Obama's administration, after considering whether to strike the rule entirely,[2] instead chose to pare down the rule in 2011.[3] In 2019, President Donald Trump's HHS decided to restore and expand the Bush-era rule to cover twenty-five federal conscience laws.[4]

In November 2019, Judge Paul A. Engelmayer of the Southern District of New York struck down the Trump administration's rule as violative of the Administrative Procedure Act and the U.S. Constitution in *State of New York v. United States Department of Health and Human Services* (*NY v. HHS*).[5] The decision is currently being appealed to the U.S. Court of Appeals for the Second Circuit.

1 Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (codified at 45 C.F.R. Part 88).

2 Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"; Proposal, 74 Fed. Reg. 10207 (proposed Mar. 10, 2009).

3 Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (codified at 45 C.F.R. Part 88).

4 Protecting Statutory Rights in Health Care, 84 Fed. Reg. 23170 (May 21, 2019) (codified at 45 C.F.R. Part 88) (Conscience Rule).

5 New York v. United States HHS, No. 19 Civ. 4676 (PAE), 2019 U.S. Dist. LEXIS 193207 (S.D.N.Y. Nov. 6, 2019), *available at* https://s3.amazonaws.com/becketnewsite/CMDA-ruling.pdf.

This article reviews the legal landscape that set the stage for HHS's conscience protection rule, critiques the reasoning of the *NY v. HHS* decision, and looks at the future of federal conscience protections.

I. Background

A. Existing Federal Conscience Protections

Of the twenty-five provisions enforced by the Trump administration's final Conscience Rule, most of the discussion revolves around four key provisions concerning abortion, sterilization, and euthanasia in specified contexts. These are the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and portions of the Affordable Care Act.

The Church Amendments are the federal statutory provisions listed in 42 U.S.C. § 300a-7. They were enacted with bipartisan support during the 1970s in the wake of *Roe v. Wade*.[6] Essentially, the Church Amendments ensure that recipients of certain federal funds are not required to perform abortions or sterilizations[7] and that recipients of those federal funds may not discriminate against health care personnel with religious or moral objections to abortions or sterilizations.[8] The Church Amendments also protect medical school students from being required to participate in abortions or sterilizations.[9]

The Coats-Snowe Amendment to the Public Health Service Act was enacted in 1996 with bipartisan support.[10] It provides that recipients of federal financial assistance may not discriminate against individuals or entities that refuse to provide or participate in training for abortion procedures.

The Weldon Amendment has been included in congressional federal appropriations bills every year since 2004. As the Conscience Rule states:

> Weldon provides that none of the funds made available in the applicable Labor, HHS, and Education appropriations act be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[11]

The Affordable Care Act contains two conscience provisions. The first, Section 1303(b)(4), provides that "No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions."[12] The second, Section 1553, provides that recipients of federal financial assistance under the ACA may not discriminate against entities that do not participate in "assisted suicide, euthanasia, or mercy killing."[13]

B. The Regulatory History

HHS promulgated its first version of the conscience rule in 2008 under the Bush administration. The final rule was titled, "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law."[14] As the title implies, the rule was designed to ensure that HHS funds did not support discriminatory practices that violated the Church Amendments, the Coats-Snowe Amendment, or the Weldon Amendment.

The Department offered multiple reasons for adopting the 2008 rule. First, HHS explained that it was concerned about "the development of an environment in sectors of the health care field that is intolerant of individual objections to abortion or other individual religious beliefs or moral convictions," which "may discourage individuals from entering health care professions."[15] Discrimination against individuals with these beliefs could exacerbate the shortage of health care professionals and undermine HHS's goal of expanding patient access to healthcare.[16] HHS also explained that the rule serves to protect "the integrity of the doctor-patient relationship" and to protect doctors from being compelled to provide services that they are not comfortable providing.[17]

In 2009, the Obama administration proposed to rescind the rule.[18] According to the proposal, the Department was reviewing the rule "to ensure its consistency with current Administration policy" and to reevaluate the necessity for regulations implementing the three federal conscience provisions.[19] Ultimately, instead of rescinding the rule, HHS decided to keep a pared down version of the rule. The 2011 final rule simply stated that the purpose of the rule was to enforce the Church, Coats-Snowe, and Weldon Amendments and enabled HHS's Office for Civil Rights to receive complaints of violations of these laws.[20] The 2011 rule eliminated the 2008 rule's definitions, stating that the previous rule's language may have caused confusion about the scope of the rule.[21]

In 2019, the Trump administration promulgated a final rule titled "Protecting Statutory Rights in Health Care" (Conscience

6 410 U.S. 113 (1973).

