Nos. 19-1614, 20-1215

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SUPPLEMENTAL BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity[i] ("Policy Integrity") is a nonpartisan, not-for-profit think tank at New York University School of Law.[ii] No publicly-held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

Date: April 28, 2020 /s/ Bethany Davis Noll
Bethany Davis Noll

[i] Under Federal Rule of Appellate Procedure 29(a)(4)(E), the Institute for Policy Integrity states that no party's counsel authored this brief in whole or in part, and no person contributed money intended to fund the preparation or submission of this brief.

[ii] This brief does not purport to represent the views, if any, of New York University School of Law.

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INTERESTS OF AMICUS CURIAE

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity") submits this supplemental brief as *amicus curiae* in support of Plaintiff-Appellee, the Mayor and City Council of Baltimore.

Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity's legal and economic experts have produced extensive scholarship on the best practices for regulatory impact analysis and the proper valuation of regulatory costs and benefits. Our director, Professor Richard L. Revesz, has published more than eighty scholarly articles and books, including many works on the role of economics in regulatory decisionmaking. *See* Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2008);[1] *See also* Brief of Institute for Policy Integrity as Amicus Curiae at 1–2, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir. Aug. 6, 2019), ECF No. 49 ("Policy Integrity Aug. Br.") (describing Policy Integrity's expertise).

[1] A full list of publications can be found in Professor Revesz's online faculty profile, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228.

Harnessing that expertise, Policy Integrity previously submitted an *amicus* brief in support of Appellees in the consolidated appeal from the preliminary injunction issued in this case, No. 19-1614, which explained that the Department of Health and Human Services ("HHS") unreasonably ignored the harmful effects of the rule at issue in this case, Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) ("Final Rule"). *See* Policy Integrity Aug. Br. 5–22; *see also id.* at 3 (describing Policy Integrity's significant involvement in regulatory and judicial proceedings regarding the Final Rule). As Policy Integrity explained, despite ample data to the contrary submitted through comments, HHS severely underestimates the costs of the Final Rule that it did recognize, while ignoring other costs altogether. *Id.* at 8–12. The District Court also found that the agency's consideration of costs was inadequate and rendered the Final Rule arbitrary and capricious. *See Mayor & City Council of Baltimore v. Azar*, No. 19-1103, 020 WL 758145 (D. Md. Feb. 14, 2020) (SJA 1308–17).

HHS now advances two new arguments in an attempt to justify its treatment of the Final Rule's costs. *See* Appellants' Supplemental Opening Brief 9, 23 ("HHS Supp. Br."). These new arguments implicate administrative law and cost-benefit analysis, both areas of Policy Integrity expertise. And because HHS has invoked

these arguments in another rule as well,[2] the Court's decision here has the potential to affect parties beyond those directly involved here. Thus, this supplemental *amicus* brief focuses on those two new arguments.

Policy Integrity consulted with the parties pursuant to Fed. R. App. P. 29(a)(2), and all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

While HHS unveils two new arguments in its Supplemental Opening Brief to defend its treatment of the Final Rule's harmful effects, those arguments fail to save the agency's inadequate analysis. As a preliminary matter, neither argument appears in the Final Rule, and thus neither argument can rescue the agency's faulty decisionmaking. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943); *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 274 (4th Cir. 2018); *see also* Supp. Br. for Appellee 37–39 ("Appellee Supp. Br."). But setting aside the belatedness of these arguments, each is meritless.

First, HHS's argument that its "legal conclusions alone justify its adoption of the [Final] Rule, regardless of what the Rule's effects and costs might be," HHS Supp. Br. 23, lacks merit. As the Supreme Court has made clear, even when an

[2] *See* Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71,674, 71,688 (Dec. 27, 2019) (citing "better alignment" with the statute as a counter-weight to the listed costs of the rule).

agency is engaged in statutory interpretation, it must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). And that requirement does not permit an agency to unreasonably ignore the harms of its decision as HHS did here. In the Final Rule, HHS dramatically underestimates the costs of compliance by providers and ignores all non-compliance costs, including negative impacts to patients. *See* Policy Integrity Aug. Br. 8–9, 12. Furthermore, HHS commits these errors while neglecting plentiful data in comments alerting the agency to the substantial costs of the Final Rule. *See id.* at 8–12. The agency fails to provide a reasoned explanation for the disconnect between this data and the agency's estimates. *See id.* at 12–13. That HHS now says it prefers one statutory interpretation over another does not excuse these failures.

