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14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**  
16 **SAN FRANCISCO DIVISION**

17 CITY AND COUNTY OF SAN  
18 FRANCISCO,

Plaintiff,

vs.

21 ALEX M. AZAR II et al.,

22 Defendants.

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

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

23 STATE OF CALIFORNIA, by and through  
24 ATTORNEY GENERAL XAVIER  
25 BECERRA,

Plaintiff,

vs.

27 ALEX M. AZAR II et al.,  
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Defendants.

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STATE OF CALIFORNIA, by and through  
ATTORNEY GENERAL XAVIER  
BECERRA,

Plaintiff,

vs.

ALEX M. AZAR II et al.,

Defendants.

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1 **INTERESTS OF AMICI CURIAE**

2 Amici are local governments across the United States—including Columbus, Ohio,  
3 Oakland, California, and 19 other cities and counties—who are responsible for the health and  
4 wellbeing of their communities.<sup>1</sup> Combined, Amici represent approximately 17.5 million people.  
5 Amici vary in size and are situated in regions across the country with different political realities.  
6 They run public health departments, subsidize and fund public health centers, and operate specialty  
7 clinics, including clinics for alcohol and drug abuse prevention, family planning, immunizations,  
8 sexual health, HIV/STD treatment, and women’s health and wellness. They also provide  
9 emergency medical services.

10 Amici will be significantly harmed if the United States Department of Health and Human  
11 Services’ (HHS) “conscience” rule—*Protecting Statutory Conscience Rights in Health Care;*  
12 *Delegations of Authority*, 84 Fed. Reg. 23,170 (May 21, 2019) (to be codified as 45 C.F.R. pt. 88)  
13 (the “Final Rule”)—takes effect. Because cities, counties, and townships often serve as the  
14 healthcare provider of last resort for the most vulnerable segments of their populations, Amici and  
15 our vulnerable residents will bear the negative impacts of this Final Rule. This new federally  
16 mandated requirement will leave Amici with a Hobson’s choice: allow their employees to  
17 circumvent the intent of Amici’s local antidiscrimination policies by refusing service to residents in  
18 need of medical care, or risk forfeiting hundreds of millions of dollars in federal funding. By  
19 HHS’s own estimate, 613,000 hospitals, health clinics, doctors’ offices, and nonprofits will be  
20 impacted by the Final Rule. When employees of these providers are enabled to refuse to provide  
21 treatment to patients, local governments and their most vulnerable constituents will bear the burden.

22  
23  
24 <sup>1</sup> Amici are: the City of Columbus, Ohio; the City of Oakland, California; the City of Albuquerque,  
25 New Mexico; the City of Austin, Texas; the City of Baltimore, Maryland; the City of Berkeley,  
26 California; the City of Chicago, Illinois; the City of Dallas, Texas; the City of Dayton, Ohio; the  
27 City of Gary, Indiana; the City of Holyoke, Massachusetts; the City and County of Honolulu,  
28 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; the County of Sonoma, California; the City of Stockton, California; and  
the City of Tucson, Arizona.



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

### 8 INTRODUCTION

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

17 These local health departments, hospitals, clinics, emergency medical services providers,  
 18 and healthcare centers offer crucial services to their residents. In terms of preventive care, they  
 19 screen for communicable diseases, such as tuberculosis, HIV/AIDS, and Hepatitis, as well as  
 20 provide vital adult and childhood immunizations.<sup>6</sup> For instance, 98% of county health departments

21 \_\_\_\_\_  
 22 <sup>2</sup> Eileen Salinsky, *Government Public Health: An Overview of State and Local Public Health*  
 23 *Agencies*, NAT’L HEALTH POL’Y F. (Aug. 18, 2010), at 1, 10,  
 24 [https://www.nhpf.org/library/background-papers/BP77\\_GovPublicHealth\\_08-18-2010.pdf](https://www.nhpf.org/library/background-papers/BP77_GovPublicHealth_08-18-2010.pdf) (last  
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26 <sup>3</sup> *Fast Facts on U.S. Hospitals, 2019*, AM. HOSP. ASS’N (Jan. 2019) (hereinafter “*Fast Facts*”),  
 27 <https://www.aha.org/statistics/fast-facts-us-hospitals#community> (last accessed Sept. 12, 2019).