7 42 U.S.C. § 300a-7(b).

8 42 U.S.C. § 300a-7(c).

9 42 U.S.C. § 300a-7(e).

10 42 U.S.C. § 238n.

11 84 Fed. Reg. at 23172.

12 42 U.S.C. § 18023(b)(4).

13 42 U.S.C. § 18113.

14 73 Fed. Reg. 78072.

15 *Id.* at 78073.

16 *Id.*

17 *Id.* at 78073-74.

18 74 Fed. Reg. 10207.

19 *Id.*

20 76 Fed. Reg. at 9975.

21 *Id.* at 9974 ("The Department rescinds the definitions contained in the 2008 Final Rule because of concerns that they may have caused confusion regarding the scope of the federal health care provider conscience protection statutes. The Department is not formulating new definitions because it believes that individual investigations will provide the best means of answering questions about the application of the statutes in particular circumstances.").

Rule).[22] This rule resuscitated and expanded the Bush rule, explaining that the Obama rule's *lack* of definitions had caused confusion.[23] The rule argued that a new regulation was needed because the conscience protection laws had not been vigorously enforced in recent years.[24] It also pointed to an increase in complaints as evidence of the need for greater enforcement.[25] Finally, the rule explained that because courts have held some of the conscience statutes do not afford a private right of action,[26] administrative agencies may be the only venue in which those protected by federal conscience laws are able to vindicate their rights.[27]

II. The Structure of the Conscience Rule

The Conscience Rule narrowly implements twenty-five laws that condition the receipt of federal funds on meeting certain non-discrimination requirements. The four main laws implemented by the rule—the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and portions of the Affordable Care Act—concern abortion, sterilization, and euthanasia. All of the conscience statutes at issue have been on the books for years, and some have been law for decades.

The Conscience Rule aims to protect doctors, nurses, and other healthcare professionals from being discriminated against for refusing to participate in certain medical procedures that they believe are unethical or that violate their religious beliefs. But rather than broadly declare that no one may be forced to participate in *any* healthcare procedure or service that they find objectionable, the Conscience Rule is tailored to follow the language of the statutes passed by Congress. It does not extend into healthcare contexts not addressed by Congress, such as the treatment of individuals with gender dysphoria, despite speculation by some groups.[28] The regulation defines terms in the statutes and clarifies available enforcement mechanisms, as virtually all regulations do. But overall, the rule closely follows the existing statutory provisions.

III. *NY v. HHS* Litigation

This regulation was struck down in *NY v. HHS*. In his opinion, Judge Engelmayer concluded that HHS's Conscience Rule violated the Administrative Procedure Act (APA) and the Constitution in six ways:[29]

1. HHS exceeded its authority by too broadly defining four statutory terms and by requiring entities to certify that they would not discriminate.
2. HHS lacked the authority to enforce the rule by terminating all HHS funds for noncompliance.
3. HHS "acted contrary to law in promulgating the Rule" because the rule conflicted with Title VII of the Civil Rights Act of 1964 and the Emergency Medical Treatment and Labor Act.
4. HHS acted arbitrarily and capriciously because its rationale for the rule was not substantiated by the record before the agency, it did not adequately explain its change in policy, and it failed to consider important aspects of the problem.
5. The final definition of "discriminate or discrimination" was not a logical outgrowth of HHS's notice of proposed rulemaking.
6. The Conscience Rule's enforcement mechanisms violated the separation of powers and the Spending Clause of the Constitution.

The court concluded, therefore, that the Conscience Rule must be stricken and that the Obama-era 2011 rule implementing three of the statutory provisions should be in effect in its place.[30] Yet the court erred at each step, fundamentally because it substituted its own judgment for that of HHS, which promulgated the Conscience Rule as a modest attempt to implement the will of Congress. This article will look at and critique each of the court's six arguments.

