Legislative Update: State and Federal, Including Affordable Care Act

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New York State Bar Association Health Law Section
Hot Topics in New York Health Law
State and Federal Legislative Update
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I. New York State Legislative Update

A. Political Backdrop

1. *Election year:* 2018 will be a year full of election-year politics and heightened partisanship, with the Governor, Lieutenant Governor, State Comptroller and the Attorney General on the ballot this fall, along with every member of the New York State Legislature and the U.S. House of Representatives, and one of New York's U.S. Senate seats.

2. *2020:* Two statewide office holders expected to be on that ballot—Governor Andrew Cuomo and Senator Kirsten Gillibrand—are also widely mentioned as potential Presidential candidates in 2020, making this election a critical test for each of them.

3. *State Assembly:* The "People's House" remains overwhelmingly Democratic and will remain unchanged in 2019. The Assembly has had more than 105 Democratic members in the 150 member chamber since 2013 and we expect that more than two-thirds Democratic majority will remain in place beyond 2018.

4. *State Senate.:* As of January 1, 2018, the 63-member State Senate is composed of 31 Republicans, one Democrat (Simcha Felder) who has consistently conferenced with the Republicans, 21 members of the mainline Democratic Conference, and 8 members of the separate Independent Democratic Conference (IDC). There are two vacancies, resulting from George Latimer's election as Westchester County Executive and Ruben Diaz Sr.'s election to the New York City Council.

5. *Prospects for Senate Democratic Control:* The IDC has governed with the Republicans in a de facto coalition since January of 2011. Although an apparent agreement, brokered by the Democratic State Committee and Governor Cuomo, has been reached to reunite the Senate Democrats, the realignment may still be in the formative stage and will only be tested once the legislative session resumes in

earnest. The reunited Democratic coalition would not, in any event, appear to have the votes to unseat the Republican majority before 2019—since Senator Felder would also need to join the Democrats, the Democrats would have to win both seats in the not-yet-scheduled special election and the Senate's rules require a vote of 38 Senators (or two-thirds of the entire chamber) to replace a Majority Leader in the middle of his or her two-year term.

6. *Implications of Democratic Control of the State Senate:* If the Democrats were to control both houses of the Legislature in 2019, it would be expected that a host of Democratic proposals that have been stalled in the Republican-led Senate would be passed by both houses—including much of what the IDC and the Democratic conference have highlighted in their discussions, such as single-payer health care, public campaign finance, the DREAM Act, strengthening reproductive rights, prohibiting discrimination based on gender identity and a host of other proposals. If that were to occur, these bills would find their way to the Governor's desk, just as the campaign for the Presidency in 2020 was reaching full steam.

B. The 2017 Legislative Session Overview

1. *Bill Volume:* This past legislative session generated the fewest new laws since Governor Cuomo took office in 2011—thanks, in part, to a relatively healthy veto to approval ratio of 1:5.

Year	2017	2016	2015	2014	2013	2012	2011
Approvals	502	519	589	552	558	505	610
Vetoes	101	100	133	109	87	61	68

2. *Budget Legislation:* As has often been the case in recent years, much of the most significant legislation was enacted as part of the State Budget, including a proposal to raise the age of criminal responsibility from sixteen to eighteen, a new Excelsior Scholarship program to eliminate tuition for eligible students at SUNY and CUNY institutions (together with an enhancement to tuition assistance for participating private colleges), increased funding for direct support professionals providing services to persons with developmental disabilities or with mental illness, authorization for ride-sharing businesses (like Uber and Lyft) in upstate New York, and a series of economic development and infrastructure initiatives to promote jobs, affordable housing and clean water. To help pay for all of the above, the Legislature agreed to extend a tax on millionaires.

C. Highlights of 2017 Health-Related Legislation by Subject:

(1) Public Health

(a) Studies on Asthma (Veto Memo 219 of the Laws of 2017; A.703 Sepulveda / S.3103 Serrano; A.7214 Seawright / S.5559 Alcantara; A.947 Simon / S.5770 Hamilton): These bills would have directed the Department of Health to complete a study on the incidence of asthma in the Bronx, Brooklyn, and Manhattan, with a focus on examining income, racial, ethnic, and environmental disparities. This bill was vetoed by the Governor on December 18, 2017.

(b) Sexual Offense Kits (Chapter 6 of the Laws of 2017; A.375 Simotas / S.980 Hannon): This law provides technical amendments to Chapter 500 of the Laws of 2016 by clarifying that police and prosecutorial agencies must develop DNA profiles from evidence that is eligible for comparison to the federal CODIS database. This law also requires police and prosecutorial agencies to inventory any sexual offense kits they possessed and to submit such inventories to the New York State Division of Criminal Justice Services. This law was signed by the Governor on February 1, 2017 and is deemed to have been in effect since November 28, 2016.

(c) Disaster Planning for Homecare and Hospice (Chapter 385 of the Laws of 2017; A.6549-A Cusick / S.5016-A Lanza): This law requires comprehensive emergency management plans to include input from homecare providers. This law was signed by the Governor on October 23, 2017. This law took effect immediately.

(d) Sepsis Awareness (Chapter 347 of the Laws of 2017; A. 6053-A Nolan /S. 4971-A Marcellino): The law requires the Commissioner of Education, in consultation with the Commissioner of Health and sepsis awareness organizations, to establish a sepsis awareness, prevention and education program. This law was signed by the Governor on October 23, 2017 and will take effect July 1, 2018.

(e) Newborn Health and Safe Sleep Pilot Program (Chapter 401 of the Laws of 2017; A.6044-A Simotas / S.3867-A Hannon): This law requires the Commissioner of Health to establish a newborn health and safe sleep pilot program. The program would provide ‘baby boxes’ and other products that encourage safe sleep practices and reduce the incidence of sudden infant death

syndrome, as well as information on infant safe sleeping. This law was signed by the Governor on October 23, 2017 and took effect immediately.

(f) Maternal Depression Treatment (Chapter 463 of the Laws of 2017; A.8308 Richardson / S.4000 Krueger): This law requires the Commissioner of Health, in collaboration with the Commissioner of Mental Health, to compile a list of providers who offer services related to maternal depression. This law was signed by the Governor on December 18, 2017 and took effect on January 1, 2018.

(g) Designation of Comprehensive Care Centers for Eating Disorders (Chapter 259 of the Laws of 2017; A.7949 Ortiz / S.5927 Hannon): This law increases the State's designation for comprehensive eating disorders from two to five years. This law was signed by the Governor on August 21, 2017 and took effect immediately.

(2) Insurance-related

(a) Discounted Dental Services (Veto Memo 237 of the Laws of 2017; A.8141-A Cymbrowitz / S.6496-A O'Mara): This bill would have prohibited insurers and managed care organizations from using contract language that requires dentists to provide services at a fee set by or subject to the approval of the insurer, unless that service is part of the insurer's benefit package. This bill was vetoed by the Governor on December 18, 2017.

(b) Coverage of Tomosynthesis (Chapter 414 of the Laws of 2017; A.5677 Seawright / S.4150 Griffo): The law clarifies that the existing requirement on health insurers to cover mammography screening would be extended to include tomosynthesis, which provides three-dimensional imaging to detect potential breast cancer. The Department of Financial Services has already required insurers to cover tomosynthesis, at least under certain circumstances, under a 2017 directive clarifying the existing mammography mandate. This law was signed by the Governor on November 29, 2017 and will take effect on January 28, 2018.

(c) Municipal Notification for Changes in Health Insurance Plans (Veto Memo 194 of the Laws of 2017; S.4324 Tedisco / A.5210 Abinanti): This bill would have required public corporations to give notice within 45 days to retired employees and covered family members of any change in a health insurance plan and to provide a description of such change. Currently, there is no notice

requirement for such health insurance plans to public employee retirees unless it is required pursuant to a collectively bargained agreement. This bill was vetoed by the Governor on November 29, 2017.

(3) Medicaid and Managed Care

(a) Coverage of Allergy Testing (Veto Memo 183 of the Laws of 2017; A.807 Perry / S.1222 Rivera): This bill would have required Medicaid coverage of serologic-specific tests when it has been determined that percutaneous skin tests are medically necessary to diagnose an enrollee's allergies. This would have allowed enrollees to receive allergy testing from their primary care physician, instead of being referred out to an allergy specialist. This bill was vetoed by the Governor on November 29, 2017.

(b) Carve-out of School-Based Health Centers from Medicaid Managed Care (Veto Memo 235, A.7866 Gottfried/ S. 6012 Seward). This bill would have "carved-out" school-based health centers from the Medicaid managed care program. The centers were scheduled to be included within the Medicaid managed care program on July 1, 2018. Although the Governor vetoed the bill on December 18, 2017, he agreed to delay inclusion of these programs in Medicaid managed care until January 1, 2021.

(c) Oxygen Therapy (Veto Memo 189 of the Laws of 2017; A.2906 Ortiz / S.3421 Parker): This bill would have required Medicaid coverage of topical oxygen wound therapy for chronic wound management if prescribed by a physician or other qualified prescriber. This law was vetoed by the Governor on November 29, 2017.

(d) Coverage of Complex Rehabilitation Technology (Veto Memo 165 of the Laws of 2017; A.6120-B McDonald / S.4557-B Ortt): This bill would have required Medicaid coverage of individually configured durable medical equipment for individuals with significant physical or functional impairment. This bill was vetoed by the Governor on October 23, 2017.

(e) Carve-Out of Blood Clotting Factor Products (Veto Memo 156 of the Laws of 2017; A.7581 Gottfried / S.5774 Hannon): The bill would have prevented the "carving-in" of blood clotting factor and related services, on which persons with hemophilia and other bleeding disorders rely, into Medicaid managed care. Coverage of clotting factor had been provided on a fee-for-service basis for the approximately 200 Medicaid beneficiaries who require the product

since the inclusion of pharmacy benefits into Medicaid managed care, but the State's Medicaid program planned to incorporate the benefit into Medicaid managed care on July 1. This bill was vetoed by the Governor on June 28, 2017.

(f) Enhanced Safety Net Hospital Program (Veto Memo 229 of the Laws of 2017; A.7763 Gottfried / S.5661-B Little): This bill would have established the "enhanced safety net hospital program", which would have provided enhanced medical assistance payments to hospitals that serve a high proportion of medical assistance recipients or uninsured patients. To receive payments, a hospital must: (i) provide care to uninsured patients in its emergency room, hospital based clinics and community based clinics, (ii) provide community services, such as dental care and prenatal care; (iii) be a public hospital operated by a county, municipality, public benefit corporation or the State University of New York; or (iv) a federally designated critical access or sole community hospital. This bill was vetoed by the Governor on December 18, 2017.

(g) Payments for Reserved Days (Veto Memo 238; A.8338 Gottfried / S.6559 Hannon): This bill would have allowed the Department of Health to continue making payments for "reserved bed days" in residential healthcare facilities as they did prior to the adoption of the SFY 2017-18 Enacted Budget, which directed the Department to cease making such payments. This bill was vetoed by the Governor on December 18, 2017.

(h) Coverage of Clinical TBI Services (Veto Memo 202 of the Laws of 2017; A.8241 Morelle / S.6511 Hannon): This bill would have authorized medical assistance payments up to the Medicaid rate for clinical services received by individuals with traumatic brain injuries. Currently, payments for clinical services for individuals with traumatic brain injuries are made up to the Medicare rate for physician practices, which is 20-30% below the Medicaid rate. This bill was vetoed by the Governor on November 29, 2017.

(4) Regulation of Healthcare Delivery

(a) Delivery of Telehealth in Educational and Adult Care Settings (Chapter 285 of the Laws of 2017; A.4703 Jenne / S.3293 Hannon; Chapter 238 of the Laws of 2017; A.1464-B Jenne / S.4285-A Serino): These laws both expand the "originating sites" from which patients may receive telehealth services. The first includes public private and charter elementary and secondary schools,

school-age child care centers and day care centers as originating sites. The second includes licensed adult care facilities licensed under Article VII, Title II of the Social Services Law. These laws were signed by the Governor on September 12, 2017 and August 21, 2017 respectively. These laws took effect immediately.

(b) Rural Health Council (Chapter 419 of the Laws of 2017; A.7203 Jones / S.4741 Hannon): This law establishes a council on rural health, which would be charged with advising the Commissioner of Health on healthcare delivery in rural areas. The council would examine the impact of proposed programs, statutes, regulations, and healthcare reimbursement policies. This law was signed by the Governor on November 29, 2017 and took effect immediately.

(c) Nurse-Family Partnerhip Program (Veto Memo 234 of the Laws of 2017; A.8388 Gottfried / S.6656 Hannon): This bill would have clarified that the Nurse-Family Partnership program—an evidence-based nurse home visiting program for at-risk first-time mothers—would not be required to satisfy the requirements applicable to home care agencies. After noting that the issue had been resolved in discussions between the program and the Department of Health, this bill was vetoed by the Governor on December 29, 2017.

(d) Certificates of Public Advantage (Chapter 80 of the Laws of 2017; A.7748 Gottfried / S.5342 Hannon): The law extends the authority of the Commissioner of Health to issue Certificates of Authority to facilitate collaboration among healthcare facilities, under state supervision, without incurring antitrust liability. The existing authority to issue COPAs expired on December 31, 2016; under the law, the authority will be extended another four years, until December 31, 2020. This law was signed by the Governor on June 29, 2017 and took effect immediately.

(e) Certificate of Need for Assisted Living Programs (Veto Memo 214 of the Laws of 2017; A. 7727-A Lupardo / S.5840 Hannon): This bill would have replaced a competitive solicitation process for assisted living programs with a new certificate of need program, which would have award beds based on demonstrated community need. The bill would have also authorized the Director of the Division of the Budget to impose a moratorium on the approval of new beds if their approval would result in a net increase in Medicaid expenditures. This bill was vetoed (and tabled) by the Governor on December 18, 2017.

(5) Mental Health, Developmental Disability and Substance Abuse Services

(a) Kendra's Law (Chapter 67 of the Laws of 2016; A.7688 Gunther / S.6726 Young): This law extends the expiration of Kendra's law, which established a court-ordered assisted outpatient treatment program in New York State, from June 30, 2017 to June 30, 2022. This law was signed by the Governor on June 29, 2017 and took effect immediately.

(b) Involuntary Care and Treatment (Chapter 198 of the Laws of 2017; A.7604 Gunther / S.6154 Ortt): This law amends the Mental Hygiene Law to clarify that an individual must "pose…a real and present risk of substantial physical harm to himself or herself or others" in order to be considered in need of involuntary care and treatment. This law was signed by the Governor on August 21, 2017 and took effect immediately.

(c) OPWDD Care Demonstration Program (Chapter 491 of the Laws of 2017; A.7399 Gunther / S.5681 Ortt): This law requires the Commissioner of the Office for People with Developmental Disabilities to establish a care demonstration program. The demonstration program would offer community habilitation, in-home respite, pathways to employment, supported employment, and community prevocational services. This law was signed by the Governor on December 18, 2017 and took effect immediately.

(6) Pharmacy and pharmaceutical regulation

(a) Safe Disposal of Controlled Substances (Veto Memo 247 of the Laws of 2017; A.387-B Gunther / S.6750 Hannon): This bill would have required chain and mail order pharmacies to operate safe drug disposal sites for the collection of unused controlled substances. This bill was vetoed by the Governor on December 18, 2017.

(b) PTSD and Medical Marijuana (Chapter 403 of the Laws of 2017; A7006 Gottfried / S.5629 Savino): The law adds post-traumatic stress disorder (PTSD) to the conditions that would qualify a patient to receive a certification for medical marijuana. This law was signed by the Governor on November 11, 2017 and took effect immediately.

(c) Practitioners Authorized to Certify Medical Marijuana Use (Chapter 438 of the Laws of 2017; A.2882 Peoples-Stokes / S.5627 Savino): This law directs the Department of Health to disclose the practitioners who have been

registered to certify medical marijuana use and make such information available on the Department's website. This law was signed by the Governor on November 29, 2017. This law will take effect on January 28, 2018.Refills of Non-controlled Substances (Veto Memo 159 of the Laws of 2017; A.6371-B Simanowitz / S.5171-B Felder): This bill would have authorized pharmacists to modify refills of prescriptions for non-controlled substances by dispensing a greater quantity of the indicated medication. The modified refill must not exceed a 90-day supply, or the amount authorized by the prescriber, and the pharmacist must notify the prescriber within forty-eight hours of dispensing the modified refill. This bill was vetoed by the Governor on October 23, 2017.

(d) Interchangeable Biological Products (Chapter 357 of the Laws of 2017; A.7509-A Gottfried / S.4788-A Hannon): This law defines "biological product" and "interchangeable biological product" in the pharmacy provisions of the Education Law and would require the substitution of a less expensive biological product if it is interchangeable and has not otherwise been prohibited by the prescriber. This law was signed by the Governor on October 23, 2017 . This law took effect immediately and will sunset after five years.

(7) Regulation of the Professions

(a) Reporting on Nurse Practitioners (Chapter 409 of the Laws of 2017; A.834-B Gunther / S.3567-B Hannon): This law requires the president of the civil service commission to review the job title of nurse practitioner, and to determine whether it reflects nurse practitioners' current scope of practice and provides appropriate compensation. This law was signed by the Governor on November 29, 2017 and will take effect November 29, 2019.

(b) Education Requirements for Registered Nurses (Chapter 502 of the Laws of 2017; A.1842-B Morelle / S.6768 Flanagan): This law requires registered professional nurses to either have or obtain a bachelor's degree in nursing within ten years of initial licensure. This law also creates a temporary nursing program evaluation commission to examine and make recommendations on barriers to entry into nursing. This law was signed by the Governor on December 18, 2017. The portion of the law establishing the temporary commission took effect immediately, whereas the section creating the bachelor's requirements will take effect June 16, 2018.

(c) DNRs and Nurse Practitioners (Chapter 430 of the Laws of 2017; A.7277-A Gottfried / S.1869-A Hannon): This law adds nurse practitioners to the list of healthcare practitioners authorized to execute orders not to resuscitate and orders relating to life-sustaining treatments. This law was signed by the Governor on November 29, 2017 and will take effect on May 28, 2018.

(8) Child care and children's services

(a) Impact of Tax Deductions for Adoption of Special Needs Children (Chapter 382 of the Laws of 2017; A.6800 Joyner / S.4492 Golden): This law requires the Office of Children and Family Services to complete a report analyzing the impact of a tax deduction for expenses associated with the adoption of a special needs child. The report would include: (i) how many special needs children have been adopted in the past ten years, (ii) the average waiting periods for adopting special needs children, (iii) the per year out-of-pocket expenses incurred by adoptive parents, and (iv) the existing benefits available to adoptive parents. This law was signed by the Governor on October 23, 2017. This law took effect on November 22, 2017.

(b) Online Listing of Afterschool and Child Care Programs (Chapter 424 of the Laws of 2017; A.2183 Mayer / S.683 Kennedy): This law requires the Council on Children and Families to develop a listing and map of all afterschool and school age child care programs that receive funding from the state, and make such list available to the public. This law was signed by the Governor on November 29, 2017 and will take effect on February 27, 2018.

(c) Child Care Availability Taskforce (Chapter 493 of the Laws of 2017; A.7726-A Jaffee / S.5929 Avella): This law establishes a child care availability taskforce, which is be charged with evaluating and determining the need for child care throughout the state. The taskforce is also required to examine: (i) access to and the cost of subsidized child care, (ii) availability of child care for non-traditional work hours, (iii) whether parents are voluntarily leaving the workforce due to lack of affordable or accessible child care, (iv) whether employers have identified lack of child care as a reason for a shortage of a qualified workforce; and (v) the impact of child care on economic development throughout the state. This law was signed by the Governor on December 18, 2017 and took effect immediately.

(9) Organ donation and transplantation

(a) Lauren's Law (Chapter 332 of the Laws of 2017; A.5179 Ortiz / S.1206 Carlucci): This law makes the provisions of Lauren's Law permanent by removing the current three year sunset on the bill. Lauren's Law requires all applicants for driver's licenses or renewals to make an affirmative choice as to whether they would like to register as an organ, eye, and tissue donor in the New York State Donate Life Registry. This law was signed by the Governor on October 16, 2017. This law took effect immediately.

(b) New York State Transplant Council (Chapter 26 of the Laws of 2017; A.5132 Gottfried / S.2495 Hannon): This law would expand the authority of the New York State Transplant Council by directing it to make recommendations related to organ, eye, and tissue donation. This law would also require the council to make yearly reports to the Commissioner of Health. This law was signed by the Governor on May 12, 2017 and took effect immediately.

(10) Educationally-related legislation

(a) New York STEM Incentive Program (Veto Memo 207 of the Laws of 2017, A.1808-A Morelle / S.2466 LaValle): This bill would have expand the eligibility of the New York State science, technology, engineering and mathematics incentive program to include students enrolled at private colleges and universities. This bill was vetoed (and tabled) by the Governor on December 18, 2017.

(b) Institutional Accreditation (Veto Memo 242 of the Laws of 2017; A.8491 Glick / S.6780 LaValle): This bill would have clarified that the State Education Department has the authority to collect fees from institutions of higher education that are seeking accreditation services from the Department, and would establish that the Department may deposit such revenues into a newly created "Board of Regents institutional accreditation account". This bill was vetoed by the Governor on December 18, 2017, who noted that he would support the continuation of the accreditation program, which could charge fees if necessary.

(c) Five-Year Capital Plans for SUNY and CUNY (Veto Memo 205 of the Laws of 2017; A.967 Glick / S.1625 LaValle): This bill would have required the Governor to submit a five-year capital plan for the SUNY and CUNY systems that would meet one hundred percent of the critical maintenance needs for each SUNY-operated campus and CUNY senior college. This bill was vetoed by the Governor on December 18, 2017.

(11) Housing-related legislation

(a) New York State Housing and Mortgage Agencies (Chapter 89 of the Laws of 2017; A.8259 De La Rosa / S.6414 Little): This law, which was a Division of Housing and Community Renewal Departmental bill, extends the statutory authorizations of the New York State Housing Finance Agency (HFA), the State of New York Mortgage Agency (SONYMA) and the SONYMA Mortgage Insurance Fund (MIF) to issue bonds, finance or enter into other financial arrangements for housing purposes. The law also increases the bonding authority of HFA by $2.5 billion to a maximum of $26.780 billion. This law was signed by the Governor on July 21, 2017 and took effect on that date.

(b) Affordable Residential Green Building Program (Chapter 486 of the Laws of 2017; S.3746-A Griffo / A.4969-A Rosenthal): This law requires the New York State Energy Research and Development Authority to develop a program to provide incentives to owners for the construction of new residential buildings which are affordable and promote smart growth and smart planning, reduce greenhouse gas emissions, reduce energy consumption and achieve other energy efficient standards. This law was signed by the Governor on December 18, 2017 and took effect immediately.

(c) Allowable Maximum Income (Chapter 131 of the Laws of 2017; S.4628 Savino / A.7463-A Kavanagh): This law increases the allowable maximum income for seniors and disabled living in New York City from $29,000 to $50,000 in order to be eligible for the Senior Citizen Homeowners' Exemption (SCHE) and the Disabled Homeowners' Exemption (DHE) tax abatement. This law was signed by the Governor on July 25, 2017 and took effect immediately, and applies to exemption applications for the city 2017 fiscal year.

(12) Medical Malpractice

(a) Malpractice Actions Related to Cancer Diagnoses (A.8516 Weinstein/ S.800 DeFrancisco): This is the only 2017 bill on which the Governor has not yet acted. The bill would extend the statute of limitations in medical malpractice actions involving cancer misdiagnoses to the date the malpractice was discovered, rather than when it occurred. The bill would allow for medical malpractice actions premised on the negligent failure to diagnose a malignant

tumor or cancer to be commenced within two and one-half years from when the plaintiff *knew or reasonably should have known* of the negligence, provided that the action is commenced no more than seven years after the negligence occurred. While the Governor has publicly expressed support for the bill—known as "Lavern's Law," named for an individual whose opportunity to assert a claim for malpractice was precluded by the current statute of limitations—it is expected that some amendments may be advanced in the coming days or weeks to address some of the bill's ambiguities and technical issues. This bill has passed both houses, and was sent to the Governor on December 29, 2017. This bill would take effect immediately.

D. A Preview of the 2018 Legislative Session

(1) *Fiscal and budgetary issues*: Given the current fiscal environment, a challenging budget-making process may dominate the 2018 legislative session—caused by a downturn in state revenues and either actual or potential reductions in federal support. Projections of the next year's deficit range from $4.5 billion to much higher amounts. Budget and associated legislation being submitted just after the deadline for these materials..

(2) *State of the State:* The Governor's State of the State message touched on a wide range of issues, including strengthening the State's laws on sexual harassment, curtailing new investments by State pension plans in entities with significant fossil fuel-related activities, new proposals to address the burden of student loans, additional initiatives to combat opioid epidemic and additional economic development efforts. The Governor also indicated that the Administration is considering means to mitigate the impact of the provisions of the federal tax reform statute that will eliminate the state and local tax deductions through the use of payroll taxes and charitable contributions. .

(3) *Progressive Agenda:* The Governor and his Democratic allies are likely to seek consideration of the DREAM Act, criminal justice reforms (e.g., bail reform), the reproductive health agenda, campaign finance and ethics reforms and a single payor health plan, all of which were cited by the IDC as issues that should be considered if there is a reunification of the Senate Democrats. Other bills that have stalled in the past several years are likely to be debated again, including safe staffing/ nurse-patient ratio bills, child victims legislation (addressing the statute of limitations in child sexual abuse cases), GENDA (prohibiting discrimination based on gender identity), and medical aid in dying legislation, a bill that would

provide the authority for physician assistance in dying that New York's highest court recently declined to recognize.

(4) *Playing defense:* New York may also consider steps to address the Trump Administration's continued efforts to dismantle the Affordable Care Act. Consideration might be given to implementing a New York State individual mandate—like the one in Massachusetts on which the ACA was modeled—to replace the repeal of the federal individual mandate that was part of the tax reform legislation enacted by Congress. State initiatives may also be considered to protect New York against other healthcare threats, such as the implementation of Disproportionate Share Hospital payment cuts, the destabilization of the Obamacare insurance exchanges, the potential interruption in funding for the Child Health Insurance Program and community health centers, changes to the 340-B drug program, and the threatened defunding of Planned Parenthood.

II. Federal Legislative/Administrative Update

A. Reprise of Repeal and Replace

1. *Obama era repeal efforts:* Over 70 votes by Congress to repeal the ACA between 2011-2016.

2. *American Health Care Act (AHCA)*: Passed by House of Representatives in May, 2017, AHCA would have resulted in $44 billion reduction in Medicaid funding, 2017-26.

3. *Better Care Reconciliation Act (BCRA)*: Never brought to a vote in the U.S. Senate, BCRA died in July, 2017. It would have cut $40 billion in Medicaid funding, 2017-26.

4. *Graham-Cassidy*: Bill was defeated in Senate in September, 2017 and would have caused a 54% reduction in Marketplace and Medicaid funding.

5. *Alexander-Murray*: Bill was aimed at stabilizing ACA exchanges, remains pending.

6. *Tax Cut and Jobs Act,* the federal tax reform legislation repeals the ACA's individual mandate penalty, effective 1/1/2019. CBO estimates 10% premium increase and 13 million fewer Americans with coverage.

B. Current Federal Status

1. *Budget shutdown and programs in the lurch:* With the next government funding deadline looming on January 19, Congress continues to focus on long-term funding for the government; the outcome of these conversations will determine the fate of the Children's Health Insurance Program (CHIP), community health center funding, and several other health care provisions.

2. *Alexander-Murray*: Just as Senators Lamar Alexander (R-TN) and Patty Murray (D-WA) are reengaging on talks about their Marketplace stabilization legislation, a March document came to light that was initially described as a revelation about the Administration's efforts to undermine the Affordable Care Act (ACA). The document details strategies to limit Marketplace enrollment (such as tightening eligibility standards and cutting outreach efforts), but it also lists strategies designed to stabilize the Marketplaces. Most notably, the March 2017 document calls for supporting 1332 reinsurance waivers as a way to reduce premiums/

3. *CHIP and other health funding issues:* The major focus in Congress this week remains on securing an agreement to extend funding for the government beyond January 19. The funding bill could again be a vehicle for various health policy provisions, including community health center funding, delay of scheduled Medicaid disproportionate share hospital (DSH) cuts, and several Medicare extenders. Whether the next government funding bill will carry a long-term CHIP extension is a key question as states again confront looming funding shortfalls. Although Congress provided approximately $3 billion in December to temporarily patch CHIP funding, health policy experts report that at least 10 states and DC will run out of funds by the end of February, and approximately half of all states will run out of funds in March. Last week's updated Congressional Budget Office (CBO) score of a five-year CHIP extension might ease the path to approval, since estimates updated to reflect the impact of individual mandate repeal show that a five-year CHIP extension would increase the deficit by $800 million over the next decade, a sharp decline from the earlier $8.2 billion estimate. Senate Finance Committee Chairman Orrin Hatch (R-OR) has strongly championed rapid passage of a CHIP extension and this week expressed his view that the broader budget issues should not prevent immediate action on CHIP.

4. *340B:* House Energy and Commerce Committee Republicans released a report outlining findings and recommendations related to oversight of the 340B

Drug Pricing program (340B program), including a call for Congress to "clarify the intent of the 340B program" and to provide increased regulatory authority to the Health Resources and Services Administration (HRSA) for program oversight/ Meanwhile, hospital industry leaders filed a notice of appeal in response to the December 29 U.S. District Court dismissal of a request for injunction to block reductions to the 340B drug discount program that took effect January 1.

C. Executive Actions:

1. *Guidance on Work Requirement Provisions in Medicaid 1115 Waivers.* On January 11, CMS released long-anticipated guidance to states with regard to crafting and implementing section 1115 waiver demonstrations that require work and community engagement as a condition of qualifying for health care coverage through the Medicaid program.

2. *Senate Confirmation Hearing for HHS Secretary Nominee Alex Azar.* HHS Secretary nominee Alex Azar appeared before the Senate Finance Committee on Tuesday and, while the hearing included intense questioning, the Committee is expected to endorse his nomination. Mr. Azar offered signals about his stance on several policy priorities, along with support for at least some provisions of the previously failed Graham-Cassidy legislation, including "allowing states to run their own budgets."

3. *Reinsurance Waivers 2.0.* After three reinsurance waivers were approved in 2017, a number of states are considering similar waivers this year, including Idaho, which posted a 1332 waiver proposal including reinsurance in late 2017; Washington, which held a legislative hearing on reinsurance this week; Maine, which is seeking to reinstate its pre-ACA program; and Colorado, where legislation will be considered this year. If the federal government were to provide additional federal support, such as the legislation introduced by Senators Susan Collins (R-ME) and Bill Nelson (D-FL) would do, state interest in reinsurance would likely expand dramatically.

Some Headline Issues in Legal Ethics

Speaker:
Stephen Gillers, Esq.

Some Headline Issues in Legal Ethics
Notes

New York State Bar Association Health Law Section

Legal Ethics CLE

Stephen Gillers

January 24, 2018 / 10-10:50 a.m.

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Agenda (minutes)

- Introduction (5)
- Bias and Harassment in Law Practice– 20 minutes
  - The ABA's new Rule 8.4(g)
  - The current New York rule
- "Slut-Shaming" in Chaz Reetz-Laiolo v. Emma Cline
  - That's the charge – Is it Right? What Ethics Rules Apply – 15 minutes
- Q&A – 10 minutes

2

Bias and Harassment in the Practice of Law

What Are the Rules?

What Should They Be?

3

NY Rule 8.4(g)

- A lawyer or law firm shall not…
  - unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.
  - Where there is a tribunal with jurisdiction to hear a complaint, timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance.
  - A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

4

ABA Rule 8.4(g)

- It is professional misconduct for a lawyer to:…
  - (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.
  - This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

5

Rule 8.4 comment

- [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

6

Rule 8.4 comment

- [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

7

Rule 8.4 comment

- [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

8

ABA Code of Judicial Conduct 2.3

- (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

9

Masterpiece Cakeshop v. Colorado Civil Rights Commission (Cert. granted. 6-26-17)

- Jack Phillips is a cake artist. The Colorado Civil Rights Commission and the state courts ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA'') when he declined to design and create a custom cake honoring a same sex marriage because doing so conflicts with his sincerely held religious beliefs.
- The question presented is:
  - Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

10

Other sources

- Stephen Gillers, A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 195 (2017).
- Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241 (2017).

11

“Slut-Shaming” In the Practice of Law

Or Not?

12

REPRESENTATION OF PLAINTIFFS IN Chaz Reetz-Laiolo v. Emma Cline

- Alexandra Alter, *Sex, Plagiarism and Spyware. This Is Not Your Average Copyright Complaint* (NYT 12-2-17)
  - https://www.nytimes.com/2017/12/01/books/emme-cline-lawsuit-boies.html?_r=0
- Sheelah Kolhatkar, *How the Lawyer David Boies Turned a Young Novelist's Sexual Past Against Her (*New Yorker *12-1-17)*
  - https://www.newyorker.com/news/news-desk/how-the-super-lawyer-david-boies-turned-a-young-novelists-sexual-past-against-her

13

From the New Yorker…

- In the [Boies Schiller] letter [to Cline's lawyer], which also made allegations against Random House, Boies Schiller accused Cline of stealing fragments of written work from a former boyfriend and using them in a draft of her novel. Additionally, the letter said, Cline had spent years improperly snooping on the e-mail accounts of the ex-boyfriend, Chaz Reetz-Laiolo, and two of the former couple's female friends.
- Cline's attorneys argued that the plagiarism allegations were false, and asserted in a letter that Reetz-Laiolo—who was thirty-three-years old when the two started dating, while Cline was twenty—had been emotionally and physically abusive toward her, that he had cheated on her, and that she had installed the spyware in order to monitor his behavior and protect herself, not to steal his writing. (In a statement, Reetz-Laiolo said that Cline had made "false accusations of physical abuse against me," and that she'd offered no defense for allegedly accessing his co-plaintiff's online accounts.)

14

From the New Yorker…

- On May 26th, Boies Schiller responded by sending a hundred-and-ten-page draft of a complaint that it said it was prepared to file in court if the two sides did not reach a settlement. David Boies's name appeared at the top of it. …
- [It began by saying] that "evidence shows that Cline was not the innocent and inexperienced naif she portrayed herself to be, and had instead for many years maintained numerous 'relations' with older men and others, from whom she extracted gifts and money."
- [Complaint exhibits included] thirteen pages containing screenshots of explicit chat conversations with lovers, including one in which Cline had sent a naked photo of herself (the photo was blacked out in the letter) to a boyfriend, explicit banter with people she'd met online, and snippets of her most intimate diary entries. All of this material had been recorded by the spyware and remained on Cline's old laptop, which Reetz-Laiolo now had in his possession.

15

From the New Yorker…

- A letter that Boies Schiller sent along with the draft complaint included even more graphic sexual details and screenshots pertaining to Cline's romantic relationships.
- The letter went on to state that Cline's arguments—that she had been abused by her former boyfriend, and that her concern about infidelity was the reason for her cyber-espionage—had "placed Ms. Cline's sexual conduct directly at issue."

16

From the New Yorker:

Carrie Goldberg, one of Cline's lawyers, told the New Yorker:

"Legal complaints are public record, and, basically, they're saying, 'Hey, if you don't give us what our client wants, we're going to put this very personal information out into the open, and the whole world is going to know the inner workings of your sex life and your sexual history and every proclivity that you have.' "

17

An Email to Me (1/4/18)

- Professor Gillers:
  - I am a member of the team representing Chaz Reetz-Laiolo, Kari Bernard, and Kristin Kiesel in litigation against Emma Cline and Random House. I attended your CLE at the New York City Bar Association addressing the case. Ms. Bernard and Ms. Kiesel have recently published a letter to the editor in *The New Yorker*, linked below, which I thought I might bring to your attention in case you had not already read it and are interested in reading their perspective:
  - https://www.newyorker.com/magazine/2018/01/08/letters-from-the-january-8-2018-issue

18

NY Rule 4.4(a)

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

19

NY Rule 1.2(a)

- (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

20

NY Rule 1.16(c)

- (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
  - (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

21

ARTICLES

A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)

STEPHEN GILLERS*

ABSTRACT

After twenty-two years of failed efforts to add a rule forbidding bias and harassment in law practice to the American Bar Association's Model Rules of Professional Conduct, *the ABA's House of Delegates approved one by voice vote in August 2016. Model Rule 8.4(g) will now move to the states. The goal of this Article is to aid state courts and bar groups as they debate whether to adopt Rule 8.4(g) as is, with changes, or not at all. Their deliberations should assess earlier ABA efforts to pass an anti-bias and anti-harassment rule, similar provisions now in the rules of American jurisdictions, and the legislative history of Rule 8.4(g) itself. Anti-bias and anti-harassment provisions in the ABA's* Code of Judicial Conduct *will offer guidance. This Article discusses each of these sources of information and then identifies at least ten issues that must be addressed as the states review Rule 8.4(g). The Article also addresses objections to Rule 8.4(g) from religious communities and challenges under the First Amendment's Speech Clause.*

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* Elihu Root Professor of Law, New York University School of Law. I thank the D'Agostino Greenberg Fund for assistance that permitted me to work on this Article. I am grateful to Professors Gregory Sisk and Barbara S. Gillers for comments on an earlier draft of this Article. In addition, I benefitted from a roundtable discussion of an earlier draft, arranged by Professor Ellen Yaroshefsky as part of the Hofstra in the City program. While the editors of the Journal kindly offered to let me amend my Article to respond to Professor Josh Blackman's piece, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017), in which case he would of course be entitled to amend his article to respond to my response, I have chosen not to address his response at this time. I hope and expect that the two articles will aid discussion of Rule 8.4(g) or variations of it as the courts proceed to consider them. © 2017, Stephen Gillers.

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II. ANTI-BIAS AND ANTI-HARASSMENT PROVISIONS IN STATE PROFESSIONAL CONDUCT RULES 208

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INTRODUCTION

On August 8, 2016, at the Annual Meeting of the American Bar Association (ABA), the ABA's House of Delegates voted on a Revised Resolution to amend the *Model Rules of Professional Conduct* by adding Rule 8.4(g) and three comments aimed at forbidding lawyers from engaging in harassment or biased conduct in law practice.[1] Rule 8.4(g) provides:

1. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION, at 1–3 (Aug. 8, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/KT5F-2YRM] [hereinafter 2016 REVISED RESOLUTION]. The Revised Resolution was accompanied by a Report.

Electronic copy available at: https://ssrn.com/abstract=2979495

> It is professional misconduct for a lawyer to . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[2]

No one could be confident how the vote would go, although the resolution seemed likely to pass judging from the strong support it received in written and oral comments on earlier drafts.[3] But more modest efforts to add an anti-bias provision to the *Model Rules* across twenty-two years had come to naught.[4] There had been opposition to the early drafts of Rule 8.4(g), too, but it had largely receded by the time the final text came to a vote.[5] The debate drew the attention of the media.[6] So the public, not only lawyers, was watching and that could affect the outcome, although no one could say exactly how.

The Revised Resolution passed by voice vote. I estimate that the ratio of "yays" to "nays" was in the neighborhood of ten to one. No one spoke in opposition.[7]

One reason the ABA adopted an anti-bias rule[8] this time, after more than two decades of intransigence, may be the changing nature of the legal profession. Looking at the composition of the House of Delegates as it prepared to vote, I was struck by the large number of women and lawyers of color. The outgoing president was a black woman. The incoming president was a white woman.

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2. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2016) [hereinafter MODEL RULES]. The comments are discussed below. *See infra* note 67 and Part V. I was at the meeting as an observer to assist my work on this Article, then in progress, and also for spousal support. My wife, Barbara S. Gillers, was a member of the Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment. I say this in the spirit of full disclosure.

3. *See* 2016 REVISED RESOLUTION, *supra* note 1, at 4.

4. *See infra* Part I.

5. *See, e.g., infra* text accompanying notes 71–73 and 75.

6. *See* Elizabeth Olson, *Bar Association Considers Striking "Honeys" from the Courtroom*, N.Y. TIMES (Aug. 5, 2016), http://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html?_r=0 [https://perma.cc/8LZP-E9KL]; *see also* Sara Randazzo, *Proposed Anti-Discrimination Rule for Lawyers Sparks Heated Debate*, WALL ST. J. (May 5, 2016), http://www.wsj.com/articles/proposed-antidiscrimination-rule-for-lawyers-sparks-heated-debate-1462440602 [https://perma.cc/D57T-AT3D]. Adoption of the Rule was also covered. *See* Elizabeth Olson, *Goodbye to "Honeys" in Court, by Vote of American Bar Association*, N.Y. TIMES (Aug. 9, 2016), http://www.nytimes.com/2016/08/10/business/dealbook/aba-prohibits-sexual-harassment-joining-many-state-bars.html [https://perma.cc/K8R7-H34F].

7. A video of the presentations and vote is on the ABA's website. Am. Bar Ass'n House of Delegates, *Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision*, AM. BAR ASS'N (Aug. 9, 2016), http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html [https://perma.cc/MH72-36G7].

8. I will use the term "anti-bias rule" as a shorthand to refer to a rule that forbids bias and prejudice, discrimination, and harassment.

Following a steady increase beginning in the 1970s, female students today are nearly in parity with male students at American law schools. The percentage of minority law students has increased from 17.8% in 1993–94 to 26.9% in 2013–14.[9] Anyone who has taught at an American law school during the last three or four decades, as I have, and who attended law school a decade earlier, has seen the dramatic change in the composition of the student population firsthand.

One might think that the ABA's adoption of a strong anti-bias rule means that those who worry about how women, minorities, and other groups are treated in law practice can now declare victory, order champagne, and go home. If only. The ABA vote is just the beginning. Lawyers are governed by rules adopted by courts in the jurisdictions in which they are admitted.[10] To affect a lawyer's behavior, his or her jurisdiction must adopt an anti-bias rule or a functional equivalent. Today, twenty-four states and Washington, D.C., have such a rule, but none is as broad as the new ABA rule. Some are considerably narrower.[11] The other states have no rule. Twelve states have only a comment.[12] Fourteen states have neither a rule nor a comment.[13]

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9. Statistics on women and minority law students over time can be found at AM. BAR ASS'N, STATISTICS: ETHNIC/GENDER DATA, FIRST-YEAR & TOTAL JD MINORITY, http://www.americanbar.org/groups/legal_education/resources/statistics.html [https://perma.cc/66UP-RJH4] (last visited Feb. 15, 2017) (scroll to Ethnic/Gender Data and open the link, "First-Year & Total JD Minority").

10. Rule 8.5 of the ABA *Model Rules*, broadly adopted in U.S. jurisdictions, recognizes, however, that if a lawyer appears in an out-of-state court *pro hac vice*, the rules of that court will govern the lawyer's conduct. And sometimes a lawyer practicing outside her state of admission other than in court may be governed by the rules of another state. *See* MODEL RULES R. 8.5.

11. *See* CAL. RULES OF PROF'L CONDUCT R. 2-400 (2015); COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2016); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2007); FLA. RULES OF PROF'L CONDUCT R. 4-8.4(d) (2017); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2014); ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2015); IND. RULES OF PROF'L CONDUCT R. 8.4(g) (2016); IOWA RULES OF PROF'L CONDUCT R. 8.4(g) (2015); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2013); MD. LAW. RULES OF PROF'L CONDUCT R. 8.4(e) (2016); MICH. RULES OF PROF'L CONDUCT R. 6.5 (2015); MINN. RULES OF PROF'L CONDUCT R. 8.4(h) (2015); MISS. RULES OF PROF'L CONDUCT R. 4-8.4(g) (2004); NEB. RULES OF PROF'L CONDUCT R. 8.4(d) (2016); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (2016); N.M. RULES OF PROF'L CONDUCT R. 16-300 (2009); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017); N.D. RULES OF PROF'L CONDUCT R. 8.4(f) (2006); OHIO RULES OF PROF'L CONDUCT R. 8.4(g) (2016); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(7) (2015); R.I. RULES OF PROF'L CONDUCT R. 8.4(d); TEX. RULES OF PROF'L CONDUCT R. 5.08 (2016); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2009); WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); WIS. RULES OF PROF'L CONDUCT R. 8.4(i) (2017). Key differences among these are addressed *infra* Part II.

12. ARIZ. RULES OF PROF'L CONDUCT R. 8.4 cmt. (2004); ARK. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2016); CONN. RULES OF PROF'L CONDUCT R. 8.4 commentary (2006); DEL. LAW. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013); ME. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014); N.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 5 (2015); S.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015); S.D. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2004); TENN. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2016); UTAH RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013); W. VA. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015); WYO. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014).

13. *See* 2016 REVISED RESOLUTION, *supra* note 1, at 6 n.13. They are Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia. A court in a state without a rule or a comment could nevertheless impose discipline under a less specific rule or using its inherent power. *See, e.g.*, Claypole v. Cty. of Monterey, No. 14-cv-02730-BLF, 2016

This Article provides state courts and state and local bar groups with a history of the effort to include an anti-bias rule in the ABA's *Model Rules*, including the legislative history of Rule 8.4(g) itself, and an analysis of the various rules now in state ethics codes. This information should be useful as the states consider whether to adopt Rule 8.4(g) as written or amended. Or not at all.

One group of opponents of the new rule especially interests me. Its arguments did not get an airing in the House of Delegates, nor did its members ask to speak. I am referring to those who voiced religious objections to a draft of the rule. Similarities are apparent between these objections and objections by officials who on religious grounds resist issuing marriage licenses to same-sex couples and by businesses that refuse to bake cakes, arrange flowers, take photographs, or rent venues for same-sex weddings. These officials and businesses have so far lost claims based on the First Amendment's Speech and Free Exercise Clauses.[14] It may be that a lawyer will hereafter cite the amendment to resist discipline under a rule like Rule 8.4(g).[15] A court will then have to decide whether there is something about the lawyer-client relationship, unlike the relationship between a photographer or baker and a same-sex couple, that gives the lawyer a stronger constitutional claim. Although I will try to identify the legal issues a court facing religious objections will need to sort through,[16] I am here primarily interested in asking another question: As a matter of policy, should a lawyer with a sincere religious objection to representing a particular client, or a client in a particular matter, be exempt from the ABA's rule because the attorney-client relationship is fiduciary and (in some sense) intimate, whereas commercial relationships are not?

Rule 8.4(g) is not a sop to political correctness. It responds to a real problem faced by members of the groups it aims to protect. The behavior it describes can cause harm.[17] Judging by reported decisions *only*, bias and harassment in the practice of law is a persistent but not a pervasive problem. The ABA's Standing Committee on Ethics and Professional Responsibility ("the Ethics Committee"), the sponsor of Rule 8.4(g) before the House of Delegates, gave examples.[18] I can

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WL 145557, at *4 (N.D. Cal. 2016) (relying on inherent power to sanction a lawyer for a "sexist remark" at a deposition).

14. *See infra* text accompanying notes 125–26.

15. *See infra* Part VI.

16. *See infra* Part VI.

17. *See infra* Part V.F.

18. It wrote:

> The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was "a cool person to know." On one day, the lawyer sent 19 text messages asking whether the victim was the "kind of girl who likes secret contact with an older married elected DA . . . the riskier the better." One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. *In re* Kratz, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a

add to them.[19] Overwhelmingly, these decisions and surveys disclose that the targets of the conduct are predominantly women, one of the new rule's protected groups.[20] The reported decisions suggest that biased conduct based on race or ethnicity occurs, but less often. Perhaps lawyers realize that racially-biased conduct is indefensible but do not view gender bias equally so.

Although the full extent of biased conduct is unknowable, it is also irrelevant. The reason to adopt the new ABA rule is not solely to provide lawyers with notice of the kind of harassing or biased conduct that will lead to discipline and then to impose discipline if warranted. Adding Rule 8.4(g) achieves two other worthwhile goals. First, it tells the bar as a whole that its licensing authority deems the behavior the rule describes as unacceptable. A lawyer who looked at many current state ethics codes would not get that message because the codes have no rule or a quite narrow rule addressing biased or harassing conduct in law practice. Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct in law practice, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.

Drafting an anti-bias rule, even the brief rule and comments that the ABA adopted, is harder than may first appear. Of course, it is easy to say that biased conduct has no place in law practice and the administration of justice. As a starting point, we can expect broad agreement for that general statement. Add harassment—including sexual harassment—and discrimination to the text and

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> clinic, made unwelcome comments about the student's appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re* Griffith, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re* McGrath, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re* Campiti, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a "black male" and that such association was placing the children in harm's way. During a hearing, the lawyer referred to the African-American man as "the black guy" and "the black man." *In re* Thomsen, 837 N.E.2d 1011 (2005).

2016 REVISED RESOLUTION, *supra* note 1, at 6 n.15.

19. *See infra* Appendix.

20. The Young Lawyers Division of the Florida Bar surveyed women lawyers in Florida. The survey had a fifteen percent response rate. Forty-three percent of the 464 respondents said they had experienced gender bias. Seventeen percent said they had been subjected to harassment. *Results of the 2015 YLD Survey on Women in the Legal Profession*, FLA. BAR, at 9 (Dec. 2015), https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement [https://perma.cc/UF6R-HTUT]; *see also* Amanda Shelley, *Sexual Harassment Trends in the Legal Industry: Policy Enforcement & Targeted Sexual Harassment Training Are Key*, NETWORK (Nov. 6, 2014), https://www.tnwinc.com/10538/sexual-harassment-training-and-trends-legal-industry/ [https://perma.cc/CMD6-45AP] (reporting on surveys of male and female lawyers).

still, as a general statement, we can expect broad support. But when we venture into the details, the consensus may shrink. What is "harassment"? What groups should be protected? And while the words "bias," "prejudice," and "harassment" may have only negative associations in this context, what about "discrimination"? When we say someone is discriminating, we may mean it as a compliment.

Next, we may find disagreement over the circumstances in which the rule applies—for example, "in the representation of a client" or, more broadly, "in conduct related to the practice of law."[21] Or maybe the rule should be narrower than either phrase and apply only in matters before a tribunal where rights are decided, because it is courts and other tribunals that we most want to protect from the fact and appearance of bias.

We may encounter both support and opposition to adding a culpable state of mind—for example, to forbid only "knowing" harassment or "intentional" discrimination. Without a culpable state of mind, the rule could be read to create strict liability, which may drain needed support. On the other hand, will requiring that harassment be knowing make it too easy for a lawyer to escape responsibility for conduct we want to curtail—or too hard for a discipline committee to prove a violation?

At bottom, we face two drafting challenges. First, what goal do we want the rule to achieve? Second, how should the rule be drafted to achieve that goal? Whether in a statute, an agency rule, or a contract, drafting is what lawyers do. The legal profession is one of words. Drafting is words on paper (or on a screen). Drafting demands clarity and the elimination of ambiguity so far as words allow. Mathematical precision is rarely possible. We must strive to draft a rule that identifies the behavior we mean to forbid and not the behavior we do not. Lawyers have drafted far more complicated rules and documents, including penal codes, the Internal Revenue Code, rules of evidence, bylaws and trust documents, and, of course, all the other rules in the *Model Rules of Professional Conduct*. While it may not be easy to draft an anti-bias rule, it is certainly possible. Once we do so, the question will be whether the draft can win support.

So why has the ABA, an organization of lawyers who are trained in drafting, had so much trouble writing a rule forbidding bias, harassment, and discrimination in law practice? Surely, no one can think that all of the behavior described here[22] is acceptable, or that it does not harm the rule of law and the administration of justice for lawyers to act that way.[23] Yet except for a brief (and meaningless) comment added to Rule 8.4 in 1998,[24] no prior amendment to the *Rules* had managed to win approval or even get a vote in the House of Delegates. This is so despite the fact that in 2008, the ABA adopted what has come to be known as

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21. *See infra* Part V.E.
22. *See supra* note 18, Appendix.
23. On the questions of harm, see *infra* Part V.F.
24. *See infra* text accompanying notes 44–50.

Goal III, one of four goals in the ABA Mission Statement.[25] Goal III is entitled "Eliminate Bias and Enhance Diversity" and includes two "objectives":

> 1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
>
> 2. Eliminate bias in the legal profession and the justice system.

As stated, my purpose is to aid lawyers and judges as they consider Rule 8.4(g). Part I offers a brief history of the ABA's unsuccessful efforts to adopt an anti-bias rule. Part II surveys the anti-bias provisions—rules and comments—now in some state professional conduct rules. The ABA's *Code of Judicial Conduct* has had an anti-bias rule since 1990. It was expanded in 2007. It addresses judges' own conduct and the conduct they must demand of lawyers who appear before them. The judicial conduct rule is the subject of Part III. Part IV turns to the legislative history of Rule 8.4(g) itself. It analyzes the changes the Ethics Committee made in successive drafts of the rule. Part V examines ten drafting decisions that confronted the Ethics Committee and that will confront state courts and bar groups as they review Rule 8.4(g). Although written objections from religious communities were not debated at the meeting that approved Rule 8.4(g), they will likely be aired at the state level. These objections are the subject of Part VI. Finally, Part VII explains why Rule 8.4(g) should survive a First Amendment overbreadth challenge. The Article ends with a Conclusion. I suggest that if you accept the first premise in the Conclusion, the remainder is all about execution.

I. A SHORT HISTORY OF THE ABA'S FAILED EFFORTS TO ADOPT AN ANTI-BIAS RULE

In 1994, both the ABA's Standing Committee on Ethics and Professional Responsibility and its Young Lawyers Division proposed different anti-bias amendments to the *Model Rules* at the ABA's Midyear Meeting. The Ethics Committee proposal would have amended Rule 8.4 to make it professional misconduct for a lawyer to

> (g) knowingly manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not apply to a lawyer's confidential communications to a client or preclude legitimate advocacy with respect to the foregoing factors.[26]

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25. *ABA Mission and Goals*, AM. BAR ASS'N, http://www.americanbar.org/about_the_aba/aba-mission-goals.html [https://perma.cc/77X8-XAFG] (last visited Feb. 15, 2017).

26. Standing Comm. on Ethics & Prof'l Responsibility, Am. Bar Ass'n, *Report No. 3*, *in* ANNUAL REPORT OF THE AM. BAR ASS'N INCLUDING PROCEEDINGS OF THE FIFTY-SEVENTH MIDYEAR MEETING OF THE HOUSE OF DELEGATES 106, 106 (Feb. 7–8, 1994) [hereinafter 1994 ABA ANNUAL REPORT].

A proposed comment explained that the rule

> identifies the special importance of lawyers' words or conduct, in the course of the representation of clients, that knowingly manifest bias or prejudice against others, based upon race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status. When lawyers act as officers of the court and the judicial system, their conduct must reflect a respect for the law. Discriminatory conduct toward others on bases that are generally viewed as unacceptable manifests a lack of respect for the law and undermines a lawyer's professionalism. Excluded from paragraph (g), however, are a lawyer's confidential communications to a client. Also excluded are those instances in which a lawyer engages in legitimate advocacy with respect to these factors. Perhaps the best example of this is when a lawyer employs these factors, when otherwise not prohibited by law, in the selection of a jury.[27]

The Young Lawyers Division's proposal would have made it professional misconduct for a lawyer to "commit a discriminatory act prohibited by law or to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status, where the act of discrimination or harassment is committed in connection with a lawyer's professional activities."[28]

The two proposals differed in key ways. There is no state of mind requirement in the language of the Young Lawyers Division's proposal. It prohibited discrimination only if unlawful. The list of protected groups was longer. And the Young Lawyers Division's proposal was not limited to conduct while representing a client. These differences would continue to emerge in ensuing debates.

Neither proposal received a House vote. Both were withdrawn.[29] David Isbell, the Ethics Committee chair, "stated that it was the hope that with additional time for commentary, a single proposal commanding general support could be developed for consideration at the 1995 Midyear Meeting,"[30] a year later. The implication is that both sponsors then expected to lose before the House of Delegates. And so what if they did, one might ask. Wouldn't having a debate prove valuable? But there was no debate.

No proposal came before the House at its 1995 Midyear Meeting, as Mr. Isbell had hoped. But the Young Lawyers Division returned at the 1995 Annual Meeting with an "aspirational"[31] resolution.[32] On the floor, a member of the Division "emphasized that [its proposal] was a policy statement, not a disciplinary rule"

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27. *Id.*

28. Young Lawyers Div., Am. Bar Ass'n, *Report No. 1*, *in* 1994 ABA ANNUAL REPORT, *supra* note 26, at 353, 353.

29. 1994 ABA ANNUAL REPORT, *supra* note 26, at 18.

30. *Id.* The Midyear Meetings are held in February. The Annual Meetings are held in August.

31. ANNUAL REPORT OF THE AM. BAR ASS'N INCLUDING PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING OF THE HOUSE OF DELEGATES 61 (Aug. 8–9, 1995) [hereinafter 1995 ABA ANNUAL REPORT].

32. As revised, the resolution states:

and that it "embodies the ABA's commitment to equality and to justice."[33] Mr. Isbell explained the decision to shift to an aspiration:

> [Mr. Isbell] said that in the past a rule had been proposed and debated for quite some time, but the Standing Committee on Ethics and Professional Responsibility determined that no disciplinary rule could be drawn that would, to its satisfaction, meet standards of precision and therefore standards of due process, and also would not unduly impinge on the First Amendment. He stated that, because no satisfactory rule could be drawn, the adoption of policy would serve to lead the profession and to state where the profession stands on these matters. He urged adoption of the resolution.[34]

In other words, lawyers at the ABA, or at least those on the two committees most active on the question, decided that they were unable to draft a constitutionally valid rule that would forbid bias in law practice. This was a remarkable confession. Anti-discrimination and anti-harassment provisions regulate many American institutions, public and private, and populate many statutes and agency rules of the federal and local governments.[35] Could it be that there

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> *RESOLVED*, That the American Bar Association:
>
> a) Condemns the manifestation by lawyers in the course of their professional activities, by words or conduct, of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others, based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or a cause;
> b) opposes unlawful discrimination by lawyers in the management or operation of a law practice in hiring, promoting, discharging or otherwise determining the conditions of employment, or accepting or terminating representation of a client;
> c) condemns any conduct by lawyers that would threaten, harass, intimidate or denigrate any other person on the basis of the aforementioned categories and characteristics;
> d) discourages members from belonging to any organization that practices invidious discrimination on the basis of the aforementioned categories and characteristics;
> e) encourages affirmative steps such as continuing education, studies, and conferences to discourage the speech and conduct described above.

Id. at 61–62.

33. *Id.* at 61.