28 <sup>4</sup> 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-  
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<sup>5</sup> *See id.*

<sup>6</sup> Salinsky, *supra* note 2 at 15.

1 provide childhood immunizations.<sup>7</sup> Moreover, most local governments provide treatment for  
 2 communicable diseases like tuberculosis and sexually transmitted infections (STIs).<sup>8</sup> Some local  
 3 governments also provide maternal and child health services,<sup>9</sup> family planning services including  
 4 contraception and abortion,<sup>10</sup> developmental screenings,<sup>11</sup> and nutrition counseling services for  
 5 women, infants, and children.<sup>12</sup> Finally, local public health agencies offer population-based  
 6 services, including influenza pandemic planning, communicable disease surveillance, restaurant  
 7 inspections and licensing, environmental health services,<sup>13</sup> mental and behavioral services, and  
 8 substance abuse services.<sup>14</sup>

9 Local governments act as the “healthcare safety net” for their residents, particularly for the  
 10 uninsured and underinsured and those patients turned away from private healthcare institutions  
 11 because they are unable to pay.<sup>15</sup> Thus, cities, counties, and special-purpose health or hospital  
 12 districts “bear a large share of the direct financing of public hospital and clinic services.”<sup>16</sup> In  
 13 California, for example, state law requires counties to serve as the healthcare provider of last resort  
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16  
 17 <sup>7</sup> INST. OF MED., THE FUTURE OF THE PUBLIC’S HEALTH IN THE 21ST CENTURY (2003) (hereinafter  
 18 “FUTURE OF THE PUBLIC’S HEALTH”), at 110, <https://www.nap.edu/read/10548/chapter/5#111> (last  
 19 accessed Sept. 12, 2019).

20 <sup>8</sup> Salinsky, *supra* note 2 at 15.

21 <sup>9</sup> INST. OF MED., U.S. COMMITTEE ON THE CONSEQUENCES OF UNINSURANCE, A SHARED DESTINY:  
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 25 Sept. 12, 2019).

26 <sup>10</sup> *See, e.g., Publicly Funded Family Planning Services in the United States*, GUTTMACHER INST.  
 27 (Sept. 2016), [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_contraceptive\\_serv\\_0.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_contraceptive_serv_0.pdf)  
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<sup>11</sup> Salinsky, *supra* note 2 at 15.

<sup>12</sup> Drew E. Altman & Douglas H. Morgan, *The Role of State and Local Government in Health*,  
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 accessed Sept. 12, 2019).

<sup>13</sup> *Id.*; *see also* FUTURE OF THE PUBLIC’S HEALTH, *supra* note 7 at 111.

<sup>14</sup> FUTURE OF THE PUBLIC’S HEALTH, *supra* note 7 at 111.

<sup>15</sup> COMMUNITY EFFECTS OF UNINSURANCE, *supra* note 9 at 43

<sup>16</sup> *See id.* at 128.

1 for their residents.<sup>17</sup> Across the country, emergency medical services are also a vital component of  
2 the healthcare safety net.<sup>18</sup>

3 To help serve low-income patients and increase their capacity to provide services, local  
4 hospitals and healthcare centers also receive funding from Medicare, Medicaid, and other HHS  
5 programs.<sup>19</sup> Notably, for some of these funding sources, the number of patients treated and the  
6 amount of care provided are not taken into account when allocating funds.<sup>20</sup> And when local  
7 governments do receive federal funds, they are often statutorily mandated to provide services to all  
8 residents and vulnerable populations—such as individuals with HIV.<sup>21</sup>

9 **ARGUMENT**

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

13 To provide equal access and opportunities to their citizens, Amici have all enacted a variety  
14 of non-discrimination policies and laws.<sup>22</sup> Most apply to employment, housing, and public  
15 accommodations, including hospitals. Some also specifically address how healthcare will be  
16 provided by Amici to their patients in a non-discriminatory fashion. For example, Columbus Public  
17 Health maintains a “Client Non-Discrimination Policy” that requires that employees “serve all  
18 clients . . . without malice or bias on the basis of race, ethnicity, sex, sexual orientation, gender  
19 identity or expression, color, religion, ancestry, national origin, age, disability, familial status, or

20 <sup>17</sup> Cal. Welf. & Inst. Code § 17000.