1. Exceeding Regulatory Authority to Define Terms

In *NY v. HHS*, the federal court said HHS violated the APA when it exceeded its authority by defining four terms the way it did.[31] Courts confronted with challenges to agency rules should be concerned with agencies smuggling substantive changes into purported definitions.[32] Yet definitions remain necessary, and HHS took pains to define terms modestly in the Conscience Rule.[33] Instead of giving one broad definition of a term that covers all of the conscience statutes, the Conscience Rule defined terms with respect to each statute at issue.

For instance, the Conscience Rule defines the term "health care entity" differently with respect to the Weldon and the

22 84 Fed. Reg. 23170, *supra* note 4.

23 *Id.* at 23175.

24 *Id.*

25 *Id.*

26 *See*, *e.g.*, Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 698-99 (2d Cir. 2010); Hellwege v. Tampa Family Health Centers, 103 F. Supp. 3d 1303 (M.D. Fla. 2015); Nat'l Instit. of Family and Life Advocates v. Rauner, No. 3:16-cv-50310 (N.D. Ill. July 19, 2017).

27 84 Fed. Reg. at 23178.

28 *See*, *e.g.*, *HHS Denial of Care Rule FAQ*, Lambda Legal (last accessed Nov. 17, 2019), *available at* https://www.lambdalegal.org/faq_hhs-denial-of-care.

29 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *187-89.

30 *Id.* at *197 n.76.

31 *Id.* at *74-82.

32 *See, e.g.*, Franciscan Alliance, Inc. v. Burwell, No. 7:16-cv-00108 (N.D. Tex. Dec. 31, 2016) (holding "HHS's expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557").

33 Especially compared with the way previous administrations have used definitions to make substantive policy changes. *See*, *e.g.*, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31467. The regulation implementing the Affordable Care Act's prohibition of sex discrimination interpreted "sex" to include "gender identity," and it further defined "gender identity" to include male, female, and non-binary identities. It was one of the first times, if not the first time, that non-binary gender identities were expressly included in a federal regulation.

Coats-Snowe Amendments. The relevant text of the Weldon Amendment passed by Congress reads, "the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."[34] For purposes of implementing the Weldon Amendment, the Conscience Rule defines a health care entity as:

> an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; a provider-sponsored organization; a health maintenance organization; a health insurance issuer; a health insurance plan (including group or individual plans); a plan sponsor or third-party administrator; or any other kind of health care organization, facility, or plan.[35]

The court concluded that HHS exceeded its authority by including health care insurance plan sponsors and third-party administrators of health care insurance plans as health care entities.

The text of the Coats-Snowe Amendment reads, "The term 'health care entity' includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions."[36] For purposes of implementing the Coats-Snowe Amendment, the Conscience Rule defines a health care entity as:

> an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; or any other health care provider or health care facility.[37]

The court concluded that it was too broad to include pharmacists and medical laboratories in the rule's definition.

The court declined to defer to the agency interpretation and was not persuaded by HHS's argument that the statutes both use the term "includes" followed by a list of examples, indicating that the lists are non-exhaustive. Instead, the court concluded that the rule's definition "extends beyond what the face of these statutes disclose."[38] According to the court, these definitions were impermissibly substantive because they would "impos[e] substantive obligations" on additional entities, rather than simply spelling out "what [the] statute has always meant."[39] The other three definitions with which the court took issue—"discriminate or discrimination," "assist in the performance," and "referral or refer for"—were similarly reasoned.[40]

2. Non-Discrimination Enforcement Mechanisms and the Threat of Withdrawal of Federal Funds

The *NY v. HHS* court was most troubled by one of the Conscience Rule's enforcement mechanisms. Section 88.7(i)(3)(iv) of the final rule authorizes HHS to withhold all of a recipient's HHS funding as one of several potential penalties for non-compliance. The court concluded that this enforcement mechanism went beyond the standard rules for HHS grants that provide for the termination of the grant at issue, and therefore HHS exceeded its delegated authority in violation of the APA, specifically 5 U.S.C. § 706(2)(C).[41]

