

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

FRANCISCAN ALLIANCE, INC.;
SPECIALITY PHYSICIANS OF
ILLINOIS, LLC;
CHRISTIAN MEDICAL & DENTAL
ASSOCIATIONS,

- and -

STATE OF TEXAS;
STATE OF NEBRASKA;
COMMONWEALTH OF KENTUCKY, by
and through Governor Matthew G. Bevin;
STATE OF KANSAS;
STATE OF LOUISIANA;
STATE OF ARIZONA; and
STATE OF MISSISSIPPI, by and through
Governor Phil Bryant,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United
States Department of Health and Human
Services; and UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants.

Civ. Action No. 7:16-cv-00108-O

**APPENDIX IN SUPPORT OF PROPOSED INTERVENORS' OPPOSITION TO STATE
AND PRIVATE PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 7.1(i), Proposed Intervenors file this Appendix in support of their Opposition to State and Private Plaintiffs' Motions for Summary Judgment, filed contemporaneously herewith.

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Exhibit 1: Proposed Intervenors' 56(D) Declaration App.1

Respectfully submitted this 5th day of April, 2019.

/s/ Joshua Block

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2019, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court.

By: /s/ Joshua Block
JOSHUA BLOCK

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PROPOSED INTERVENORS' 56(D) DECLARATION

I, Lindsey Kaley, declare as follows:

1. I am counsel for River City Gender Alliance and the American Civil Liberties Union of Texas, Proposed Intervenors in the above-captioned matter.

2. I am submitting this Declaration pursuant to Federal Rule of Civil Procedure 56(d), which provides that “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: defer considering the motion or deny it; [or] allow time to obtain affidavits or declarations or to take discovery.”
3. Proposed Intervenors maintain that State and Private Plaintiffs’ motions for summary judgment should be denied for several independent reasons, as set forth in Proposed Intervenors’ memorandum in opposition.
4. In addition, Proposed Intervenors submit this Declaration to lay out material facts that are unavailable to Proposed Intervenors because they are in the possession of Plaintiffs or Defendants, because the administrative record has not been filed, and because no discovery has been conducted in this action. Without these facts, Proposed Intervenors are unable to fully and adequately respond to Plaintiffs’ motions.

BACKGROUND

5. On May 18, 2016, the Department of Health and Human Services (“HHS”) published the “Nondiscrimination in Health Programs and Activities” final rule, implementing Section 1557 of the Affordable Care Act.
6. On August 23, 2016, Plaintiffs, including both State and Private Plaintiffs, initiated this challenge to the regulations on several bases, including claims that they violate the Administrative Procedure Act.
7. This Court granted Plaintiffs’ request for a preliminary injunction on December 31, 2016, without the administrative record having been produced, and subsequently stayed the case on July 10, 2017.

8. On December 17, 2018, this Court lifted the stay, and Plaintiffs moved for summary judgment on February 4, 2019.
9. In support of their motions for summary judgment, both Private Plaintiffs and State Plaintiffs fail to cite to any evidence that their policies or practices violate the regulations' prohibition on discrimination based on termination of pregnancy. State Plaintiffs cite almost exclusively to the Amended Complaint as evidence of their Article III standing to challenge the regulations, which does not meet the summary judgment evidentiary requirements. Fed. R. Civ. P. 56(c)(1)(a). Additionally, one of the Private Plaintiffs, the Christian Medical Dental Association ("CMDA"), has provided no evidence that any of its members are entities covered by the challenged regulations.
10. To date, HHS has not produced the administrative record underlying the regulations and there has been no opportunity for discovery.

FACTS PRESENTLY UNAVAILABLE TO PROPOSED INTERVENORS

A. The Administrative Record

11. HHS has not produced the administrative record that provided the basis for its promulgation of the challenged regulations.
12. In order to review agency action, a "court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. "That review is to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).
13. Proposed Intervenors thus seek the administrative record underlying the regulations.

