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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14

15 CITY AND COUNTY OF SAN FRANCISCO,
16 Plaintiff,
17 vs.

18 ALEX M. AZAR II, et al.,
19 Defendants.

20 STATE OF CALIFORNIA, by and through
21 ATTORNEY GENERAL XAVIER BECERRA,
22 Plaintiff,
23 vs.

24 ALEX M. AZAR, et al.,
25 Defendants.

26 COUNTY OF SANTA CLARA et al,
27 Plaintiffs,
28 vs.

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

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

**DECLARATION OF JULIE
BURKHART IN SUPPORT OF
PLAINTIFFS' 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
Dept: 12
Judge: Hon. William H. Alsup
Trial Date: None Set
Action Filed: 5/2/2019

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I, Julie Burkhart, declare:

1. I am the Founder and Chief Executive Officer of Trust Women, which operates clinics that provide full-spectrum reproductive healthcare and certain health services to the LGBTQ community.¹ Trust Women operates clinics in Kansas, Oklahoma, and Washington State with the goal of ensuring affordable access to abortion, contraception, LGBTQ healthcare, and other reproductive healthcare services.

2. I submit this Declaration in support of Plaintiffs’ challenge to the final rule promulgated by the Department of Health and Human Services (“HHS”) relating to “Conscience Rights in Health Care” (the “Rule”) and the Rule’s enforcement by the HHS Office of Civil Rights (“OCR”).

3. Trust Women Seattle, located in Seattle, Washington, opened in June 2017 and provides reproductive healthcare, including abortion services, contraceptive care, and general gynecological care, as well as a growing number of services for LGBTQ patients, including the provision of gender-confirmation hormone therapies. The clinic receives Medicaid funding.

4. Trust Women’s mission is to operate clinics that empower our patients to make autonomous decisions about their healthcare in a compassionate and non-judgmental environment. It is essential to Trust Women’s mission that patients be treated with dignity, empathy, and respect, given complete and accurate medical information, and be empowered to make decisions about their health and lives free from judgment or disruptions in their care. Given our structure and the interactions that most staff have with patients and the provision of care, we seek to ensure that all staff treat each patient with dignity and compassion and respect patient autonomy.

5. Trust Women Seattle endeavors to protect our patients from judgment also because we offer services that are stigmatized and under threat in the U.S. We have seen the harm prejudice and judgment impose on our patients, including in their ability to access needed healthcare. For example, many of our patients come to us after being turned away from another

¹ This term refers to lesbian, gay, bisexual, transgender, and queer/questioning people and other sexual and gender minority individuals. ²

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provider.

6. To that end, Trust Women Seattle has a “no turn away” policy. For each patient, the clinic staff work to utilize healthcare benefits fully and raise any additional money from donors and other funds, if necessary. This practice ensures that we see patients regardless of their ability to pay.

7. This policy is largely contingent on the continued availability of state Medicaid reimbursement. If the clinic did not receive this income, it would have to attempt to raise significantly more money from contributors and other sources, which is not presently available, and extremely unlikely to be secured solely through these sources.

8. In 2018, approximately 64% of our abortion patients relied on Medicaid; approximately half of our patients receiving contraception relied on Medicaid; and approximately 60% of our income from providing transgender healthcare came from Medicaid.

9. Only 2 patients in the history of the clinic have been denied Medicaid coverage—one due to residency ineligibility and the other due to income above the threshold. The clinic relies on Medicaid approvals to provide services.

10. I understand that Trust Women Seattle is considered a “subrecipient” under the Rule because it receives Medicaid funding through Washington State, which receives that funding as a direct recipient of HHS Medicaid funding.

11. I understand that the Rule states that “any entity that carries out any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of [HHS],” is prohibited from “requir[ing]” any “individual to perform or assist in the performance of any part of a health service program or research activity if such performance or assistance would be contrary to the individual’s religious beliefs or moral convictions.”

12. I understand that an “entity that carries out any part of a health service program or research activity” funded through HHS includes subrecipients, like Trust Women Seattle, who receive Medicaid reimbursement through state programs under the Rule.

13. Were it to take effect, the Rule would impose immediate compliance and

1 administrative costs. First, in order to ensure compliance, the clinic would need to hire an
2 attorney to review the Rule and our policies. The clinic must also maintain records of its
3 compliance, although the Rule does not specify the form of these records. The Rule states that
4 patient privacy is not grounds to refuse access to OCR when it seeks to inspect records. To the
5 extent that the Rule allows OCR access to unredacted patient information and internal clinic
6 records, it is extremely problematic. Our mission is to protect and empower our
7 patients—opening patient records to inspectors who may be hostile to our mission is antithetical
8 to our central purpose.

