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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

**DECLARATION OF SASHA CUTTLER
IN SUPPORT OF SEIU LOCAL 1021'S
AMICUS BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

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

26 I, Sasha Cuttler, hereby declare as follows:

27 1. I am a member of the Executive Board of the Service Employees International
28 Union, Local 1021 ("SEIU Local 1021"). I have been a Registered Nurse ("RN") since 1985 and
received a Ph.D. in nursing in 2008. I serve as the Industry Chair for Registered Nurses within
SEIU Local 1021. I have personal knowledge of the matters stated in this declaration, and if
called as a witness, I would and could testify competently to the matters stated herein.

1 2. SEIU Local 1021 represents approximately sixty thousand employees in northern
2 California. Over sixteen thousand of our members are employees of the City and County of San
3 Francisco (“City”). Over eleven thousand two hundred of our members work in healthcare.
4 SEIU Local 1021’s membership includes nurses, nurse staffing assistants, healthcare billing
5 clerks, laboratory techs, psychiatric techs, and many other healthcare employees. Our
6 membership, particularly the Registered Nurses and healthcare workers generally, are aware of
7 the so-called “Conscience” rule recently promulgated by the U.S. Department of Health and
8 Human Services (“HHS”). The “Conscience” rule purports to serve healthcare workers’ personal
9 ethical and religious interests, but I can say unequivocally that the rule does not serve our
10 interests: rather the rule conflicts with our interests and our ethical commitments as nurses, health
11 care workers, and Union members.

12 3. I understand that the new rule creates a definition for the term “discrimination”
13 that forces healthcare employers to permit employees to refuse to assist in any healthcare service
14 based on the employees’ individual religious beliefs, even if doing so negatively impacts patient
15 care. I believe protections against discrimination are important, but I have never understood
16 discrimination protections to require the hospital to subjugate patient care to individual employee
17 beliefs. In the delivery of healthcare, we are opposed to discrimination against our already
18 vulnerable patients, many of them from marginalized groups. I believe a rule that subjugates
19 patient care is contrary to fundamental ethical and moral standards and our basic professional
20 commitments as healthcare workers. I also believe that if this new rule is upheld, it will gravely
21 impair U.S. healthcare delivery. The reasons for these beliefs are as follows.

22 4. In the City of San Francisco, healthcare workers already enjoy protections that
23 allow us to refuse assignments that conflict with our personal ethical and/or religious beliefs.
24 However, these protections also permit the employer to ensure that safe and adequate patient care
25 is prioritized. For example, Article II.K of the SEIU Local 1021 collective bargaining agreement
26 with the City (referred to as a Memorandum of Understanding), prohibits discrimination and
27 recognizes that RNs may refuse certain assignments. However, Article II.K also recognizes that

1 situations may arise “where the immediate nature of the patient’s needs will not allow for
2 personnel substitutions.” In such cases, under Article II.K, consistent with longstanding and well-
3 understood standards in U.S. American healthcare, “the patient’s right to receive the necessary
4 nursing care will take precedence over exercise of the nurse’s individual beliefs and rights until
5 other personnel can be provided.” A true and correct copy of Article II.K of the SEIU 1021
6 Memorandum of Understanding (“MOU”) with the City is attached herein as **Exhibit A**.

7 5. In my experience, the preeminence of safe high-quality patient care is consistent
8 with the tradition of nursing and healthcare generally. Based on my experience serving the
9 public, I believe this is what the greater community understands and expects from our healthcare
10 system. Our professional Code of Ethics reflects this. The American Nurses Association
11 promulgates a Code of Ethics which broadly describes RN ethical duties and which sets accepted
12 standards for our nursing profession. A true and correct copy of the American Nurses
13 Association Code of Ethics is attached herein in as **Exhibit B**. The standards clearly hold safe,
14 high-quality, and equitable patient care as the highest priority. Provision Two of the Code makes
15 this clear. It states: “The nurse’s primary commitment is to the patient, whether an individual,
16 family, group, or population.” Provision Three further describes the nurse’s duty to advocate for
17 patients. It states: “The nurse promotes, advocates for, and protects the rights, health, and safety
18 of the patient.”

