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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 CITY AND COUNTY OF SAN FRANCISCO,

17 Plaintiff,

18 v.

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

25 Defendants.

No. 3:19-cv-2405-WHA

**MOTION FOR LEAVE TO FILE
26 AMICUS BRIEF IN SUPPORT OF
27 PLAINTIFF'S MOTION FOR
28 PRELIMINARY INJUNCTION**

Date: July 17, 2019
Time: 8:00 a.m.
Dept.: 12, 19th Floor
Judge: Hon. William H. Alsup

1 The Service Employees International Union, Local 1021 (“SEIU Local 1021”) hereby
2 moves for leave to file an Amicus Brief in Support of Plaintiff’s Motion for Preliminary
3 Injunction, attached hereto as **Exhibit A**. The district court has broad discretion to appoint amici
4 curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). Plaintiff City and County of San
5 Francisco (“City”) seeks to enjoin Defendants from enforcing certain portions of the recently
6 passed so-called “Conscience Rights” rule. The rule makes receipt of Department of Health and
7 Human Services’ (“HHS”) funds contingent on the recipient’s compliance with the requirement
8 that individual employee beliefs be prioritized over the delivery of safe patient care. SEIU Local
9 1021 urges the Court to consider its briefing on the issues in this matter, as resolution of this
10 matter will significantly affect SEIU Local 1021 members and those they serve.

11 The parties in this matter, as well as the related cases, have each consented to the filing of
12 an amicus brief by SEIU Local 1021.

13 **I. SEIU LOCAL 1021 HAS A SIGNIFICANT INTEREST IN THIS MATTER**

14 SEIU Local 1021 represents approximately sixty thousand employees throughout northern
15 California bargaining on their behalves with their employers to improve the terms and conditions
16 of their employment. Over eleven thousand members are healthcare workers. Over sixteen
17 thousand are employees of the City and County of San Francisco, Plaintiff in this matter.
18 Declaration of Sasha Cuttler in Support of SEIU Local 1021’s Amicus Brief in Support of
19 Plaintiff’s Motion for Preliminary Injunction (“Cuttler Decl.”) ¶ 2. SEIU Local 1021 has a strong
20 interest in the resolution of this matter, as the funds at risk for non-compliance directly support
21 the healthcare workers’ programs and facilities. Further, if San Francisco lost its HHS funds, it
22 would likely make drastic cuts in other areas, in order to balance its budget, potentially affecting
23 SEIU Local 1021 members who do not directly work in healthcare delivery. Enforcement of the
24 HHS rule could result in high levels of job loss and financial hardships for SEIU Local 1021
25 members and their families.

26 Also, if the City and other healthcare employers choose to comply with the rule, SEIU
27 1021 members will bear the brunt of its enforcement. The rule will nullify a longstanding
28

1 contract provision contained in the SEIU 1021 bargaining agreement with the City, for the
 2 Registered Nurse bargaining unit. The contract provision asserts that nurses have the right to
 3 refuse assignments based on their religious beliefs. Importantly, the rule also clearly states—
 4 contrary to the HHS rule—that the “patient’s right to receive the necessary nursing care will take
 5 precedence over exercise of the nurse’s individual beliefs and rights until other personnel can be
 6 provided.” Cuttler Decl. ¶ 4, and Exh. A. The HHS rule would nullify this provision by
 7 superseding this explicit priority of interests and would have a significant effect both on the way
 8 SEIU Local 1021 members are expected to deliver care and on their conditions of employment.
 9 Over eleven thousand SEIU Local 1021’s members are healthcare providers: in addition to
 10 nurses, there are nurse staffing assistants, healthcare billing clerks, laboratory techs, psychiatric
 11 techs, and many, many others. Cuttler Decl. ¶ 2. As the new rule significantly reverses the
 12 priorities in healthcare delivery, enforcement of the new HHS rule will directly impact the terms
 13 and conditions of employment of all these SEIU 1021 members if it is enforced.