34. *Id.*

35. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable [as discrimination under Title VII], it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) ("[D]iscrimination consisting of same-sex sexual harassment is actionable under Title VII."). State and federal agency regulations also forbid discrimination and harassment based on race, sex, religion, and other attributes. *See, e.g.*, 31 C.F.R. § 0.217(a) (2016) ("Employees shall not discriminate against or harass any other employee, applicant for employment, contractor, or person dealing with the [Treasury] Department on official business on the basis of race, color, religion, national origin, sex, sexual orientation, age, disability, political affiliation, marital status, parental status, veterans status, or genetic information."); MONT. ADMIN. R. 2.21.4005(1)–(2) (2017) ("(1) The executive branch is committed to equal opportunity, nondiscrimination, and harassment prevention in all aspects of employment and in programs, services, and activities offered to the public. (2) Agency managers, as defined by the agency in policy or rule to

was no way constitutionally to forbid bias and harassment in law practice? The aspirational Resolution passed eighty to seventy.[36]

The prospect of adding an anti-bias rule to the *Model Rules* looked bleak in light of Mr. Isbell's concession, but two-and-a-half years later proponents of anti-bias language pursued the alternative of amending the comments to Rule 8.4 and not the rule itself. At the 1998 Midyear Meeting, the Ethics Committee offered the following new comment. It refers to Rule 8.4(d), which forbids a lawyer to "engage in conduct that is prejudicial to the administration of justice"[37]:

> A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).[38]

Comments occupy an ambiguous space in the *Model Rules*. The Scope section of the *Rules* says this about the comments: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[39]

Complicating matters further, some state courts do not adopt the comments.[40] Yet some comments are important and address issues that the rules they interpret leave open because rules have to be comparatively short and follow a legislative style, while comments can take more space.[41]

The report supporting the proposed comment offered these arguments (in part echoing Mr. Isbell's concession in 1995):

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promote consistency with internal policies and procedures, may not tolerate discrimination or harassment based on an individual's race, color, national origin, age, physical or mental disability, marital status, religion, creed, sex, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth, sexual orientation, gender identity or expression, political beliefs, genetic information, military service or veteran's status, culture, social origin or condition, or ancestry. Likewise, agency management may not tolerate discrimination or harassment because of a person's marriage to or association with individuals in one of the previously mentioned protected classes.").

36. 1995 ABA ANNUAL REPORT, *supra* note 31, at 61.

37. MODEL RULES R. 8.4(d).

38. ABA House of Delegates, Tr. of Proceedings, Feb. 2–3, 1998, at 81 [hereinafter ABA HOD 1998 Proceedings].

39. MODEL RULES scope ¶ 21.

40. New York courts, for example, do not adopt the comments. *See* N.Y. RULES OF PROF'L CONDUCT (2009).

41. For example, MODEL RULE 1.7, whose subject is "Conflicts of Interest: Current Clients," is less than a half page but it is followed by thirty-five paragraphs of comments taking more than eight pages. MODEL RULE 5.5, whose subject is "Unauthorized Practice of Law; Multijurisdictional Practice of Law," occupies about a page of text followed by twenty-one comments taking four times the space.

> Formulation of a black-letter rule barring unacceptable conduct while preserving legitimate advocacy and First Amendment freedoms is a difficult task because manifestations of bias and prejudice may include protected speech, and because race, gender and other factors are sometimes legitimate subjects of consideration and comment in the legal process. The [Ethics] Committee believes that the recently-created Commission on Evaluation of the Model Rules of Professional Conduct ("ETHICS 2000") should consider whether an amendment to the Model Rules should be proposed and, if so, how that rule should be crafted. In the meantime, however, the [Ethics] Committee believes that the Commentary to the existing model rule prohibiting conduct prejudicial to the administration of justice should be amended to make explicit that expressions of bias and prejudice are among the actions of a lawyer that can prejudice the administration of justice and subject a lawyer to disciplinary action.[42]

Perhaps because the proponents again expected to lose (how else explain it?), Peter Moser, the Ethics Committee chair, withdrew the comment and "requested input from Sections and Committees that have any questions about the resolution."[43]

Matters again brightened six months later. At the 1998 Annual Meeting, the Ethics Committee, now joined by the Criminal Justice Section, submitted the same comment with the addition of this sentence: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."[44] A report that was substantially the same as the one submitted six months earlier explained that the added sentence

> address[ed] a concern of the criminal bar, namely whether a finding by a trial judge that a lawyer exercised a peremptory challenge in a discriminatory manner could be considered a *per se* violation of this Rule. We think that it should not. A trial court may find that a lawyer has exercised a peremptory challenge with impermissible discriminatory intent if it disbelieves the lawyer's neutral explanation for striking the juror [citing *Batson v. Kentucky*]. Although we note that some reasons for striking a juror such as location of residence, age, level of education, or prior involvement by the juror or a family member with the law are easily verifiable, neutral grounds for striking the juror, more subjective reasons such as body language, eye contact, or tone of voice are less subject to verification, placing the trial court in the difficult position of deciding whether a seemingly neutral reason is sufficient or indicative of the lawyer's conscious or unconscious discrimination.[45]

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42. ABA HOD 1998 Proceedings, *supra* note 38, at 82.
43. *Id.* at 25.
44. Standing Comm. on Ethics & Prof'l Responsibility & Criminal Justice Section, *Report*, *in* ANNUAL REPORT OF THE AM. BAR ASS'N INCLUDING PROCEEDINGS OF THE ONE HUNDRED TWENTIETH ANNUAL MEETING OF THE HOUSE OF DELEGATES 611, 611 (Aug. 3–4, 1998) [hereinafter 1998 ABA ANNUAL REPORT].
45. *Id.* at 614–15.

Before the House, Deborah Coleman, the chair of the Ethics Committee, stressed the narrowness of the comment: "The proposed comment amendment, Ms. Coleman stated, was reasonably interpreted to reach only knowing conduct that is of such nature or frequency that it has the effect of prejudicing the administration of justice."[46] The comment was approved by voice vote,[47] which means that the vote was not close enough to warrant a head count.

The comment was far narrower than Ms. Coleman may have realized. For five reasons, it should be seen to achieve little or even nothing. First, the comment only applies when the conduct prejudices the administration of justice within the meaning of Rule 8.4(d), the only part of Rule 8.4 it purports to interpret. Tribunals—courts, agency proceedings, and arbitrations—are where justice is administered, which means the comment, like Rule 8.4(d) itself, would not apply in transactional matters, in advising clients, or in mediation.[48] Second, the comment only applies if the conduct occurs "in the course of representing a client," which means it would not apply to biased conduct elsewhere, such as within a law firm, at a bar organization, or if a lawyer were before a tribunal as a witness or a party, whether or not he or she were represented. Third, the biased conduct must be done "knowingly." Whether there should be a mens rea requirement in an anti-bias rule and, if so, what it should be are recurrent issues, revisited below.[49] Fourth, a comment by itself has no force because a comment is not a rule.[50] Fifth, and critically, the comment adds nothing to Rule 8.4(d). This is true however the phrase "prejudicial to the administration of justice" is defined, i.e., whether or not it is limited to work before a tribunal. The comment merely says that certain conduct or words violate Rule 8.4(d) if their effect is to violate Rule 8.4(d)—i.e., if they prejudice the administration of justice. The comment is redundant.

46. *Proceedings for the Annual Meeting of the House of Delegates, in* 1998 ABA ANNUAL REPORT, *supra* note 44, at 1, 46.

47. *Id.*

48. Howell v. State, 559 S.W.2d 432, 436 (Tex. 1977) ("Administration of justice has been described thusly: The administration of justice consists in the trial of cases in the court, and their judicial determination and disposition by orderly procedure, under rules of law, and putting of the judgment into effect.") (internal quote and citation omitted); *In re* Smith, 848 P.2d 612, 613 (Or. 1993) ("[T]he rule proscribing conduct that is prejudicial to the administration of justice [requires] that conduct . . . have occurred . . . during the course of some judicial proceeding or a matter directly related thereto."). Some courts, without any discussion or explanation, have applied Rule 8.4(d) outside of dispute resolution and seemingly to any work that a lawyer does for a client. *See, e.g.*, Iowa Supreme Court Bd. of Prof'l Ethics v. Fay, 619 N.W.2d 321 (2000) (in imposing discipline where lawyer entered a business deal with a client in violation of DR 5-104(A), now Rule 1.8(a), court also found a violation of DR 1-102(A)(5), now Rule 8.4(d), without explaining how a violation of DR 5-104(A) prejudices the administration of justice).

49. *See infra* Part V.D.

50. *See supra* note 39 and accompanying text.

II. ANTI-BIAS AND ANTI-HARASSMENT PROVISIONS IN STATE PROFESSIONAL CONDUCT RULES

Attention must be paid to the states. Lawyers must obey the rules of state courts that license them. Although courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form,[51] these rules differ widely. Most contain the nexus "in the course of representing a client" or its equivalent.[52] Most tie the forbidden conduct to a lawyer's work in connection with the "administration of justice"[53] or, more specifically, to a matter before a tribunal.[54] Six jurisdictions' rules require that forbidden conduct be done "knowingly," "intentionally," or "willfully."[55] Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available.[56] Only four jurisdictions use the word "harass" or variations in their rules.[57] In twelve states, anti-bias language appears in a comment only[58] and fourteen states have no anti-bias language in their rules or comments.

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51. *See supra* note 11.

52. *See, e.g.*, MO. SUP. CT. R. 4-8.4(g) ("[I]n representing a client").

53. *See, e.g.*, N.D. RULES OF PROF'L CONDUCT R. 8.4(f).

54. *See, e.g.*, N.M. RULES OF PROF'L CONDUCT R. 16-300 (limiting the rule to conduct in "the course of any judicial or quasi-judicial proceeding before a tribunal"); TEX. RULES OF PROF'L CONDUCT R. 5.08 ("[I]n connection with an adjudicatory proceeding"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) ("[I]n appearing in a professional capacity before a tribunal").

55. New Mexico, Oregon, Maryland, Florida, Texas, and North Dakota. California uses the word "knowingly" for part of its rule. Rules in these states are cited *supra* note 11.

56. New York, California, Illinois, and the District of Columbia. Rules in these jurisdictions are cited *supra* note 11. For example, N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) says that a lawyer or law firm shall not

> unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

The exhaustion requirement makes some sense because anti-discrimination agencies have experience in adjudicating claims of employment discrimination. One problem with the requirement, however, is that a lawyer or other law firm employee who has been the target of unlawful discrimination may not wish to bring a formal complaint before a state or federal agency. Doing so demands more time and can lead to public disclosure of the complaint, which the employee may want to avoid. Also, the employee may not have suffered significant damages. But if she does not exhaust an administrative remedy, she cannot file a disciplinary complaint. A more formidable problem with the New York rule is that it has no application to biased or harassing conduct outside the employment relationship. It is limited to unlawful discrimination. It does not apply, for example, if a lawyer makes derogatory comments about an opposing lawyer or client or about a witness.

57. Wisconsin, Minnesota, Iowa, and Maryland. Rules in these states are cited *supra* note 11.

58. *See supra* note 12.

It is worth looking at the rules in two states—one rule from the middle of the pack and one of the broadest—to get a sense of the discrepancy of coverage. Indiana's rule is among the broadest. It provides: "It is professional misconduct for a lawyer to . . . engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors."[59] This rule is not limited to matters before a tribunal. The phrase "in a professional capacity" is broader than "in the representation of a client" because it reaches conduct that occurs within a law firm or at a professional event. There is no mens rea requirement. On the other hand, the word "harassment" does not appear. While the list of protected groups is shorter than the list in Model Rule 8.4(g), the rule adds "or similar factors."

Contrast Maryland Rule 8.4(e), which is more representative and narrower. It says it is professional misconduct for a lawyer to

> knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph.[60]

This rule has a mens rea requirement ("knowingly"). Its nexus requirement ("when acting in a professional capacity") is broader than "in the representation of a client," but perhaps not as broad as the nexus in Model Rule 8.4(g) ("in conduct related to the practice of law"). "When representing a client" will not encompass biased behavior towards law office colleagues and subordinates, but "when acting in a professional capacity" might. The word "harass" or variants do not appear. The list of protected categories is shorter than in Model Rule 8.4(g). And most limiting, Maryland's rule applies only "when such action is prejudicial to the administration of justice."

III. LESSONS FROM THE CODE OF JUDICIAL CONDUCT

In the same decade that the ABA was unable to add an anti-bias rule to its *Model Rules*, a different story was unfolding in the rules for judges. When the House of Delegates was asked in 2016 to approve Rule 8.4(g), it had at hand a twenty-six-year-old precedent in its *Code of Judicial Conduct*. When adopted in 1990, Rule 2.3 of that *Code* not only imposed on judges a duty to refrain from manifesting bias or prejudice toward certain groups, it also said that judges had to

59. IND. RULES OF PROF'L CONDUCT R. 8.4(g).
60. MD. RULES OF PROF'L CONDUCT R. 8.4(e).

require the same of lawyers.[61] In 2007, an amendment to the *Code* expanded this duty. It added the words "or engaging in harassment" to describe the prohibited conduct. And it added the following to the list of protected attributes: "gender," "ethnicity," "marital status," and "political affiliation." As approved in 2007, section 2.3 of the *Code* now provides in relevant part:

> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
>
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
>
> (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.[62]

Section 2.3 has no state of mind requirement. This makes sense in the context of a judicial conduct code. Eliminating harassment and the expression of bias and prejudice in matters before the court should not depend on whether the biased or harassing conduct was knowing or only ill informed. The expression of bias and harassment can harm the courts even if a lawyer is well meaning but clueless.

There is little difference between the conduct that the 1990 *Code of Judicial Conduct* said a judge "shall require" of lawyers and the conduct that proposed amendments to the *Model Rules* in the ensuing decade would have required of lawyers. So why did the amendments fail? One possible explanation is the fact that a judicial conduct code provision is not a disciplinary rule. If the same prohibition were added to the *Model Rules*, the threat to lawyers would expand exponentially. If a lawyer exhibits biased or harassing conduct in court, the judge will tell her or him to cease and that would ordinarily be the end of it.[63] Not so for a rule in the *Model Rules*, where a violation can lead to discipline. It could also be that judges saw themselves as the primary constituency for the *Code of Judicial*

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61. *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 650 (2017). The first ABA code for judges was adopted in 1924. It was replaced by successor codes in 1972, 1990, and 2007. *Id.* at 649–52.

62. *Id.* at 667–68.

63. Of course, the judge could also choose to refer the lawyer for discipline, or might even impose a sanction herself. Whether the state disciplinary authority would pursue such a reference would turn in part on what the lawyer did and what anti-bias rule, if any, the state professional conduct code contained.

Conduct, were consequently more engaged in its development than they were in the *Model Rules*, and wanted an anti-bias provision in it while lawyers did not want one in the *Rules*. But these explanations are just conjectures. No exploration of the dichotomy appears in debates over the proposed *Model Rules* amendments. It is as though the two documents—the *Model Rules* and the *Code of Judicial Conduct*—had been spawned in parallel universes, hermetically sealed from each other.

IV. 2015–2016: THE ABA ETHICS COMMITTEE'S THREE DRAFTS AND REVISED RESOLUTION

The Ethics Committee released draft rules and comments in July 2015, December 2015, and April 2016. The December 2015 draft was the subject of a transcribed public hearing at the ABA's Midyear Meeting the following February. The April draft became the committee's May 2016 Formal Resolution to the House of Delegates for consideration at the forthcoming August Annual Meeting. It was then revised as the vote got closer so the House was eventually asked to vote on a document entitled Revised Resolution.[64] The drafting history is instructive. Issues that arose in debates within the ABA are likely to recur in the states.

The July 2015 draft said it was professional misconduct to "knowingly harass or discriminate against persons" based on a list of eleven attributes. (The list has not changed.)[65] It offered two alternatives to describe the nexus required between the conduct and the lawyer's work. The conduct must have occurred either while

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64. The Revised Resolution, all earlier drafts, accompanying reports, public comments, and the transcribed testimony in February 2016 can be found on the ABA's website. AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 8.4 (Nov. 29, 2016), http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html [http://perma.cc/7AUL-64JC].

65. Here is the text of the July draft and comment:

> It is professional misconduct for a lawyer to . . . (g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law.
>
> Comment [3]. Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.

MODEL RULES R. 8.4 Amendment (AM. BAR ASS'N, Discussion Draft, July 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/draft_07082015.authcheckdam.pdf [http://perma.cc/P66X-34EE].

the lawyer was "engaged in the practice of law" or while the lawyer was "engaged in conduct related to the practice of law." The former language could be read to limit the rule to a lawyer's words or conduct while representing a client—i.e., while practicing law. The latter language can encompass conduct unrelated to work for clients but related to law practice, most notably behavior within a law office.

Five months later, in the December 2015 draft, the word "knowingly" continued to modify "discriminate," but it no longer modified "harass." And the nexus option became "conduct related to the practice of law."[66]

The May 2016 Resolution reflected additional changes and was itself amended before submission of the Revised Resolution to the House. Changes between the May Resolution and the Revised Resolution are shown below. Additions are in italics, deletions are bracketed.

> It is professional misconduct for a lawyer to . . . (g) *engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination* [harass or discriminate] on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This [Rule] *paragraph* does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. *This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.*[67]

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66. The December 2015 draft rule and comment provide:

> It is professional misconduct for a lawyer to . . . (g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

> Comment [3]. Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

MODEL RULES R. 8.4 (AM. BAR ASS'N, Discussion Draft, Dec. 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf [https://perma.cc/ND5U-SZWZ].

67. *See* 2016 REVISED RESOLUTION, *supra* note 1. The comments were also amended. *Id*. Additions are italicized, deletions are bracketed:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others [because of their membership or perceived membership in one or more of the groups listed in paragraph (g)]. Harassment includes sexual

The most consequential change in the Revised Resolution is the addition of a state of mind requirement—i.e., "knows or reasonably should know" for both discrimination and harassment. The addition eliminated the possibility of a strict liability construction whereby a lawyer might be disciplined even though he did not know and could not reasonably know that his words or conduct constituted harassment or discrimination. Some other rules in the *Model Rules* have the same state of mind requirement.[68] Yet other rules require "knowledge" in fact.[69] And still other rules have no state of mind requirement at all, including most conflict rules.[70]

Many organizations, individuals, and ABA entities commented on the December 2015 draft.[71] Among them were the Standing Committee on Professional Discipline, the Section of Litigation, the Commission on Sexual Orientation and Gender Identity, the Commission on Disability Rights, the Section of

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harassment and derogatory or demeaning verbal or physical conduct [towards a person who is, or is perceived to be, a member of one of the groups]. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. [Paragraph (g) does not prohibit conduct undertaken to promote diversity.] *Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.*

[5] [Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.] *A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).* A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

68. *See, e.g.*, MODEL RULES R. 3.6(a) ("Trial Publicity"); MODEL RULES R. 4.3 ("Dealing with Unrepresented Person"); MODEL RULES R. 4.4(b) ("Respect for the Rights of Third Persons"). "Knowingly," "known," and "knows" are defined in MODEL RULES R. 1.0(f). "Reasonably should know" is defined in MODEL RULES R. 1.0(j).

69. *See, e.g.*, MODEL RULES R. 1.10(a) ("Imputation of Conflicts of Interest: General Rule"); MODEL RULES R. 1.13(b) ("Organization as Client"); MODEL RULES R. 3.3(a) ("Candor Toward the Tribunal); MODEL RULES R. 4.2 ("Communication with Persons Represented by Counsel").

70. *See, e.g.*, MODEL RULES R. 1.7 ("Conflict of Interest: Current Client"); MODEL RULES R. 1.9(a) ("Duties to a Former Client").

71. All comments are posted at Standing Comm. on Ethics and Prof'l Responsibility, Am. Bar Ass'n, *Comments to Model Rule of Prof'l Conduct 8.4*, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html [https://perma.cc/89AM-H7GB] (last visited Feb. 13, 2016).

Labor and Employment Law, the Commission on Women in the Profession, and the Business Law Section. In addition, and perhaps unexpectedly, 272 individuals submitted nearly identical brief comments, which implies a coordinated campaign. These comments all raised religious objections. Some comments supported a submission from the Christian Legal Society, where the dominant argument against the proposal cited the First Amendment and religious freedom.[72] In addition, fifty-two ABA members joined in a single memorandum containing detailed legal arguments opposing the December 2015 draft.[73] Another 136 individuals submitted statements agreeing with that memorandum. Sixty-three other comments offered a variety of reactions to the draft, nearly all in substantial opposition.

V. TEN ISSUES LIKELY TO ARISE IN DELIBERATIONS OVER AN ANTI-BIAS RULE

Here we come to ten policy issues that proponents of Rule 8.4(g) had to tackle and that will confront any state court weighing whether to adopt the new ABA rule (or how much of it to adopt).

A. PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

Should the rule be limited to conduct that is prejudicial to the administration of justice? Most states with either a rule or a comment now adopt this limit because former comment [3] to Rule 8.4 did so. I argued above that former comment [3] was redundant whatever the meaning of "prejudicial to the administration of justice." It is also inadequate if the term is limited to work lawyers do before tribunals.[74]

B. WHAT IS HARASSMENT?

Rule 8.4(g) prohibits both harassment and discrimination. Several comments argued that the term "harassment" failed to give fair notice of the forbidden conduct and might even be unconstitutionally vague.[75] The argument that a word

72. *See infra* text accompanying notes 119–22.
73. *See infra* notes 91–98.
74. *See supra* text accompanying notes 48–50 and *infra* text accompanying notes 88–90.
75. The Standing Committee on Discipline commented:

> The terms "harass" and "discriminate," absent further definition, are similarly vague, and, as urged in [our earlier] letter, should be defined for purposes of their use in what is intended to be an enforceable disciplinary rule. The Discipline Committee concluded that the failure to define what is meant by these terms for disciplinary purposes in proposed Model Rule 8.4(g) and its Comment does not serve lawyers, disciplinary counsel, respondents' counsel or the courts well.
>
> These terms cover a wide range of conduct, not all of which is unlawful, and the lack of clarity as to the scope of covered conduct risks misinterpretation and misapplication of the proposed Rule. The

is vague has to be evaluated in the context of the sentence in which the word appears.[76] Rule 8.4(g) forbids lawyers to "engage in conduct that the lawyer knows or reasonably should know is harassment . . . on the basis of" the listed attributes. A discipline committee would have to prove the particular conduct *and* that the conduct occurred because of the target's membership in the protected group. Still, the question remains: What conduct is harassing? The comment to Rule 8.4(g) is helpful. As relevant here, it says:

> Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person. Sexual harassment includes unwelcome

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> Discipline Committee queries whether the Ethics Committee intends the term "harass" to include what may be regarded as bullying or even persistent, annoying conduct by a lawyer? For example, would a lawyer's actions to collect a client's or the lawyer's debt against a socioeconomically disadvantaged person potentially subject the lawyer to discipline under the proposed Rule? Similarly vague is the term "discriminate."

Letter from Arnold R. Rosenfeld, Chair, Am. Bar Ass'n Standing Comm. on Prof'l Discipline, to Myles V. Lynk, Chair, Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, at 4 (Mar. 10, 2016) (citations omitted), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf [https://perma.cc/YC6M-QQNG]. Although this letter addresses the December 2015 draft, the word "harassment" appears in the rule as adopted. However, the comment now explains that "harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person." The answer to the question in the penultimate sentence of the Standing Committee's comment is that it would not constitute harassment. The lawyer is seeking to collect a debt owed her client from a debtor who may happen to have no or little income. She is not seeking to collect the debt because of the debtor's socioeconomic status any more than a lawyer who seeks to collect a debt from a single woman is harassing her because of her marital status or sex.

76. Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988) (citations omitted), rejected the argument that the phrase "prejudicial to the administration of justice" is unconstitutionally vague. The court wrote:

> The traditional test for vagueness in regulatory prohibitions is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." The particular context in which a regulation is promulgated therefore is all important. The regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession."
>
> Assuming for the argument that [the rule] might be considered vague in some hypothetical, peripheral application, this does not . . . warrant throwing the baby out with the bathwater. To invalidate the regulation in toto, as appellant would have us do, we would have to hold that it is impermissibly vague in all of its applications.

Id. at 208 (citations omitted). Especially noteworthy is that the court, in describing the "context" for the vagueness analysis, cited the identity of the persons to whom the rule was directed—lawyers, who "have the benefit" of access to legal authority. Similarly, the Texas Supreme Court held that a rule that prohibited comments to a former juror that "are calculated merely to harass" the juror was not unconstitutionally vague once the court

> [i]nterpret[ed] the word "calculated" in this context as meaning that a lawyer must not make a communication which an ordinary reasonable lawyer would foresee is likely to harass . . . an ordinary juror. This construction of "calculated" measures both the lawyer's speech and the juror's reaction by an objective reasonableness standard.

Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 439 (Tex. 1998).

> sexual advances, requests for sexual favor, and other unwelcome sexual advances. The substantive law of . . . anti-harassment statutes and case law may guide application of paragraph (g).[77]

Precise drafting could have fixed the boundaries of the comment's definition by substituting "is" for "includes." "Includes" makes the described conduct illustrative (what else is included?), not exclusive. The *Code of Judicial Conduct* uses "is" in part of the comment to Rule 2.3.[78]

The claim that "harassment" is unfairly vague, perhaps fatally so, ignores some powerful contrary arguments. First, the *Model Rules* have since 2002 prohibited a "communication" with jurors or prospective jurors after discharge of the jury if the communication "involves . . . duress or harassment."[79] Second, courts have sanctioned lawyers for conduct that would meet the definition of harassment under Rule 8.4(g) while relying on even more general language, language that offers even less notice of the forbidden conduct.[80] If notice is the goal, the proposed rule is a great improvement. Second, other provisions in the *Model Rules* use words far more imprecise than "harassment" as defined in the comment to Rule 8.4(g). Examples include "significant risk," "significantly harmful," "substantial likelihood," "embarrass[ing]," "substantial purpose," and

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77. MODEL RULES R. 8.4(g) cmt. 3.

78. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 3 (AM. BAR ASS'N 2010) [hereinafter MODEL JUDICIAL CODE].

79. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 257–59 (2003).

80. At a New York deposition, a male lawyer called the opposing female lawyer a "bitch," described her with anatomical references ("c___" and "a______"), and told her to "go home and have babies." *In re* Schiff, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993). The court imposed a public censure citing a New York rule (now N.Y. RULES R. 8.4(h)), *In re* Schiff, 599 N.Y.S.2d 242, 294 (Sup. Ct. 1993), that makes it misconduct for a lawyer to engage in "conduct that adversely reflects on the lawyer's fitness as a lawyer." N.Y. RULES R. 8.4(h). An edited version of the disciplinary committee's findings is reprinted in STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 533–36 (10th ed. 2015).

The "adversely reflects" rule offers much less guidance of the forbidden conduct than does Rule 8.4(g). It has been upheld against a constitutional challenge. In *In re Holley*, 729 N.Y.S.2d 128, 132 (App. Div. 2001), the respondent challenged the use of this standard to censure him for conduct that had not theretofore been a basis for discipline. The court rejected the challenge, citing the New York Court of Appeals' decision in *In re Holtzman*, 577 N.E.2d 30 (1991):

> [In *Holtzman*], the Court of Appeals, referring to the same disciplinary rule at issue herein, noted that "broad standards governing professional conduct are permissible and indeed often necessary" where it is almost impossible to enumerate every offense for which an attorney ought to be removed or disciplined. Thus, the Court in *Holtzman* found that "the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed". Contrary to respondent's assertion, this Court did not set a new standard of care. Rather, respondent's conduct violated the every-day, ordinary standard of care. Indeed, a reasonable attorney would have been on notice that revealing sensitive information about client matters to reporters could be held to reflect adversely on his or her fitness as a lawyer. The fact that this case is one of first impression does not mean that no discipline should be imposed.

Holley, 729 N.Y.S.2d at 132.

"reasonable possibility."[81] The words "reasonably" or "unreasonable" or variations of them appear dozens of times in the *Model Rules*.[82] Last, a rule is not struck simply because it is possible to conceive of situations where the language of the rule fails to give fair notice of its application. That test, as the Fifth Circuit wrote in rejecting a vagueness challenge to "prejudicial to the administration of justice," would throw "the baby out with the bath water."[83]

C. WHAT IS DISCRIMINATION?

Rule 8.4(g) makes it unethical to "engage in conduct that the lawyer knows or reasonably should know is . . . discrimination." The comment tells us that "[s]uch discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." Again the word "includes" appears in the comment's definition, so while a definition is welcome, the one offered here, like the one for "harassment," is open-ended. Does "discrimination" encompass other conduct? If so, what? Substituting "is" for "includes" could have eliminated that uncertainty. Uncertainty, of course, is what invites an argument that the rule does not give fair notice. Furthermore, if the comment's definition is intended to be exclusive, rather than illustrative, there is the curious decision not to put the definition in the rule itself and omit the word "discrimination."[84]

D. A MENS REA REQUIREMENT

The May 2016 Resolution had no mens rea requirement. The rule it contained, which might be read as an absolute liability rule, said that a lawyer may not "harass or discriminate" based on the listed attributes. The lack of a mens rea requirement would likely draw opposition. Discipline punishes. It has been called quasi-criminal.[85]

The Ethics Committee apparently decided that it could achieve its goals—and increase the chance of passage—by restoring a mens rea requirement to its proposal, and it did so in the Revised Resolution. Its Report explains that the requirement provides "a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination,

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81. See, respectively, MODEL RULES R. 1.7(a)(2) ("Conflicts of Interest: Current Clients"); MODEL RULES R. 1.18(c) ("Duties to Prospective Client"); *id.*; MODEL RULES R. 4.4(a) ("Respect for Rights of Third Persons"); *id.*; MODEL RULES R. 4.3 ("Dealing with Unrepresented Person").

82. *See, e.g.*, MODEL RULES R. 1.3 ("Diligence"); MODEL RULES R. 1.4(a)(2)–(3) ("Communication"); MODEL RULES R. 1.5(a) ("Fees"); MODEL RULES R. 1.13(b) ("Organization as Client"); MODEL RULES R. 3.3(a)(3) ("Candor Toward the Tribunal"); *see also infra* Part VII.

83. Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988).

84. Former comment [3] to Rule 8.4 uses the phrase "manifests . . . bias or prejudice," as does the *Model Code of Judicial Conduct*. 2016 REVISED RESOLUTION, *supra* note 1; MODEL JUDICIAL CODE R. 2.3(C). Carrying it into the text of Rule 8.4(g) would have been consistent.

85. *See In re* Ruffalo, 390 U.S. 544, 551 (1968).

as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination."[86] This seems right as a matter of policy and certainly as a way to garner support—or at least to avoid opposition. So the rule as submitted and passed requires that a lawyer "knows or reasonably should know" that her or his words or acts amount to discrimination or harassment.

The word "discrimination" presents a special problem because there is a body of law that forbids discrimination in employment and provides remedies, even if there is no intent to discriminate, when an employment practice has a discriminatory effect.[87] That is all well and good, but should well-intentioned criteria for hiring and promotion be a basis to discipline a lawyer because, as it happens, the criteria turn out to have a discriminatory effect? Even if civil liability is appropriate because someone or some group was harmed in fact, discipline seems wrong.

One might argue that in fact disciplinary counsel would not bring charges against a lawyer based on a discriminatory effect alone, absent an intent to discriminate. That may be true, but both the "reasonably should know" test in the rule itself and comment [3] to Rule 8.4(g) permit a contrary argument. The comment says that the "substantive law of antidiscrimination . . . statutes and case law may guide application of paragraph (g)." Lawyers on a management committee who adopt hiring, compensation, assignment, or promotion standards that they reasonably should know would have a discriminatory effect, but in fact did not know, could be said to have violated the rule.

If the "manifests bias or prejudice" language had been raised to the rule itself and the word "discrimination" deleted, what would have been lost? Nothing. A law partner who intentionally discriminated against an associate because she is, for example, Latina, would thereby "manifest bias" and be subject to discipline. If the rule is meant to reach intentional or knowing discrimination outside the employment context, "manifests bias or prejudice" also suffices. If, on the other hand, the goal is to include even unintentional discrimination as a basis for professional discipline whenever a lawyer should have known (but does not know and has not consciously avoided knowledge) that a facially neutral employment policy will have a discriminatory effect, it runs into the criticism that doing so misuses the disciplinary process and turns discipline committees into shadow antidiscrimination agencies.

Does the mens rea requirement for harassment add anything? Or does the word "harassment" necessarily imply one? Sometimes it does. It would not seem to make sense, as a practical (real world) matter, to say that Bill harassed opposing

86. 2016 REVISED RESOLUTION, *supra* note 1, at 8.

87. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (noting under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

lawyer Jill because of her sex when he called her a "bitch," but he did not and could not know it. Or to say that Jill manifested bias toward opposing lawyer Bill because of his sexual orientation when she called him a "fag," but she did not and could not know it. In each instance the proof would have to show that whatever Bill or Jill said was said "on the basis of" Jill's sex or Bill's sexual orientation. Proving that basis would seem to require proving the very state of mind—this is *why* Bill and Jill said what they said—that makes the harassment knowing. Adding "should have known" to the rule has the salutary effect of encouraging lawyers to learn what conduct is deemed harassing because ignorance will not be a defense.

E. THE SCOPE OF THE RULE

An anti-bias rule must describe the required nexus between the lawyer's conduct and his or her professional self. Former comment [3] to Rule 8.4 used the phrase "in the course of representing a client."[88] Because the comment was identifying behavior that would be prejudicial to the administration of justice, this limitation may appear superfluous. A lawyer in a position to act in a manner that is prejudicial to the administration of justice is almost certainly going to be representing a client. But not always. A lawyer appearing pro se may engage in the conduct the comment forbids, but he or she is not "representing a client" and would not, literally, run afoul of the rule. The same could be said for a lawyer who is a witness or a party in a matter. By contrast, the *Code of Judicial Conduct* instructs judges to require lawyers "in proceedings before the court to refrain from" certain conduct.[89] This language is broader than the language in former comment [3] because it will apply to lawyers acting pro se and to lawyers who are parties or witnesses.

Rule 8.4(g) has an even broader reach. It forbids certain conduct when "related to the practice of law." Not only would this language apply to client matters that are not before a tribunal, such as negotiation or counseling, it would also apply to a lawyer's words or conduct toward others in his or her law office and at professional meetings or on bar committees. It would cover a lawyer who made unwelcome sexual overtures to a subordinate lawyer or a legal assistant.[90]

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88. *Id.* at 2.

89. MODEL JUDICIAL CODE R. 2.3(C).

90. The Ethics Committee explained in its Report to the House that the scope of the rule was broader than conduct while representing a client:

> The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration [of] justice. Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The

F. MUST THERE BE PROOF OF HARM?

In one comment in opposition to the December 2015 draft of Rule 8.4(g), fifty-two ABA members cited two Indiana cases that disciplined lawyers and argued that

> the amendments contemplated here have resulted in nothing less than the creation of a pure speech code. After Indiana elevated Comment [3] into its Rule 8.4, two Indiana attorneys were professionally disciplined under the new Indiana Rule—one for "gratuitously" asking if someone was "gay" . . . and another for applying a racially derogatory term to himself in a private telephone communication between the offending attorney and another's secretary.[91]

By "pure speech code," the comment's authors seem to mean that no harm was done. Instead, in this view, the lawyers were disciplined simply for what they said. "In neither case," they wrote, "did the offending conduct occur within the context of a legal proceeding, and in neither case was the offending conduct shown to have had any prejudicial affect [sic] on the administration of justice. It was deemed sufficient that the attorneys had simply used certain offensive language."[92]

These are meant to be provocative examples. It is true that both events occurred outside the "administration of justice" if that term is understood to mean matters before a tribunal.[93] So if the two cases are cited for the proposition that biased or harassing comments should be allowed in all matters that are not before a tribunal, the comment needed to defend that claim, which it did not. Indeed, it would be a hard claim to defend. Why should identical biased words or conduct be forbidden in litigation but allowed in all other work lawyers do?

Alternatively, the cases may be cited for the proposition that what the lawyers said should not be subject to discipline, wherever it was said, because there was no proof that it caused harm. A full consideration of that claim requires a richer description of the two cases and consideration of what constitutes harm.

In *In re Kelley*,[94] the parties stipulated to these facts:

> ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.

2016 REVISED RESOLUTION, *supra* note 1, at 10 (footnote omitted).

91. Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, *Joint Comment Regarding Proposed Changes to ABA Model Rule of Professional Conduct 8.4*, at 7 (Am. B. Ass'n Working Draft), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf [perma.cc/J4Z9-3CUS] (last visited Mar. 10, 2017).

92. *Id.*

93. *See supra* text accompanying note 48.

94. 925 N.E.2d 1279, 1279 (Ind. 2010).

> In June 2008, Respondent began receiving on her unlisted phone number persistent pre-recorded messages from a company seeking a person by the name of Respondent's husband. Respondent and her husband agreed that Respondent would call the company at the toll-free number given in the messages. Accordingly, Respondent called the number and spoke to a male representative of the company, identifying her husband as her client. Noting what she thought was a feminine-sounding voice, Respondent gratuitously asked the company's representative if he was "gay" or "sweet." After the company representative commented on the unprofessional nature of this inquiry, the phone conversation ended abruptly.[95]

The parties agreed that the lawyer's conduct violated the Indiana rules. So we do not have reasoning from the court on that question. However, the claim that the lawyer was disciplined merely for "asking if someone was 'gay'" mischaracterizes the facts. The question was not asked in a neutral way, like asking where someone went to law school or if someone has children. Asking if someone is gay need not exhibit bias or constitute harassment and often will not. Context matters. Here, the respondent attorney was on the other side of a negotiation and the question was posed in response to the sound of a voice on the telephone. The question had nothing to do with the subject of the negotiation. It was not asked as part of the "small talk" that may accompany any professional work. Whether or not the question would affect the other party to the conversation, it could have had no other purpose than to attempt to bring that party's irrelevant (but presumed) sexual orientation into the negotiation for whatever strategic value the lawyer asking the question might have thought it could have. Would the fifty-two ABA members who cited these examples make the same argument if the question had been "are you Jewish?" or "are you a Muslim?" or "are you a spick?" The court's imposition of discipline reflects the view that simply asking such a legally irrelevant question in this context harms the rule of law.

Consider the second of the two cited cases. In *In re McCarthy*,[96] the court found the following facts, which the fifty-two ABA members omit:

> Respondent was an officer of a title company who gave legal advice to the company and represented it in legal disputes. The title company became involved in a dispute regarding a cloud on the title of property subject to a sale agreement. At some point, the agent representing the seller directed his secretary to send an email to Respondent demanding that he arrange a meeting of all involved in the dispute. In response, Respondent sent an email to the secretary stating:
>
> I know you must do your bosses [sic] bidding at his direction, but I am here to tell you that I am neither you [sic] or his nigger. You do not tell me what to

95. *Id.*
96. 938 N.E.2d 698, 698 (Ind. 2010).

> do. You ask. If you ever act like that again, it will be the last time I give any thought to your existence and your boss will have to talk to me. Do we understand each other?[97]

Characterizing these facts as nothing more than an example of a lawyer "applying a racially derogatory term to himself in a private telephone communication[98] between the offending attorney and another's secretary" seriously distorts the case. The conversation was not "private." It pertained to a legal dispute. The lawyer did not apply the word "nigger" to describe himself as an African-American. We do not know his race. He used the word to invoke the subordinate status of a racial group. For all he knew, he was communicating with a person who was herself a member of that group.

Although the comment's two cases were inadequately described, they are useful in addressing the question of harm. As the fifty-two ABA members argued, a claim that Rule 8.4(g) creates a pure speech code will rely on the absence of a requirement in the text of the rule that a lawyer's speech or conduct cause harm. The rule prohibits "harassment or discrimination." A target of either may just brush it off without even "psychic" harm. If biased or harassing words and conduct cause no harm to a particular target, are we not punishing the speaker simply because we are offended by his or her language? Can and should that suffice? The question whether it *can* suffice necessarily implicates the First Amendment, which I briefly address below.[99] Here I want to explore the policy question. *Should* we require proof of harm before biased or harassing words or conduct can lead to discipline? And what do we mean by "harm?"

Comment [3] to Rule 8.4(g) does use the word "harmful" in defining "discrimination." It tells us that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice toward others." Definitions for "harassment" and "sexual harassment," however, do not include the word "harmful." Harassment does include "derogatory or demeaning verbal or physical conduct," and "sexual harassment" includes "unwelcome sexual advances." Yet any such verbal or physical conduct or unwelcome advances may not cause harm if harm is measured only by the effect on those they target. The target may be unruffled. The need for proof of harm and what we mean by harm may be the thorniest of the policy issues that confront efforts to draft an anti-bias rule.

Cases have not required proof of an effect on the individual who is the target of biased or harassing conduct. Rather, they talk about the harm to the legal profession or the system or goals of justice. In *Mullaney v. Aude*, the court wrote:

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97. *Id.*
98. The communication was not on the telephone but in an email. *Id.*
99. *See infra* Part VII.

> Mr. Harris's behavior with respect to Ms. Aude and her counsel at the deposition was a crass attempt to gain an unfair advantage through the use of demeaning language, a blatant example of "sexual [deposition] tactics." With respect to the effect on the profession, we think Judge Waldron [in the lower court] stated it well when he said:
>
>> These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors.[100]

The court in *Principe v. Assay Partners* took the same position:

> The fundamental concern raised is that discriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession. The principles involved are so basic that they are set forth in the Preamble to the Code of Professional Responsibility as follows:
>
>> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual . . . . Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. . . .
>
> While the conduct here falls under the heading of sexist, the same principle applies to any professional discriminatory conduct involving any of the variations to which human beings are subject, whether it be religion, sexual orientation, physical condition, race, nationality or any other difference.[101]

There is good reason not to require proof that the words or conduct described in Rule 8.4(g) harmed a targeted lawyer. That requirement would turn the inquiry into a question about the fortitude (or lack thereof, the sensitivity) of the lawyer, which in turn will discourage reporting. No lawyers will relish cross-examination asking whether they were unable "to take it." Lay targets of that behavior may also be reluctant. But this does not mean that harmfulness should be read out of the rule. Rather, the question should be whether the words or comments harm the justice system because they create the impression that the rule of law can be distorted by name calling grounded in identity. Not all will. It is a matter of degree. Calling a female lawyer "sweetheart" once toward the end of a difficult daylong deposition, though inappropriate, poses less harm than referring to a female lawyer with an anatomical term or ridiculing the accent of an opposing

100. 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999).

101. 586 N.Y.S.2d 182, 185 (Sup. Ct. 1992); *see also* Cruz-Aponte v. Caribbean Petroleum Corp., 123 F. Supp. 3d 276, 280 (D.P.R. 2015) ("When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.").

minority lawyer. That is to say, some comments will be mild enough that they should not be seen as harmful. Correction can take the form of a gentle reminder. Harmfulness does remain a consideration for evaluating whether the rule was violated but it includes harm to the justice system, not necessarily personal harm to the target.

Take an admittedly extreme example but one that is useful as a mind game. At a bench trial, a lawyer refers to his opponent not by name but with a derogatory ethnic or gender term ("the Jap," "the Kike," "the bimbo"). The opponent truthfully says she doesn't like it but it does not at all affect her. The judge truthfully says it will not at all affect him. So neither the opposing client nor the lawyer will be harmed. But if tolerated the conduct will harm the public's confidence in and the reputation of the justice system. The first lawyer should not find a defense to an allegation of misconduct by citing the lack of harm to her opponent or the opponent's client.

Examples of words or conduct that may reveal a bias as some see it but which would not cause harm within the meaning of the rule are easy to imagine. Say a lawyer refers to Native Americans as "Indians," or refers to Asians as "Orientals," or uses the term "colored people" rather than "people of color," or does not tell an off-color joke because "there are ladies present," or holds the door open for a female lawyer and says "Ladies first." Do we want to discipline those lawyers? Of course not.

Although the parallel is not exact, the Supreme Court has paid the same attention to degree when a plaintiff brings a sexual harassment claim under Title VII. In *Faragher v. City of Boca Raton*, the Court wrote:

> [I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Most recently, we explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. A recurring point in these opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.[102]

102. 524 U.S. 775, 787–88 (1998) (citations and internal quotation marks omitted).

G. FOUR OTHER ISSUES

There seem to be at least two ways to draft a rule with the aim of maximizing support. First, strive not to make the rule broader than it needs to be to achieve its objective. Second, add explicit qualifiers that describe circumstances in which the rule will *not* apply. If we do the first task well, there should be no need for the second. On the other hand, no matter how precise we try to be, language has its limits. We may not be able to avoid some ambiguity at the margins. Garnering support may require offering stakeholders assurance that the language will not be interpreted to interfere with the discretion that other rules or the adversary system grants them. So it is that Rule 8.4(g) and its comments specifically describe conduct that their texts say the rule will not reach.

Peremptory challenge. Assume that a trial lawyer in picking a jury believes that women, or young women, or young unmarried women, are likely to be less sympathetic to his client than older married men. Perhaps he has hired a jury consultant who gave that advice, or perhaps he reached his conclusion after trying the case to a mock jury. Will he violate Rule 8.4(g) if he uses peremptory challenges to remove jurors in these categories? Will he thereby discriminate (or manifest bias) against one or more protected groups—defined by gender, age, marital status, or even all three?

Seeming further to complicate this issue, using peremptory challenges to remove jurors based on sex or race will violate the Equal Protection Clause.[103] If a lawyer's use of peremptory challenges against women or African-Americans is challenged and the court concludes that the lawyer has not offered a non-discriminatory reason for removing a woman or African-American, will that finding also establish a violation of Rule 8.4(g)? Comment [5] says that it does not "alone" do so, carrying over language from former comment [3]. A contrary rule could discourage lawyers from using peremptory challenges lest the judge conclude that their reasons were pretextual, a finding that could subject them to discipline. A contrary rule could also discourage judges from finding a *Batson* violation because they would know that a finding of pretext would also be a finding that counsel had violated a disciplinary rule.

Freedom to reject and to withdraw from a matter. Another issue that the Ethics Committee addressed is whether the proposed rule would limit the present right of a lawyer to decline to accept a matter or to withdraw from a matter. A lawyer today may reject a matter because, for example, she dislikes the particular client or because she finds his matter uninteresting or unprofitable. Perhaps she does not want to publicly associate herself with a controversial argument or with the client's side of it. A lawyer can today decline a matter for no reason she may wish to state. How will Rule 8.4(g) change that?

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103. Batson v. Kentucky, 476 U.S. 79, 89 (1986) (race); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (gender).

The caption to Rule 1.16 is "Declining or Terminating Representation," but nothing in its text addresses "declining" a representation, only termination.[104] The rule's first comment does address declining a representation, but it says only when lawyers must decline a representation, not when they may decline a matter or must accept one. This is most likely because there was seen to be no reason to say more. Absent court assignment,[105] Rule 1.16 purports to give lawyers the autonomy to turn away anyone they wish for any reason they wish.

Read by itself, Rule 8.4(g) would forbid declining to represent a client solely because of her membership in a protected group. An estates lawyer could not have a policy of refusing to probate the estate of a man because he is married to a man or refusing to prepare the estate plan of a woman because she is married to a woman. A lawyer who handled adoptions could not have a policy of refusing to assist a single person in adopting a child. A business lawyer could not refuse to represent Jewish or Muslim clients. And if these lawyers, after accepting a matter, first learned of the client's same-sex marriage, single status, or religion, they could not withdraw for that reason.[106]

We cannot read Rule 8.4(g) by itself because its text subordinates it to Rule 1.16 and so the threshold question is whether Rule 1.16 forbids discrimination in the choice of a client because he or she is a member of any of the groups Rule 8.4(g) protects. On this question, we have precious little authority.[107] I see no need to investigate it further here except to address the arguments of those who opposed Rule 8.4(g) as an infringement on religious liberty, which I do below.[108]

Legitimate advice or advocacy. Rule 8.4(g) says that "this paragraph does not preclude legitimate advice or advocacy consistent with these Rules." Would anyone have thought otherwise? If the advice or advocacy is indeed "legitimate,"

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104. *See* MODEL RULES R. 1.16.

105. MODEL RULES R. 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal . . . except for good cause.").

106. A decision to withdraw must also satisfy MODEL RULES R. 1.16, but a lawyer who objects to same-sex marriages and then discovers that the man who has retained him to prepare a prenuptial agreement intends to marry a man might cite MODEL RULES R. 1.16(b)(4), which permits a lawyer to withdraw from a matter when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." The lawyer may cite his religion to explain his objection.

107. On a lawyer's authority to reject a client based on the client's identity, see generally Samuel Stonefield, *Lawyer Discrimination Against Clients: Outright Rejection—No; Limitations on Issues and Arguments—Yes*, 20 W. NEW ENG. L. REV. 103 (1998). In *In re Hale*, 723 N.E.2d 206 (Ill. 1999) (mem.), the Supreme Court of Illinois refused to review a decision of its Character and Fitness Committee to deny Matthew Hale admission to the bar. The committee cited Hale's "open advocacy of racially obnoxious beliefs." *Id.* at 206 (Heiple, J., dissenting). It further found that the "'fundamental truths' of equality and nondiscrimination 'must be preferred over the values found in the First Amendment'" and that Hale was "'on a collision course with the Rules of Professional Conduct.'" *Id.* (Heiple, J., dissenting). Justice Heiple wrote that denial of Hale's application based on a prediction of his behavior if admitted to the bar warranted court review.

108. *See infra* Part VI. Even if Rule 1.16 overrides Rule 8.4(g), a jurisdiction's public accommodation law may forbid the same conduct. *See infra* text accompanying notes 111–17.

and is not foreclosed by another rule,[109] whether procedural or evidentiary, or a court order, nothing in the language of Rule 8.4(g) can be read to forbid it. The Litigation Section wished to leave nothing to doubt, perhaps because similar language was in former comment [3] and because of concern that its absence would be read to signal a change.[110]

Limiting a practice to members of underserved populations. Comment [5] to Rule 8.4(g) says the rule is not violated if a lawyer limits her "practice to members of underserved populations in accordance with these Rules and other law." That should not be controversial. But what if the underserved population happens predominantly to consist of members of one race or ethnicity or gender? Still that should not be a problem so long as the limitation is framed in terms of underrepresentation and not race or gender. A lawyer may open a storefront office in a part of town whose population is overwhelmingly Latino, and her clients may turn out to be solely Latino. But if her practice is not limited to Latino clients, if she does not turn away a resident of the community because he is not Latino, the rule is satisfied.

This brings us to the intriguing case of the matrimonial lawyer whose practice was limited to the representation of women. Judith Nathanson declined to represent a man, Joseph Stropnicky, in his matrimonial matter. Stropnicky complained to the Massachusetts Commission Against Discrimination. The Hearing Commissioner described the facts as follows:

> 1. Complainant, Joseph Stropnicky, is a white male residing in Beverly, Massachusetts . . . .
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> 3. During the summer of 1991, Complainant was in the process of executing a divorce settlement agreement with his wife of eighteen years. He testified that his role throughout his marriage was non-traditional. During the early years of his eighteen-year marriage, Complainant worked to support himself and his wife while she pursued a career in medicine. Once Complainant and his wife had children, he stayed home serving as homemaker and caregiver for seven years. After his second child's third birthday, he returned to school and acquired a teaching degree in biology. At the time of their divorce, Complainant was earning one-tenth of his wife's salary . . . .
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> 5. On or about July 21, 1991 Complainant phoned Respondent's office seeking to retain Attorney Nathanson to review his draft separation agreement. Nathanson's secretary informed him that Nathanson did not represent men in

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109. *See, e.g.*, MODEL RULES R. 3.4 ("Fairness to Opposing Party and Counsel").

110. *See* Letter from Steven Weiss, Chair, Litig. Section, to Myles Lynk, Chair, Ethics Comm. (June 20, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_section_of_litigation_comment.authcheckdam.pdf [http://perma.cc/7BPU-8VKB] ("[I]t is also critical that the Rule (and not just a Comment) make clear that 'legitimate advocacy' and 'zealous representation'—including in, but not limited to, jury selection—is not violative of the Rule."). The phrase "zealous representation" was not included, but the Litigation Section supported the Revised Revolution on the floor of the House.

> divorce proceedings. Complainant insisted on speaking with Nathanson and demanded that she return his call.
>
> 6. Nathanson returned Complainant's phone call and explained that she would not review Complainant's separation agreement because she only represented women in divorce proceedings. She maintained this position even after Complainant explained that the circumstances surrounding his divorce were those traditionally associated with women in divorce proceedings.[111]

Nathanson defended her "women only" policy:

> 10. Nathanson testified that she represented only women in divorce cases, in part, because she sought to devote her expertise to eliminating gender bias in the court system. She stated that the issues that arise in representing wives in divorce proceedings differ from those involved in representing husbands. By example, she noted that wives' attorneys emphasize the value of homemaker services and the limited future earning potential of homemakers re-entering the work force, while husbands' attorneys tend to minimize these issues.[112]

The Hearing Commissioner rejected her defense and fined her $5000.[113] The decision was affirmed by the full Commission.[114]

The tribunal in *Stropnicky v. Nathanson* was a state anti-discrimination agency. Nathanson's policy would also violate Rule 8.4(g). She will reject—and therefore discriminate against—prospective male clients because of their sex. Comment [5] might protect Nathanson if women in divorce are an "underserved" population. Are they? Many wives lack counsel as experienced and skillful as their wealthy husbands, but does that suffice? The comment does not map perfectly onto the client population Nathanson excludes. There will be men in the traditional female position, like Joseph Stropnicky. Nathanson's policy would fare well if she limited her practice to the less moneyed spouse. Nathanson might argue, however, that her policy comes close enough because in the overwhelming majority of divorce cases, men are in an economically superior position.

Nathanson did not herself claim that women are an "underserved" population in divorce. (Of course, Rule 8.4(g) and this language did not then exist.) She did say that the aim of her policy was to "eliminat[e] gender bias in the court system."[115] She offered the example of how lawyers for men and women differently weigh "the value of homemaker services."[116] The comment does not, however, protect that motive. Even if it did, representing Stropnicky would not impede it. Stropnicky was the "homemaker" in the family.

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111. Stropnicky v. Nathanson, 1997 Mass. Comm. Against Discrim. LEXIS 12, at *2–3 (1997).
112. *Id.* at *5.
113. *See id.* at *16–17.
114. *See* Stropnicky v. Nathanson, No. 91-BPA-0061, 1999 Mass. Comm. Discrim. LEXIS 33 (1999).
115. *Stropnicky*, 1997 Mass. Comm. Against Discrim. LEXIS 12, at *10.
116. *See id.*

It is difficult to identify a realistic situation where limiting a practice to a truly underserved population could violate Rule 8.4(g). Imagine a law office that represented only tenants in housing court, homeowners facing foreclosure, consumers battling collection agencies, and undocumented immigrants. Limiting a practice to any of these clients or groups would not run afoul of the anti-discrimination and anti-harassment language of Rule 8.4(g).

In any event, even if comment [5] would give a lawyer like Nathanson a defense to discipline, that argument will not be available if other law forbids the discriminatory treatment, as in Nathanson's case it did. An anti-discrimination commission would not be bound by the professional conduct rules for lawyers.[117]

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117. A lawyer in Nathanson's position could also argue that the commission, a legislative creation, could not make rules for the conduct of lawyers, who are governed by their state courts. This argument sometimes succeeds. *See, e.g.*, Preston v. Stoops, 285 S.W.3d 606, 609 (Ark. 2008) (stating that "any action by the General Assembly to control the practice of law would be a violation of the separation-of-powers doctrine"). In any event, the argument does not appear to have been made in Nathanson's case.

I have identified ten issues that may confront a court weighing whether to adopt Rule 8.4(g) and its comments. I could have added the prohibition of discrimination and harassment based on socioeconomic status. This prohibition is also present in some state anti-bias rules. *See, e.g.*, IND. RULES OF PROF'L CONDUCT R. 8.4(g). Rule 2.3(c) of the *Code of Judicial Conduct* says that judges must require lawyers to refrain from bias, prejudice, or harassment based on socioeconomic status. *See supra* text accompanying notes 61–62.

A comment to the Ethics Committee by Professor Eugene Volokh anticipated that inclusion of socioeconomic status could be read unwisely to forbid certain employment practices:

> [A] law firm should be free to prefer higher educated employees—both as lawyers and as staffers—over less-educated ones. Indeed, it should be free to choose employees who went to high "status" institutions, such as Ivy League schools. It should be free to contract with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.
>
> Likewise, when choosing a prospective partner, a lawyer should be able to prefer someone who is wealthier. Wealth might be a plausible (though imperfect) indicator of past professional success, and a predictor of whether the partner would have the resources to weather economic hard times (and to help the firm do the same). And firms might reasonably spend more effort courting wealthy prospective clients and less effort pursuing middle-class ones.

Comment Letter from Eugene Volokh, Professor of Law, UCLA Sch. of Law, to AM. BAR ASS'N Standing Comm. on Ethics & Prof'l Responsibility, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/volokh_3_1_2016.authcheckdam.pdf [http://perma.cc/YT5L-5TAN] (last visited Mar. 5, 2017). Hiring better educated lawyers or experts would certainly not violate the rule. Some misguided law firm might have a policy of favoring rich lawyers but it is doubtful that the policy would be discrimination within the meaning of the rule or be prosecuted as such unless the firm could be shown to be using wealth as a pretext to exclude a protected group. In any event, Professor Volokh saw no problem with socioeconomic status if confined to conduct prejudicial to the administration of justice. The Ethics Committee so envisioned it:

> Some commenters objected to retaining the term "socioeconomic status" in new paragraph (g). This term is included in the current provision and also is in the Model Judicial Code. The term has not been applied indiscriminately or irrationally in any jurisdiction which has adopted it. The Indiana disciplinary case *In re Campiti*, 937 N.E.2d 340 (2009) provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant's socioeconomic status: the litigant was receiving free legal services. [The Ethics Committee] concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

VI. THE RELIGIOUS OBJECTIONS

No one who objected to Rule 8.4(g) for religious reasons spoke at the House of Delegates before it adopted the Revised Resolution. No one speaking in support of the resolution responded to the written submissions that opposed the rule for religious reasons. Most of these submissions were brief and substantially the same, implying coordination. Some of the concerns in the few substantive memoranda opposing the rule, at least if unchanged, anticipated application of the rule in situations in which the rule would not apply and which do not appear to have emerged in any of the twenty-five jurisdictions that now have an anti-bias rule, although, as stated, Rule 8.4(g) is substantially broader than any current rule.[118]

The Christian Legal Society and the Office of General Counsel of the United States Conference of Catholic Bishops submitted the most thorough comments citing religious objections.[119] While generally opposing the Revised Resolution, they also offered specific suggestions for change. One suggestion was to make it clear that the duty imposed by the rule was subordinate to the First Amendment.[120] This is a curious request. We do not add subordinating language to other rules, like the advertising rule, where a defense to an accusation of violation might plausibly cite the First Amendment. Any lawyer charged with violating

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STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES *13 (2016).