The court did not find persuasive HHS's explanation that the federal conscience statutes authorize HHS to ensure that HHS administers its programs in compliance with federal nondiscrimination laws. HHS argued in its brief:

> in addition to statutes that explicitly authorize HHS to ensure that its grant recipients comply with the conditions found in federal law, the Federal Conscience Statutes implicitly authorize HHS to ensure that recipients of the funds that it disburses and administers comply with those statutes; otherwise, the statutes would be unenforceable and thus meaningless.[42]

Conditioning the receipt of federal funds on meeting non-discrimination requirements has been a standard feature of executive enforcement for decades. For instance, Executive Order 11246, dating back to September 24, 1965, conditions eligibility to receive any federal government contract on compliance with non-discrimination requirements. Title IX also has been interpreted to authorize the termination of Department of Education funds as an enforcement mechanism.[43] Similarly, other

34 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-245, Div. B., § 507(d)(2), 132 Stat. 2981, 3118 (2018).

35 84 Fed. Reg. at 23264.

36 42 U.S.C. § 238n(c)(2).

37 84 Fed. Reg. at 23264.

38 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *78-79.

39 *Id.* at *80 (quoting Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 920 F.3d 1, 19 (D.C. Cir. 2019)).

40 *Id.* at *74-82.

41 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *57, *94-99 (citing Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, 79 Fed. Reg. 75889 (Dec. 19, 2014)). The court concluded separately that the remedy also violated the Spending Clause of the U.S. Constitution. *See infra* at section III.6.

42 Defs.' Consolidated Reply Supp. Mot. Dismiss at 5, *NY v. HHS*, 1:19-cv-04676 (Sept. 19, 2019), ECF No. 224.

43 Dear Colleague Letter, U.S. Dep't of Education (Apr. 4, 2011), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (If "a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."), *rescinded on other grounds by* Dear Colleague Letter, U.S. Dep't of Education (Sept. 22, 2017).

non-discrimination provisions of the ACA have been interpreted to authorize the withdrawal of all federal funds.[44]

To the extent the Conscience Rule's enforcement mechanism for any particular statute exceeded the bounds of the statute, the *NY v. HHS* court could have struck the offending portion of the rule, which HHS argued was the proper remedy. The court instead struck the regulation in its entirety, in light of all of the supposed defects of the rule.[45]

After holding that the Conscience Rule's enforcement mechanism violated the APA, the court determined that the proper remedy was to revert back to the Obama-era version of the rule.[46] However, the court's opinion does not mention that the 2011 rule appears to employ the same enforcement mechanisms, including the termination of funding:

> Enforcement of the statutory conscience protections will be conducted by staff of the Department funding component, in conjunction with the Office for Civil Rights, through normal program compliance mechanisms. . . . If, despite the Department's assistance, compliance is not achieved, the Department will consider all legal options, *including termination of funding*, return of funds paid out in violation of health care provider conscience protection provisions under 45 CFR parts 74, 92, and 96, as applicable.[47]

As stated in the 2011 rule, this enforcement mechanism is consistent with the rule's stated purpose of withholding federal funding for entities that discriminate. The 2011 rule reads, "The conscience provisions contained in 42 U.S.C. 300a–7 (collectively known as the 'Church Amendments') were enacted at various times during the 1970s to make clear that receipt of Federal funds did not require the recipients of such funds to perform abortions or sterilizations."[48] Furthermore:

> the Federal health care provider conscience protection statutes, including the Church Amendments, the PHS Act Sec. 245, and the Weldon Amendment, require, among other things, that the Department and recipients of Department funds (including state and local governments) refrain from discriminating against institutional and individual health care entities for their participation in certain medical procedures or services, including certain health services, or research activities funded in whole or in part by the Federal government.[49]

The rule describes the receipt of federal funds generally and appears to not be limited to individual funding streams. In short, the court found the Trump agency's error so problematic that it withdrew the entire rule and replaced it with an earlier rule with the same error.