21 <sup>18</sup> See, e.g., *The Uninsured: Access to Medical Care Fact Sheet*, Am. College of Emergency  
22 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).

23 <sup>19</sup> See *id.* at 61.

24 <sup>20</sup> COMMUNITY EFFECTS OF UNINSURANCE, *supra* note 9 at 61.

25 <sup>21</sup> See, e.g., Public Health Services Act, § 330, 42 U.S.C. §§ 254b (requiring federally-qualified  
26 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).

27 <sup>22</sup> See, e.g., GARY, IND., MUN. CODE OF THE CITY OF GARY, IND. §§ 26-19, 139 (2010); OAKLAND,  
28 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.

1 military status.”<sup>23</sup> Similarly, Baltimore City Health Department clinics display notices to patients  
 2 that they will receive care without discrimination.<sup>24</sup> As local governments, Amici are the unit of  
 3 government closest to their residents, and these ordinances were oftentimes passed in direct  
 4 response to local findings and harms.<sup>25</sup>

5 The Final Rule demands that Amici make an impossible choice. If Amici do not permit  
 6 discrimination in the provision of local government services, we may risk losing critical federal  
 7 funding.<sup>26</sup> Although styled as a choice by HHS, it is really no choice at all.<sup>27</sup> If Amici do not  
 8 permit discrimination, the loss of federal funds will inevitably and necessarily force Amici to close  
 9 key services, eliminate personnel, and compromise the health and safety of their residents. But  
 10 following and implementing the Final Rule and permitting discrimination will cause a distinct and  
 11 particularly insidious harm by (1) placing the weight of government behind the discrimination, and  
 12 (2) disproportionately impacting low-income patients who rely on local governments for healthcare  
 13 services. As a result, the Final Rule leaves Amici trapped between two untenable options.

14 The Final Rule attacks Amici’s non-discrimination ordinances and policies in two ways.  
 15 First, it hampers Amici’s ability to manage their safety net healthcare services fairly, predictably,  
 16 and effectively. The Final Rule does not allow local governments to ask, prior to hiring, whether a

17 \_\_\_\_\_  
 18 <sup>23</sup> *About Columbus Health*, THE CITY OF COLUMBUS,  
 19 <https://www.columbus.gov/publichealth/About/About-Columbus-Public-Health/> (last accessed  
 20 Sept. 12, 2019).

21 <sup>24</sup> BALT., MD., BALT. CITY CODE art. 4, §§ 1-1(f)(1), 3-4.

22 <sup>25</sup> *See, e.g.*, OAKLAND, CAL., OAKLAND MUN. CODE § 9.40.020 (Findings) (“The 1985 Alameda  
 23 County AIDS Response Plan reported that AIDS cases in Alameda County are doubling every nine  
 24 to twelve (12) months, and that for every case of AIDS there exist two or three individuals with  
 25 ARC or other related, nonfatal illnesses. The report states that as of June 14, 1985, there were one  
 26 hundred thirteen (113) diagnosed AIDS cases in Alameda County, and estimates that by the end of  
 27 1989 there could be nearly eight thousand (8,000) diagnosed AIDS cases in the county. The report  
 28 indicates that as of June 14, 1985, there were sixty-seven (67) diagnosed AIDS cases in Oakland.”).

<sup>26</sup> 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).

<sup>27</sup> As San Francisco accurately notes, this is not mere encouragement, but rather will place a gun to  
 Amici’s heads. *See* City & Cty. of San Francisco’s Notice of Motion and Motion for Preliminary  
 Injunction; Memorandum of Points and Authorities in Support Thereof at 19, *San Francisco v.*  
*Azar*, No. 3:19-cv-2405-JCS (June 3, 2019) (quoting *National Federation of Independent Business*  
*v. Sebelius*, 567 U.S. 519, 581 (2012)).