118. The Conference of Catholic Bishops offered this hypothetical in support of language that would protect "Tom's" advice. However, nothing in the rule could possibly be construed to make Tom's advice a basis for discipline.

> Tom is in-house counsel to a private hospital. The hospital asks him whether, in hiring an orderly to serve female patients, it may lawfully consider the applicant's sex. Tom does not engage in professional misconduct when he correctly advises the hospital that there is case law, likely applicable in this case, allowing it to prefer a female applicant for female patients. Tom has a professional and ethical duty to fully and correctly advise his client.
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> U.S. Conference of Catholic Bishops Office of General Counsel, *Comments on Proposed Amendment to Model Rule 8.4*, at 5 (Mar. 10, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/moses_3_11_16.authcheckdam.pdf [http://perma.cc/8ZB6-BQ8U] [hereinafter U.S. Conference of Catholic Bishops Comments].

119. *Id.*; Christian Legal Soc'y, *Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3)* (Mar. 10, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf [https://perma.cc/XJ2N-HWL4].

120. The Christian Legal Society proposed this addition:

> Add to the proposed rule explicit protection for lawyers' right to freedom of speech, assembly, expressive association, and exercise of religion, by adding the following: "except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

Christian Legal Soc'y, *supra* note 119, at 14.

Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is unconstitutional. That is so whether or not the rule says, for example, "subject to the First Amendment."

The Christian Legal Society also requested the addition of the following language in comment [3]: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."[121] This sentence would permit lawyers to refuse to represent anyone within one of the protected groups on *any* matter by citing one of these "considerations," although the Society's particular concern appears to be the representation of gay men and lesbians.[122] The Society's intention, if not its language, may be even narrower, namely to permit lawyers to refuse a particular category of legal service to a particular population of clients within one of the protected groups. So a lawyer who would represent a gay man who wished to start a plumbing business could decline to represent him in an effort to adopt a child or enter a surrogacy contract.

The submission of the Conference of Catholic Bishops likewise questions the effect of the rule on a lawyer's freedom to decline to advocate for a particular goal:

> [N]o lawyer should be subject to a claim of professional misconduct because he or she declines to represent someone on a particular matter. This would include situations in which the lawyer has . . . a religious or moral objection to the client's objective. For example, individual prosecutors do not run afoul of the rules of professional responsibility if, for religious or moral reasons, they decline to represent the government in death penalty sentencing proceedings.[123]

Refusal to seek a death sentence for moral or religious reasons is allowed under Rule 8.4(g). That refusal is not based on the race, religion, sex, or any of the other attributes the rule identifies. The example, however, may be meant to show that we do tolerate religious or moral objections in other situations.

The Conference of Catholic Bishops then offers this more pertinent example:

> Sharon prepares prenuptial agreements. She declines, however, to provide such an agreement for her clients, Harry and Dennis, because she believes, on

121. *Id.* at 4.

122. For example, the Christian Legal Society's submission says:

> Legitimate differences of opinion exist in our country concerning issues of sexual conduct. Unsurprisingly, many attorneys' views regarding sexual conduct reflect their religious convictions. A lawyer should not be compelled to undertake a representation that would require her to advocate viewpoints or facilitate activities that violate her religious convictions. Neither should a lawyer be compelled to undertake a representation that she considers to be immoral, unethical, or contrary to the public interest.

Id. at 12.

123. U.S. Conference of Catholic Bishops Comments, *supra* note 118, at 6.

> moral and religious grounds, that marriage is the union of one man and one woman. Serving as counsel in such a matter, Sharon believes, would be an unacceptable form of moral cooperation. Her decision not to provide this particular service to Harry and Dennis does not constitute professional misconduct, and in fact Sharon may have a duty to decline given her personal conflict of interest.
>
> The proposed Model Rule should state that it is not professional misconduct to represent or decline to represent someone in a particular matter, or to take or decline to take a particular position in advocacy.[124]

Rule 8.4(g) would indeed restrict lawyers like Sharon. Whether lawyers who for religious reasons reject certain clients (or more likely certain work for certain clients) will have a First Amendment defense to discipline is a question outside the purview of this Article. But a photographer, a baker, a florist, and owners of a wedding venue have all lost their freedom of religion arguments when charged with discrimination for rejecting the custom of same-sex couples.[125] A county clerk lost her claim that she had a First Amendment right to refuse to issue marriage licenses to same-sex couples.[126] So the prospect of a successful First Amendment defense under the Free Exercise Clause for violating Rule 8.4(g) may be remote.[127]

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124. *Id*.

125. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (baker); Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013) (photographer); Gifford v. McCarthy, 23 N.Y.S.3d 422 (App. Div. 3d Dep't 2016) (wedding venue); State v. Arlene's Flowers, Inc., 389 P.3d 543 (2017) (florist).

126. *See* Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015). Sharon might have a stronger argument than the florist and the other businesses if Harry and Dennis wanted to retain her to represent them in adopting a child. Then her work might be said directly to facilitate an event that she may find morally or religiously repugnant. Sharon's work will all but achieve the adoption. (By contrast, Harry and Dennis do not need a prenuptial agreement in order to marry.) True, it is the court order that effectuates the adoption as a legal matter, but in a state whose laws permit it, that will often be pro forma.

Sharon may also cite Rule 1.16(b)(4). Although that rule does not mention religious belief as a basis to "withdraw from" a representation, it does say that a lawyer may withdraw if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." MODEL RULES R. 1.16(b)(4). That disagreement may spring from religious belief. Because the rule addresses withdrawal, we must read "action" to refer to tactics or strategy within a matter that the lawyer has already accepted. Yet we should also read the rule to recognize a lawyer's right to decline to accept a matter if she considers the client's objective repugnant. Rule 8.4(g) says that it does "not limit the ability of a lawyer to . . . decline . . . a representation in accordance with Rule 1.16." MODEL RULES R. 8.4(g). Declining is less disruptive for the client than withdrawing. So if the second is allowed, so should be the first. Sharon might say that she is not rejecting Harry and Dennis because of their sexual orientation—she would represent them in the purchase of a home—but because she considers same-sex marriage "repugnant." That claim would also allow Sharon to cite her "repugnan[ce]" to refuse to write a prenuptial agreement for two clients of different races or religions or to assist a single woman in adopting a child. A claim of repugnance does not even require a religious motive.

127. The federal Religious Freedom Restoration Act (RFRA) does not apply to the states, whose judiciaries will decide whether to adopt and how to apply Rule 8.4(g). *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997). Some states have their own RFRAs. *Elane Photography* held that the New Mexico RFRA did not apply to the facts before the court because by its terms the law only applied "to legal actions in which the government

We should also ask whether, as a matter of law or policy, a lawyer's religious objections are stronger because of the difference between attorney-client relationships and those between a wedding photographer, baker, florist, or owner of a wedding venue and their customers. A lawyer is a fiduciary. Important to the attorney-client relationship is the client's trust and the lawyer's professional devotion. Whether or not we think of the lawyer as a special purpose friend, as Charles Fried has suggested we do,[128] we recognize and may want to encourage some degree of intimacy between a lawyer and her client. So we might ask if it makes sense to require a lawyer, on pain of discipline, to represent a client when that level of trust and intimacy may not be possible because of the lawyer's religious opposition to the client's objective. What is gained? The answer would have to be that there is a supervening value in having a system of laws where no person can be denied representation by anyone licensed and competent to provide it, and who does provide it to others, because of the person's membership in one of the protected groups.

Of course, the lawyer has a remedy. If, for example, she does not want to represent a same-sex couple, an unmarried couple, or a single man (marital status being a protected category) wishing to adopt a child, she can exclude adoption from the legal services she offers. That decision would not violate Rule 8.4(g) even if her motive was to escape from a requirement that she represent single men or same-sex or unmarried couples who wish to adopt. This may be a big price to pay for one's faith, but it is available, just as the baker can avoid baking a custom cake for a same-sex wedding by declining to bake custom cakes for any wedding. A service provider is not discriminating against a particular customer or client in declining a service if he does not offer that service to anyone.

Furthermore, nothing in the rule would prevent a lawyer from telling prospective clients that he has a religious objection to adoption by same-sex, single, or unmarried couples, but will represent them if they wish because adoption is work he does and he is not allowed to discriminate against them based on their sexual orientation or marital status. That information may cause them to choose other counsel. Indeed, the lawyer can even offer to recommend other

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was a party." The case was an appeal of a decision from the New Mexico Human Rights Commission and the dispute was between two private parties. 309 P.3d at 76.

The federal RFRA prohibits the "[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden is the least restrictive means of advancing a compelling government interest. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014). If adopted, Rule 8.4(g) would be an obligation imposed by government and enforced by the state courts through discipline. In a state with a RFRA that copies the federal language, the question before the court would be whether the burden of complying with Rule 8.4(g) is "substantial" and, if so, whether the burden furthers a compelling government interest and is the least restrictive way to do so.

128. *See generally* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

lawyers who do not share his views.[129]

The daunting challenge that confronted the Conference of Catholic Bishops and the Christian Legal Society—acknowledged by neither—was the need to identify any limitation on a lawyer's decision to reject a client based on a covered attribute for religious (or moral or ethical) reasons. The examples above posit particular services for a same-sex couple, a single man, or an unmarried couple. But the wording of proposals from the religious objectors would also permit a lawyer to decline to represent interfaith or interracial couples, Jews, Muslims, immigrants from the Middle East, or atheists on any matter. It would allow male lawyers to refuse to represent women or single women. It will not work to question the bona fides of the lawyer who cites a religious or similar motive for declining this work. Do we really want to have a separate inquiry and a ruling on whether a lawyer is sincere?

VII. THE SPEECH CLAUSE IN BRIEF

The goal of this Article has been to identify the drafting and policy issues that will arise when an anti-bias and anti-harassment provision is proposed for a jurisdiction's rules governing its legal profession. There will be questions about the compatibility of any such provision, or its application in a particular matter, with the First Amendment's Speech Clause.

Preliminarily, we should recognize that even today the *Model Rules* contain provisions limiting speech. Rules 1.6(a) and 1.9(c) forbid lawyers from revealing confidential information about a client and former client.[130] Rule 3.4(e) limits what a lawyer may say or "allude to" at trial.[131] Rule 3.4(f) forbids lawyers from asking most witnesses not to cooperate with an adversary.[132] Rule 3.5 restricts the freedom of lawyers to "communicate with a juror or prospective juror after

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129. If the lawyer's religious opposition to the client's status or, more likely, the status coupled with the legal service the client requests, is strong, a question may be seen to arise under Rule 1.7(a)(2), as the hypothetical from the Conference of Catholic Bishops suggests by its reference to Sharon's "personal conflict of interest." Rule 1.7(a)(2) says there is a conflict if "there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer." MODEL RULES R. 1.7(a)(2). The textual issue then is whether a religious objection is a "personal interest." *Id.* Comment [10] to the rule gives as examples the lawyer's financial interests or "the probity of the lawyer's own conduct." MODEL RULES R. 1.7(a)(2) cmt. 10. But "personal interest" should also include the interest in not doing anything the lawyer's religion deems sinful. However, the rule requires that the lawyer's "personal interest" create a "significant risk" of "materially" limiting the representation. MODEL RULES R. 1.7(a)(2). Consider a lawyer whose practice includes drafting prenuptial agreements. It is unlikely that she could persuasively claim that a religious objection to same-sex marriage will interfere with her ability to draft a competent prenuptial agreement for a same-sex couple, a service she is competent to perform and may routinely perform for others. The same could be said if a same-sex couple asks a lawyer to represent them in the purchase of a home.

130. MODEL RULES R. 1.6(a), 1.9(c).

131. MODEL RULES R. 3.4(e).

132. MODEL RULES R. 3.4(f).

discharge of the jury."[133] Rule 3.6 limits what a lawyer associated with a matter before a tribunal may say to the media.[134] Rule 4.2 forbids certain communications with another lawyer's client.[135] Rule 4.4(a) forbids a lawyer, in "representing a client . . . [to] use means that have no substantial purpose other than to embarrass" a third person.[136] Rule 8.2(a) says lawyers may not knowingly or with reckless disregard make certain false statements about judges and judicial candidates.[137] Courts, using an objective standard of what a reasonable lawyer would or should know, have upheld Rule 8.2(a).[138] Each of these rules subordinates the right to speak in order to protect the fairness of and public confidence in the legal system, just as Rule 8.4(g) does. Rule 4.2 does so by preventing an opposing lawyer from taking advantage of another lawyer's client by questioning the client in her lawyer's absence. Rule 3.4(e) ensures that irrelevant but possibly inflammatory evidence is not introduced at trial.

Experience teaches us that the kind of biased or harassing speech that will attract the attention of disciplinary counsel will not enjoy First Amendment protection.[139] But a lawyer may claim that the rule is vague or overbroad and should be declared unconstitutional even if his or her own speech is not constitutionally protected. An overbreadth claim is likely to fail. The Supreme Court described why in *Virginia v. Hicks*:

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the "strong medicine" of overbreadth invalidation.[140]

133. MODEL RULES R. 3.5(c).

134. MODEL RULES R. 3.6. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court was unanimous in holding that rules prohibiting extra-judicial publicity do not necessarily violate the First Amendment, although the Justices divided on the appropriate First Amendment test for evaluating those rules and on whether the particular rule then before the Court was unconstitutionally vague.

135. MODEL RULES R. 4.2.

136. MODEL RULES R. 4.4(a).

137. MODEL RULES R. 8.2(a).

138. Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa 2008).

139. *Cf., e.g.*, Florida Bar v. Martocci, 791 So. 2d 1074, 1077 (Fla. 2001) (discipline imposed where "[t]he entire record is replete with evidence of Martocci's verbal assaults and sexist, racial, and ethnic insults").

140. Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (emphasis in original) (internal citations omitted).

So long as the rule is carefully drafted in a way that seeks to define only the conduct or speech that will and constitutionally can be the basis of discipline, it will survive.[141] But words are not numbers and mathematical exactitude is not possible, nor is it expected. "There are limitations in the English language with respect to being both specific and manageably brief, . . . [and statutes] will not be struck down as vague, even though marginal cases could be put where doubts arise."[142]

Courts have rejected claims of overbreadth in other professional conduct rules for lawyers. In *Commissioner for Lawyer Discipline v. Benton*,[143] a lawyer who wrote to jurors after they had delivered a verdict against his client was charged with violating this rule:

> After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[144]

Among other arguments, the lawyer claimed that the words "harass" and "embarrass" made the rule unconstitutionally overbroad.[145] The court rejected the claim:

> [A] statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is strong medicine and have employed it with hesitation, and then only as a last resort. Therefore, the Supreme Court has developed a requirement that the overbreadth must be substantial before the statute will be held unconstitutional on its face . . . . Only if the statute reaches a substantial amount of constitutionally protected conduct may it be struck down for overbreadth.[146]

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141. In *United States v. Wunsch*, 84 F.3d 1110, 1116 (9th Cir. 1996), a lawyer wrote a letter to a female prosecutor that the court said "impugns 'female lawyers' and reveals a patently sexist attitude." The court held, however, that the lawyer could not be sanctioned under a state law that required lawyers to "abstain from all offensive personality." *Id.* at 1119–20. The term "offensive personality" was unconstitutionally vague. *Id.* Rule 8.4(g) and its comments are substantially more specific.

142. Arnett v. Kennedy, 416 U.S. 134, 159 (1974) (quoting Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973)).

143. Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

144. *Id.* at 428–29.

145. *Id.* at 429.

146. *Id.* at 436 (internal quotes and citations omitted). *Benton* later cites *Howell v. State Bar of Texas*, 843 F.2d 205 (5th Cir. 1988), which rejected an overbreadth challenge to a rule that prohibited conduct "prejudicial to the administration of justice." The court wrote:

> Overbreadth is "'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' . . . ." "[A] law should not be invalidated for overbreadth unless it reaches a substantial

CONCLUSION

A series of propositions should make it clear that a rule like Rule 8.4(g) deserves adoption. I do not mean to say that it could not be improved. State bars and courts may change the text of any rule or comment in salutary ways. I am not urging national uniformity—a single set of rules in every jurisdiction. But I think Rule 8.4(g) goes most of the way and perhaps the entire way toward accomplishing its purpose.

I begin with a premise: No lawyer has a First Amendment right to demean another lawyer (or anyone else involved in the legal process). There is no First Amendment right, for example, to call a female opponent "a c__," or to mock another lawyer's accent, or to use a racial epithet in addressing an opposing party. Nor is there a constitutional right to refuse categorically to represent Mormons, or atheists, or racial minorities, or persons with disabilities. There is no constitutional right to sexually harass an employee or a client. Opponents of Rule 8.4(g) are free to advocate a contrary position, but I do not believe that any has gone so far.

If we accept this premise, several additional propositions necessarily follow. They are all about drafting.

First, we should have a rule that can be used to discipline a lawyer who behaves in these ways.

Second, the rule must be sufficiently specific to give notice of the forbidden behavior. A catalogue of all the things one cannot do or say is not, of course, possible and would go on for many pages even if it were possible. There should be a standard, but it should be as specific as language reasonably permits.

Third, efforts should be made to draft the rule so that it does not sweep within its orbit words or conduct that would enjoy First Amendment or other constitutional protections. I write "efforts should be made" because drafting is an art, not a science. It will always be possible to identify a situation that one might plausibly argue falls within the language of a rule but where the words or conduct are constitutionally protected. These situations tend to be rather extreme and it is highly unlikely that disciplinary counsel would pursue the lawyers described in them. But if one did—if one were to seek to discipline a lawyer who said "ladies first" when opening a door for a woman—that lawyer would win quick dismissal of the charges.

Fourth, so drafted, the rule should not be subject to challenge on grounds of overbreadth. A lawyer who is charged with, for example, telling an opponent that

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> number of impermissible applications . . . ." Put another way, a statute should not be invalidated where there are a "substantial number of situations to which it might be validly applied." Where, as here, Texas consistently has applied the doctrine of DR 1-102(A)(5) to attorneys in their functions as officers of the court and has recognized its obligation to make such application consistent with the demands of the Constitution, this Court should not void the regulation as facially overbroad.

Id. at 208 (citations omitted).

she should go back to the country she came from and have babies because depositions are not conducted under "girls' rules" will not be able to argue that although the rule could constitutionally forbid what he said, the rule is unconstitutional because it might be used to discipline lawyers whose words or conduct were constitutionally protected.

I think Rule 8.4(g) satisfies each of these drafting requirements, which is not to foreclose the possibility of improvement.

APPENDIX

Over the years, for my casebook and continuing legal education talks, I have tried to gather cases that address biased or harassing comments. In the following selection, the lawyers were all sanctioned or criticized for their conduct.

- Claypole v. Cty. of Monterey, No. 14-cv-02730-BLF, 2016 WL 145557, at *4 & n.37 (N.D. Cal. Jan. 12, 2016) ("At a contentious deposition, when Plaintiffs' counsel asked Bertling not to interrupt her, Bertling told her, '[D]on't raise your voice at me. It's not becoming of a woman . . . or an attorney who is acting professionally under the rules of professional responsibility'").

- In *Cruz-Aponte v. Caribbean Petroleum Corp.*, 123 F. Supp. 3d 276, 278 (D.P.R. 2015), Mr. Salas had the following exchange with Ms. Monserrate, the opposing lawyer, during a deposition:

  MR. NEVARES: The air conditioner works.

  MS. MONSERRATE: I don't know, but it's hot in here.

  MR. SALAS*: ¿Tienes calor todavía?* ["You're still warm?"] You're not getting menopause, I hope.

  MS. MONSERRATE: That's on the record.

  MR. SALAS: No, no, no, no.

  MS. MONSERRATE: You know that a lawyer here got in big trouble for a comment just like that.

  MR. SALAS: Really.

  - *Cruz-Aponte* cites *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.,* 2007 WL 4901555, at *2–7 (N.Y. Sup. Ct. 2007) (ordering referee supervision of future depositions after male attorney addressed female attorney as "dear," "hon," and a "sorry girl," said she had a "cute little thing going on," and asked why she was not wearing her wedding ring during deposition) (parenthetical by the *Cruz-Aponte* court).

- Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. N.Y. Co. 1992):

  As Beth Rex, Esq., was representing the fourth-party defendant in a deposition, Lawrence Clarke, Esq . . . . in front of numerous attor-

> neys, the witness, and the reporter, made a number of remarks . . . directed to his colleague . . . :
>
> "I don't have to talk to you, little lady";
>
> "Tell that little mouse over there to pipe down";
>
> "What do you know, young girl";
>
> "Be quiet, little girl";
>
> "Go away, little girl."
>
> Ms. Rex states these comments "were accompanied by disparaging gestures . . . dismissively flicking his fingers and waving a back hand at me." The transcript contains the remarks and an attorney for another party corroborates the description of the gestures. The affidavit in opposition justifies the comments as "name-calling".

- In *Florida Bar v. Martocci*, 791 So. 2d 1074, 1075–76 (Fla. 2001), the referee found that "after a hearing . . . upon exiting an elevator, Martocci told Ms. Figueroa that she was a 'stupid idiot' and that she should 'go back to Puerto Rico.'" "The record reflects that Martocci: (1) made insulting facial gestures to Ms. Berger and Ms. Figueroa; (2) called Ms. Figueroa a 'bush leaguer'; [and] (3) told Ms. Figueroa that depositions are not conducted under 'girl's rules' . . . ."

- *In re* Monaghan, 743 N.Y.S.2d 519, 520 (1st Dep't 2002) ("The respondent engaged in a continuing harangue of Ms. Perry [the African-American opposing lawyer] for her alleged mispronunciation of the words "establish" and "especially").

- In *Mullaney v. Aude*, 730 A.2d 759 (Md. 1999), the plaintiff (Aude), represented by Green, charged the defendant with the "negligent or intentional spreading of the herpes virus from a male defendant to a female plaintiff . . . ." *Id.* at 768. The following occurred at a deposition:

> As Ms. Aude was leaving the room to retrieve [a] document, Mr. Harris [opposing counsel] remarked that she was going to meet "[a]nother boyfriend" at the car. Ms. Green and Mr. Bernstein quickly told Mr. Harris that his comment was in poor taste and asked him to refrain from making further derogatory comments. The following ensued:
>
> MR. MULLANEY: It's going to be a fun trial.
>
> MR. HARRIS: It must have been in poor taste if Miss Green says it was in poor taste. It must have really been in poor taste.
>
> MS. GREEN: You got a problem with me?
>
> MR. HARRIS: No, I don't have any problem with you, babe.
>
> MS. GREEN: Babe? You called me babe? What generation are you from?

MR. HARRIS: At least I didn't call you a bimbo.

MR. LIPSITZ: Cut it out.

MS. GREEN: The committee will enjoy hearing about that.

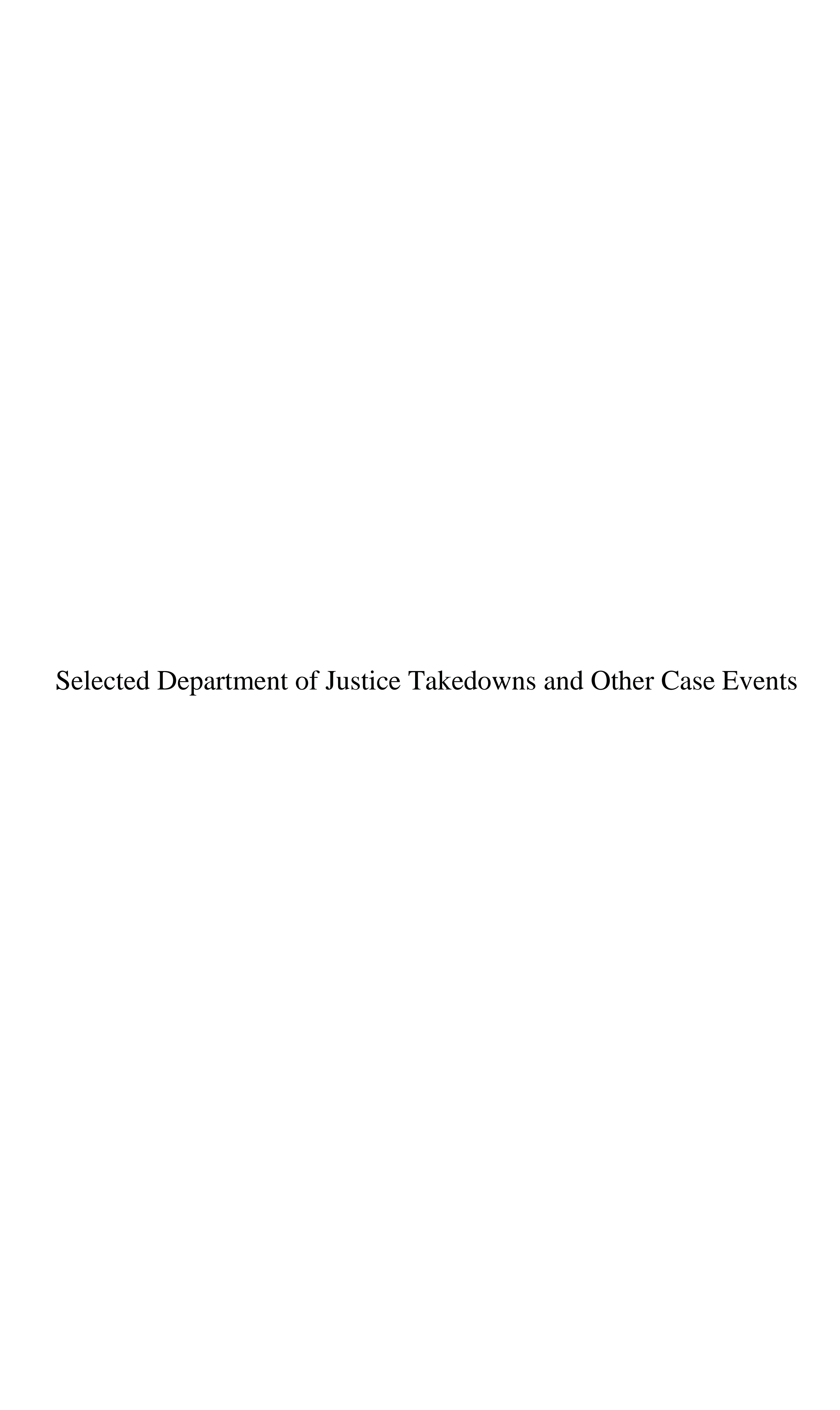
MR. BERNSTEIN: Alan, you ought to stay out of the gutter.

Id. at 761–62.

- At a New York deposition, a male lawyer called the opposing female lawyer a "bitch," described her with her with anatomical references ("c___" and "a______"), and told her to "go home and have babies." *In re* Schiff, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993). The court imposed a public censure. *In re* Schiff, 599 N.Y.S.2d 242 (1st Dep't 1993).

Areas of Interest and Focus in Healthcare Fraud for the U.S. Department of Justice

Speaker:
A. Brendan Stewart, Esq.



Selected Department of Justice Takedowns and Other Case Events

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, July 13, 2017

National Health Care Fraud Takedown Results in Charges Against Over 412 Individuals Responsible for $1.3 Billion in Fraud Losses

Largest Health Care Fraud Enforcement Action in Department of Justice History

Attorney General Jeff Sessions and Department of Health and Human Services (HHS) Secretary Tom Price, M.D., announced today the largest ever health care fraud enforcement action by the Medicare Fraud Strike Force, involving 412 charged defendants across 41 federal districts, including 115 doctors, nurses and other licensed medical professionals, for their alleged participation in health care fraud schemes involving approximately $1.3 billion in false billings. Of those charged, over 120 defendants, including doctors, were charged for their roles in prescribing and distributing opioids and other dangerous narcotics. Thirty state Medicaid Fraud Control Units also participated in today's arrests. In addition, HHS has initiated suspension actions against 295 providers, including doctors, nurses and pharmacists.

Attorney General Sessions and Secretary Price were joined in the announcement by Acting Assistant Attorney General Kenneth A. Blanco of the Justice Department's Criminal Division, Acting Director Andrew McCabe of the FBI, Acting Administrator Chuck Rosenberg of the Drug Enforcement Administration (DEA), Inspector General Daniel Levinson of the HHS Office of Inspector General (OIG), Chief Don Fort of IRS Criminal Investigation, Administrator Seema Verma of the Centers for Medicare and Medicaid Services (CMS), and Deputy Director Kelly P. Mayo of the Defense Criminal Investigative Service (DCIS).

Today's enforcement actions were led and coordinated by the Criminal Division, Fraud Section's Health Care Fraud Unit in conjunction with its Medicare Fraud Strike Force (MFSF) partners, a partnership between the Criminal Division, U.S. Attorney's Offices, the FBI and HHS-OIG. In addition, the operation includes the participation of the DEA, DCIS, and State Medicaid Fraud Control Units.

The charges announced today aggressively target schemes billing Medicare, Medicaid, and TRICARE (a health insurance program for members and veterans of the armed forces and their families) for medically unnecessary prescription drugs and compounded medications that often were never even purchased and/or distributed to beneficiaries. The charges also involve individuals contributing to the opioid epidemic, with a particular focus on medical professionals involved in the unlawful distribution of opioids and other prescription narcotics, a particular focus for the Department. According to the CDC, approximately 91 Americans die every day of an opioid related overdose.

"Too many trusted medical professionals like doctors, nurses, and pharmacists have chosen to violate their oaths and put greed ahead of their patients," said Attorney General Sessions. "Amazingly, some have made their practices into multimillion dollar criminal enterprises. They seem oblivious to the disastrous

consequences of their greed. Their actions not only enrich themselves often at the expense of taxpayers but also feed addictions and cause addictions to start. The consequences are real: emergency rooms, jail cells, futures lost, and graveyards. While today is a historic day, the Department's work is not finished. In fact, it is just beginning. We will continue to find, arrest, prosecute, convict, and incarcerate fraudsters and drug dealers wherever they are."

"Healthcare fraud is not only a criminal act that costs billions of taxpayer dollars - it is an affront to all Americans who rely on our national healthcare programs for access to critical healthcare services and a violation of trust," said Secretary Price. "The United States is home to the world's best medical professionals, but their ability to provide affordable, high-quality care to their patients is jeopardized every time a criminal commits healthcare fraud. That is why this Administration is committed to bringing these criminals to justice, as President Trump demonstrated in his 2017 budget request calling for a new $70 million investment in the Health Care Fraud and Abuse Control Program. The historic results of this year's national takedown represent significant progress toward protecting the integrity and sustainability of Medicare and Medicaid, which we will continue to build upon in the years to come."

According to court documents, the defendants allegedly participated in schemes to submit claims to Medicare, Medicaid and TRICARE for treatments that were medically unnecessary and often never provided. In many cases, patient recruiters, beneficiaries and other co-conspirators were allegedly paid cash kickbacks in return for supplying beneficiary information to providers, so that the providers could then submit fraudulent bills to Medicare for services that were medically unnecessary or never performed. The number of medical professionals charged is particularly significant, because virtually every health care fraud scheme requires a corrupt medical professional to be involved in order for Medicare or Medicaid to pay the fraudulent claims. Aggressively pursuing corrupt medical professionals not only has a deterrent effect on other medical professionals, but also ensures that their licenses can no longer be used to bilk the system.

"This week, thanks to the work of dedicated investigators and analysts, we arrested once-trusted doctors, pharmacists and other medical professionals who were corrupted by greed," said Acting Director McCabe. "The FBI is committed to working with our partners on the front lines of the fight against heath care fraud to stop those who steal from the government and deceive the American public."

"Health care fraud is a reprehensible crime. It not only represents a theft from taxpayers who fund these vital programs, but impacts the millions of Americans who rely on Medicare and Medicaid," said Inspector General Levinson. "In the worst fraud cases, greed overpowers care, putting patients' health at risk. OIG will continue to play a vital leadership role in the Medicare Fraud Strike Force to track down those who abuse important federal health care programs."

"Our enforcement actions underscore the commitment of the Defense Criminal Investigative Service and our partners to vigorously investigate fraud perpetrated against the DoD's TRICARE Program. We will continue to relentlessly investigate health care fraud, ensure the taxpayers' health care dollars are properly spent, and endeavor to guarantee our service members, military retirees, and their dependents receive the high standard of care they deserve," advised Deputy Director Mayo.

"Last year, an estimated 59,000 Americans died from a drug overdose, many linked to the misuse of prescription drugs. This is, quite simply, an epidemic," said Acting Administrator Rosenberg. "There is a great responsibility that goes along with handling controlled prescription drugs, and DEA and its partners remain absolutely committed to fighting the opioid epidemic using all the tools at our disposal."

"Every defendant in today's announcement shares one common trait - greed," said Chief Fort. "The desire for money and material items drove these individuals to perpetrate crimes against our healthcare system and prey upon many of the vulnerable in our society. Thanks to the financial expertise and diligence of IRS-CI special agents, who worked side-by-side with other federal, state and local law enforcement officers to

uncover these schemes, these criminals are off the street and will now face the consequences of their actions."

The Medicare Fraud Strike Force operations are part of a joint initiative between the Department of Justice and HHS to focus their efforts to prevent and deter fraud and enforce current anti-fraud laws around the country. The Medicare Fraud Strike Force operates in nine locations nationwide. Since its inception in March 2007, the Medicare Fraud Strike Force has charged over 3500 defendants who collectively have falsely billed the Medicare program for over $12.5 billion.

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For the Strike Force locations, in the Southern District of Florida, a total of 77 defendants were charged with offenses relating to their participation in various fraud schemes involving over $141 million in false billings for services including home health care, mental health services and pharmacy fraud. In one case, the owner and operator of a purported addiction treatment center and home for recovering addicts and one other individual were charged in a scheme involving the submission of over $58 million in fraudulent medical insurance claims for purported drug treatment services. The allegations include actively recruiting addicted patients to move to South Florida so that the co-conspirators could bill insurance companies for fraudulent treatment and testing, in return for which, the co-conspirators offered kickbacks to patients in the form of gift cards, free airline travel, trips to casinos and strip clubs, and drugs.

In the Eastern District of Michigan, 32 defendants face charges for their alleged roles in fraud, kickback, money laundering and drug diversion schemes involving approximately $218 million in false claims for services that were medically unnecessary or never rendered. In one case, nine defendants, including six physicians, were charged with prescribing medically unnecessary controlled substances, some of which were sold on the street, and billing Medicare for $164 million in facet joint injections, drug testing, and other procedures that were medically unnecessary and/or not provided.

In the Southern District of Texas, 26 individuals were charged in cases involving over $66 million in alleged fraud. Among these defendants are a physician and a clinic owner who were indicted on one count of conspiracy to distribute and dispense controlled substances and three substantive counts of distribution of controlled substances in connection with a purported pain management clinic that is alleged to have been the highest prescribing hydrocodone clinic in Houston, where approximately 60-70 people were seen daily, and were issued medically unnecessary prescriptions for hydrocodone in exchange for approximately $300 cash per visit.

In the Central District of California, 17 defendants were charged for their roles in schemes to defraud Medicare out of approximately $147 million. Two of these defendants were indicted for their alleged involvement in a $41.5 million scheme to defraud Medicare and a private insurer. This was purportedly done by submitting fraudulent claims, and receiving payments for, prescription drugs that were not filled by the pharmacy nor given to patients.

In the Northern District of Illinois, 15 individuals were charged in cases related to six different schemes concerning home health care services and physical therapy fraud, kickbacks, and mail and wire fraud. These schemes involved allegedly over $12.7 million in fraudulent billing. One case allegedly involved $7 million in fraudulent billing to Medicare for home health services that were not necessary nor rendered.

In the Middle District of Florida, 10 individuals were charged with participating in a variety of schemes involving almost $14 million in fraudulent billing. In one case, three defendants were charged in a $4 million scheme to defraud the TRICARE program. In that case, it is alleged that a defendant falsely represented himself to be a retired Lieutenant Commander of the United States Navy Submarine Service. It is alleged

that he did so in order to gain the trust and personal identifying information from TRICARE beneficiaries, many of whom were members and veterans of the armed forces, for use in the scheme.

In the Eastern District of New York, ten individuals were charged with participating in a variety of schemes including kickbacks, services not rendered, and money laundering involving over $151 million in fraudulent billings to Medicare and Medicaid. Approximately $100 million of those fraudulent billings were allegedly part of a scheme in which five health care professionals paid illegal kickbacks in exchange for patient referrals to their own clinics.

In the Southern Louisiana Strike Force, operating in the Middle and Eastern Districts of Louisiana as well as the Southern District of Mississippi, seven defendants were charged in connection with health care fraud, wire fraud, and kickback schemes involving more than $207 million in fraudulent billing. One case involved a pharmacist who was charged with submitting and causing the submission of $192 million in false and fraudulent claims to TRICARE and other health care benefit programs for dispensing compounded medications that were not medically necessary and often based on prescriptions induced by illegal kickback payments.

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In addition to the Strike Force locations, today's enforcement actions include cases and investigations brought by an additional 31 U.S. Attorney's Offices, including the execution of search warrants in investigations conducted by the Eastern District of California and the Northern District of Ohio.

In the Northern and Southern Districts of Alabama, three defendants were charged for their roles in two health care fraud schemes involving pharmacy fraud and drug diversion.

In the Eastern District of Arkansas, 24 defendants were charged for their roles in three drug diversion schemes that were all investigated by the DEA.

In the Northern and Southern Districts of California, four defendants, including a physician, were charged for their roles in a drug diversion scheme and a health care fraud scheme involving kickbacks.

In the District of Connecticut, three defendants were charged in two health care fraud schemes, including a scheme involving two physicians who fraudulently billed Medicaid for services that were not rendered and for the provision of oxycodone with knowledge that the prescriptions were not medically necessary.

In the Northern and Southern Districts of Georgia, three defendants were charged in two health care fraud schemes involving nearly $1.5 million in fraudulent billing.

In the Southern District of Illinois, five defendants were charged in five separate schemes to defraud the Medicaid program.

In the Northern and Southern Districts of Indiana, at least five defendants were charged in various health care fraud schemes related to the unlawful distribution and dispensing of controlled substances, kickbacks, and services not rendered.

In the Southern District of Iowa, five defendants were charged in two schemes involving the distribution of opioids.

In the Western District of Kentucky, 11 defendants were charged with defrauding the Medicaid program. In one case, four defendants, including three medical professionals, were charged with distributing controlled substances and fraudulently billing the Medicaid program.

In the District of Maine, an office manager was charged with embezzling funds from a medical office.

In the Eastern and Western Districts of Missouri, 16 defendants were charged in schemes involving over $16 million in claims, including 10 defendants charged as part of a scheme involving fraudulent lab testing.

In the District of Nebraska, a dentist was charged with defrauding the Medicaid program.

In the District of Nevada, two defendants, including a physician, were charged in a scheme involving false hospice claims.

In the Northern, Southern, and Western Districts of New York, five defendants, including two physicians and two pharmacists, were charged in schemes involving drug diversion and pharmacy fraud.

In the Southern District of Ohio, five defendants, including four physicians, were charged in connection with schemes involving $12 million in claims to the Medicaid program.

In the District of Puerto Rico, 13 defendants, including three physicians and two pharmacists, were charged in four schemes involving drug diversion, Medicaid fraud, and the theft of funds from a health care program.

In the Eastern District of Tennessee, three defendants were charged in a scheme involving fraudulent billings and the distribution of opioids.

In the Eastern, Northern, and Western Districts of Texas, nine defendants were charged in schemes involving over $42 million in fraudulent billing, including a scheme involving false claims for compounded medications.

In the District of Utah, a nurse practitioner was charged in connection with fraudulently obtaining a controlled substance, tampering with a consumer product, and infecting over seven individuals with Hepatitis C.

In the Eastern District of Virginia, a defendant was charged in connection with a scheme involving identify theft and fraudulent billings to the Medicaid program.

In addition, in the states of Arizona, Arkansas, California, Delaware, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New York, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington and Wisconsin, 96 defendants have been charged in criminal and civil actions with defrauding the Medicaid program out of over $31 million. These cases were investigated by each state's respective Medicaid Fraud Control Units. In addition, the Medicaid Fraud Control Units of the states of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, New York, North Carolina, Ohio, Texas, and Utah participated in the investigation of many of the federal cases discussed above.

The cases announced today are being prosecuted and investigated by U.S. Attorney's Offices nationwide, along with Medicare Fraud Strike Force teams from the Criminal Division's Fraud Section and from the U.S. Attorney's Offices of the Southern District of Florida, Eastern District of Michigan, Eastern District of New York, Southern District of Texas, Central District of California, Eastern District of Louisiana, Northern District of Texas, Northern District of Illinois and the Middle District of Florida; and agents from the FBI, HHS-OIG, Drug Enforcement Administration, DCIS and state Medicaid Fraud Control Units.

A complaint, information, or indictment is merely an allegation, and all defendants are presumed innocent unless and until proven guilty.

Additional documents related to this announcement will shortly be available here: https://www.justice.gov/opa/documents-and-resources-july-13-2017.

This operation also highlights the great work being done by the Department of Justice's Civil Division. In the past fiscal year, the Department of Justice, including the Civil Division, has collectively won or negotiated over $2.5 billion in judgements and settlements related to matters alleging health care fraud.

Topic(s):
Opioids
Health Care Fraud

Component(s):
Criminal Division
Office of the Attorney General

Press Release Number:
17-768

Updated December 11, 2017

2017 HEALTH CARE FRAUD TAKEDOWN: DAILY STAT BREAKDOWN

Participating Federal Judicial Districts

1. Alabama - Northern
2. Alabama - Southern
3. Arkansas - Eastern
4. California - Central*
5. California - Eastern
6. California - Northern
7. California - Southern
8. Connecticut
9. Florida - Middle*
10. Florida - Southern*
11. Georgia - Northern
12. Georgia - Southern
13. Illinois - Northern*
14. Illinois - Southern
15. Indiana - Northern
16. Indiana - Southern
17. Iowa - Southern
18. Kentucky - Western
19. Louisiana - Eastern*
20. Louisiana - Middle *
21. Maine
22. Michigan - Eastern*
23. Mississippi - Southern
24. Missouri - Eastern
25. Missouri - Western
26. Nebraska
27. Nevada
28. New York - Eastern*
29. New York - Northern
30. New York - Southern
31. New York - Western
32. Ohio - Northern
33. Ohio - Southern
34. Puerto Rico
35. Tennessee - Eastern
36. Texas - Eastern
37. Texas - Northern
38. Texas - Southern*
39. Texas - Western
40. Utah
41. Virginia - Eastern

**Strike Force Location*

Participating MFCUs

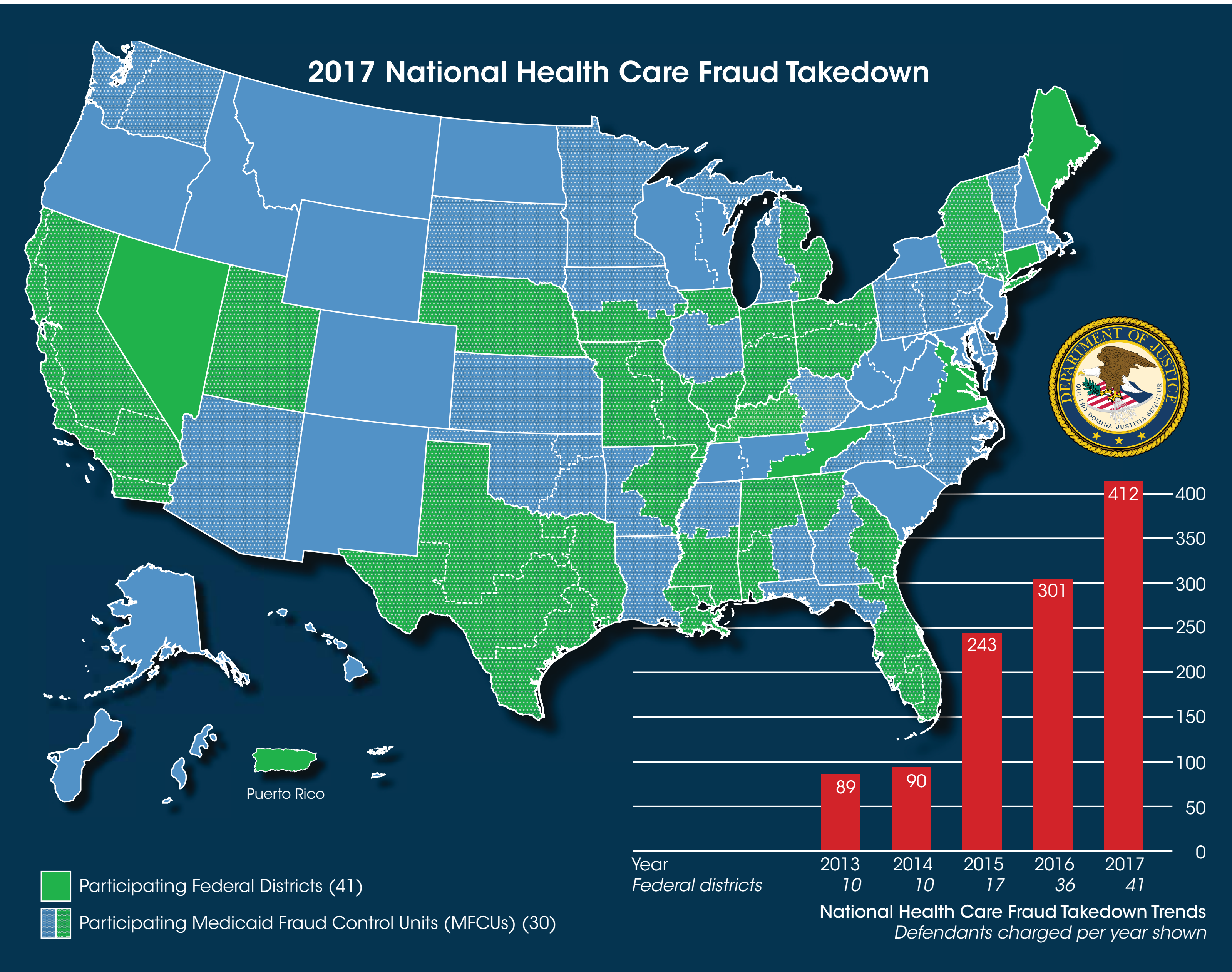
1. Alabama	1. Minnesota
2. Arizona	2. Mississippi
3. Arkansas	3. Missouri
4. California	4. Nebraska
5. Delaware	5. New York
6. Florida	6. North Carolina
7. Georgia	7. Ohio
8. Illinois	8. Oklahoma
9. Indiana	9. Pennsylvania
10. Iowa	10. Rhode Island
11. Louisiana	11. South Dakota
12. Kansas	12. Texas
13. Kentucky	13. Utah
14. Massachusetts	14. Vermont
15. Michigan	15. Washington

National Health Care Fraud Takedown Numbers

FY 2013 – FY 2017

Year	Defendants Charged	Number of Federal Districts Participating
2013	89	10
2014	90	10
2015	243	17
2016	301	36
2017	412	41

**Strike Force Location*



2017 National Health Care Fraud Takedown
Puerto Rico
Participating Federal Districts (41)
Participating Medicaid Fraud Control Units (MFCUs) (30)
DEPARTMENT OF JUSTICE
QUI PRO DOMINA JUSTITIA SEQUITUR
400
350
300
250
200
150
100
50
0
89
90
243
301
412
Year
Federal districts
2013
10
2014
10
2015
17
2016
36
2017
41
National Health Care Fraud Takedown Trends
Defendants charged per year shown

THE UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT of NEW YORK

Department of Justice

U.S. Attorney's Office

Eastern District of New York

FOR IMMEDIATE RELEASE Thursday, July 13, 2017

Three Doctors, A Chiropractor, Three Therapists And Medical Company Owners Arrested In Brooklyn As Part Of National Health Care Fraud Takedown

Alleged Fraudulent Billings in Brooklyn and Queens Exceed $125 Million

Ten individuals, including three doctors, a chiropractor, three licensed physical and occupational therapists and two medical company owners, have been charged for their alleged participation in multiple schemes that fraudulently billed the Medicare and Medicaid programs more than $125 million. The charges filed in federal court in Brooklyn, New York are part of a nationwide health care fraud takedown led by the Medicare Fraud Strike Force, which resulted in criminal charges against 412 individuals for their alleged participation in health care fraud schemes involving approximately $1.3 billion in fraudulent claims.

The Brooklyn and Queens cases were announced by Bridget M. Rohde, Acting United States Attorney for the Eastern District of New York, William F. Sweeney, Jr., Assistant Director-in-Charge, Federal Bureau of Investigation, New York Field Office (FBI), Special Agent in Charge Scott Lampert of the U.S. Department of Health and Human Services - Office of Inspector General (HHS-OIG), New York Regional Office, James D. Robnett, Special Agent-in-Charge, Internal Revenue Service-Criminal Investigation, New York (IRS-CI), and Medicaid Inspector General Dennis Rosen of New York State Office of Medicaid Inspector General (OMIG). The results of the nationwide takedown were announced today by Attorney General Jeff Sessions, Department of Health and Human Services (HHS) Secretary Tom Price, M.D., Acting Assistant Attorney General Kenneth A. Blanco of the Justice Department's Criminal Division, Acting FBI Director Andrew McCabe, Acting Drug Enforcement Administration (DEA) Administrator Chuck Rosenberg, Inspector General Daniel Levinson of the HHS Office of Inspector General (OIG), IRS-Criminal Investigations Chief Don Fort, Centers for Medicare and Medicaid Services Administrator Seema Verma, and Deputy Director Kelly P. Mayo of the Defense Criminal Investigative Service (DCIS).

"As alleged, the defendants charged in the Eastern District of New York as part of this national takedown took advantage of programs designed to provide essential healthcare for the elderly and the needy. Doctors, medical professionals and others who defraud Medicare and Medicaid and pay illegal kickbacks to line their pockets at the taxpayers' expense are on notice that they will be investigated and prosecuted," stated Acting United States Attorney Rohde. Ms. Rohde extended her grateful appreciation to the U.S. Office of Personnel Management, Office of Inspector General (OPM-OIG), U.S. Immigration and Customs Enforcement, Homeland Security Investigations (HSI), the Drug Enforcement Administration (DEA), the New York City Police Department (NYPD), the New York Attorney General's Medicaid Fraud Control Unit (MFCU), the New York City Human Resources Administration and the New York City Health and Hospitals Corporation, Office of Inspector General, for their assistance in the investigations in this district.

"Bhambhani's alleged acts of illegally paying for patient referrals and submitting a plethora of false million-dollar claims to Medicare and Medicaid were aimed towards selfish gain," FBI Assistant Director-in-Charge Sweeney Jr. stated. "Crimes of this nature not only stand to compromise government programs created to assist those in need, but also the confidence of those who put great trust in doctors and medical professionals. It goes without saying that to betray this trust is utterly unethical."

"Being a health care provider in the Medicare and Medicaid programs is a privilege, not a right. When fraudsters rip off scarce taxpayer funds meant to pay for legitimate health care services, they undermine these vital programs and affect the millions of Americans who rely on them," said Special Agent in Charge Lampert of HHS-OIG. "Our agency, working closely with our law enforcement partners, will continue root out fraudulent schemes and hold criminals accountable in order to protect the integrity of our nation's federally funded health care system."

"Healthcare Fraud is not a victimless crime," stated IRS-Criminal Investigation Special Agent-in-Charge Robnett. "We all pay when others swindle the United States overnment. With both law enforcement and financial investigation expertise, our agents are uniquely qualified to assist our law enforcement partners in these cases, by following the money when investigating these allegations."

"Individuals who commit Medicaid fraud prey on the most vulnerable New Yorkers, and the impacts - fewer health care resources and waste of taxpayer dollars - affect all of us," said OMIG Inspector General Rosen. "My office will continue to work closely with our partners at the federal and state level to root out fraud and hold wrongdoers fully accountable."

The schemes charged in the Eastern District of New York, detailed in four indictments and two criminal complaints, are as follows:

> Ghanshyam Bhambhani: A criminal complaint charges Ghanshyam Bhambhani, a Queens cardiologist, with violating the Anti-Kickback Statute by paying other physicians for patient referrals to his practice. A search warrant was also executed at his medical office in Ozone Park. According to the complaint, physicians who worked with the doctor covertly recorded him discussing paying for patient referrals. Bhambhani, along with other employees of his practice, submitted over $3.7 million in claims to Medicare Part B, and Bhambhani is listed

as the attending physician for over $7.4 million in claims submitted to Medicare Part A. This case is being prosecuted by Assistant United States Attorney Erin Argo and Senior Litigation Counsel Patricia Notopoulos of the U.S. Attorney's Office for the Eastern District of New York. Bhambani was arrested today and he is expected to be arraigned this afternoon before United States Magistrate Judge Robert Levy at the federal courthouse in Brooklyn, New York on July 13, 2017.

United States v. Wael Bakry, et al.: The indictment charges five health care professionals for their role in a wide-ranging health care fraud conspiracy in Brooklyn and Queens that billed the Medicare program approximately $100 million. The defendants—Wael Bakry, a physical therapist, Abraham Demoz, a physician, Victor Genkin, an occupational therapist, Mayura Kanekar, an occupational therapist, and Alexander Khavash, a chiropractor—were charged with conspiring to commit health care and wire fraud and with related tax charges. According to the indictment, the defendants paid illegal kickbacks for the referral of patients to their clinics who, in turn, subjected themselves to purported physical and occupational therapy and other services. This case is being prosecuted by Acting Assistant Chief A. Brendan Stewart and Trial Attorney Richard A. Powers of the Criminal Division's Fraud Section. Bakry, Demoz, and Kanekar were arrested and arraigned before States Magistrate Judge Vera M. Scanlon at the federal courthouse in Brooklyn, New York on July 10, 2017. The case has been assigned to States District Judge Pamela K. Chen.

Xiaoliang Zhang: A criminal complaint charges Xiaoliang Zhang, a licensed physician specializing in rehabilitation medicine, with health care fraud for submitting $27 million worth of claims to Medicare and Medicaid for physical therapy services even though such services were not medically necessary, often not provided, and otherwise did not qualify for reimbursement. Search warrants were executed by agents from the FBI and HHS-OIG at two of Zhang's medical clinic locations, which he operated under the name Elmhurst United Medical, P.C. As described in the complaint, Zhang ordered his physical therapists to bill Medicare and Medicaid for administering treatments to patients that were not rendered. This case is being prosecuted by Senior Litigation Counsel Patricia Notopoulos of the U.S. Attorney's Office for the Eastern District of New York. Zhang was arrested and arraigned before United States Magistrate Judge Robert M. Levy at the federal courthouse in Brooklyn, New York on July 12, 2017.

Svetlana Shargorodskaya: The indictment charges Svetlana Shargorodskaya, the owner of a medical diagnostic testing company, LUVR Diagnostic Services, with health care fraud, false claims, and conspiracy to receive and pay kickbacks. As set forth in the indictment, Shargorodskaya, through LUVR, submitted false claims to various health care benefit programs, including Medicare, and paid patients to receive medically unnecessary services. LUVR fraudulently billed Medicare and insurance companies for more than $13 million in diagnostic testing services. This case is being prosecuted by Trial Attorneys Debra Jaroslawicz and Richard A. Powers of the Criminal Division's Fraud Section. Shargorodskaya was

arrested and arraigned before United States Magistrate Judge Robert M. Levy at the federal courthouse in Brooklyn, New York on July 12, 2017. The case has been assigned to United States District Judge Margo K. Brodie.

Suzanna Meliksetyan: The indictment charges Suzanna Meliksetyan with conspiracy to commit health care fraud, health care fraud, and false statements relating to health care matters for her role in a scheme to defraud Healthfirst, a non-profit, New York-based health maintenance organization that administered Medicare Advantage plans and New York Medicaid Managed Care plans for participating members. As described in the indictment, Meliksetyan and others impersonated representatives of approved providers in order to get approval for the submission of fraudulent claims for durable medical equipment. In total, the scheme resulted in the submission of more than $12 million in fraudulent claims and the payment of more than $5 million for those claims. This case is being prosecuted by Trial Attorney Andrew Estes of the Criminal Division's Fraud Section. Meliksetyan was arrested and arraigned before United States Magistrate Judge Timothy J. Sullivan at the federal courthouse in Greenbelt, Maryland on July 11, 2017. The case has been assigned to United States District Judge Roslynn R. Mauskopf.

Vadim Alekseyev: The indictment charges Vadim Alekseyev, who owned and operated a number of shell companies in furtherance of a health care fraud and kickback scheme, with conspiracy to commit money laundering and conspiracy to obstruct the lawful functions of the Internal Revenue Service. As described in the indictment, Alekseyev and his co-conspirators filled multiple Brooklyn-area clinics, which purported to provide physical and occupational therapy to Medicare and Medicaid beneficiaries, with patients by paying bribes and kickbacks to beneficiaries and to Brooklyn-area ambulance drivers, who provided patients to be subjected to medically unnecessary treatment at the clinics. Through the clinics in which Alekseyev was involved, he and his co-conspirators submitted claims for over $40 million in purported therapy sessions in return for which Medicare and Medicare paid the clinics over $11 million. This case is being prosecuted by Trial Attorneys Sarah Wilson and Richard A. Powers of the Criminal Division's Fraud Section.

The charges in the indictments and complaints are merely allegations, and the defendants are presumed innocent unless and until proven guilty.

