UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

No. 19 Civ. 4676 (PAE)
No. 19 Civ. 5433 (PAE)
No. 19 Civ. 5435 (PAE)

UNOPPOSED MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE COURT'S ORDER, DATED JULY 16, 2019

Fifteen cities and counties, by and through undersigned counsel, hereby submit this Unopposed Motion for Leave to File an Amicus Curiae Brief in support of Plaintiffs' Motion for Summary Judgment pursuant to the Court's order, dated July 16, 2019, allowing amicus briefs in support of Plaintiffs, provided such briefs are filed on or before September 12, 2109. ECF D.E. 121.

In support of this Motion, the local governments state as follows: Amici are local governments across the United States—including Columbus, OH; Oakland, CA; Baltimore, MD; Sacramento, CA; Holyoke, MA; Gary, IN; Honolulu, HI; and Houston, TX—responsible for the health and wellbeing of their communities. Combined, Amici represent nearly 12 million people. Amici vary in size and are situated in regions across the country. They run public health departments, subsidize and fund public health centers, and operate specialty clinics, including clinics for alcohol and drug abuse prevention, family planning, immunizations, sexual health, HIV/STD treatment, and women's health and wellness. They also provide emergency medical services.

Amici Curiae Local Governments will be significantly harmed if the United States Department of Health and Human Services' (HHS) "conscience" rule—*Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified as 45 C.F.R. pt. 88) (the "Final Rule")—takes effect. Because cities, counties, and townships often serve as the healthcare provider of last resort for the most vulnerable segments of their populations, Amici and our vulnerable residents will bear the negative impacts of the Final Rule. By HHS's own estimate, the Final Rule will impact 613,000 hospitals, health clinics, doctors' offices, and nonprofits. When employees of these providers are

enabled to refuse treatment to patients, local governments and their most vulnerable constituents will bear the burden.

The Final Rule will strain already depleted local budgets and deteriorate healthcare outcomes for patients. Further, because the Final Rule applies to emergency transportation personnel, it will quite literally put the lives of our residents—whose care, or lack thereof, may be left to the religious or moral objections of the particular responders who arrive on the scene—at risk.

Amici, therefore, respectfully submit this brief supporting Plaintiffs' motion for summary judgment and opposing the Final Rule not only because it violates statutory and constitutional provisions, but also because it will cause substantial, imminent, and irreparable harm to Amici and their citizens.

CONCLUSION

For the foregoing reasons, *amici curiae* local governments respectfully request that the Court grant their unopposed motion for leave to file this amicus brief and order that the brief be filed.

Dated: September 12, 2019

Respectfully submitted,

By: */s/ Peter M. Skinner*

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BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTERESTS OF *AMICI CURIAE*

Amici are local governments across the United States—including Columbus, Ohio, Oakland, California, and 13 other cities and counties—who are responsible for the health and wellbeing of their communities.[1] Combined, Amici represent over 12 million people. Amici vary in size and are situated in regions across the country with different political realities. They run public health departments, subsidize and fund public health centers, and operate specialty clinics, including clinics for alcohol and drug abuse prevention, family planning, immunizations, sexual health, HIV/STD treatment, and women's health and wellness. They also provide emergency medical services.

Amici will be significantly harmed if the U.S. Department of Health and Human Services' (HHS) "conscience" rule—*Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170 (May 21, 2019) (to be codified as 45 C.F.R. pt. 88) (the "Final Rule")—takes effect. Because cities, counties, and townships often serve as the healthcare provider of last resort for the most vulnerable segments of their populations, Amici and our vulnerable residents will bear the negative impacts of this Final Rule. This new federally mandated requirement will leave Amici with a Hobson's choice: allow their employees to circumvent the intent of Amici's local antidiscrimination policies by refusing service to residents in need of medical care, or risk forfeiting hundreds of millions of dollars in federal funding. By HHS's own estimate, 613,000 hospitals, health clinics, doctors' offices, and nonprofits will be impacted by the Final Rule. When employees of these providers are enabled to refuse treatment to patients, local governments and their most vulnerable constituents will bear the burden.

[1] Amici are: the City of Columbus, Ohio; the City of Oakland, California; the City of Austin, Texas; the City of Baltimore, Maryland; the City of Dayton, Ohio; the City of Gary, Indiana; the City of Holyoke, Massachusetts; the City and County of Honolulu, Hawaii; the City of Houston, Texas; the City of Los Angeles, California; the City of Sacramento, California; the City of Saint Paul, Minnesota; the City of Seattle, Washington; the City of Somerville, Massachusetts; and the City of Stockton, California.