9 14. The clinic will also be subject to investigation or inspection by HHS, which I
10 understand can be initiated by HHS based on a complaint or even in the absence of a complaint. I
11 understand that under the Rule, OCR must conduct an investigation “whenever a compliance
12 review, report, complaint, or any other information found by OCR indicates a threatened,
13 potential, or actual failure to comply with Federal healthcare conscience and associated anti-
14 discrimination laws or [the Rule].” The Rule is silent as to whether HHS must inform the clinic of
15 an investigation or follow any particular procedure with respect to these investigations or
16 inspections. The Clinic must cooperate with these measures, although the Rule is also silent as to
17 the specific requirements of such cooperation.

18 15. Unannounced inspections and investigations can be very problematic for a small
19 provider. At Trust Women’s Kansas clinic, for example, we are already subject to significant
20 scrutiny. The Board of Healing Arts in Kansas subpoenas information from our clinic and
21 inspects the clinic without notice. These actions are based on “complaints” that have invariably
22 been baseless and inappropriate allegations. The Department of Sanitation has also preformed
23 unannounced inspections. All of these inspections and the production of information and records
24 require costly advice from local counsel and the commitment of extensive staff resources, which
25 together divert funds and personnel from our primary mission. We are targeted for these
26 burdensome actions simply because we provide abortion.

27 16. Across the country, independent family-planning and other specialized
28 reproductive-healthcare clinics are singled out for excessively burdensome treatment at the local,

1 state, and federal level. As another example, in Oklahoma, Trust Women applied for two types of
2 licenses. The Department of Health sat on the applications for 12 months, and we ultimately
3 needed legal counsel to help get the process moving. To the extent that the Rule will impose such
4 burdens on all independent clinics at the federal level, it is unworkable.

5 17. I understand that if OCR finds a violation of the Rule, OCR may withdraw or even
6 clawback our funding. I understand that under the Rule, Washington State's Medicaid program,
7 as the direct recipient that provides our Medicaid dollars, also bears "primary responsibility" for
8 Trust Women Seattle's compliance with the Rule and stands to lose its HHS funding should Trust
9 Women fail to comply with the Rule, incentivizing the program to discontinue its commitment to
10 funding reproductive healthcare and services to LGBTQ patients. I further understand that under
11 the Rule, the conduct or activity of contractors is "attributable" to the state for the purposes of
12 enforcement or liability under the Weldon Amendment, further disincentivizing continued
13 funding to the clinic. These enforcement mechanisms could shutter our clinics.

14 18. The Rule is unworkable for Trust Women Seattle. To the extent that it would
15 prevent us from continuing to operate our business, force us to change core policies, or incite staff
16 to exercise a unilateral veto over patient access to information and care, it would be extremely
17 harmful for both our patients and our reputation, would cause devastating harm to our business,
18 and would undermine our mission.

19 19. Small medical practices like Trust Women Seattle are specialized. We hire staff
20 with special skills to work in our clinic, including staff sensitive to the experiences of women
21 seeking abortion, contraceptive, and services for LGBTQ patients and medical staff with
22 experience in assisting with gynecological care. Many staff members who work at the clinic have
23 a connection to abortion care, contraception, or LGBTQ services, even if it only involves
24 scheduling or doing bookkeeping or other administrative tasks related to such services. Trust
25 Women Seattle is a small business, and part of our business model is to cross-train clinical and
26 some non-clinical staff to serve multiple roles, many of which touch on providing information
27 about, scheduling, or directly providing abortion, contraception, or transgender care. For example,
28 some employees focus on recording compliance with medical standards, which includes

1 monitoring the provision of abortion care and contraceptive care at the clinic. Others perform
2 medication management, sanitize instruments, and clean operating rooms and laboratories that
3 may be used for general gynecological exams one day, and the provision of contraception or
4 hormone therapy the next.

5 20. Although these activities do not involve the direct provision of care, if an
6 employee were to refuse to participate in precisely these types of services, it would force a change
7 in staffing structure that would be extremely costly and unworkable for the clinic. Likewise, if
8 any employee were to unilaterally turn away a patient away seeking information or services, it
9 would compromise our ability to provide healthcare services to our patients—the crux of both our
10 mission and business. To the extent that we would have to ensure that all employees were not
11 opposed to a new service anytime we add any services to our practice, it would significantly
12 compromise our ability to expand our services and our resources.

13 21. Trust Women Seattle also has an emergency policy requiring all office personnel
14 to be familiar with transfer agreements in the case of an emergency. This policy requires that any
15 staff member assist in an emergency transfer, even if only by calling ahead to the hospital. To the
16 extent that the Rule would prevent us from continuing to enforce this policy, it would be
17 unworkable.