The Defendants:

Ghanshyam Bhambhani
Age: 52
Queens, NY

EDNY Docket No. 17-M-604

WAEL BAKRY

Age: 45
Staten Island, NY

Dr. Abraham Demoz
Age: 57
Oceanside, NY

Victor Genkin
Age: 48
Brooklyn, NY

Mayura Kanekar
Age: 42
Bayside, NY

Alexander Khavash
Age: 40
Parkland, FL

EDNY Docket No. 17-CR-353

XIAOLIANG ZHANG
Age: 53
Brooklyn, NY

EDNY Docket No. 17-M-618

Svetlana Shargorodskaya
Age: 47
Staten Island, NY

EDNY Docket No. 17-CR-358

Suzanna Meliksetyan
Age: 28
Montgomery Village, MD

EDNY Docket No. 17-CR-351

Vadim Alekseyev
Age: 33
Brooklyn, NY

EDNY Docket No. 17-CR-336

Topic(s):

Health Care Fraud
StopFraud

Component(s):
Federal Bureau of Investigation (FBI)
USAO - New York, Eastern

Contact:
John
Marzulli Tyler Daniels United States Attorney's Office (718) 254-6323

Updated July 13, 2017

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, June 22, 2016

National Health Care Fraud Takedown Results in Charges against 301 Individuals for Approximately $900 Million in False Billing

Most Defendants Charged and Largest Alleged Loss Amount in Strike Force History

Attorney General Loretta E. Lynch and Department of Health and Human Services (HHS) Secretary Sylvia Mathews Burwell announced today an unprecedented nationwide sweep led by the Medicare Fraud Strike Force in 36 federal districts, resulting in criminal and civil charges against 301 individuals, including 61 doctors, nurses and other licensed medical professionals, for their alleged participation in health care fraud schemes involving approximately $900 million in false billings. Twenty-three state Medicaid Fraud Control Units also participated in today's arrests. In addition, the HHS Centers for Medicare & Medicaid Services (CMS) is suspending payment to a number of providers using its suspension authority provided in the Affordable Care Act. This coordinated takedown is the largest in history, both in terms of the number of defendants charged and loss amount.

Attorney General Lynch and Secretary Burwell were joined in the announcement by Assistant Attorney General Leslie R. Caldwell of the Justice Department's Criminal Division, FBI Associate Deputy Director David Bowdich, Inspector General Daniel Levinson of the HHS Office of Inspector General (OIG), Acting Director Dermot O'Reilly of the Defense Criminal Investigative Service (DCIS), and Deputy Administrator and Director of CMS Center for Program Integrity Shantanu Agrawal M.D.

The defendants announced today are charged with various health care fraud-related crimes, including conspiracy to commit health care fraud, violations of the anti-kickback statutes, money laundering and aggravated identity theft. The charges are based on a variety of alleged fraud schemes involving various medical treatments and services, including home health care, psychotherapy, physical and occupational therapy, durable medical equipment (DME) and prescription drugs. More than 60 of the defendants arrested are charged with fraud related to the Medicare prescription drug benefit program known as Part D, which is the fastest-growing component of the Medicare program overall.

"As this takedown should make clear, health care fraud is not an abstract violation or benign offense – It is a serious crime," said Attorney General Lynch. "The wrongdoers that we pursue in these operations seek to use public funds for private enrichment. They target real people – many of them in need of significant medical care. They promise effective cures and therapies, but they provide none. Above all, they abuse basic bonds of trust – between doctor and patient; between pharmacist and doctor; between taxpayer and government – and pervert them to their own ends. The Department of Justice is determined to continue working to ensure that the American people know that their health care system works for them – and them alone."

“Millions of seniors depend on Medicare for essential health coverage, and our action shows that this administration remains committed to cracking down on individuals who try to defraud the program,” said Secretary Burwell. “We are continuing to put new tools and additional resources to work, including $350 million from the Affordable Care Act, for health care fraud prevention and enforcement efforts. Thanks to the hard work of the Medicare Fraud Strike Force, we are making progress in addressing and deterring fraud and delivering results to help ensure Medicare remains strong for years to come.”

According to court documents, the defendants allegedly participated in schemes to submit claims to Medicare and Medicaid for treatments that were medically unnecessary and often never provided. In many cases, patient recruiters, Medicare beneficiaries and other co-conspirators were allegedly paid cash kickbacks in return for supplying beneficiary information to providers, so that the providers could then submit fraudulent bills to Medicare for services that were medically unnecessary or never performed. Collectively, the doctors, nurses, licensed medical professionals, health care company owners and others charged are accused of submitting a total of approximately $900 million in fraudulent billing.

“The Medicare Fraud Strike Force is a model of 21st-Century data-driven law enforcement, and it has had a remarkable impact on health care fraud across the country,” said Assistant Attorney General Caldwell. “As the cases announced today demonstrate, the Strike Force’s strategic approach keeps us a step ahead of emerging fraud trends, including drug diversion, and fraud involving compounded medications and hospice care.”

“These criminals target the most vulnerable in our society by taking money away from the care of the elderly, children and disabled,” said Associate Deputy Director Bowdich. “The FBI is committed to working with our partners and the public to stop fraud and ensure that healthcare dollars are used to help the sick, and not line the pockets of criminals.”

“While it is impossible to accurately pinpoint the true cost of fraud in federal health care programs, fraud is a significant threat to the programs’ stability and endangers access to health care services for millions of Americans,” said Inspector General Levinson. “As members of the joint Strike Force, OIG will continue to play a vital role in tracking down these criminals and seeing that justice is done.”

“DCIS, in partnership with our fellow federal investigative agencies, will continue to uncompromisingly investigate and bring to justice the people who perpetrate these criminal acts,” said Acting Director O’Reilly. “Their actions threaten to cripple our vital national health care industry, and place our citizenry at risk. We will remain vigilant.”

“Taxpayers and Congress provided CMS with resources to adopt powerful monitoring systems that fight fraud, safeguard program dollars, and protect Medicare and Medicaid,” said Deputy Administrator and Center for Program Integrity Director Agrawal. “The diligent use of innovative data analytic systems has contributed or led directly to many of the law enforcement cases presented here today. CMS is committed to its collaboration with these agencies to keep federally-funded health care programs safe and strong for all Americans.”

The Medicare Fraud Strike Force operations are part of the Health Care Fraud Prevention & Enforcement Action Team (HEAT), a joint initiative announced in May 2009 between the Department of Justice and HHS to focus their efforts to prevent and deter fraud and enforce current anti-fraud laws around the country. The Medicare Fraud Strike Force operates in nine locations and since its inception in March 2007 has charged over 2,900 defendants who collectively have falsely billed the Medicare program for over $8.9 billion.

Including today’s enforcement actions, nearly 1,200 individuals have been charged in national takedown operations, which have involved more than $3.4 billion in fraudulent billings. Today’s announcement marks

the second time that districts outside of Strike Force locations participated in a national takedown, and they accounted for 82 defendants charged in this takedown.

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For the Strike Force locations, in the Southern District of Florida, a total of 100 defendants were charged with offenses relating to their participation in various fraud schemes involving approximately $220 million in false billings for home health care, mental health services and pharmacy fraud. In one case, nine defendants have been charged with operating six different Miami-area home health companies for the purpose of submitting false and fraudulent claims to Medicare, including for services that were not medically necessary and that were based on bribes and kickbacks. In total, Medicare paid the six companies over $24 million as a result of the scheme.

In the Southern District of Texas, 24 individuals were charged in cases involving over $146 million in alleged fraud. One of these defendants is a physician with the highest number of referrals for home health services in the Southern District of Texas. This physician has been charged with participating in separate schemes to bill Medicare for medically unnecessary home health services that were often not provided. Numerous companies that submitted claims to Medicare using the fraudulent home health referrals from the physician were paid over $38 million by Medicare.

In the Northern District of Texas, 11 people were charged in cases involving over $47 million in alleged fraud. In one scheme, a physician allowed unlicensed individuals to perform physician services and then billed Medicare as if he performed them. Additionally, the physician certified patients for home health care that was often medically unnecessary. Home health companies submitted approximately $23.3 million in billings to Medicare based on the physician's fraudulent certifications.

In the Central District of California, 22 defendants were charged for their roles in schemes to defraud Medicare of approximately $162 million. In one case, a doctor was charged with causing almost $12 million in losses to Medicare through his own fraudulent billing, including performing medically unnecessary vein ablation procedures on Medicare beneficiaries.

In the Eastern District of Michigan, 19 defendants face charges for their alleged roles in fraud, kickback, money laundering and drug distribution schemes involving approximately $114 million in false claims for services that were medically unnecessary or never rendered. Among these are owners of a physical therapy clinic who lured patients through the payment of cash kickbacks and medically unnecessary prescriptions for Schedule II medications for the purpose of stealing more than $36 million from Medicare.

In Tampa, Orlando and elsewhere in the Middle District of Florida, 15 individuals were charged with participating in a variety of schemes including compounding pharmacy fraud and intravenous prescription drug fraud involving $17 million in fraudulent billing. In one case, the owner of several infusion clinics allegedly defrauded the Medicare program of over $8 million through a scheme involving reimbursement claims for expensive intravenous prescription drugs that were never purchased and never administered to patients.

In the Northern District of Illinois, six individuals were charged in cases related to three different schemes involving bribery and false and fraudulent claims for home health services and disability benefits. The charged defendants include individuals who owned or co-owned the fraudulent providers and a medical doctor. In total, these schemes resulted in over $12 million being paid to the defendants and their companies.

In the Eastern District of New York, 10 individuals were charged in six different cases, including five individuals who were charged for their roles in a scheme involving over $86 million in physical and

occupational therapy claims to Medicare and Medicaid. In that case, the defendants are alleged to have filled a network of Brooklyn clinics that they controlled with patients by paying bribes and kickbacks. Once at the clinics, these patients were subjected to medically unnecessary therapy. The defendants then laundered the proceeds of the fraud through over a dozen shell companies.

In the Eastern District of Louisiana, three defendants were charged in connection with a health care fraud and wire fraud conspiracy involving a defunct home health care provider. This scheme centered on the payment of kickbacks through patient recruiters in exchange for patients who oftentimes never received nor qualified for home health care as billed. Once admitted, patient medical records were routinely fabricated and altered to support false and fraudulent claims to Medicare.

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In addition to the Strike Force, today's enforcement actions include cases brought by 26 U.S. Attorney's Offices, including the unsealing of search warrants in investigations being conducted by the Eastern District of North Carolina, Southern District of Georgia, District of Columbia, Eastern District of Texas, Southern District of West Virginia, Middle District of Louisiana, District of Minnesota, and the Northern District of Alabama.

In the Northern District of Georgia, nine defendants were charged for their roles in two health care fraud schemes involving $7 million in fraudulent billings. Eight defendants were charged in a scheme where bribes and kickbacks were allegedly paid to a state of Georgia official in exchange for falsifying applications and licensing requirements and recommending the approval of unqualified mental health providers.

In the Middle District of Alabama, two defendants were charged for their roles in a mental health services scheme allegedly involving $246,000 in fraudulent billings.

In the Middle District of Tennessee, a doctor was charged for his role in an illegal kickback scheme under which he allegedly referred patients to a certain DME supplier in exchange for cash kickbacks.

In the Western District of Kentucky, a business entity was charged for its role in a health care fraud scheme.

In the Southern District of Ohio, two defendants were charged for their roles in a $7.5 million home healthcare fraud scheme.

In the Western and Eastern Districts of Pennsylvania, three defendants were charged for their roles in drug diversion and embezzlement schemes.

In the Southern District of New York, a pharmacist was charged for his role in a scheme involving over $51 million in fraudulent Medicare and Medicaid billings.

In the Districts of Maine, Alaska, Kansas, Connecticut and Vermont, five defendants were charged for their roles in Medicaid-related schemes.

In the Eastern District of Missouri, four defendants, including a doctor and pharmacist, were charged for their roles in schemes involving over $3 million in billings.

In the Southern District of California, eight individuals were charged in health care-related cases. In one case, five individuals, including a doctor and a pharmacist, were charged in a scheme to pay bribes and kickbacks to doctors in exchange for prescribing expensive durable medical equipment and compound pain creams that were not medically necessary. The indictment alleges that approximately $27 million in false and fraudulent claims were submitted to insurers.

In the District of New Mexico, two defendants were charged for their roles in a Medicaid fraud scheme.

In the Northern District of Iowa, a settlement agreement was reached with a corporate entity for its role in a health care fraud scheme in a juvenile residential treatment facility.

In the District of Oregon, one defendant was charged for his role in a $1.7 million optometry services scheme.

In the District of Puerto Rico, civil demand letters were issued to six individuals for their roles in a scheme to defraud the Medicaid program.

In addition, in the states of Florida, Iowa, South Dakota, Indiana, New York, Michigan, Oklahoma, Rhode Island, Louisiana, Pennsylvania, New Hampshire, Oregon, Kentucky and Alaska, 49 defendants have been charged in criminal and civil actions with defrauding the Medicaid program and 57 sites were searched, pursuant to search warrants. These cases were investigated by each state's respective Medicaid Fraud Control Units.

The cases announced today are being prosecuted and investigated by U.S. Attorneys' Offices nationwide, along with Medicare Fraud Strike Force teams from the Criminal Division's Fraud Section and from the U.S. Attorney's Offices of the Southern District of Florida, Eastern District of Michigan, Eastern District of New York, Southern District of Texas, Central District of California, Eastern District of Louisiana, Northern District of Texas, Northern District of Illinois and the Middle District of Florida; and agents from the FBI, HHS-OIG, Drug Enforcement Administration, DCIS and state Medicaid Fraud Control Units.

A complaint or indictment is merely a charge, and all defendants are presumed innocent unless and until proven guilty.

The court documents for each case will posted online, as they become available, here: https://www.justice.gov/opa/documents-and-resources-june-22-2016-medicare-fraud-strike-force-press-conference.

The Affordable Care Act has provided new tools and resources to fight fraud in federal health care programs. The law provides an additional $350 million for health care fraud prevention and enforcement efforts, which has allowed the department to hire more prosecutors and the Strike Force to expand from two cities to nine. The act also toughens sentencing for criminal activity, enhances provider and supplier screenings and enrollment requirements and encourages increased sharing of data across government.

In addition to providing new tools and resources to fight fraud, the Affordable Care Act clarified that for sentencing purposes, the loss is determined by the amount billed to Medicare and increased the sentencing guidelines for the billed amounts, which has provided a strong deterrent effect due to increased prison time, particularly in the most egregious cases.

Since January 2009, the Justice Department's Civil Division, along with U.S. Attorney's Offices around the country, has recovered a total of more than $29.9 billion through False Claims Act cases, with more than $18.3 billion of that amount recovered in cases involving fraud against federal health care programs.

Attachment(s):
Download National Healthcare Fraud Takedown

Topic(s):
False Claims Act
Health Care Fraud
StopFraud

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Office of the Attorney General

Press Release Number:
16-725

Updated April 27, 2017

JUSTICE NEWS

Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing a National Healthcare Fraud Takedown

Washington, DC ~ Wednesday, June 22, 2016

Remarks as prepared for delivery

Good morning everyone and thank you all for being here. I am joined by several key leaders in our nation's efforts to address health care fraud: Department of Health and Human Services Secretary [Sylvia] Burwell; Assistant Attorney General for the Criminal Division [Leslie] Caldwell; United States Attorney [Wifredo] Ferrer of the Southern District of Florida; FBI Associate Deputy Director [David] Bowdich; HHS Deputy Inspector General for Investigations [Gary] Cantrell; DCIS Acting Director [Dermot] O'Reilly; and [Shantanu] Agrawal, Deputy Administrator and Director of the Center for Program Integrity at the Centers for Medicare and Medicaid Services.

We are here today to announce a significant step in the federal government's ongoing work to keep our nation's health care system free of fraud and exploitation and to ensure that taxpayer dollars are used lawfully and appropriately. Over the last three days, the Medicare Fraud Strike Force – a joint effort between the Department of Justice and the Department of Health and Human Services – executed a significant nationwide health care fraud takedown. This action involved charging or unveiling charges against approximately 300 defendants in 36 federal districts for their alleged participation in a variety of schemes involving more than $900 million in fraudulent billings, making this the largest takedown in the Strike Force's nine-year history.

The defendants named in these charges include doctors, nurses, pharmacists, physical therapists and home health care providers. They are accused of a wide range of serious crimes, from conspiring to commit health care fraud to making false statements and from bribery to money laundering. They submitted dishonest claims, charged excessive fees and prescribed unnecessary drugs. One group of defendants controlled a network of clinics in Brooklyn that they filled with patients through bribes and kickbacks. These patients then received medically unnecessary treatment, for which the clinic received over $38 million from Medicare and Medicaid – money that the conspirators subsequently laundered through more than 15 shell companies. In another case, a Detroit clinic billed Medicare for more than $36 million, even though it was actually a front for a narcotics diversion scheme. And yet another defendant took advantage of his position in a state agency in Georgia by accepting bribes and recommending the approval of unqualified health providers. These are just a few examples of the criminals that we targeted in this operation and although the specific nature of their wrongdoing varied from case to case, all of them betrayed the basic principles of their professions.

In addition to the usual patterns of fraud and deception that we've encountered in the past, we also saw new trends emerging in this year's charges. For instance, in a number of cases involving the Medicare prescription drug benefit program known as Part D, we saw new evidence of identity theft, including the use of stolen doctors' IDs to prepare fake prescriptions. We have also seen a growing number of cases involving compounded medications, which are combinations of two or more drugs prepared by a licensed

professional. In recent years, the cost of these drugs has grown exponentially, making them a more attractive target for criminals looking to exploit them for profit.

As this takedown should make clear, health care fraud is not an abstract violation or benign offense. It is a serious crime. The wrongdoers that we pursue in these operations seek to use public funds for private enrichment. They target real people – many of them in need of significant medical care. They promise effective cures and therapies, but they provide none. Above all, they abuse basic bonds of trust – between doctor and patient; between pharmacist and doctor; between taxpayer and government – and pervert them to their own ends. The Department of Justice is determined to continue working to ensure that the American people know that their health care system works for them – and them alone.

In tackling these challenges, the Medicare Fraud Strike Force relies on close cooperation between the federal, state and local, governments. Since 2014, the Justice Department's Criminal Division has organized an annual National Health Care Fraud Training Conference for Assistant U.S. Attorneys and state and federal law enforcement officers, which has substantially expanded the reach of our actions. More than 20 non-Strike Force U.S. Attorney's Offices participated in this year's takedown, helping us to combat health care fraud in a total of 30 federal districts nationwide, from Alaska to Florida. We were also assisted by approximately 20 state Medicaid Fraud Control Units, a reflection of the close partnership between state and federal authorities in combatting health care fraud – a partnership that we will continue to strengthen in the days ahead.

I want to thank my colleagues in the FBI, the Criminal Division and U.S. Attorneys' Offices for their ongoing efforts to combat health care fraud. I want to thank all of the state and local law enforcement officers across the country who participated in this complex and fast-moving takedown. And I look forward to continuing our work together in the days ahead.

At this time, I'd like to turn things over to Secretary Burwell, who has been a dedicated leader and indispensable partner in this critical work and who will provide additional details on today's announcement.

Speaker:
Attorney General Loretta E. Lynch

Topic(s):
Health Care Fraud

Component(s):
Office of the Attorney General

Updated September 29, 2016

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, September 15, 2017

Owner of Two New York Medical Clinics Sentenced to 84 Months for Her Role in $55 Million Health Care Fraud Scheme

The owner of two Brooklyn, New York, medical clinics was sentenced today to 84 months in prison for her role in a $55 million health care fraud scheme.

Acting Assistant Attorney General Kenneth A. Blanco of the Justice Department's Criminal Division, Acting U.S. Attorney Bridget M. Rohde of the Eastern District of New York, Special Agent in Charge Scott Lampert of the U.S. Department of Health and Human Services Office of Inspector General's (HHS OIG) Office of Investigations, Special Agent in Charge James D. Robnett of the IRS Criminal Investigation's (IRS-CI) New York Field Office and Inspector General Dennis Rosen of the New York State Office of the Medicaid Inspector General (OMIG) made the announcement.

Valentina Kovalienko, 47, of Brooklyn, and the owner of Prime Care on the Bay LLC and Bensonhurst Mega Medical Care P.C., was sentenced by U.S. District Judge Roslynn R. Mauskopf of the Eastern District of New York, who also ordered Kovalienko to forfeit $29,336,497. Kovalienko pleaded guilty in October 2015 to one count of conspiracy to commit health care fraud and one count of conspiracy to commit money laundering.

As part of her guilty plea, Kovalienko acknowledged that her co-conspirators paid cash kickbacks to patients to induce them to attend her two clinics. Kovalienko also admitted that she submitted false and fraudulent claims to Medicare and Medicaid for services that were induced by prohibited kickback payments to patients or that were unlawfully rendered by unlicensed staff. Kovalienko also wrote checks from the clinics' bank accounts to third-party companies, which purported to provide services to the clinics, but which in fact were not providing services, and the payments were instead used to generate the cash needed to pay the illegal kickbacks to patients, she admitted.

Twenty other individuals have pleaded guilty in connection with this case, including the former medical directors of Prime Care on the Bay LLC and Bensonhurst Mega Medical Care P.C., six physical and occupational therapists, three ambulette drivers, the owner of several of the sham companies used to launder the money and a former patient who received illegal kickbacks.

HHS-OIG, IRS-CI and OMIG investigated the case, which was brought as part of the Medicare Fraud Strike Force, under the supervision by the Criminal Division's Fraud Section and the U.S. Attorney's Office for the Eastern District of New York. Acting Assistant Chief A. Brendan Stewart of the Fraud Section and Assistant U.S. Attorney F. Turner Buford of the Eastern District of New York, formerly a Fraud Section trial attorney, are prosecuting the case.

The Criminal Division's Fraud Section leads the Medicare Fraud Strike Force. Since its inception in March 2007, the Medicare Fraud Strike Force, now operating in nine cities across the country, has charged nearly 3,500 defendants who have collectively billed the Medicare program for more than $12.5 billion. In addition, the HHS Centers for Medicare & Medicaid Services, working in conjunction with the HHS-OIG, are taking steps to increase accountability and decrease the presence of fraudulent providers.

To learn more about the Health Care Fraud Prevention and Enforcement Action Team (HEAT), go to: www.stopmedicarefraud.gov.

Component(s):
Criminal Division
USAO - New York, Eastern

Press Release Number:
17-1014

Updated September 15, 2017

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, November 12, 2013

Brooklyn Clinic Owner Sentenced for Role in $77 Million Medicare Fraud Scheme

The owner of a Brooklyn medical clinic was sentenced today to serve 15 years in prison for her leading role in a $77 million Medicare fraud scheme.

Acting Assistant Attorney General Mythili Raman of the Justice Department's Criminal Division, U.S. Attorney for the Eastern District of New York Loretta E. Lynch, Assistant Director in Charge George Venizelos of the FBI's New York Field Office, and Special Agent in Charge Thomas O'Donnell of the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) made the announcement.

Irina Shelikhova, 50, of Brooklyn, was sentenced by U.S. District Judge Nina Gershon of the Eastern District of New York. In addition to her prison term, Shelikhova was sentenced to serve three years of supervised release with a concurrent exclusion from Medicare, Medicaid and all Federal health programs, ordered to forfeit $36,241,545 and ordered to pay $50,943,386 in restitution. Shelikhova has been in custody since her arrest at the John F. Kennedy International Airport on June 15, 2012, after living as a fugitive in Ukraine for nearly two years. After serving her sentence, Shelikhova faces deportation from the United States.

Shelikhova pleaded guilty on Dec. 18, 2012, to one count of conspiracy to commit money laundering. Including Shelikhova, 13 individuals have been convicted in this case.

Court documents state that from 2005 to 2010, Shelikhova owned and operated a clinic in Brooklyn that billed Medicare under three corporate names: Bay Medical Care PC, SVS Wellcare Medical PLLC and SZS Medical Care PLLC (collectively, Bay Medical clinic). Shelikhova and her employees at the Bay Medical clinic paid cash kickbacks to Medicare beneficiaries and used the beneficiaries' names to bill Medicare for more than $77 million in services that were medically unnecessary or never provided. The defendants billed Medicare for a wide variety of fraudulent medical services and procedures, including physician office visits, physical therapy and diagnostic tests.

According to trial testimony, Shelikhova masterminded the health care fraud at the Bay Medical clinic, which included hiring a medically unlicensed co-defendant to impersonate the clinic's doctor and render medical care to patients. Shelikhova also directed employees to create phony medical notes in an attempt to back up the false billing and to forge doctors' names on prescriptions and charts.

The government's investigation included the use of a court-ordered audio/video recording device hidden in a room at the clinic, which showed conspirators paying cash kickbacks to corrupt Medicare beneficiaries. The conspirators were recorded paying approximately $500,000 in cash kickbacks during a period of

approximately six weeks from April to June 2010. This room was marked "PRIVATE" and featured a Soviet-era poster of a woman with a finger to her lips and the words "Don't Gossip" in Russian. The purpose of the kickbacks was to induce the beneficiaries to receive unnecessary medical services or to stay silent when services not provided to the patients were billed to Medicare.

To generate the large amounts of cash needed to pay the patients, Shelikhova directed the recruitment and operations of a network of external money launderers who cashed checks for the clinic. Shelikhova wrote clinic checks payable to various shell companies controlled by the money launderers. These checks did not represent payment for any legitimate service at or for the Bay Medical clinic, but rather were written to launder the clinic's fraudulently obtained health care proceeds. The money launderers cashed these checks and provided the cash back to the clinic. Shelikhova used the cash to pay illegal cash kickbacks to the Bay Medical clinic's purported patients.

The case was investigated by the FBI and HHS-OIG and was brought as part of the Medicare Fraud Strike Force, under the supervision of the Criminal Division's Fraud Section and the U.S. Attorney's Office for the Eastern District of New York. This case is being prosecuted by Trial Attorney Sarah M. Hall of the Fraud Section and Assistant U.S. Attorney Shannon Jones of the Eastern District of New York.

Since its inception in March 2007, the Medicare Fraud Strike Force, now operating in nine cities across the country, has charged more than 1,500 defendants who have collectively billed the Medicare program for more than $5 billion. In addition, HHS's Centers for Medicare & Medicaid Services, working in conjunction with HHS-OIG, is taking steps to increase accountability and decrease the presence of fraudulent providers.

To learn more about the Health Care Fraud Prevention and Enforcement Action Team (HEAT), go to: www.stopmedicarefraud.gov.

Component(s):
Criminal Division

Press Release Number:
13-1207

Updated September 15, 2014

Cybersecurity, HIPAA, Ransomware and New York's Cybersecurity Regulations

Speakers:
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Tim Howard, Esq.
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HEALTH LAW

Expert Analysis

Cybersecurity in the Health Care Sector

By **Francis J. Serbaroli**

As if it were not facing enough challenges, the health care industry is now becoming a more frequent target for hacking and ransomware by miscreants both domestic and foreign. Health care organizations have lagged behind other business sectors in protecting data, which is hard to understand given the extreme sensitivity of the data in their possession: personal and health information on individual patients; confidential information on internal quality assurance, risk management and utilization; results of clinical research on drugs, medical devices, and therapies; personal information on employees; sensitive internal financial information; confidential information on potential partnerships and deals with other organizations; and so on. Of even greater concern is the reality that hackers can interfere with web-connected medical equipment and devices and physically harm patients.

The Health Care Industry Cybersecurity Task Force, which was established by Congress in 2015, is comprised of representatives from both the government and private sector, and is charged with analyzing and making recommendations regarding securing and protecting the health care sector against cybersecurity incidents. S.754—114th Congress: Cybersecurity Information Sharing Act of 2015. The Task Force recently issued its "Report on Improving Cybersecurity in the Health Care Industry" (Report). The Report highlights the vulnerabilities to cyberattacks of organizations involved directly or indirectly in providing health care services and products, and makes recommendations to both the government and the industry to enhance awareness and improve protections.

Industry

The Report begins by describing the industry as a "mosaic" of large health care systems, physician practices, public and private payors (e.g., Medicare, Medicaid, private insurers and plans), research institutions, medical device developers and manufacturers, software companies, as well as a large and diverse population of patients. It observes that the continuing evolution of electronic health records and the health care industry's extensive connectivity to the Internet have led to major improvements in both the quality and timeliness of patient care. The Report notes that the downside to these advances is that they have resulted in an increased attack surface for health care providers, medical device companies, and many other parts of the health care industry. The Report emphasizes that securing health care data as well as securing the operation of medical devices is essential to protecting patients and providing them with the highest level of medical care.

> The Report makes recommendations to both the government and the industry to enhance awareness and improve protections.

Turning to the reality of cybersecurity and preparedness in the industry, the Report found that many health care organizations

> lack the infrastructure to identify and track threats, the capacity to analyze and translate the threat data they receive into actionable information, and the capability to act on that information. Many

FRANCIS J. SERBAROLI *is a shareholder in Greenberg Traurig and the former vice-chair of the New York State Public Health Council.*

organizations also have not crossed the digital divide in not having the technology resources and expertise to address current and emerging cybersecurity threats. These organizations may not know that they have experienced an attack until long after it has occurred.

As to regulatory oversight, the Report finds that multiple federal agencies play a role in establishing and policing how health care organizations secure the privacy of their health care information, which has the potential to create complications:

Some entities may be subject to regulation and oversight by multiple federal government entities, each with their own rules, which may be difficult to reconcile. Product and technology innovations for medical devices and health IT outpace the development and creation of regulations.

Then there is the cost of compliance:

While many regulations that apply to cybersecurity in health care are well-meaning and individually effective, taken together, they can impose a substantial legal and technical burden on health care organizations. These organizations must continually review and interpret multiple regulations, some of which are vague, redundant, or both. In addition, organizations must dedicate resources to implement policy directives that may not have a material impact on reducing risks.

Recommendations

The Report includes six "high-level" imperatives, for each of which the Task Force provides a number of recommendations.

Imperative 1: "Define and streamline leadership, governance, and expectations for health care industry cybersecurity." To bring this about the Task Force recommends:

- creating a cybersecurity leader role within the U.S. Department of Health and Human Services (HHS) to align industry efforts for health care cybersecurity;
- establishing a consistent, consensus-based Cybersecurity Framework that is health-care specific, and includes standards, guidelines, and best practices;

> The inherent vulnerabilities in the health care sector, together with the fact that health care will soon account for 20 percent of this country's gross domestic product, make it all the more attractive to cyberattackers, and virtually guarantee that the problem will only get more serious and more complicated.

- requiring federal regulatory agencies to harmonize existing and future laws and regulations that affect health care cybersecurity;
- identifying scalable best practices for governance of cybersecurity across the health care sector; and
- exploring potential changes to the Stark Anti-Referral Law (42 U.S.C. §1395nn), the Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)), and other fraud and abuse laws to allow large health care organizations to share cybersecurity resources and information with their partners (e.g., physician practices).

Imperative 2: "Increase the security and resilience of medical devices and health information technology." Specifically the Task Force recommends:

- securing legacy systems through compensating controls, device update, device retirement, network segmentation, etc.;
- improving manufacturing and development transparency among software developers and users;
- increasing the adoption and rigor of the secure development lifecycle (from concept generation through end of life recycling or disposal) in the development of medical devices and electronic health records;
- requiring strong authentication to improve identity and access management for health care workers, patients, medical devices and electronic health records;
- employing strategic and architectural approaches to reduce the attack surface for medical devices, electronic health records, and their interfaces; and
- establishing a Medical Computer Emergency Readiness Team to coordinate medical device-specific responses to cybersecurity incidents and vulnerability disclosures.

Imperative 3: "Develop the health care workforce capacity necessary to prioritize and ensure cybersecurity awareness and technical capabilities." To that end, the Task Force recommends:

- requiring every health care organization to identify the cybersecurity leadership role (e.g., chief information security officer) for driving more robust cybersecurity policies, processes and functions, with involvement of senior executives;
- establishing a model for adequately resourcing the cybersecurity workforce with qualified individuals, and determining an acceptable ratio of health care cybersecurity expertise to the size

of the organization, complexity of care, degree of interconnectedness with other organizations, etc.;
- creating managed security service providers (MSSP) models to support small and medium-sized health care providers so they can have state-of-the-art security monitoring, defensive and reporting capabilities; and
- evaluating options for small and medium-sized health care providers to migrate patient records and legacy systems to secure environments such as hosted, cloud, and shared computer environments.

Imperative 4: "Increase health care industry readiness through improved cybersecurity awareness and education." The Task Force believes this can be accomplished by:
- developing education programs targeting executives and boards of directors about the importance of cybersecurity education;
- ensuring existing and new products/systems' risks are managed in a secure and sustainable fashion through "cybersecurity hygiene" (i.e., an evaluation of each individual's security practices and precautions when conducting activities online);
- establishing an assessment model for evaluating a health care organization's conformity with cybersecurity hygiene that regulatory agencies and industry can rely upon;
- customizing the Baldridge Cybersecurity Excellence Builder, a cybersecurity self-assessment tool created by the National Institute of Standards and Technology, for use by health care organizations;
- increasing outreach and engagement for cybersecurity across all levels of government and the private sector through a cybersecurity education campaign involving both HHS and the Department of Homeland Security; and
- providing patients with information on how to manage their health care data to enable them to make educated decisions when selecting services or products from non-regulated entities (e.g., fitness trackers, devices and other consumer health care/lifestyle products).

Imperative 5: "Identify mechanisms to protect research and development efforts and intellectual property from attacks or exposure." The Task Force recommends:
- developing guidance for industry and academia on creating economic impact analysis and loss for cybersecurity risk for health care research and development; and
- pursuing research into protecting health care "big data" sets.

Imperative 6: "Improve information-sharing about industry threats, risks, and mitigations." The Task Force outlined the following steps to accomplish this:
- make information-sharing on threats and risks easier among small and medium-size health care organizations that rely on limited or part-time cybersecurity staff;
- create more effective mechanisms for disseminating and utilizing data about threats, vulnerabilities and incidents; and
- encourage cybersecurity annual readiness exercises by the health care industry to prevent uncoordinated and ineffective responses to cyberattacks.

Conclusion

The Task Force's Report is a wake-up call to every organization in the health care sector, large or small. Cyberattacks are increasing and becoming even more dangerous. The inherent vulnerabilities in the health care sector, together with the fact that health care will soon account for 20 percent of this country's gross domestic product, make it all the more attractive to cyberattackers, and virtually guarantee that the problem will only get more serious and more complicated.

Health care organizations that do not recognize these dangers or take effective steps to mitigate them are not only doing a disservice to their patients or customers, they are risking their reputations and subjecting themselves to costly notification processes and remediation expenses, as well as regulatory crackdowns, class action lawsuits, significant penalties and legal liabilities, and the potential separation from employment of the senior executives on whose watch the problem occurred. Placed in that context, expenditures on appropriate cybersecurity protections look like a wise investment.

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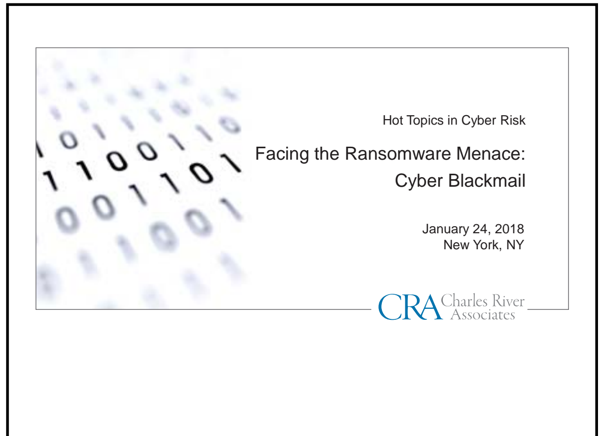

Hot Topics in Cyber Risk

Facing the Ransomware Menace: Cyber Blackmail

January 24, 2018
New York, NY

CRA Charles River Associates

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6 things to include in your **incident response plan**

When corporate data are moved to the cloud, key access logs and other forensic artifacts can get moved as well. Follow the tips below before an incident occurs to ensure that your incident response team can preserve access to these critical data stores.

ACTIVATE ACCESS LOGS AND TRACKING
Ask your cloud provider to activate access logs and other tracking mechanisms. Confirm that the logs are being retained for the time period that matters to you.

NEGOTIATE A RESPONSE AGREEMENT
Memorialize a service level agreement with your cloud provider that includes breach incident response. This should include a process, a price, and an agreed-upon response time.

HOLD "CYBER FIRE DRILLS"
Periodically test your incident response plan to ensure that it continues to function as expected and as needed.

VALIDATE SCALABILITY
You may have a plan in place to search a single mailbox or a single day's worth of activity. However, can you quickly and effectively search for evidence of intrusion across all employees over a multiple-month time frame?

CONFIRM EVERYTHING
Does your cloud provider have the desired security? Insurance coverage? Cyber disaster recovery protocols in place? Confirm all of these things periodically.

FIND AN INDEPENDENT EXPERT
Retain an experienced incident response team via outside counsel to reasonably establish and preserve attorney-client privilege. This is vital since it is likely that the findings and conclusions will be of significant interest to third parties who will have interests adverse to your own.

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What will you do when your company is asked to **pay a ransom?**

What conversations need to occur now – at your company and with your board – and how will you weight the relevant legal, ethical, practical, and public policy considerations?

If I pay the ransom, will it increase the likelihood of being targeted again?

If we make ransom payments to potential terrorists, **what criminal exposure could it create for our organization?**

What is our regulator's perspective on these issues?

Does management need board approval before paying a ransom?

What will we do if compromised individuals need to be notified, but law enforcement asks us to defer such notification while they investigate?

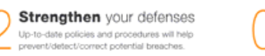
Could a ransom payment be considered a **violation of the Foreign Corrupt Practices Act?**

CRA Charles River Associates

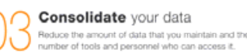
Reduce the risk and cost **of a data breach**

A well thought out strategy can dramatically reduce the likelihood and severity of a data incident. Follow the tips below to help reduce your risks.

Engage the board
This critical step will improve risk oversight and help demonstrate fiduciary obligations were fulfilled.



Strengthen your defenses
Up-to-date policies and procedures will help prevent/detect/correct potential breaches.



Consolidate your data
Reduce the amount of data that you maintain and the number of tools and personnel who can access it.

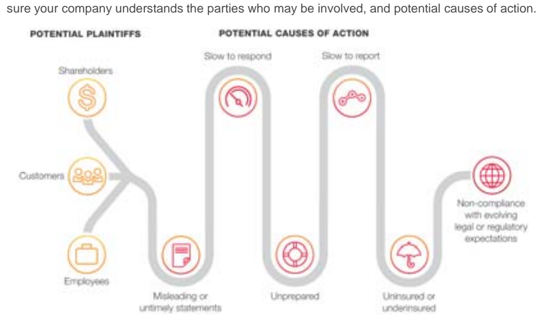
Understand your attackers
Will their motivation be ransom-as-a-service? Trade secrets and other confidential information? Sabotage?

Limit data access
Keep your customer data on secure, encrypted company networks that are accessible only by authenticated users.

Purchase insurance
Contingent business interruption insurance covers your losses when your cloud provider experiences an interruption to its business operations.

Be prepared for **class action litigation**

Companies that experience a data breach face a very real risk of class action litigation. Make sure your company understands the parties who may be involved, and potential causes of action.



CRA Charles River Associates

What cyber damages **can you recover?**

Because cyber damages can be challenging to quantify, companies risk making business, legal, and disclosure decisions based on incomplete estimates of the comprehensive economic impact of a cyber incident.

"BASIC" DAMAGES
Often captured in a company's books and records in the normal course of operations.

Investigation
Remediation
Notification
Credit monitoring
Litigation
Recovery
Asset replacement
Penalties and fines

CRA Charles River Associates

Maximize your cyber **insurance coverage**

Will your company's insurance adequately mitigate the economic impact of a cyber incident? The time to perform a coverage assessment is now – and periodically thereafter.

Cyber policies

Cyber policies typically cover a range of expenses incurred in a data breach, including:

- Notification costs
- Credit monitoring
- Fines
- Penalties
- Costs to defend regulatory claims
- Business interruption

Non-cyber policies

You don't necessarily need a policy with the word "cyber" in it. If your company has one of the policies below, you may already have some level of coverage in the event of a cyber incident.

Kidnap and ransom insurance
Some policies cover situations where computers and systems have been "constructively kidnapped" by ransomware.

Property insurance
Policies written on an "all-risk" basis may cover physical damage caused by malware.

Fidelity (or "crime") insurance
May cover situations of employee-caused theft or sabotage.

Directors and officers (D&O) policy
Covers board members if named as defendants in a cyber-related derivatives action.

Professional liability/errors and omissions policies
Some policies can cover losses resulting from when an employee makes a mistake resulting in cyber-related damage (e.g., spread of malware).

General liability
Some policies may indemnify and provide a defense against a wide variety of claims, including claims alleging violation of privacy rights and some policies may afford coverage for theft of consumer data, misuse of customer information, copyright infringement, and other types of unfair competition.

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Regulatory expectations **after a data breach**

The U.S. Securities and Exchange Commission has outlined the following guidance for registrants who experience a ransomware and/or cybercrime incident:

Financial impact
If your company has a material breach, the financial impact must be disclosed in a timely manner. In addition, the costs of investigating and responding need to be accrued in a timely manner unless immaterial.

Portfolio impact
If your company is part of a portfolio, remember: the reporting obligations outlined here may flow up to the parent company's financial statements.

Mergers impact
If a target company is acquired through the purchase or sale of securities, and if a material cyber incident occurred pre-close and was not disclosed to the purchaser, then the SEC may consider this to be securities fraud.

Preparedness
If your company does not have adequate processes in place to prevent, detect, or correct a breach in a timely manner, that may need to be disclosed.

Other regulators and governmental entities have also communicated various expectations, and in some cases the penalties for non-compliance are severe, including potential criminal exposure.

CRA Charles River Associates

To continue the conversation

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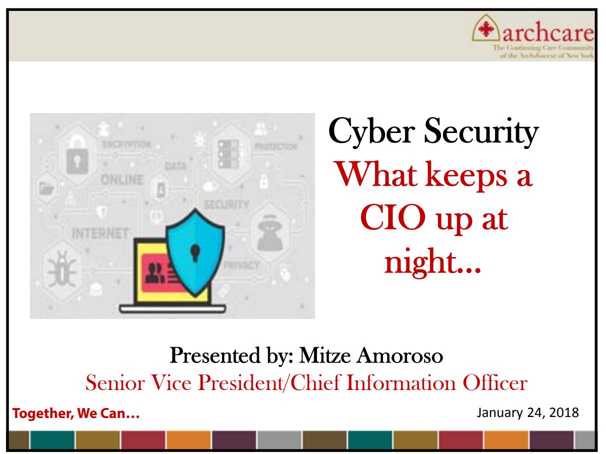
CRA Charles River Associates


archcare
The Continuing Care Community of the Archdiocese of New York
Cyber Security
What keeps a CIO up at night…
Presented by: Mitze Amoroso
Senior Vice President/Chief Information Officer
Together, We Can…
January 24, 2018

INFORMATION TECHNOLOGY
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Security Vision
Ensure the confidentiality, integrity and the availability of information, assets and resources
Together, We Can…

INFORMATION TECHNOLOGY
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Threats
in Healthcare
Ransomware
Ransomware is a type of malicious software from cryptovirology that threatens to publish the victim's data or perpetually block access to it unless a ransom is paid. Wikipedia
Phishing
Phishing is the attempt to obtain sensitive information such as usernames, passwords, and credit card details, often for malicious reasons, by disguising as a trustworthy entity in an electronic communication. Wikipedia
Medical Devices
Tele-medicine devices
Virus/ Malware
computer virus is a type of malicious software program ("malware") that, when executed, replicates itself by modifying other computer programs and inserting its own code. Infected computer programs can include, as well, data files, or the "boot" sector of the hard drive. Computer virus - Wikipedia
Third Party
Consultants, vendors who have access to your data
Users
Employees, users
Together, We Can…

INFORMATION TECHNOLOGY
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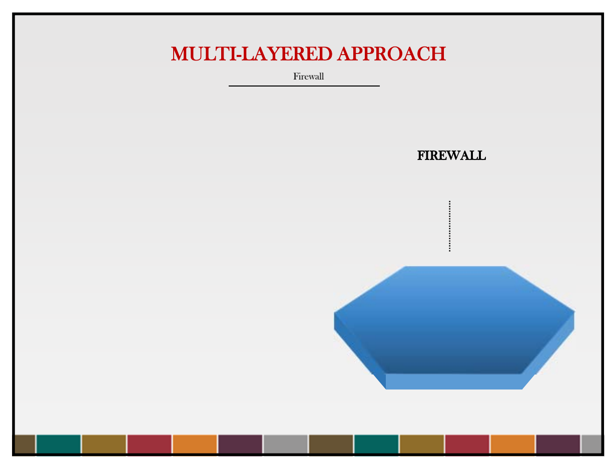
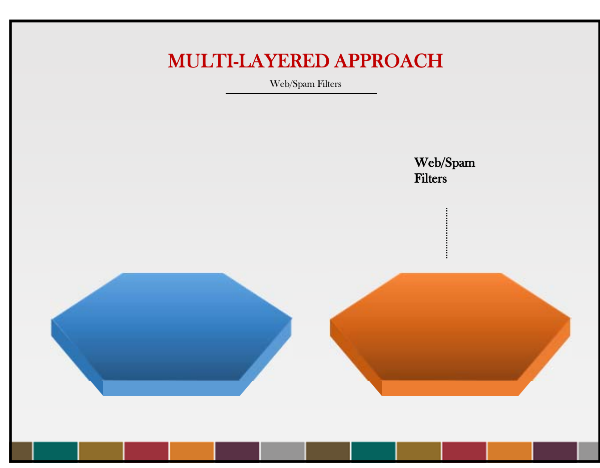
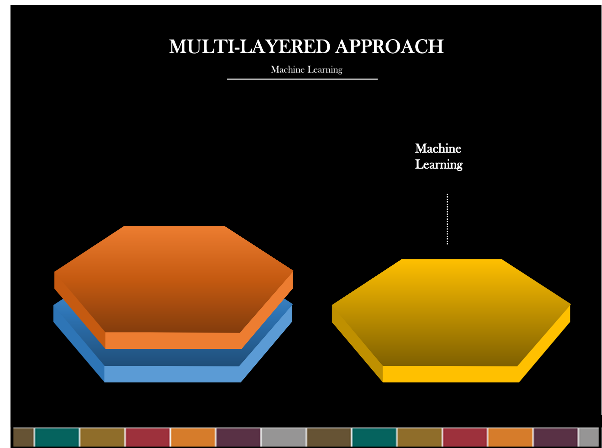
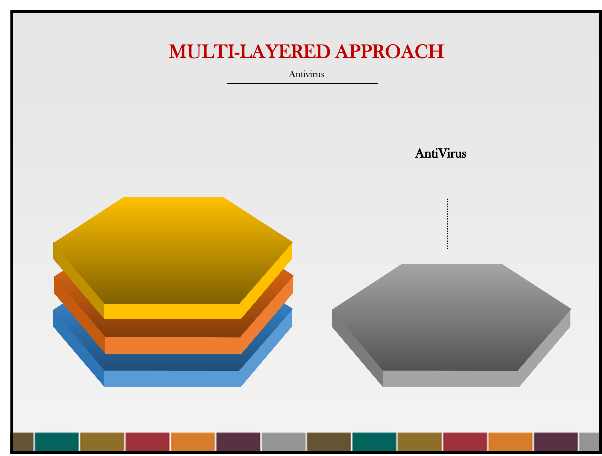
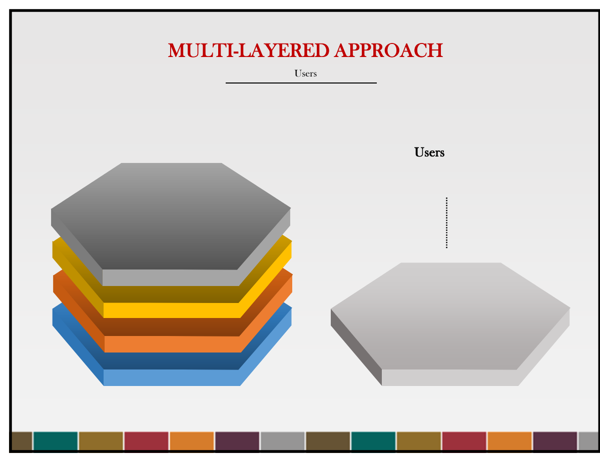
The Solution
Multi-Layered Security Approach
Together, We Can…

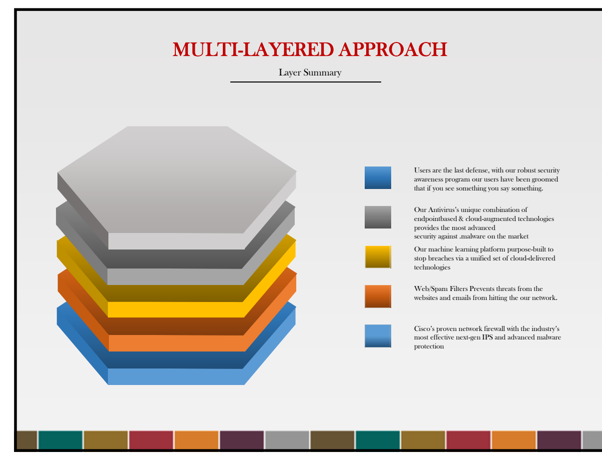

MULTI-LAYERED APPROACH
Firewall
FIREWALL

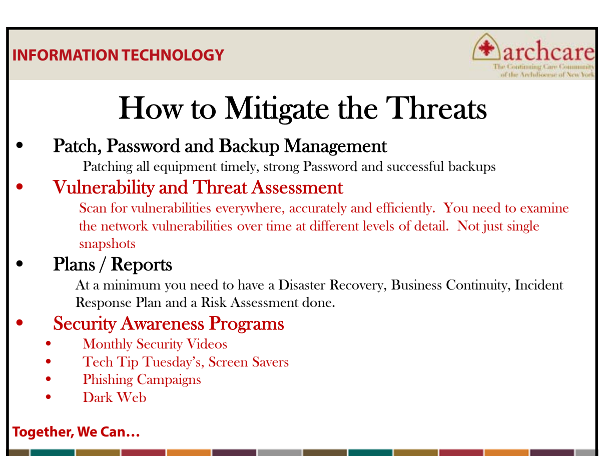

MULTI-LAYERED APPROACH
Web/Spam Filters
Web/Spam
Filters

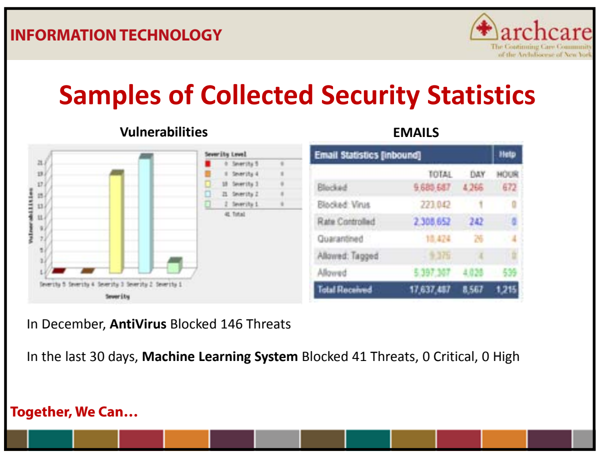

MULTI-LAYERED APPROACH
Machine Learning
Machine Learning


MULTI-LAYERED APPROACH
Antivirus
AntiVirus

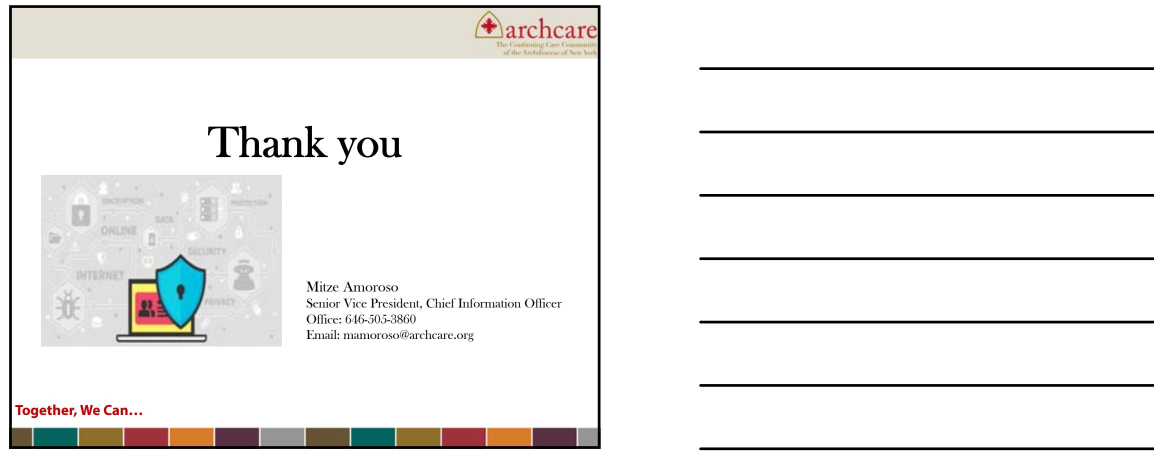

MULTI-LAYERED APPROACH
Users
Users







Email Statistics [inbound]	TOTAL	DAY	HOUR
Blocked	9,680,687	4,266	672
Blocked: Virus	223,042	1	0
Rate Controlled	2,308,652	242	0
Quarantined	10,424	26	4
Allowed: Tagged	9,375	4	0
Allowed	5,397,307	4,028	539
Total Received	17,637,487	8,567	1,215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Thank you
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Together, We Can…

A Year in Litigation: Overview of Legal Challenges to 2017 Federal Executive Actions and Legislation

Speaker:
Laura Alfredo, Esq.

Overview of Legal Challenges to Federal Executive Actions and Legislation in Health Care

NYSBA, Health Law Section
January 24, 2018

Laura M. Alfredo
Deputy General Counsel and
Senior Vice President,
Legal, Regulatory and Professional Affairs,
GNYHA

Legal Challenges on the Affordable Care Act's Cost-Sharing Reduction Payments

Issue Outline:

- The ACA's Cost Sharing Reduction (CSR) payments were intended to offset the cost of copay and deductible waivers that health plans are required to provide to low-income individuals under the ACA. CSR payments are also referenced in the ACA's payment methodology for its Basic Health Plan (BHP), which two states—New York and Minnesota—have enacted to cover individuals between 138-200% of the Federal Poverty Limit.
- In 2014, the US House of Representatives sued the Obama Administration over the payment of CSRs, on the grounds that Congress had not specifically appropriated the funding (*House v. Burwell.*) A DC district court ruled in favor of the House, ordered that the payments be stopped, then stayed the order. The payments continued.
- On October 12, 2017, President Trump announced a halt to the payment of CSRs, citing the district court's ruling, among other reasons.
- In December 2017, the parties in what had become *House v. Hargan*, announced a conditional settlement, as there was no longer any controversy on the merits between the House and the Executive.
- In the meantime, several state attorneys general, including New York's, took action, first intervening in *House v. Hargan*, then, in October 2017, commencing a new action in the Northern District of California. In that case, the AGs allege the Administration's cessation of the payments violated the Administrative Procedure Act and US Constitution.
- The district court in *California, et al, v. Trump* denied the plaintiffs' motion for a preliminary injunction. The case is continuing.
- New York State stands to lose approximately $870m in Federal funding for its Basic Health Plan, known in NYS as the Essential Plan, in addition to any impacts on health plan market participation and premium increases. The Essential Plan covers approximately 700,000 New Yorkers.

Attachments:

- Proposed Settlement Agreement in *House v. Hargan,* dated December 15, 2017
- Order Denying Motion for Preliminary Injunction in *California, et al v. Trump,* by Judge Chhabria, dated October 25, 2017

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into by and between (a) the United States House of Representatives (the "House"); (b) the United States Department of Health and Human Services, the United States Department of the Treasury, and their respective Secretaries (the "Agencies"); and (c) the States of California, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia (the "States").

1. In light of changed circumstances, the House, the Agencies, and the States have determined to resolve the dispute that is pending before the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") in *United States House of Representatives v. Hargan, et. al*, No. 16-5202 (D.C. Cir.).

2. By no later than two business days after execution of this Agreement, the House and the Agencies (collectively, "the Parties") will submit to the district court a request that the district court issue an indicative ruling pursuant to Rule 62.1 of the Federal Rules of Civil Procedure stating that, if the case is remanded by the court of appeals, the district court will vacate the portion of its final order providing that "reimbursements paid to issuers of qualified health plans for the cost-sharing reductions mandated by Section 1402 of the Affordable Care Act, Pub. L. 111-148, are ENJOINED pending an appropriation for such payments." ECF No. 74, *United States House of Representatives v. Burwell, et al.*, No. 1:14-cv-01967-RMC (D.D.C.). If the district court grants that motion, the Parties and the States will file a motion that asks the court of appeals to remand the case to allow the district court to grant the motion as provided in its indicative ruling.

3. The Parties recognize that the Executive Branch of the United States Government ("Executive Branch") continues to disagree with the district court's non-merits holdings, including its conclusion that the House had standing and a cause of action to bring this suit. The Parties agree that because subsequent developments have obviated the need to resolve those issues in an appeal in this case, the district court's holdings on those issues should not in any way control the resolution of the same or similar issues should they arise in other litigation between the House and the Executive Branch. The Parties also recognize that the States continue to disagree with the district court's merits holding. Accordingly, if the court of appeals grants the Joint Motion, the Parties agree that the district court's holding on the merits should not in any way control the resolution of the same or similar issues should they arise in other litigation, and hereby waive any right to argue that the judgment of the district court or any of the district court's orders or opinions in this case have any preclusive effect in any other litigation.

4. If the district court grants the motion described in paragraph 2 above and, following remand from the D.C. Circuit, the district court vacates its injunction in accordance with its indicative ruling, the Parties and the States agree that this litigation will have been resolved. The Parties and the States will bear their own fees and costs.

5. If the district court declines to grant the motion described in paragraph 2 above, or indicates that it would enter other relief not jointly supported by the Parties, this Agreement shall be of no force and effect and the Parties and the States shall be returned to their respective positions prior to execution of this Agreement.

6. FULL AUTHORITY TO SIGN. Each person signing this Agreement represents and warrants that he or she has full authority to execute the Agreement on behalf of himself or herself, or on behalf of the party or entity on whose behalf he or she signs this Agreement.

7. EXECUTION IN COUNTERPARTS AND ELECTRONIC SIGNATURES. This Agreement may be executed and delivered in counterparts, and may be executed by electronic signature, and if so, shall be considered an original. Each counterpart, when executed, shall be considered one and the same instrument, which shall comprise the Agreement, which takes effect on the date of execution by all parties to the Agreement.

/s/ Thomas G. Hungar
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Executed this 15th day of December, 2017, in Washington, D.C.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,
Plaintiffs,
v.
DONALD J. TRUMP, et al.,
Defendants.

