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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR, II; and UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN
SERVICES,

Defendants.

No. 2:19-cv-00183-SAB

UNOPPOSED MOTION FOR
LEAVE TO FILE BRIEF OF
LEADING MEDICAL
ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF
PLAINTIFF'S CROSS-
MOTION FOR SUMMARY
JUDGMENT AND
OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS, OR, IN THE
ALTERNATIVE, MOTION
FOR SUMMARY JUDGMENT

11/7/2019
With Oral Argument: 10:00 a.m.
Spokane Courtroom 755

1 The American College of Obstetricians and Gynecologists, the
2 American Medical Association, the American Academy of Pediatrics, the
3 American College of Emergency Physicians, the American College of
4 Osteopathic Obstetricians and Gynecologists, the American Society for
5 Reproductive Medicine, the National Association of Nurse Practitioners in
6 Women’s Health, the Society for Maternal-Fetal Medicine, the American
7 College of Nurse-Midwives, the North American Society for Pediatric and
8 Adolescent Gynecology, the American Muslim Health Professionals, Kaiser
9 Permanente, the Washington State Medical Association, and the World
10 Professional Association for Transgender Health, (collectively, “*amici*”),
11 respectfully move this Court for an order (1) granting the proposed *amici*
12 leave to submit the attached proposed brief in the above-captioned case;
13 (2) accepting for consideration the proposed brief that has been filed
14 electronically and duly served; and (3) granting such other and further relief
15 as this Court deems just and proper. The parties consent to the filing of the
16 brief.
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23 *Amici* are the leading medical organizations representing physicians
24 and health practitioners in the United States. They include the American
25 Medical Association, the largest professional association of physicians,
26 residents, and medical students in the country; the American College of

1 Obstetricians and Gynecologists, the nation’s leading organization of
2 physicians who provide health services unique to women; the American
3 Academy of Pediatrics, representing more than 67,000 pediatricians and
4 pediatric subspecialists; the American College of Emergency Physicians, the
5 leading advocate for emergency physicians and their patients, and many
6 others. *Amici* are dedicated to healthcare, to research, and to evidence-based
7 health policy. *Amici* are opposed to all forms of discrimination, and are
8 committed to advocating for the public health and to preserving access to
9 health care for all ages and populations.
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12

13 “District courts have ‘broad discretion’ regarding the appointment of
14 amici.” *Rosas v. Sarbanand Farms*, 2019 WL 3428663, at *1 (W.D. Wash.
15 July 30, 2019). “The classic role of amicus curiae includes assisting in a case
16 of general public interest, supplementing the efforts of counsel, and drawing
17 the court’s attention to law that escaped consideration.” *Id.* (quoting *Miller-*
18 *Wohl Co. v. Comm’r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204
19 (9th Cir. 1982)) (internal quotations omitted). “An amicus brief should
20 normally be allowed . . . when the amicus has unique information or
21 perspective that can help the court beyond the help that the lawyers for the
22 parties are able to provide.” *Cnty. Ass’n for Restoration of Env’t (CARE) v.*
23 *DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). As set
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26

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 27th day of September, 2019, at Seattle, Washington.

/s/ Marissa Lock_____

Marissa Lock
Legal Assistant

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September 27, 2019

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1 **I. Interests of *Amici Curiae***

2 The following medical organizations respectfully submit this brief as
3 *Amici Curiae* in support of Plaintiff:¹

- 4 • The American College of Obstetricians and Gynecologists
5 (“ACOG”) is the specialty’s premier professional membership
6 organization dedicated to the improvement of women’s health,
7 with more than 58,000 members representing more than 90% of
8 board certified ob-gyns in the United States.
- 9 • The American Medical Association (“AMA”) is the largest
10 professional association of physicians, residents, and medical
11 students in the United States. Through state and specialty
12 medical societies and other physician groups seated in the
13 AMA’s House of Delegates, substantially all U.S. physicians are
14 represented in the AMA’s policymaking process.
- 15 • The American Academy of Pediatrics (“AAP”) is a national,
16 not-for-profit organization dedicated to furthering the interests
17 of child and adolescent health, representing more than 67,000
18 primary care pediatricians, pediatric medical subspecialists, and
19 pediatric surgical specialists.
- 20 • The American College of Emergency Physicians (“ACEP”)
21 represents more than 38,000 emergency physicians, emergency