1 prospective employee will object to performing essential job functions, so it is possible that Amici  
2 will not be aware, until the moment an emergency occurs, that an employee objects to performing  
3 an essential function.<sup>28</sup> The Final Rule also bars Amici from reassigning an employee who refuses  
4 to perform a health service unless she voluntarily accepts the accommodation.<sup>29</sup> For example, if a  
5 local health department were preparing to respond to an outbreak of measles, and had an employee  
6 unwilling to administer that vaccine, it would prevent the local health department from responding  
7 to a Class A Infectious Disease Outbreak.

8 The Final Rule will amplify staffing issues that already uniquely affect public hospital and  
9 health clinics, who have fewer dedicated staff than private facilities. For example, only 28.5% of  
10 public hospitals have a dedicated in-patient physician who works exclusively in a hospital.<sup>30</sup> Rural  
11 public hospitals have even fewer healthcare providers on staff when compared to metropolitan  
12 public hospitals.<sup>31</sup> Thus, if employees of public healthcare systems—particularly rural ones—opt  
13 out of providing certain services as the Final Rule allows, another qualified employee may be  
14 unavailable to help patients, even in emergency circumstances.

15 Second, and more coercively, the Final Rule conditions the receipt of federal funds on  
16 compliance with its provisions and authorizes HHS to withhold, deny, or suspend federal funds if  
17 Amici fail to comply.<sup>32</sup> If Amici adhere to their current non-discrimination policies, this may be  
18 deemed a “failure to comply” and could amount to hundreds of millions of dollars in lost funding  
19 for Amici. For example, approximately half of the funding for Baltimore City Health Department’s  
20 clinics and 75% of funding for the Baltimore City Fire Department’s Emergency Medical Services  
21 comes from federal funds that would be at risk under the Final Rule. Similarly, HHS funding for  
22 Columbus accounts for over \$12 million dollars of Columbus Public Health’s budget and funds 100

23 \_\_\_\_\_  
24 <sup>28</sup> 84 Fed. Reg. at 23263.

25 <sup>29</sup> *Id.*

26 <sup>30</sup> Taressa Frazee et al., *Public Hospitals in the United States, 2008*, AGENCY FOR HEALTHCARE RES.  
27 & QUALITY, Sept. 2010, at 2, <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb95.pdf> (compared  
28 with 50.3% of private non-profit hospitals who have hospitalist on staff) (last accessed Sept. 12,  
2019).

<sup>31</sup> *See id.*

<sup>32</sup> 84 Fed. Reg. at 23269, 23271-72.

1 city jobs. Moreover, it is unclear under the Final Rule whether only HHS funds are at stake or  
 2 whether federal funds from the Department of Labor, Department of Education, Medicare, and  
 3 Medicaid may also be withheld if local governments do not comply.<sup>33</sup> The loss of funding from  
 4 any, let alone all, of these sources would be cataclysmic for a wide swath of services provided by  
 5 Amici and other local governments.

## 6 **II. THE FINAL RULE WILL BURDEN LOCAL GOVERNMENTS AND HARM 7 THEIR RESIDENTS**

8 If HHS is allowed to enforce the Final Rule, Amici will be uncertain as to whether medical  
 9 providers throughout the country, including Amici's providers, will refuse to treat patients,<sup>34</sup> and  
 10 may not direct those patients to needed care.<sup>35</sup> Those turned away will invariably look to Amici for

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11 <sup>33</sup> See *id.* at 23272 (“[C]ompliance . . . may be effected by . . . temporarily withholding Federal  
 12 financial assistance or other Federal funds, in whole or in part, pending correction of the  
 13 deficiency); *id.* at 23172 (implicating funds made available in Labor, HHS, and Education  
 14 appropriations); see also *Factsheet: Final Conscience Regulation*, DEP’T OF HEALTH & HUM.  
 15 SERVS. (May 2, 2019) (hereinafter “*HHS Factsheet*”), [https://www.hhs.gov/sites/default/files/final-  
 16 conscience-rule-factsheet.pdf](https://www.hhs.gov/sites/default/files/final-conscience-rule-factsheet.pdf) (last accessed Sept. 12, 2019).