19 6. I believe that the new HHS rule will adversely affect the healthcare of underserved
20 populations such as impoverished women and mothers, transgendered and other LGBTQI
21 patients, HIV positive patients, and other marginalized groups that have been historically
22 subjected to prejudice. But Provision Eight of the Code reflects RN’s duty to reduce such
23 disparities in treatment. It states: “The nurse collaborates with other health professionals and the
24 public to protect human rights, promote health diplomacy, and reduce health disparities.” While
25 the nursing profession certainly recognizes that individual nurses must also attend to their
26 individual health and spiritual needs, our profession simply does not allow for the subjugation of
27

1 patient care to individual healthcare workers' beliefs, and the new HHS rule attempts to do just
2 that.

3 7. I believe delivering healthcare in a way that prioritizes employees' personal beliefs
4 without regard to the effect on patient care also conflicts with our state nursing professional
5 standards. The California regulations describe any conduct which could jeopardize patient health
6 as "gross negligence." Nurses found to have engaged in gross negligence are disciplined and can
7 lose their licenses. Under a variety of circumstances, the refusal to treat certain patients based on
8 a nurse's personal ethical code or religious beliefs undoubtedly could jeopardize patients' health.

9 8. Without open and honest communication between providers and patients, fatal
10 errors in care can occur. If the new HHS rule is enforced, I believe the public, and particularly
11 marginalized groups, will lose confidence in healthcare providers, and crucial trust in our
12 healthcare system will be lost and not easily regained. This will lead to increased health risks for
13 the entire community. Particularly for matters of sexual and reproductive health, stigma and fear
14 of judgment can result in patients withholding important subjective and objective data from their
15 providers. It can also result in patients totally avoiding the healthcare system. When a patient
16 avoids seeking healthcare, this increases risk of disease and harm to that patient, as well as
17 everyone in their community. In my work and personal life, transgendered patients have
18 repeatedly informed me that they avoided seeking healthcare for long periods of time because of
19 fear of being judged for who they are. Since the news about the new HHS rule has been
20 publicized, I have already seen people in the transgendered community make comments showing
21 that the new rule is dismantling their trust in the healthcare system. I have seen comments on
22 social media from patients in the transgendered community to the effect that "they," meaning
23 HHS, "want to kill us," "they want us to die," and comments to that effect. These types of
24 comments are extremely concerning and demonstrate the irreparable harm that this rule will
25 inflict on our patients and our whole community.

26 9. For me in particular, this new rule clashes entirely with my reasons for electing a
27 healthcare profession. I went into the profession of nursing to help, not harm people. Patients by
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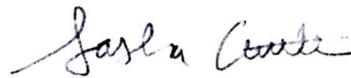
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definition are more vulnerable than healthy people and they require competent care that respects their individual dignity and religious beliefs. We nurses and other providers learn to work with and care for people with very different beliefs and experiences from our own. Doing nursing teaches us that, as human beings, we have so much more in common than divides us. This rule legitimizes discrimination and prejudice against vulnerable patient populations, by elevating individual beliefs as superior to patient care and safety, and quite frankly, reminds me of the kinds of things my Jewish grandparents endured in Europe on the way to genocide. This rule increases divisions and is anathema to nursing. I never dreamed that the United States Department of Health and Human Services would stoop to this level.

10. My views about the HHS rule are consistent with mainstream views in the nursing community. I have witnessed many nurses and other providers speak out against this rule because of the grave concerns I have mentioned here. The California Board of Registered Nursing (“Board”), the body that enforces the Nursing Practices Act and administers RN licenses, voted to formally oppose the HHS rule at a recent Board meeting. A true and correct copy of the Board of Registered Nursing Agenda Item Summary for the meeting at which the Board adopted the recommended action to oppose the new rule, is attached herein as **Exhibit C**.

11. If this rule is enforced, I believe the rule would fundamentally change the nursing profession and healthcare delivery in this country. A law that prioritizes an employee’s personal beliefs over safe, high-quality patient care simply is not consistent with the duties and values of the profession that I chose, trained for, and have served in for nearly thirty-five years.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 27th day of JUNE 2019, in SAN FRANCISCO, California.