The Final Rule will strain already depleted local budgets and deteriorate healthcare outcomes for patients. Further, because the Final Rule applies to emergency transportation personnel, it will quite literally put the lives of our residents—whose care, or lack thereof, may be left to the religious or moral objections of the particular responders who arrive on the scene—at risk. Amici, therefore, oppose the Final Rule and support Plaintiffs' motion for summary judgment not only because the Final Rule is against statutory and constitutional authority, but also because it will cause substantial, imminent, and irreparable harm to Amici and their citizens.

INTRODUCTION

Local governments play an important role in the American healthcare system. Across the United States, there are roughly 2,794 local health departments.[2] Local governments also run community hospitals[3] and fund community health centers and clinics that provide free or low-cost healthcare to low-income and medically underserved communities.[4] More than 1,400 government-funded or -operated community health centers in the United States provide care to over 25 million Americans every year, including one in ten American children and one in three Americans living in poverty.[5] Emergency life-saving care is also provided by local governments via fire departments and paramedics.

These local health departments, hospitals, clinics, emergency medical services providers, and healthcare centers offer crucial services to their residents. In terms of preventive care, they screen for communicable diseases, such as tuberculosis, HIV/AIDS, and Hepatitis, as well as

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[2] Eileen Salinsky, *Government Public Health: An Overview of State and Local Public Health Agencies*, NAT'L HEALTH POL'Y F., Aug. 18, 2010, at 1, 10, https://www.nhpf.org/library/background-papers/BP77_GovPublicHealth_08-18-2010.pdf (last accessed Sept. 12, 2019). .

[3] *Fast Facts on U.S. Hospitals, 2019*, AM. HOSP. ASS'N (Jan. 2019) (hereinafter "*Fast Facts*"), https://www.aha.org/statistics/fast-facts-us-hospitals#community (last accessed Sept. 12, 2019)..

[4] Tom Price, *Here's What's So Great About Community Health Centers*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Aug. 18, 2017), https://www.hhs.gov/blog/2017/08/18/heres-whats-so-great-about-community-health-centers.html (last accessed Sept. 12, 2019). .

[5] *See id.*

provide vital adult and childhood immunizations.[6] For instance, 98% of county health departments provide childhood immunizations.[7] Moreover, most local governments provide treatment for communicable diseases like tuberculosis and sexually transmitted infections (STIs).[8] Some local governments also provide maternal and child health services,[9] family planning services including contraception and abortion,[10] developmental screenings,[11] and nutrition counseling services for women, infants, and children.[12] Finally, local public health agencies offer population-based services, including influenza pandemic planning, communicable disease surveillance, restaurant inspections and licensing, environmental health services,[13] mental and behavioral services, and substance abuse services.[14]

Local governments act as the "healthcare safety net" for their residents, particularly for the uninsured and underinsured and those patients turned away from private healthcare institutions because they are unable to pay.[15] Thus, cities, counties, and special-purpose health or hospital districts "bear a large share of the direct financing of public hospital and clinic

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[6] Salinsky, *supra* note 2 at 15.
[7] INST. OF MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 110 (2003) (hereinafter "FUTURE OF THE PUBLIC'S HEALTH"), at 110, https://www.nap.edu/read/10548/chapter/5#111 (last accessed Sept. 12, 2019).
[8] Salinsky, *supra* note 2 at 15.
[9] INST. OF MED., U.S. COMMITTEE ON THE CONSEQUENCES OF UNINSURANCE, A SHARED DESTINY: COMMUNITY EFFECTS OF UNINSURANCE 69 (2003) (hereinafter "COMMUNITY EFFECTS OF UNINSURANCE"), https://www.ncbi.nlm.nih.gov/books/NBK221329/pdf/Bookshelf_NBK221329.pdf (last accessed Sept. 12, 2019).
[10] *See, e,g., Publicly Funded Family Planning Services in the United States*, GUTTMACHER INST. (Sept. 2016), https://www.guttmacher.org/sites/default/files/factsheet/fb_contraceptive_serv_0.pdf (last accessed Sept. 12, 2019).
[11] Salinsky, *supra* note 2 at 15.
[12] Drew E. Altman & Douglas H. Morgan, *The Role of State and Local Government in Health*, HEALTH AFFAIRS (Jan. 1, 1983), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2.4.7(last accessed Sept. 12, 2019).
[13] *Id.*; *see also* FUTURE OF THE PUBLIC'S HEALTH, *supra* note 7 at 111.
[14] FUTURE OF THE PUBLIC'S HEALTH, *supra* note 7 at 111.
[15] COMMUNITY EFFECTS OF UNINSURANCE, https://www.ncbi.nlm.nih.gov/books/NBK221329/pdf/Bookshelf_NBK221329.pdf