14 **II. THE AMICUS BRIEF IS DESIRABLE AND THE MATTERS ASSERTED ARE**
 15 **RELEVANT TO DISPOSITION OF THE CASE**

16 The amicus brief of SEIU Local 1021 is desirable and relevant because SEIU Local 1021
 17 represents the interests of the healthcare workers whom the HHS rule purportedly seeks to
 18 benefit. Ostensibly, the HHS rule benefits employees who work in healthcare by protecting them
 19 from conflicts with their religious or ethical values in performing their work. In its amicus brief
 20 SEIU Local 1021 refutes this hollow promise and demonstrates that the rule not only will fail to
 21 benefit healthcare workers, but will disrupt the safe, ethical execution of their healthcare duties,
 22 as well as their professional relationships.

23 ///

24 ///

25 ///

26 ///

27 ///

1 For these reasons, SEIU Local 1021 believes its interests and arguments as amicus curiae
2 should be heard in this matter, and respectfully requests leave to file its amicus brief.

3 Dated: June 28, 2019

WEINBERG, ROGER & ROSENFELD
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4
5 By: /s/ Xochitl A. Lopez
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CITY & COUNTY OF SAN FRANCISCO v. ALEX M. AZAR II
U.S. DISTRICT COURT, NORTHERN CALIFORNIA
Case No. 19-cv-2405-JCS

EXHIBIT A

**To Motion for Leave to File Amicus Brief
in support of Plaintiff's Motion for
Preliminary Injunction**

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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
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12 CITY AND COUNTY OF SAN FRANCISCO,

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15 ALEX M. AZAR II, Secretary of U.S.
16 Department of Health and Human Services;
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17 Rights, Department of Health and Human
18 Services; U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES; and DOES 1-25,

19 Defendants.
20
21

No. 3:19-cv-2405-JCS

**[PROPOSED] BRIEF OF AMICUS
CURIAE SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL
1021 IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

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I. INTRODUCTION

1
2 The U.S. Department of Health and Human Services (“HHS” or “Department”) has
3 promulgated a new rule that purports to construe a variety of federal statutes enforcing so-called
4 “conscience rights”—the rights of healthcare providers to decline to engage in activities that
5 conflict with their religious beliefs. The rule fails to allow employers to consider the potentially
6 conflicting obligation to provide safe, quality patient care in accommodating these “conscience
7 rights.” The City and County of San Francisco (“City”) and a number of other litigants have
8 sought to enjoin the new HHS rule because the Department failed to comply with constitutional
9 and statutory requirements in issuing the rule. SEIU Local 1021, a Union that represents
10 thousands of healthcare workers who will be directly affected by this rule, herein addresses
11 HHS’s failure to take into account the grave and significant risks to patients that will ensue if the
12 rule is enforced.

13 SEIU Local 1021 specifically challenges the rule as it pertains to the Church
14 Amendments. The HHS rule adopts an overbroad definition of the term “discrimination” that
15 encompasses a wide swath of conduct not included in the Church Amendments’ express statutory
16 language; imposes a duty to accommodate that does not exist in the statute; and in failing to allow
17 any undue hardship or similar exception this contrived duty to accommodate, contravenes
18 longstanding medical and ethical standards by requiring healthcare employers to prioritize
19 individual employee beliefs over safe patient care. For these reasons, the HHS rule does not
20 constitute a reasonable interpretation of the statute and Plaintiff is likely to prevail in setting it
21 aside. In addition, the HHS rule will cause irreparable harm to patients and their communities by
22 endangering patients with urgent health needs and eroding patient confidence in the healthcare
23 system. For these reasons, the HHS rule must be preliminarily enjoined.

II. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

24
25 In order to grant the preliminary injunction, the Court must find that Plaintiff is likely to
26 succeed on the merits. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). In analyzing the validity of
27 an agency interpretation of a statute, a two-step analysis is applied. *Encino Motorcars, LLC v.*

1 *Navarro*, 136 S. Ct. 2117, 2124 (2016). First, the examining court must determine whether
 2 Congress has “directly spoken to the precise question at issue.” *Id.*, citing *Chevron U. S. A. Inc. v.*
 3 *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). In determining the meaning
 4 of the statute at this step, courts examine “the legislative history, the statutory structure, and other
 5 traditional aids of statutory interpretation in order to ascertain congressional intent.” *Altera Corp.*
 6 *& Subsidiaries v. Commissioner*, Nos. 16-70496, 16-70497, 2019 U.S. App. LEXIS 17143, at *26
 7 (9th Cir. June 7, 2019). If the meaning of the statute is clear, “that is the end of the matter” as the
 8 court must give effect to the unambiguously expressed intent of Congress. *Encino Motorcars,*
 9 *LLC v. Navarro*, 136 S. at 2124. If the statute is silent or ambiguous, then at the second step, the
 10 court may defer to the agency’s interpretation only if it is “reasonable.” *Id.* at 2124-2125.

11 Plaintiff is likely to succeed in this case because the HHS rule departs dramatically from
 12 the clear meaning of the statutory text it purports to interpret, and thus fails at step one of this
 13 analysis. The HHS action also fails at step two because it contravenes longstanding traditions and
 14 ethical standards in healthcare and therefore is not a reasonable interpretation of the statute.

15 Thus, it must be set aside.

16 **A. BECAUSE THE HHS RULE DEFINES “DISCRIMINATION” IN A WAY THAT**
 17 **CONFLICTS WITH THE STATUTE IT PURPORTS TO IMPLEMENT, IT WILL**
 18 **BE SET ASIDE**

19 The Court must set aside any agency action that is “arbitrary, capricious, an abuse of
 20 discretion, or otherwise not in accordance with law;” “contrary to constitutional right, power,
 21 privilege, or immunity;” or “in excess of statutory jurisdiction, authority, or limitations, or short
 22 of statutory right.” 5 U.S.C. § 706. Where an agency has interpreted a statute, the action will be
 23 set aside where the statute unambiguously prohibits that interpretation; if the statute is
 24 ambiguous, the agency interpretation fails if it is not a reasonable interpretation. *Altera Corp. &*
 25 *Subsidiaries v. Commissioner*, 2019 U.S. App. LEXIS 17143, at *26. The definition of
 26 “discrimination” in HHS’s new rule is arbitrary and capricious, contrary to law, and in excess of
 27 statutory right because it overtly departs from the statutory language it purports to implement,
 28

1 imposes an unconscionable standard, and far exceeds any reasonable definition of what it means
2 to discriminate in healthcare employment.

3 HHS’s stated purpose in enacting the new “Protecting Statutory Conscience Rights in
4 Health Care” rule, is to “provide for the implementation and enforcement” of the Church
5 Amendments, the Coats-Snowe Amendment, the Weldon Amendments, Affordable Care Act
6 provisions, and other statutes. 84 Fed. Reg. 23263 (Tuesday May 21, 2019 [to be codified at 45
7 C.F.R. 88.1]). However, the new rule defines discrimination differently from each of the
8 statutory texts, rendering the new rule a *change* to the statutes, rather than an implementation or
9 enforcement tool.

10 Among the statutes the HHS rule purports to implement, the Church Amendments are
11 most applicable to SEIU Local 1021 members, who are non-physician healthcare workers. The
12 Church Amendments apply to “any physician or other health care personnel.” The Church
13 Amendments proscribe a specific type of discrimination against healthcare employees, in a
14 limited set of circumstances. The Church Amendments provide that entities that receive the
15 specified HHS funding may not:

16 discriminate in the employment, promotion, or termination of
17 employment of any physician or other health care personnel, or . .
18 in the extension of staff or other privileges . . because he refused to
19 perform or assist in the performance of [a lawful sterilization
20 procedure] or abortion on the grounds that his performance or
21 assistance in the performance of the procedure or abortion would be
22 contrary to his religious beliefs or moral convictions, or because of
23 his religious beliefs or moral convictions respecting sterilization
24 procedures or abortions. . . .