Case No. 17-cv-05895-VC

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

The Affordable Care Act requires health insurance companies to subsidize the cost of co-payments and deductibles for lower-income people. In turn, the Act requires the federal government to make advance payments to the companies to cover the cost of this subsidy. The legal problem in this case is that while the Act requires the insurance companies to be paid, it's unclear whether the Act actually appropriated money for these payments. If Congress doesn't appropriate money for a program, the Constitution prohibits the executive branch from spending money on that program – even if Congress previously enacted a statute requiring the expenditure.

The Obama Administration took the position that the Affordable Care Act indeed appropriated money for the payments, so it drew funds from the U.S. Treasury every month to make them. The Trump Administration initially continued this practice, but has now concluded that the Act did not actually make the necessary appropriation. So the Trump Administration has terminated the payments, at least until Congress decides to appropriate the money.

In response, the State of California, along with 17 other states and the District of Columbia, filed this lawsuit, contending the Obama Administration was right. They seek an

emergency ruling requiring the Trump Administration to continue making the payments while the lawsuit is pending. This request is denied. First, although the case is at an early stage, and although it's a close question, it appears initially that the Trump Administration has the stronger legal argument. Second, and more importantly, the emergency relief sought by the states would be counterproductive. State regulators have been working for months to prepare for the termination of these payments. And although you wouldn't know it from reading the states' papers in this lawsuit, the truth is that most state regulators have devised responses that give millions of lower-income people better health coverage options than they would otherwise have had. This is true in almost all the states joining this lawsuit. Including California, whose regulators issued a press release just days before the suit explaining how so many lower-income people will benefit.

I.

The central purpose of the Affordable Care Act is to provide health coverage for the millions of people who don't get it through their jobs. Six years after its enactment in 2010, the Act is well on its way to achieving that purpose: almost half of the previously uninsured people in the United States now have coverage.[1] Some people have coverage because the Act expanded Medicaid eligibility.[2] Many others have purchased insurance, usually on new insurance "exchanges" where people can shop for coverage. Three key policies acting in concert have enabled the Act's success: (1) the Act bars insurance companies from denying coverage to people or charging them more based on their health status; (2) the Act requires people to buy insurance; and (3) the Act provides significant subsidies to help lower-income people buy insurance on the exchanges. It cannot reasonably be disputed that, for the Affordable Care Act to achieve its

---

[1] *See* Robin A. Cohen et al., National Center for Health Statistics, *Health Insurance Coverage: Early Release of Estimates from the National Health Interview Survey, 2016* at 2 (May 2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/insur201705.pdf [https://perma.cc/W2TP-L9RK].

[2] Around 15 million people were covered by the expansion of Medicaid in 2016. *Medicaid Expansion Enrollment, Timeframe: FY 2016*, Kaiser Family Foundation, https://www.kff.org/health-reform/state-indicator/medicaid-expansion-enrollment [https://perma.cc/EWQ4-MUZ5].

goals, all three of these pillars must remain standing. *See King v. Burwell*, 135 S. Ct. 2480, 2485, 2487 (2015).

Lower-income people have access to two forms of subsidies to help them afford insurance sold on the exchanges. The most significant subsidy is a tax credit to help offset the cost of monthly insurance premiums: people whose income puts them between 100% and 400% of the federal poverty level receive significant tax credits to alleviate the cost of buying insurance. (The federal poverty level for a single person is a mere $12,060 per year.)[3] To use an example of how the tax credit works on the exchanges, in San Francisco, a 60-year-old making around $45,000 in 2017 could purchase a fairly typical plan for around $360 per month – even though the actual premiums would be $940 per month absent the tax credits.[4] A large majority of people who purchase health care on the exchanges rely on these tax credits.[5]

The premium tax credit is structured so you get it in advance, when you are actually paying your insurance premiums. Although normally with tax credits you have to wait for the benefits until your tax returns are filed the following year, the Affordable Care Act established a system through which your tax credit is estimated and paid in advance to the insurance companies, so they can reduce your premiums by a corresponding amount. If, after the year is over, there is a discrepancy between the discount you received and the amount of your premium tax credit, it is reconciled through your tax returns. 26 U.S.C. § 36B(f). In fact, when you're shopping for insurance on the exchange – at least in California – you are not even told the amount of monthly premium before the tax credit. You're simply told the amount you're required to pay.[6]

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[3] Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8831, 8832 (Jan. 31, 2017).
[4] App. B at 2, 5; 2017 QHP Individual Rates, Covered California, http://hbex.coveredca.com/data-research/library/2017_QHP_Individual_Rates_File_for_Posting_100716.xlsx [https://perma.cc/2MT6-EH3D]; *see also* 26 U.S.C. § 36B(b)(2)(B).
[5] In March 2016, 84.7% of people who purchased health care on the exchanges received the tax credit. March 31, 2016 Effectuated Enrollment Snapshot, Centers for Medicare & Medicaid Services, https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-06-30.html [https://perma.cc/3ESH-M44Z].
[6] *See, e.g.*, App. B at 4-6, 9-11.

The other subsidy – the one that's the subject of this dispute – reduces the amount that lower-income people have to pay out-of-pocket when they use their insurance to get care. When you have insurance, you typically make "co-payments" when you visit the doctor or pick up medications from the pharmacy. Sometimes you also have a "deductible," which means that you must pay the full cost of your health-care expenses until you reach the deductible amount, at which point your insurance kicks in and covers the rest. You also might be required to pay "co-insurance." Co-insurance is triggered after you've reached your annual deductible and requires you to pay a percentage, say 20%, of your doctor's bill or the price of your medications; the insurance company pays the remaining share.

The Affordable Care Act refers to these payments as "cost-sharing" payments, because you are sharing the cost of your treatment with your insurance company. The subsidy provided by the Act is called a "cost-sharing reduction," because the insurance companies are forced to reduce your cost-sharing payments. Specifically, the Act requires insurance companies to offer plans to lower-income people with reduced cost-sharing payments. People whose income puts them between 100% and 250% of the federal poverty level can buy plans of this type.

In turn, the Act requires the federal government to compensate the insurance companies for those reductions. Typically, people refer to the payments by the federal government to the insurance companies as "cost-sharing reduction payments," or "CSR payments." Throughout this opinion, the phrase "CSR payments" references these payments that the federal government is required to make to the insurance companies.

As with the tax credits, the Act provides that the federal government will pay for these subsidies in advance. Specifically, the federal government estimates in advance the amount of subsidy to which you are entitled and makes a CSR payment in that amount to your insurance company. As a result, the insurer can reduce your cost sharing by a corresponding amount throughout the year on the federal government's dime. If, after the year is over, you ended up using less money from the subsidy than what the federal government gave the insurance company, the insurance company must return the excess to the federal government. *See* 45

C.F.R. § 156.430(e)(2).

The premium tax credits and the cost-sharing reductions work together: the tax credits help people obtain insurance, and the cost-sharing reductions help people get treatment once they have insurance. In 2016, the federal government spent $32 billion on premium tax credits, and these credits helped around 10 million people purchase insurance on the exchanges. For the same year, it spent $7 billion on CSR payments to insurance companies, which helped 7 million people pay for doctor's visits, medications, and other treatment. [7]

Following passage of the Affordable Care Act, and once the exchanges were ready to get up and running, an issue about the statutory language arose. For the premium tax credits, the language of the Act was clear: it required the tax credits to be paid, and made a "permanent appropriation" for those tax credits, meaning the money would automatically be available each year for the executive branch to fulfill its duty to make the payments. But for the cost-sharing subsidies, the language of the Act was different. It required the insurance companies to give people the reductions, and it required the federal government to pay the insurance companies in advance for these reductions, but it did not explicitly make a permanent appropriation for the CSR payments to the insurance companies. Absent a permanent appropriation, the responsibility would be on Congress to help fulfill the federal government's obligation to make the CSR payments by providing money through the annual appropriations process.

In 2013, the Obama Administration concluded that the Act could be interpreted as implicitly making a permanent appropriation for CSR payments, meaning that no annual appropriations were required. So, beginning in January 2014, the Administration began drawing money from the U.S. Treasury to make those payments on a monthly basis, just as it did for the

---

[7] Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2016 to 2026* 31, tbl. 2 (2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51385-healthinsurancebaselineonecol.pdf [https://perma.cc/M3S7-8X53]; 2017 Marketplace Plan Selections with Financial Assistance, Kaiser Family Foundation, https://www.kff.org/health-reform/state-indicator/2017-marketplace-plan-selections-by-financial-assistance-status [https://perma.cc/VX6G-Q47Z].

premium tax credits. In contrast, the House of Representatives took the position that the Act contained no permanent appropriation for CSR payments. Because Congress was not making annual appropriations, the House believed the Administration was violating the Constitution by making payments to the insurance companies for which money had not been appropriated. *See* U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

Accordingly, in November 2014, the House filed a federal lawsuit against the Obama Administration in Washington, D.C., to stop the allegedly unconstitutional payments. In May 2016, United States District Judge Rosemary Collyer ruled in favor of the House, concluding the Act had made no permanent appropriation for the federal government to make CSR payments. As a result, Judge Collyer concluded, the Administration could not (absent annual appropriations or an amendment to the Affordable Care Act providing for a permanent appropriation) continue to make the CSR payments. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 168 (D.D.C. 2016). However, Judge Collyer stayed her ruling so the federal government could continue making the payments while the Obama Administration pursued an appeal of her ruling in the D.C. Circuit. *Id.* The Obama Administration therefore continued making payments.

Then the election happened. Shortly afterward, on November 21, 2016, the House asked the D.C. Circuit to stay the appeal. Appellee's Motion to Hold Briefing in Abeyance, *U.S. House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Nov. 21, 2016). The House explained that, in light of public statements by members of the incoming Trump Administration, it believed that the executive branch might reconsider its legal position on the validity of the payments. Given that, the House asserted that it might be a waste of time to keep moving forward on an appeal the new Administration might eventually drop. *Id.* at 3-4. The D.C. Circuit granted the motion in December 2016 and stayed the case. Order Granting Motion to Hold in Abeyance, *U.S. House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Dec. 5, 2016).

In spring 2017, 17 states (including most of those bringing the current lawsuit) and the District of Columbia sought to intervene in the D.C. Circuit appeal. Their argument for

intervention was that: (i) they believed the Affordable Care Act had made a permanent appropriation for CSR payments; (ii) it appeared the Trump Administration was prepared to renounce that position, leaving nobody in the case to argue it; and (iii) the states would be harmed if the payments stopped. In August 2017, the D.C. Circuit granted the states' motion. It concluded that the states had standing to intervene because they would be injured by any decision to terminate the payments, and that the states' participation in the appeal was needed to ensure that someone would continue to argue the position previously taken by the Obama Administration in the case. Order Granting Motion to Intervene, *U.S. House of Representatives v. Price*, No. 16-5202 (D.C. Cir. Aug. 1, 2017). But the D.C. Circuit kept the stay in place, apparently awaiting the Trump Administration's decision about whether it would change its position in the case.

Meanwhile, seeing the writing on the wall, states throughout the country began working with insurance companies early in 2017 to prepare for the likelihood that the Trump Administration would switch positions and stop making the CSR payments. The problem was that even if the payments to the insurance companies stopped, the Affordable Care Act would still require the companies to provide the cost-sharing reductions to patients enrolled in certain plans. To offset this cost increase, insurance companies would want to raise premiums for 2018 insurance coverage. And if the companies did not believe they'd be able to offset the costs through premium increases, they might withdraw from the exchanges for 2018. Withdrawal by an insurance company would be especially harmful if it was the only company offering plans on an exchange for a given region: although people can buy insurance "off-exchange," they are only eligible for premium tax credits or cost-sharing reductions if they purchase insurance on an exchange. *See* 42 U.S.C. § 18071(b)(1); 26 C.F.R. § 1.36B-2(a)(1). So most states went to work with the insurance companies to try to figure out a way the companies could increase premiums to make up for the expected termination of the CSR payments. Their efforts are described more fully in Section IV below.

On October 11, 2017, the anticipated termination of the CSR payments became a reality.

The Attorney General sent a letter to the Treasury Department and the Department of Health and Human Services, explaining his view that the Affordable Care Act had not made a permanent appropriation for the CSR payments, and that the agencies therefore were precluded from making them. Notice at 6, *U.S. House of Representatives v. Hargan*, No. 16-5202 (D.C. Cir. Oct. 13, 2017). The next day, the White House announced this decision to the media. The day after that, October 13, the Justice Department filed a notification with the D.C. Circuit, informing it of the decision. *Id.*

Also on October 13, the State of California, along with 17 other states and the District of Columbia, filed this lawsuit in San Francisco. They allege the federal government is required under the Affordable Care Act to make the CSR payments to the insurance companies, that the Act permanently appropriated the money to make these payments, and that the Administration is therefore violating the law by refusing to make them. On October 18, the states filed a request for a temporary restraining order that would force the Administration to make the payments. The states sought a ruling by 4 p.m. on October 19, because the insurance companies had been anticipating the next round of payments on October 20. During a telephonic conference with the parties, the Court declined to issue a ruling on such a tight time frame and without receiving a response from the Administration. Instead, the Court scheduled a hearing for October 23. Since then, both sides have agreed that the TRO application should be converted to a motion for a preliminary injunction. Therefore, the question presented by this motion is whether the Court should issue a preliminary injunction requiring the Administration to make the CSR payments to the insurance companies while this case is pending, rather than wait until the case is fully adjudicated before deciding what relief (if any) is appropriate.

II.

The Administration believes that two procedural defects in the states' lawsuit prevent the Court from even inquiring whether to issue a preliminary injunction. The current record reveals no such defects.

First, the Administration contends the states lack standing under Article III of the

Constitution to bring this case in federal court, because they have failed to allege any direct injury from the decision to terminate the CSR payments. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). But the states allege – among other harms – that they have incurred and will continue to incur administrative costs because of the disruption to the exchanges caused by the federal government's decision to stop CSR payments. And the states have presented evidence to back up those allegations. These costs are enough to satisfy the standing requirement. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *see also Texas v. United States*, 787 F.3d 733, 748-41 (5th Cir. 2015); *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012); Order Granting Motion to Intervene at 1-2, *U.S. House of Representatives v. Price*, No. 16-5202 (D.C. Cir. Aug. 1, 2017) (holding the states have standing based on their allegations of harm to their citizens from the termination of CSR payments and the resulting costs likely to be borne by the states in response to the harm).

Second, the Administration contends that even if the states have standing to sue in federal court, they haven't sued in the proper federal court. Since most of the plaintiffs in this case have intervened in the D.C. Circuit appeal, the Administration contends it is not appropriate for the states to pursue a separate action in this Court. While it's true that the usual rule is for federal district courts to refuse to adjudicate matters where a case with significant overlap is already being adjudicated in another federal court, that rule is subject to many exceptions. Whether to allow the second suit to proceed is a matter of judicial discretion, particularly in extraordinary cases. *See Church of Scientology of California v. U.S. Dep't of Army*, 611 F.2d 738, 749-50 (9th Cir. 1980), *overruled on other grounds*, *Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (en banc); *see also Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 628 (9th Cir. 1991); *EEOC v. Univ. of Pennsylvania*, 850 F.2d 969, 977 (3d Cir. 1988). This is not a situation where a plaintiff sued in one court, didn't like how it was going, and then tried to sue in another court. *See, e.g.*, *Padilla v. Willner*, No. 15-cv-04866-JST, 2016 WL 860948, at *5 (N.D. Cal. Mar. 7, 2016). Nor is it a situation where a plaintiff sued in one court only to see the defendant respond by suing in a different forum that the defendant found

more attractive. *See, e.g., Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 955-64 (N.D. Cal. 2008). The states were not parties to the D.C. litigation until they moved to intervene in the appeal to protect their interests.

Moreover, given the states' alleged need for emergency relief, it was not merely justifiable to seek that relief in a different forum; it was prudent. The D.C. case is on appeal, and currently stayed, so it's not clear how quickly the states could get their request for emergency relief heard in D.C. What's more, there are serious questions about whether the D.C. Circuit has jurisdiction in the appeal. The Obama Administration argued, and the Trump Administration continues to argue, that the House of Representatives never had standing to bring the lawsuit challenging the CSR payments in the first place. Brief for Appellants at 19-38, *U.S. House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Oct. 24, 2016); Defs.' Opp'n at 8 n.5, Dkt. No. 35. If that's correct (and could it really be wrong if both Administrations agree on it?), it means Judge Collyer lacked jurisdiction to issue the ruling against the Obama Administration. This, in turn, likely means the D.C. Circuit lacks jurisdiction to do anything other than dismiss the appeal (or remand to the district court with instructions to dismiss the case for lack of standing). *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *see also, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 539-49 (1986); *Ervine v. Desert View Regional Medical Center Holdings, LLC*, 753 F.3d 862, 866-71 (9th Cir. 2014).

III.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). A court may grant a preliminary injunction even if a plaintiff only shows that there are "serious questions going to the merits"—a lesser showing than likelihood of success on the merits, if the balance of hardships "tips sharply in the plaintiff's favor," the plaintiff is likely to suffer irreparable harm, and the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135

(9th Cir. 2011). When the government is a party, the public interest and balance of hardships analyses often merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

A.

First the merits. On the legal question presented – whether Congress has appropriated money for the CSR payments – both sides have reasonable arguments. However, with the important caveats that the Court has only been given a few days to study this complex matter and the states may not have fully developed all arguments, it initially appears the Administration has the stronger legal position.[8]

To understand both sides' arguments, it's important to know how laws get put on the books. When statutory provisions from new laws like the Affordable Care Act are incorporated into the U.S. Code (the official compilation of all federal laws), they are considered "codified." The U.S. Code is divided into different parts based on subject area, such as the Internal Revenue Code and the Public Health and Welfare Code. The numbering of the sections of bills when they are first passed by Congress do not match the numbering of the sections of the U.S. Code where they are ultimately codified. In other words, when Congress votes on a bill, that bill has many sections. But language from different sections of the bill is often inserted into different parts of the U.S. Code, based on what the particular section seeks to accomplish.

The Affordable Care Act contains clear language making a permanent appropriation for the premium tax credits. Section 1401 of the Act established the premium tax credits, and the language of section 1401 was codified in the Internal Revenue Code – specifically, in 26 U.S.C. § 36B. Section 36B provides that lower-income people buying insurance on an exchange "shall"

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[8] The states raise claims under the Administrative Procedure Act, the Take Care Clause of the U.S. Constitution, and the Declaratory Judgment Act. Complaint at 22-23. Success on any of these claims almost certainly depends on whether Congress appropriated money to fund the CSR payments, because the Court can only award the relief the states seek if money was appropriated for this purpose. *See, e.g.*, *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-25 (1990); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850); *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 184 (D.C. Cir. 1992).

receive the "premium assistance credit." *Id.* That is how, to use federal budgeting parlance, the tax credits were "authorized." But this language does not appropriate the money for the credits. The Affordable Care Act accomplished the appropriation by amending a different statute, namely 31 U.S.C. § 1324. This statute is contained in the portion of the U.S. Code titled "Money and Finance," and section 1324 is in fact titled "refund of internal revenue collections." Subsection 1324(a) makes a permanent appropriation for tax refunds, stating that "[n]ecessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law." Then, subsection 1324(b) imposes limits on the tax refunds for which the permanent appropriation is made. It states that the executive branch may "only" make disbursements under section 1324 for: (1) individual tax refunds; and (2) "refunds due from" various provisions of the Internal Revenue Code, including (after passage of the Affordable Care Act) section 36B. Therefore, section 1324 clearly contains a permanent appropriation for the premium tax credit program codified at 26 U.S.C. § 36B.

This clarity is in contrast to the language in the Act involving cost-sharing reductions. As mentioned in the preceding paragraph, section 1401 of the Affordable Care Act created the tax credits and was codified at 26 U.S.C. § 36B – which is part of the Internal Revenue Code. Section 1402 of the Affordable Care Act created the cost-sharing reduction program. Unlike section 1401's premium tax credits, section 1402's cost-sharing reduction program is not codified in section 36B of the Internal Revenue Code; rather it is codified in the Public Health and Welfare Code, at 42 U.S.C. § 18071. The cost-sharing reduction program requires the insurance companies to lower the amount consumers must pay out of pocket, and in turn requires the federal government to pay the companies for the reductions. 42 U.S.C. § 18071(c)(3)(A) (federal government "*shall* make periodic and timely payments to the [insurance company] equal to the value of the reductions" (emphasis added)). This is how the Affordable Care Act "authorized" the cost-sharing reduction program and the CSR payments to the insurers. But there is no explicit language regarding appropriations. While the Act added section 36B of the Internal Revenue Code to the permanent appropriations statute for tax refunds (namely, 31

U.S.C. § 1324) the Act did not add section 18071 of the Public Health and Welfare Code to that same appropriations statute for tax refunds. Nor does the Act appear to have included any other explicit language making a permanent appropriation for the CSR payments to insurers. This may suggest that Congress needed to make annual appropriations before the executive branch could make the CSR payments, and that the Obama Administration (along with the Trump Administration for the first half of 2017) acted unconstitutionally by making the payments every month since 2014. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."); *see also U.S. House of Representatives*, 185 F. Supp. 3d at 185.

The response by the states is that the language of 31 U.S.C. § 1324, which makes a permanent appropriation for the premium tax credits established in 26 U.S.C. § 36B, impliedly includes a permanent appropriation for the CSR payments established by 42 U.S.C. § 18071. Specifically, the states argue that: (i) 31 U.S.C. § 1324 appropriates money for "refunds due from" 26 U.S.C. § 36B; (ii) the cost-sharing reductions from 42 U.S.C. § 18071 are closely coordinated with the premium tax credits throughout the statute; (iii) a person cannot receive the cost-sharing reductions unless she also gets the tax credits; and therefore (iv) the cost-sharing reductions from 42 U.S.C. § 18071 should be considered "refunds due from" section 36B within the meaning of section 1324.

This argument is based on the Supreme Court's ruling in *King v. Burwell*, which also involved the Affordable Care Act. There, the Court considered language providing that tax credits would go to people who purchased insurance through "an Exchange established by the State." *King*, 135 S. Ct. at 2487. This language seemed unambiguous when read in isolation: premium tax credits were available for lower-income people who purchased insurance through an exchange established by a state, but not for people who purchased insurance through an exchange established by the federal government. But the Court held that the Act did, in fact, provide premium tax credits for lower-income people who bought insurance through federal exchanges. *Id.* at 2495-96.

There were two steps in the Court's analysis. First, the Court determined that although the pertinent language seemed unambiguous when read in isolation, it became ambiguous upon reading other parts of the Act. Among other things, the Act required all exchanges (state and federal) to complete certain tasks relating to the premium tax credits. "If tax credits were not available on Federal Exchanges," the Court explained, "these provisions would make little sense." *Id.* at 2492.

Second, after concluding that the phrase "an Exchange established by the State" was ambiguous in light of the surrounding statutory language, the Court set out to resolve the ambiguity by examining the purposes of the Affordable Care Act. That part was easy, because as discussed at the outset of this ruling, there are three pillars to the Act: preventing insurers from refusing coverage or charging more based on a person's health status, requiring people to get insurance, and making it affordable to purchase insurance on the exchanges. The failure to provide tax credits to lower-income people in places with federal exchanges would have removed one of those pillars, causing the whole health care reform project designed by Congress to come crumbling down. *Id.* at 2495-96. Thus, the Court resolved the ambiguity in the pertinent language by interpreting it to provide tax credits for insurance purchased on all exchanges, state and federal.

In this case, the states present some good arguments relating to the second part of the *King v. Burwell* analysis. To be sure, the absence of money for CSR payments does not seem to be causing health care reform to come crumbling down, as discussed in the next section. Nonetheless, the absence of a permanent appropriation for these payments may be in significant tension with congressional purpose. For example, as argued most persuasively by the amicus brief from America's Health Insurance Plans, the absence of a permanent appropriation seems odd from a timing standpoint. Insurance companies must work with the states to set their rates for the coming year well in advance (for example, insurers were expected to set their 2018 rates early in 2017). If CSR payments are subject to the vagaries of the annual appropriations process (which Congress often does not complete until late in the year), insurance companies cannot

reasonably predict how much it will cost to provide insurance on the exchanges. This uncertainty could make insurance companies less likely to offer coverage on the exchanges, leaving consumers with fewer options (or, far worse, no options) in a given geographic region.[9]

In addition, the two subsidies that form one pillar of health care reform – the tax credits and the cost-sharing reductions – fit hand in glove: the tax credits allow lower-income people to buy health coverage, and the cost-sharing reductions allow people to actually use this coverage. It's not clear why Congress would have intended more certainty for one type of expenditure than the other. This is particularly true where the Act establishes the same basic procedure for processing the subsidies. The federal government estimates the amount of tax credits and cost-sharing reductions to which a person is entitled and provides that amount in advance to the insurance company, allowing the insurance company to provide cheaper coverage to lower-income people who get insurance on the exchanges.[10] *See* 42 U.S.C. § 18082.

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[9] On the other hand, perhaps one response is that this is not the first time Congress has imposed mandatory spending requirements – important ones – on the executive branch, while leaving appropriations for those spending requirements to the annual appropriations process. *See, e.g.*, 42 U.S.C. § 1396-1 (authorizing annual appropriations for Medicaid grants to states pursuant to Title XIX of the Social Security Act); Defs.' Opp'n at 22-23, Dkt. No. 35 (listing other mandatory spending programs funded by annual appropriations); *see also U.S. House of Representatives*, 185 F. Supp. 3d at 185.

[10] But perhaps the response here is that the tax credits are far more central to the Act's health care reform project, so Congress took extra care to protect funding for those. After all, as discussed earlier, the tax credits represent a much larger investment of money by the federal government – $32 billion in 2016 compared to $7 billion for the cost-sharing reductions. Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2016 to 2026* at 31, tbl. 2 (2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51385-healthinsurancebaselineonecol.pdf [https://perma.cc/M3S7-8X53]. They benefit more people, as well as a wider range of the population (for the tax credits, people whose incomes put them between 100% and 400% of the federal poverty level, and for the cost-sharing reductions, people whose incomes put them between 100% and 250% of the federal poverty level). 2017 Marketplace Plan Selections with Financial Assistance, Kaiser Family Foundation, https://www.kff.org/health-reform/state-indicator/2017-marketplace-plan-selections-by-financial-assistance-status [https://perma.cc/VX6G-Q47Z]. It also bears recalling that the absence of funding for CSR payments does not prevent lower-income people from receiving that subsidy. It means only that the insurance companies pay for it, rather than the federal government. And as discussed in the next section, the states have devised a way for insurance companies to recoup those costs, apparently while also avoiding harm to (and instead

But recall that the Court in *King v. Burwell*, before resolving a statutory ambiguity by looking to the purpose of the Affordable Care Act, first had to conclude that a provision which seemed clear in isolation was actually ambiguous in light of other language in the Act. It's this first part of the analysis that gives the states a tougher challenge.

Although the states emphasize that the premium tax credits and cost-sharing reductions are mentioned together no fewer than 45 times in the Affordable Care Act, it's not clear that this feature of the statute supports their proposed reading of it. Repeatedly referring to the two programs by their separate names suggests Congress considered them distinct, if undoubtedly related. And the statute often recites not just the names of these two programs, but the different statutory provisions that created them. For instance, in the advance payment provision, which is central to the states' argument, the statute refers to "the premium tax credit allowable under section 36B of Title 26 and the cost-sharing reductions under section 18071 of this title." 42 U.S.C. § 18082(a)(1); *see also, e.g.*, *id.* § 300gg-4(l)(3)(A)(ii) ("credits under section 36B of Title 26 or cost-sharing assistance under section 18071 of this title"); *id.* § 18031(i)(3)(B) ("premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 18071 of this title"). That Congress so often identified each reform by its location in one title of the U.S. Code or the other suggests that Congress was cognizant of the different way in which each reform fit into the statutory scheme. In other words, the language relied on by the states may further suggest that Congress did not intend the reference to section 36B in the permanent appropriation provision to encompass the CSR payments codified in an altogether different place.

The states also point to language prohibiting the use of either premium tax credits or CSR payments for abortion services. *See id.* § 18023(b)(2)(A). This language achieves the same purpose as the Hyde Amendment, which is the amendment routinely enacted as part of annual appropriations legislation that likewise bars the use of federal funds for abortion services. *See*

benefitting) lower-income people who buy insurance on the exchange.

Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 475 n.1 (1996) (per curiam). Including a similar restriction in the Affordable Care Act, the states contend, would be redundant unless the CSR payments were exempted from the annual appropriations process. Perhaps that's right. On the other hand, there appears to be no requirement that Congress incorporate the Hyde Amendment into its appropriations legislation every year. So perhaps there is an argument that Congress, by including a similar restriction in the Affordable Care Act, simply intended to ensure that the federal money associated with either reform not be used to pay for abortion services regardless of whether Congress chose to enact the Hyde Amendment in any given year. *See id.* at 477-78 (acknowledging "the changeable nature of spending bills in general, and the Hyde Amendment in particular" (citation omitted)).

The states also argue that, had Congress intended for the CSR payments to be funded through annual appropriations, it would have included a provision saying so. For instance, Congress could have included an "authorization of appropriations" provision when it set up the cost-sharing program, as it did in several other provisions of the Affordable Care Act. *See, e.g.*, Pub. L. No. 111-148, § 3511, 124 Stat. 119, 538 (2010); *id.* § 4003(a)(7), 124 Stat. at 543; *id.* § 5306(a), 124 Stat. at 626-67. In other words, in the states' view, because the Act included language authorizing annual appropriations for other programs implementing health care reform, the omission of such language in the CSR payment provisions suggests that Congress funded the CSR payments through the permanent appropriation in 31 U.S.C. § 1324(b). That might be right, but it's not a necessary conclusion. At oral argument, counsel for the states referred to other, unspecified programs created by the Affordable Care Act that didn't include specific authorization language but for which there may also be no permanent appropriation. Moreover, apparently such language is not needed to authorize an annual appropriation, and annual appropriations appear to be the default way in which Congress provides funds. *See* U.S. Government Accounting Office, GAO-04-261SP, Principles of Federal Appropriations Law (Vol. 1) 2-13, 2-41 (3d ed. 2004); *Civil Rights Commission*, 71 Comp. Gen. 378 (1992).

Looming over this whole discussion is the fact that the parties are disputing the meaning

of an appropriations statute, not just any statute. Congress has established certain rules regarding appropriations, including that "[a] law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . ." 31 U.S.C. § 1301(d). Perhaps the clear-statement rule announced in this provision is of limited relevance here, since it is undisputed that the appropriations provision at issue, 31 U.S.C. § 1324, makes a permanent appropriation, meaning that the disagreement concerns the scope of that appropriation, not its existence. Counsel for the Administration appeared to concede this point at oral argument. But even putting section 1301 aside, the role of the Appropriations Clause in enforcing the constitutional separation of powers provides reason for caution in adopting a reading of an appropriations statute broader than the one most obviously provided by the text. *See, e.g., U.S. Dep't of Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).[11]

In sum, the Affordable Care Act requires the federal government to pay insurance companies to cover the cost-sharing reductions. The federal government is failing to meet that obligation. If there was no permanent appropriation in the Act, Congress is to blame for the

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[11] There are a couple of arguments the states and their allies do not make. Perhaps there is good reason for this, so the Court mentions them only as an indication of the extent to which further briefing and research would be helpful before a definitive ruling on the merits. First, although the states contend Congress affirmatively intended to make a permanent appropriation through section 36B while the Administration contends Congress affirmatively intended to leave CSR payments to the annual appropriations process, it's conceivable that Congress simply forgot to include permanent appropriations language for the payments. Certainly if CSR payments are as integral to the statutory scheme as the states claim (and as the Obama Administration argued) then the omission of any appropriations-related language may have been unintentional. *Cf. Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004); *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 872 (9th Cir. 1981). There are, after all, numerous apparent errors in the statutory text. *See, e.g., King*, 135 S. Ct. at 2942 (noting that the Affordable Care Act created "three separate Section 1563s"). The parties have not discussed what the legal implications would be if Congress had intended, but simply forgotten, to make the appropriation. Nor do the states explore, as an alternative argument, the possibility that funds for CSR payments could be drawn from a general programmatic appropriation or other source. *Cf.* Department of Health and Human Services – Risk Corridors Program, B-325630, 2014 WL 4825237 (Comp. Gen. Sept. 30, 2014).

failure, because it has not been making annual appropriations for CSR payments. The Administration cannot fix Congress's error, because the Constitution prevents the Administration from making payments on its own. In contrast, if the Act created a permanent appropriation, the Administration is legally at fault for the federal government's failure to meet its obligation under the Act to make CSR payments. On the merits, it's a close and complicated question, even if the Administration may seem to have the better argument at this stage.

B.

The remaining three preliminary injunction inquiries (irreparable harm to the plaintiffs, the balance of hardships, and the public interest) overlap significantly, so they are discussed together in this section. On the issue of harm to the plaintiffs themselves (namely, the states), the Administration's decision to terminate the CSR payments certainly will cause some degree of direct and irreparable injury. As already discussed in Section II, the states are incurring significant administrative costs in responding to the termination of the payments, and there likely is no way to remedy that when the case is over. But in a case like this, where so much of the harm is alleged to be inflicted on society, and particularly on lower-income residents who need health coverage, the crucial question is whether the absence of a preliminary injunction would harm the public and impede the objectives of health care reform. The Affordable Care Act is the law of the land, and its goal is to provide meaningful and affordable health coverage to people who don't get it through their jobs. Any significant interference with that goal not clearly permitted by law is a major harm that would justify an injunction.

But it bears repeating that the only question presented by this motion is whether the Court should require the Administration to make the CSR payments for a few months – that is, until this Court can reach a final decision on the case, likely in early 2018. Therefore, allegations by the states about harms that loom further on the horizon – say, in 2019 or beyond – are not particularly relevant at the moment, because those harms can likely be addressed at the end of the case, if the states are indeed able to prevail on the merits. What matters for this motion is how people will be affected in 2017 and 2018 without a preliminary injunction.

In that regard, it appears that because of the measures taken by the states in anticipation of a decision by the Administration to terminate CSR payments, the large majority of people who purchase insurance on exchanges throughout the country will either benefit or be unharmed. In particular, many lower-income people stand to benefit. To explain this requires a somewhat detailed discussion of how things work on the exchanges.

There are four basic levels of health insurance plans available on the exchanges: bronze plans, silver plans, gold plans, and platinum plans. As the names imply, the levels vary in quality, with the bronze plans estimated to cover 60% of a person's health care costs, the silver plans 70%, the gold plans 80%, and the platinum plans 90%. *See* 42 U.S.C. § 18022(d).

If you meet the income requirements (that is, if your income puts you between 100% and 400% of the federal poverty level) you qualify for the premium tax credits, and you can use those tax credits to help purchase insurance on the exchanges. As mentioned earlier, you don't need to front the full premium payments and wait for a tax credit the following year. Under the Affordable Care Act, the federal government estimates your tax credit for next year and gives the insurance company the money, so that you get an upfront discount on premiums based on your tax credit. *See* 42 U.S.C. § 18082(c)(2)(A).

The calculation of the tax credit is complicated, but for this discussion what's important is that the amount is based on the cost of the second-cheapest silver plan available on the exchange in your geographic area, and then adjusted based on your income (that is, based on where you fall on the spectrum between 100% and 400% of the federal poverty level). So, if premiums for the second-cheapest silver plan in your area go up, the amount of your tax credit will go up by a corresponding amount. *See* 26 U.S.C. § 36B.

With respect to cost-sharing subsidies, the Affordable Care Act only requires insurers to offer them for silver plans. 42 U.S.C. § 18071(b)(1). This often makes silver plans the most attractive for lower-income people who qualify for both tax credits and cost-sharing subsidies (people who earn between 100% and 250% of the poverty level). The monthly premiums of the silver plans are relatively low and covered in part by tax credits, and the cost of actually going to

the doctor is low because of the Act's cost-sharing reductions.[12]

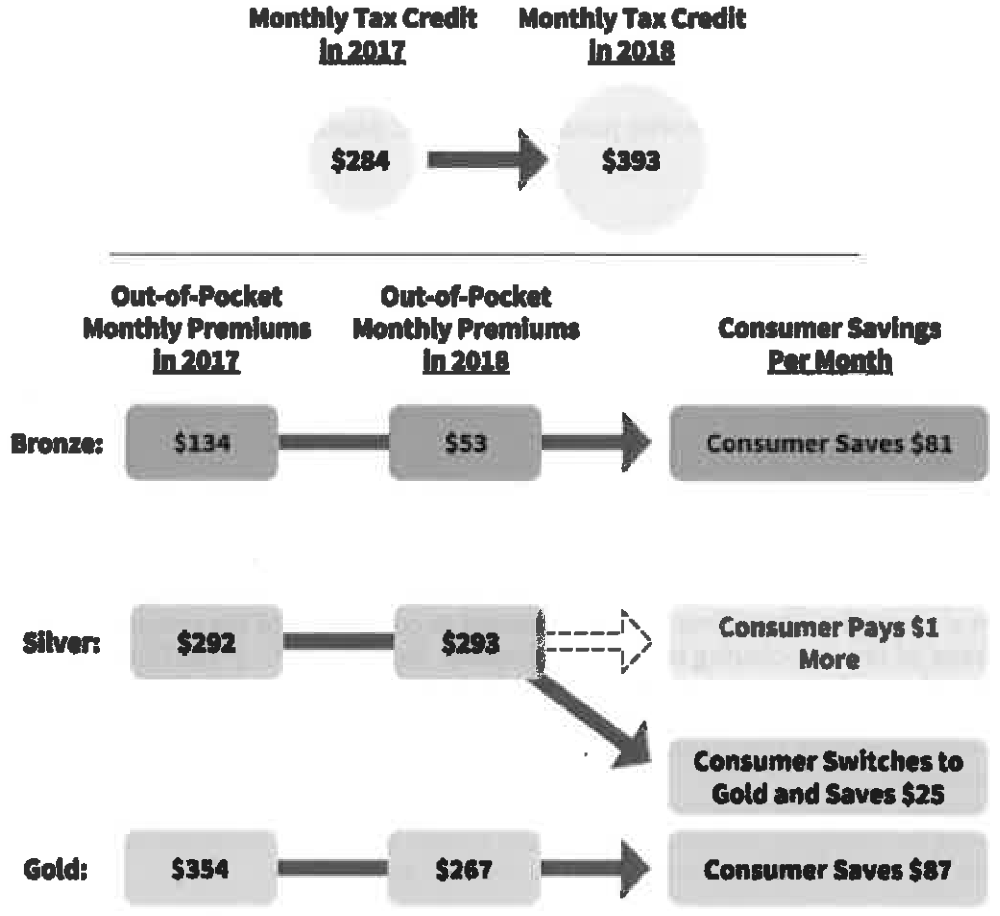
With this background, let's rewind to early 2017. Anticipating that the Administration would terminate CSR payments, most states began working with the insurance companies to develop a plan for how to respond. Because the Affordable Care Act requires insurance companies to offer plans with cost-sharing reductions to customers, the federal government's failure to meet its CSR payment obligations meant the insurance companies would be losing that money. So most of the states set out to find ways for the insurance companies to increase premiums for 2018 (with open enrollment beginning in November 2017) in a fashion that would avoid harm to consumers. And the states came up with an idea: allow the insurers to make up the deficiency through premium increases for *silver plans only*. In other words, allow a relatively large premium increase for silver plans, but no increase for bronze, gold, or platinum plans.[13]

As a result, in these states, for everyone between 100% and 400% of the federal poverty level who wishes to purchase insurance on the exchanges, the available tax credits rise substantially. Not just for people who purchase the silver plans, but for people who purchase other plans too.

[12] For example, when a person earning between 100% and 150% percent of the federal poverty level buys a silver plan, that silver plan is estimated to cover 94% of the person's health care costs because of the cost-sharing reduction subsidies. *See* 42 U.S.C. § 18071(c)(2)(A). Recall that a silver plan without cost-sharing subsidies is designed to cover only 70% of a person's health care costs. By covering 94% of her costs, the silver plan with cost-sharing subsidies provides more insurance than even a platinum plan, which is designed to cover 90% of a person's health care costs.

[13] To be precise, premium increases for those other plans were permitted for other reasons, such as to account for changing medical costs and the overall health of plan members, but not to account for the loss of CSR payments from the federal government.

As an example, take a 50-year-old single person at 300% of the poverty level who lives in Santa Clara County (specifically, San Jose). The chart below shows the effect for her, in 2018, of California's response to the Administration's termination of the CSR payments. For 2017, her available tax credit was $284. In 2018, because of the silver plan premium increases, her tax credit will be $393. As a result, the area's most popular bronze plan would have cost her $134 per month in 2017, but the same bronze plan, with her increased tax credit, will cost her $53 per month in 2018. The area's most popular silver plan would have cost her $292 per month in 2017, while the same plan will cost her only a dollar more per month in 2018. And take a look at the gold plan. The area's most popular gold plan would have cost her $354 per month in 2017, but it will cost her just $267 per month in 2018. This means that if she had the silver plan in 2017, she can switch to the gold plan in 2018, paying $25 less per month for higher quality care.



These figures were taken directly from the website for Covered California, the state entity that operates the exchanges and is largely responsible for administering the Affordable Care Act exchanges in the state. The chart is reproduced at Appendix A to this opinion, backed up by the screenshots from the queries made on the Covered California website. Incidentally, in these screenshots the consumer is not told what the premium price would be absent the tax credit, so there's nothing to scare the customer away – nothing to mislead her into thinking the premiums are higher than they actually will be for her. Appendices B through E contain charts and screenshots for people in other California cities and with different income levels. Although results vary somewhat from place to place, the pattern is largely similar: for lower-income people who purchase insurance on the exchange, the elimination of the CSR payments will not increase premiums for the silver plans, but it will cause premiums for the other plans to go down. No wonder that back in January 2017, economists hired by the State of California estimated that the state's response to the anticipated termination of CSR payments would result in 20,000 more people buying health care in California in 2018.[14]

Even before the Administration announced its decision, 38 states accounted for the possible termination of CSR payments in setting their 2018 premium rates.[15] And now that the

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[14] Wesley Yin & Richard Domurat, Covered California, Evaluating the Potential Consequences of Terminating Direct Federal Cost-Sharing Reduction (CSR) Funding (2017), https://www.coveredca.com/news/pdfs/CoveredCA_Consequences_of_Terminating_CSR.pdf [https://perma.cc/ZB9D-XVVL].

[15] *See* Decl. of Jeff Wu at 5, Dkt. No. 35-5; *see also, e.g., Part II Rate Increase Justification*, Mountain Health CO-OP, https://doi.idaho.gov/DisplayPDF?Cat=consumer&ID=2018_MHC_Indiv&Type=pdf [https://perma.cc/T6MN-PC4Z]; *Insurance Shopping A Challenge for Connecticut Consumers*, New Haven Register (Oct. 20, 2017), http://www.nhregister.com/news/article/Insurance-shopping-a-challenge-for-Connecticut-12293891.php [https://perma.cc/VH65-BYWD]; Steve Sinovic, *Subsidy Cut Already Priced Into Premiums*, Albuquerque Journal (Oct. 19, 2017), https://www.abqjournal.com/1080093/subsidy-cut-already-priced-into-premiums.html [https://perma.cc/9HKF-KP26]; Margot Sanger-Katz, *Trump's Attack on Insurer 'Gravy Train' Could Actually Help a Lot of Consumers*, New York Times (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/upshot/trumps-attack-on-insurer-gravy-train-could-actually-help-a-lot-of-consumers.html; Kristen Schorsch, *How Team Rauner Hustled To Protect Obamacare from Trump*, Crain's Chicago Business (Oct. 17, 2017), http://www.chicagobusiness.com/article/20171017/NEWS03/171019869/how-team-rauner-hustled-to-protect-obamacare-from-trump [https://perma.cc/26GG-P9X4]; Louise Norris, Nevada's Health Insurance Marketplace: History and News of the State's Exchange,

announcement has been made, even more states are adopting a strategy like California's, including states that are plaintiffs in this lawsuit but had not already put a plan in place.[16] Recall that roughly 85% of people who purchase insurance on exchanges throughout the country qualify for tax credits, and recall that roughly 12 million people purchase insurance on exchanges, so the improvements described above have the potential to benefit millions of lower-income people.

What about a person who does not qualify for tax credits? This question is more complicated. In the states that responded to the Administration's decision by permitting premium increases for only silver plans, this higher-income person can buy a bronze, gold, or platinum plan for the same price they'd otherwise have been required to pay.[17] And in at least a

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HealthInsurance.org (Oct. 5, 2017), https://www.healthinsurance.org/nevada-state-health-insurance-exchange/#CSR [https://perma.cc/W4E3-XUST].

[16] *See* Decl. of Jeff Wu at 5-6, Dkt. No. 35-5; Meredith Cohn, *Maryland Officials Consider Higher Obamacare Rates After Federal Subsidies Cut*, Baltimore Sun (Oct. 23, 2017), http://www.baltimoresun.com/health/bs-hs-new-obamacare-rates-20171023-story.html; Holly K. Michels, *Health Insurance Companies Able To Raise Rates, Continue Selling on Exchange*, Independent Record (Oct. 19, 2017), http://helenair.com/news/politics/state/health-insurance-companies-able-to-raise-rates-continue-selling-on/article_f2e30986-d61e-5b15-8fdc-73e8448ee1e4.html [https://perma.cc/C278-9RNA]; Press Release, Pennsylvania Pressroom, Acting Insurance Commissioner Announces Approved 2018 Individual and Small Group Rates, Highlights Opportunities To Lessen Impact of Trump Administration Actions on Pennsylvania Consumers (Oct. 16, 2017), http://www.media.pa.gov/Pages/Insurance-Details.aspx?newsid=278 [https://perma.cc/HZ8P-2VLE]; Letter from Mike Kreidler, Insurance Commissioner, State of Washington, to Plan Year 2018 Individual Market Health Plan Issuers (Oct. 16, 2017), https://www.insurance.wa.gov/sites/default/files/documents/Kreidler-letter-to-issuers-CSR-101617.pdf [https://perma.cc/Q5W9-SBG9]; Press Release, Oregon Division of Financial Regulation, State Announcement Regarding Trump Administration Discontinuation of Cost-Sharing Reduction Payments, Oregon Division of Financial Regulation (Oct. 13, 2017), http://dfr.oregon.gov/news/Pages/20171013-trump-payment-reduction.aspx [https://perma.cc/3HTP-RU58]; Liz Ruskin, *Premera To Bump Up Premium To Cover Trump Cut*, Alaska Public Media (Oct. 13, 2017), http://www.alaskapublic.org/2017/10/13/premera-to-bump-up-premium-to-cover-trump-cut [https://perma.cc/T4G8-TNCF].

[17] *See* Decl. of Jeff Wu at 7-8, Dkt. No. 35-5; *see also, e.g.*, Press Release, Oregon Division of Financial Regulation, State Announcement Regarding Trump Administration Discontinuation of Cost-Sharing Reduction Payments (Oct. 13, 2017), http://dfr.oregon.gov/news/Pages/20171013-trump-payment-reduction.aspx [https://perma.cc/3HTP-RU58]; Press Release, Pennsylvania Pressroom, Acting Insurance Commissioner Announces Approved 2018 Individual and Small Group Rates, Highlights Opportunities To Lessen Impact of Trump Administration Actions on Pennsylvania Consumers (Oct. 16, 2017), http://www.media.pa.gov/Pages/Insurance-Details.aspx?newsid=278 [https://perma.cc/HZ8P-2VLE]; Press Release, Covered California, Covered California Keeps Premiums Stable by Adding Cost-Sharing Reduction Surcharge Only to Silver Plans to Limit Consumer Impact 2 (Oct. 11, 2017), https://www.calhospital.org/sites/main/files/file-attachments/10-11-17_-_coveredca_-_csr_surcharge.pdf [https://perma.cc/4P73-BPCU].

subset of the states described above, including California, this person can also buy a silver plan without paying more. Although the monthly premiums for silver plans sold *on* the exchange will increase, insurers and regulators in some states have also developed a set of comparable plans available *off* the exchange. The monthly premiums for these "off-exchange silver" plans will not increase in response to the CSR increases, because unlike on-exchange silver plans, these plans will not provide cost-sharing reductions.[18] So someone with a higher income who wants to purchase a silver plan need not lose money, but to do so he will have to purchase that policy from outside the exchange.

For all these reasons, Covered California issued a press release the day before the Administration publicly announced its decision to terminate CSR payments. In the press release, Covered California proclaimed: "because the surcharge [that is, the increase attributable to the Administration's decision] will only be applied to Silver-tier plans, nearly four out of five consumers will see their premiums stay the same or decrease, since the amount of financial help they receive will also rise." The press release later says: "In addition, Covered California consumers with Silver plans *who do not receive financial help* to pay their premium can also avoid paying the surcharge by switching to a different metal tier or buying near-identical Silver coverage directly from a health insurance company." [19]

But apparently, even in California, one out of five consumers will see premiums increase because of the termination of CSR payments. Though the states certainly haven't offered a concrete explanation for why some people might see increased premiums, here are some possibilities. Some people whose income is not low enough to receive tax credits will likely enroll or re-enroll in silver plans sold on the exchange because they do not know they can purchase a comparable but more affordable plan outside the exchange. Others may see their

[18] *See supra* note 17.
[19] Press Release, Covered California, Covered California Keeps Premiums Stable by Adding Cost-Sharing Reduction Surcharge Only to Silver Plans to Limit Consumer Impact 1-2 (Oct. 11, 2017), https://www.calhospital.org/sites/main/files/file-attachments/10-11-17_-_coveredca_-_csr_surcharge.pdf [https://perma.cc/4P73-BPCU].

rates increase because the price of the silver plan they purchased increased by more than the price of the second cheapest silver plan in their region (the plan that matters for purposes of measuring tax credits). In any event, the Covered California press release says that about half those people "will see increases of less than $25 per month."[20]

Presumably, if the payments were restored, premiums for the silver plans would need to be reduced, because the insurance companies would no longer need to increase them to recover the value of the lost CSR payments. But as the above discussion shows, such a remedy would likely cause millions of lower-income people across the country who purchase insurance on the exchanges to be worse off than if today's status quo is preserved. Their tax credits would go down, the bottom-line cost of purchasing bronze and gold plans would go up, and the bottom-line cost of purchasing silver plans wouldn't go down.

When counsel for the State of California was confronted at oral argument with the fact that the relief sought by the states could cause this harm, he responded by suggesting that perhaps the Court could order the Administration to resume the CSR payments even while the states continue to allow the insurance companies to charge higher premiums on the exchanges, with the idea that the numbers would reconciled later, through some unexplained process. In other words, allow the insurance companies to collect double payments in 2018. This argument does not even merit a response.

But it does raise the question: why, in light of this discussion, have all these Attorneys General rushed to court seeking an emergency ruling against President Trump?

The primary reason offered by the states, and one they repeat over and over, is that premiums will go up for millions of people. But as already discussed, they are only able to make that argument sound compelling by omitting the fact that the premium increases in almost every state will cause tax credits to increase in a corresponding amount, leaving so many people (especially lower-income people) better off or unharmed. To be sure, in the few states that have

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[20] *Id.* at 2.

not responded as most states have, the harm may be greater. But it may not be too late for those states to change course; for example, just two days ago, Maryland apparently finalized its decision to take the California approach.[21]

The states also assert that insurance companies will withdraw from the exchanges for 2018 because of the Administration's decision to terminate the CSR payments. But for the most part insurance companies seem to have chosen to work with the states to anticipate the termination rather than withdrawing. And the states don't identify a single company that has withdrawn since the Administration announced its decision 13 days ago, even though open enrollment for 2018 begins just 7 days from now. It's true, as the states note, that Anthem withdrew from some exchanges earlier this year, primarily citing the anticipated termination of CSR payments. But the fact that more insurance companies have not done so suggests perhaps Anthem did not understand that states would devise a way for insurance companies to recoup their costs while avoiding harm to most people and in fact benefitting many.[22]

The states repeatedly cite a report from the Congressional Budget Office from August 2017 that predicted that termination of CSR payments would cause the ranks of the uninsured in the United States to increase by 1 million. Two things about that. First, this prediction was based on the assumption that many insurance companies would respond by fleeing the exchanges – something that hasn't happened (at least not for 2018). Second, the Congressional Budget Office report predicts that, starting in 2020, the CSR payment termination will cause the ranks of

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[21] Morgan Eichensehr, *Maryland Seeks To Minimize Higher Obamacare Premiums Following Subsidy Cut*, Baltimore Business Journal (Oct. 23, 2017), https://www.bizjournals.com/baltimore/news/2017/10/23/maryland-seeks-to-minimize-higher-obamacare.html [https://perma.cc/23GM-VNBN]; *see also* Decl. of Jeff Wu at 5-6, Dkt. No. 35-5.

[22] There may be one very real harm to the insurance companies: although they are recouping the lost CSR payments through 2018 premium increases, it appears those increases don't compensate for the missed payments in October, November, and December of 2017. But financial harm is almost never irreparable harm. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015). The insurance companies could presumably recover that money once this case is over, if not through a judgment by this Court then through lawsuits brought under the Tucker Act, 28 U.S.C. § 1491(a)(1). *See Greenlee County. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 441, 450 (2017); *see also United States v. Mitchell*, 463 U.S. 206, 215-16 (1983).

the uninsured to *decrease* by roughly 1 million people.[23]

Speaking of which, another harm the states discuss is that the termination of CSR payments will end up costing the federal government more money. They note, correctly, that the widespread increase in silver plan premiums will qualify many people for higher tax credits, and that the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments. In other words, in their effort to get emergency relief, the states complain that the federal government will be spending more money on health coverage for poor people.

The United States suffers from immense inequality of wealth and opportunity. Courts (and in fact, all branches of government) should be reluctant to balance harms or apply laws in ways that exacerbate these inequalities.[24] That's especially true when the statute involved – the Affordable Care Act – reflects a policy judgment that it's unacceptable to allow tens of millions of people (mostly lower-income people) to go uninsured. As the Ninth Circuit has explained in an analogous context, when the tradeoff is between saving money and allowing lower-income people to obtain meaningful health coverage, the balance tips sharply in favor of health coverage. *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1125-26 (9th Cir. 2008). Therefore, to the extent the states are truly arguing that it's harmful to bolster health coverage for lower-income people through the use of the progressive tax system, that argument is not well-taken.

Finally, the states express concern that the termination of CSR payments will cause confusion among people who shop on the exchanges. In particular, the states argue, the fear of increased premiums may scare consumers from the exchanges. There is likely some truth to that. The Affordable Care Act is complicated, the endeavor of buying insurance on the exchanges is

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[23] Congressional Budget Office, *The Effects of Terminating Payments for Cost-Sharing Reductions* 7 (2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53009-costsharingreductions.pdf [https://perma.cc/RF6V-TY3C].

[24] *See* Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, & the Constitution of Opportunity: A Story of Two Traditions*, NOMOS (forthcoming), http://ssrn.com/abstract=2620920 [https://perma.cc/RZ2R-4N28].

confusing enough as it is, and the consumers who shop there are not universally sophisticated. *See* Brief of Amicus Curiae Families USA et al. at 12-19, Dkt. No. 51-2. But if the Administration's decision to terminate the CSR payments added to the confusion, would a court order requiring their resumption alleviate it? Moreover, the states may be overstating their "confusion" argument. As the Appendices illustrate, if you benefit from tax credits and you go shopping for insurance on the Covered California website, you may never even realize that premiums went up. You are only informed of what *you* have to pay for insurance. And as already discussed, if you're eligible for tax credits, it's highly likely you'll pay the same or less.

One last point on the issue of confusion. If the states are so concerned that people will be scared away from the exchanges by the thought of higher premiums, perhaps they should stop yelling about higher premiums. With open enrollment just days away, perhaps the states should focus instead on communicating the message that they have devised a response to the CSR payment termination that will prevent harm to the large majority of people while in fact allowing millions of lower-income people to get a better deal on health insurance in 2018.

IV.

The motion for a preliminary injunction is denied. A telephonic case management conference will take place on November 21, 2017, at 2:30 p.m. for the purpose of setting a schedule for the full adjudication of the case.

IT IS SO ORDERED.

Dated: October 25, 2017

VINCE CHHABRIA
United States District Judge

Legal Challenge to Reimbursement Cut for Certain Outpatient Drugs Covered under the 340B Drug Discount Program

Issue Outline:

- The 340B program, enacted in 1992, requires pharmaceutical manufacturers to provide discounts on certain outpatient drugs to certain hospitals and Federal grantees as a condition of participating in the Medicaid program. The purpose is to assist safety net and other providers in supporting health care access to low income patients.
- The 340B program has grown significantly since its inception, both in terms of affected patients, but also covered entities and discount savings. The pharmaceutical industry, legislators and others, such as MedPac have called for reform of the program.
- Legislators and regulators have been working on studies and reform recommendations. Guidance is pending from the Health Resources and Services Administration, the primary overseer of the 340B program.
- Late last year, the Centers for Medicare and Medicaid Services issued its annual Outpatient Prospective Payment System final rule, containing a significant (~30%) cut to the payment rates for certain outpatient drugs covered under the 340B program. The goal is to reduce the margin that 340B covered entities achieve on such drugs by virtue of the program.
- The American Hospital Association, along with two other national trade associations and three hospital systems filed suit in DC district court in December, arguing that the Secretary of the Department of Health and Human Services exceeded his authority in adjusting the payment rates. They also argued that the final rule, in general, is an attempt to undermine the 340B statute.
- On December 29, 2017, the district court dismissed *AHA v. Hargan*, finding that it lacked subject matter jurisdiction because the plaintiffs had failed to meet a statutory predicate to filing suit, that a claim be presented to the government for payment. The plaintiffs have filed a notice of appeal.

Attachment:

- Memorandum Opinion by Judge Contreras, denying plaintiffs' motion for a preliminary injunction, dated December 29, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, *et al.*,	:	
Plaintiffs,	:	Civil Action No.: 17-2447 (RC)
v.	:	Re Document Nos.: 2, 17, 19
ERIC D. HARGAN, Acting Secretary, Department of Health and Human Services, *et al.*	:	
Defendants.	:	

MEMORANDUM OPINION

GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING AS MOOT PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; AND DENYING MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

I. INTRODUCTION

This case represents a dispute between certain public and not-for-profit hospitals and the Department of Health and Human Services ("HHS") over the rates at which Medicare will begin reimbursing them for pharmaceuticals that they acquire through a federal program known as the 340B Program. Although the 340B Program has enabled eligible hospitals to purchase pharmaceuticals from manufacturers at discounts, Medicare has historically reimbursed those hospitals at rates that were significantly higher than acquisition costs. Healthcare providers, including Plaintiffs, claim that they have used this surplus to provide additional healthcare services to communities with vulnerable populations. But in 2017, the Centers for Medicare and Medicaid Services ("CMS"), a component of HHS, issued a regulation which was designed to begin closing the gap between what hospitals were paying for drugs and the rates at which Medicare reimbursed those hospitals.