services."[16] Across the country, emergency medical services are also a vital component of the healthcare safety net.[17]

To help serve low-income patients and increase their capacity to provide services, local hospitals and healthcare centers also receive funding from Medicare, Medicaid, and other HHS programs.[18] Notably, for some of these funding sources, the number of patients treated and the amount of care provided are not taken into account when allocating funds.[19] And when local governments do receive federal funds, they are often statutorily mandated to provide services to all residents and vulnerable populations—such as individuals with HIV.[20]

ARGUMENT

I. THE FINAL RULE WILL FORCE LOCAL GOVERNMENTS TO BETRAY THE INTENT OF THEIR OWN NON-DISCRIMINATION POLICIES OR POTENTIALLY FORFEIT HUNDREDS OF MILLIONS IN FEDERAL FUNDING

To provide equal access and opportunities to their citizens, Amici have all enacted a variety of non-discrimination policies and laws.[21] Most apply to employment, housing, and public accommodations, including hospitals. Some also specifically address how healthcare will be provided by Amici to their patients in a non-discriminatory fashion. For example, Columbus Public Health maintains a "Client Non-Discrimination Policy" that requires that employees

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[16] *See id.* at 128.
[17] *See, e.g.*, *The Uninsured: Access to Medical Care Fact Sheet*, Am. College of Emergency Physicians (2016), http://newsroom.acep.org/2009-01-04-the-uninsured-access-to-medical-care-fact-sheet ("Emergency care is the safety net of the nation's health care system, caring for everyone, regardless of ability to pay.") (last accessed Sept. 12, 2019).
[18] *See id.* at 61.
[19] COMMUNITY EFFECTS OF UNINSURANCE, *supra* note 9 at 61.
[20] *See, e.g.*, Public Health Services Act, § 330, 42 U.S.C. §§ 254b (requiring federally-qualified health centers to serve all residents); Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990, PUB. L. NO. 101-381, 104 STAT. 576 (1990) (requiring providers to offer HIV/AIDS medications and healthcare services to poor patients who need them but cannot otherwise access them).
[21] *See, e.g.*, GARY, IND., MUN. CODE OF THE CITY OF GARY, IND. §§ 26-19, 139 (2010); OAKLAND, CAL., OAKLAND MUN. CODE ch. 9.40, 9.44 (2019); COLUMBUS, OHIO, COLUMBUS CITY CODES §§ 2331.04, 3906.02 (2019); BALT., MD., BALT. CITY CODE art. 4, §§ 1-1(f)(1), 3-4.

"serve all clients . . . without malice or bias on the basis of race, ethnicity, sex, sexual orientation, gender identity or expression, color, religion, ancestry, national origin, age, disability, familial status, or military status."[22] Similarly, Baltimore City Health Department clinics display notices to patients that they will receive care without discrimination.[23] As local governments, Amici are the unit of government closest to their residents, and these ordinances were oftentimes passed in direct response to local findings and harms.[24]

The Final Rule demands that Amici make an impossible choice. If Amici do not permit discrimination in the provision of local government services, we may risk losing critical federal funding.[25] Although styled as a choice by HHS, it is really no choice at all.[26] If Amici do not permit discrimination, the loss of federal funds will inevitably and necessarily force Amici to close key services, eliminate personnel, and compromise the health and safety of their residents. But following and implementing the Final Rule and permitting discrimination will cause a distinct and particularly insidious harm by (1) placing the weight of government behind the discrimination, and (2) disproportionately impacting low-income patients who rely on local governments for healthcare services. As a result, the Final Rule leaves Amici trapped between two untenable options.

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[22] *About Columbus Health*, THE CITY OF COLUMBUS, https://www.columbus.gov/publichealth/About/About-Columbus-Public-Health/ (last accessed Sept. 12, 2019).

