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 11 CITY AND COUNTY OF SAN FRANCISCO

12
 13 UNITED STATES DISTRICT COURT
 14
 15 NORTHERN DISTRICT OF CALIFORNIA

16 CITY AND COUNTY OF SAN
 FRANCISCO,

17 Plaintiff,

18 vs.

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

22 Defendants.

Case No. 3:19-cv-02405 WHA

**PLAINTIFF CITY AND COUNTY OF SAN
 FRANCISCO'S OPPOSITION TO
 DEFENDANTS' ADMINISTRATIVE MOTION
 TO SET A SUMMARY JUDGMENT
 BRIEFING SCHEDULE AND TO HOLD
 PLAINTIFF'S MOTION FOR A
 PRELIMINARY INJUNCTION IN ABEYANCE
 OR, IN THE ALTERNATIVE, TO ENLARGE
 TIME TO FILE THEIR OPPOSITION TO
 PLAINTIFF'S MOTION FOR A
 PRELIMINARY INJUNCTION**

Judge: Hon. William Alsup
 Hearing Date: July 17, 2019
 Time: 8:00 a.m.
 Place: Courtroom 12, 19th Floor
 450 Golden Gate Avenue
 San Francisco, CA 94102

Trial Date: None set

INTRODUCTION

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2 On July 22, 2019, the final rule titled Protecting Statutory Conscience Rights In Health Care;
3 Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified as 45 C.F.R. pt. 88)
4 (hereafter “the Final Rule”) is scheduled to go into effect. In its Motion for Preliminary Injunction, the
5 City and County of San Francisco (“San Francisco”) details the numerous harms that will ensue if it
6 does. *See* ECF No. 14 (“PI Mot.”). Providers will be emboldened to deny care to vulnerable
7 populations, and San Francisco will be required to amend its policies and practices to excuse
8 individuals from assisting with procedures they object to even if patient care would be compromised.
9 *Id.* at 21-22. Patients will suffer—and could even die—as a result. *Id.* at 22. San Francisco will also
10 be required to alter its policies and practices to prohibit involuntarily transfers of individuals who have
11 a religious or moral objection to performing critical aspects of their job, which will impede the ability
12 of hospitals and clinics to function efficiently. *Id.* at 23. And patients—particularly LGBTQ people
13 and other vulnerable populations—will delay seeking medical care based on fear of being
14 discriminated against or mistreated in healthcare facilities. *Id.*

15 The United States Department of Justice (“DOJ”) now asks this Court—at the eleventh hour—
16 to delay consideration of San Francisco’s motion based on its representation that “HHS will delay
17 enforcement of the HHS rule challenged in this case . . . until November 22, 2019.” ECF No. 50
18 (“Admin Mot.”) at 2. But this bare assertion does not prevent the Final Rule from harming
19 San Francisco, and cannot justify vacating the current schedule and holding the pending motion in
20 abeyance. The Court should deny Defendants’ Administrative Motion in its entirety.

ARGUMENT

21
22 DOJ’s proposal to delay enforcement of the Final Rule, while allowing it to go into effect, will
23 not vitiate the harm that the Final Rule will cause to San Francisco, as preliminary injunction would.

24 As an initial matter, DOJ’s representation of delayed enforcement is based on nothing more
25 than the mere assertion of counsel, presented in a declaration, that “The Department of Health and
26 Human Services (HHS) has indicated to the undersigned that it will delay enforcement of the Final
27 Rule until November 22, 2019.” ECF No. 50-1, Declaration of Benjamin T. Takemoto In Support Of
28 Defendants’ Administrative Motion at ¶ 4. The Rule itself provides that the Department of Health and

1 Human Services' Office for Civil Rights ("HHS OCR"), not DOJ, is responsible for enforcement of
2 the Final Rule. *See* 45 C.F.R. § 88.7. The hearsay statement from a trial attorney at DOJ that an
3 unnamed official at a different federal department "will delay enforcement of the Final Rule" provides
4 San Francisco with insufficient protection to withdraw its Motion for Preliminary Injunction or for the
5 Court to hold the Motion for Preliminary Injunction in abeyance.