3. Conflict with Laws Using Different Frameworks

Next, the *NY v. HHS* court held that the Conscience Rule's framework conflicted with that of other nondiscrimination statutes, primarily Title VII of the Civil Rights Act of 1964.[50] Title VII provides a general rule that employers are required to provide religious accommodations to religious employees absent an "undue hardship."[51] By contrast, the Conscience Rule—which was specifically tailored to prohibit discrimination in healthcare-related contexts—did not include exceptions and did not use the term "undue hardship." According to the court, Title VII preempts the entire field of employment discrimination law and, by using the term "discrimination" in the conscience statutes, Congress meant to incorporate the undue hardship exception found in Title VII. The opinion reasons:

> While Congress was at liberty to displace these aspects of the Title VII framework and adopt a unique definition of "discrimination" for purposes of the Conscience Provisions, the Conscience Provisions that contain that term do so without elaboration. And HHS has not pointed to any evidence of congressional intent to supersede the Title VII framework. Therefore, even assuming HHS had statutory rulemaking authority to define "discrimination" for purposes of the Conscience Provisions, its latitude to do so in the employment context was bounded by Title VII.[52]

There are various ways to combat discrimination, and federal laws often take different approaches. To say that Congress incorporated a particular framework simply by using the term "discrimination" is a novel argument.

Moreover, it is a canon of legal construction that when two laws appear to cover the same territory, the more specific law usually trumps the more general law. Here, the *NY v. HHS* court apparently flipped that canon on its head to require the more specific laws to conform to the structure of the more general laws. Both the conscience statutes and Title VII aim to protect religious employees from discrimination. Title VII addresses the issue broadly, whereas the conscience statutes address only discrimination in healthcare with respect to religious or moral

44 Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31439 ("We further noted that where noncompliance or threatened noncompliance cannot be corrected by informal means, the enforcement mechanisms provided for and available under the civil rights laws referenced in Section 1557 include suspension of, termination of, or refusal to grant or continue Federal financial assistance; referral to the Department of Justice with a recommendation to bring proceedings to enforce any rights of the United States; and any other means authorized by law.").

45 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *194-97.

46 *Id.* at *197 n.76 ("The 2011 Rule, which has governed HHS's administration of the Conscience Provisions for eight years and is unaffected by this decision, will remain in place, and continue to provide a basis for HHS to enforce these laws.").

47 76 Fed. Reg. at 9972, *supra* note 3 (emphasis added). *Compare* 84 Fed. Reg. at 23184 (similarly worded Conscience Rule).

48 76 Fed. Reg. at 9969.

49 *Id.* at 9975.

50 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *145-49. The court also held that the rule conflicted with the 1986 Emergency Medical Treatment and Labor Act (EMTLA), 42 U.S.C. § 1395dd. *Id.* at 142-45. The court did not mention that the 2011 rule under the Obama administration also considered EMTLA and found no conflicts. 76 Fed. Reg. at 9973 ("The conscience laws and the other federal statues have operated side by side often for many decades.").

51 42 U.S.C. § 2000e(j).

52 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *101-02.

exemptions in certain circumstances, primarily with respect to abortion, sterilization, or euthanasia. Congress deemed these health care issues important enough to address specifically, without exceptions, and the Conscience Rule implements those provisions.

As HHS explains in its brief and in the regulation itself, Title VII is a "comprehensive regulation of American employers" that applies "in far more contexts, and is more vast, variable, and potentially burdensome (and, therefore, warranting of greater exceptions)."[53] By contrast, the Church Amendments, Coats-Snowe Amendment, Weldon Amendment, and relevant section of the ACA "are health care specific, and often procedure specific, and . . . are specific to the exercise of Congress's Spending Clause authority."[54] Because Congress set forth targeted protections for employees in the healthcare context, that more specific framework should be given effect even where it is not aligned with the broader Title VII framework.

As with the enforcement issue, the Obama-era 2011 rule addressed Title VII in a similar way as the Trump rule.[55] Neither rule followed the Title VII framework or incorporated an undue hardship standard. Yet the failure to incorporate Title VII's exceptions was one of the reasons the court abandoned the Trump rule in favor of the Obama rule.