Plaintiffs in this action, three hospital associations and three of their member hospitals, contend that the Medicare reimbursement rate for 340B drugs is set by statute and that the Secretary exceeded his authority when he "adjusted" that statutory rate downward by nearly 30%. Compl. ¶¶ 47–49, ECF No. 1. In order to preserve the *status quo*, Plaintiffs now seek a preliminary injunction directing HHS and the Acting Secretary not to implement these provisions pending the resolution of this lawsuit and any appeal. Pls.' Mot. Prelim. Inj., ECF No. 2. In response, Defendants, HHS and the Acting Secretary, have opposed this motion and have themselves moved to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See* Defs.' Mot. Dismiss, ECF No. 17. For the reasons stated below, the Court concludes that it lacks subject matter jurisdiction because Plaintiffs have failed to present any claim to the Secretary for final decision as required by 42 U.S.C. § 405(g). Accordingly, the Court grants Defendants' motion to dismiss and denies Plaintiffs' motion for preliminary injunction as moot.

II. BACKGROUND

A. The 340B Program

In 1992, Congress established what is now commonly referred to as the "340B Program." Pub. L. 102-585. This program was intended to enable certain hospitals and clinics "to stretch scarce Federal resources as far as possible, reaching more eligible patients and providing more comprehensive services." H.R. Rep. 102-384(II), at 12 (1992). To do this, it allowed participating hospitals and other health care providers to purchase certain "covered outpatient drugs" at discounted prices from manufacturers. *See* 42 U.S.C. § 256b. Under this program, participating drug manufacturers agree to offer certain covered outpatient drugs to "covered

entities" at or below a "maximum" or "ceiling" price, which is calculated pursuant to a statutory formula. *See* 42 U.S.C. § 256b(a)(1)–(2).

B. Setting Medicare Reimbursement Rates for 340B Drugs

Medicare is a federal health insurance program for the elderly and disabled. *See* 42 U.S.C. §§ 1395 *et seq.* Part A of Medicare provides insurance coverage for inpatient hospital care, home health care, and hospice services. *Id.* at § 1395c. Part B, provides supplemental coverage for other types of care, including outpatient hospital care. *Id.* at §§ 1395j, 1395k.

One component of Medicare Part B is the Outpatient Prospective Payment System ("OPPS"), which pays hospitals directly to provide outpatient services to beneficiaries. *See id.* at § 1395*l*(t). Under this system, hospitals are paid prospectively for their services for each upcoming year. As part of the annual determination of OPPS rates, CMS must also determine how much Medicare will pay for "specified covered outpatient drugs" ("SCODs"). *See id.* at § 1395*l*(t)(14). Importantly, some of these SCODs include outpatient drugs that hospitals purchase pursuant to the 340B Program.

Under the statutory scheme applicable here, Congress has authorized two potential methods of setting SCOD rates. First, if available, the payment rates must be set using "the average acquisition cost for the drug for that year." *Id.* at § 1395*l*(t)(14)(iii)(I). If that data is not available, however, then the payment rates must be set equal to "the average price for the drug in the year established under [certain other statutory provisions] . . . as calculated and adjusted by the Secretary as necessary for purposes of this paragraph." *Id.* at § 1395*l*(t)(14)(iii)(II). For 2018, the applicable provision was 42 U.S.C. § 1395w-3a, which specified that the payment rate should be the "average sales price" for the drug plus six percent ("ASP + 6%"). *See id.* at § 1395w-3a(b).

C. The 2018 OPPS Rule

On July 13, 2017, CMS issued a proposed rule for OPPS rates for the Calendar Year 2018. *Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs*, 82 Fed. Reg. 33,558 (Jul. 20, 2017). In addition to updating the OPPS rates for 2018, CMS also proposed changing the way Medicare would pay hospitals for SCODs acquired through the 340B Program. *See id.* at 33,634. In its proposed rule, CMS noted that several studies in recent years had shown that the difference between the price that hospitals paid to acquire 340B drugs and the amount that Medicare reimbursed hospitals for those drugs was significant. *See id.* at 33,632–33. For example, in 2015, the Medicare Payment Advisory Commission ("MedPAC") estimated that, on average, "hospitals in the 340B program 'receive[d] a minimum discount of 22.5 percent of the [average sales price] for drugs paid under the [OPPS]," yet hospitals were being reimbursed at a rate of ASP + 6%. *Id.* at 33,632 (second alteration in original). The MedPAC report also observed drug spending increases correlated with hospitals' participation in the 340B Program. *Id.* Moreover, the number of hospitals participating in the 340B Program was only going higher. *Id.* at 33,633.

"Given the growth in the number of providers participating in the 340B program and recent trends in high and growing prices of several separately payable drugs administered under Medicare Part B to hospital outpatients, [CMS] believe[d] it [was] timely to reexamine the appropriateness of continuing to pay the current OPPS methodology of ASP + 6 percent to hospitals that have acquired those drugs under the 340B program at significantly discounted rates." *Id.* CMS also expressed concern "about the rising prices of certain drugs and that Medicare beneficiaries, including low-income seniors, are responsible for paying 20 percent of

the Medicare payment rate for these drugs." *Id.* Specifically, CMS was "concerned that the current payment methodology may lead to unnecessary utilization and potential overutilization of separately payable drugs." *Id.*

Accordingly, CMS proposed lowering the Medicare payment rate for 340B Program drugs. CMS's goal was "to make Medicare payment for separately payable drugs more aligned with the resources expended by hospitals to acquire such drugs while recognizing the intent of the 340B program to allow covered entities, including eligible hospitals to stretch scarce resources while continuing to provide access to care." *Id.* CMS, however, did not have the data necessary to "precisely calculate the price paid by 340B hospitals for [any] particular covered outpatient drug[s]." *Id.* at 33,634. For that reason, CMS believed it was appropriate to essentially estimate hospitals' acquisition costs based on hospitals' average discount under 340B. *See id.* Specifically, CMS proposed applying the average discount that MedPAC had estimated—22.5 percent of the average sales price. *See id.* CMS believed that MedPAC's estimate was appropriate and, in fact, conservative because the "actual average discount experienced by 340B hospitals is likely much higher than 22.5 percent." *Id.*

CMS also stated its purported statutory basis for altering payment rates for 340B drugs. Specifically, CMS believed that this proposed change was within its authority "under section 1833(t)(14)(A)(iii)(II) [of] the Act [(codified at 42 U.S.C. § 1395*l*(t)(14)(A)(iii)(II))], which states that if hospital acquisition cost data are not available, the payment for an applicable drug shall be the average price for the drug . . . as calculated and adjusted by the Secretary as necessary. *Id.* CMS conceded that it did not "have hospital acquisition cost data for 340B drugs" and, therefore, it was proposing to continue paying for the drugs under its authority at § 1395*l*(t)(14)(A)(iii)(II). *Id.* CMS proposed "exercise[ing] the Secretary's authority to adjust

applicable payment rate as necessary and, for separately payable drugs and biologicals . . . acquired under the 340B program, . . . adjust[ing] the rate to ASP minus 22.5 percent which [CMS] believe[d] better represents the average acquisition cost for these drugs and biologicals." *Id.*

The proposed rule, of course, solicited comment from the public and Plaintiffs in this case responded. Plaintiffs argued, among other things, that CMS, for various reasons, did not in fact, have the legal authority to change the 340B payment rates in the manner that CMS proposed and that adopting the nearly 30% reduction would severely impact covered entities' ability to provide critical healthcare programs to their communities, including underserved patients. *See* AHA Comments at 1–9, ECF No. 2-6; AAMC Comments at 3–6, ECF No. 2-7; AEH Comments at 3–13, ECF No. 2-8; EHMS Comments at 2–3, ECF No. 2-9; Henry Ford Comments at 1–3, ECF No. 2-10.

Nevertheless, on November 13, 2017, CMS adopted the payment reduction for 340B drugs that it had originally proposed. *See Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs*, 82 Fed. Reg. 52,356, at 52,362 (Nov. 13, 2017). CMS did, however, respond to Plaintiffs' arguments about its authority to change Medicare reimbursement rates for 340B drugs. *See id.* at 52,499. CMS argued that the Secretary's authority under § 1395*l*(t)(14)(A)(iii)(II) to "calculate and adjust" drug payments "as necessary for purposes of this paragraph" gave the Secretary broad discretion to adjust payments for drugs, which it believed included an ability to adjust Medicare payment rates according to whether or not certain drugs are acquired at a significant discount. *Id.* CMS also disagreed with commenters that the authority to "calculate and adjust" drug rates as necessary is limited to "minor changes" and it saw "no evidence in the statute to

support that position." *Id.* at 52,500. Accordingly, CMS saw fit to use its purported authority "to apply a downward adjustment that is necessary to better reflect acquisition costs of [340B] drugs." *Id.* Under this final rule, the change to 340B reimbursement rates is scheduled to go into effect on January 1, 2018. *Id.* at 52,356.

D. The Present Action

On November 13, 2017, Plaintiffs brought suit in this Court challenging the 340B provisions of the 2018 OPPS Rule under the Administrative Procedure Act ("APA"). *See* Compl., ECF No. 1. Plaintiffs allege, as they did in their comments, that the Secretary's nearly 30% reduction in the Medicare reimbursement rate for 340B drugs was "in excess of [his] authority under 42 U.S.C. § 1395*l*(t)(14)(A)(iii)" and that it, therefore, violated the APA. Compl. ¶¶ 47–49. That same day, Plaintiffs also moved for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. *See* Pls.' Mot. Prelim. Inj. Plaintiffs specifically requested that this Court enjoin Defendants from implementing the new 340B provisions until this case has been fully adjudicated. *See* Pls.' Mot. Prelim. Inj. Defendants opposed Plaintiffs' motion and filed their own motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[1] *See* Defs.' Mot. Dismiss. On December 21, 2017, the Court heard oral argument from the parties on both motions.

[1] On December 8, 2017, thirty-two not-for-profit state and regional hospital associations filed a consent motion for leave to submit a brief as *amici curiae* in support of Plaintiffs' motion for preliminary injunction and in opposition to Defendants' motion to dismiss. ECF No. 19. Because the Court does not reach the merits of Plaintiffs' claim, the Court finds it unnecessary to consider the amicus brief. Accordingly, the Court will deny the motion for leave.

III. ANALYSIS

The Court's analysis in this matter necessarily begins and ends with an inquiry into its own subject matter jurisdiction. On a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, it is the plaintiff's burden to establish that the court has subject matter jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). When considering whether it has jurisdiction, a court must accept "the allegations of the complaint as true." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992)). However, a court may also "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* (quoting *Herbert*, 974 F.2d at 197).

In this case, there is only one potential source of subject matter jurisdiction—42 U.S.C. § 405(g). "The Medicare Act places strict limits on the jurisdiction of federal courts to decide 'any claims arising under' the Act." *Am. Orthotic & Prosthetic Ass'n, Inc. v. Sebelius*, 62 F. Supp. 3d 114, 122 (D.D.C. 2014) (citing 42 U.S.C. § 405(h)). Indeed, any such claim must be brought pursuant to 42 U.S.C. § 405(g) of the Social Security Act (which is made applicable to the Medicare Act by virtue of 42 U.S.C. § 1395ii) even if the claim has been framed as a challenge under other laws or the Constitution. *See* 42 U.S.C. § 405(h); *Heckler v. Ringer*, 466 U.S. 602, 615–16 (1984) ("§ 405(g), to the exclusion of 28 U.S.C. § 1331, is the sole avenue for judicial review for all 'claim[s] arising under' the Medicare Act") (alterations in original); *see also Three Lower Ctys. Cmty. Health Servs., Inc. v. U.S. Dep't of Health & Human Servs.*, 317 F. App'x 1, 2 (D.C. Cir. 2009) ("Parties challenging Medicare rules must exhaust the agency review process regardless of whether the matter involves a direct constitutional, statutory, or

regulatory challenge.") (per curiam). A claim arises under the Medicare Act when its provisions provide "both the standing and the substantive basis" for the complaint. *Weinberger v. Salfi*, 422 U.S. 749, 760–61 (1975). Because Plaintiffs' sole claim is substantively based on the Medicare Act, judicial review may occur only if § 405(g)'s jurisdictional requirements are satisfied. *See Am. Orthotic & Prosthetic Ass'n, Inc.*, 62 F. Supp. 3d at 122 ("As all of [plaintiff]'s claims are substantively based in the Medicare Act, satisfaction of the Act's conditions regarding judicial review is required.")

Section 405(g) permits judicial review only "after [a] final decision of the [Secretary] made after a hearing to which he was a party." 42 U.S.C. § 405(g); *Mathews v. Eldridge*, 424 U.S. 319, 327 (1976). Thus, § 405(g) speaks in terms of both "ripeness" and "exhaustion." And while these are familiar concepts in the administrative law context, the Supreme Court has been clear that the requirements under § 405(g) represent an even more exacting standard. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. at 12 ("the bar of § 405(h) reaches beyond ordinary administrative law principles of 'ripeness' and 'exhaustion of administrative remedies'. . . ."). Indeed, while ordinary administrative law doctrines might permit judicial review under various exceptions, the Medicare Act "demands the 'channeling' of virtually all legal attacks through the agency." *Id.*

The Supreme Court has defined two elements that a plaintiff must establish in order to satisfy § 405(g). First, there is a non-waivable, jurisdictional "requirement that a claim for benefits shall have been presented to the Secretary." *Eldridge*, 424 U.S. at 328. "Absent such a claim there can be no 'decision' of any type," which "is clearly required by the statute." *Id.* Thus, the D.C. Circuit has previously described the presentment requirement as an "absolute prerequisite" to review and has found jurisdiction to be lacking where a plaintiff "proceeded

directly to district court, seeking a preliminary injunction barring HHS . . . from implementing [a] new rate reduction." *Nat'l Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1129–30 (D.C. Cir. 1992). The second element is a waivable "requirement that the administrative remedies prescribed by the Secretary be exhausted." *Eldridge*, 424 U.S. at 328. Unlike the first element, however, a plaintiff may be excused from this obligation when, for example, exhaustion would be futile. *See Tataranowicz v. Sullivan*, 959 F.2d 268, 274 (D.C. Cir. 1992); *Nat'l Ass'n. for Home Care & Hospice, Inc. v. Burwell*, 77 F. Supp. 3d 103, 110 (D.D.C. 2015) ("Futility may serve as a ground for excusing exhaustion, either on its own or in conjunction with the other factors . . . ."). Together, § 405(g)'s two elements serve the practical purpose of "preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Salfi*, 422 U.S. at 765; *see also Ill. Council on Long Term Care, Inc.*, 529 U.S. at 13 (§ 405(g)'s requirements "assure[] the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts . . . ."). In this case, Plaintiffs argue that they have satisfied the presentment requirement and that they should be excused from the exhaustion requirement. *See* Pls.' Reply at 14–17, ECF No. 20.

The Plaintiffs' problem, however, is that they have not yet presented any specific claim for reimbursement to the Secretary upon which the Secretary might make a final decision. Indeed, the Rule that sets the reimbursement rates at issue and which might form the basis of reimbursement claims that they might submit someday in the future has not yet gone into effect. The Supreme Court addressed similar circumstances in *Heckler v. Ringer*, 466 U.S. 602 (1984).

In *Ringer*, the plaintiff had not presented an actual claim, but was instead "seeking to establish a right to future payments" on a potential future claim. *Id.* at 621. The Court held that allowing an anticipatory challenge to the Secretary's policy choice in the absence of a specific claim "would be inviting [claimants] to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court." *Id.* Thus, "[b]ecause [the plaintiff] ha[d] not given the Secretary an opportunity to rule on *a concrete claim for reimbursement*, he ha[d] not satisfied the nonwaivable exhaustion requirement of § 405(g)." *Heckler v. Ringer*, 466 U.S. 602, 622 (1984) (emphasis added); *see also Three Lower Ctys. Cmty. Health Servs., Inc. v. U.S. Dep't of Health & Human Servs.*, 317 F. App'x 1, 2 (D.C. Cir. 2009) ("anticipatory challenges to the lawfulness of a provision that might later bar recovery of benefits must proceed 'through the special review channel that the Medicare statutes create.'" (quoting *Ill. Council*, 529 U.S. at 5)).

Plaintiffs argue, however, that they have met the presentment requirement because they "submitt[ed] detailed comments during the notice-and-comment process for the 340B Provisions of the OPPS Rule." Pls.' Reply at 14. But comments submitted in a rulemaking are not individualized, "concrete claim[s] for reimbursement," as courts routinely require to satisfy presentment. *Ringer*, 466 U.S. at 625 ("Congress . . . has . . . expressly set up a scheme that requires the presentation of a concrete claim to the Secretary."). Not surprisingly then, the few Courts that have specifically considered arguments like those espoused by Plaintiffs have generally found that the submission of letters and comments that are divorced from discrete claims for reimbursement are insufficient for purposes of § 405(g). For example, in *National Association for Home Care & Hospice, Inc. v. Burwell*, 77 F. Supp. 3d 103 (D.D.C. 2015), another court in this District held that the presentment requirement was not satisfied when the

plaintiffs "submit[ed] comments to the agency and [] me[t] with agency officials to voice disagreement with [a particular] rule" because "an association may not challenge the constitutionality of Medicare regulations in the abstract on the basis that its members are likely to confront those regulations in the future." *Id.* at 109 n.1 (citing *Ill. Council*, 529 U.S. at 5); *see also Three Lower Ctys. Cmty. Health Servs., Inc. v. U.S. Dep't of Health & Human Servs.*, 317 F. App'x at 3 (holding that plaintiff's "letter to the PRRB requesting a jurisdictional ruling" did not satisfy the presentment requirement because "[t]he Medicare Act [] requires that parties present all such challenges to the agency in the context of a fiscal year reimbursement claim"); *Am. Orthotic & Prosthetic Ass'n, Inc.*, 62 F. Supp. 3d at 123 ("Because [plaintiff's letters] were not tied to any concrete claims, [plaintiffs]'s self-described 'detailed critiques of the [agency action] . . . [were] insufficient to establish presentment.").

Plaintiffs do not cite any authority in this Circuit or elsewhere in which a court has found the submission of comments in response to an agency's request for notice and comment on a proposed regulation satisfies 405(g)'s presentment requirement. *See* Hr'g Tr. at 21:22–22:4 (Dec. 21, 2017) (admitting that Plaintiffs have not seen any "circuit case that specifically finds that commenting in a notice-and-comment period satisfies the presentment requirement"). Nevertheless, Plaintiffs attempt to bolster their argument with two cases that they claim support their position. First, Plaintiffs point to *Mathews v. Eldridge*, 424 U.S. 319 (1976), where the Supreme Court held that the plaintiff's failure to "raise with the Secretary his constitutional claim" was "not controlling." *Id.* at 329. But in that case, even though the plaintiff had not presented his precise constitutional argument to the Secretary, there had been a "'final decision' by the Secretary with respect to the [plaintiff's] claim of entitlement to benefits." *Id.* Indeed, the Court found that the named plaintiff, "[t]hrough his answers to the state agency questionnaire,

and his letter in response to the tentative determination that his disability had ceased, had specifically presented the claim that his benefits should not be terminated because he was still disabled." *Id.* Moreover, "[t]his claim was denied by the state agency and its decision was accepted by the [Social Security Administration]." *Id.* Thus, despite not presenting a particular constitutional argument to the Secretary, the plaintiff in *Eldridge*—unlike the Plaintiffs here—*had* submitted a claim for definite benefits, which the Secretary had denied. Thus, *Eldridge* does not lend support to Plaintiffs' position that comments made during the rulemaking process alone may satisfy § 405(g)'s presentment requirement.

Plaintiffs also place heavy reliance on *Action Alliance of Senior Citizens v. Johnson*, 607 F. Supp. 2d 33 (D.D.C. 2009), but it too offers limited support to Plaintiffs' position. In that case, two organizations and one recipient of Medicare benefits sought to challenge the Secretary's decision to recover refunds that HHS had erroneously issued to Medicare beneficiaries. After filing their complaint, plaintiffs sought, and were granted, a preliminary injunction. *See Action All. of Senior Citizens v. Leavitt*, 483 F.3d 852, 854 (D.C. Cir. 2007). The Secretary challenged that injunction in several respects on appeal, but he did not contest subject matter jurisdiction until the D.C. Circuit itself raised the issue *sua sponte* and requested supplemental briefing. *See id.* at 856. Ultimately, the Circuit held that the district court did not have jurisdiction to consider plaintiffs' claims or to issue the preliminary injunction because the plaintiffs had not adequately presented their claims to the Secretary for a final determination. *See id.* It then remanded the case to the district court. *Id.* at 861.

Following the D.C. Circuit's opinion, the plaintiffs sent letters to the agency setting forth their various legal arguments and requesting that it accord the affected Medicare beneficiaries with certain relief. *Action All. of Senior Citizens*, 607 F. Supp. 2d at 37–38; *see also* Joint

Appendix at A-130, *Action All. of Senior Citizens v. Sebelius*, 607 F.3d 860 (D.C. Cir. 2010) (No. 09-5191). The agency responded by denying the plaintiffs' requests and explaining its rationale. *See Action All. of Senior Citizens*, 607 F. Supp. 2d at 37–40. On remand, the Secretary argued that the two association plaintiffs did not satisfy the presentment requirement because the letters were from the associations rather than their members. *See id.* at 38–39. The Secretary did not argue, however, that presentment must be accomplished, if at all, through a formal submission of a concrete claim. *See* Defs.' Mot. Dismiss at 21–23, *Action All. of Senior Citizens v. Johnson*, 607 F. Supp. 2d 33 (D.D.C. 2009) (No. 06-1607), ECF No. 49. And the district court did not address this issue on its own. Rather, the district court held that associations may present claims on behalf of their members and concluded, without explanation, that the organizations' letters satisfied § 405(g)'s presentment requirement. *See Action All. of Senior Citizens*, 607 F. Supp. 2d at 40. The district court then proceeded to consider the merits of plaintiffs' claims, but ultimately sided with the Secretary and granted his motion to dismiss. *See id.* at 42.

Plaintiffs then appealed the district court's decision. The Secretary did not cross-appeal on the jurisdictional issue and, in fact, conceded that the Circuit "ha[d] jurisdiction to address the issues presented in th[e] appeal." *See* Appellee's Brief at 11 n.2, *Action All. of Senior Citizens v. Sebelius*, 607 F.3d 860 (D.C. Cir. 2010) (No. 09-5191). And while the Secretary did present an abbreviated version of the argument made to the trial court, the Secretary still did not argue that the generalized nature of the letters in anyway made them deficient. *See id.* After reviewing the case, the D.C. Circuit affirmed the judgment of the district court and observed in a footnote that, while presentment had at one time precluded judicial review of their claims, "[p]laintiffs ha[d] since cured the jurisdictional defect." *See Action All. of Senior Citizens v. Sebelius*, 607 F.3d

860, 862 n.2 (D.C. Cir. 2010). But like the district court, the Court of Appeals did not offer any explanation as to why generalized letters satisfied the presentment requirement. *See id.* at 862.

Given the lack of any substantive discussion on the issue of whether generalized letters may suffice for purposes of presentment by either the defendant Secretary, the district court, or the Court of Appeals, at least one court has questioned the precedential value of *Action Alliance* in that regard. *See Am. Orthotic & Prosthetic Ass'n, Inc.*, 62 F. Supp. 3d at 123 ("The lack of explanation in both cases is likely because the precise question presented here—whether generalized grievance letters rather than discrete claims are sufficient to satisfy presentment—was not raised by the parties in Action Alliance, and the Court therefore questions the precedential value of those opinions."); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 749 (D.C. Cir. 1987) ("[I]t is well settled that cases in which jurisdiction is assumed *sub silentio* are not binding authority for the proposition that jurisdiction exists." (citing *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 119 (1984))). This Court too believes that *Action Alliance*'s value on this underdeveloped issue is doubtful. In any event, there is a meaningful difference between the letters at issue in *Action Alliance* and the comments that Plaintiffs submitted in this case. Indeed, in *Action Alliance,* the associations' letters concerned specific claims that *had already accrued to individuals* and thus "were closer to the 'concrete claim for reimbursement' that the Supreme Court has held is required for proper presentment." *Am. Orthotic & Prosthetic Ass'n, Inc.*, 62 F. Supp. 3d at 123 (quoting *Ringer*, 466 U.S. at 622). By contrast, even though Plaintiffs' comments in this case criticized the proposed 2018 OPPS Rule, they were not advancing any specific, concrete claims for reimbursement.

Thus, they cannot satisfy the presentment requirement of § 405(g). *See id.* ("Because [plaintiff's letters] were not tied to any concrete claims, [plaintiff]'s self-described 'detailed critiques of the [agency action]' . . . [were] insufficient to establish presentment."); *Ringer*, 466 U.S. at 625 ("Congress . . . has . . . expressly set up a scheme that requires the presentation of a concrete claim to the Secretary.").

In conclusion, Plaintiffs' failure to present any concrete claim for reimbursement to the Secretary for a final decision is a fundamental jurisdictional impediment to judicial review under 42 U.S.C. § 405(g). As a result, the Court must necessarily dismiss Plaintiffs' action for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss (ECF No. 17) is **GRANTED**; Plaintiffs' Motion for a Preliminary Injunction (ECF No. 2) is **DENIED AS MOOT**; and the Motion for Leave to File Brief as *Amici Curiae* (ECF No. 19) is **DENIED**. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: December 29, 2017

RUDOLPH CONTRERAS
United States District Judge

Legal Challenges to "Travel Ban" Executive Orders

Issue Outline:

- On January 27, 2017, President Trump issued the first "travel ban" executive order, *Protecting the Nation from Foreign Terrorist Entry into the United States.*
- On March 6, a second version was issued, clarifying and narrowing its terms.
- On September 24, a third version was issued, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,* further clarifying certain terms and applying restrictions more tailored to each of eight countries, based on a review by Department of Homeland Security.
- Multiple lawsuits challenging the lawfulness and constitutionality of each of the versions have been commenced. Currently, the main cases are pending in the Fourth and Ninth Circuit Courts of Appeals.
- The Supreme Court has ruled that the September travel ban may take effect while the appeals are pending.
- The challenges have focused on alleged violations of the Immigration and Nationality Act and the Establishment Clause of the US Constitution, among other provisions.
- The primary concern for the hospital community has been the travel ban's impact on the recruitment of international medical graduates (IMGs) as workforce members and trainees. IMGs disproportionately serve in safety net hospitals and medically underserved areas and are thought to be key to addressing physician shortages in a number of specialties over coming years.

Attachment:

- *Per Curiam* Opinion by Ninth Circuit, in *Hawaii v. Trump*, affirming in part and vacating in part Hawaii district court's preliminary injunction, dated December 22, 2017

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 22 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASSOCIATION OF HAWAII, INC., Plaintiffs-Appellees, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA, Defendants-Appellants.	No. 17-17168 D.C. No. 1:17-cv-00050-DKW-KSC District of Hawaii, Honolulu ORDER

Before: HAWKINS, GOULD, and PAEZ, Circuit Judges.

The opinion disposition filed on December 22, 2017, is withdrawn and a new opinion disposition is filed concurrently with this order.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 22 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASSOCIATION OF HAWAII, INC.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, in her official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA,

Defendants-Appellants.

No. 17-17168

D.C. No.
1:17-cv-00050-DKW-KSC

OPINION

Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted December 6, 2017
Seattle, Washington

Before: Michael Daly Hawkins, Ronald M. Gould, and Richard A. Paez, Circuit Judges.

PER CURIAM:

For the third time, we are called upon to assess the legality of the President's efforts to bar over 150 million nationals of six designated countries[1] from entering the United States or being issued immigrant visas that they would ordinarily be qualified to receive. To do so, we must consider the statutory and constitutional limits of the President's power to curtail entry of foreign nationals in this appeal of the district court's order preliminarily enjoining portions of § 2 of Proclamation 9645 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (the "Proclamation").

The Proclamation, like its predecessor executive orders, relies on the premise that the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President's issuance of the Proclamation once again exceeds the scope of his delegated authority. The Government's interpretation of 8 U.S.C. § 1182(f) not only upends the carefully crafted immigration scheme Congress has enacted through the INA, but it deviates from the text of the statute, legislative history, and prior executive practice as well.

[1] Although Proclamation 9645 imposes varying restrictions on nationals of eight countries—Chad, Iran, Libya, Somalia, Syria, Yemen, North Korea, and Venezuela—Plaintiffs challenge only the restrictions imposed on the nationals of six Muslim-majority countries.

Further, the President did not satisfy the critical prerequisite Congress attached to his suspension authority: before blocking entry, he must first make a legally sufficient finding that the entry of the specified individuals would be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). The Proclamation once again conflicts with the INA's prohibition on nationality-based discrimination in the issuance of immigrant visas. Lastly, the President is without a separate source of constitutional authority to issue the Proclamation.

On these statutory bases, we affirm the district court's order enjoining enforcement of the Proclamation's §§ 2(a), (b), (c), (e), (g), and (h). We limit the scope of the preliminary injunction, however, to foreign nationals who have a bona fide relationship with a person or entity in the United States.

I. Background[2]

A. Prior Executive Orders and Initial Litigation

On January 27, 2017, one week after his inauguration, President Donald J. Trump signed an Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry into the United States." Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1"). EO-1's stated purpose was to "protect the American people from terrorist attacks by foreign nationals admitted to the United States."

[2] Portions of the background section have been drawn from the district court's order below. *See Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 4639560, at *1–4 (D. Haw. Oct. 17, 2017) ("*Hawai'i TRO*").

Id. EO-1 took effect immediately and was challenged in several venues shortly after it was issued. On February 3, 2017, a federal district court in the State of Washington enjoined the enforcement of EO-1. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). The Government filed an emergency motion seeking a stay of the injunction, which we denied. *See Washington v. Trump*, 847 F.3d 1151, 1161–64 (9th Cir. 2017) (per curiam), *reh'g en banc denied*, 853 F.3d 933 (9th Cir. 2017). The Government later voluntarily dismissed its appeal of the EO-1 injunction.

On March 6, 2017, the President issued Executive Order 13,780, which was given the same title as EO-1 and was set to take effect on March 16, 2017. 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2"). EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments were providing adequate information about their nationals seeking entry into the United States. *See* EO-2 § 2(a). EO-2 also directed the Secretary of Homeland Security to report those findings to the President; following the Secretary's report, nations identified as providing inadequate information were to be given an opportunity to alter their practices before the Secretary would recommend entry restrictions for nationals of noncompliant countries. *Id.* §§ 2(b), (d)–(f).

During this global review, EO-2 imposed a 90-day suspension on the entry of certain foreign nationals from six Muslim-majority countries: Iran, Libya,

Somalia, Sudan, Syria, and Yemen. *Id.* § 2(c). That 90-day suspension was challenged in multiple courts and was preliminarily enjoined by federal district courts in Hawai'i and Maryland. *See Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017); *Int'l Refugee Assistance Project* ("*IRAP*") *v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017). Those injunctions were affirmed by the Ninth and Fourth Circuits, respectively. *See Hawai'i v. Trump* (*Hawai'i I*), 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc), *as amended* (May 31, 2017). The Supreme Court granted a writ of *certiorari* in both cases and left the injunctions in place pending its review, except as to foreign nationals who lacked a "credible claim of a bona fide relationship with a person or entity in the United States." *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017).

On September 24, 2017, the President issued the Proclamation, which indefinitely suspends immigration by nationals of seven countries and imposes restrictions on the issuance of certain nonimmigrant visas for nationals of eight countries. 82 Fed. Reg. 45,161, 45,164–67 (Sept. 24, 2017). The entry restrictions were immediately effective for foreign nationals who 1) were subject to EO-2's restrictions, and 2) lack a credible claim of a bona fide relationship with a person or entity in the United States. *Id.* at 45,171. For all other affected persons, the Proclamation was slated to take effect on October 18, 2017. *Id.* On October 10, 2017, the Supreme Court vacated the Fourth Circuit's opinion in *IRAP v. Trump* as

moot. *See Trump v. IRAP*, No. 16-1436, — S. Ct. —, 2017 WL 4518553 (U.S. Oct. 10, 2017). On October 24, 2017, the Supreme Court vacated our opinion in *Hawai'i I* on the same grounds. *See Trump v. Hawai'i*, No. 16-1540, — S. Ct. —, 2017 WL 4782860 (U.S. Oct. 24, 2017). In vacating our prior decision as moot, the Supreme Court explicitly noted that it expressed no view on the merits of the case. *See id.*

B. Plaintiffs' Third Amended Complaint

On October 10, 2017, Plaintiffs sought to amend their complaint to include allegations related to the Proclamation. The third amended complaint includes statutory claims for violations of the INA, the Religious Freedom Restoration Act, and the Administrative Procedure Act, as well as constitutional claims for violations of the Establishment and Free Exercise Clauses of the First Amendment and the equal protection guarantees of the Fifth Amendment's Due Process Clause. Plaintiffs also moved for a temporary restraining order; after expedited briefing, the district court granted the motion on October 17, 2017. *Hawai'i TRO*, 2017 WL 4639560, at *1. Relying on our now-vacated opinion in *Hawai'i I*, the district court found that the Proclamation suffered from the same deficiencies as EO-2. *Id.* at *1, *9–13. At the parties' request, the district court converted the temporary restraining order into a preliminary injunction on October 20, 2017, rendering it an

appealable order. *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC (D. Haw. Oct. 20, 2017), ECF No. 390 (order entering preliminary injunction).

The Government timely appealed. During the pendency of this appeal, we partially stayed the district court's preliminary injunction "except as to foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Hawai'i v. Trump*, No. 17-17168, 2017 WL 5343014 (9th Cir. Nov. 13, 2017). On December 4, 2017, the Supreme Court granted the Government's request for a complete stay pending review of the district court's preliminary injunction. *Trump v. Hawai'i*, No. 17A550, — S. Ct. — (Dec. 4, 2017).

C. The Proclamation

The Proclamation derives its purpose from the President's belief that he "must act to protect the security and interests of the United States." 82 Fed. Reg. at 45,161. In furtherance of this goal, the Proclamation imposes indefinite and significant restrictions and limitations on entry of nationals from eight countries whose information-sharing and identity-management protocols have been deemed "inadequate." *Id.* at 45,162–67. The Proclamation notes that screening and vetting protocols and procedures play a critical role in preventing terrorist attacks and other public safety threats by enhancing the Government's ability to "detect foreign nationals who may commit, aid, or support acts of terrorism." *Id.* at

45,162. Thus, the Proclamation concludes, "absent the measures set forth in th[e] proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of th[e] proclamation [will] be detrimental to the interests of the United States." *Id.* at 45,161–62.

The President selected eight countries for inclusion in the Proclamation based on a "worldwide review" conducted under the orders of EO-2. *Id.* at 45,161, 45,163–64. As part of that review, the Secretary of the Department of Homeland Security established global requirements for information sharing "in support of immigration screening and vetting" that included a comprehensive set of criteria on the information-sharing practices, policies, and capabilities of foreign governments. *Id.* at 45,161–63. The Secretary of State then "engaged with the countries reviewed in an effort to address deficiencies and achieve improvements." *Id.* at 45,161. The Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, ultimately identified 16 countries as "inadequate" based on "an analysis of their identity-management protocols, information-sharing practices, and risk factors." *Id.* at 45,163. An additional 31 countries were deemed "at risk" of becoming "inadequate." *Id.*

Countries were classified as "inadequate" based on whether they met the "baseline" developed by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. *Id.* at 45,162. The

baseline incorporated three categories of criteria: 1) identity-management information; 2) national security and public-safety information; and 3) national security and public-safety risk assessment. *Id.* Identity-management information ensures that foreign nationals seeking to enter the United States are who they claim to be. *Id.* This category "focuses on the integrity of documents required for travel to the United States," including whether the country issues passports with embedded data to confirm identity, reports lost and stolen passports, and provides additional identity-related information when requested. *Id.* National security and public-safety information includes whether the country "makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request," whether it provides identity document exemplars, and whether the country "impedes the United States Government's receipt of information about passengers and crew traveling to the United States." *Id.* Finally, national security and public-safety risk assessment focuses on whether the country is "a known or potential terrorist safe haven," whether the country participates in the Visa Waiver Program, and whether the country "regularly fails to receive its nationals" following their removal from the United States. *Id.* at 45,162–63.

After a "50-day engagement period to encourage all foreign governments . . . to improve their performance," the Secretary of Homeland Security ultimately determined that Chad, Iran, Libya, North Korea, Syria,

Venezuela, and Yemen continued to be "inadequate" based on their identity-management protocols, information-sharing practices, and risk factors.[3] *Id.* at 45,163. The Secretary of Homeland Security also determined that Iraq did not meet the baseline requirements, but concluded that entry restrictions and limitations were not warranted because of the "close cooperative relationship between the United States and the democratically elected government of Iraq, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combating the Islamic State of Iraq and Syria (ISIS)." *Id.*

On September 15, 2017, the Secretary of Homeland Security submitted a report to the President recommending entry restrictions for nationals from seven countries "determined to be 'inadequate' in providing such [requested] information and in light of the other factors discussed in the report." *Id.* After consultation with "appropriate Assistants to the President and members of the Cabinet, including the Secretaries of State, Defense, and Homeland Security, and the Attorney General" and "accounting for the foreign policy, national security, and

[3] The Proclamation does not include the other thirty-nine countries deemed either "inadequate" or "at risk" of becoming "inadequate." *See* 82 Fed. Reg. at 45,163. As the district court noted, "the explanation for how the Administration settled on the list of eight countries is obscured." *Hawai'i TRO*, 2017 WL 4639560, at *11 n.16. This is due, in large part, to the fact that no court has been able to consider—or even view—the DHS report in question.

counterterrorism objectives of the United States," the President decided to "restrict and limit the entry of nationals of 7 countries found to be 'inadequate'": Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. *Id.* at 45,164. And although Somalia "generally satisfies" the information-sharing requirements of the baseline, the President also imposed entry restrictions and limitations on Somalia nationals because of "its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory." *Id.* The President restricted entry of all immigrants from seven of the eight countries, and adopted "a more tailored approach" to the entry of nonimmigrants. *Id.* at 45,164–65.

Section 2's challenged country restrictions and proffered rationales are as follows:

Chadian nationals may not enter as immigrants or nonimmigrants on business, tourist, or business/tourist visas because, although Chad is "an important and valuable counterterrorism partner of the United States, and . . . . has shown a clear willingness to improve," it "does not adequately share public-safety and terrorism-related information," and several terrorist groups are active within Chad or the surrounding region. *Id.* at 45,165.

Iranian nationals may not enter as immigrants or nonimmigrants except under valid student and exchange visitor visas, and such visas are subject to

"enhanced screening and vetting." *Id.* The Proclamation notes that "Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals" following final orders of removal from the United States. *Id.*

The entry of Libyan nationals as immigrants and as nonimmigrants on business, tourist, or business/tourist visas is suspended because, although Libya "is an important and valuable counterterrorism partner," it "faces significant challenges in sharing several types of information, including public-safety and terrorism-related information," "has significant deficiencies in its identity-management protocols," does not "satisfy at least one key risk criterion," has not been "fully cooperative" in receiving its nationals after their removal from the United States, and has a "substantial terrorist presence" within its territory. *Id.* at 45,165–66.

The entry of all Syrian nationals—on immigrant and non-immigrant visas alike—is suspended because "Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism." *Id.* at 45,166. Syria also has "significant inadequacies in identity-

management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion." *Id.*

Yemeni nationals may not enter the United States as immigrants or nonimmigrants on business, tourist, or business/tourist visas because despite being "an important and valuable counterterrorism partner," Yemen "faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory." *Id.* at 45,166–67.

Somali nationals may not enter the United States as immigrants, and all nonimmigrant visa adjudications and entry decisions for Somali nationals are subject to "additional scrutiny." *Id.* at 45,167. Although Somalia satisfies information-sharing requirements, it "has significant identity-management deficiencies" and a "persistent terrorist threat also emanates from Somalia's territory." *Id.*

These restrictions apply to foreign nationals of the affected countries outside the United States who do not hold valid visas as of the effective date and who do not qualify for a visa under § 6(d)[4] of the Proclamation. *Id.* Suspension of entry does not apply to lawful permanent residents of the United States; foreign nationals

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[4] Section 6(d) of the Proclamation permits individuals whose visas were marked revoked or canceled as a result of EO-1 to obtain "a travel document confirming that the individual is permitted to travel to the United States and seek entry under the terms" of the revoked or canceled visa. 82 Fed. Reg. at 45,171.

who are admitted, paroled, or have a non-visa document permitting them to travel to the United States and seek entry valid or issued on or after the effective date of the Proclamation; any dual national traveling on a passport issued by a non-designated country; any foreign national on a diplomatic visa; any refugee already admitted to the United States; or any individual granted asylum, withholding of removal, advance parole, or Convention Against Torture protection. *Id.* at 45,167–68. Further, a consular officer, the Commissioner of U.S. Customs and Border Protection, or the Commissioner's designee "may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent" with certain specified guidelines. *Id.* at 45,168.

II. Justiciability

We first address several of the same justiciability arguments that we found unpersuasive in *Washington v. Trump* and *Hawai'i I*. Once more, we reject the Government's contentions. The Proclamation cannot properly evade judicial review.

A. Ripeness

The Government argues that Plaintiffs' claims are speculative and not ripe for adjudication until a specific applicant is denied a visa.[5] We reject this argument. We conclude that the issues in this case are "fit for review," and that significant hardship to Plaintiffs would result from "withholding court consideration" at this point. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 812 (2003).

"Ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (alteration and internal quotation marks omitted) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)). This case does not concern mere abstract disagreements. Instead, Plaintiffs challenge the Proclamation as implemented by the Department of State and the Department of Homeland Security. That is permissible. Under the traditional "pragmatic" approach to finality, an order may be immediately reviewable even if no "particular action [has been] brought against a particular [entity]." *U.S. Army*

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[5] The Government does not challenge Plaintiffs' Article III standing on appeal. Nonetheless, we "have an obligation to consider Article III standing independently, as we lack jurisdiction when there is no standing." *Day v. Apoliona*, 496 F.3d 1027, 1029 n.2 (9th Cir. 2007). For the reasons set forth in the district court's order, we conclude that Plaintiffs have Article III standing. *See Hawai'i TRO*, 2017 WL 4639560, at *4–7.

Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967)).

Moreover, contrary to the Government's position, the Proclamation's waiver provisions are not a "sufficient safety valve" and do not mitigate the substantial hardships Plaintiffs have already suffered and will continue to suffer due to the Proclamation. *Washington*, 847 F.3d at 1168–69. Plaintiff Muslim Association of Hawaii, for example, has already lost members as a result of the Proclamation and its predecessors, and expects to lose more. The mere possibility of a discretionary waiver does not render Plaintiffs' injuries "contingent [on] future events that may not occur." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). "[W]ithholding court consideration" at this juncture would undoubtedly result in further hardship to Plaintiffs. *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 808. We therefore conclude that Plaintiffs' claims are ripe for review.

B. Doctrine of Consular Nonreviewability

As in the litigation over EO-1 and EO-2, the Government contends that we are precluded from reviewing the Proclamation by the consular nonreviewability doctrine. Under that doctrine, "the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986). In other words, "it is not

within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a *given* alien." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (emphasis added). Although the political branches' power to exclude aliens is "largely immune from judicial control," it is not *entirely* immune; such decisions are still subject to "narrow judicial review." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citations omitted). Moreover, this case is not about individual visa denials, but instead concerns "the President's *promulgation* of sweeping immigration policy." *Washington*, 847 F.3d at 1162. Reviewing the latter "is a familiar judicial exercise," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012); courts do not hesitate to reach "challenges to the substance and implementation of immigration policy." *Washington*, 847 F.3d at 1163. Although "[t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

The Government's arguments to the contrary are foreclosed by *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993). In *Sale*, the Supreme

Court reviewed on the merits whether the President had violated the INA and the United States' treaty obligations by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[] the entry of undocumented aliens from the high seas." *Id.* at 160. By reaching the merits, *Sale* necessarily first decided that the Court had jurisdiction to review whether the President's orders under the color of § 1182(f) were *ultra vires*. *See id.* at 187–88. As in *Sale*, here we determine whether the Proclamation goes beyond the limits of the President's power to restrict alien entry.

Because *Sale* did not address the Court's jurisdiction explicitly, the Government speculates that the Supreme Court "could have decided it was unnecessary to" reach this issue, "given that the Court agreed with the government on the merits." We disagree. Instead, the argument "that a court may decide [questions on the merits] before resolving Article III jurisdiction" is "readily refuted." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). "Without jurisdiction the court cannot proceed at all in any cause." *Id.* at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . ." *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). While it is true that "drive-by jurisdictional rulings . . . have no precedential effect," *Sale* was not a case where jurisdiction "had been assumed by the parties" and so went unaddressed. *Id.* at 91. To the contrary, as the Government concedes, the parties

in *Sale* thoroughly briefed and debated this issue. *See* U.S. Br. 13–18 (No. 92-344); Resp. Br. 50–58 (No. 92-344); Reply Br. 1–4 (No. 92-344).

Judicial review of the legality of the Proclamation respects our constitutional structure and the limits on presidential power. The consular nonreviewability doctrine arose to honor Congress's choices in setting immigration policy—not the President's. *See Sing v. United States*, 158 U.S. 538, 547 (1895). This doctrine shields from judicial review only the enforcement "through executive officers" of Congress's "declared [immigration] policy," *id.*, not the President's rival attempt to set policy. The notion that the Proclamation is unreviewable "runs contrary to the fundamental structure of our constitutional democracy."[6] *Washington*, 847 F.3d at 1161. We have jurisdiction to review such an action, and we do so here.

C. Cause of Action and Statutory Standing

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[6] The Government argues that the President, at any time and under any circumstances, could bar entry of all aliens from any country, and intensifies the consequences of its position by saying that no federal court—not a federal district court, nor our court of appeals, nor even the Supreme Court itself—would have Article III jurisdiction to review that matter because of the consular nonreviewability doctrine. United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 13:01–17:33, https://www.youtube.com/watch?v=9Q0p_B40Pa8. Particularly in the absence of an explicit jurisdiction-stripping provision, we doubt whether the Government's position could be adopted without running roughshod over the principles of separation of powers enshrined in our Constitution.

The Government also contends that Plaintiffs' statutory claims are unreviewable for lack of a cause of action and lack of statutory standing. We disagree.

1. APA Cause of Action

We begin first by examining whether Plaintiffs' claims are reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Although the President's actions fall outside the scope of direct review, *see Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive," *id.* at 828 (Scalia, J., concurring); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324, 1328 (D.C. Cir. 1996) (holding that the court could review whether an executive order conflicted with a federal statute where plaintiffs had sought to enjoin executive branch officials implementing the order). Here, Plaintiffs bring suit not just against the President, but also against the entities charged with carrying out his instructions: the Department of State and the Department of Homeland Security. Further, because these agencies have "consummat[ed]" their implementation of the Proclamation, from which "legal consequences will flow," their actions are "final"

and therefore reviewable under the APA.[7] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation and internal quotation marks omitted).

Finally, the Government argues that the APA precludes review of actions committed to "agency discretion by law," 5 U.S.C. § 701(a)(2), and that the Proclamation is such an action. Plaintiffs counter that the Proclamation is not an unreviewable discretionary action, but rather is cabined by discernible constitutional and statutory limits. We are not persuaded by the Government's characterization of the Proclamation as an action committed to the Executive's discretion. This exception to the presumption of judicial review is "very narrow," applying only where "statutes are drawn in such broad terms that . . . there is no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). It does not apply where, as here, a court is tasked with reviewing whether an executive action has exceeded statutory authority. *See Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 791–92 (9th Cir. 1986) (collecting cases).

2. Zone of Interests

The Government additionally argues that even if an APA cause of action exists, Plaintiffs cannot avail themselves of it because they do not fall within the

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[7] The Government contends that there is no "final" agency action here because Plaintiffs' claims are unripe. For the reasons discussed previously, we reject this argument.

INA's zone of interests. Once again, we are tasked with determining whether Plaintiffs' interests "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

We conclude that Dr. Elshikh's challenge to the Proclamation falls within the INA's zone of interests. He asserts that the Proclamation prevents his brothers-in-law from reuniting with his family. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471–72 (D.C. Cir. 1995) ("The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress implemented the underlying intention of our immigration laws regarding the preservation of the family unit. Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect." (internal citations and alterations omitted)), *vacated on other grounds*, 519 U.S. 1 (1996). John Does 1 and 2 fall within the same zone of interest, alleging that they will be separated from family members—a son-in-law and a mother, respectively.

The Government maintains that these interests are inadequate because a relative of an alien seeking admission has no right to participate in visa proceedings. Yet the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner, as have we. *See,*

e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (involving a challenge by U.S. citizen to denial of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756–60 (1972) (arising from a challenge by American professors to denial of visa to journalist invited to speak at academic events); *Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (addressing a U.S. citizen's challenge to denial of husband's visa). In a case similar to the one before us, *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, the D.C. Circuit found that visa sponsors had standing to sue when they alleged that the State Department's refusal to process visa applications resulted in an injury to the sponsors. 45 F.3d at 471–73.

Likewise, Hawai'i's "efforts to enroll students and hire faculty members who are nationals from the six designated countries fall within the zone of interests of the INA." *Hawai'i I*, 859 F.3d at 766. The INA clearly provides for the admission of nonimmigrant students into the United States. *See* 8 U.S.C. § 1101(a)(15)(F) (identifying students qualified to pursue a full course of study); 8 C.F.R. § 214.2(f) (providing the requirements for nonimmigrant students, including those in colleges and universities). The INA also provides that nonimmigrant scholars and teachers may be admitted into the United States. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (identifying students, scholars, trainees, and professors in fields of specialized knowledge or skill, among others); *id.* §

1101(a)(15)(H) (identifying aliens working in specialty occupations); *id.* § 1101(a)(15)(O) (identifying aliens with extraordinary abilities in the sciences, arts, education, business, or athletics). As we have said before, "[t]he INA leaves no doubt" that Hawai'i's interests in "student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA." *Hawai'i I*, 859 F.3d at 766.

Further, the Muslim Association of Hawai'i (the "Association") alleges that its members will suffer harms such as separation from their families, and that the Association itself will suffer the loss of its members if it is not granted a preliminary injunction.

Once again, we conclude that "Plaintiffs' claims of injury as a result of the alleged statutory violations are, at the least, '*arguably* within the zone of interests' that the INA protects" and therefore judicially reviewable. *Id.* at 767 (quoting *Bank of Am. Corp. v. City of Miami*, — U.S. —, 137 S. Ct. 1296, 1303 (2017) (citation omitted) (emphasis added).

3. Equitable Cause of Action

Even if there were no "final agency action" review under the APA, courts have also permitted judicial review of presidential orders implemented through the

actions of other federal officials.[8] This cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority. *See Reich*, 74 F.3d at 1327–28 (citing *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110 (1902) and *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958)) (permitting challenge to an Executive Order promulgated by the president and implemented by the Secretary of Labor, despite the lack of a final agency action under the APA); *see also Duncan v. Muzyn*, 833 F.3d 567, 577–79 (6th Cir. 2016); *R.I. Dep't Envtl. Mgmt. v. United States*, 304 F.3d 31, 40–43 (1st Cir. 2002); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing *McAnnulty* for the proposition that federal courts may enjoin "violations of federal law by federal officials"). When, as here, Plaintiffs challenge the President's statutory authority to issue the Proclamation, we are provided with an additional avenue by which to review these claims.

Having concluded that Plaintiffs' claims are justiciable, we now turn to the district court's preliminary injunction.

III. The Preliminary Injunction

[8] The Supreme Court has decided the merits of such claims, including the specific claim that an action exceeded the authority granted under § 1182(f). *See Sale*, 509 U.S. at 187–88; *see also Dames & Moore v. Regan*, 453 U.S. 654 (1981).

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20. We may affirm the district court's entry of the preliminary injunction "on any ground supported by the record." *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

A. Likelihood of Success on the Merits

We consider first whether Plaintiffs are likely to succeed on the merits. In so doing, we consider four arguments[9] advanced by Plaintiffs: (1) the President has exceeded his congressionally delegated authority under 8 U.S.C. § 1182(f); (2) the President has failed to satisfy § 1182(f)'s requirement that prior to suspending entry, the President must find that entry of the affected aliens would be detrimental to the interests of the United States; (3) the Proclamation's ban on immigration from the designated countries violates 8 U.S.C. § 1152(a)(1)(A)'s prohibition on nationality-based discrimination; and (4) the President lacks the authority to issue

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[9] As we explain below, we decline to reach Plaintiffs' arguments other than those listed here.

the Proclamation in the absence of a statutory grant. We address each in turn.

1. Scope of Authority under § 1182(f)

In determining whether the President has the statutory authority to issue the Proclamation under 8 U.S.C. § 1182(f), we begin with the text. *See Sale*, 509 U.S. at 171; *Haig v. Agee*, 453 U.S. 280, 289–90 (1981). But our inquiry does not end there. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *see also United States* v. *Witkovich*, 353 U.S. 194, 199 (1957) (declining to "read in isolation and literally" an immigration statute that "appear[ed] to confer upon the Attorney General unbounded authority"). In *Brown & Williamson*, the Court looked beyond the "particular statutory provision in isolation," and interpreted the statute to create a "symmetrical and coherent regulatory scheme." 529 U.S. at 132–33. The Court thus undertook a holistic review, which entailed examining the statute's legislative history, *see id.* at 146–47, "congressional policy," *id.* at 139, and "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude," *id.* at 133.

Taking guidance from the Court's instructions in *Brown & Williamson* to look beyond the challenged "provision in isolation," *id.* at 132, we conclude that the Proclamation is inconsistent not just with the text of § 1182(f), but with the statutory framework as a whole, legislative history, and prior executive practice.

Although no single factor may be dispositive, these four factors taken together strongly suggest that Plaintiffs are likely to succeed on their claim that the President has exceeded his delegated authority under section 1182(f). We discuss each factor in greater detail below.

a. Statutory Text

We turn first to the text of § 1182(f). The INA grants the President the power to "*suspend* the entry of . . . any class of aliens" "for *such period* as he shall deem *necessary*." 8 U.S.C. § 1182(f) (emphasis added). We note at the outset that broad though the provision may be, the text does not grant the President an unlimited exclusion power.

Congress's choice of words is suggestive, at least, of its hesitation in permitting the President to impose entry suspensions of unlimited and indefinite duration. "The word 'suspend' connotes a temporary deferral." *Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976) (citing Webster's Third New International Dictionary (1966) and Bouvier's Law Dictionary (3d ed. 1914)). "[T]he word 'period,'" in turn, "connotes a stated interval of time commonly thought of in terms of years, months, and days." *United States v. Updike*, 281 U.S. 489, 495 (1930). This construction

of the term "period" is reinforced by the requirement that it be "necessary." [10] § 1182(f).

At argument, the Government contended that the indefinite duration of the Proclamation's entry restrictions is consistent with the text of § 1182(f). United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 22:45–23:15. Citing to § 4 of the Proclamation, which provides for a review of the restrictions every 180 days, the Government argued that because the suspensions will be "revisited" twice a year, the Proclamation is less indefinite than President Reagan's and President Carter's orders regarding Cubans and Iranians,[11] respectively. *Id.* at 23:04–23:14. This argument is unpersuasive.

The Government has repeatedly emphasized that the travel restrictions are necessary to incentivize and pressure foreign governments into improving their information-sharing and identity-management practices. This creates a peculiar situation where the restrictions may persist ad infinitum. To paraphrase a well-

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[10] As we discuss later, although prior executive orders or proclamations invoking § 1182(f) did not provide for a set end date, they were noticeably narrower in scope than the Proclamation. At the very least, Congress in adopting § 1182(f) likely did not contemplate that an executive order of the Proclamation's sweeping breadth would last for an indefinite duration.

[11] Proclamation 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (Cuba order); Exec. Order 12172, 44 Fed. Reg. 67,947 (Nov. 26, 1979) (Iran order), *amended by* Exec. Order 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980).

known adage, the Proclamation's review process mandates that the restrictions will continue until practices improve. The Proclamation's duration can be considered definite only to the extent one presumes that the restrictions will, indeed, incentivize countries to improve their practices. Where, as here, there is little evidence to support such an assumption, the Proclamation risks producing a virtually perpetual restriction—a result that the plain text of § 1182(f) heavily disfavors for such a far-reaching order.[12]

b. Statutory Framework

We next examine the statutory framework of the INA. *Brown & Williamson*, 529 U.S. at 133. We first note that the Constitution gives Congress the primary, if not exclusive, authority to set immigration policy. *See Arizona v. United States*, 567 U.S. 387, 409 (2012) (citing *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see also Fiallo*, 430 U.S. at 792 ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of

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[12] Because issuing indefinite entry restrictions under these circumstances violates § 1182(f), we further view § 1182(f) as prohibiting a series of temporary bans when it appears such serial bans are issued to circumvent the bar on indefinite entry restrictions. *See also* Brief of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae, Dkt. No. 41 at 7–8 (arguing that § 1182(f)'s use of the singular as it relates to "proclamation" and "period" is meaningful and precludes the use of serial bans to bypass the bar on indefinite suspensions, and noting that other provisions in § 1182 specifically use plural nouns to authorize multiple actions by the executive branch).

aliens." (citation and internal quotation marks omitted)); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 340 (1909) ("[T]he authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject . . . ."). Congress has delegated substantial power in this area to the Executive Branch, but the Executive may not exercise that power in a manner that conflicts with the INA's finely reticulated regulatory scheme governing the admission of foreign nationals.

In line with this principle, the D.C. Circuit has held that the Executive cannot use general exclusionary powers conferred by Congress to circumvent a specific INA provision without showing a threat to public interest, welfare, safety or security that was independent of the specific provision. *Abourezk*, 785 F.2d at 1057–58. The *Abourezk* court reasoned that the Executive's use of the general exclusionary provision to deny entry to members of groups proscribed in the specific provision would "rob [the general provision] of its independent scope and meaning," render the specific provision superfluous, and conflict with limits that Congress imposed on the use of the specific provision. *Id.* at 1057. We agree with the D.C. Circuit's approach and apply it to § 1182(f).

We conclude that the Proclamation conflicts with the statutory framework of the INA by indefinitely nullifying Congress's considered judgments on matters of immigration. The Proclamation's stated purposes are to prevent entry of terrorists

and persons posing a threat to public safety, as well as to enhance vetting capabilities and processes to achieve that goal. *See* 82 Fed. Reg. at 45,161. Yet Congress has already acted to effectuate these purposes.