[23] BALT., MD., BALT. CITY CODE art. 4, §§ 1-1(f)(1), 3-4.

[24] *See, e.g.*, OAKLAND, CAL., OAKLAND MUN. CODE § 9.40.020 (Findings) ("The 1985 Alameda County AIDS Response Plan reported that AIDS cases in Alameda County are doubling every nine to twelve (12) months, and that for every case of AIDS there exist two or three individuals with ARC or other related, nonfatal illnesses. The report states that as of June 14, 1985, there were one hundred thirteen (113) diagnosed AIDS cases in Alameda County, and estimates that by the end of 1989 there could be nearly eight thousand (8,000) diagnosed AIDS cases in the county. The report indicates that as of June 14, 1985, there were sixty-seven (67) diagnosed AIDS cases in Oakland.").

[25] Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23223, 23269, 23271-72 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).

[26] As with the threatened loss of over 10 percent of a state's budget in *Sebelius*, this is not mere encouragement, but rather will place a gun to Amici's heads. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 581 (2012)).

The Final Rule attacks Amici's non-discrimination ordinances and policies in two ways. First, it hampers Amici's ability to manage their safety net healthcare services fairly, predictably, and effectively. The Final Rule does not allow local governments to ask, prior to hiring, whether a prospective employee will object to performing essential job functions, so it is possible that Amici will not be aware, until the moment an emergency occurs, that an employee objects to performing an essential function.[27] The Final Rule also bars Amici from reassigning an employee who refuses to perform a health service unless she voluntarily accepts the accommodation.[28] For example, if a local health department were preparing to respond to an outbreak of measles, and had an employee unwilling to administer that vaccine, it would prevent the local health department from responding to a Class A Infectious Disease Outbreak.

The Final Rule will amplify staffing issues that already uniquely affect public hospital and health clinics, who have fewer dedicated staff than private facilities. For example, only 28.5% of public hospitals have a dedicated in-patient physician who works exclusively in a hospital.[29] Rural public hospitals have even fewer healthcare providers on staff when compared to metropolitan public hospitals.[30] Thus, if employees of public healthcare systems—particularly rural ones—opt out of providing certain services as the Final Rule allows, another qualified employee may be unavailable to help patients, even in emergency circumstances.

Second, and more coercively, the Final Rule conditions the receipt of federal funds on compliance with its provisions and authorizes HHS to withhold, deny, or suspend federal funds if Amici fail to comply.[31] If Amici adhere to their current non-discrimination policies, this may be deemed a "failure to comply" and could amount to hundreds of millions of dollars in lost funding

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[27] 84 Fed. Reg. at 23263.
[28] *Id.*
[29] Taressa Fraze et al., *Public Hospitals in the United States, 2008*, AGENCY FOR HEALTHCARE RES. & QUALITY, Sept. 2010, at 2, https://www.hcup-us.ahrq.gov/reports/statbriefs/sb95.pdf (compared with 50.3% of private non-profit hospitals who have hospitalist on staff) (last accessed Sept. 12, 2019).
[30] *See id.*
[31] 84 Fed. Reg. at 23269, 23271-72.

for Amici. For example, approximately half of the funding for Baltimore City Health Department's clinics and 75% of funding for the Baltimore City Fire Department's Emergency Medical Services comes from federal funds that would be at risk under the Final Rule. Similarly, HHS funding for Columbus accounts for over $12 million dollars of Columbus Public Health's budget and funds 100 city jobs. Moreover, it is unclear under the Final Rule whether only HHS funds are at stake or whether federal funds from the Department of Labor, Department of Education, Medicare, and Medicaid may also be withheld if local governments do not comply.[32] The loss of funding from any, let alone all, of these sources would be cataclysmic for a wide swath of services provided by Amici and other local governments.

II. THE FINAL RULE WILL BURDEN LOCAL GOVERNMENTS AND HARM THEIR RESIDENTS

If HHS is allowed to enforce the Final Rule, Amici will be uncertain as to whether medical providers throughout the country, including Amici's providers, will refuse to treat patients,[33] and may not direct those patients to needed care.[34] Those turned away will invariably

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[32] *See id.* at 23272 ("compliance . . . may be effected by . . . temporarily withholding Federal financial assistance or other Federal funds, in whole or in part, pending correction of the deficiency); *id.* at 23172 (implicating funds made available in Labor, HHS, and Education appropriations); *see also Factsheet: Final Conscience Regulation*, DEP'T OF HEALTH & HUM. SERVS. (May 2, 2019) (hereinafter "*HHS Factsheet*"), https://www.hhs.gov/sites/default/files/final-conscience-rule-factsheet.pdf (last accessed Sept. 12, 2019).