4. Arbitrary and Capricious Standard When Agencies Change Policy Positions

The court concluded that the agency violated the APA by acting arbitrarily and capriciously in three ways: lack of evidentiary support for the Conscience Rule, insufficient explanation for the policy change, and failure to address important aspects of the problem.[56] This section focuses on the arguments about whether and how agencies may alter previous policies because the question of whether HHS is bound by prior policies is the most fundamental of the three issues.

The arbitrary and capricious standard of review is supposed to be a deferential standard. Under *FCC v. Fox Television Stations, Inc.*, "a court is not to substitute its judgment for that of the agency."[57] This standard is not heightened when an agency changes its policy provided the agency shows that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[58] In another context, Judge Engelmayer has held that, provided a reasoned explanation for the departure is given, "an agency's reconsideration and revision of an earlier outcome to conform it to the law does not render its change of course arbitrary and capricious."[59]

Here, the *NY v. HHS* court concluded that the Department did not meet *Fox Television Stations*' requirement of a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[60] Specifically, the court pointed to the 2011 rule's conclusion that the 2008 rule was causing confusion and that the 2008 rule may negatively impact access to care if interpreted broadly.

Yet, contrary to the court's conclusion, it is not clear that the Conscience Rule in fact represents a departure or about face compared to HHS's previously enacted rules. Instead, it can be seen as supplementing or strengthening the previous rules. The final rules under Bush, Obama, and Trump all accepted complaints based upon violations of the Church, Coats-Snowe, and Weldon Amendments. The purpose of all three rules was to ensure that HHS was not funding entities that discriminated in violation of these statutes. It was only the scope and detail of the regulations that varied.

Other courts have previously held that where a new policy is not in conflict with an old policy, no special analysis for the change is required. According to *Abraham Lincoln Memorial Hospital v. Sebelius*:

> Were HHS to have abandoned a long-standing policy and taken a new direction, we would require a reasoned analysis of its reasons for doing so. The Administrator's Decision, however, does not constitute such a change in course. Prior to this case, HHS had not issued any construction of the statute or applicable regulations that was in tension with the application here of the regulatory provisions at issue.[61]

Because the Conscience Rule was not in tension with the previous rule but rather a refinement that strengthened it, the court should not have held that HHS was arbitrary and capricious when it promulgated the new rule without regard to the Obama administration's claim that providing definitions is confusing or may limit access to health care.

5. Logical Outgrowth of NPRM

The *NY v. HHS* court concluded that the final rule's definition of "discriminate"[62] was not a logical outgrowth of the notice of proposed rulemaking (NPRM).[63] The APA requires agencies to provide notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[64] The final rule need only be a "logical outgrowth" of the NPRM, not identical to it.[65] The dispositive question is "whether

53 Defs.' Consolidated Reply Supp. Mot. Dismiss at 32, *NY v. HHS*, 1:19-cv-04676 (Sept. 19, 2019), ECF No. 224.

54 *Id.*

55 76 Fed. Reg. at 9973.

56 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *111.

57 556 U.S. 502, 513-14 (2009).

58 *Id.* at 515.

59 Glara Fashion, Inc. v. Holder, No. 11 Civ. 889 (PAE), 2012 U.S. Dist. LEXIS 13660, at *21 (S.D.N.Y. Feb. 3, 2012); *see also* Noroozi v. Napolitano, 905 F. Supp. 2d 535, 543 (S.D.N.Y. 2012).

60 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *124-25 (quoting *Fox Television Stations*, 556 U.S. at 516).

61 698 F.3d 536, 555 (7th Cir. 2012).

62 45 C.F.R. § 88.2(4)-(6).

63 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *150-158.

64 5 U.S.C. § 553(b)(3).

65 Cooling Water Intake Structure Coal. v. EPA, 905 F.3d 49, 61 (2d Cir. 2018).

the agency's notice would fairly apprise interested persons of the subjects and issues of the rulemaking."[66]

The Conscience Rule's NPRM defined "discriminate" by listing six ways in which discrimination may manifest itself.[67] The *NY v. HHS* court concluded that subsections 1 through 3 remained substantially the same, but took issue with the additions of subsections 4 through 6 in the final rule. Sections 4 through 6 provide specific safe harbor situations that do not count as discrimination.