17 <sup>34</sup> The non-state and local government entities covered by the Rule include HHS, private health  
 18 providers that receive HHS funds, universities and schools that provide health care training, and  
 19 individuals and entities that receive taxpayer dollars from HHS or programs administered by HHS,  
 20 such as Medicare, Medicaid, the Affordable Care Act, and the Public Health Services Act. See *HHS  
 21 Factsheet*, *supra* note 33. Some estimate this will impact over 613,000 hospitals, health clinics,  
 22 doctors’ offices, and nonprofits. See Complaint for Declaratory and Injunctive Relief at 5, *Planned  
 23 Parenthood Fed’n of Am., Inc. v. Azar*, No. 1:19-cv-05433 (S.D.N.Y. June 11, 2019),  
 24 <https://www.courthousenews.com/wp-content/uploads/2019/06/PlannedParenthood.pdf> (last  
 25 accessed Sept. 12, 2019).

26 <sup>35</sup> 84 Fed Reg. at 23263 (defining “assist in the performance” to include “counseling, referral,  
 27 training, or otherwise making arrangements”). Unfortunately discrimination in the provision of  
 28 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),  
[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](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); 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](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).

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

4 If they are denied care by other healthcare providers under the Final Rule, residents will  
5 naturally rely on Amici, the providers of last resort for their communities, for routine healthcare and  
6 emergency treatment. Of the 5,262 community hospitals in the United States, 972 are run by state  
7 and local governments.<sup>36</sup> As a result, an uptick in the number of patients funneled to local hospitals  
8 will significantly impact their ability to provide care to existing and new patients. Local  
9 government clinics and health departments also will need to step in if private doctors' offices and  
10 clinics covered by the Final Rule begin turning away patients. More patients, even those with  
11 insurance, will consume appointment times, vaccination doses, and resources allocated for other  
12 uses.<sup>37</sup> For example, if a pediatricians' office employs a scheduler who morally objects to  
13 vaccinations, and so refuses to schedule those appointments, parents and caregivers could be  
14 funneled to public options. Adding patients to a system when those patients should be receiving  
15 services outside of the system will harm Amici's citizens, particularly those most in need.

16 This harm to the public is not speculative.<sup>38</sup> The Final Rule by its terms allows any  
17 healthcare provider, whether an entity or an individual working for one, to deny healthcare to  
18 patients on the basis of "religious, moral, ethical, or other reasons" without justification or notice.<sup>39</sup>  
19 This could include denying services for lesbian, gay, bisexual, transgender, and queer or  
20 questioning (LGBTQ) individuals, individuals seeking reproductive healthcare, the elderly, those  
21 struggling with substance abuse, and other vulnerable populations.

22 <sup>36</sup> *Fast Facts*, *supra* at note 3.

23 <sup>37</sup> This increased stress on Amici's healthcare systems would be occurring at the same time when  
24 the number of uninsured in the United States is rising. See Congressional Budget Office, *Federal  
25 Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028* (May 2018).

26 <sup>38</sup> See, e.g., Association of American Medical Colleges, Comment Letter on Proposed Rule to  
27 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).

28 <sup>39</sup> 84 Fed. Reg. at 23263.