[33] The non-state and local government entities covered by the Rule include HHS, private health providers that receive HHS funds, universities and schools that provide health care training, and individuals and entities that receive taxpayer dollars from HHS or programs administered by HHS, such as Medicare, Medicaid, the Affordable Care Act, and the Public Health Services Act. *See HHS Factsheet*, *supra* note 33. Some estimate this will impact over 613,000 hospitals, health clinics, doctors' offices, and nonprofits. *See* Complaint for Declaratory and Injunctive Relief at 5, *Planned Parenthood Fed'n of Am., Inc. v. Azar*, No. 1:19-cv-05433 (S.D.N.Y. June 11, 2019), https://www.courthousenews.com/wp-content/uploads/2019/06/PlannedParenthood.pdf (last accessed Sept. 12, 2019).

[34] 84 Fed. Reg. at 23263 (defining "assist in the performance" to include "counseling, referral, training, or otherwise making arrangements"). Unfortunately discrimination in the provision of healthcare is anything but hypothetical. For example, one transgender woman was told to "[g]o back to California" when she sought treatment in Tulsa, suffering from terrible pain due to complications from surgery. Laura Arrowsmith, *When Doctors Refuse to See Transgender Patients, the Consequences Can Be Dire*, WASH. POST (Nov. 26, 2017),

look to Amici for their healthcare needs and add stress to an already strained system. Some of those in need simply will not receive the care they require. This will lead to worse health outcomes for patients and have significant negative effects on counties and municipalities.

If they are denied care by other healthcare providers under the Final Rule, residents will naturally rely on Amici, the providers of last resort for their communities, for routine healthcare and emergency treatment. Of the 5,262 community hospitals in the United States, 972 are run by state and local governments.[35] As a result, an uptick in the number of patients funneled to local hospitals will significantly impact their ability to provide care to existing and new patients. Local government clinics and health departments also will need to step in if private doctors' offices and clinics covered by the Final Rule begin turning away patients. More patients, even those with insurance, will consume appointment times, vaccination doses, and resources allocated for other uses.[36] For example, if a pediatricians' office employs a scheduler who morally objects to vaccinations, and so refuses to schedule those appointments, parents and caregivers could be funneled to public options. Adding patients to a system when those patients should be receiving services outside of the system will harm Amici's citizens, particularly those most in need.

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https://www.washingtonpost.com/national/health-science/when-doctors-refuse-to-see-transgender-patients-the-consequences-can-be-dire/2017/11/24/d063b01c-c960-11e7-8321-481fd63f174d_story.html (last accessed Sept. 12, 2019); *see also* LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf (finding that over half of lesbian, gay, or bisexual respondents, and 70 percent of transgender respondents, had been refused care or subjected to discriminatory or abusive treatment in the course of seeking medical care) (last accessed Sept. 12, 2019).

[35] *Fast Facts*, *supra* note 3.

[36] This increased stress on Amici's healthcare systems would be occurring at the same time when the number of uninsured in the United States is rising. *See* Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028* (May 2018).

This harm to the public is not speculative.[37] The Final Rule by its terms allows any healthcare provider, whether an entity or an individual working for one, to deny healthcare to patients on the basis of "religious, moral, ethical, or other reasons" without justification or notice.[38] This could include denying services for lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) individuals, individuals seeking reproductive healthcare, the elderly, those struggling with substance abuse, and other vulnerable populations.

The likely effect on local LGBTQ communities provides a concrete illustration of the disastrous impact the Final Rule could have on Amici's residents. Per the express terms of the Final Rule, gay and bisexual men can be denied healthcare services. But LGBTQ individuals already face significant discrimination when accessing healthcare services,[39] so the Final Rule will exacerbate an already acute problem. Although gay and bisexual men make up approximately 2% of the U.S. population, they account for 71% of new HIV infections and represent 61% of those currently living with HIV.[40] Early detection and treatment as soon as one is diagnosed are critical in helping reduce mortality rates and further transmission.[41]

To the extent LGBTQ people, and particularly gay and bisexual men, are denied services, there necessarily will be either (1) a harmful delay in the detection and treatment of HIV patients, or (2) more people living with HIV who do not know it.[42] Healthcare workers will be

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[37] *See, e.g.*, Association of American Medical Colleges, Comment Letter on Proposed Rule to Protect Statutory Conscience Rights in Healthcare (Mar. 26, 2018), https://www.regulations.gov/document?D=HHS-OCR-2018-0002-67592 (explaining that the Rule, as proposed, will harm lower-income Americans, racial and ethnic minorities, the LGBTQ community, and patients in rural areas) (last accessed Sept. 12, 2019).