18 22. Were the Rule to prevent the clinic from requiring that staff members interact with
19 all patients without judgment, it would likewise be unworkable. To the extent that we would be
20 prevented from requiring that front-facing employees like receptionists, who do not assist in
21 procedures according to our present understanding, be compassionate and supportive of the
22 independent decision-making of our patients, it would undermine both our business and inhibit
23 our patients' access to healthcare.

24 23. Patients at Trust Women Seattle have conveyed that they have been disrespected
25 and demeaned by other healthcare providers for making independent decisions about their
26 healthcare, including past and present reproductive healthcare choices. Likewise, transgender
27 patients have thanked us for addressing them with their chosen identity because they have been to
28 healthcare providers who have refused to use their chosen pronouns or name based on prejudice.

1 Our core mission is to treat all patients with dignity and compassion and, above all, to respect the
2 autonomous choices of our patients. This mission is our central focus because we understand that
3 many of our patients, and many patients around the country, have been marginalized in seeking
4 needed medical services.

5 24. If, contrary to our practice of empowering patients to make their own decisions,
6 employees were to substitute their opinions about a patient's care for the patient's
7 judgment—essentially exercising a unilateral veto over the patient's receipt of care or
8 information—and the clinic was rendered powerless to protect our patients without risking total
9 loss of funding, we would either be forced to abandon our core mission or close.

10 25. We are concerned that, for example, an employee who supports access to
11 contraception might be opposed to abortion or to abortion after a certain stage in pregnancy.
12 Alternatively, staff who support abortion access may be willing to serve patients seeking
13 reproductive healthcare but be opposed to treating members of the transgender community.
14 Personal opinions can fall on a spectrum, and we are particularly vulnerable because of the
15 breadth of services we provide and the varied communities we serve. We would be in a
16 particularly untenable position if someone comes to assert a refusal after they were hired and
17 staffed.

18 26. Extreme anti-abortion or anti-LGBTQ activists also pose a significant threat to the
19 clinic and our staff, a threat that may become more significant if the clinic is unable to exercise
20 the necessary controls within the clinic to protect patients and patient care. Because of the intense
21 opposition to abortion and the ongoing presence of protestors outside our clinic, we are keenly
22 aware of security threats posed by those who radically oppose abortion. It would be extremely
23 dangerous to our staff and patients to have anyone on staff who would pose such a threat, and, to
24 the extent that the Rule renders us powerless to prevent it, we would be forced to either assume
25 that risk or risk total loss of and even clawback of federal funding. Further, patients and their
26 communities trust us to be a safe place for them to receive nonjudgmental care and information.
27 We would lose that trust and potentially sacrifice the safety of everyone in the clinic were we to
28 compromise our mission in response to the Rule.⁷

1 27. To the extent the Rule would require Trust Women to change our cross-training
2 and staffing policies or abandon our emergency policies, it would be impossible for Trust Women
3 to continue providing abortion, contraception, and LGBTQ care.

4 28. It is unlikely, if not impossible, for the clinic to qualify for enough alternative
5 funding from non-Medicaid sources to survive. At present levels, we could not survive.

6 29. Whether we continue to operate while constraining our provision of abortion,
7 contraception, or LGBTQ services, or instead close altogether, our patients will suffer. Many of
8 our patients rely on us for abortion, contraception, and transgender care that they cannot access
9 anywhere else.

10 30. Even if we could continue operating by, for example, incorporating another type of
11 practice to supplement the clinic's income, we would have to lay off staff and sacrifice our core
12 mission to provide reproductive healthcare and services to LGBTQ patients. Further, that could
13 not be achieved without fundamentally altering our business model and finding a new location,
14 hiring additional specialized staff and physicians, purchasing new equipment, and retaining
15 specialized administrative support. In short, incorporating another practice to stay open would
16 completely undermine the mission and purpose of our clinic.

17 31. If we do close, it will be very difficult to reopen. Opening any kind of medical
18 practice is complicated. It requires licensing, finding appropriate space, new equipment, supplies,
19 insurance, and credentialing. Reopening our Seattle clinic after a closure would likely cost in
20 excess of \$2,000,000 and, in Seattle, only 7% of downtown real estate is available for rent at all.

21 32. The Rule thus creates an impossible choice—either fundamentally change the way
22 we operate, potentially compromising our core mission to provide compassionate reproductive
23 healthcare and care to the LGBTQ community, or risk the loss of all funding and closure.

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

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Executed on 3 Sept. 2019 in Wichita, Kansas,



Julie Burkhart
Founder and CEO, Trust Women