As for the prevention of entry of terrorists and persons likely to pose public-safety threats, Congress has considered these concerns, and enacted legislation to restrict entry of persons on those specific grounds. Under 8 U.S.C. § 1182(a)(3)(B), any alien who has "engaged in a terrorist activity" is inadmissible,[13] unless the Secretary of State determines in his unreviewable discretion that the alien qualifies for a waiver. *See id.* § 1182(d)(3)(B). With regard to public safety, Congress has created numerous inadmissibility grounds, including an array of crime-related grounds. *See, e.g.*, *id.* § 1182(a)(2)(A) (crime of moral turpitude or drug offense); § 1182(a)(2)(B) (two or more offenses for which the aggregate sentences were five years or more); § 1182(a)(2)(C) (drug trafficking or benefitting from a relative who recently trafficked drugs); § 1182(a)(2)(D) (prostitution or "commercialized vice"); § 1182(a)(2)(H) (human trafficking); § 1182(a)(2)(I) (money laundering); § 1182(a)(3) ("Security and related grounds").

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[13] The term "engaged in a terrorist activity" is comprehensive. For example, "terrorist activity" includes any unlawful use of a weapon or dangerous device "other than for mere personal monetary gain," and "[e]ngag[ing] in terrorist activity" includes providing "material support" for any "terrorist activity" or terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(bb), (a)(3)(B)(iv).

With respect to the enhancement of vetting capabilities and processes, we likewise conclude that Congress has considered the reality that foreign countries vary with respect to information-sharing and identity-management practices, as well as terrorism risk. In fact, Congress addressed those concerns in a neighboring section, 8 U.S.C. § 1187 (the Visa Waiver Program or "VWP"), which was amended as recently as 2015 to address the heightened risk of terrorism in certain countries. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, § 203, 129 Stat. 2242, 2989–91. Significantly, many of the criteria used to determine whether a foreign national's country of origin qualifies for VWP treatment are replicated in the Proclamation's list of baseline criteria. This includes that the countries use electronic passports, § 1187(a)(3)(B), report lost or stolen passports, § 1187(c)(2)(D), and not provide safe haven for terrorists, § 1187(a)(12)(D)(iii). *See* 82 Fed. Reg. 45,162. The Proclamation even makes participation in the Visa Waiver Program part of its criteria for evaluating countries. *Id.* at 45,162–63.

The Government argues that the Visa Waiver Program is irrelevant because its "specific purpose" is the "facilitation of travel," and therefore it does not foreclose the President from addressing the "separate issue of what to do about a country that fails so many criteria that its information-sharing practices and other risk factors are collectively inadequate." This argument falls short. The Visa

Waiver Program's travel facilitation purpose is notable, but not for the reason advanced by the Government. As we explained above, the Visa Waiver Program utilizes many of the same criteria relied upon by the Proclamation. Congress thus expressly considered the reality that countries vary with respect to information-sharing and identity-management practices, as well as terrorism risk. In response to that reality, Congress could have enacted measures restricting travel from countries with inadequate risk factors, taken no action, or enacted provisions facilitating travel from low-risk countries. In creating the Visa Waiver Program, Congress chose the third approach. In so doing, Congress necessarily determined that the interests of the United States would be better served by facilitating *more* travel, not less. By heavily restricting travel from the affected countries, the Proclamation thus conflicts with the purpose of the Visa Waiver Program.

More broadly, the Government contends that Plaintiffs' reliance on the statutory framework is misplaced because § 1182(f) empowers the President to issue "*supplemental*" admission restrictions when he finds that the national interest so warrants. Although true, this merely begs the question of whether the restrictions at issue here are "supplemental." We conclude that the indefinite suspension of entry of all nationals from multiple countries, absent wartime or exigent circumstances, nullifies rather than "supplement[s]" the existing statutory scheme. The President is not foreclosed from acting to enhance vetting capabilities

and other practices in order to strengthen existing immigration law, but must do so in a manner consistent with Congress's intent. Put another way, the President cannot effectively abrogate existing immigration law while purporting to merely strengthen it; the cure cannot be worse than the disease. Here, the President has used his § 1182(f) and § 1185(a) powers to nullify numerous specific provisions of the INA indefinitely with regard to all nationals of six countries, and has overridden Congress's legislative responses to the same concerns the Proclamation aims to address. The Executive cannot without assent of Congress supplant its statutory scheme with one stroke of a presidential pen.

c. Legislative History

The legislative history suggests further limitations on § 1182(f)'s broad grant of authority. Prior to passing the INA, which included § 1182(f), the House of Representatives debated an amendment that would have continued to restrict the President's authority to suspend immigration only "[w]hen the United States is at war or during the existence of a national emergency proclaimed by the President." 98 Cong. Rec. 4423 (statement of Rep. Multer).[14] Speaking in opposition to the

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[14] Section 1182(f)'s 1941 predecessor limited the president's authority to suspend entry of aliens only to times of war or national emergency. *See* Act of June 21, 1941, 55 Stat. 252, 252–53. In anticipation of future immigration reform, the Senate Committee on the Judiciary published a comprehensive report in 1950 on the state of immigration laws in the country. *See* S. Rep. No. 81-1515, at 1–2 (1950). Although the report states that the committee was considering a provision that would "permit the President to suspend any and all immigration whenever he

ultimately unsuccessful amendment, the sponsor of the bill urged that § 1182(f)'s broad language was "absolutely essential," because

> [W]hen there is an outbreak of an epidemic in some country, whence these people are coming, it is *impossible* for Congress to act. People might conceivably in large numbers come to the United States and bring all sorts of communicable diseases with them. More than that, suppose we have a period of great unemployment? In the judgment of the committee, it is advisable at such times to permit the President to say that for a certain time we are not going to aggravate that situation.

Id. (statement of Rep. Walter) (emphasis added).

Although Representative Walter and the bill's supporters did not "intend[] [their] list of examples to be exhaustive," *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990), "it is significant that the example[s] Congress did give" all share the common trait of exigency. *Moran v. London Records, Ltd.*, 827 F.2d 180, 183 (7th Cir. 1987). Proponents of § 1182(f) deliberately pinned the provision to examples where it would be difficult, if not impossible, for Congress to react in a timely manner, thus necessitating swift presidential action.[15] The

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finds such action to be desirable in the best interests of the country," it is unclear whether the report's brief statement was in reference to what would eventually become § 1182(f) two years later. *Id.* at 381. More importantly, as Plaintiffs point out, none of the bill's supporters affirmatively voiced such a broad interpretation of § 1182(f) when pressed on the matter by members of the opposition.

[15] We note that hearings in 1970 and 1977 produced testimony from the Department of State that § 1182(f) (or § 212(f) of the INA) could be traced to "health prohibitions" even though the text does not explicitly limit executive use to exigencies, health or otherwise. *See, e.g.*, *United States-South African Relations: South Africa's Visa Policy: Hearing Before the Subcomm. on Africa & Int'l Org. of*

legislative history, then, suggests that despite § 1182(f)'s facially broad grant of power,[16] the Proclamation—which cites to no exigencies, national or otherwise, and does not respond to a situation Congress would be ill-equipped to address—falls outside of the boundaries Congress set.

d. Prior Executive Practice

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the Comm. on Int'l Relations H. Rep., 95th Cong. 10–11 (1977) (statement of Hon. Barbara M. Watson, Administrator, Bureau of Security and Consular Affairs, Dep't of State). Considering the strength of legislative history supporting use of § 1182(f) to restrict entry during epidemics, it is noteworthy that a 2014 Congressional Research Service report cautioned that the provision could only "potentially" be used to prevent entry of "foreign nationals traveling from a particular country or region from which there has been an Ebola outbreak." *See* Sarah A. Lister, *Preventing the Introduction and Spread of Ebola in the United States: Frequently Asked Questions*, Cong. Res. Serv. 3 (Dec. 5, 2014). The report noted that § 1182(f) had "never been employed so broadly" before. *Id.*

[16] Several congressmen did express concerns prior to enactment that § 1182(f) would give the President "an untrammeled right, an uninhibited right to suspend immigration entirely." 98 Cong. Rec. 4423 (statement of Rep. Celler). Their "fears and doubts," however, "are no authoritative guide to the construction of legislation[,] [because] [i]n their zeal to defeat a bill, [opponents to a bill] understandably tend to overstate its reach." *Bryan v. United States*, 524 U.S. 184, 196 (1998) (internal citations and quotation marks omitted).

Moreover, there is some evidence that supporters of § 1182(f) and its predecessor provision believed the opposition's concerns unreasonably presumed executive abuse of power. *See* 87 Cong. Rec. 5049 (1941) (statement of Rep. Bloom) (dismissing a representative's concerns because "the gentleman is figuring on something that the President would not do"); *see also* 98 Cong. Rec. 4424 (statement of Rep. Halleck) ("I take it that the gentleman would not be concerned [about section 1182(f)] if he were sure he would always have a President that could not do any wrong").

Notwithstanding the aforementioned factors, the Government argues that "[h]istorical practice confirms the breadth of, and deference owed to, the President's exercise of authority under Sections 1182(f) and 1185(a)(1)." We pass no judgment on the legality or appropriateness of the Executive's past practice, but we consider such practice to the extent it bears on congressional acquiescence. *See Abourezk*, 785 F.2d at 1055 ("[E]vidence of congressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling."); *see also Zemel v. Rusk*, 381 U.S. 1, 17–18 (1965) ("We have held . . . and reaffirm today, that the 1926 [Passport] Act must take its content from history: it authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" (quoting *Kent v. Dulles*, 357 U.S. 116, 128 (1958))).

The Government is correct that presidents have suspended the entry of foreign nationals in various foreign policy and national security settings, but we nevertheless conclude that the Proclamation and its immediate predecessors, EO-1 and EO-2, stand apart in crucial respects. First, out of the forty-three proclamations or orders issued under § 1182(f) prior to EO-1, forty-two targeted only government officials or aliens who engaged in specific conduct and their associates or relatives. *See* Kate M. Manuel, Cong. Research Serv., R44743,

Executive Authority to Exclude Aliens: In Brief 6–10, (2017) (listing prior § 1182(f) proclamations and orders).

Only one § 1182(f) proclamation suspended entry of all nationals of a foreign country. Proclamation 5517, issued in 1986, suspended entry of Cuban nationals as immigrants in response to the Cuba government's own suspension of "all types of procedures regarding the execution" of an immigration agreement between the United States and Cuba. 51 Fed. Reg. 30,470 (Aug. 22, 1986). In addition, President Carter delegated authority under § 1185(a) to the Secretary of State and the Attorney General to prescribe limitations governing the entry of Iranian nationals, but did not ban Iranian immigrants outright. *See* Exec. Order 12172, 44 Fed. Reg. 67,947 (Nov. 26, 1979), *amended by* Exec. Order 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980). These isolated instances, which applied to a single country each and were never passed on by a court, cannot sustain the weight placed on them by the Government. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.").

Moreover, unlike the Proclamation, the Cuba and Iran orders were intended to address specific foreign policy concerns distinct from general immigration concerns already addressed by Congress. The same holds true for the vast majority

of prior § 1182(f) suspensions. *See, e.g.*, Executive Order 13606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (suspending entry of persons who facilitated cyber-attacks and human rights abuses by the Syrian or Iranian governments); Proclamation 6925, 61 Fed. Reg. 52,233 (Oct. 3, 1996) (suspending entry of persons "who formulate, implement, or benefit from policies that impede Burma's transition to democracy, and the immediate family members of such persons"); Proclamation 6569, 58 Fed. Reg. 31,897 (June 3, 1993) (suspending entry of persons "who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and the immediate family members of such persons").

The only prior entry suspension lacking a foreign policy or national security purpose distinct from general immigration concerns is found in President Reagan's High Seas Interdiction Proclamation and its implementing executive orders. That Proclamation suspended "entry of undocumented aliens from the high seas" and ordered that such entry "be prevented by the interdiction of certain vessels carrying such aliens." Proclamation 4865, 46 Fed. Reg. 48,107 (Sep. 29, 1981). Consequently, Proclamation 4865 and its implementing executive orders, unlike the present Proclamation, applied by their terms almost entirely to aliens who were

already statutorily inadmissible.[17] *See id.*; Exec. Order 12324, 46 Fed. Reg. 48,109 (Sep. 29, 1981); Exec. Order 12807, 57 Fed. Reg. 23,133 (May 24, 1992).

We recognize that presidents ordinarily may use—and have used—§ 1182(f) to suspend the entry of aliens who might otherwise be admissible under the INA. But when, as here, a presidential proclamation addresses only matters of immigration already passed upon by Congress, the President's § 1182(f) authority is at its nadir.

The High Seas Interdiction suspensions are consistent with this principle because they apply predominantly to otherwise inadmissible aliens. In contrast, by suspending entry of a class of 150 million potentially admissible aliens, the Proclamation sweeps broader than any past entry suspension and indefinitely nullifies existing immigration law as to multiple countries. The Proclamation does so in the name of addressing general public-safety and terrorism threats, and what it deems to be foreign countries' inadequate immigration-related practices—concerns that Congress has already addressed.

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[17] Under 8 U.S.C. § 1182(a)(7)(A)(i)(I), an alien who does not possess "a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document" is inadmissible. The High Seas Interdiction suspensions did, however, affect some aliens who could have become admissible insofar as the suspensions prevented refugees fleeing persecution from reaching United States territorial waters. *See Sale*, 509 U.S. at 187–88 (holding that barring the entry of refugees outside the territorial waters of the United States did not violate the INA or the United Nations Convention Relating to the Status of Refugees).

We conclude that the Executive's past practice does not support the Government's position. Instead, such practice merely confirms that the Proclamation, like EO-2, "is unprecedented in its scope, purpose, and breadth." *Hawai'i I*, 859 F.3d at 779.

e. Constitutional Avoidance and Separation of Powers

Principles of separation of powers further compel our conclusion that the Proclamation exceeds the scope of authority delegated to the President under § 1182(f). It is a bedrock principle of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also INS v. St. Cyr*, 553 U.S. 289, 300 (2001) ("[W]e are obligated to construe the statute to avoid [serious constitutional] problems."). Here, a conclusion that the Proclamation does not exceed the President's delegated authority under § 1182(f) would raise "serious constitutional problems" and should thus be avoided. *See DeBartolo*, 485 U.S. at 575. Reading § 1182(f) to permit the Proclamation's sweeping exercise of authority would effectively render the statute void of a requisite "intelligible principle" delineating the "general policy" to be applied and "the boundaries of th[e] delegated authority," *Mistretta v. United*

States, 488 U.S. 361, 372–73 (1989). Without any meaningful limiting principles,[18] the statute would constitute an invalid delegation of Congress's "exclusive[]" authority, *Galvan*, 347 U.S. at 531, to formulate policies regarding the entry of aliens.

As discussed above, the Proclamation functions as an executive override of broad swaths of immigration laws that Congress has used its considered judgment to enact. If the Proclamation is—as the Government contends—authorized under § 1182(f), then § 1182(f) upends the normal functioning of separation of powers. Even Congress is prohibited from enabling "unilateral Presidential action that either repeals or amends parts of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 439 (1998). This is true even when the executive actions respond to issues of "first importance," issues that potentially place the country's "Constitution and its survival in peril." *Id.* at 449 (Kennedy, J., concurring). In addressing such critical issues, the political branches still do not "have a somewhat free hand to reallocate their own authority," as the "Constitution's structure requires a stability which transcends the convenience of the moment" and was crafted in recognition that "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Id.* at 449–50.

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[18] These limiting principles are primarily found in the text of the statute, but also include the surrounding statutory framework, the legislative history, and prior executive practice.

And the Proclamation's sweeping assertion of authority is fundamentally legislative in nature. Where an action "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and [an alien], all outside the legislative branch," the Supreme Court has held that the action is "essentially legislative in purpose and effect" and thus cannot bypass the "single, finely wrought and exhaustively considered, procedure" for enacting legislation.[19] *INS v. Chadha*, 462 U.S. 919, 951–52 (1983). Here, the Proclamation does not merely alter the "legal rights, duties and relations" of a single alien, *id.* at 952, but rather affects the rights, duties and relations of countless American citizens and lawful permanent residents whose ability to be reunified with, and receive visits from, their family members is inhibited by the Proclamation; the Proclamation also significantly affects numerous officials within the Department of Homeland Security and Department of State. Whereas the House's action in *Chadha* "operated . . . to overrule the Attorney General," *id.*, here the Proclamation would operate to overrule Congress's "extensive and complex" scheme of immigration laws, *Arizona*, 567 U.S. at 395, as

[19] Although the Government has not explained why the President has thus far failed to ask Congress to enact the Proclamation's policies by legislation, potential congressional inaction cannot sustain the President's authority to issue the Proclamation, as "[f]ailure of political will does not justify unconstitutional remedies" like violating the Constitution's separation of powers. *Clinton v. City of New York*, 524 U.S. at 499 (Kennedy, J., concurring).

they pertain to the eight affected countries and the over 150 million affected individuals.

Decades of Supreme Court precedent support reading meaningful limitations into § 1182(f) in order to avoid striking down the statute itself as an unconstitutional delegation. For example, in *Zemel v. Rusk*, the Court opted to read in limiting principles despite statutory language that, on its face, appeared to grant the Executive complete discretion: "The Secretary of State may grant and issue passports under such rules as the President shall designate and prescribe for and on behalf of the United States." 381 U.S. at 7–8, 17. By so doing, the Court saved the statute from constituting "an invalid delegation." *Id.* at 18. The Court noted that principles of separation of powers still apply even in the field of foreign relations, holding that "simply because a statute deals with foreign relations" does not mean that the statute "can grant the Executive totally unrestricted freedom of choice." *Id.* at 17. Similarly, in *United States v. Witkovich*, the Court—faced with statutory language that "if read in isolation and literally, appears to confer upon the Attorney General unbounded authority"—nonetheless adopted a more "restrictive meaning" in order to avoid the "constitutional doubts" implicated by a "broader meaning." 353 U.S. at 199.

To avoid the inescapable constitutional concerns raised by the broad interpretation the Government urges us to adopt, we interpret § 1182(f) as

containing meaningful limitations—limitations that the Proclamation, in effectively rewriting the immigration laws as they pertain to the affected countries, exceeds. After all, "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Zivotofsky ex rel. Zivotofsky v. Kerry,* 135 S. Ct. 2076, 2090 (2015).

2. Compliance with § 1182(f)

We next turn to whether, even assuming the President did not exceed the scope of his delegated authority under § 1182(f), the Proclamation meets § 1182(f)'s requirement that the President find that the entry of certain persons "would be detrimental to the interests of the United States" prior to suspending their entry. 8 U.S.C. § 1182(f).

Although we considered this question in *Hawai'i I* and ultimately answered it in the negative, 859 F.3d at 770–74, the Proclamation differs from EO-2 in several ways. As we discussed above, the Proclamation's suspensions of entry apply indefinitely, rather than for only 90 days. Unlike EO-2, the Proclamation developed as a result of a multi-agency review. The justifications for the Proclamation are different, too. The Proclamation puts forth a national security interest in information sharing between other countries and the United States, explains that it imposes its restrictions as an incentive for other countries to meet the United States' information-sharing protocols, and identifies "tailored"

restrictions for each designated country. And the list of affected countries differs from EO-2's: the Proclamation adds Chad, removes Sudan, and includes two non-majority Muslim countries, North Korea and Venezuela.

Although there are some differences between EO-2 and the Proclamation, these differences do not mitigate the need for the President to satisfy § 1182(f)'s findings requirement. Despite our clear command in *Hawai'i I*, the Proclamation—like EO-2—fails to "provide a rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States." *Id.* at 773. In assessing the scope of the President's statutory authority, we begin with the text. The relevant portion of § 1182(f) states:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

While § 1182(f) gives the President broad authority to suspend or place restrictions on the entry of aliens or classes of aliens, this authority is not unlimited. Section 1182(f) expressly requires that the President *find* that the entry of a class of aliens would be *detrimental* to the interests of the United States before the aliens in a class are excluded. The use of the word "find" was deliberate.

Congress used "find" rather than "deem" in the immediate predecessor to § 1182(f) so that the President would be required to "base his [decision] on some fact," not on mere "opinion" or "guesses." 87 Cong. Rec. 5051 (1941) (statements of Rep. Jonkman and Rep. Jenkins).

By contrast, the Proclamation summarily concludes: "[A]bsent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation would be detrimental to the interests of the United States." 82 Fed. Reg. 45,161–62. The Proclamation points out that screening and vetting protocols enhance the Government's ability to "detect foreign nationals who may commit, aid, or support acts of terrorism and other public-safety threats." *Id.* at 45,162. It then asserts that the travel restrictions will encourage the targeted foreign governments to improve their information-sharing and identity-management protocols and practices. The degree of desired improvement is left unstated; there is no finding that the present vetting procedures are inadequate or that there will be harm to our national interests absent the Proclamation's issuance.

In assessing the merits of Plaintiffs' motion for a preliminary injunction, the district court considered whether the Government had made the requisite findings for the President to suspend the entry of aliens under § 1182(f). Relying on our decision in *Hawai'i I*, the district court concluded that the Government had not.

Hawai'i TRO, 2017 WL 4639560, at *9–10. Although our prior decision in *Hawai'i I* has since been vacated as moot, the Supreme Court "express[ed] no view on the merits" in ordering vacatur. *Trump*, 2017 WL 4782860, at *1. We therefore adopt once more the position we articulated in *Hawai'i I* that § 1182(f) requires entry suspensions to be predicated on a finding of detriment to the United States. 859 F.3d at 773.

The Government argues that the "detailed findings" in the Proclamation satisfy the standard we set forth in *Hawai'i I*. Plaintiffs respond that the findings were inadequate because § 1182(f) expressly requires (1) "'find[ings]' that support the conclusion that admission of the excluded aliens would be 'detrimental,'" and (2) "the harm the President identifies must amount to a 'detriment to the interests of the United States.'" We agree with Plaintiffs.

The Proclamation makes no finding whatsoever that foreign nationals' nationality alone renders entry of this broad class of individuals a heightened security risk to the United States.[20] Nor does it contain a finding that the nationality of the covered individuals alone renders their entry into the United States on certain forms of visas detrimental to the interests of the United States. As such, there is no stated connection between the scope of the restriction imposed

[20] Rather, a declaration from former national security advisors—quoting a study from the Department of Homeland Security—states: "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."

and a finding of detriment that the Government seeks to alleviate. While the district court may have imprecisely stated that the Proclamation was "unsupported by verifiable evidence," *Hawai'i TRO*, 2017 WL 4639560, at *11, it was correct in concluding that the stated findings do not satisfy § 1182(f)'s prerequisites.

To be sure, the Proclamation does attempt to rectify EO-2's lack of a meaningful connection between listed countries and terrorist organizations. For instance, it cites to the fact that "several terrorist groups are active" in Chad. 82 Fed. Reg. at 45,165. But the Proclamation does not tie the nationals of the designated countries to terrorist organizations. For the second time, the Proclamation makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk or that current screening processes are inadequate.[21]

National security is not a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under § 1182(f). *United States v. Robel*, 389 U.S. 258, 263–64 (1967). Section 1182(f) requires that the President make a finding that the entry of an alien or class of aliens *would be* detrimental to the interests of the United States. That requirement has not been met.

[21] As the statistics provided by the Cato Institute demonstrate, no national from any of the countries selected has caused any of the terrorism-related deaths in the United States since 1975. *See* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 84 at 26–28.

The Government argues that the district court erred by imposing a higher standard than that set forth in *Hawai'i I* by objecting to the President's stated reasons for the ban, by identifying internal inconsistencies, and by requiring verifiable evidence. We need not address the Government's argument because, as discussed above, the Proclamation has failed to make the critical finding that § 1182(f) requires. We therefore hold that Plaintiffs have shown a likelihood of success on the merits of their § 1182(f) claim that the President has failed to make an adequate finding of detriment.

3. Section 1185(a)

In addition to relying on § 1182(f), the Proclamation also grounds its authority in 8 U.S.C. § 1185(a), which states:

> Unless otherwise ordered by the President, it shall be unlawful [] for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1).

The Government does not argue that § 1185(a) provides an independent basis to suspend entry. Instead, the Government contends that § 1185(a) permits the President to skirt the requirements of § 1182(f) because § 1185(a) does not require a predicate finding before the President prescribes reasonable rules, regulations, and orders governing alien entry and departure. The Government also

argues that there is no meaningful standard for review because these matters are committed to the President's judgment and discretion. Plaintiffs respond that the Government cannot use the general authority in § 1185(a) to avoid the preconditions of § 1182(f).

We conclude that the Government cannot justify the Proclamation under § 1182(f) by using § 1185(a) as a backdoor. General grants in a statute are limited by more specific statutory provisions, and § 1182(f) has a specific requirement that there be a finding of detriment before entry may be suspended or otherwise restricted. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general." (internal quotation marks and alterations omitted)). Section 1185(a) does not serve as a ground for reversal of the district court's conclusion on Plaintiffs' likelihood of success.

4. Section 1152(a)(1)(A)'s Prohibition on National Origin Discrimination

Next, we consider the impact of 8 U.S.C. § 1152(a)(1)(A) on the President's authority to issue the Proclamation. Section 1152(a) states:

> [N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1)(A) (emphasis added).

The Government argues that the district court erred by reading § 1152(a)(1)(A) to limit the President's authority under § 1182(f), and that § 1152(a)(1)(A) has never been used as a constraint on the President's authority under § 1182(f). In making this argument, the Government once again urges us to conclude that § 1152(a)(1)(A) operates in a separate sphere from § 1182(f). This we decline to do.

Congress enacted § 1152(a)(1)(A) of the INA contemporaneously with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to eliminate the "national origins system as the basis for the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965). In so doing, Congress manifested its intent to repudiate a history of nationality and race-based discrimination in United States immigration policy.[22] *See* 110 Cong. Rec. 1057 (1964) (statement of Sen.

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[22] The discriminatory roots of the national origins system may be traced back to 1875, when xenophobia towards Chinese immigrants produced Congress's first race-based immigration laws. *See* Brief of the National Asian Pacific American Bar Association as Amicus Curiae, Dkt. No. 126, at 5. The Page Law, passed in 1875, banned immigration of women—primarily Asian women—who were presumed, simply by virtue of their ethnicity and nationality, to be prostitutes. *Id.* at 5. The Page Law was followed in quick succession by the Chinese Exclusion Act in 1882 and the Scott Act in 1888. *Id.* at 6. These laws were justified on security grounds. *See Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (declining to overturn the Scott Act because "the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security."). This underlying xenophobia eventually produced the national origins system, which clearly signaled that "people of some nations [were]

Hart) ("[A]n immigration policy with different standards of admissibility for different racial and ethnic groups, in short, a policy with build-in bias, is contrary to our moral and ethical policy."). Recognizing that "[a]rbitrary ethnic and racial barriers [had become] the basis of American immigration policy," Senator Hart, the bill's sponsor, declared that § 1152(a)(1)(A) was necessary "[t]o restore equality and fairplay in our selecting of immigrants." *Id.*

The Government argues that § 1152(a)(1)(A)'s prohibition of discrimination in the issuance of visas does not cabin the President's authority to regulate entry under § 1182(f). We disagree. As the Government concedes, the Proclamation restricts the entry of affected aliens *by precluding consular officers from issuing visas* to nationals from the designated countries. *See* 82 Fed. Reg. at 45,168. Put another way, the Proclamation effectuates its restrictions by withholding immigrant visas on the basis of nationality. This directly contravenes Congress's "unambiguous[] direct[ions] that no nationality-based discrimination . . . occur." *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473.

We are bound to give effect to "all parts of a statute, if at all possible." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). The Government's position that § 1152(a)(1)(A) and § 1182(f) operate in different

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more welcome to America than others," and created "token quotas" based on "implications of race superiority." 110 Cong. Rec. 1057 (statement of Sen. Hart).

spheres—the former in issuance of immigrant visas, the latter in entry—would strip § 1152(a)(1)(A) of much of its power. It is difficult to imagine that Congress would have celebrated the passing of the bill as "one of the most important measures treated by the Senate . . . [for its] restate[ment] [of] this country's devotion to equality and freedom" had it thought the President could simply use § 1182(f) to bar Asian immigrants with valid immigrant visas from entering the country. 111 Cong. Rec. 24785 (1965) (statement of Sen. Mansfield); *see also* Lyndon B. Johnson, *Remarks at the Signing of the Immigration Bill, Liberty Island, New York*, The Am. Presidency Project (Oct. 3, 1965), http://www.presidency.ucsb.edu/ws/index.php?pid=27292 (concluding that the discriminatory national origins quota system "will never again shadow the gate to the American Nation with the twin barriers of prejudice and privilege").

We do not think Congress intended § 1152(a)(1)(A) to be so easily circumvented. We therefore read § 1152(a)(1)(A) as prohibiting discrimination on the basis of nationality *throughout* the immigration visa process, including visa issuance and entry.[23]

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[23] Even if we assume for the sake of argument that Congress intended § 1182(f) and § 1152(a)(1)(A) to operate in entirely separate spheres, as is argued by the Government, the result would be the same. This is so because both at oral argument and in the Proclamation's text, the Government has conceded that if its entry ban were upheld, all embassy actions in issuing visas for nationals of the precluded countries would cease. 82 Fed. Reg. at 45,168 (noting that waiver by consular officers will be effective "both for *the issuance of a visa and for any*

To the extent that § 1152(a)(1)(A) conflicts with the broader grant of authority in § 1182(f) and § 1185(a), the Government asks us to give the latter two provisions superseding effect. The Government argues that as the more recently amended and "more specific" provision, § 1185(a) ought to control over § 1152(a)(1)(A). We are unpersuaded by this argument for several reasons.

First, when two statutory provisions are in irreconcilable conflict, a later-enacted, more specific provision is treated as an exception to an earlier-enacted, general provision. *See, e.g.*, *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 183–87 (2012). Section 1152(a)(1)(A) was enacted over a decade after § 1182(f). Section 1152(a)(1)(A) also operates at a greater level of specificity than either § 1182(f) or § 1185(a)—it eliminates nationality-based discrimination for the issuance of immigrant visas. Because the "specific provision is construed as an exception to the general one," we agree with Plaintiffs that § 1152(a)(1)(A) provides a specific anti-discrimination bar to the President's general § 1182(f) powers. *RadLAX*, 566 U.S. at 645.

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subsequent entry on that visa" (emphasis added)); United States Court of Appeals for the Ninth Circuit, *17-17168 State of Hawaii v. Donald Trump*, YouTube (Dec. 7, 2017) at 9:55–11:33; 11:59–12:12. Enforcement of the entry ban under § 1182(f) would inescapably violate § 1152(a)(1)(A)'s prohibition on nationality-based discrimination in the issuance of immigrant visas, because the Proclamation effectively bars nationals of the designated countries from receiving immigrant visas.

Second, § 1152(a)(1)(A) clearly provides for exceptions in a number of circumstances. *See* 8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. Neither § 1182(f) nor § 1185(a) is included in the list of enumerated exceptions. We presume that Congress's inclusion of specified items and exclusion of others is intentional. *See United States v. Vance Crooked Arm*, 788 F.3d 1065, 1075 (9th Cir. 2015) ("Under the longstanding canon *expressio unius est exclusio alterius*, we presume that the exclusion of . . . phrases" by Congress was intentional). The conspicuous absence of § 1182(f) and § 1185(a) from the listed exceptions vitiates the Government's position that both provisions fall outside § 1152(a)(1)(A)'s purview.

Lastly, the Government's reliance on prior Executive practice is misplaced. The Government again points to President Reagan's Proclamation 5517 suspending immigration from Cuba in response to Cuba's own suspension of immigration practices, and President Carter's Executive Order 12172 and the accompanying visa issuance regulations as to Iranian nationals during the Iran hostage crisis. As we explained above, *supra* at § III.A.1.d, those restrictions were never challenged in court and we do not pass on their legality now. Moreover, both orders are outliers among the forty-plus presidential executive orders restricting entry, and therefore cannot support a showing of congressional acquiescence. *See Solid Waste Agency*, 531 U.S. at 169. Finally, we need not

decide whether a President may, under special circumstances and for a limited time, suspend entry of all nationals from a foreign country. *See IRAP v. Trump*, No. TDC-17-0361, 2017 WL 4674314, at *21 (D. Md. Oct. 17, 2017). Such circumstances, if they exist, have not been argued here.

For the reasons stated above, the Proclamation's indefinite entry suspensions constitute nationality discrimination in the issuance of immigrant visas. We therefore conclude that Plaintiffs have shown a likelihood of success on the merits of their claim that the Proclamation runs afoul of § 1152(a)(1)(A)'s prohibition on nationality-based discrimination.

5. Alternative Authority

Having concluded that the Proclamation violates the INA and exceeds the scope of the President's delegated authority under § 1182(f), we view the Proclamation as falling into Justice Jackson's third category from *Youngstown Sheet & Tube Co. v. Sawyer*: "[w]hen the President [has] take[n] measures incompatible with the expressed or implied will of Congress." 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Under *Youngstown*'s tripartite framework, presidential actions that are contrary to congressional will leave the President's "power [] at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* We therefore must determine whether the President has constitutional authority to issue

the Proclamation, independent of any statutory grant—for if he has such power, it may be immaterial that the Proclamation violates the INA. But when a President's action falls into "this third category, the President's asserted power must be both 'exclusive' and 'conclusive' on the issue" in order to succeed. *Zivotofsky ex rel. Zivotofsky*, 135 S. Ct. at 2084.

We conclude that the President lacks independent constitutional authority to issue the Proclamation, as control over the entry of aliens is a power within the exclusive province of Congress.[24] *See Galvan*, 347 U.S. at 531 ("[T]he formulation of these [immigration] policies is entrusted exclusively to Congress"); *see also Arizona*, 567 U.S. at 407 (citing *Galvan*, 347 U.S. at 531). While the Supreme Court's earlier jurisprudence contained some ambiguities on the division of power between Congress and the Executive on immigration,[25] the Court has

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[24] In *Hawai'i I*, we opted not to decide the question of "whether and in what circumstances the President may suspend entry under his inherent powers as commander-in-chief or in a time of national emergency." 859 F.3d 741, 782 n.21 (9th Cir. 2017). In holding today that the President lacked independent constitutional authority to issue the Proclamation, we again need not, and do not, decide whether the President may be able to suspend entry pursuant to his constitutional authority under *any* circumstances (such as in times of war or national emergency), as the Proclamation was issued under no such exceptional circumstances.

[25] *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 467–482 (2009) (examining the Supreme Court's shift from viewing authority over immigration as ambiguously belonging to the political branches—without specifying the allocation of power between the two—to increasingly identifying control over immigration as the province of Congress).

more recently repeatedly recognized congressional control over immigration policies. *See, e.g.*, *Chadha*, 462 U.S. at 940 ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question"); *Fiallo*, 430 U.S. at 793 (recognizing "the need for special judicial deference to congressional policy choices in the immigration context"); *Galvan*, 347 U.S. at 531–32 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government . . . . [we] must therefore under our constitutional system recognize congressional power in dealing with aliens.").

Exclusive congressional authority over immigration policy also finds support in the Declaration of Independence itself, which listed "obstructing the Laws for Naturalization of Foreigners" and "refusing to pass [laws] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." The Declaration of Independence para. 2 (U.S. 1776). As Justice Jackson noted in *Youngstown*, "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." 343 U.S. at 641 (Jackson, J., concurring). This is perhaps why the Constitution vested Congress with the power to "establish an uniform Rule of Naturalization": the

Framers knew of the evils that could result when the Executive exerts authority over the entry of aliens, and so sought to avoid those same evils by granting such powers to the legislative branch instead. *See* U.S. Const. art. I, § 8, cl. 4.

B. Remaining Preliminary Injunction Factors

The three remaining preliminary injunction factors also lead us to affirm the preliminary injunction. Plaintiffs have successfully shown that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that the preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20.

1. Irreparable Harm

The Government argues that Plaintiffs will suffer "no cognizable harm" absent the injunction because the Proclamation may only "delay" their relatives, students and faculty, and members from entering the United States. Indefinite delay, however, can rise to the level of irreparable harm. *See, e.g.*, *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (granting emergency stay from preliminary injunction because the "indefinite delay" of a broadcast would cause "irreparable harm to the news media"). This is one such instance.

Plaintiffs have presented evidence that the Proclamation will result in "prolonged separation from family members, constraints to recruiting and retaining

students and faculty members to foster diversity and quality within the University community, and the diminished membership of the Association," the last of which "impacts the vibrancy of [the Association's] religious practices and instills fear among its members." *Hawai'i TRO*, 2017 WL 4639560, at *13. As we have said before, "[m]any of these harms are not compensable with monetary damages and therefore weigh in favor of finding irreparable harm." *Hawai'i I*, 859 F.3d at 782–83; *see also Washington*, 847 F.3d at 1168–69 ("[T]he States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad."); *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (characterizing the "collateral harms to children of detainees whose parents are detained" as an irreparable harm); *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 520 (9th Cir. 1984) (crediting intangible harms such as the "impairment of their ongoing recruitment programs [and] the dissipation of alumni and community goodwill and support garnered over the years"); *cf. Moore v. East Cleveland*, 431 U.S. 494, 503–04 (1977) (explaining that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

We therefore conclude that Plaintiffs are likely to suffer irreparable harm in the absence of the preliminary injunction.

2. Balance of Equities

We next conclude that the district court correctly balanced the equities in this case. When considering the equities of a preliminary injunction, we must weigh the "competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citation omitted). In contrast to Plaintiffs' concrete allegations of harm, the Government cites to general national security concerns.[26] National security is undoubtedly a paramount public interest, *see Haig*, 453 U.S. at 307 ("[N]o governmental interest is more compelling than the security of the Nation."), but it cannot be used as a "talisman . . . to ward off inconvenient claims." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017); *cf. New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (describing "security" as a "broad, vague generality whose contours should not be invoked to abrogate" the law). When, as here, the President has failed to make sufficient findings that the "entry of certain classes of aliens would be detrimental to the national interest," "we cannot conclude that national security interests outweigh the harms to Plaintiffs." *Hawai'i I*, 859 F.3d at 783.

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[26] The Government additionally argues that "[t]he injunction . . . causes irreparable injury by invalidating an action taken at the height of the President's authority." Not so. For the reasons discussed earlier, by acting in a manner incompatible with Congress's will, the President's power here is "at its lowest ebb." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

The injunction here would only preserve the status quo as it existed prior to the Proclamation while the merits of the case are being decided. We think it significant that the Government has been able to successfully screen and vet foreign nationals from the countries designated in the Proclamation under current law for years. *See* Brief of the Cato Institute as Amicus Curiae, Dkt. No. 84 at 26–27 (explaining that, from 1975 through 2017, "no one has been killed in a terrorist attack on U.S. soil by nationals from any of the eight Designated Countries"); *id.* at 29 (showing that the U.S. incarceration rate for persons born in the designated countries is lower than the U.S. incarceration rates for persons born in the U.S. or other non-U.S. countries). Accordingly, the balance of equities tips in Plaintiffs' favor.

3. Public Interest

Lastly, we consider whether Plaintiffs have successfully shown that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. We conclude that they have.

It is axiomatic that the President must exercise his executive powers lawfully. When there are serious concerns that the President has not done so, the public interest is best served by "curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided court* 136 S. Ct. 2271 (2016). Amici provide further insight into the public interests that

would be served by sustaining the district court's injunction. They have furnished us with a plethora of examples, of which we highlight a few.

Amici persuasively cite to increased violence directed at persons of the Muslim faith as one of the Proclamation's consequences. *See* Brief of Civil Rights Organizations as Amici Curiae, Dkt. No. 52 at 19–23; Brief of Members of the Clergy et al. as Amici Curiae, Dkt. No. 97 at 29–32. Amici also explain that by singling out nationals from primarily Muslim-majority nations, the Proclamation has caused Muslims across the country to suffer from psychological harm and distress, including growing anxiety, fear, and terror. Brief of Muslim Justice League et al. as Amici Curiae, Dkt. No. 68 at 21–23.

In assessing the public interest, we are reminded of Justice Murphy's wise words: "All residents of this nation are kin in some way by blood or culture to a foreign land." *Korematsu v. United States*, 323 U.S. 214, 242 (Murphy, J., dissenting). It cannot be in the public interest that a portion of this country be made to live in fear.

We note, too, that the cited harms are extensive and extend beyond the community. As Amici point out, the Proclamation, like its predecessors, "continues to disrupt the provision of medical care" and inhibits "the free exchange of information, ideas, and talent between the designated countries and [various] [s]tates, causing long-term economic and reputational damage." Brief of New

York et al. as Amici Curiae, Dkt. No. 71 at 4. Moreover, because the Proclamation bans the entry of potential entrepreneurs, inventers, and innovators, the public's interest in innovation is thwarted at both the state and corporate levels. *See* Brief of Technology Companies as Amici Curiae, Dkt. No. 99 at 5–7. The Proclamation further limits technology companies' abilities to hire to full capacity by barring nationals of the designed countries from filling vacant positions. *See* Brief of Massachusetts Technology Leadership Council as Amicus Curiae, Dkt. No. 120 at 8–16 (explaining that "the technology industry is growing too rapidly to be staffed through domestic labor alone").

The Proclamation also risks denying lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals in the United States the opportunity to reunite with their partners from the affected nations. *See* Brief of Immigration Equality et al. as Amici Curiae, Dkt. No. 101 at 17–20. The Proclamation allows that it "may be appropriate" to grant waivers to foreign nationals seeking to reside with close family members in the United States. 82 Fed. Reg. at 45,168–69. But many of the affected nations criminalize homosexual conduct, and LGBTQ aliens will face heightened danger should they choose to apply for a visa from local consular officials on the basis of their same-sex relationships. Brief of Immigration Equality at 4. The public interest is not served by denying LGBTQ persons in the United States the ability to safely bring their partners home to them.

* * *

For the foregoing reasons, we conclude that the district court did not abuse its discretion in granting an injunction.

C. Scope of the Preliminary Injunction

The Government argues that the injunction is overbroad because it is not limited to redressing the Plaintiffs' "own cognizable injuries." Plaintiffs argue that the nationwide scope of the injunction is appropriate particularly in the immigration context because piecemeal relief would fragment immigration policy. Plaintiffs further argue that it would be impracticable or impossible for them to name all those who would apply to the University of Hawai'i or the Association, but who have been chilled or prevented by the Proclamation from doing so.

We review the scope of a preliminary injunction for abuse of discretion. *McCormack v. Hiedeman*, 694 F.3d 1004, 1010 (9th Cir. 2012). Although the district court has "considerable discretion in fashioning suitable relief and defining the terms of an injunction," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), there are limitations on this discretion. Injunctive relief must be "tailored to remedy the specific harm[s]" shown by the plaintiffs. *Id.*

Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights. *See Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) ("[A]n injunction is not necessarily

made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*"). "[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.'" *Texas*, 809 F.3d at 187–88 (citations omitted). Any application of § 2 of the Proclamation would exceed the scope of § 1182(f), violate § 1152(a)(1)(A), and harm Plaintiffs' interests. Accordingly, the district court did not abuse its discretion by granting a nationwide injunction.

Although a nationwide injunction is permissible, a worldwide injunction as to all nationals of the affected countries extends too broadly. As the Supreme Court observed in *IRAP*: "The equities relied on by the lower courts do not balance the same way in that context." 137 S. Ct. at 2088. "[W]hatever burdens may result from enforcement of § 2(c) against a foreign national who lacks any connection to this country, they are, at a minimum, a good deal less concrete than the hardships identified [previously]." *Id.* "At the same time, the Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.*

We therefore narrow the scope of the preliminary injunction, as we did in our November 13, 2017 order on the Government's motion for emergency stay. *See Hawai'i v. Trump*, 2017 WL 5343014, at *1. We then wrote:

> The preliminary injunction is stayed except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States," as set out below.
>
> The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States. Such persons include grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. "As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading [Proclamation 9645]."

Id. (internal citations omitted).

We again limit the scope of the district court's injunction to those persons who have a credible bona fide relationship with a person or entity in the United States. The injunction remains in force as to foreign nationals who have a "close familial relationship" with a person in the United States, including grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. As for entities, the relationship must be formal, documented, and formed in the ordinary course of business, rather than for the purpose of evading the Proclamation.

IV. Establishment Clause Claim

Plaintiffs argue that the Proclamation also violates the Establishment Clause of the United States Constitution. They urge us to adopt the view taken by the *en banc* Fourth Circuit in its review of EO-2 that "the reasonable observer would likely conclude that EO-2's primary purpose [was] to exclude persons from the United States on the basis of their religious beliefs." *IRAP*, 857 F.3d at 601.

Because we conclude that the district court did not abuse its discretion in granting the preliminary injunction relying on Plaintiffs' statutory claims, we need not and do not consider this alternate constitutional ground. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) ("Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.").

V. Conclusion

For all of these reasons, we affirm in part and vacate in part the district court's preliminary injunction order. We narrow the scope of the injunction to give relief only to those with a credible bona fide relationship with the United States, pursuant to the Supreme Court's decision in *IRAP*, 137 S. Ct. at 2088. In light of the Supreme Court's order staying this injunction pending "disposition of the Government's petition for a writ of certiorari, if such writ is sought," we stay our decision today pending Supreme Court review. *Trump v. Hawai'i*, No. 17A550, — S. Ct. —, 2017 WL 5987406 (Dec. 4, 2017). Because we conclude

that Plaintiffs have shown a likelihood of success on their statutory claims, we need not reach their constitutional claims.

AFFIRMED IN PART, VACATED IN PART.

Legal Challenge to "2-for-1" Regulatory Streamlining Executive Order

Issue Outline:

- On January 30, 2017, President Trump issued an Executive Order, *Reducing Regulation and Controlling Regulatory Costs*, as part of the Administration's de-regulation efforts.
- On February 8, 2017, Public Citizen, along with three other organizations, filed suit against the Executive Order, seeking declaratory and injunctive relief.
- The plaintiffs argued that the Executive Order violates the Take Care Clause of the US Constitution, exceeds the President's authority by directing the executive agencies to take action that would be contrary to the laws enacted by Congress, and violates the statutory bar against arbitrary and capricious decision making, among other arguments.
- Cross-motions for dismissal and summary judgment are pending. The case is ongoing.
- The first year of the Trump Administration has seen very little regulatory activity in health care, with some notable exceptions for modifications to the Affordable Care Act and Obama-era regulations that were revisited, such as the rulemaking on bundled payment models.
- In the meantime, the agencies are still conducting reviews of regulations, considering where to streamline provisions.

Attachment:

- September 6, 2017 GNYHA comment letter to HHS's Office for Civil Rights urging the revision or rescission of several provisions of the Health Insurance Portability and Accountability Act (HIPAA)

GREATER NEW YORK HOSPITAL ASSOCIATION

(21 262-6350 • KENNETH

September
Six
2017

Via Electronic Mail
US Department of Health and Human Services
Office for Civil Rights
200 Independence Avenue, SW
Room 509F, HHH Building
Washington, D.C. 20201

Attention: Deven McGraw

Re: Regulatory Streamlining

Dear Ms. McGraw:

On behalf of the 160 hospital members of the Greater New York Hospital Association (GNYHA), I am writing to provide input into the Office for Civil Rights' (OCR) ongoing effort to consider streamlining amendments to certain regulatory provisions of the Health Insurance Portability and Accountability Act (HIPAA). In our view, various HIPAA regulations impose significant burdens on covered entities (CEs) without generating much benefit, often requiring a substantial amount of paperwork in the form of documentation and policies. These activities divert time and resources from other pressing endeavors such as developing meaningful training programs and shoring up defenses against cyberattacks. We offer the following detailed comments for your consideration.

Notice of Privacy Practices (45 CFR 164.520)

Providing patients with adequate notice of how their protected health information (PHI) may be used and disclosed is important, but the provision of the notice of privacy practices (NPP) has become a burdensome, *pro forma* exercise that supplants meaningful notice and understanding on the part of patients. Part of the problem is the extremely detailed implementation specifications for the content and provision of the notice, especially the onerous requirement that CEs obtain written acknowledgement that the NPP was received. This exercise diverts CEs' time and resources from more productive activities that could enhance patient understanding, and patients get little to no benefit from it. The NPP requirement is also particularly challenging in the context of telemedicine, where transmitting the document and obtaining acknowledgement in accordance with the rules is impracticable.

With respect to the content of the notice, the US Department of Health and Human Services (HHS) model NPP was a significant step in the right direction. But recent OCR desk audit findings raise questions about use of the model NPP, since audits indicated that OCR requires content (such as a description of how protected health information [PHI] may be forwarded to a third party) that is not found in the model NPP.

The regulations at 45 CFR 164.520(b) should be replaced with the requirement for a standardized notice that OCR should develop (to which CEs may add, if they wish). This may include a safe harbor for use of the HHS model NPP. The regulations at 45 CFR 164.520(c) should be streamlined in favor of a requirement that CEs post the standardized notice at their premises and on their website, with rescission of the requirement for a signed acknowledgement.

Security Incidents 45 CFR 164.304, 164.314, and 164.308(a)(6)

Security incidents are currently defined as attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system. In this era of cyberattacks, "attempts" are made on a constant basis. It is impracticable at best to document each and every security incident that is attempted.

The regulations should be updated to reflect today's security challenges. Security incidents that are "attempted" should be removed from the definition of "security incident" at 45 CFR 164.304.

"Minimum Necessary" Rule (45 CFR 164.514(d))

The "minimum necessary" rule requires CEs to determine the categories of PHI that each person or class of persons in their workforce needs access to, and to make reasonable efforts to limit such access accordingly. The regulations also require CEs to have policies and procedures in place to limit PHI disclosed on a regular and recurring basis, as well as on an individual basis, to the minimum necessary to achieve the purpose of the disclosure. Similar requirements apply to CEs' requests for PHI. These regulations have always been somewhat unrealistic, but they have become increasingly cumbersome as electronic health records have become more prevalent and care delivery has become more integrated.

The concept of "minimum necessary" should be revisited in light of the prevalence of electronic health records and exchange and integrated delivery systems. The requirement to identify the categories of PHI that persons or classes of persons in the workforce need access to (45 CFR 164.514(d)(2)) should be rescinded. The requirements at 45 CFR 164.514(d)(3) and (4) should be streamlined to impose a general requirement that access, disclosures, and requests for PHI be tailored to the purpose of the use or disclosure, subject to a reasonableness standard or professional judgment. If it is determined that a more

detailed regulatory requirement for a minimum necessary standard is indicated, the burden should be on the requester of the PHI, not the discloser.

Policies and Procedures (45 CFR 164.316, 45 CFR 164.530(i))

The HIPAA regulations on policies and procedures, as interpreted by OCR, are so expansive that to comply a CE must reiterate the regulatory language in voluminous policies and procedures. For example, OCR's published audit protocol has over 400 references to "policies and procedures," effectively dictating that CEs have hundreds of pages of privacy and security policies. In recent desk audits, it was not enough for CEs to perform risk analyses and implement risk management plans; OCR made clear that they must have extremely detailed policies and procedures governing these processes. This is counterproductive to compliance, as it requires CEs of all sizes to retain counsel or consultants to draft and update policies that few, if any, CE staff can even understand. These sorts of policies hamper, rather than support, training.

The standard for policies and procedures at 45 CFR 164.316 and .530(i) should be revised, as should the audit protocols. OCR should focus on whether CEs are complying with the Privacy, Security, and Breach Notification Rules, rather than focusing on policies and procedures.

"Addressable" Security Rule Specifications (45 CFR 164.306(d)(3))

The Security Rule implementation specifications that are "addressable" require an unreasonable amount of documentation, which diverts resources from the actual work of assessing and addressing security risks. If a CE concludes an addressable implementation specification is not reasonable and appropriate, the CE must document why not and implement an equivalent, alternative measure. While these requirements sound simple, they are in fact quite onerous in today's complex cybersecurity environment. Further, the concept of an "equivalent" measure is unclear in many cases (as an example, it is unclear what an equivalent measure is with respect to encryption in transit).

As health care entities have become major targets of cyberattacks, CEs are struggling to stretch scarce resources to address myriad threats. It is not the best use of those resources to create and maintain all of the documentation required in connection with addressable implementation specifications. The regulations at 45 CFR 164.306(d)(3) should be rescinded. The requirements for conducting and documenting a risk analysis ensure that CEs would continue to be held to a reasonable standard that entails identification, ranking, and addressing security risks.

Conclusion

We believe the above, relatively non-controversial suggestions would reduce the amount of regulatory burden facing CEs. Other aspects of the HIPAA regulations merit study and possible streamlining on a longer-term basis. For example, many of the purposes of business associate

agreements may be achieved through the use of a basic notice, with more complicated, unique terms placed in a written agreement (an approach that is similar to that of the cloud computing guidance). Another potential area for streamlining is the accounting of disclosures requirement.

Thank you for the opportunity to provide this informal comment. We look forward to working with you in the future to ensure HIPAA compliance among our membership.

Sincerely,

Kenneth E. Raske
President

OVERVIEW OF LEGAL CHALLENGES TO FEDERAL EXECUTIVE ACTIONS AND LEGISLATION IN HEALTHCARE

NYSBA Health Law Section
January 24, 2018

Laura M. Alfredo

GREATER NEW YORK HOSPITAL ASSOCIATION
Over 100 years of helping hospitals deliver the finest patient care in the most cost-effective way.

Overview

- ACA
- 340B
- Regulatory Streamlining
- Immigration

ACA

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HOSPITAL ASSOCIATION

Where We Are

December 2017: Individual Mandate Repealed

Executive Action Stopping Cost Sharing Reduction Payments

Cost-Sharing Reduction (CSR) Payments

Subsidized health plan waivers of deductible and copay amounts for low-income people, as required under ACA

Referenced in payment methodology for ACA Basic Health Plans *a.k.a.* NYS Essential Plan -- $870 million, covering approximately 700,000 New Yorkers (138% - 200% FPL)

ACA appropriation language at issue

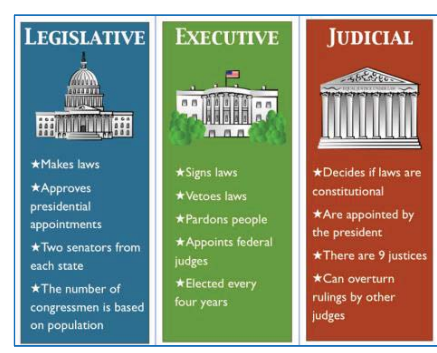
House v. Burwell … Price … Hargan

Action commenced in DC District Court in 2014 arguing Obama Administration making CSR payments without authorization

DC District Court ordered payments be stopped but stayed order

State AGs, including NYS, successfully intervened in August 2017; GNYHA Amicus

Case conditionally settled December 2017 in three-way agreement



December 2017 Conditional Settlement of *House v. Hargan*

Executive's Interests

- Agreed with merits holding that CSRs not authorized
- Disagreed with non-merits holding that House had standing and a cause of action
- **Result**: Vacate district court's language ordering Executive to stop the payments

House's Interests

- Agreed with both non-merits and merits holdings
- Given October 2017 Executive action stopping payments, willing to forego risk of adverse appellate ruling on standing

State-Intervenors' Interests

- Disagreed with merits holding
- Wished to avoid preclusive effect on other litigation
- **Result**: Parties agree not to cite district court decision on merits

California, et al v. Trump

Action commenced in ND Ca October 2017 by California, New York and 17 other states; GNYHA Amicus

Violations of APA, “Take Care Clause” alleged

Seeking DJ, injunctive relief

Motion for preliminary injunction denied October 2017

340B

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HOSPITAL ASSOCIATION

340B Basics

- 1992 program under Public Health Service Act
- Requires pharmaceutical companies to discount OP drugs to certain hospitals and Federal grantees as a condition of participating in Medicaid
- Technical requirements on patient, provider, and drug eligibility, and “duplicate discounts”
- Program growth since 1992 in patients, savings

340B Environmental Scan

HRSA "Mega-Guidance" (under review)

- Wide-ranging proposals -- eligible patient, determination of outpatient status, contract pharmacy arrangements

Energy & Commerce Committee

- Oversight Committee Report issued January 10, 2018
- Recommends more rigorous oversight, expanded audits, Congressional clarification of intent

GAO Report (Under Development)

- Anticipated focus on contract pharmacies, fee arrangements, benefits to uninsured patients

OPPS Cut

Medicare Outpatient PPS 340B Cut

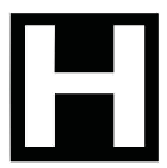
Final rule effective Jan. 1, 2018

Cuts separately payable drugs (defined as >$120/day) from ASP + 6% to ASP -22.5%

With budget neutrality adjustment, NYS impact ~$51m/year, net

AHA, et al v. Hargan

- Action commenced in DC December 2017 seeking to bar OPPS cut based on HHS's exceeding authority in adjusting payment rates and undermining 340B statute
- GNYHA amicus with several other hospital associations, showing real-world impact
- District Court dismissed case for lack of subject matter jurisdiction (presentment) December 29, 2017
- Plaintiffs appealing and pursuing administrative process in connection with claims



REGULATORY STREAMLINING

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HOSPITAL ASSOCIATION

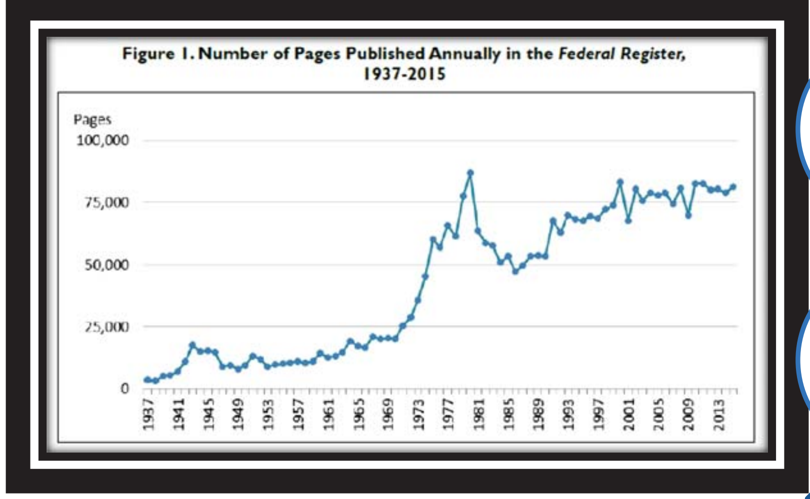
Re-cap; Regulatory Freeze

Directed agencies to hold or withdraw regulations not effective as of January 20, 2017, pending review, further rulemaking

Key rules impacted:

- Bundled Payment Models (CJR/SHFFT)
- Substance use disorder confidentiality rule
- Human subjects research (common rule)
- 340B Mega Guidance

January 30, 2017 Executive Order, *Reducing Regulation and Controlling Regulatory Costs,* ("2-for-1")



- For each "significant regulatory action," two regulations must be repealed
- Net zero growth in incremental costs 2017; future years TBD

Public Citizen v. Trump

Action commenced in February 2017, by Public Citizen, National Resources Defense Council, Communication Workers of America seeking declaratory and injunctive relief, citing APA, Constitutional grounds

Cross-motions pending

Speaking of Regulatory Streamlining … A Word on HIPAA

Notice of Privacy Practices

- NPPs burdensome, ineffectual
- Written acknowledgement of receipt especially onerous
- **GNYHA**: Replace with standardized notice as a safe harbor, drop written acknowledgement.