[38] 84 Fed. Reg. at 23263.

[39] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CENTER FOR AMERICAN PROGRESS (Jan. 18, 2018), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/(last accessed Sept. 12, 2019).

[40] *The HIV/AIDS Epidemic in the United States: The Basics*, HENRY J. KAISER FAM. FOUND. (Mar. 25, 2019), https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/#endnote_link_391348-59 (last accessed Sept. 12, 2019).

[41] *See id.*

[42] *Id.* (the CDC estimates that "as of 2016 15% of those infected with HIV are unaware they are infected, and 38% infections resulted from individuals who did not know they had HIV").

entitled to refuse to perform specific services for LGBTQ patients, such as screening for STIs, fertility treatment for lesbian couples, and providing hormone therapy for transgender individuals. Consequently, the Final Rule is likely to lead to LGBTQ patients hiding or failing to disclose their identity or medical history for fear of discrimination, resulting in incomplete care.

Along with the obvious harms incomplete care will inflict on LGBTQ individuals, creating an environment where people do not feel safe sharing their sexual identity and medical history will also have serious public health impacts. For example, during a disease outbreak the Center for Disease Control may identify men who have sex with men as a high risk group making them eligible for a free "outbreak vaccine." However, if men in this group are afraid to disclose their identity due to discrimination they may not receive necessary medical care. This will put them at greater risk and hamper local government's ability to contain and mitigate diseases. Thus, the Final Rule will create an environment of discrimination that will significantly harm each LGBTQ person and may have a deleterious ripple effect for all individuals in a city or county.

In addition, LGBTQ individuals denied care elsewhere will turn to the healthcare services provided by Amici. For example, cities and counties often work to provide services to people living with HIV through Part A grants from the Ryan White HIV/AIDS Treatment Extension Act of 2009.[43] Cities like Columbus also provide HIV testing through their sexual health clinics. But local governments have not had time to prepare their budgets or their facilities for additional patients. Further, local governments who receive Ryan White funding are left in a state of perpetual contradiction because they are both legally mandated to provide services to HIV patients and legally required by the Final Rule to allow staff to refuse to care for such patients.

In the short-term, all local services, including those services for people living with HIV, could be overrun and lead to gaps in healthcare. Key safety net services will be underfunded or

[43] *Part A: Grants to Eligible Metropolitan and Transitional Areas*, HEALTH RESOURCES & SERVS. ADMIN., https://hab.hrsa.gov/about-ryan-white-hivaids-program/part-a-grants-emerging-metro-transitional-areas (last accessed Sept. 12, 2019).

funds from other local services will need to be diverted to make up shortfalls, while Amici already lack the resources to successfully meet the needs of their residents.[44] For those individuals who are denied private services and do not turn to services Amici provide, they will undeniably suffer worse health outcomes. Amici will also incur the downstream costs of a population that is sicker and less productive.

If local residents are denied or delayed in receiving services by other healthcare providers, Amici will be further overwhelmed with patients, have unhealthier populations, and face higher costs to their healthcare systems.

III. THE FINAL RULE ENDANGERS THE PUBLIC BY ALLOWING EMTS AND PARAMEDICS TO REFUSE TO PROVIDE CARE

The Final Rule's applicability to both emergency responders and emergency situations will harm Amici and their residents. It will reduce the quality of emergency care available in Amici's jurisdictions, prevent Emergency Medical Services from providing the necessary speed of care, and not only endanger reproductive and LGBTQ healthcare, but disproportionately harm Amici's low-income and vulnerable populations. Many local governments offer emergency transportation and care, which may be provided via ambulance services or under the auspices of Emergency Medical Services (EMS), often run via local fire departments.[45] Fire department Emergency Medical Technicians (EMTs) and paramedics are typically first on the scene in response to EMS calls, and they provide life-saving care to individuals suffering from medical

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[44] *See, e.g.*, INST. OF MED., COMMITTEE ON PUBLIC HEALTH STRATEGIES TO IMPROVE HEALTH, FOR THE PUBLIC'S HEALTH: INVESTING IN A HEALTHIER FUTURE, Ch. 4, Funding Sources and Structures to Build Public Health (April 10, 2010), https://www.ncbi.nlm.nih.gov/books/NBK201025/ ("Public health departments have a history of chronic underfunding and unstable budgets.") (last accessed Sept. 12, 2019). As one example, Ohio requires counties to perform tuberculosis control, but does not provide designated funding for them to do so. Many counties are forced to contract with other counties to comply with this mandate.