22 ¹ All parties consent to the filing of this brief. No counsel for a party authored
23 this brief in whole or in part, and no counsel for a party, nor any person other
24 than the *amici curiae*, its members, or its counsel, contributed money
25 intended to fund the preparation or submission of this brief. Pursuant to
26 Federal Rule of Civil Procedure 7.1, the undersigned counsel certifies that
none of the *amici* has a parent corporation and no publicly-held corporation
owns 10% or more of their respective stock.

1 medicine residents and medical students. ACEP promotes the
2 highest quality of emergency care and is the leading advocate
3 for emergency physicians, their patients, and the public.

- 4 • The American College of Osteopathic Obstetricians and
5 Gynecologists (“ACOOG”) is a 2,500-member organization
6 dedicated exclusively to the physical, mental, and emotional
7 health of women.
- 8 • The American Society for Reproductive Medicine (“ASRM”) is
9 a multidisciplinary not-for-profit organization dedicated to the
10 advancement of the science and practice of reproductive
11 medicine, representing approximately 8,000 professionals.
- 12 • The National Association of Nurse Practitioners in Women’s
13 Health (“NPWH”) is a national professional membership
14 organization for advanced-practice registered nurses dedicated
15 to women and their health.
- 16 • The Society for Maternal-Fetal Medicine (“SMFM”) is the
17 medical professional society for obstetricians who have
18 additional training in the area of high-risk, complicated
19 pregnancies, representing over 4,000 members.
- 20 • The American College of Nurse-Midwives (“ACNM”) represents
21 approximately 7,000 certified nurse-midwives and
22 certified members who provide primary and maternity care
23 services to help women of all ages and their newborns attain,
24 regain, and maintain health.
- 25 • The North American Society for Pediatric and Adolescent
26 Gynecology (“NASPAG”) is dedicated to providing
multidisciplinary leadership in education, research, and
gynecologic care to improve the reproductive health of youth
with a diverse membership including gynecologists, adolescent
medicine specialists, pediatric endocrinologists, and other
medical specialties.
- The American Muslim Health Professionals (“AMHP”) is a
national nonprofit organization focused on professional
development, health education and advocacy centered on the
unique needs of American-Muslims.
- The World Professional Association for Transgender Health
 (“WPATH”) is an interdisciplinary professional and educational
organization devoted to transgender health. Its members engage

1 in clinical and academic research to develop evidence-based
2 medicine and strive to promote a high quality of care for
3 transsexual, transgender, and gender-nonconforming individuals
internationally.

- 4 • Washington State Medical Association is the largest medical
5 professional association in Washington, representing physicians,
6 residents, medical students and physician assistants from nearly
all specialties and practice settings throughout the state.
- 7 • Kaiser Permanente is an integrated healthcare delivery system
8 that provides coverage for more than 12 million members, and
9 in which 22,914 physicians, 59,127 nurses, and 217,712
employees provide the full range of necessary healthcare
services for our members.

10 **II. Introduction**

11 *Amici* are the leading medical organizations representing physicians
12 and health practitioners in the United States. *Amici* are dedicated to health
13 care, to research, and to evidence-based health policy. *Amici* are opposed to
14 all forms of discrimination, and are committed to preserving access to health
15 care for all ages and populations.
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18 All patients are entitled to prompt, complete, and unbiased health care.
19
20 All patients should have access to care that is medically and scientifically
21 sound, unaffected by the personal preferences or religious beliefs of those
22 who provide it. *Amici* believe that respect for individual conscience is
23 important. But personal convictions should not deprive a patient of medically
24 sound treatment, information, or services. In medicine, the patient is
25
26 paramount.