Security Incidents

- Attempted or successful unauthorized access, use, disclosure, … interference
- Impracticable in this era to document attempts
- **GNYHA**: Redefine security incidents to exclude attempts.

"Minimum Necessary" Rule

- Must determine the categories of PHI to which each person or class of persons in their workforce needs access, make reasonable efforts to limit this access accordingly, and implement certain policies and procedures
- Always unrealistic, more so now with EHR
- **GNYHA**: Replace with a general requirement that disclosures be tailored to the purpose of the use or disclosure, subject to a reasonableness standard or professional judgment.

Policies and Procedures

- Expansively interpreted; extreme, hyper-technical detail required
- Boon for counsel and consultants
- **GNYHA**: Revise the regulations and focus on substantive compliance, not paperwork.

IMMIGRATION

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HOSPITAL ASSOCIATION

Impacts on Health Care

Patient issues	Workforce issues
ICE enforcement concerns	Travel ban
DOJ memo on prosecuting immigration violations, other announcements	Extreme vetting for visa applicants
BUT, “Sensitive Locations” policy remains in effect	Actions to limit H1-B visas

Timeline of Travel Ban Executive Orders

January 27, 2017
Protecting the Nation from Foreign Terrorist Entry into the United States

March, 6, 2017
Second EO, revising and narrowing the first

September 24, 2017,
Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats

- EO -1
- *EO-2*
- *EO-3*

EO-1 and its Legal Challenges

Basics

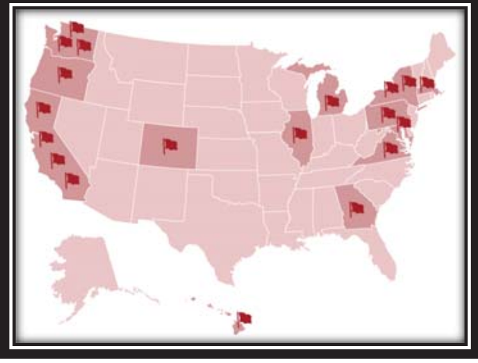
- 7 nations, 90 days -- can be expanded in time and scope as screening procedures are reviewed
- Applies to current and prospective visa holders

Initial Reaction from the Courts, Litigants

- Nationwide temporary stay upheld by 9th Circuit; government seeking further review
- Preliminary injunction issued by VA court; no appeal yet
- 20+ cases

GNYHA Advocacy

- GNYHA to Secretaries of State, DHS:
- "*We urge you to issue a clear, specific waiver or other notice of your intention to exercise this discretion [granted in EO] in the case of foreign nationals currently under consideration for residency slots in U.S. physician training programs.*"
- GNYHA amicus in two actions



GNYHA January 2017 Member Survey on Visa Usage

	All Countries	7 Countries
Total visas	5,649	121
Total trainees	2,058	79
Trainees with H1-B	843	18
Trainees with other visas	1,215	61
Other workers	3,591	42
Other workers with H1-B	1,339	17
Other workers with other visas	2,252	25

Data from 37 respondents representing 91 hospitals

15/37 respondents (57 hospitals) had interviewed or planned to interview candidates from one of the seven countries during current match process

Current State: EO-3

Indefinite travel restrictions for 8 countries, tailored based on DHS review of each country's internal procedures and ability/ willingness to cooperate with US screening

B visas -- business visitors and tourists – used for meetings and conferences, including interviews, exams

H1-B and J-1 visas used for professionals and students/trainees

Exceptions and waiver authority clarified, expanded, compared to prior EOs

Country	H1-B Permitted?	J-1 Permitted?
Iran	No	Yes
Syria	No	No
North Korea	No	No
Libya	Yes	Yes
Chad	Yes	Yes
Venezuela	Yes	Yes
Yemen	Yes	Yes
Somalia	Yes	Yes

Current State: Legal Challenges

On December 4, the Supreme Court ruled EO-3 could take effect pending Government appeals to 4th and 9th Circuits

On December 8, 4th Circuit heard arguments on appeal of MD decision granting injunction on statutory (Immigration and Nationality Act) and Constitutional grounds

On December 22, 9th Circuit upheld ruling issued by district court in HI, finding EO-3 violated INA

GNYHA amicus in prior iteration of 4th Circuit case

27

Thank You

The Future of Long Term Care, Including Assisted Living, Home Care and Legal Issues

Speakers:
Robert Borsody, Esq.
Emina Poricanin, Esq.

The Future of Senior Housing

I own a company, with a partner Wayne Kaplan, that owns and operates 25 assisted living and memory care communities in seven states and we are expanding and looking for more. By the way, if you know of any for sale let me know. I still have my license to practice law (and as a result, you'll get CLE credit for this portion of the presentation.) However, now I am full-time running the company and so I'm in a position to give you a pretty good insight into the senior housing business which I will do. Also at some point, I'll tell you how I transitioned from being a healthcare attorney, which I was for many, many years, into being a full-time businessman, in case you're interested in doing something along the same lines.

The senior housing industry segment is a large and expanding sector of the economy corresponding, of course, to the growth of the numbers of those who need it. I'm not going to spend a lot of time on statistics on the numbers of the aging population because you know them I'm sure. However, I will give you some figures on the senior housing industry itself. It is highly fragmented. There are few behemoths. Among the top 10, in terms of number of properties and number of beds, there are only four publicly traded companies. The largest, a publicly traded company, Brookdale Senior Living, headquartered in Nashville Tennessee, has over one thousand properties and recently acquired one of the other larger chains, Emeritus. Brookdale is having a great deal of trouble digesting that meal; its stock has suffered and its other metrics such as average census has as well.

Senior Housing Defined

Let me define and explain what senior housing comprises. It is generally viewed as consisting of three broad segments: independent living, assisted living, and skilled nursing. CCRCs, or Continuing Care Retirement Communities, are a combination of all three of these. Over half of the industry is nursing homes in terms of numbers of communities and numbers of beds. Independent living, according to the same criteria, is about 10% or 11%. CCRCs are 8% measured by number of communities and over twice that, or 20%, measured by the number of beds since they tend to be larger. By comparison, assisted living is 36% by number of communities but only 20% by number of beds, reflecting the fact that they tend to be, on the average, much smaller. Indeed, probably about two thirds of the assisted living sector is small "mom-and-pop" type of communities where one, two or maybe three locations are owned and operated by the same person or "mom-and-pop."

Independent living is, basically, multifamily housing for older folks. It is often age restricted to 55 years and older. It is usually strictly a monthly rental which can include one or more meals at a centrally located dining room as well as housekeeping services. Most importantly there is no assistance with the "activities of daily living." Very importantly it is not subject to licensure in any state. Here is where an interesting situation arises with the so-called "look-alikes."

Since licensing can be a time-consuming process and a heavy burden to shoulder operationally, it is tempting for some operators to create and operate a business that looks very much like it is a licensed assisted living facility, making many of the same services of assistance with activities of daily living available to residents, but not having a license from the state. This

is often done by having a home health agency come in and provide needed services to residents of an independent living building. Where it can get very sticky is if the same person or entity that owns and operates the independent living building owns and operates the home health agency that provides services to the residents of that building. NYSDOH does not like look-alikes and has taken some pains in the past to require them to secure licensure. Operators such as myself, who have gone to the time and effort of securing licensure, don't much like them either.

The reason and motivation for these look-alikes is that the independent living operator can keep residents longer in the building if a home health agency comes in to service them instead of the resident having to move to a higher level of care, such as assisted living or skilled nursing. Of course if that operator also owns the home health agency there are two streams of income to that operator and the home health agency has a captive population of customers.

The next segment of the senior housing business is **assisted living**. That, of course, is my sweet spot since we have a couple of dozen of those. By the way, memory care is usually considered part of the assisted living business. It certainly is not independent living and residents with memory care or Alzheimer's diagnosis are usually not quite sick enough to go into skilled, although it is a gray area as I will discuss further when we talk about skilled. Further by the way, the term "Alzheimer's" is sometimes thrown around loosely. I understand that the current state of medicine is that an Alzheimer's diagnosis can only be accurately done by an autopsy and there are a number of other reasons for memory loss, other than Alzheimer's, although I can't remember a lot of them. (That's supposed to be a joke.) However, you will frequently see discussions, signs, and advertisements for "Alzheimer's" facilities because the general public equates that with memory loss.

The major distinction between independent living and assisted living is, as mentioned, licensing which is required in every state for assisted living. Assisted living communities are called that because they provide assistance with the "activities of daily living." Those activities include bathing, dressing, medication management, grooming, transferring, toileting, and eating. There is no bright line test for admission to an assisted living facility although there is a requirement or test at the other end, for continued retention as a resident in assisted living.

What I mean is this. Anybody could walk into an assisted living facility and say, "sign me up, I want to move in." As a practical matter, potential residents usually have one or more needs for assistance with the activities of daily living. As a matter of fact, very few people move into any of our facilities willingly. This is another practical contrast with independent living. Frequently, someone 55 or older will voluntarily move into a nice gated community, independent living, where children are not allowed and they are not bothered with the hassle of maintaining their house and they can, if they wish, choose from a list of services available including dining, housekeeping and perhaps others. However, our residents and most assisted living residents move because they have to. (In the industry, assisted living is referred to as "need driven" for that reason.)

The typical potential resident has been living in their house for a very long time and the spouse (usually the husband) has passed away some time ago and the caregiver (usually a middle-aged daughter) has to exercise considerable influence to induce and produce a move to assisted living. What we usually see is that the potential resident, we will call her "mom," has not

been eating properly, the cupboard and the refrigerator are usually almost bare, not necessarily because of lack of money, but because of not getting out to buy supplies. Mom's friends have all passed away or moved away and she doesn't socialize but sits in the house all day watching television. She may have had a fall or two and for that, and perhaps other reasons, she has had to go to the emergency room a few times. At this age mom is taking usually half a dozen medications but the problem is, she's not taking them on a regular basis or at all. Ordinary tasks of life are neglected like paying bills, minor repairs around the house, etc. Mom either hangs around all day in a house dress or wears the same thing which is getting to look ragged and worn. I think you get the picture.

It's time to go to assisted living where all her needs are taken care of. All licensed assisted living communities are required to, and do provide: three nutritious meals a day; careful management of medications to make sure that they all are taken and at the right time; twenty-four hour a day and seven day a week supervision including case management and significant socialization provided if desired. (Usually not very long after a resident reluctantly moves in to assisted living, they have made new friends and are enjoying the socialization.)

So, in other words everything that was lacking and probably would cause an early demise, is provided, and for one fixed fee per month. In terms of the fee, or rent (and the topic of reimbursement will be discussed later on) while the amount varies from location to location, usually more in urban areas than rural areas, there are worksheets that the communities provide that show that the cost of living in an assisted living facility is comparable and sometimes actually lower than the cost of continuing to live in the old homestead.

I have mentioned that while there is no fixed criteria for entering an assisted living community there are state laws governing who can remain in an assisted living community, known as retention standards. State laws dictate that as a resident reaches higher levels of acuity, and they must be regularly assessed to determine this, at that point they must be discharged to a higher level of care, usually a nursing home. As might be expected, the Department of Health regularly and, of course at random, inspects licensed assisted living communities and one of the grounds for violation is that a resident needs a higher level of care and has not been discharged to a higher level of care.

At this point it's appropriate to describe specifically the New York state licensing system for what I have been calling assisted living. If one has a residence which gives assistance with the activities of daily living, a license is required, but that facility is licensed as, and is called, "an adult home." In order for such a facility to advertise and put a sign out calling itself "assisted living," there must be a second level of licensure procured called ALR or an Assisted Living Residence. It's a little strange but it is all in the name.

The next level of licensure is called EALR or, Enhanced Assisted Living Residence. What this means is a higher level of care can be provided, allowing residents to be retained longer before being released to some other facility such as a nursing home. The next and final level of licensure is called an SNALR which is a Special Needs Assisted Living Residence. As a practical matter, this is always for memory care (or as I mentioned before, what many people refer to as "Alzheimer's care"). Many ALR licensed communities provide some type of memory care, since it is an almost inevitable consequence of aging. However, without an SNALR license,

no community may advertise itself or have a sign saying it provides memory care or Alzheimer's care.

The last, and probably largest, segment of the senior housing industry in terms of number of beds, value of assets and sheer volume of payments including from the government, is the nursing home industry, which is often referred to as the **skilled** segment.

Unlike the other parts of the senior housing business where anyone can just walk in and rent, there are standards for admission to a skilled facility. This is determined by a prospective patient's score on a Patient Review Instrument or PRI which looks at a number of determinants measuring one's degree of illness. For this reason people in nursing homes are called patients because they are, basically, sick and in need of medical care. By contrast persons in assisted living communities are called residents. Assisted living is a "social model" not a "medical model." While we will discuss reimbursement for all the segments of senior housing later, it should be noted that Medicaid or government reimbursement is the principal source of income for the skilled sector. Many persons will start out paying privately out of their own pockets in a nursing home but the high expense usually exhausts assets and most people eventually go on Medicaid. I believe that, countrywide, Medicaid comprises about three quarters of the income for most skilled facilities. By the way, Medicare does cover the first 90 days of nursing home expense, provided it is immediately preceded by a stay in a hospital.

I mentioned that memory care can be a "gray area" in terms of where persons who have such a diagnosis can be housed and treated. Persons with this diagnosis are often found in licensed assisted living facilities, whether or not those facilities have the additional SNALR licensure. However, many are also in nursing homes. Such nursing home patients may have little or no physical impairment but qualify under the PRI analysis simply because of their cognitive impairment.

Continuing Care Retirement Communities, or CCRCs, are a combination of the three major segments of the senior housing business. By the way, sometimes you hear of these type of facilities referred to as "life care communities." Many years ago, earlier models of this type of care provided all needed care by all three levels for life for one large fixed payment and the term "life care" was more appropriate. A number of these facilities, many of which were located in California, went bankrupt because the residents lived too long and the cost of care exceeded the large fixed payment. Hence, the term has fallen into disuse.

By the way, most CCRCs countrywide are not-for-profit. This is also true, as you know with hospitals. That is not the case with nursing homes and assisted living communities most of which, but certainly not all, are for-profit.

The common and distinguishing characteristics of CCRCs is that there is an upfront fee called "an entry fee." Although practices vary, it is quite common for all or most of that fee to be returned if the resident dies or moves out. All CCRCs, however, also charge a monthly fee which usually covers maintenance and other charges. Accordingly, that decreases the probability that the CCRCs will go bankrupt because the resident outlives the initial entry fee. In these financial characteristics, CCRC is more like a condominium where there is a large payment, which is for ownership of the condominium, and continuing monthly payments for maintenance.

Reimbursement for Rent and Services

Reimbursement for services provided in these segments of the assisted living business is sharply different for each. Payment for independent living is private pay, always. As is well known Medicare and Medicaid by law can only be for medical treatment and, of course independent living is simply housing. This will be discussed later, so is assisted living but there is a difference provided by the Medicaid waiver programs.

Payment for nursing homes, depending upon whether nursing home is located, sometimes starts out as private pay but as noted because of the high cost, usually assets are exhausted and the patient is switched to Medicaid. In many areas in the country, the patient simply applies for Medicaid upon applying for admissions to the nursing home. Countrywide, about two thirds of nursing home residents are on Medicaid. As is well known there are income and asset limitations for eligibility for Medicaid and there is a small elder law specialty in working around these limitations by setting up trusts for assets owned by potential Medicaid nursing home applicants or transferring these assets to relatives all of which must be done before the five-year "look back" period of time.

Nursing home Medicaid reimbursement has been the subject of numerous studies and significant legislative concerns because of its enormous and increasing cost. Another presentation today will discuss a new approach to this.

As has been stated, assisted living, a social model, is housing just like independent living with, however personal care services. State law significantly limits provision of any medical services in a licensed assisted living community. Even in an EALR and SNALR licensed facility, it is not much more than case management, which is regular assessments to determine if a higher level of care is needed, and medication management (although EAR and SNALR license communities do employ RNs.) Accordingly, payment for assisted living is also private pay with a few exceptions.

Long-term care insurance covers assisted living but it is very small part of the income of any community at this point and probably well into the future.

Supplemental security income, or SSI, while not paid directly to any licensed facility, is income which a resident can use to pay for the cost of assisted living. This payment which in the old days used to be called "welfare," is available to residents whose income and resources are below a certain level. This is, unfortunately, something common to the elderly. The problem is that SSI is only $1,429 a month which is not enough to pay for the rent at almost any assisted living facility.

Aid and Attendance is payment made by the Veterans Administration to veterans and spouses of deceased veterans under certain circumstances. Generally, it is paid for any veteran who served anywhere at any time when there was a war on which, as we all know, is quite a bit of this country's history. It is only about $1400 a month. However, Aid and Attendance and SSI combined begins to be an amount that most assisted living facilities will accept.

Medicaid Waivers and ALP Beds

There is another significant source of reimbursement for assisted living communities in New York and that is Medicaid. Although as mentioned, by federal law, Medicaid can only be for medical services, there are "waiver" programs in every state, including New York, which allow Medicaid payment, under certain circumstances to be used for assisted living services. These Medicaid waiver laws came into effect a number of years ago driven by a couple of factors. The first was that Medicaid was, and is, for every state a major portion of the state budget and most of that Medicaid payment is for nursing home services. The second is that there was, and probably still is, a significant number of nursing home residents who can be adequately treated in assisted living communities. It is also a fact that the cost of assisted living is significantly less than the cost of nursing home care.

The combination of these factors led to pressure upon the federal government to grant "waivers" to the states to allow Medicaid to be paid to assisted living communities for assisted living services to persons who were not quite sick enough for nursing homes. This is believed to have saved states a lot of money. In New York these Medicaid beds are called ALP beds and are highly prized and coveted by most assisted living operators. The payment level is one half of the nursing home rate in a particular county where the assisted living facility is located. This is usually not much less than the private pay rate for those facilities.

The New York State Department of Health regularly sprinkles ALP beds around the state, where they are needed and they are hotly competed for by assisted living operators. The easy and obvious reason for this competition is the well-founded belief that there are lots of potential Medicaid residents around and it is easy to fill those beds. While this is true, and an ALP assisted living community of a certain size can stay in business and make money, there is another not so obvious but important business consideration. An ALP licensure requires that a home health agency be set up and maintained by the facility to provide services to the Medicaid residents. It is called a Licensed Home Care Services Agency or LHCSA and it provides homecare services such as nursing, PT, OT speech therapy etc. The staffing requirement of that agency and the staffing requirements to comply with the ALP licensure generally are significant requiring, among other things, 24-hour nursing staffing by RNs and LPNs. (By the way, RNs and LPNs are not, by law, required to be employed by New York licensed assisted living communities. Although many do employ them, they are not allowed to provide nursing.) Accordingly, while for a certain size ALP community, certainly 100 or 200 beds, profits and continued operation are possible, for a small, a ten or perhaps even a twenty bed ALP, because of the overhead, principally staffing costs, it is a money losing situation.

There are other issues as well for ALP beds but none as large as that discussed above. For example, in an assisted living facility, if a resident has to go to a hospital for a period of time, the rent is still due and must be paid. Medicaid does not pay the assisted living facility while the resident is in hospital. They obviously don't want to pay double. Moreover, and fairly significantly, when a resident moves into an assisted living community and cannot pay the rent but may be eligible for Medicaid, application is made and, hopefully it is granted by the Medicaid administration for Medicaid coverage. (If such application is not granted, the assisted living facility is stuck with a resident who cannot pay the rent. Needless to say, although it is

legally possible, for many reasons it is difficult and unpleasant to evict an assisted living resident for nonpayment of rent.)

However, even if Medicaid coverage is granted, there is a period of time, which can be months, before a check actually arrives from Medicaid. A private pay resident pays the first month's rent up front, just like renting an apartment which, basically, it is. These months of delay in payment for Medicaid resident multiplied by a number of Medicaid residents can add up to a large amount. Again, if there are 100 or so ALP beds it's not so much of a problem; not so if there is a small number of ALP beds.

The Future of the Senior Housing Industry

So that is the senior housing business as it exists. Now let's talk about its **future.** Let me start out by correcting one widely held misapprehension, that the so-called silver tsunami of baby boomers is upon us now and is creating a huge demand for senior housing. Not so; that won't happen for another 10 or 15 years. Baby boomers are those born immediately after the end of the first world war in 1945 when all those soldiers came home and started creating babies. 1945 is 72 years ago. The average age of the folks in our facilities, which are typical of most, is in the mid-80s.

Moreover, as time goes on and healthcare improves overall people are delaying retirement and working longer. Depressed economic circumstances also cause older people to remain on the job longer and in their homes longer, if they can. Of course depressed economic circumstances also means that potential residents are less likely to be able to pay the rent. Both of these factors combine to moderate demand. Not good news for the senior housing industry in general.

It is increasingly difficult for the senior housing business to attract workers. The majority of senior housing workers, the food-service workers and aides the direct hands-on caretakers, are low-paid and nearby fast food restaurants and even the shrinking bricks and mortar retail sector are hot competition for the same worker pool. There are two future possible trends that strongly influence the depth of that worker pool. If the economy gets worse those jobs will become more attractive to more people. In those areas where we have communities where the demographics show greater concentration of higher income population, while it may be a little easier to get private pay residents there, it is harder to get employees. If there is less immigration, although all licensed facilities are usually under pressure to hire only documented workers, that will mean it will be harder to get these kind of workers.

There will probably be increasing consolidation in the senior housing industry, especially in assisted living. As noted earlier, it is a highly fragmented portion of the senior housing industry, and many are quite small. For example, in Florida half of the assisted living communities are under six beds and 70% are under 20 beds. There will be limited consolidation by acquisition of the smaller properties by chains of communities because the smaller properties are simply not attractive acquisition targets. It is difficult if not impossible to run a stand-alone community of under 20 or 30 beds profitably. There are simply no economies of scale. In Florida, for example, there are a large number of people who have converted their homes into assisted living (and secured licensure for such) and they live there and provide services to their

few residents. As those owner/operators age out or pass away they will find very few potential buyers. This is unfortunate because a very small town that has such a very small assisted living community will then have no assisted living community.

Also, when the so-called “baby boomers” start looking for assisted living or even independent living their standards will be higher than those that satisfied residents of past years. They will look for larger living spaces and more amenities such as: more elaborate and up-to-date fitness centers; perhaps indoor pools; more elaborate common areas including small movie theaters; more technology such as Wi-Fi throughout the facility and more high-tech health saving and preserving gadgets. This is hard to do in a small assisted living facility. Those that can’t compete and attract paying residents will go out of business.

High-tech and health saving gadgets are becoming prevalent in the more modern assisted living and even an independent living communities. These include sensors which communicate to a central area and/or ring an alarm when a resident gets out (or falls out) of bed and other motion sensors and tracking devices to enhance the supervision capability of the frail elderly.

With respect to the concept of the “frail” elderly, a trend that has been increasing in recent years and will continue to increase, is higher acuity of persons moving into assisted living. In many cases those residents are persons who would have been in nursing homes many years ago. One of the drivers of this trend is increasing availability of technical devices and care approaches which enable people to stay in their homes longer, which any older person will always prefer to do. Therefore, when a move into assisted living becomes inevitable and unavoidable, their condition will be much worse and they will require much more care in the assisted living facility.

The Internet has had a huge effect on many segments of our economy. For example online marketing has dealt a blow, almost fatal, to many bricks and mortar stores. Not really for senior housing. Senior housing, all segments, is a local and hands-on type of business. It is sometimes described as “high touch not high-tech.”

For example, Internet marketing is a huge commercial area but it is of limited utility for most senior housing operators because they draw their residents from only 5, 10 or maybe 15 miles away. Thus, even radio or television advertising as part of the marketing budget, is usually not money well spent. Although many vendors aggressively try to convince senior housing operators of the absolute necessity of Internet marketing, including search engine optimization or SEO, our experience has proved it to be relatively useless because of the difficulty and probably impossibility to target the relatively tiny geographic area that is defined as the “primary market area” of a particular senior housing community. Of course the national operators such as Brookdale use all kinds of marketing media including television and the Internet because they have national brand. However, the smaller operators including even the smaller regional operators like ourselves usually do not use the Internet for marketing and probably will not do so in the future.

By the way, this is not to say that a good website is not important. It is of great importance in “selling” a community. We usually ask how a prospect has come to a particular community and most frequently it is word-of-mouth from neighbors or relatives of present

former residents. Many times a prospect says they looked at our website. However, when we ask how they got to the website, it is always that they got some local recommendation, for example from a neighbor, and then went to the website to check it. It is never through a search engine. The only time that Internet marketing and a search engine has ever come through for us, and I mention this because I think it's typical for many operators our size, is if there is a son or daughter who is posted on the job way far away from where mom lives and who believes that mom needs to move into assisted living and does a search for assisted living near where mom is. We have had a State Department employee in Indonesia who contacted us to acquire about availability of accommodations for a parent who was a few miles from one of our communities in New York. That State Department employee in Indonesia found us through the Internet. That's very rare however, and accordingly at least in our experience and from what we understand in the industry generally, Internet marketing is of little or marginal utility.

How will foreseeable future changes in laws or the economy affect the senior housing industry? Probably not a great deal. It was mentioned that when the economy dips so does our census because people stay in their homes longer and have a harder time finding money to pay the rent. It was also mentioned, however, that ours is a "need driven" business. People come to assisted living and nursing homes because they have no other choice and must do it. Independent living is more elective and optional and, in an economic downturn, that segment of the industry really suffers. The recent downturn beginning in 2008 adversely affected all segments of the economy. However, senior housing, and in particular assisted living, was as a percent less seriously affected than any other segment of the economy. It is certainly not recession proof but is certainly recession resistant.

An economic downturn also slows down development of new properties. Lenders become more cautious as do investors. Again, however, as evidenced by experience during that same recent recession of 10 years ago, while new construction in multifamily housing, office buildings or any other area may have ground to a halt, there was still some activity in the development of senior housing, simply because of the accurate perception that there continued to be a growing supply of future customers.

On the other hand, as the economy expands or even heats up, there is a quite different and somewhat distressing trend of "irrational exuberance" in development of projects for senior housing. There are clearly now certain areas of the country that are thought to be overbuilt, particularly for assisted living and independent living projects. The experienced and cautious senior housing developer will always do a conservative market study of the area where the prospective development project is located before taking any further steps to develop a new project. A market study, prepared and conducted by one of the many national experienced experts in this area, will use a combination of existing and projected demographics, the existing competition within the primary market area and, to the extent ascertainable, the planned or proposed similar projects to arrive at a needs analysis. The needs analysis will show that, for some period of time in the future there will be a need for a certain number of beds of assisted living, memory care, independent living or skilled, whatever is the proposed project by the developer. If the market study shows a need for 400 assisted living beds, for example, then the construction of some number, for example 100 or 200 beds, would justify the investment of time and effort to develop the project.

We frequently are called by developers, real estate brokers, or simply landowners who, hearing that there will be large numbers of old people in the country in the future, think that a particular parcel of real estate that they have would be ideal for senior housing. They go on to list all the benefits of their real estate, describing how it is near stores, bowling alley or some such thing. My first reaction is, do you have a market study, and if so send it over before I hear another word? Market studies are not expensive, a few thousand dollars, and all lenders and investors in senior housing required them. As a potential operator of any future development project we certainly do as well.

While the economic future of the country will certainly affect the future of senior housing, it is unlikely to have a huge positive or negative effect. The same is probably true with any legal changes on federal or state level.

There are a few federal laws that impact the senior housing industry. Certainly greater attention to, or more stringent inspection and regulation of, nursing homes is always popular with federal regulators and the public. However this is expected, anticipated and part of the cost and the burden of doing business in that industry segment. Nursing homes, and for that matter assisted living and memory care, are necessary and will never be so burdened that they will go out of existence.

The usual laws and regulations that affect all businesses in the country also affect the senior housing industry. For example, there were proposed changes in the federal employment regulations last year to change the definition of what employees were exempt from being paid overtime (time and a half) for working more than 40 hours a week. The wage level for employees subject to being paid overtime was proposed to be raised, thereby including many more employees who would not otherwise be classified as “exempt” employees and therefore would be subject to being paid overtime. While that proposed change is now under review and may not go forward, if it had and if it does, it would increase operational expenses for senior housing as well as, of course, every other business in the country. There were no other proposed or even discussed changes in federal regulation which would impact the senior housing industry that I know of.

Medicaid, which does support a great deal of the skilled sector and is a significant source of income to assisted living as well, could possibly be decreased on the federal level which will then affect the state level. It is unlikely that any change, specifically any decrease, would be so drastic as to drive a significant number of operators out of the business, although some would suffer economic pain. Any such Medicaid decrease would of, course drive operators to secure private pay residents in place of Medicaid residents. However, except for some large Medicaid operators in urban areas, for example operators of large multi-hundred bed facilities in New York City, a Medicaid decrease would not have significant impact on assisted living. While there are no proposed changes in institutional Medicare reimbursement, it is also a nominal source of income for the senior housing industry.

As mentioned, while the senior housing industry is required by law and usually does only employee documented immigrants, any significant constriction in immigration will, nonetheless, affect the availability of the lower paid, and by far the greatest number, of employees in the

senior housing industry. On the other hand a downturn in the economy would make more of those same type of employees available.

Healthcare benefits are a significant component of compensation expense which, itself, is by far the largest operational expense of senior housing. Repeal or significant modification of the Affordable Care Act, while probably having an adverse effect on the public at large and the employees in particular of senior housing industry, will decrease the financial burden on operators if it eliminates the legal requirements to provide any specific levels of healthcare benefits or, perhaps, any benefits at all.

State laws, on the other hand, are much more of concern, more visible and have much more effect on most segments of the healthcare industry and senior housing is no different. Indeed, even independent living is probably much more affected by local zoning and building regulations than by any federal legislation. New York State licensing regulations for skilled and assisted living are comprehensive and constantly changing but usually in, minor ways.

For example, there was a recent change in the regulations applicable to securing licensure for assisted living facilities in New York or change of ownership of such facilities. Both of these procedures have for many years required a long time, because of lack of staff at the state level. Recent regulations provided that if an applicant has secured a license or gone through a change of ownership procedure within the last two years, then such subsequent application within such two-year window, would take no longer than 60 days. There has been some confusion about the implementation of this new regulation. Virtually without exception, every applicant for licensure does so with a "special purpose entity," which entity is created and used solely for the purpose of operating that particular facility at that location. Therefore, such an "applicant" would never apply for another license or a change of ownership. It is thought now that NYSDOH will recognize reality and practicality and provide that the parent entity of applicants will be able to take advantage of this new shortened time frame.

Becoming a Businessman

Okay, now the bonus portion of the presentation: how to jump from one side of the desk to the other – from being a lawyer to being a client. My company uses lots of lawyers for specific purposes. Obviously, since both myself and my partner Wayne are lawyers, we are not about to call lawyer for something we can do ourselves. However, we also know our limitations. For specialized work such as real estate closings or employment issues and so forth we use lawyers local to where we have our properties. Any lawyer who becomes a businessman usually has the good sense to do that. However, a businessman who is also a lawyer does have certain advantages in negotiations and having a basic knowledge of the legal system.

I didn't start out as a healthcare attorney because when I started out there really wasn't any such specialty. I started work just out of law school for a law firm which was very large for that time, 100 lawyers, called Sullivan Cromwell. I did basic litigation at S&C and then spent some time in the public interest area up at Columbia University and started a project, which I still believe exists called Legal Services for the Elderly Poor. At about that time, Medicare and Medicaid money started flowing into the economy creating a lot of legal questions as well. That combination, of money and legal issues you will recall, gave birth to the health law specialty. I

then got another grant from the Office of Economic Opportunity for something I called the Health Law Project because I saw that many of the legal issues of the elderly poor were related to healthcare.

As that grant tailed off, many of my clients were in the healthcare area and that continued for many years after I and a few other healthcare lawyers founded Epstein Becker Borsody and Green. I'm sure many of you will understand that, as a healthcare attorney I dealt with many doctors, hospitals and businessmen who wanted to start new ventures, often in combination with each other. One of the first things they did is go to a healthcare lawyer for counsel, since it is such a heavily regulated area. I spent a lot of time advising startups and business venture combinations in the healthcare area, advising them as to many business-related issues including how, where, and whether to secure financing. I became very familiar with a number of sources of financing and they became familiar with me.

One of the important things to do when starting a business and being a businessman is to know how to get financing for the business you are starting or buying. Perhaps you have heard the expression "money talks," well it does, and loudly. Lots of people have great ideas and lots of people have a lot of talent, but to start and operate any venture takes financing and not so many people have that or can get it.

The best way to finance new businesses is to write a check from your savings or get the money from people you know. In the business area that's called "family and friends" financing and there are a lot of advantages to that, but if you don't have that you have to find other sources. Frequently, somebody with money or access to money who is looking to start a business, partners with a lawyer basically, to save money. The money source brings in the lawyer as a partner with the understanding that the lawyer will provide legal services for free to the budding business venture. If the money source has any sense, and most do, the lawyer will not get much of an equity interest for the free legal services. Also, of course that lawyer better have some current paying clients to support him until the business takes off and can pay him enough profits to do so. So, lots of lawyers take a "piece of the action," compensation in the form of stock, or options or something like that, when they help to start a new business. However, that's not really being a businessman or an entrepreneur, that's just another form of investment. Although the lawyer may have a little more personal interest and knowledge of the business that he has received an interest in, in exchange for helping to found it, he doesn't really have a hand on the tiller and a say in the operations.

In order to really jump over the desk and become a client and not a lawyer (although one can never really shed that legal training and the utility that it brings, as I mentioned) you have to give up part or all of your law practice and become full-time committed to operating the business that you own all or part of. However, you do need to have financing to start the business. If you start small enough and therefore need very little money you may be able to do it yourself, perhaps with a money partner who may give you not only a large ownership interest in the small, start up business but also a hand in the operations if you actually bring some knowledge and ability in that respect. However, all lawyers do not make good businessman, I'm sure that will not surprise you to hear. Indeed, having been involved in the growth, management and operation of a law firm that attained a certain size over the years I can tell you that many, many lawyers who have excellent legal skills have very poor business skills. For example, many excellent

lawyers are very bad about sending out bills to clients and even worse about collecting those bills. That particular function, billing and collecting, is pretty important to every business including the legal business.

Getting to my particular history in this respect of "jumping over the desk," I was fortunate to be introduced to my partner Wayne Kaplan by an investment banker we both used and he had a long and very good background and history in senior housing. This gave our new company the credibility it needed for access to capital. The second step was using REIT financing and syndications to investors for our initial acquisitions.

As most of you know a REIT is a real estate investment trust that acquires real estate and rents the real estate to a business that occupies the real estate and pays rent to the REIT. There are many kinds of REITs that specialize in different business sectors including of course, the healthcare sector. The way REIT financing works is as follows. A REIT may acquire a nursing home for $10 million and then triple net lease that nursing home to an operator who will pay rent, say 8% of the acquisition cost or $800,000 year, to the REIT. REITs need operators because they do not, and cannot, operate the properties they acquire. (There is a minor variation here created by the "REIT Investment Diversification and Empowerment Act" or RIDEA which allows REITs to share in the operation, but there's no need to get into details like that here.)

So, stopping right here, it looks like you could get into the business of owning and operating a senior housing property for free. The REIT buys it and leases it to you; you pay the rent; and hopefully there's something left over for you to take. There are a couple of pretty large bumps in the road on the way to this "free lunch," however. First, unless you have a long history with the REIT and even then it is unusual, there will be a security deposit required for the rent, just as if you rent an apartment. This is determined by credit considerations and analysis that the REIT makes of the soundness of the business that they are acquiring and the history of the owners, that would be you. It could be nine months, six months or perhaps as little as three months' rent. In the $800,000 year rent example that I gave above, you do the math. While, technically and legally, that security deposit is your money, you won't see it until the end of the lease which could be 10 or 15 years later so, in effect, that's the price of entry into the business.

But that's the easy part. The landlord REIT needs to make sure that the rent will be paid. While the nursing home, in my example, may be a solid business with a good history of sound operation, the skill, experience and capability of the operator is critical to the continued sound operation of the nursing home and, accordingly, the ability to pay the rent to the REIT. That is where the typical lawyer, getting into this business would usually need a partner with good operating experience. I had the good fortune to hook up with Wayne Kaplan who had that.

The other form of financing, which Wayne and I started out with, and you could as well, is syndication to investors. Similar considerations apply to raising money from private equity. Again let me give you an example. You want to acquire a nursing home for $10 million. It's fairly easy to get debt financing at up to 80% LTV (loan-to-value) from a number of sources, usually a HUD 232 guaranteed mortgage. Although, again HUD in doing its underwriting for that mortgage guarantee, looks at the operating experience of the owners, since they want to make sure that the debt is serviced and their guarantee will not have to be called upon, that is not the only time where operational experience is needed. In my example, for the $10 million

acquisition, although $8 million could be secured by the debt financing that we mentioned, there is $2 million of equity needed. Unless you can write a check for that, you can raise it by a syndication to investors (although most syndicators would not look at a syndication this small because the fees would not be enough for them) or you could go to the numerous equity sources that want to invest in senior housing. We are approached by many of them on a continuous basis, everything from foreign sovereign equity funds to family offices or numerous other kind of funds. However, the common characteristic, whether it is syndication to investors where the experience of the proposed operators who wish to acquire this nursing home is described in an Offering Memorandum to the potential investors or a sit down meeting with one of the private equity funds, the topic will be the experience in operating the nursing home to be acquired. Obviously those investors, just like the HUD underwriters who want to make sure that the insured debt will be serviced, want to make sure they will get a return on their investment and, of course, not lose their investment through incompetent management.

There is another wrinkle when seeking investment, especially from private equity but sometimes also in a syndication, and that is co-investment from the operator. In order to incentivize the operator to stick with it and not throw up their hands and walk away and also to assure attention to maximizing profits, some amount of investment by the operator is usually required. This is known as requiring “skin in the game,” and is standard in the investment community. The amount of this required skin in the game can vary and usually does, according to the confidence that the money source has in the operator, but it is always something. In the example I have given of needed $2 million equity, it could be as little as 10% or $200,000.

By the way, in order to avoid putting in cash or as much cash skin in the game, an approach that I have often tried, with little success, is to offer a guarantee, including a personal guarantee, in lieu of cash. For example, in the recent past in discussing a $100 million acquisition; a 70% LTV debt arrangement and, therefore, a $30 million equity requirement; and a request for 20% skin in the game or $6 million which we did not happen to have lying around, I proposed a personal guarantee. I proffered what I thought was the excellent reasoning as follows. I argued that, instead of just merely putting in money which any operator, if things really got bad might make up his mind to walk away from, a personal guarantee would provide a great incentive for continued diligent attention to operation to turn around a sagging business, because otherwise the operator would have to come up with that money out of his pocket in the future. The money guys who I tried this argument out on, who had probably heard it before, said they were not interested in chasing somebody if the deal went south. Accordingly, you will have to reach into your pocket if you go to private equity or probably even a syndication to get the skin in the game equity portion of any acquisition or development.

What I think I have made clear is that when securing financing, either REIT financing or any other form of debt or equity, what it comes down to is the experience of the operator which, very sensibly, is a major determinant of the success of any business including, of course the healthcare business and, specifically, my business of assisted living and memory care and the other components of senior housing. If you don’t have it you will have to find it in the form of a partner who has that experience. By the way, although this should be obvious, the operational experience has to be as close as possible to the business proposed to be acquired. In the early stages of my transition from full-time practicing lawyer to an entrepreneur I considered teaming up with some other operators who were very skilled and experienced in other businesses, even

some as close to senior housing as the hospital business, but it was no dice. In order for debt or equity sources to have confidence they need to have an operator who knows how to operate the very business under consideration for acquisition.

I think a lot of what I have said, especially in the last part of this discussion, is probably obvious to many of you and for that I beg your indulgence for having taken your time. Indeed, some of it may be at odds with your own knowledge and experience and for that I would be very grateful in the getting your input to correct or amplify my own knowledge. One of the things I have learned, which has contributed to my success in this business, is how little I know compared with many other people. Simply said, the more you know the more you realize how much more there is to know. With that I will close my presentation and thank you for your attention.

By the way, in the event that any of you want to learn more about the senior housing business I'm posting a link to a CLE presentation which we put on for the Health Law Section about a year and a half ago which provides more information. Here is the link: http://www.nysba.org/seniorhousing2016/.

Updates in Health IT: Fraud, Waste and Abuse Implications of Misusing HIT/EHRs, and How HIPAA Business Associates' Sharing Data for Research and Other Purposes Impacts Covered Entities

Speaker:
Veda M. Collmer, Esq.

New York State Bar Association Annual Conference 2018
Hot Topics in Health Information Technology

By Veda Collmer, WebPT In-House Counsel

I. Compliance & Health Information Technology ("HIT")

a. Fraud and Meaningful Use Incentives

  i. The basis of federal fraud enforcement is the False Claims Act

  ii. Definitions

    1. **Fraud:** Fraud is the intentional misrepresentation of data for financial gain. Fraud occurs when an individual knows or should know that something is false and makes a knowing deception that could result in some authorized benefit to themselves or another person.[1]

    2. **Waste:** Waste is overutilization; the extravagant, careless, or needless expenditure of healthcare benefits or services that result from deficient practices or decisions.[2]

    3. **Abuse:** Abuse involves payment for items or services where there was no intent to deceive or misrepresent but the outcome of poor, insufficient methods results in unnecessary costs to the Medicare program.[3]

  iii. DHHS Office of Inspector General Findings: Inappropriate payments to Eligible Providers who did not satisfy program requirements.

    1. HITECH established the Meaningful Use Program to promote adoption of electronic health records ("EHR").

    2. Eligible Providers self-report they meet the program requirements through CMS' online reporting system

    3. EHR incentive payments of $6,093,924,710 paid between 5/2011-6/2014

      a. OIG review of 100 Eligible Providers identified 14 Eligible Providers that did not meet meaningful use requirements

        i. Incorrect reporting

        ii. Insufficient use of the EHRs

        iii. Inappropriate payments to Eligible Providers who switched incentive programs

      b. Recommendations to CMS: implement stronger program integrity safeguards for incentive payments as MIPS is implemented

  iv. EHR vendors and the False Claims Act

    1. eClinical Works ("ECW") pays $155 Million to settle False Claims Allegations

      a. Compliant alleges ECW falsely obtained certification of its EHR software.[4]

        i. Harcoded only the 16 drug codes required for certification testing vs. programming the capability to retrieve any drug from the complete database.

        ii. Did not adequately record user actions in the audit log.

iii. Did not reliably record diagnostic imaging orders or perform drug interaction checks.
1. Some bugs caused incorrect information to appear in the medical record.

iv. Relied on customers to identify bugs and did not remediate bugs in a timely manner

b. Provided remuneration to customers to recommend its products as part of a referral program in violation of the Anti-Kickback Statute.
i. The Anti-Kickback Statute imposes criminal penalties on any person that knowingly and willfully solicits, receives, offers, or pays remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind for either inducing a referral or reward.[5]

c. Whistleblower: a New York City government employee, implementing ECW at Rikers Island.

v. Fraudulent Meaningful Use data for failing to fulfill patient requests for electronic medical records

1. Whistleblower attorneys in Indiana and Georgia[6]
a. Complaint filed against 62 hospitals
b. Misreporting satisfaction of Meaningful Use requirements for providing patient records in electronic format within 3 days of request.

b. EHR features that save time and pose compliance and legal risks.

i. Definitions

1. **<u>AMA Definition of Medical Necessity</u>**
a. Medically necessary is defined as health care services needed to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of practice.
i. In accordance with generally accepted standard of practice
ii. Clinically appropriate in terms of type, frequency, extent, site, and duration
iii. Not intended for the economic benefit of the health plan or purchaser or for the convenience of the patient or provider

2. **<u>Medicare's Definition of Medical Necessity</u>**
a. "No payment may be made under Part A or Part B for expenses incurred for items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."[7]

ii. Problematic EHR features may pose legal and compliance risks.[8]

1. **Copy-pasting or cloning**

a. Cloning is the ability to cut and paste information from one record into another record.

2. **Auto-populate, templates, or drop down menus**
   a. These features allow the user to build sentences or populate a field using built in templates.
3. **"Make me an author" tool**
   a. This design flaw allows the physician to substitute his or her signature for the person creating the documentation.
4. **Retroactive alteration of a note**
   a. A design flaw that allows a finalized note to be retroactively altered rather than amending the documentation.
   b. Best practices indicate the note should be amended to reflect the change with a time and date stamp.
5. **The ability to suspend the audit trail.**
   a. This is a design flaw that allows the user to stop tracking actions that occur in a medical record.
      i. The audit trail protects the integrity of the medical record and should not be suspended or altered.
6. **The EHR provides alerts on evaluation and management (E&M) codes.**
   a. This design flaw can result in upcoding or code creep.
      i. Upcoding is defined as assigning an inaccurate code to a medical procedure or treatment to receive higher reimbursement.
7. **The EHR does not provide a field to enter a narrative about the patient visits.**
   a. This design flaw can cause medical records and visits appear identical, possibly resulting in an audit.
8. **The audit trail indicates the provider entered vital signs and other information about the patient the day before the visit.**
   a. If the provider did not review the note for accuracy, the premature entry can result in inaccurate information about the patient.
9. **The EHR allows the user to not enter mandatory information**
   a. Failure to enter mandatory information results in incomplete notes and can affect reimbursement.[9]

iii. **Compliance issues**

1. Inappropriate or improper use of some EHR features may result in improper billing practices and pose a heightened risk of Medicare and Medicaid fraud, waste or abuse.
2. Failure to review information for accuracy could result in documentation not specific to patient; does not meet Medicare medical necessity requirements.

c. **Practice Points**

i. Educate clients about federal incentive programs; know the pitfalls and recommend strategies for avoiding them.

ii. Educate clients on fraud, waste and abuse laws and compliance issues.

iii. Advise clients to avoid referral programs when participating in federal incentive programs or for services directly reimbursable by a federal health program.

II. Big Data and sharing health information[10]

a. Big data is the ability to collect, process, and interpret massive amounts of information.

b. Big Data uses:

 i. Big data is being used by government entities for data mining to detect aberrant billing practices.

 ii. Big data is being used by covered entities and business associates for financial remuneration, research, and outcomes assessment.

 iii. Big Data will help transform healthcare from volume-based to value based care, through assessment of efficacious treatments, sharing health information, and improved coordination of care.

 iv. New tools are being developed for better analysis and use of healthcare data.

  1. Improved data storage.
  2. Data analytics tools to analyze data.
  3. Patient engagement tools (web based tools and mobile applications)

c. The legal framework governing Big Data

 i. The Health Insurance Portability and Accountability Act (HIPAA)

  1. HIPAA requires patient consent to use protected health information (PHI) for non-treatment purposes (e.g., data analysis, marketing, monetization).[11]

   a. Business associates are only authorized to use and disclosed PHI as set forth in the business associate agreement.

   b. Business associates may aggregate and analyze data from multiple covered entities for healthcare operations purposes. 45 CFR 164.502(e)(4) Business associate may not use PHI for secondary purposes unless PHI is de-identified.

  2. De-identifying PHI[12]

   a. Safe harbor method-removing the 18 individual identifiers

   b. Expert determination method

  3. Patient consent is required for use and disclosure of PHI for marketing and financial remuneration.

   a. Marketing defined by the Privacy Rule as making a communication about a product or services that encourages recipients of the communication to purchase or use the product. Marketing is also an arrangement between a covered entity and any other entity whereby the covered entity discloses PHI to the other entity in exchange for direct or indirect remuneration for the other entity to make a communication about its own product or services that encourages recipients of the communication to purchase or use the product.

    i. Exceptions:

1. Communication is made to describe health-related products or services that is provided by or included in a plan of benefits.
2. Communication made for the treatment of an individual.
3. Communication made for case management or care coordination of the patient or to direct or recommend alternative therapies.

b. Patient authorization required before using PHI to market to them.[13]

c. Patient authorization required prior to selling PHI to a third party.[14]

i. Exception for research purposes for reasonable cost-based fee to transmit the PHI

4. Patient authorization is not required for the following use and disclosure of PHI for research

a. Covered entities may release a limited data set with a researcher pursuant to a Data Use Agreement.[15]

b. Collection and use of de-identified PHI is permitted.

c. Collection pursuant to an Institutional Review Board or a Privacy Board Waiver of Authorization.

d. Applicable NY state laws

i. N.Y. Public Health Law §18 Access to Patient Information

ii. N.Y. Public Health Law §4410 Health Maintenance Organizations; professional services

iii. N.Y. Public Health Law §2168 State Immunization Information System

iv. N.Y. Public Health Law §2782 Public Health- HIV Related Testing-Confidentiality and Disclosure

v. N.Y. Mental Hygiene Law §33.13 Clinical records; Confidentiality

e. Practice Points

i. Business associates and secondary uses of PHI

1. The business associate agreement must expressly allow the business associate to aggregate data for health care operations purposes of the covered entity.
2. The business associate agreement should expressly permit the business associate to de-identify information.
3. The business associate agreement should include an express transfer of ownership of de-identified data.
4. Business associate should disclose uses and disclosure of identifiable information in its privacy policy. Business associate should also disclose that it is de-identifying PHI.

References

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[1] 42 C.F.R. §455.2(2016).
[2] Healthcare Fraud and Integrity: An Overview for Providers, Ctr. For Medicare and Medicaid Serv. (2016), https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/fwa-overview-booklet.pdf.
[3] 42 C.F.R. §455.2 (2016).
[4] See Tom Sullivan, *eClinical Works To Pay $155 Million To Settle Suit Alleging It Faked Meaningful Use Certification* (May 31, 2017), available at http://www.healthcareitnews.com/news/eclinicalworks-pay-155-million-settle-suit-alleging-it-faked-meaningful-use-certification.
[5] Criminal Penalties for Acts Involving Federal Health Care Programs, 42 U.S.C.§1320a-7b (2015).
[6] *See* Evan Sweeney, *Unsealed Lawsuit Claims 62 Indiana Hospitals, Ciox Health Triggered Fraudulent EHR Incentive Payments* (Nov. 27, 2017), available at https://www.fiercehealthcare.com/ehr/indiana-hospitals-false-claims-lawsuit-ciox-health-ehr-incentive-payments-medical-records.
[7] Social Security Act, 42 U.S.C. §1395y (a)(1)(A) (2012).
[8] *See* Cassandra Andrews Jackson, *Compliance and Managing EHR Risks, Part 1*, **COMPLIANCE TODAY**, Feb. 2016, at 47-51.
[9] *See* Cassandra Andrews Jackson, *Compliance and Managing EHR Risks*, *Part 2*, **COMPLIANCE TODAY**, Mar. 2016, at 59-63.
[10] See Tapping Into The Big Value of Health Care Big Data: Top Legal and Regulatory Considerations on the Path to Monetization (2015), available at https://m.foley.com/files/Publication/b5702375-940f-4379-ba5f-f2e885088780/Presentation/PublicationAttachment/b74426c3-097c-4381-8366-3cfd3a0b852e/Monetization%20of%20Data%20White%20Paper.pdf.
[11] 45 C.F.R. §164.508 (2013).
[12] 45 C.F.R. §164.514 (2013).
[13] 45 C.F.R. §164.501 (2013); 45 C.F.R.§164.508(a)(3)(2013).
[14] 45 C.F.R. §164.502 (a)(5)(ii)(2013).
[15] 45 C.F.R. §164.514 (e)(3)(ii)(2013).

Hot Topics in Health Information Technology

NYSBA Annual Meeting 2018
By Veda Collmer, In-House Counsel, WebPT

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Fraud, Waste and Abuse

Improper billing (e.g., billing for services not rendered, upcoding)

False Claims Act:

- knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval
- Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim

31 U.S.C. § 3729

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Fraud, Waste and Abuse

Definitions:

Fraud: Fraud is the intentional misrepresentation of data for financial gain. Fraud occurs when an individual knows or should know that something is false and makes a knowing deception that could result in some unauthorized benefit to themselves or another person.

Waste: Waste is overutilization; the extravagant, careless, or needless expenditure of healthcare benefits or services that result from deficient practices or decisions.

Abuse: Abuse involves payment for items or services where there was no intent to deceive or misrepresent but the outcome of poor, insufficient methods results in unnecessary costs to the Medicare program.

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Fraud Enforcement and Meaningful Use

OIG Report and Recommendations

- HITECH established the Meaningful Use Program to promote adoption of electronic health records ("EHR")
- Eligible Providers self-report satisfaction of program requirements through CMS' online reporting system
- EHR incentive payments of $6,093,924,710 paid between 5/2011-6/2014
- OIG report identified payments made to providers who did not meet the criteria:
  - Incorrect reporting
  - Insufficient use of the EHRs
  - Inappropriate payments to Eligible Providers who switched incentive programs

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Fraud Enforcement and Meaningful Use

Fraud and EHR vendors

- eClinical Works pays $155 Million to settle False Claims Allegations
- False certification of its EHR
- Caused providers to submit false attestations for Meaningful Use incentives
- Anti Kickback liability for referral bonus program

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Fraud Enforcement and Meaningful Use

Fraudulent Meaningful Use data for failing to fulfill patient requests for electronic medical records

- Whistleblower attorneys in Indiana and Georgia
- Complaint filed against 62 hospitals
- Allegation: Misreporting satisfaction of Meaningful Use requirements for providing patient records in electronic format within 3 days of request

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Fraud and EHR Features

AMA's Definition of Medically Necessary

Medically necessary is defined as health care services needed to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of practice.

- In accordance with generally accepted standard of practice
- Clinically appropriate in terms of type, frequency, extent, site, and duration
- Not intended for the economic benefit of the health plan or purchaser or for the convenience of the patient or provider

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Fraud and EHR Features

Medicare Standard: Medically Necessary

"No payment may be made under Part A or Part B for expenses incurred for items or services which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."

Social Security Act §1862

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Copy-pasting or cloning: The ability to cut and paste information from one record into another record.

Risks:

- Failure to review the information for accuracy could result in inappropriate charges billed to Medicare or Medicaid, upcoding, or charges for services not rendered
- Does not meet the medical necessity requirements because the documentation is not specific to the patient
- Incorrect information could affect the integrity of the records; incorrect information may harm the patient or not provide a benefit of the medical care
- Affects patient outcomes and clinical decision-making

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Fraud and EHR Features

Auto-populate, templates, or drop down menus: This features allow the user to build sentences or populate a field using built in templates.

Risks:

May result in inaccurate documentation

Upcoding, billing for services not rendered, or the documentation may not meet medical necessity requirements

Affects the integrity of the records

May threaten the patient's safety

Other providers may not receive accurate information about the patient

Affects patient outcomes and clinical decision making

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Fraud and EHR Features

Retroactive alteration of a note: A design flaw that allows a finalized note to be retroactively altered, rather than amending the documentation to reflect the change with a time and date stamp.

Ability to suspend the audit trail: This is a design flaw that allows the user to stop tracking actions that occur in a medical record.

Risks:

- Impacts the availability of metadata
- Affects the information that can defend or prove a malpractice claim
- Affects integrity of the record
- HIPAA Security Rule

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Fraud and EHRs

- The EHR provides alerts on evaluation and management (E&M) codes
- The EHR does not provide a field to enter a narrative about the patient visits
- The EHR allows the user to not enter mandatory information

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Practice Points

- Educate clients about federal incentive programs; know the pitfalls and recommend strategies for avoiding them.
- Educate clients on fraud, waste and abuse laws and compliance issues.
- Advise clients to avoid referral programs when participating in federal incentive programs or for services directly reimbursable by a federal healthcare program.
- Educate clients on EHR problematic features and the appropriate use of the EHR. Recommend implementing organizational policies and procedures, employee training, and periodic audits.

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Big Data and Sharing Health Information

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Uses of Big Data

Big data- the ability to collect, process, and interpret massive amounts of information.
Uses:

- Used by government entities for data mining to detect aberrant billing practices.
- Used by HIPAA covered entities and business associates for financial remuneration, research, and outcomes assessment.
- To transform healthcare from volume-based to value based care, through assessment of efficacious treatments, sharing health information, and improved coordination of care.

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Uses of Big Data

New tools are being developed for better analysis and use of healthcare data:

- Improved data storage.
- Data analytics tools to analyze data.
- Patient engagement tools (web based tools and mobile applications)

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Legal Framework for Big Data

HIPAA requires patient consent to use protected health information (PHI) for non-treatment purposes (e.g., data analysis, marketing, monetization)

- Business associates are only authorized to use and disclosed PHI as set forth in the business associate agreement.
- Business associates may aggregate and analyze data from multiple covered entities for healthcare operations purposes.
- Business associates may not use PHI for secondary purposes unless PHI is de-identified.

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Legal Framework for Big Data

Two methods for De-identifying PHI

- Safe harbor method-removing the 18 individual identifiers
- Expert determination method

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Legal Framework for Big Data

Patient consent is required for use and disclosure of PHI for marketing and financial remuneration.

- **Marketing:** communication about a product or services that encourages recipients of the communication to purchase or use the product or disclosure of PHI for payment for the other entity to communicate about its own product or services that encourages recipients of the communication to purchase or use the product.
  - Exceptions:
    - Communication is made to describe health-related products or services that is provided by or included in a plan of benefits.
    - Communication made for the treatment of an individual.
    - Communication made for case management or care coordination of the patient or to direct or recommend alternative therapies.
    - Exception for research purposes for reasonable cost-based fee to transmit the PHI

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Legal Framework for Big Data

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N.Y. Mental Hygiene Law §33.13 Clinical records; Confidentiality

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Practice Points

Business associates and secondary uses of PHI

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