25 because he refused to perform or assist in the performance of any
26 [lawful health service or research activity] on the grounds that his
27 performance or assistance in the performance of such service or
28 activity would be contrary to his religious beliefs or moral
convictions.

42 U.S.C.S. § 300a-7(c)(2). As shown, the statute provides a limited list of employee protections,
which apply only in the “employment, promotion, or termination” of an employee, or the
“extension of staff or other privileges.” *Id.* In contrast, the HHS rule vastly enlarges the
protections through its overbroad definition of the term “discrimination.” The rule defines the

1 term is such a way as to cover many more activities beyond the handful listed in the statute,
2 including, the “enforcement of laws,” “contractual arrangements,” “utilize[ation of] any
3 criterion,” or “site selection,” anytime any of these activities causes the employee to experience
4 “any adverse treatment.” 84 Fed. Reg. 23263.

5 In addition to this unsupported expansion of the activities that trigger the “conscience
6 rights” protections under the Church Amendments, the new HHS definition of discrimination
7 imposes on employers a duty to accommodate employees’ religious beliefs that also does not
8 originate in the statute itself. Where there are conflicts between an employee’s refusal to perform
9 services and the healthcare delivery required by his or her job, the only option provided by the
10 new rule is for the employer to offer an “effective accommodation” that is “voluntarily” accepted
11 by the objecting employee. 84 Fed. Reg. 23263. In this way, the rule imposes a duty to
12 accommodate. The Church Amendments’ statutory text does not support the imposition of a duty
13 to accommodate.

14 The duty to accommodate may not be inferred from the simple use of the term
15 “discrimination” in a statute. The duty to accommodate employees is an affirmative and complex
16 responsibility that far exceeds the ordinary duty to refrain from discriminatory conduct. Federal
17 laws which impose the duty to accommodate employees explicitly assert that duty in the language
18 of the statute. *See, e.g.*, 42 U.S.C.S. § 2000e (specifying, under Title VII, that the term religion
19 includes all aspects of religious practice unless the employer “demonstrates that he is unable to
20 reasonably accommodate to an employee’s or prospective employee’s religious observance or
21 practice without undue hardship”); 42 U.S.C.S. § 12112 (specifying, under Title I of the
22 Americans with Disabilities Act that “discrimination” includes the duty to reasonably
23 accommodate unless it causes undue burden on the employer). Unlike Title VII and the
24 Americans with Disabilities Act which explicitly reference the duty to accommodate, the Church
25 Amendments do not set forth any duty to accommodate employees. 42 U.S.C. §300a-7. In 1971,
26 the Supreme Court in *Dewey* affirmed the Sixth’s Circuit holding that Title VII prohibitions on
27 religious discrimination did not impose a duty to accommodate, because the statute at that time

1 contained no language to that affect. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), aff'g
 2 *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970) (“Nowhere in the legislative
 3 history of the Act do we find any Congressional intent to coerce or compel one person to accede
 4 to or accommodate the religious beliefs of another.”). Congress subsequently amended Title VII
 5 to include the duty to accommodate in 1972. Equal Employment Opportunity Act of 1972, 86
 6 Stat. 103, March 24, 1972. The Church Amendments were enacted the following year, in 1973.
 7 Health Programs Extension Act of 1973, 87 Stat. 95, June 18, 1973. Given the timing of these
 8 events, Congress surely would have known to explicitly assert a duty to accommodate in the
 9 language of the Church Amendments if it had so intended. Because there is no mention of the
 10 duty to accommodate in the Church Amendments, HHS’s imposition of this duty in its rule
 11 conflicts with the clear meaning of the statute, and is devoid of statutory authority.