1 The Department of Health and Human Services (“HHS”) rule entitled
2 “Protecting Statutory Conscience Rights in Health Care” (the “Rule”)
3 completely disregards the ethical obligations and medical standards that are
4 the bedrock of contemporary patient-centered care. 84 Fed. Reg. 23170 (May
5 21, 2019) (to be codified at 45 C.F.R. pt. 88). It represents a dramatic
6 departure from statutory standards and prior agency interpretation, is
7 unworkably vague, and creates dangerous uncertainty.²

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9
10 *Amici* are deeply concerned that the Rule will radically disrupt medical
11 care and endanger the lives and health of patients. Where professional ethics
12 recognize that the patient is paramount, the Rule prioritizes the personal
13 beliefs of a person other than the patient. It permits objectors to refuse to
14 provide care without prior notice, without disclosing that refusal, and without
15 arranging or referring for alternative care. The Rule allows this *even when*
16 *the refusal to provide care jeopardizes another’s life and safety*. The Rule
17 protects objectors and endangers patients in every conceivable context—from
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22 ² Defendants received comments from several *amici* during the notice and
23 comment period detailing the particular ways the Rule endangers their
24 primary patient constituencies, but Defendants ignored the view of the
25 established medical community *amici* represent.
26

1 infancy through end-of-life, in rural clinics and urban hospitals, from
2 preventative care to life-or-death emergencies. Patients will inevitably suffer
3 as a result. For already-vulnerable populations, the Rule promises to be
4 especially devastating, perpetuating racial and socioeconomic inequalities.
5

6 *Amici*, whose policies and guidance represent the considered judgment
7 of the many physicians and other clinicians in this country, write in full
8 support of Plaintiff. *Amici* believe it is imperative that the Court consider the
9 incredibly damaging effect of the Rule on patients and the practice of
10 medicine. *Amici* write to alert the Court to the many ways the Rule
11 undermines principles of medical ethics, intrudes into the patient-provider
12 relationship, compromises patient safety and wellbeing, impedes the
13 provision of quality health care services on a non-discriminatory basis, and
14 critically threatens the effective functioning of health care institutions, which
15 will be subject to extreme penalties for noncompliance with vague standards
16 they cannot parse. *Amici* urge the Court to grant Plaintiff's motion for
17 summary judgment and vacate and set aside the Rule.
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23 **III. Principles of Medical Ethics**

24 The moral imperative to serve the best interests of patients and
25 alleviate suffering is the foundational principle of medical ethics. Any
26 analysis of the Rule should compare its disregard for patient well-being with

1 the foundational ethics that govern the practice of medicine.

2 The ethical rules unequivocally place the patient first. The Code of
3 Medical Ethics of the American Medical Association (“AMA Code”)³
4 provides that a physician is ethically required to use sound medical judgment,
5 holding the best interests of the patient as paramount. AMA Code, Opinion
6 1.1.1. *See also* AMA Code, Opinion 1.1.1 (“The relationship between a
7 patient and a physician is based on trust, which gives rise to physicians’
8 ethical responsibility to place patients’ welfare above the physician’s own
9 self-interest.”) Similarly, the American College of Obstetricians and
10 Gynecologist’s Code of Professional Ethics (“ACOG Code”) states that the
11 “*welfare of the patient (beneficence) is central to all considerations in the*
12 *patient–physician relationship.*” ACOG Code, *December 2018*, Ch. I.⁴

13 Under the American College of Emergency Physicians Code of Ethics for
14 Emergency Physicians (“ACEP Code”) “*physicians assume a fundamental*
15

16 _____
17 ³ The federal judiciary has repeatedly cited the AMA Code. *See, e.g., Roe v.*
18 *Wade*, 410 U.S. 113, 144 n.39 (1973); *Ferguson v. City of Charleston*, 532
19 U.S. 67, 81 (2001); *Baze v. Rees*, 553 U.S. 35, 64 & 112 (2008) (Alito, J.,
20 concurring & Breyer, J., concurring).