SASHA CUTTLER

147716/1029756

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 Declaration of Sasha Cuttler in
support of SEIU Local 1021's Amicus
Brief in support of Plaintiff's Motion for
Preliminary Injunction**

ARTICLE II – EMPLOYMENT CONDITIONS

Professional Development

235. Clinical Nurse Specialists will be given release time to participate in twice yearly Department of Public Health-wide meetings for the express purpose of professional development. The Department of Public Health will provide specific planning arrangements for site, date, and time. The Clinical Nurse Specialists will provide the agenda and content at least three (3) months in advance of the meetings.
236. Clinical Nurse Specialists may plan additional monthly meetings among Clinical Nurse Specialists for the express purpose of professional development and will receive release time to participate in such meetings, provided that the Department of Public Health is given notice at least three (3) months in advance of such meetings, written agendas seven (7) days prior to the meetings, and that the meetings are scheduled at a time to minimize the impact on patient care.

II.I. INDEMNIFICATION AND DEFENSE OF CITY EMPLOYEES

237. The City shall defend and indemnify an employee against any claim or action against the employee on account of an act or omission in the scope of the employee's employment with the City, in accord with, and subject to, the provisions of California Government Code Sections 825 et seq. and 995 et seq. Nothing herein is deemed to supersede referenced state law.

II.J. CHANGES IN PERSONNEL POLICY

Departmental Changes

238. The Appointing Officer/designee agrees to furnish the Union with a written copy of proposed departmental personnel policies or proposed revisions to existing policies, which affect wages, hours and working conditions within the scope of representation. If the Union does not respond in writing within fifteen (15) calendar days from the date of the notification, the Union shall waive its right to meet and confer on the proposed policy.

City Changes

239. The procedure set forth above do not apply to those proposed personnel policies or proposed revisions to existing policies as they may apply to City departments which are adopted by the City and County of San Francisco.

II.K. CONSCIENTIOUS OBJECTOR

240. The rights of patients to receive quality nursing care are to be respected.
241. It is recognized that Registered Nurses hold certain moral, ethical and religious beliefs and in good conscience may be compelled to refuse involvement with abortions and other procedures involving ethical causes.
242. Situations will arise where the immediate nature of the patient's needs will not allow for personnel substitutions. In such circumstances the patient's right to receive the necessary nursing care will take precedence over exercise of the nurse's individual beliefs and rights until other personnel can be provided.

ARTICLE II – EMPLOYMENT CONDITIONS

II.L. PERSONNEL FILES

243. Only one (1) official personnel file on an individual nurse may exist. The official file shall be located in one of the three Human Resources offices of the Department of Public Health (San Francisco General Hospital, Laguna Honda Hospital and 101 Grove Street) or at the Human Services Agency Human Resources Office.
244. Each nurse shall have the right upon request to review the contents of the nurse's official personnel file. Nothing may be removed from the file by the nurse but copies shall be provided upon request. Copies in excess of 100 pages will be provided at ten cents per page.
245. A representative, chosen by the nurse, may at the nurse's request, accompany the nurse in this review, or the nurse may give written permission to another person to review the file.
246. All material in the file must be signed and dated.
247. No derogatory information or statements not related to the nurse's assigned duties or professional responsibilities shall be placed in this file.
248. The nurse shall have the opportunity to sign, date and attach a response to all material in the official personnel file related to the nurse's assigned duties and professional responsibilities.
249. The nurse shall have the right to include in the file any material or information which is mutually considered to be germane to the nurse's professional career.
250. Discipline may not be imposed upon any matter in the file dated prior to two (2) years from the date of proposed discipline, unless the matter was subject to prior disciplinary action. Any prior disciplinary action may be considered in a termination or dismissal hearing.
251. Material relating to disciplinary actions in the employee's personnel file which have been in the file for more than three (3) years shall not be used. At the request of the employee, materials relating to disciplinary actions which are three (3) or more years old, shall be removed, provided there has been no recurrence of the conduct during the immediate three (3) years after the incident on which the discipline was based. Performance evaluations are excluded from this provision but employees may petition for removal of performance evaluations under rules of the Civil Service Commission.

II.M. PERFORMANCE EVALUATIONS

252. This confirms that written performance evaluations are not grievable under the Staff Nurse/P-103 MOU. This includes allegations that a given written performance evaluation was not "fair and equitable" under the Management Rights Section of the MOU.

