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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, et al.,

Defendants.

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,

Plaintiff,

vs.

ALEX M. AZAR, et al.,

Defendants.

COUNTY OF SANTA CLARA et al,,

Plaintiffs,

vs.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

No. C 19-02405 WHA
No. C 19-02769 WHA
No. C 19-02916 WHA

DECLARATION OF DAVID H. AIZUSS, M.D. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Date:	October 30, 2019
Time:	8:00 AM
Courtroom:	12
Judge:	Hon. William H. Alsup
Action Filed:	5/2/2019

I, DAVID H. AIZUSS, M.D., declare as follows:

1. I am currently the President of the California Medical Association (CMA) and previously served as the Chair of CMA's Board of Trustees for 3 years. CMA's Board of Trustees review, debate, and set health care policy that governs CMA's advocacy in the Legislature, regulatory agencies, and the courts.

2. The California Medical Association (CMA) is a nonprofit, incorporated professional association of more than 44,000 members throughout the State of California. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA's physician members practice medicine in all specialties and settings.

3. I am a licensed physician practicing in the State of California. I have been practicing medicine for 34 years as an ophthalmologist. I currently practice in Los Angeles, California.

4. I received my undergraduate degree from Northwestern University. I received my medical degree from Northwestern University Medical School. I completed my residency at the Jules Stein Eye Institute at the University of California, Los Angeles. I am board certified in ophthalmology by the American Board of Ophthalmology.

5. I am familiar with the rule "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (the Rule), published in the Federal Register on May 21, 2019.

6. CMA submitted comments to the United States Department of Health and Human Services (HHS) on March 27, 2018 on the Notice of Proposed Rulemaking, published in the Federal Register on January 28, 2018, that preceded the Rule.

7. The Rule purports to "protect the rights of individuals, entities, and health care entities to refuse to perform, assist in the performance of, or undergo certain health care services or research activities to which they may object for religious, moral, ethical, or other reasons" and further states that the provisions are to be "interpreted and implemented broadly to effectuate their protective purpose."

8. In 2018, HHS received 25,912 health information privacy complaints compared to 343 complaints alleging conscience violations. This was an increase from a total of 10 complaints filed with HHS under the conscience protection laws between 2005 and 2015.

9. HHS estimates that implementation of the Rule will, on average, cost $312.3 million in year one and $125.5 million annually in years two through five.

10. By issuing the Rule and creating a new division within the Office of Civil Rights ("OCR")—the new "Conscience and Religious Freedom Division"—HHS is inappropriately using OCR's limited resources to encourage discrimination in health care and undermine the ability of states to enforce their own conscience and anti-discrimination laws.

The Rule Will Negatively Impact Access to Care

11. The Rule expands the application of existing conscience protections laws in a way that is likely to create serious barriers to patients accessing care, particularly patients seeking comprehensive reproductive health care and end-of-life care as well as patient populations that have been most vulnerable to insidious discrimination, including lesbian, gay, bisexual, and transgender individuals.

12. The Rule would allow any "entity" involved in a patient's care—from a hospital and the hospital board of directors to individuals such as the receptionist that schedules procedures and the person preparing a room for a procedure—to use their personal beliefs to disrupt a patient's access to care.

13. The Rule's definition of "assist in the performance" greatly expands the types of services that can be refused to include "an action that has a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity." In fact, merely "making arrangements for the procedure," is included in the reach of the Rule. This means individuals such as the office scheduler, the technician charged with cleaning surgical instruments, and other medical office and hospital employees, can now assert a new right to refuse care based on their religious and moral convictions. Such an interpretation is potentially disruptive to the normal operations of a medical office or other health care facility and impedes the provision of necessary care to patients.

14. The Rule also defines "referral" or "refer" to mean providing any information, "in oral, written, or electronic form … where the purpose or reasonably foreseeable outcome of the provision of the information is to assist a person in receiving funding or financing for, training in, obtaining, or performing a particular health care service, program, activity, or procedure." This includes information related to contact information, directions, instructions, descriptions, or other information resources that could help an individual to get the health care service they need.

15. Such an expansive definition could prevent patients from getting information about the availability of comprehensive health care options in their state.

16. CMA believes that these overly broad definitions will result in denial of care and miscommunication to patients without meaningfully advancing physicians' rights of conscience.

The Rule Undermines Anti-Discrimination Protections in Healthcare

17. The Rule undercuts California laws that have been put into place to ensure that patients in the state have access to comprehensive health care. The Rule interferes with existing state laws and accreditation requirements and will create needless legal confusion for California physicians.