Second, HHS argues that the benefits of its new statutory interpretation, "including compliance with the better reading of Title X, outweighed the costs." HHS Supp. Br. 9. But this assertion is not an adequate explanation for imposing the costs of the Final Rule. To begin, an agency's conviction that a rule reflects a "better reading" of a statute does not constitute a cognizable benefit for the purposes of a cost-benefit analysis. Additionally, there is no indication that HHS's new reading of Title X is indeed better, because a "better reading" must be assessed against the

principles of arbitrary-and-capricious review and traditional rules of statutory construction, which require the agency to assess the harms of its decision in a reasoned manner. As HHS does not engage in this analysis, the Final Rule is arbitrary and capricious.

ARGUMENT

As Policy Integrity previously explained, HHS has failed to provide a reasoned explanation for causing harm in the Final Rule. In its Supplemental Brief, the agency offers two new arguments to justify its treatment of the rule's harms, but both fail. First, HHS's claim that its "better reading" of Title X makes further analysis unnecessary, HHS Supp. Br. 23, runs counter to decades of administrative law. Second, HHS's claim that its "better reading" should be considered a regulatory benefit, *id.* at 9, contradicts the well-established practices followed by administrative agencies in conducting cost-benefit analyses and does not satisfy the agency's duty to provide a reasoned explanation for imposing the harms of the Final Rule.

I. Adopting What an Agency Claims Is a "Better Reading" of a Statute Does Not Allow the Agency to Shirk Basic Rulemaking Procedures

In its Supplemental Opening Brief, HHS claims for the first time that its determination that the Final Rule reflects a "better reading" of Title X "alone justif[ies] its adoption of the Rule, regardless of what the Rule's effects and costs might be." HHS Supp. Br. 23. Notably, HHS does not argue that its previous

interpretation was illegal or inconsistent with the statute and thus foreclosed as an option available to the agency; rather, HHS merely contends that the Final Rule's interpretation is a "better reading" of the statute than other valid readings. *See id.* (characterizing the agency's position as declining to "adopt a *worse* reading of an ambiguous statute"). Moreover, HHS asserts that as long as it believes it has adopted a better reading of the statute "[i]t cannot be arbitrary and capricious" to impose the costs of that reading on affected individuals and entities. *Id.*

As a threshold matter, this argument cannot rescue the Final Rule, because HHS did not provide this argument as a justification at the time of the rule's promulgation. The legality of an agency's actions must be measured by the justifications the agency offered at the time of its action, not by reasons manufactured after the fact. *See Chenery Corp.*, 318 U.S. at 93–94; *see also* Appellee Supp. Br. 37–39.

But beyond its belated invocation, HHS's new argument contradicts Supreme Court precedent. According to the Supreme Court's decision in *Encino Motorcars v. Navarro*, regardless of whether an agency is engaged in statutory interpretation, it must still satisfy the "basic procedural requirement[]" that it "give adequate reasons for its decisions." 136 S. Ct. at 2125. In *Encino*, the Department of Labor had promulgated a rule based on a changed statutory interpretation it deemed to be reasonable and in line with the statute. *Id.* at 2123, 2127. But, as the Court explained,

although an agency may rely on its belief that an interpretation is "more consistent with statutory language" to justify a policy change, the Department had not adequately analyzed or explained why its interpretation was better. *Id.* at 2127 (internal quotation marks omitted). As *Encino* shows, the reasoned explanation requirement applies even when an agency is exercising discretion to interpret a statute.

Following *Encino*, other courts have confirmed that the adoption of a new statutory interpretation can be vacated if found to be procedurally defective under *State Farm*'s reasoned explanation requirement. *See Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) (rejecting Department of Agriculture's claim that because the agency's preferred statutory interpretation was reasonable, its action could not be found arbitrary and capricious for failing to offer a reasoned explanation); *Catskill Mountains Chapter of Trout Unltd., Inc. v. EPA*, 846 F.3d 492, 522 (2d Cir. 2017) ("[I]f an interpretive rule was promulgated in a procedurally defective manner, it will be set aside regardless of whether its interpretation of the statute is reasonable." (citing *Encino*, 136 S. Ct. at 2125)).

Under the reasoned explanation requirement, when changing, suspending, or repealing a rule, an agency must "cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[A] reasoned explanation is needed for

disregarding facts and circumstances that underlay or were engendered by the prior policy."). In determining whether an agency provided a cogent explanation, the Court must analyze whether the agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("[A]gency action is lawful only if it rests on a consideration of the relevant factors." (internal quotation marks omitted)); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]he court must consider whether the decision was based on a consideration of the relevant factors[.]").