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22 ⁴ Unless otherwise stated, all emphases are added.
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1 *duty to serve the best interests of their patients.”* ACEP Code, *January*
2 *2017*, Ch. II.B.1. In pediatric care, “[p]atient well-being should be the
3 *primary motivating factor in patient care, ahead of physicians’ own*
4 *interests and needs.”* M. E. Fallat, J. Glover, & the Committee on Bioethics,
5 *Professionalism in Pediatrics: Statement of Principles*, 120 *Pediatrics* 895,
6 896 (2007). Other medical professionals represented by *amici* make similar
7 pledges to patient well-being.
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10 The primacy of the patient reflected in the Codes derives from first
11 principles that reflect an abiding commitment to the moral imperatives of
12 beneficence and nonmaleficence, autonomy, and justice:
13

14 ***Beneficence and Nonmaleficence.*** Beneficence and nonmaleficence
15 require providers to help and not hurt those they care for. Beneficence
16 requires a physician to act in a way that is likely *to benefit* the patient.
17 Nonmaleficence is the obligation not to harm or cause injury. ACOG
18 Committee Opinion No. 385, *The Limits of Conscientious Refusal in*
19 *Reproductive Medicine*, Nov. 2007, (“CO 385”) at 3. This duty to the patient
20 is primary, and where conscience implores physicians to deviate from
21 standard practices, “[p]hysicians’ freedom to act according to conscience is
22 not unlimited.” AMA Code, Opinion 1.1.7.
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1 **Autonomy.** Respect for patient autonomy holds that persons should be
2 free to choose and act without controlling constraints imposed by others. *See*
3 CO 385 at 1-3; AMA Code, Opinion 2.1.1; ACEP Code, Ch. II.B.3. Informed
4 consent by a patient to a particular course of medical treatment “is
5 fundamental in both ethics and law” as a necessary safeguard of patient
6 autonomy. AMA Code, Opinion 2.1.1. “[I]t is ordinarily an ethically
7 unacceptable violation of who and what persons are to manipulate or coerce
8 their actions or to refuse their participation in important decisions that affect
9 their lives.” ACOG Committee Opinion No. 439, *Informed Consent*, Aug.
10 2009, at 3. True patient autonomy requires medical professionals also
11 commit to scientific integrity and evidence-based practice out of respect for
12 patients’ personhood and right to free and informed choices. *Id.*

13 **Justice.** In the context of medical ethics, justice concerns both the
14 obligation to render to a patient the care and respect that is owed to them and
15 an affirmative ethical obligation to advocate “for patients’ needs and rights[,
16 and neither] create nor reinforce racial or socioeconomic inequalities in
17 society.” CO 385 at 4. *See also*, ACOG Committee Opinion No. 390, *Ethical*
18 *Decision Making in Obstetrics and Gynecology*, Dec. 2007; AMA Code,
19 Opinion 11.1.4 (“[P]hysicians . . . have an ethical responsibility to ensure that
20 all persons have access to needed care regardless of their economic means.”);
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1 ACEP Code Ch. II.B.4. The AMA Code also prohibits physicians from
2 “discriminating against a prospective patient on the basis of race, gender,
3 sexual orientation or gender identity, or other personal or social
4 characteristics that are not clinically relevant to the individual’s care.” AMA
5 Code, Opinion 1.1.2; *see also* ACEP Code, Ch. II.D.3.a (“Denial of
6 emergency care or delay in providing emergency services on the basis of
7 race, religion, sexual orientation, gender identity, ethnic background, social
8 status, type of illness or injury, or ability to pay is unethical.”).

12 **IV. Argument**

13 **A. The Rule Undermines Fundamental Principles of Medical** 14 **Ethics.**

15 The Rule cannot be reconciled with bedrock principles of medical
16 ethics. The Rule turns the fundamental moral obligation to put patients first
17 on its head, effectively permitting anyone involved in patient care to ignore
18 patients’ suffering and affirmatively refuse to assist in their care, even when
19 that refusal endangers or harms them. It compels institutions to certify that
20 they will prioritize the objectors over patients. The Rule puts the patient last.
21

23 The Rule’s complete disregard for medical ethics is evident on its face.
24 It expressly permits health care providers or virtually any employee working
25 in a health care setting receiving federal funds to refuse to provide patients
26