[45] *See, e.g.*, *Fire Department, Medical Services Division*, CITY OF OAKLAND CALIFORNIA, http://www2.oaklandnet.com/government/o/OFD/o/EmergencyMedicalServices/index.htm (last visited June 21, 2019); *Division of Fire*, City of Columbus, https://www.columbus.gov/public-safety/fire/reports/EMS-Reports/ (last accessed Sept. 12, 2019).

emergencies.[46] If local governments are asked to choose between vital federal funding and enabling discrimination, residents' lives will be endangered.

The Final Rule explicitly includes EMTs and paramedics as individuals who may decline to provide healthcare services based on religious objections.[47] It also fails to provide any exception for patients in life-threatening or critical condition, which is contrary to EMTALA,[48] and will literally endanger the lives of patients who rely on EMTs and paramedics to respond rapidly and appropriately to emergencies. For example, under the Final Rule, Amici are concerned that an emergency responder could refuse to provide a pregnant person suffering from a life-threatening miscarriage with the drugs that would induce a life-saving abortion.[49] Similarly, an ambulance driver could refuse to transport a patient with an ectopic pregnancy to the hospital, anticipating an abortion to be the course of treatment.[50] An EMT could even refuse to provide care to an individual in medical distress who is perceived to be LGBTQ, based purely on that real—or imagined—identity.

As Amici know well, fire personnel and EMTs must be dispatched urgently after a 911 call is received, and care and treatment must often be administered as soon as possible upon arrival. Speed is of the essence in providing emergency medical treatment, when even a

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[46] *See, e.g.*, CITY OF OAKLAND, PROPOSED POLICY BUDGET: FISCAL YEAR 2019-2021 26 (2019), https://cao-94612.s3.amazonaws.com/documents/FY-2019-21-Proposed-Budget-Book-WEB-VERSION.pdf (last accessed Sept. 12, 2019).

[47] 84 Fed. Reg. at 23188 ("EMTs and paramedics are treated like other health care professionals under this definition. . . . EMTs and paramedics are trained medical professionals, not mere 'drivers.' If commenters contend that driving a patient to a procedure should never be construed to be assisting in the performance of a procedure, the Department disagrees and believes it would depend on the facts and circumstances of each case. For example, the Department believes driving a person to a hospital or clinic for a scheduled abortion could constitute 'assisting in the performance of' an abortion, as would physically delivering drugs for inducing abortion.").

[48] The Emergency Medical Treatment and Active Labor Act (EMTALA) requires hospitals with emergency departments to screen and offer emergency medical treatment and stabilization regardless of patients' inability to pay. 42 U.S.C. § 1395dd.

[49] "[T]he Department believes driving a person to a hospital or clinic for a scheduled abortion could constitute 'assisting in the performance of' an abortion, as would physically delivering drugs for inducing abortion." 84 Fed. Reg. at 23188.

[50] *See, e.g., id.*

minute's delay in some life-threatening cases can have a measurable impact on mortality rates.[51] If EMTs and paramedics are able to refuse to provide care when they arrive at the scene, it will be costly—if not impossible[52]—for localities to provide adequate alternative care to acutely suffering patients. Further, to enable employees to endanger community-members' lives in this way would be an abdication of local governments' duty to provide for their citizens' health and welfare. For example, many regions of the United States are currently experiencing an opioid crisis. Under the broad terms of this rule, Amici fear that an EMT who religiously or morally objects may refuse to administer naloxone to an individual overdosing on an opioid, reducing the chance of survival.[53]

In addition to the material and financial harms this Final Rule will cause to Amici and other local governments, it will also discourage patients from seeking appropriate care in a timely manner, further increasing the burden on emergency services provided by local governments. An individual seeking contraception could be deterred for fear of being turned away by a Final Rule-invoking doctor or pharmacist. Such patients would be endangered and more likely to need costly emergency care as a result of unwanted pregnancy or medical complications. An LGBTQ individual, similarly, could delay seeking both regular and emergency treatment for fear of discriminatory refusals by Final Rule-invoking healthcare professionals. This chilling effect will compound the negative consequences of the Final Rule and increase reliance on Amici's safety-net care and emergency services.