6 Moreover, when the Final Rule goes into effect on July 22, 2019, San Francisco becomes
7 subject to it, regardless of any representations from DOJ that HHS will temporarily delay enforcement.
8 DOJ's delayed enforcement will not prevent the Final Rule from causing harm to San Francisco,
9 including:

- 10 • San Francisco will still be required to take immediate action to amend its policies and
11 practices to avoid being in violation of the Final Rule. Indeed, DOJ has not clarified whether
12 after November 22, 2019, it would take action against San Francisco for failure to comply with
13 the Final Rule in the period beginning July 22, 2019. San Francisco cannot know whether it
14 would later face consequences for maintaining policies that are in violation of the Final Rule
15 during the interim period of delayed enforcement.
- 16 • San Francisco will also still be subject to the certification and assurances requirements
17 set forth in Section 88.4 of the Final Rule. The period during which Defendants propose to
18 delay enforcement of the Final Rule includes the end of the federal government's fiscal year on
19 September 30, 2019. As indicated in declarations supporting San Francisco's Motion for
20 Preliminary Injunction, San Francisco received over \$61 million in HHS grant funds during its
21 2017-2018 fiscal year. *See* ECF No. 16, Declaration of Ben Rosenfeld in Support of City and
22 County of San Francisco's Motion for Preliminary Injunction ¶ 6; ECF No. 22, Declaration of
23 Greg Wagner in Support of City and County of San Francisco's Motion for Preliminary
24 Injunction ¶ 3. The Final Rule requires San Francisco, "as a condition of the approval,
25 renewal, or extension of any Federal financial assistance of Federal funds" to provide grant
26 assurances and certifications to HHS. 45 C.F.R. § 88.4(a)(2). If the Final Rule is in effect at
27 the beginning of the new federal fiscal year on October 1, 2019, presumably San Francisco will
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1 have to provide such assurances and certifications of compliance in order to receive renewed
2 funds regardless of whether HHS OCR is enforcing the Final Rule at that time.

3 • Patients—particularly LGBTQ people and other vulnerable populations—will still
4 delay seeking medical care based on fear of being discriminated against or mistreated in
5 healthcare facilities. *See* ECF No. 15, Declaration of Grant Colfax in Support of City and
6 County of San Francisco’s Motion for Preliminary Injunction (“Colfax Decl.”) ¶ 22; ECF
7 No. 24, Declaration of Seth Pardo in Support of City and County of San Francisco’s Motion
8 for Preliminary Injunction ¶¶ 9-13. These delays in seeking care will lead to worse individual
9 and public health outcomes, as well as higher costs to San Francisco’s healthcare system.
10 Colfax Decl. ¶ 22.

11 In scheduling negotiations regarding DOJ’s proposal to delay consideration of the Motion for
12 Preliminary Injunction, DOJ previously represented to San Francisco that HHS would publish notice
13 in the Federal Register delaying the effective date of the Final Rule. *See* Declaration of
14 Sara J. Eisenberg In Support Of San Francisco’s Opposition to Defendants’ Administrative Motion
15 (“Eisenberg Decl.”) Exhibit A at 6, 3. DOJ’s latest proposal to merely delay enforcement while the
16 Final Rule goes into effect represents a significant departure from that position.

17 In the absence of adequate protections, such as the Court entering an order temporarily
18 “postpon[ing] the effective date” of the Final Rule under the Administrative Procedure Act, *see* 5
19 U.S.C. § 705, until it can consider cross-motions for summary judgment, San Francisco needs the
20 protection of a preliminary injunction. San Francisco does not necessarily oppose a schedule that
21 would take its Motion for Preliminary Injunction off calendar and allow the Court to rule instead on
22 cross-motions for summary judgment. Critically, however, any such schedule would need to provide
23 San Francisco with assurance that the Final Rule will not go into *effect* until after this Court has had an
24 opportunity to rule on the merits of the cross-motions for summary judgment. In addition, any such
25 schedule would need to allow San Francisco adequate time to examine the administrative record in this
26 case, which has not yet been lodged and is anticipated to be quite voluminous, before filing its motion
27 for summary judgment. San Francisco previously proposed such a schedule to Defendants. *See*
28 Eisenberg Decl. Exhibit A at 2.

1 Neither DOJ’s primary nor alternative proposals—which would prevent the Court from ruling
2 on the Motion for Preliminary Injunction until well after the Final Rule goes into effect on
3 July 22, 2019—meet these criteria. Accordingly, DOJ’s Administrative Motion should be denied in its
4 entirety.¹

5 In light of Defendants’ failure to file an opposition to the Motion for Preliminary Injunction by
6 noon today, as the Court’s scheduling order required, ECF No. 40, the Court could deem the Motion
7 for Preliminary Injunction unopposed and grant a preliminary injunction pending resolution of later-
8 filed cross-motions for summary judgment.

9 San Francisco asks that the Court rule as promptly as possible to deny the Administrative
10 Motion, and order the Administrative Motion deemed submitted for immediate determination pursuant
11 to Northern District of California Civil Local Rule 7-11(c).

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13 Dated: June 26, 2019

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CITY AND COUNTY OF SAN FRANCISCO

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¹ Should the Court provide Defendants’ with additional time in which to file their opposition to the Motion for Preliminary Injunction, San Francisco requests that it be allowed to file its reply brief during the week of July 8th in light of the July 4th holiday.

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