1 health care services and information, without regard to medical necessity and
2 including potentially in emergency situations, based solely on personal
3 views. *See* 84 Fed. Reg. at 23263, § 88.2. The objecting employee need not
4 notify his or her employer or the patient of the objection before asserting it
5 and refusing to provide care, information, or a referral. *Id.* Instead, the Rule
6 puts the onus on the employer to ask whether an employee is likely to lodge
7 an objection. *Id.* By purportedly permitting doctors, nurses, emergency
8 medical technicians, and virtually every other individual involved in health
9 care to refuse help to those in need, without warning, the Rule eviscerates the
10 paramount ethical commitment to respect and care for patients.
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14 **B. The Rule Is Inconsistent with Patient Wellbeing and Medical**
15 **Professionals' Duty to Do No Harm and to Act to Promote**
16 **the Wellbeing of the Patient.**

17 The Rule is fundamentally irreconcilable with medical ethics because
18 the Rule: (1) permits refusal to provide necessary services, even in cases of
19 emergency; (2) fails to protect continuity of care for all patients; and
20 (3) permits individuals without medical training to impede patient treatment.
21

22 *1. The Rule Endangers Patients in Emergency Situations.*

23 In a total repudiation of established medical ethics, the Rule purports
24 to permit health care employees to deny patients access to necessary care,
25 even in emergencies in which referral is not possible or might harm the
26

1 patient's health.⁵ By prioritizing the religious views of employees over a
2 patient's prompt receipt of emergency care, the Rule endangers the physical
3 safety of patients. *See* Letter from ACOG to Sec. Azar, March 27, 2018 (on
4 file with HHS Office for Civil Rights, *Protecting Statutory Conscience*
5 *Rights in Health Care*) ("ACOG Comment Letter") at 2 ("In an emergency in
6 which referral is not possible or might negatively impact the patient's
7 physical or mental health, providers have an obligation to provide medically
8 indicated and requested care."); ACEP Code Ch. I.2 ("Emergency physicians
9 shall respond promptly and expertly, without prejudice or partiality, to the
10 need for emergency medical care"). The Rule also appears to violate settled
11 law: the Emergency Medical Treatment and Labor Act (EMTALA) requires
12 clinicians to screen and stabilize patients who come to the emergency
13 department. 42 U.S.C. § 1395dd. HHS claims the Rule is consistent with
14 EMTALA, 84 F.R. at 23170, 23183, but the two are patently irreconcilable.
15 An emergency department cannot anticipate every possible basis for an
16 objection, survey its employees to ascertain on which basis they might
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⁵ While HHS commented that it will permit exceptions to its discrimination prohibition on a "case by case basis," this does not adequately replace a statement that one may not refuse to provide treatment in an emergency.

1 object, and staff accordingly. This is an impossible task that jeopardizes the
2 ability to provide care, both for standard emergency room readiness and for
3 emergency preparedness. *See* Letter from ACEP to Sec. Azar, March 27,
4 2018, (on file with HHS Office for Civil Rights, *Protecting Statutory*
5 *Conscience Rights in Health Care*).

6
7
8 It is difficult to overestimate the effect of this Rule. The kind of
9 “conscience objections” the Rule permits are objections to the completely
10 legal and scientifically sound practice of medicine and provision of health
11 care. For example, an ectopic pregnancy—a condition in which a fertilized
12 egg implants outside of a woman’s uterus and cannot develop normally—can
13 be a life-threatening emergency requiring immediate surgery. ACOG
14 Practice Bulletin No. 193: *Tubal Ectopic Pregnancy*, 131 *Obstetrics &*
15 *Gynecology* 91 (March 2018). Yet the Rule protects a provider who refuses
16 to terminate an ectopic pregnancy, even in an emergency. That patient’s
17 primary care doctor could, under the Rule, simply decline to inform her (or
18 an alternate provider) of her condition. 84 Fed. Reg. at 23263, § 88.2.
19 Experiencing extreme abdominal pain, the patient could call for an
20 ambulance, but under the Rule, the ambulance driver could refuse to
21 transport her to the hospital and refuse to either refer her to alternate
22 transportation or to tell his or her supervisor of the refusal. If the patient