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[51] *See, e.g.*, James P. Byrne et al., *Association Between Emergency Medical Service Response Time and Motor Vehicle Crash Mortality in the United States*, J. Am. Med. Assoc. E1 (2019).
[52] When fire personnel respond to an emergency, they can be dispatched to the scene and may not learn until arrival what type of medical emergency they are called to address. If an EMT or paramedic were to object to providing care to the patient at the scene, that patient would have no other recourse to receive the urgent and potentially life-saving care EMS is designed to provide.
[53] *See, e.g.*, Steven Reinberg, *Many Drugstores Won't Dispense Opioid Antidote as Required*, Medical Xpress (Nov. 13, 2018), https://medicalxpress.com/news/2018-11-drugstores-wont-opioid-antidote-required.html (describing some individuals' moral objection to providing naloxone to individuals with substance abuse disorders) (last accessed Sept. 12, 2019).

Not only will the Final Rule have a devastating impact on local governments' ability to provide life-saving emergency reproductive and LGBTQ healthcare, it will also disproportionately harm the low-income and marginalized populations who are more likely to use emergency services. Individuals with less access to routine medical care are more likely to utilize EMS.[54] Perhaps because ambulance care and transportation to the hospital is overwhelmingly offered without requiring proof of insurance or ability to pay (unlike nearly all other medical care), lower-income and uninsured patients use EMS at a higher rate than those with other forms of insurance.[55] In addition, low-income Medicaid recipients are more likely to rely on ambulance transportation than other groups.[56] In metropolitan areas, uninsured ambulance use is even higher than in rural areas.[57] The Final Rule therefore will harm those of Amici's residents least able to withstand additional threats to their health and wellbeing.

The Final Rule invites providers of emergency care to discriminate against the distressed patients they are duty-bound to treat, and attempts to undermine local governments' antidiscrimination policies and laws in the provision of healthcare with the threat of funding withdrawal. This proposal will have life-and-death consequences for Amici's residents, who will suffer from the reduced availability and efficacy of emergency services.

CONCLUSION

The Final Rule violates statutory and constitutional provisions. If it takes effect, it will likely force Amici and other local governments across the United States to discriminate against their own citizens or face the loss of hundreds of millions of federal dollars, increase the number

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[54] Zachary F. Meisel et al., *Variations in Ambulance Use in the United States: the Role of Health Insurance*, 18 Academic Emergency Medicine 1036, 1042 (2011), https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1553-2712.2011.01163.x (last accessed Sept. 12, 2019 .

[55] *Id.*

[56] Benjamin T. Squire, *At-Risk Populations and the Critically Ill Rely Disproportionately on Ambulance Transport to Emergency Departments*, 56 Annals Emergency Medicine 341 (2010), https://www.annemergmed.com/article/S0196-0644(10)00384-7/fulltext (last accessed Sept. 12, 2019) .

[57] Meisel, *supra* note 54 at 1041.

of patients accessing their healthcare systems, and make their residents less healthy. Further, Amici's residents will face discrimination and suffer harm from the reduction in services the loss of funding would cause to safety-net hospitals, emergency services, and private healthcare options. For the foregoing reasons, Amici support Plaintiffs' motion for summary judgment and opposition to Defendants' motion for summary judgment prohibiting Defendants from enforcing the Final Rule.

Dated: September 12, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

No. 19 Civ. 4676 (PAE)
No. 19 Civ. 5433 (PAE)
No. 19 Civ. 5435 (PAE)

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE COURT'S ORDER, DATED JULY 16, 2019

[PROPOSED] ORDER

On September 12, 2019, fifteen *amici curiae* local governments moved for leave to file a brief in support of Plaintiffs' motion for summary judgment in these actions. Having considered the papers and pleadings on file, the Court GRANTS the motion and ORDERS that the brief be filed.

IT IS SO ORDERED

Dated: _____, 2019

_____
HONORABLE PAUL A. ENGELMAYER
United States District Court, Southern District of New York