One relevant factor that agencies must generally consider in rulemaking is the harm that a regulation may cause. As the Supreme Court has explained, rational rulemaking "requires paying attention to the advantages *and* the disadvantages of agency decisions," including "harms that regulation might do to human health." *Michigan*, 135 S. Ct. at 2707; *see also Air Alliance Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (holding that suspension rule was arbitrary in part for agency's failure to adequately address forgone benefits).

Here, rather than comply with the reasoned explanation requirement, as Policy Integrity previously explained, HHS provides only a cursory analysis of the economic and social consequences of the Final Rule, disregards its own guidelines on how to conduct a proper economic analysis, and significantly underestimates the

harmful effects of the Final Rule while neglecting other costs altogether. Policy Integrity Aug. Br. 8–24. And HHS is wrong to claim that those Final Rule's "effects and costs" are irrelevant. *See* HHS Supp. Br. 23. Indeed, under HHS's argument, agencies would be able to cite a "better interpretation," 84 Fed. Reg. at 7746, as a cure-all that salvages a rule even if the rule causes significant unmerited harm with no explanation. But that is not the law. As *Encino* makes clear, HHS cannot evade its responsibility to assess the Final Rule's costs by asserting that it has engaged in an exercise of statutory interpretation.

II. The Administrative Procedure Act Does Not Allow the Agency to Use the Alleged Benefit of a "Better" Statutory Reading as an Excuse to Ignore the Rule's Harms

HHS offers another new defense in its Supplemental Opening Brief: that the Final Rule's "benefits, including compliance with the better reading of Title X, outweighed the costs of the Rule." HHS Supp. Br. 9.[3] Again, this argument appears nowhere in the Final Rule and is thus waived. *Chenery Corp.*, 318 U.S. at 93–94; *see also* Appellee Supp. Br. 37–39. But the argument is also flawed because it misunderstands cost-benefit analysis. Cost-benefit analysis is used to measure the

[3] Similarly, HHS has argued in other recent rulemakings that an allegedly better reading may be weighed as a benefit against a rule's costs. *See* Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71,674, 71,688 (Dec. 27, 2019) (citing "better alignment" with the statute as a counter-weight to the listed costs of the bill).

impacts of the interpretation; the interpretation *itself* is not also weighed. In any event, HHS's new argument is wrong for a second reason. HHS has failed to adequately consider the effects of the Final Rule, belying the claim that its interpretation is "better."

A. HHS's Approach Is Inconsistent with Established Practices for Conducting Cost-Benefit Analysis

HHS argues that the Final Rule's "benefits, including compliance with the better reading of Title X, outweighed the costs of the Rule." HHS Supp. Br. 9 But that argument is meritless.

First and foremost, HHS has not identified anything more than conclusory and unsupported benefits to support the rule, none of which are borne out by the record. *See* Policy Integrity's Aug. Br. at 22.

Second, if HHS is citing the Final Rule's "better reading" of the statute as a benefit, that argument gravely misunderstands the established practices for conducting cost-benefit analysis. Since the presidency of George W. Bush, White House guidance has instructed agencies that cost-benefit analysis "should focus on benefits and costs that accrue to citizens and residents of the United States." Office of Mgmt. & Budget, Circular A-4 on Regulatory Analysis 15 (2003).[4] Pursuant to

[4] More recently, the Trump Administration instructed agencies to follow Circular A-4. *See generally* Office of Mgmt. & Budget, Guidance Implementing Executive

that guidance, cost-benefit analyses should evaluate a regulation's effects; the purpose of such analyses is to "provide[] a formal way of organizing the evidence on the key effects—good and bad . . . that should be considered in developing regulations." *Id.* at 1–2. That analysis can then inform a decisionmaker about the appropriateness or wisdom of the interpretation. The interpretation *itself* cannot be entered into the equation. Because cost-benefit analysis helps agencies evaluate rules and determine whether one permissible interpretation is better than another, it is circular to plug the assumption that one interpretation is "better" into the analysis as a benefit.

Instead, the interpretation's economic benefits (if any) are to be measured by its positive, real-world effects that accrue to a person or people. That White House guidance reflects the universally accepted economic principle that benefits are ameliorative impacts accruing "to one or more persons or groups." E.J. Mishan, *Elements of Cost-Benefit Analysis* 11 (Routledge Revivals ed., 2015). Indeed, if an agency were able to count benefits without reference to the impact on a person or group, there would be no clear limiting principle to the kinds of costs it could justify. Would an agency be able to claim that picking a statutory interpretation resulting in millions of deaths is cost-justified, merely because the agency claims it has picked a

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Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017), https://perma.cc/X2K9-L3QM.

better reading? If not, then courts would have to identify some kind of limiting principle to determine when a "better reading" was an insufficient justification. How many deaths would courts allow before determining an interpretation could not be "better?" Without tying the benefits to an impact on people, agencies could repeatedly attempt to use this "benefit" as an effect that outweighs any costs. And courts would understandably struggle to cabin such claims.