1 makes it to the emergency room under her own power, she will need to be
2 admitted, which a clerk could refuse to do. The patient will then need a
3 surgery involving multiple medical staff members, or face a high risk of
4 death. The Rule includes each of these employees, and many more within the
5 category of individuals who may lodge an objection and refuse to “assist in
6 the performance of” the procedure without *any* prior notice, potentially
7 costing the patient her life. 84 Fed. Reg. at 23263, § 88.2. HHS
8 acknowledges that the Rule will harm patients, but promulgated the Rule
9 anyway. 84 Fed. Reg. at 23251 (“the patient’s health might be harmed if an
10 alternative is not readily found[.]”). The harms the Rule threatens to cause
11 are the very definition of irreparable. *Blum v. Caldwell*, 446 U.S. 1311, 1314
12 (1980) (Marshall, J.) (“[T]he *very survival* of these individuals and those
13 class members . . . is threatened by a denial of medical assistance benefits.”);
14 *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (irreparable
15 harm from pain, and other adverse effects due to delayed medical treatment).

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21 2. *The Rule Violates the Duty to Provide Continuity of Care.*

22 Where a provider objects to the care a patient needs or desires, the
23 Rule goes so far as to suggest that employers may not require employees to
24 refer these patients to another health care provider who could provide such
25 services, *or even inform other staff at the relevant institution that they have*
26

1 *refused to provide such services. See* 84 Fed. Reg. at 23263, § 88.2(6).
2
3 Rather, the Rule relies on providers to post public notices with general
4 indications that alternatives are available, 84 Fed. Reg. at 23192, shifting the
5 burden of ensuring health care continuity from health care provider to
6 patient, with potentially devastating consequences. For example, if a primary
7 care physician objects to informing a patient, a minor woman on Medicaid,
8 about the availability of the HPV vaccine, the doctor need not do so, and the
9 doctor has no obligation to alert her or refer her to an alternate provider. She
10 may never learn of the vaccine, which protects against a virus that can cause
11 cervical cancer. Nearly 11,000 women in the United States are diagnosed
12 with cervical cancer each year, and nearly half that number die from it. Letter
13 from AAP to Dir. Severino, March 27, 2018, (on file with HHS Office for
14 Civil Rights, RIN 0945-ZA03; Docket ID No. HHS-OCR-2018-0002), at 4.
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19 This aspect of the Rule is irreconcilable with medical professionals’
20 obligations of beneficence and nonmaleficence, because their “fiduciary
21 responsibility to patients entails an obligation to support continuity of care
22 for their patients.” AMA Code, Opinion 1.1.5. When considering
23 withdrawing from a case, medical ethics require that physicians notify the
24 patient “long enough in advance to permit the patient to secure another
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1 physician” and “[f]acilitate transfer of care when appropriate”). *Id.*; *see also*
2 Opinion 1.1.3 (“patients’ rights” include “continuity of care”).
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4 3. *The Rule Sanctions Interference in Patient Care by*
5 *Non-Medically Trained Staff.*

6 As noted above, the Rule permits virtually any employee, including
7 clerks, laboratory technicians, and janitors, to lodge an objection that must be
8 accommodated, without any affirmative obligation to provide notice to his or
9 her employer in advance. That any staff member may, at any point and
10 without any notice, halt a medical procedure or otherwise thwart the
11 provision of appropriate care unethically endangers patients. 84 Fed. Reg. at
12 23264, § 88.2.
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15 Many medical procedures require the participation of several, if not
16 dozens, of employees. It may be impossible to perform the procedure when
17 even one of them—for example, a scrub nurse or nurse anesthetist—lodges a
18 last minute objection to providing care. In such an instance, the procedure
19 may not be able to be rescheduled for weeks or months, with potentially life-
20 threatening consequences. Thus, the Rule makes patient care subject to
21 critical disruption by objecting employees who lack sufficient medical
22 training to understand the gravity of a patient’s need for certain services.
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26 **C. The Rule Undermines Patient Autonomy and Informed
Consent.**

