

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS,

Defendants.

Civil Action No. 1:19-cv-01672-GLR

PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

The Mayor and City Council of Baltimore (the “City”) respectfully requests, pursuant to Federal Rule of Civil Procedure 65(a)(1), that on or before July 22, 2019, the Court issue a preliminary injunction preventing defendants the U.S. Department of Health and Human Services (“HHS”) and its Secretary, Alex M. Azar II, from putting into effect an HHS Final Rule titled *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170 *et seq.* (May 21, 2019), to be codified at 45 C.F.R. Part 88 (the “Rule”). This Motion is supported by the contemporaneously filed Memorandum of Law, the accompanying declarations, and any additional submissions that may be considered by the Court.

The Rule—which takes effect on July 22, 2019—grants any individual, entity, or provider in healthcare—from front office staff to ambulance drivers—the unqualified right to deny patients healthcare, including reproductive and emergency care, not just on the basis of federally recognized conscience interests, but also on the basis of “ethical or other reasons.” The Rule is a drastic departure from the statutes it purports to implement, which protect religious refusal rights

in specifically delimited circumstances; is in direct violation of statutes prohibiting creation of unreasonable barriers to health care access; violates the U.S. Constitution; and will significantly and irreparably harm the City as health care provider, insurer, and guardian of Baltimore's public health.

Preliminary injunctive relief is warranted because (1) the City is likely to succeed on the merits of its claims; (2) the Final Rule will immediately and irreparably harm the City; and (3) the public interest and balance of equities favor a preliminary injunction. The City has a strong likelihood of success on the merits of its claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), for reasons including the following:

- The Rule is contrary to law because it violates the Affordable Care Act's ("ACA") Non-Interference Mandate, 42 U.S.C. § 18114, the ACA's prohibition on discrimination in healthcare, 42 U.S.C. § 18116, the Emergency Medical Treatment and Labor Act's ("EMTALA") requirement to make accommodations for individuals needing emergency care, 42 U.S.C. § 1395dd(b)(1), and other laws. *See* 5 U.S.C. § 706(2)(A).
- The Rule violates the Establishment Clause of the United States Constitution, which prohibits accommodations for religion that unduly burden third parties, and the Spending Clause, which prohibits coercive threats to federal funding, among other restrictions. *See id.* § 706(2)(B).
- The Rule exceeds statutory authority under the laws it purports to implement by expanding definitions beyond what is in the statutes. *See id.* § 706(2)(C).
- The Rule is arbitrary and capricious because HHS failed to engage in reasoned decision-making by ignoring countervailing health rights, basing the Rule on speculative fears and

unsubstantiated benefits, and breaking from prior policy without justification. *See id.* § 706(2)(A).

The Rule will cause immediate and irreparable harm to the City as healthcare provider, insurer, and guardian of the public health for reasons including the following:

- The Rule would cripple the City and its clinics and subgrantees in the ability to provide ethical health care by granting an unrestricted right of health care employees to refuse to provide care based on religious, moral, or “ethical or other reasons” and preventing the City from making reasonable accommodations for individuals who refuse to provide care. To comply, the City would need to pay for and train alternate staff in its own programs, as well as compliance monitors for its subgrantees and partners, and to redundantly staff a wide variety of positions. This would be financially and operationally impossible. Thus, the Rule would force the City to provide substandard, unethical care to its residents.
- The Rule is incompatible with the City’s public health mission of providing trauma-informed, judgment-free health care to all and would have devastating effects on public health. Baltimore’s population includes many historically marginalized groups that have long been victims of discrimination in health care and other contexts. In addition to inflicting direct harm upon patients, this discrimination imposes enormous public costs. The Baltimore City Health Department (BCHD) has spent decades working to eradicate discrimination and persuade vulnerable populations to seek necessary health care without fear, all in furtherance of the public health. If the Rule were to take effect, it would sanction and require the City to endorse the very stigma and judgment that it has been combatting, leading to increased discrimination against vulnerable groups, a reduction in access to and quality of care, increased medical and insurance costs, and adverse patient outcomes.

The Rule places the City in an impossible bind: either compromise its public health mission and the ethical obligation to provide care to patients in need by complying, or risk losing federal funding for failure to comply, at an even greater cost as more than 50% of BCHD funding and over 75% of the Baltimore Fire Department's Emergency Medical Services funding is federal. Either option will result in irreparable harm to residents of Baltimore and surrounding areas and to Baltimore's public health, which will increase costs to the City as health care provider and insurer. At a bare minimum, the public interest favors temporarily preserving the status quo.

The City requests that the Rule be enjoined in full on a nationwide level to provide Plaintiff with necessary and appropriate relief. In the alternative, the City requests that the Court stay the effective date of the Rule under 5 U.S.C. § 705 pending adjudication of this case on the merits.

DATED: June 12, 2019

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019 the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and all counsel of record will receive an electronic copy via the Court's CM/ECF system.

/s/ Suzanne Sangree

Suzanne Sangree

² Admitted in Texas and Oklahoma only. Supervised by Richard B. Katskee, a member of the D.C. Bar.