1 The likely effect on local LGBTQ communities provides a concrete illustration of the  
 2 disastrous impact the Final Rule could have on Amici’s residents. Per the express terms of the  
 3 Final Rule, gay and bisexual men can be denied healthcare services. But LGBTQ individuals  
 4 already face significant discrimination when accessing healthcare services,<sup>40</sup> so the Final Rule will  
 5 exacerbate an already acute problem. Although gay and bisexual men make up approximately 2%  
 6 of the U.S. population, they account for 71% of new HIV infections and represent 61% of those  
 7 currently living with HIV.<sup>41</sup> Early detection and treatment as soon as one is diagnosed are critical  
 8 in helping reduce mortality rates and further transmission.<sup>42</sup>

9 To the extent LGBTQ people, and particularly gay and bisexual men, are denied services,  
 10 there necessarily will be either (1) a harmful delay in the detection and treatment of HIV patients, or  
 11 (2) more people living with HIV who do not know it.<sup>43</sup> Healthcare workers will be entitled to  
 12 refuse to perform specific services for LGBTQ patients, such as screening for STIs, fertility  
 13 treatment for lesbian couples, and providing hormone therapy for transgender individuals.  
 14 Consequently, the Final Rule is likely to lead to LGBTQ patients hiding or failing to disclose their  
 15 identity or medical history for fear of discrimination, resulting in incomplete care.

16 Along with the obvious harms incomplete care will inflict on LGBTQ individuals, creating  
 17 an environment where people do not feel safe sharing their sexual identity and medical history will  
 18 also have serious public health impacts. For example, during a disease outbreak the Center for  
 19 Disease Control may identify men who have sex with men as a high risk group making them  
 20 eligible for a free “outbreak vaccine.” However, if men in this group are afraid to disclose their  
 21 identity due to discrimination they may not receive necessary medical care. This will put them at

22 \_\_\_\_\_  
 23 <sup>40</sup> Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from*  
 24 *Accessing Health Care*, CENTER FOR AMERICAN PROGRESS (Jan. 18, 2018),  
 25 [https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-](https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/)  
 26 [lgbtq-people-accessing-health-care/](https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/) (last accessed Sept. 12, 2019).

27 <sup>41</sup> *The HIV/AIDS Epidemic in the United States: The Basics*, HENRY J. KAISER FAM. FOUND. (Mar.  
 28 25, 2019), [https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-](https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/#endnote_link_391348-59)  
[basics/#endnote link 391348-59](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).

<sup>42</sup> *See id.*

<sup>43</sup> *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”).



1 greater risk and hamper local government’s ability to contain and mitigate diseases. Thus, the Final  
2 Rule will create an environment of discrimination that will significantly harm each LGBTQ person  
3 and may have a deleterious ripple effect for all individuals in a city or county.

4 In addition, LGBTQ individuals denied care elsewhere will turn to the healthcare services  
5 provided by Amici. For example, cities and counties often work to provide services to people  
6 living with HIV through Part A grants from the Ryan White HIV/AIDS Treatment Extension Act of  
7 2009.<sup>44</sup> Cities like Columbus also provide HIV testing through their sexual health clinics. But  
8 local governments have not had time to prepare their budgets or their facilities for additional  
9 patients. Further, local governments who receive Ryan White funding are left in a state of perpetual  
10 contradiction because they are both legally mandated to provide services to HIV patients and  
11 legally required by the Final Rule to allow staff to refuse to care for such patients.

12 In the short-term, all local services, including those services for people living with HIV,  
13 could be overrun and lead to gaps in healthcare. Key safety net services will be underfunded or  
14 funds from other local services will need to be diverted to make up shortfalls, while Amici already  
15 lack the resources to successfully meet the needs of their residents.<sup>45</sup> For those individuals who are  
16 denied private services and do not turn to services Amici provide, they will undeniably suffer worse  
17 health outcomes. Amici will also incur the downstream costs of a population that is sicker and less  
18 productive.

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

22 \_\_\_\_\_  
23 <sup>44</sup> *Part A: Grants to Eligible Metropolitan and Transitional Areas*, HEALTH RESOURCES & SERVS.  
24 ADMIN., [https://hab.hrsa.gov/about-ryan-white-hivaids-program/part-a-grants-emerging-metro-  
transitional-areas](https://hab.hrsa.gov/about-ryan-white-hivaids-program/part-a-grants-emerging-metro-transitional-areas) (last accessed Sept. 12, 2019).