1 The protection of patient autonomy is at the very heart of the medical
2 ethical standards. Patient autonomy requires that patients “receive
3 information from their physicians . . . including the risks, benefits and costs
4 of forgoing treatment.” AMA Code, Opinion 1.1.3; *see also id.*, Opinion
5 2.1.1. The Rule subverts the principle of informed consent by limiting the
6 information health care employees must provide to patients. Specifically, the
7 Rule permits an objecting employee to refuse to make a “referral” for certain
8 services, which in turn is defined to include “*the provision of information . . .*
9 . where the purpose or reasonably foreseeable outcome of provision of the
10 information is to assist a person in . . . obtaining . . . a particular health care
11 service[.]” 84 Fed. Reg. at 23263-64, § 88.2. This broad mandate reaches
12 well beyond safeguarding conscience rights, allowing anyone involved with
13 patient care to virtually assure that a patient does not receive a particular
14 course of treatment—or even know options exists. For example, the Rule
15 would permit an objecting employee to decline to provide a female patient
16 with information about her reproductive health—such as the availability of
17 abortions or contraceptive procedures—or notify her that she is not receiving
18 all available information. Women cannot make fundamental decisions about
19 sexual activity or pregnancy absent that information. This is especially
20 concerning given the time limits that many states place on the availability of
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1 abortion. *See, e.g.*, Neb. Rev. Stat. §§ 28-3102 to 28-3111 (2019) (generally
2 prohibiting abortions beyond 20 weeks of pregnancy).
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4 **D. The Rule Creates and Exacerbates Unequal Access to Care.**

5 Justice requires medical professionals and policy makers to “treat
6 individuals fairly and to provide medical services in a nondiscriminatory
7 manner.” CO 385 at 4. *See also* AMA Code, Opinion 1.1.2 (requiring
8 physicians “not to discriminate against a prospective patient.”). Rather than
9 promote equal access, however, the Rule targets individuals who rely on
10 federal funding for health care and imposes new barriers to health care.
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13 *First*, the Rule imposes constraints upon medical service providers that
14 will incentivize them to limit or eliminate certain health care services, posing
15 additional hurdles to complete care for certain populations, such as rural
16 women, minorities, and LGBTQIA individuals, that already lack access to
17 adequate care. Most rural women, for example, find themselves at least a 30-
18 minute drive from reproductive care. ACOG Committee Opinion No. 586,
19 *Health Disparities in Rural Women*, Feb. 2014, at 2. In some states, there is
20 as few as *one* clinic providing abortion services. Jessica Arons, *The Last*
21 *Clinic Standing*, published on American Civil Liberties Union. Minority
22 women already face significant and persistent disparities in health care as
23 compared to the general population. ACOG Committee Opinion No. 649,
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1 *Racial and Ethnic Disparities in Obstetrics and Gynecology*, Dec. 2015, at 1.
2 For example, in 2010 in California, there were 26 black maternal deaths for
3 every seven white maternal deaths. *Id.* at 2. In a recent study, nearly 20% of
4 LGBTQIA people and 31% of transgender people stated it would be very
5 difficult or impossible to receive certain needed medical services if they were
6 unable to receive such services from their existing provider. Mirza &
7 Rooney, *Discrimination Prevents LGBTQ People from Accessing Health*
8 *Care*, published on Center for American Progress (Jan 18, 2018). The Rule
9 will force patients to overcome increased barriers to health services, such as
10 driving longer distances, potentially causing them to accept substandard care
11 or forego medical services entirely.
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16 *Second*, in addition to compromising patients' physical health,
17 subjecting vulnerable populations to additional discrimination, stigma, and
18 dignitary harm is unethical and may have life-long repercussions.⁶ Patients
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20 _____
21 ⁶ Injuries to one's "mental health and overall well-being," including feelings
22 of stigmatization, amount to irreparable injury. *Whitaker By Whitaker v.*
23 *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir.
24 2017), cert. dismissed sub nom. *Kenosha Unified Sch. Dist. No. 1 Bd. of*
25 *Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018).
26

1 who seek medical care but are turned away by an employee who objects to
2 their sexual orientation or gender identity may feel stigmatized and be
3 discouraged from seeking care from another provider. Human Rights Watch,
4 *All We Want is Equality*, Administrative Record, 000538505 – 000538552.
5

6 **E. The Rule Employs Language That Is Impermissibly Vague**
7 **and Stymies Effective Functioning of Health Care Systems.**