12 Not only is this duty to accommodate imposed without statutory support, even if some
 13 level of accommodation duty were justified—which it is not under the Church Amendments—the
 14 HHS rule unreasonably departs from any traditional or reasonable understanding of employee
 15 accommodation. It outstrips the well-known and well-developed “reasonable accommodation”
 16 and “undue hardship” doctrines of Title VII and the ADA and imposes a patently unworkable
 17 duty, rendering the rule arbitrary and capricious.¹

18 The traditional doctrine of reasonable accommodation in the employment setting is
 19 balanced by the rule that the accommodation need not impose an undue hardship on the
 20 employer. *See, e.g., TWA v. Hardison*, 432 U.S. 63, 85 (1977) (applying the undue hardship
 21 analysis under Title VII, the Court declined to “construe the statute to require an employer to
 22 discriminate against some employees in order to enable others to observe their Sabbath”). The

23
 24 ¹ The other statutes addressed by the HHS rule that include the term “discrimination” similarly
 25 lack any reference to “accommodation.” For example, the Coates-Snow Amendment prohibits
 26 discrimination by State and local governments against physicians, training programs, and
 27 participants in healthcare training programs, on the basis that such person or program “refuses to
 28 undergo training in the performance of induced abortions, to require or provide such training, to
 perform such abortions, or to provide referrals for such training and such abortions,” and based on
 other protected activities. 42 U.S.C. §238n. The statute also contains no reference to any
 accommodation.

1 undue hardship doctrine limits the duty to accommodate, so that the employee’s exercise of his or
 2 her rights does not result in unreasonable harm to the employer. *Id.* at 84 (finding that increased
 3 costs to the employer represents an undue hardship); *US Airways, Inc. v. Barnett*, 535 U.S. 391,
 4 411 (2002) (discussing the interplay between the “reasonable” accommodation and the “undue”
 5 hardship analyses). In the case of the HHS rule, the harm imposed by the rule is even more
 6 severe, as explained further below, as it is inflicted not only on the healthcare employer, but also
 7 on patients and members of the public.

8 Contrary to the balance reflected in the familiar doctrine of reasonable accommodation,
 9 the HHS rule fails to limit employers’ duty to accommodate in any manner and fails to
 10 acknowledge healthcare employers’ important duty to provide medical care to patients. Under
 11 the HHS rule, the offered accommodation must be “voluntarily” accepted by the employee. The
 12 rule does not permit the employer to balance the wishes of the employee with any other
 13 considerations—not even the need for safe patient care. *See*, 84 Fed. Reg. 23191 (HHS
 14 explaining in response to comments on the proposed rule that the rule contains no undue hardship
 15 exception to the duty to accommodate). By failing to account for any countervailing interests in
 16 imposing this duty, the HHS rule requires the employer to prioritize the individual employee’s
 17 demands over patient care needs. 84 Fed. Reg. 23263. The HHS rule clearly subjugates patients’
 18 clinical needs and the employer’s duty to provide medical care, to the refusing employee’s
 19 individually determined religious beliefs. This subjugation is patently unethical, arbitrary and
 20 capricious, and is not grounded in statutory authority. Accordingly, the HHS rule is arbitrary and
 21 capricious, is without basis in statutory authority, and must be set aside. 5 U.S.C. § 706.

22 **B. THE RULE MUST BE SET ASIDE BECAUSE IT CONTRAVENES**
 23 **LONGSTANDING MEDICAL AND ETHICAL STANDARDS AND IS NOT A**
 24 **REASONABLE INTERPRETATION OF THE STATUTE**

25 Where the agency action fails to constitute a reasonable interpretation of a statute, it will
 26 be set aside. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2124-2125. Not only has
 27 HHS failed to root its new rule in statutory language, the rule fundamentally undermines
 28 longstanding values in healthcare delivery, professional and ethical standards of healthcare

1 providers, and community expectations for healthcare delivery. For this reason, the rule does not
2 constitute a reasonable interpretation of the statute and must be set aside. By forcing employers
3 to offer accommodations acceptable to the employee without regard to the accommodations’
4 effects on patient care, the rule prevents healthcare employers from making safe, effective patient
5 care the top priority. This rule drastically conflicts with the ethical and moral standards of
6 healthcare providers and traditional values of healthcare delivery.