II.N. DEVELOPMENT PLANS

253. A nurse may be placed on a developmental plan when there is a demonstrated, documented departure from standards of competence, which include the skills, knowledge and behaviors specific to the performance criteria. The developmental plan shall be proposed not more than eight (8) weeks

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EXHIBIT B

**To Declaration of Sasha Cuttler in
support of SEIU Local 1021's Amicus
Brief in support of Plaintiff's Motion for
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Provisions of the Code of Ethics for Nurses with Interpretive Statements

Provision 1 | The nurse practices with compassion and respect for the inherent dignity, worth, and unique attributes of every person.

Provision 2 | The nurse's primary commitment is to the patient, whether an individual, family, group, community, or population.

Provision 3 | The nurse promotes, advocates for, and protects the rights, health, and safety of the patient.

Provision 4 | The nurse has authority, accountability, and responsibility for nursing practice; makes decisions; and takes action consistent with the obligation to promote health and to provide optimal care.

Provision 5 | The nurse owes the same duties to self as to others, including the responsibility to promote health and safety, preserve wholeness of character and integrity, maintain competence, and continue personal and professional growth.

Provision 6 | The nurse, through individual and collective effort, establishes, maintains, and improves the ethical environment of the work setting and conditions of employment that are conducive to safe, quality health care.

Provision 7 | The nurse, in all roles and settings, advances the profession through research and scholarly inquiry, professional standards development, and the generation of both nursing and health policy.

Provision 8 | The nurse collaborates with other health professionals and the public to protect human rights, promote health diplomacy, and reduce health disparities.

Provision 9 | The profession of nursing, collectively through its professional organizations, must articulate nursing values, maintain the integrity of the profession, and integrate principles of social justice into nursing and health policy.

CITY & COUNTY OF SAN FRANCISCO v. ALEX M. AZAR II
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EXHIBIT C

**To Declaration of Sasha Cuttler in
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Brief in support of Plaintiff's Motion for
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**BOARD OF REGISTERED NURSING
SPECIAL BOARD MEETING
Agenda Item Summary**

AGENDA ITEM: 3.0

DATE: May 28, 2019

ACTION REQUESTED: Take an oppose position on the proposed changes to the federal rules regarding Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (Jan. 26, 2018) and delegate authority to the Executive Officer to assist the Office of the Attorney General in opposing it.

REQUESTED BY: Trande Phillips, RN, President
Chairperson, Administrative Committee

BACKGROUND:

The attached Rule promulgated by the Office for Civil Rights within the Department of Health and Human Services (Department) creates a broad exemption that permits any individual, entity, or provider, ranging from physicians to front office staff, to deny patients health care on the basis of “religious, moral, ethical or other reasons.” (84 Fed. Reg. 23170, at p. 23263, located at <https://www.govinfo.gov/content/pkg/FR-2019-05-21/pdf/2019-09667.pdf>.) This Rule significantly broadens existing federal conscience protections and will permit refusals of any health care services by almost any individual in the health care industry, even those not involved in the provision of the care. Moreover, there is no exception for medical emergencies. Consequently, this Rule is in conflict with several federal and California laws, as well as the Board’s primary mission of consumer protection.

For instance, this Rule disregards the Emergency Medical Treatment and Labor Act (EMTALA) enacted by Congress in response to growing concern about the provision of adequate medical services to individuals, particularly the indigent and the uninsured, who seek care from hospital emergency rooms. (42 U.S.C. § 1395dd(a).) Instead, the Rule places conscience protection over patient care without exception, even for emergencies. The American College of Emergency Physicians (ACEP), commented that the proposed rule failed to reflect the moral and legal duty of emergency physicians to treat everyone “who comes through our doors,” stating that “[b]oth by law and by oath, emergency physicians care for all patients seeking emergency medical treatment,” and concluding that “[d]enial of emergency care or delay in providing emergency services on the basis of race, religion, sexual orientation, gender identity, ethnic background, social status, type of illness, or ability to pay, is unethical.” (ACEP comment at 1, available at <https://www.regulations.gov/document?D=HHS-OCR-2018-0002-71219>.)

The Department failed to meaningfully address these concerns, and summarily dismissed them, stating that “[w]ith respect to EMTALA, the Department generally agrees with its explanation in the preamble to the 2008 Rule that the requirement under EMTALA that certain hospitals treat and stabilize patients who present in an emergency does not conflict with Federal conscience and anti-discrimination laws.” (84 Fed. Reg. at 23183.)