18. California law explicitly prohibits discrimination based on sex, sexual orientation, or gender identity, among other factors. California law provides that persons holding licenses under the provisions of the Business & Professions Code, such as physicians, are subject to disciplinary action for refusing, in whole or in part, or aiding or inciting another licensee to refuse to perform the licensed services to an "applicant" (patient) because of any characteristics under the Unruh Civil Rights Act, that is, the applicant's race, color, sex, religion, ancestry, disability, marital status, national origin, medical condition, sexual orientation, or genetic information.

19. The California Supreme Court has held that physicians' religious freedom and free speech rights do not exempt physicians from complying with the Unruh Act's prohibition against discrimination based on a person's sexual orientation.

20. California law prohibits discrimination by any person under any program that receives any financial assistance from the state. Additionally, the California Insurance Gender Nondiscrimination Act prohibits a health plan and insurer from "refusing to enter into, cancel or

decline to renew or reinstate a contract because of race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age." Sex includes both gender identity and gender expression.

21. In addition, the Rule may conflict with policies of agencies that accredit health care institutions. For example, the Joint Commission, which accredits and certifies nearly 21,000 facilities in the U.S., has required since 2011 that the nondiscrimination policy of every accredited facility protect transgender patients.

22. The Rule will compel California physicians to risk violating the Rule or risk violating state and federal antidiscrimination laws that are in place to ensure that patient populations vulnerable to discrimination have equal access to health care and health care coverage.

CMA Policy is to Balance Patients' Rights with Physicians' Conscience Rights

23. CMA advocates for conscience protections for physicians that promote the rights of physicians to exercise their conscience while ensuring that such rights do not negatively impact patient care.

24. The Rule conflicts with policy adopted by medical professional associations including CMA and the American Medical Association which assert that physicians have an "ethical responsibility to place patients' welfare above the physicians' own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their welfare."

25. According to the policy, physicians acting or refraining from acting in accordance with their conscience cannot be at the expense of their professional obligations to patients.

Existing Laws Protect Patients' and Physicians' Rights

26. Existing federal and state laws protect the rights of physicians by allowing states to take nuanced positions on protecting the conscience rights of health care workers, particularly with regard to abortion, sterilization, and aid-in-dying. The Rule's provisions are not only redundant but will have a chilling effect on the enforcement of and passage of state laws that protect access to health care.

27. California law already properly balances the rights of physicians and their patients. California has extensive protections for health care providers that do not want to participate in abortion for moral, ethical, or religious reasons, while protecting patients who need emergency care. While religiously affiliated hospitals can also exercise their rights under this provision, they must post a notice of their refusal policy so that patients are properly informed about the care they will receive.

28. Current California law ensures that even when a patient cannot receive the services they seek at a certain facility, the patient would at least be afforded the resources, information, and options to receive treatments at an alternative site. The Rule would now "protect" the facility's moral and ethical rights to such an extent that the patient would not even receive the information they need to receive necessary medical care.

29. The Rule would impede the ability of states to craft nuanced solutions that protect the rights of providers and patients in accordance with states' own values.

The Rule's Burden on Physicians

30. Finally, the Rule puts into place new administrative requirements, imposing a significant burden on many physicians who already face an increasing number of administrative burdens under state and federal law.

31. According the Rule, physicians must submit certifications and assurances to HHS, maintain detailed records to establish compliance, cooperate with HHS's enforcement activities, and generally ensure compliance with the new Rule. It also incentivizes physicians to post lengthy required notices on their websites and in conspicuous physical locations and inform patients and employees about the federal health care conscience rights.

32. HHS conducted an analysis of the estimated burdens for the Rule in which it looks at the implementation costs for providers. The estimate includes time for providers to familiarize themselves with the Rule and the cost to hire an attorney to review it. It includes: staff time to review the assurance and certification language and underlying laws amounting to a labor cost of $93.8 million each year for the first five years; review of policies and procedures or other actions to self-assess compliance amounting to a labor cost of $46.9 million each year for the first five

years; and actions to improve compliance taken by some companies such as taking remedial action, updating policies and procedures, and implementing staffing and scheduling practices amounting to $14.8 million for the first year and $1.5 million annually for years two through five. In addition, HHS estimates that the burden on providers will amount to $93.4 million in the first year and $14.1 million annually in years two through five in costs related to the voluntary posting and distribution of notices.

33. These costs are burdensome enough in themselves; this analysis fails to fully consider, moreover, the significant time and resources it takes to continuously implement and enforce such a Rule, cooperate with any HHS enforcement actions, as well as the numerous other administrative and regulatory burdens physicians already face and the degree to which each additional burden detracts from a physician's clinical practice.

34. Excessive administrative tasks imposed on physicians divert time and focus from providing actual care to patients and improving quality and may prevent patients from receiving timely and appropriate care.

35. CMA opposes adding additional burdens to physicians that do nothing to improve the quality of patient care and create yet more regulatory hurdles for the practice of medicine.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on August 29, 2019 in Los Angeles, California.

David H. Aizuss, M.D.
President
California Medical Association