7 The collective bargaining agreement between SEIU Local 1021 and the City contains
8 protections for employees who wish to abstain from participation in certain procedures.
9 Declaration of Sasha Cuttler in Support of SEIU Local 1021’s Amicus Brief in Support of
10 Plaintiff’s Motion for Preliminary Injunction, (“Cuttler Decl.”) filed herewith, at ¶ 4, and Exh. A.
11 Those protections are balanced by the expectation that where patient safety is at risk, a healthcare
12 employer must, at times, prioritize patient safety “above the nurse’s individual beliefs and rights
13 until other personnel can be provided.” *Id.* To reverse this priority, as the HHS rule does,
14 contravenes longstanding values and traditions of nursing, and the greater community’s
15 expectations of the healthcare system. Cuttler Decl. ¶ 5. The ethical duty and expectation that
16 providers will prioritize patient safety is embodied in the American Nurses Association (“ANA”)
17 Code of Ethics, which provides that the nurse’s “primary commitment” must be to the “patient,
18 whether an individual, family, group, or population.” Cuttler Decl. ¶ 5, and Exh. B. The Code of
19 Ethics also describes the traditional expectation that nursing care must “reduce health disparities,”
20 rather than exacerbate them by allowing individuals’ beliefs to negatively impact the availability
21 of healthcare. Cuttler Decl. ¶ 6, and Exh. B. The profession of nursing “simply does not allow
22 for the subjugation of patient care to individual healthcare workers’ beliefs.” Cuttler Decl. ¶ 6.
23 Indeed, where even one incident of nurse conduct jeopardizes a patient’s “health or life,” such
24 conduct may be considered “gross negligence,” which under California regulations is punishable
25 by revocation of the nurse’s license. Cal. Business and Prof. Code. ¶ 2761(a)(1); 16 Cal. Code
26 Regs., § 1442.

1 The HHS rule so conflicts with traditional nursing and healthcare values that the nursing
 2 community rejects it, even though it purports to protect nurses’ interests. Individual nurses and
 3 other providers overwhelmingly have spoken out against the rule and the California Board of
 4 Registered Nursing, the governmental body that administers nursing licenses in this state, has
 5 officially opposed the HHS rule. Cuttler Decl. ¶¶ 9-10, and Exh. C; Declaration of Rachel Perry
 6 Limon in Support of SEIU Local 1021’s Amicus Brief in Support of Plaintiff’s Motion for
 7 Preliminary Injunction. (“Perry Decl.”) ¶ 2.

8 The HHS rule falls so far from traditional ethics and values in healthcare and fails to
 9 adhere to any reasonable interpretation of the meaning of the Church Amendments, as to render it
 10 arbitrary and capricious. As it is not a reasonable interpretation of the statute, it must be set aside.
 11 *See Altera Corp. & Subsidiaries v. Commissioner*, 2019 U.S. App. LEXIS 17143, at *26.

12 **III. THE HHS RULE WILL CAUSE IRREPARABLE HARM IF NOT ENJOINED**

13 The Court must find that irreparable harm will occur in order to issue an injunction.
 14 *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). The standard is met here, as the HHS rule, by
 15 requiring employees to be “voluntarily” accommodated without regard to the accommodation’s
 16 effect on patient care, clearly endangers patients by subjugating their safety to the self-determined
 17 religious beliefs of individual employees. The rule also undermines patient confidence in the
 18 healthcare system, which endangers individual patients who will fail to seek medical care, and in
 19 turn increases risk of illness in the community.