Here, to the extent HHS discusses the concrete beneficial effects of the Final Rule, the agency makes claims that are conclusory or unsupported—that the rule will increase compliance or result in an expanded number of providers. Policy Integrity's August Br. at 22–24. As such, HHS's conviction that its interpretation is a "better reading" of Title X cannot replace the conclusions of a properly-conducted cost-benefit analysis. And the agency's reliance on this "benefit" to overcome the impact of the costs of the Final Rule is arbitrary and capricious.

B. HHS's Failure to Consider the Final Rule's Harms Belies the Claim that Its Interpretation Is "Better"

In any event, even if a "better reading" were a cognizable benefit, HHS cannot claim that its reading is "better" because it does not adequately consider the costs of its interpretation. *See* Policy Integrity Aug. Br. 8–12. Instead, HHS's analysis is fatally lopsided and ignores important background principles of statutory interpretation.

Generally speaking, any rule "that does not explain why the costs saved were worth the benefits sacrificed" is arbitrary and capricious. *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003). It is well-settled that ignoring the costs of a regulatory action while relying on the benefits is arbitrary and capricious under the Administrative Procedure Act. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008); *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 326–27 (D.C. Cir. 1992) (holding that agency was required to explain whether safety concerns outweighed benefits of energy savings in new fuel-economy standards); *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits of declining to ban battery burning would justify forgoing air benefits); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding, with respect to an environmental impact statement, that when an agency "trumpet[s]" the economic benefits of a project, it must also disclose costs); *Johnston v. Davis*, 698 F.2d 1088, 1095 (10th Cir. 1983) (remanding an environmental study because it made "no mention" of a crucial factor that would make the action net costly). This "requirement of reasoned decisionmaking . . . prevents officials from cowering behind bureaucratic mumbo-jumbo." *Competitive Enter. Inst.*, 956 F.2d at 327.

Moreover, as the Supreme Court recently explained, interpreting a statute without any consideration of costs is normally arbitrary and capricious. *Michigan*,

135 S. Ct. at 2706–07. Unreasonable effects take multiple forms, but the Supreme Court has specifically noted that imposing "significantly more harm than good" is not "appropriate." *Id.* at 2707 (internal quotation marks omitted). And when choosing among possible interpretations of a statute, agencies must generally avoid constructions that produce "illogical or unreasonable results." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 816 F.2d 761, 766 (D.C. Cir. 1987); *accord Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013) (noting that courts normally "favor the more reasonable result"); *United States v. Ripley*, 926 F.2d 440, 448 (5th Cir. 1991) (noting the "golden rule[] of statutory interpretation . . . that unreasonableness of the result produced by one among alternative possible interpretations . . . is reason for rejecting that interpretation in favor of another which would produce a reasonable result"). HHS violates this canon by failing to consider the effects of its interpretation when choosing it as "better."

Here, HHS does not even assess the impacts of the Final Rule sufficiently to determine that it adopts a "better" interpretation because it underestimates or ignores many of the harmful effects of its interpretation. Policy Integrity Aug. Br. 8–12. Despite receiving substantial evidence of the Final Rule's harms, HHS looks only at a limited subset of the compliance costs of the rule, *see id.* at 12, and arbitrarily dismisses the substantial evidence showing that the rule will negatively affect patients and providers, *id.* at 13-17. Had the agency analyzed the effects of its

interpretation before declaring it "better," it would have grappled with costs that significantly outweigh the rule's benefits—exactly the type of result that the Supreme Court has deemed impermissible. *Michigan*, 135 S. Ct. at 2707.

By failing to consider the effects of the Final Rule, HHS fails to rationally assess whether its interpretation is "better." HHS therefore has not established that its interpretation is a "better reading" of the statute, because it ignores these traditional rules of statutory construction and unreasonably disregards the harms of the Final Rule. In sum, HHS's claim that the benefits, including a "better reading" of Title X, outweigh the costs of the Final Rule, flouts the established practices for conducting cost-benefit analysis as well as the Administrative Procedure Act's requirement that the agency engage in reasoned decisionmaking.

CONCLUSION

For above reasons, the District Court's judgment should be affirmed.

Dated: April 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because this brief contains 3467 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 Times New Roman 14-point font.

Date: April 28, 2020

/s/ Bethany Davis Noll
Bethany Davis Noll

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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Date: April 28, 2020 /s/ Bethany Davis Noll
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