Under California law, a health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience (but not on the basis of discrimination). (Prob. Code § 4734(a).) Also, a health care institution may decline to comply with an individual health care instruction when it is contrary to a policy of the institution that is

expressly based on reasons of conscience, if the policy was timely communicated to the patient. (Prob. Code § 4734(b).) However, a health care provider or institution that declines to comply with an individual health care instruction must (1) promptly so inform the patient; (2) immediately make all reasonable efforts to assist in the transfer of the patient to another provider or institution that is willing to comply with the instruction; and (3) provide continuing care to the patient until the transfer is accomplished or until it appears that a transfer cannot be accomplished. (Prob. Code § 4736.)

California laws also carefully balance provisions for conscience protections and a woman's right to reproductive health. For example, California law provides that no employer or other person shall require a physician, or any other person employed by or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion "if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate." (Health & Safety Code § 123420(a).) Additionally, no employee or person shall be subject to any penalty or discipline for refusing to participate in the induction or performance of an abortion. (Id.) However, this provision does not apply to "medical emergency situations and spontaneous abortions" (Health & Safety Code § 123420(d); Health & Safety Code § 1317(a) & (e).)

Further, pursuant to California Business and Professions Code section 125.6, a California licensed health care professional is subject to discipline "if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code [sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status], he or she refuses to perform the licensed activity or aids or incites the refusal to perform that licensed activity by another licensee, or if, because [of such characteristics], he or she makes any discrimination, or restriction in the performance of the licensed activity."

Under the Rule, however, physicians and other health care providers may be emboldened to disregard California's anti-discrimination protections, and interfere with patients' access to health care due, in part, to how broadly the Rule defines terms. (See 84 Fed. Reg. at 23263-23264.)

The American Nurses Association and the American Academy of Nursing jointly provided the following comment against the proposed rule:

ANA and AAN strongly support the right and prerogative of nurses - and all healthcare workers - to heed their moral and ethical values when making care decisions. However, the primacy of the patient in nursing practice is paramount, and the moral and ethical considerations of the nurse should never, under any circumstance, result in the inability of the patient to receive quality, medically necessary, and compassionate care.

ANA and AAN are concerned that this proposed rule, in strengthening the authority of OCR to enforce statutory conscience rights under the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and other federal statutes, could lead to inordinate discrimination against certain patient populations - namely individuals seeking reproductive health care services and lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) individuals. Proliferation of such discrimination - which in the case of LGBTQ individuals is

unlawful under Section 1557 of the Affordable Care Act (ACA) – could result in reduced access to crucial and medically necessary health care services and the further exacerbation of health disparities between these groups and the overall population.

Discrimination in health care settings remains a grave and widespread problem for many vulnerable populations and contributes to a wide range of health disparities. Existing religionbased exemptions already create hardships for many individuals. The mission of HHS is to enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, patient care, public health, and social services. This proposed rule fails to ensure that all people have equal access to comprehensive and nondiscriminatory services, and dangerously expands the ability of institutions and entities, including hospitals, pharmacies, doctors, nurses, even receptionists, to use their religious or moral beliefs to discriminate and deny patients health care. All patients deserve universal access to high quality care and we as health care providers must guard against any erosion of civil rights protections in health care that would lead to denied or delayed care.

(Letter dated March 23, 2018, located at https://www.nursingworld.org/~4988e1/globalassets/docs/ana/anaaanletter-statutoryconsciencerrights_final-03232018.pdf.)

The consequences of this Rule are expected to disproportionately impact access to care for women, sexual abuse victims, religious minorities, people living with HIV/AIDS, and lesbian, gay, bisexual, and transgender (LGBT) people. Individuals in rural and other underserved communities may experience even more barriers to obtaining care. Under the Rule, patients could be denied care, without explanation or referral. In light of the above, this Rule is in conflict with the Board highest priority of protection of the public. (Bus. & Prof. Code, § 2708.1.)

RECOMMENDATION:

Take an oppose position on this Rule and delegate authority to the Executive Officer to assist the Attorney General in opposing it.

NEXT STEPS:

Collaborate with the Office of the Attorney General to determine what form of support is requested.

FISCAL IMPACT, IF ANY:

Staff estimates no fiscal impact except for a small amount of staff time.

PERSON(S) TO CONTACT:

Stacie Berumen
Chief of Enforcement
(916) 574-7600