20 **A. THE RULE WILL ENDANGER PATIENTS**

21 There is no question that the HHS rule directly endangers patients by subjugating patient
 22 care to the beliefs of individual employees. The demands of the emergency department (“ED”) at
 23 San Francisco General Hospital, where many SEIU Local 1021 members work, demonstrate
 24 clearly the harm imposed by the requirement that employers “voluntarily” accommodate
 25 employees without regard to the impact on patient care. The ED at San Francisco General
 26 Hospital, like most EDs in major metropolitan areas of the United States, is extremely busy.
 27 Perry Decl. ¶ 3. It is not possible to predict on any given day or shift what may be required of the

1 staff and care teams. The ED receives patients from all walks of life, economic class, race and
2 culture, gender, and family circumstance. *Id.* Patients may be generally healthy and supported by
3 a family, or they may be struggling with mental illness, abuse, criminal environments, and myriad
4 other complicating factors. *Id.* It is not uncommon for the ED to receive multiple critically ill or
5 injured patients at the same time, requiring employees to rush in and begin immediate
6 resuscitative efforts on several fronts. *Id.* When an emergent resuscitative effort is required, each
7 provider must be ready to accept the duties assigned and there is no time for negotiation. If the
8 providers were forced to stop a case and juggle staffing because of individual provider beliefs, it
9 would unquestionably compromise patient safety and risk lives. *Id.*

10 The HHS rule also indirectly endangers patients by complicating the objectives of ED care
11 teams, impairing their effectiveness by adding distractions to what should be a unitary goal of
12 excellent patient care. Staff cohesiveness is a factor in successful patient outcomes. Perry Decl.
13 ¶ 4. The crucial cohesion of the care team is facilitated by the fact that each provider is focused
14 and committed to prioritizing patient care without distraction while providing care for the patient.
15 *Id.* If providers are distracted by concerns about a team member's religious or ethical beliefs, his
16 or her decision not to treat a given patient, or the need to find a replacement worker, it
17 undermines the team's professional cohesion and focus on patient care. *Id.* Likewise, team
18 morale could be compromised. Where employee objections to assignments under the HHS rule
19 cause harm or increase risk to a patient (as the rule will at times require) this could cause
20 frustration or resentments to arise within care teams, as team members who care for the
21 compromised patient must experience first hand the adverse consequences or stress of the
22 increased risk. Perry Decl. ¶¶ 5, 6. By introducing these distractions, frustrations, and stressors
23 to the care team, the HHS rule will undermine providers' team cohesion, and further endanger
24 patient care.

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1 **B. LOSS OF CONFIDENCE IN THE HEALTHCARE SYSTEM BECAUSE OF THE**
2 **HHS RULE WILL INCREASE RISK OF ILLNESS AND HARM TO**
3 **COMMUNITIES**

4 When patients decline to seek needed medical care, it increases the risk of disease and
5 other harms to the entire community. Cuttler Decl. ¶ 8. Untreated, ill patients increase risks of
6 disease to their communities. There is no question that the HHS rule will undermine patient
7 confidence in the healthcare system, particularly patients from marginalized communities, and
8 discourage these patients from seeking needed care. For example, since the HHS rule has been
9 publicized in the media, SEIU Local 1021 leadership has already observed patients from the
10 transgender community making comments showing that the rule makes them feel unsafe in the
11 healthcare system. The community perceives the rule to invite bigoted individuals to refuse them
12 urgent healthcare in potentially desperate circumstances. Patients' comments include that "they,"
13 meaning HHS, "want to kill us" or "want us to die," and words to that effect. *Id.* These
14 extremely concerning comments vividly demonstrate how drastically the HHS rule undermines
15 patient confidence in the healthcare system. Feelings such as these discourage patients from
16 marginalized groups, such as the transgendered community, to seek needed care. *Id.*

17 Even patients who do come to receive care may not feel comfortable confiding in their
18 provider because of the HHS rule. Particularly for matters of sexual and reproductive health,
19 stigma and fear of judgment can result in patients withholding important subjective and objective
20 data from their providers. Cuttler Decl. ¶ 8. Without open and honest communication between
21 providers and patients, fatal errors in care can occur. *Id.* Because the HHS rule undermines
22 patient confidence in the healthcare system, it will increase illness in these marginalized patients,
23 and in turn, increase risks to the greater community.

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IV. CONCLUSION

For these reasons, Plaintiff’s Motion for Preliminary Injunction must be granted.

Dated: June 28, 2019

WEINBERG, ROGER & ROSENFELD
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