For example, section 5 allows entities to require advanced notification of a conscience objection under certain conditions:

> (5) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to any prohibition in this part may require a protected entity to inform it of objections to performing, referring for, participating in, or assisting in the performance of specific procedures, programs, research, counseling, or treatments, but only to the extent that there is a reasonable likelihood that the protected entity may be asked in good faith to perform, refer for, participate in, or assist in the performance of, any act or conduct just described. Such inquiry may only occur after the hiring of, contracting with, or awarding of a grant or benefit to a protected entity, and once per calendar year thereafter, unless supported by a persuasive justification.[68]

The Conscience Rule explained its modification by stating that it was responding to public comments, and that the modification was designed "to acknowledge the reasonable accommodations that entities make for persons protected by Federal conscience and anti-discrimination laws."[69] Nevertheless, the court concluded that the proposed rule did not give sufficient notice that "the ground rules for the accommodation of employees were in play at all."[70]

The purpose of the notice and comment procedure is to help administrative agencies address and resolve potential problems with the proposed rule. Here, in response to comments about the practical application of the rule and how to accommodate conscientious objectors, HHS added detail to its rule which provided safe harbors for entities who provide accommodations to their employees. Still, the court found the Conscience Rule's notice insufficient and therefore held that it violated the APA.

6. Separation of Powers and the Spending Clause of the Constitution

Finally, the *NY v. HHS* court said the rule violated the separation of powers and the Spending Clause of the U.S. Constitution. Specifically, the court concluded that Section 88.7(i)(3)(iv) of the final rule, which authorizes HHS to withhold all of a recipient's HHS funding as a penalty for non-compliance, violates both.

With respect to the separation of powers, the court held that withholding federally appropriated funds is not authorized by the statutes and thus represents an executive agency assuming Congress's legislative power.[71] In an analysis that mirrored its APA delegation analysis,[72] the court again rejected HHS's argument that Congress did grant such authorization through the conscience provisions or other statutes.[73]

With respect to the Spending Clause, the court held that the final rule violated the principles that conditions for receiving federal funds must be set out unambiguously and that the financial inducement may not be impermissibly coercive.[74] Essentially, the court concluded that the possibility of revoking all federal HHS funds from entities that engage in discrimination is too coercive to be constitutional.[75]

IV. Looking Ahead

The *NY v. HHS* decision is currently being appealed to the Second Circuit. While the case is pending, the 2011 Obama-era rule is in effect. Consequently, HHS is still empowered to enforce and receive complaints based upon three of the federal conscience provisions. But because the previous rule offered no definitions or clarification of the statutory provisions, the scope of HHS's enforcement power for those three provisions remains undefined.

If administrative efforts to protect conscience rights in health care continue to be stymied by the courts, Congress may choose to step in. For the past few years, proposals such as the Conscience Protection Act of 2019 have been introduced to address some of the enforcement issues involving existing conscience laws.[76] For example, the bill's language would expressly provide a private right of action to enable the private enforcement of these laws.[77]

For those skeptical of the ever-expanding reach of the administrative state, the intense scrutiny of executive agency action demonstrated by the *NY v. HHS* opinion may be a welcome change. Yet it is difficult to imagine how any but the narrowest regulations could pass muster under such scrutiny. It remains to be seen whether courts will consistently apply this exacting standard in future administrations, or even whether *NY v. HHS* is itself upheld on appeal.

66 *Id.*

67 Protecting Statutory Conscience Rights in Health Care, 83 Fed. Reg. 3880, 3923-24 (proposed Jan. 26, 2018).

68 Protecting Statutory Rights in Health Care, 84 Fed. Reg. at 23263.

69 *Id.* at 23191-92.

70 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *151.

71 *Id.* at *158-160.

72 *See supra* section III.2.

73 *NY v. HHS*, 2019 U.S. Dist. LEXIS 193207, at *158-160.

74 *Id.* at *169.

75 *Id.* at *181-82.

76 S. 183, 116th Congress (2019-2020).

77 *Id.* (proposing adding 42 U.S.C. § 245B).