25 <sup>45</sup> *See, e.g.*, INST. OF MED., COMMITTEE ON PUBLIC HEALTH STRATEGIES TO IMPROVE HEALTH, FOR  
26 THE PUBLIC’S HEALTH: INVESTING IN A HEALTHIER FUTURE, Ch. 4, Funding Sources and Structures  
27 to Build Public Health (April 10, 2010), <https://www.ncbi.nlm.nih.gov/books/NBK201025/>  
28 (“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.

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

3 The Final Rule’s applicability to both emergency responders and emergency situations will  
 4 harm Amici and their residents. It will reduce the quality of emergency care available in Amici’s  
 5 jurisdictions, prevent Emergency Medical Services from providing the necessary speed of care, and  
 6 not only endanger reproductive and LGBTQ healthcare, but disproportionately harm Amici’s low-  
 7 income and vulnerable populations. Many local governments offer emergency transportation and  
 8 care, which may be provided via ambulance services or under the auspices of Emergency Medical  
 9 Services (EMS), often run via local fire departments.<sup>46</sup> Fire department Emergency Medical  
 10 Technicians (EMTs) and paramedics are typically first on the scene in response to EMS calls, and  
 11 they provide life-saving care to individuals suffering from medical emergencies.<sup>47</sup> If local  
 12 governments are asked to choose between vital federal funding and enabling discrimination,  
 13 residents’ lives will be endangered.

14 The Final Rule explicitly includes EMTs and paramedics as individuals who may decline to  
 15 provide healthcare services based on religious objections.<sup>48</sup> It also fails to provide any exception  
 16 for patients in life-threatening or critical condition, which is contrary to EMTALA,<sup>49</sup> and will

17 <sup>46</sup> See, e.g., *Fire Department, Medical Services Division*, CITY OF OAKLAND CALIFORNIA,  
 18 <http://www2.oaklandnet.com/government/o/OFD/o/EmergencyMedicalServices/index.htm> (last  
 19 visited June 21, 2019); *Division of Fire*, City of Columbus, [https://www.columbus.gov/public-  
 20 safety/fire/reports/EMS-Reports/](https://www.columbus.gov/public-safety/fire/reports/EMS-Reports/) (last accessed Sept. 12, 2019).

21 <sup>47</sup> See, e.g., CITY OF OAKLAND, PROPOSED POLICY BUDGET: FISCAL YEAR 2019-2021 26 (2019),  
 22 [https://cao-94612.s3.amazonaws.com/documents/FY-2019-21-Proposed-Budget-Book-WEB-  
 23 VERSION.pdf](https://cao-94612.s3.amazonaws.com/documents/FY-2019-21-Proposed-Budget-Book-WEB-VERSION.pdf) (last accessed Sept. 12, 2019).

24 <sup>48</sup> 84 Fed. Reg. at 23188 (“EMTs and paramedics are treated like other health care professionals  
 25 under this definition. . . . EMTs and paramedics are trained medical professionals, not mere  
 26 ‘drivers.’ If commenters contend that driving a patient to a procedure should never be construed to  
 27 be assisting in the performance of a procedure, the Department disagrees and believes it would  
 28 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.”).

<sup>49</sup> 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; see also City & Cty. of San  
 Francisco’s Notice of Mot. and Mot. for Prelim. Injunction; Mem. of P&A in Support Thereof, at  
 12-13 (June 3, 2019) (asserting that the challenged provisions of the Final Rule are contrary to  
 EMTALA).

1 literally endanger the lives of patients who rely on EMTs and paramedics to respond rapidly and  
2 appropriately to emergencies. For example, under the Final Rule, Amici are concerned that an  
3 emergency responder could refuse to provide a pregnant person suffering from a life-threatening  
4 miscarriage with the drugs that would induce a life-saving abortion.<sup>50</sup> Similarly, an ambulance  
5 driver could refuse to transport a patient with an ectopic pregnancy to the hospital, anticipating an  
6 abortion to be the course of treatment.<sup>51</sup> An EMT could even refuse to provide care to an individual  
7 in medical distress who is perceived to be LGBTQ, based purely on that real—or imagined—  
8 identity.