8 The Rule is irreconcilable with several core principles of medical
9 ethics, and it is inconsistent with other federal laws. Yet, because the Rule is
10 also internally ambiguous, it provides inadequate guidance on what conduct
11 it prohibits and encourages arbitrary enforcement. The Rule poses broad
12 operational and implementation challenges for providers, which must balance
13 support for employees against patient needs. For example, the Rule’s
14 absolute accommodation standard will make it virtually impossible for
15 providers both to comply with the Rule and ensure patient care needs are
16 met. That standard is all the more problematic in combination with the broad
17 definition of “discrimination” against an employee asserting an objection,
18 which prevents an employer from knowing in advance which employees
19 might object.
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24 *Amici* are particularly concerned that the Rule uses overbroad and
25 vague language in outlining its enforcement mechanisms. For example, HHS
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1 has asserted it may regulate an unspecified “broader range of funds or
2 broader categories of covered entities” for “noncompliant entities.” 83 Fed.
3 Reg. 3880, 3898 (Jan. 26, 2018). When combined with the draconian
4 penalties for noncompliance, *see* 84 Fed. Reg. at 23180 (termination of
5 funding); 84 Fed. Reg. at 23271, § 88.7(i) (withholding, denying, or
6 terminating existing or new funding; suspending award activities), providers
7 will be effectively coerced into adopting overbroad policies or cutting off
8 certain services altogether for fear of discriminating on the basis of religion.
9 Disruption of the patient-provider relationship is an irreparable harm. *Valle*
10 *del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). In addition to
11 disrupting the effective functioning of health care systems, the changes to
12 policies and personnel management practices the Rule imposes will result in
13 financial expenditures that amount to irreparable harm. *California v. Azar*,
14 911 F.3d 558, 581 (9th Cir. 2018) (administrative costs required by federal
15 rules that are not recoverable amount to irreparable injury).

21 **V. Conclusion**

22 *Amici* urge the Court to grant Plaintiff’s Cross-Motion for Summary
23 Judgment and reject Defendants’ Motions to Dismiss or for Summary
24 Judgment. The Rule will cause grave harm to patients and the public health,
25 is inconsistent with principles of medical ethics, and is impermissibly vague.
26

1 Dated: September 27, 2019

Respectfully submitted,

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 27th day of September, 2019, at Seattle, Washington.

/s/ Marissa Lock
Marissa Lock
Legal Assistant

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR, II; and UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN
SERVICES,

Defendants.

No. 2:19-cv-00183-SAB

[PROPOSED] ORDER
GRANTING UNOPPOSED
MOTION FOR LEAVE TO
FILE BRIEF OF LEADING
MEDICAL ORGANIZATIONS
AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR
SUMMARY JUDGMENT AND
OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS, OR, IN THE
ALTERNATIVE, MOTION
FOR SUMMARY JUDGMENT

1 On September 27, 2019, the American College of Obstetricians and
2 Gynecologists, the American Medical Association, the American Academy
3 of Pediatrics, the American College of Emergency Physicians, the American
4 College of Osteopathic Obstetricians and Gynecologists, the American
5 Society for Reproductive Medicine, the National Association of Nurse
6 Practitioners in Women’s Health, the Society for Maternal-Fetal Medicine,
7 the American College of Nurse-Midwives, the North American Society for
8 Pediatric and Adolescent Gynecology, the American Muslim Health
9 Professionals, Kaiser Permanente, the Washington State Medical
10 Association, and the World Professional Association for Transgender Health
11 (collectively, “*amici*”) filed an Unopposed Motion for Leave to File Amicus
12 Brief of Leading Professional Organizations as *Amici Curiae*. Having
13 considered the pleadings and papers filed in connection therewith, and all
14 other matters presented to the Court, and good cause having been shown:
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1 It is hereby ORDERED that the Unopposed Motion for Leave to File
2 Brief of Leading Medical Organizations as *Amici Curiae* is GRANTED. The
3
4 *Amicus* Brief lodged by *amici* is deemed filed and served.

5
6 This __ day of _____, 2019.
7

8
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10 _____
11 The Honorable Stanley A. Bastian

12 Presented by:

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