14. The administrative record is necessary to defend the agency's decision to include discrimination based on termination of pregnancy and gender identity within the definition of sex discrimination. The record is also needed to demonstrate the government's compelling interest in the regulations, and that they are the least restrictive means to accomplish its goals. Finally, the record will demonstrate the harms of entering an overbroad injunction against the regulations.

B. State Plaintiffs

15. Proposed Intervenors intend to seek discovery of the following facts:

- i. Policies, records, and testimony documenting discrimination by state-run health insurance programs against individuals who have terminated a pregnancy.
- ii. Policies, records, and testimony documenting discrimination by state-run health insurance programs against individuals based on gender identity.
- iii. Policies, records, and testimony regarding discrimination in the provision of health care at state-run facilities to individuals who have terminated a pregnancy.
- iv. Policies, records, and testimony regarding discrimination in the provision of health care at state-run facilities to transgender individuals.
- v. Policies, records, and testimony regarding the provision of gender transition-related treatment at state-run facilities.
- vi. Policies, records, and testimony regarding the current provision of medical treatment at state-run facilities that would need to be available as transition-related treatment under the regulations.

- vii. Evidence and testimony of physicians at state-run facilities that would be required by the regulations to provide transition-related medical treatment against their medical judgment.
- viii. Evidence and testimony of physicians at state-run facilities that would be required by the regulations to provide transition-related medical treatment in violation of their religious beliefs, who could not be accommodated.
- ix. Records and testimony of the training costs to the States associated with the regulations.
- x. Records and testimony of the compliance costs to the States associated with the regulations.
- xi. Records and testimony of the potential financial penalties to the States for violating the regulations.

C. Christian Medical Dental Association

16. Proposed Intervenors intend to seek discovery of the following facts:

- i. Evidence and testimony of CMDA members who qualify as entities covered by the regulations.
- ii. Policies, records, and testimony documenting discrimination by CMDA members' health insurance programs against individuals who have terminated a pregnancy.
- iii. Policies, records, and testimony documenting discrimination by CMDA members' health insurance programs against individuals based on gender identity.
- iv. Policies, records, and testimony regarding discrimination in the provision of health care at CMDA members' facilities against individuals who have terminated pregnancies.

- v. Policies, records, and testimony regarding discrimination in the provision of health care at CMDA members' facilities against transgender individuals.
- vi. Policies, records, and testimony regarding the provision of gender transition-related treatment by CMDA members.
- vii. Policies, records, and testimony regarding the current provision of medical treatment by CMDA members that would need to be available as transition-related treatment under the regulations.
- viii. Evidence and testimony of CMDA members that would be required by the regulations to provide transition-related medical treatment against their medical judgment.
- ix. Evidence and testimony of CMDA members that would be required by the regulations to provide transition-related medical treatment in violation of their religious beliefs, who could not be accommodated.
- x. Records and testimony of the potential financial penalties to CMDA members for violating the regulations.

D. Franciscan Alliance

17. Proposed Intervenors intend to seek discovery of the following facts:

- i. Policies, records, and testimony documenting discrimination by Franciscan Alliance's health insurance programs against individuals who have terminated a pregnancy.
- ii. Policies, records, and testimony regarding discrimination in the provision of health care at Franciscan Alliance's facilities against individuals who have terminated a pregnancy.

- iii. Policies, records, and testimony regarding the provision of health care at Franciscan Alliance's facilities to transgender individuals.
- iv. Evidence and testimony of physicians at Franciscan Alliance's facilities that would be required by the regulations to provide transition-related medical treatment against their medical judgment.
- v. Records and testimony of the potential financial penalties to Franciscan Alliance for violating the regulations.

18. Discovery of these facts is necessary to evaluate Plaintiffs' Article III standing to bring this suit, in particular what injuries Plaintiffs would be subject to under the challenged regulations. Discovery of these facts is also necessary to review Plaintiffs claims, which must be done based on the administrative record. Finally, this discovery is necessary to determine what remedies are appropriate should Plaintiffs prevail on their claims.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York this 5th day of April, 2019.

/s/ Lindsey Kaley
LINDSEY KALEY