9 As Amici know well, fire personnel and EMTs must be dispatched urgently after a 911 call  
10 is received, and care and treatment must often be administered as soon as possible upon arrival.  
11 Speed is of the essence in providing emergency medical treatment, when even a minute’s delay in  
12 some life-threatening cases can have a measurable impact on mortality rates.<sup>52</sup> If EMTs and  
13 paramedics are able to refuse to provide care when they arrive at the scene, it will be costly—if not  
14 impossible<sup>53</sup>—for localities to provide adequate alternative care to acutely suffering patients.  
15 Further, to enable employees to endanger community-members’ lives in this way would be an  
16 abdication of local governments’ duty to provide for their citizens’ health and welfare. For  
17 example, many regions of the United States are currently experiencing an opioid crisis. Under the  
18 broad terms of this rule, Amici fear that an EMT who religiously or morally objects may refuse to  
19 administer naloxone to an individual overdosing on an opioid, reducing the chance of survival.<sup>54</sup>

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20 <sup>50</sup> “[T]he Department believes driving a person to a hospital or clinic for a scheduled abortion could  
21 constitute ‘assisting in the performance of’ an abortion, as would physically delivering drugs for  
22 inducing abortion.” 84 Fed. Reg. at 23188.

23 <sup>51</sup> See, e.g., *id.*

24 <sup>52</sup> See, e.g., James P. Byrne et al., *Association Between Emergency Medical Service Response Time*  
25 *and Motor Vehicle Crash Mortality in the United States*, J. Am. Med. Assoc. E1 (2019).

26 <sup>53</sup> When fire personnel respond to an emergency, they can be dispatched to the scene and may not  
27 learn until arrival what type of medical emergency they are called to address. If an EMT or  
28 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.

<sup>54</sup> 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](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).

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

11 Not only will the Final Rule have a devastating impact on local governments' ability to  
12 provide life-saving emergency reproductive and LGBTQ healthcare, it will also disproportionately  
13 harm the low-income and marginalized populations who are more likely to use emergency services.  
14 Individuals with less access to routine medical care are more likely to utilize EMS.<sup>55</sup> Perhaps  
15 because ambulance care and transportation to the hospital is overwhelmingly offered without  
16 requiring proof of insurance or ability to pay (unlike nearly all other medical care), lower-income  
17 and uninsured patients use EMS at a higher rate than those with other forms of insurance.<sup>56</sup> In  
18 addition, low-income Medicaid recipients are more likely to rely on ambulance transportation than  
19 other groups.<sup>57</sup> In metropolitan areas, uninsured ambulance use is even higher than in rural areas.<sup>58</sup>  
20 The Final Rule therefore will harm those of Amici's residents least able to withstand additional  
21 threats to their health and wellbeing.

22 \_\_\_\_\_  
23 <sup>55</sup> Zachary F. Meisel et al., *Variations in Ambulance Use in the United States: the Role of Health*  
24 *Insurance*, 18 *Academic Emergency Medicine* 1036, 1042 (2011),  
25 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1553-2712.2011.01163.x> (last accessed Sept. 12,  
26 2019).

27 <sup>56</sup> *Id.*

28 <sup>57</sup> 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](https://www.annemergmed.com/article/S0196-0644(10)00384-7/fulltext) (last accessed Sept. 12,  
2019).

<sup>58</sup> Meisel, *supra* note 55 at 1041.

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

6 **CONCLUSION**

7 The Final Rule violates statutory and constitutional provisions. If it takes effect, it will  
8 likely force Amici and other local governments across the United States to discriminate against  
9 their own citizens or face the loss of hundreds of millions of federal dollars, increase the number of  
10 patients accessing their healthcare systems, and make their residents less healthy. Further, Amici's  
11 residents will face discrimination and suffer harm from the reduction in services the loss of funding  
12 would cause to safety-net hospitals, emergency services, and private healthcare options. For the  
13 foregoing reasons, Amici support Plaintiffs' motion for summary judgment and opposition to  
14 Defendants' motion for summary judgment prohibiting Defendants from enforcing the Final Rule.

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