Denise M. Harle, CA Bar No. 275561
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E., Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dharle@adflegal.org

*Kevin H. Theriot, AZ Bar No. 030446
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
ktheriot@adflegal.org

**Motion pro hac vice submitted*

Attorneys for Amici Curiae American Association of Pro-Life Obstetricians & Gynecologists, American College of Pediatricians, Catholic Medical Association, and National Catholic Bioethics Center

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, Secretary of U.S. Department of Health and Human Services; ROGER SEVERINO, Director, Office for Civil Rights, Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and DOES 1-25,

Defendants.

Case Nos.:
3:19-cv-2405-WHA
3:19-cv-2769-WHA
3:19-cv-2916-WHA

AMICI CURIAE BRIEF OF AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, AMERICAN COLLEGE OF PEDIATRICIANS, CATHOLIC MEDICAL ASSOCIATION, AND NATIONAL CATHOLIC BIOETHICS CENTER, IN SUPPORT OF DEFENDANTS

The Honorable William H. Alsup
Date: October 30, 2019
Time: 8:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

Identity and Interest of Amici

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization comprising more than 4,000 obstetrician–gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College/Congress of Obstetricians and Gynecologists (ACOG) from 1973 to 2013, until this designation was discontinued by ACOG. AAPLOG is concerned about the quality of care provided to pregnant women and the potential long-term adverse consequences of abortion on women's health. Accordingly, AAPLOG explores data from around the world regarding abortion-associated complications, such as depression, substance abuse, suicide, subsequent preterm birth, and *placenta previa*, in order to provide the general public, medical colleagues, and others with a realistic understanding of abortion-related health risks.

The American College of Pediatricians (ACPeds) is a national non-profit organization of pediatricians and other health care professionals, formed in 2002 and dedicated to the health and well-being of children. ACPeds's mission is to enable all children to reach their optimal physical and emotional health and well-being. To this end, ACPeds has written a number of position statements on matters unique to children and continues to produce sound policy based upon the best available research to assist parents and society in caring for children. Membership is open to qualifying health care professionals who share the ACPeds's mission, vision, and values. ACPeds currently has members in forty-seven states, as well as in several countries outside of the United States.

The Catholic Medical Association (CMA) is a national, physician-led community of health care professionals that informs, organizes, and inspires its members, in steadfast fidelity to the teachings of the Catholic Church, to uphold the principles of the Catholic faith in the science and practice of medicine.

The National Catholic Bioethics Center (NCBC) is a non-profit research and educational institute committed to applying the moral teachings of the Catholic Church to ethical issues arising in health care and the life sciences. NCBC administers a certification program in bioethics in collaboration with two graduate programs providing graduate degrees to our dually

enrolled students concentrating in bioethics. It also provides consultations to institutions and individuals seeking its opinion on the appropriate application of Catholic moral teachings to these ethical issues, impacting human rights of vulnerable populations and conscience rights of their providers. NCBC has 2,500 members (many of whom are institutional members representing thousands of persons) throughout the United States. Increasingly, the Center is contacted by members and non-members alike seeking consultation on the increasing coercion to violate deeply held religious beliefs or moral values in the delivery of health care.

Introduction and Summary

Rights of conscience are at the core of constitutional freedoms and are, in the words of James Madison, "unalienable."[1] Conscience is also at the heart of what motivates many who enter the medical field, a profession full of individuals who dedicate their lives to healing and doing no harm. When these conscience rights clash (as they sometimes do) with various rights asserted by others, the individual conscience—"the most sacred of all property"[2]—must not be sacrificed in the name of business interests, political goals, or the convenience of others.

Despite clear constitutional principles assuring the sanctity of conscience, political interest groups lobby to prevent the exercise of conscience rights by people holding certain disfavored religious or moral beliefs. Federal and state legislation have provided specific protections for medical conscience rights, but those have proven weak or ignored.

Conscience rights are not limited based on one's professional status. Plaintiffs' argument that too many health care workers' consciences would be protected under the HHS Conscience Rule shows a misunderstanding of the fundamental rights we have historically protected—beginning with the guarantees of First Amendment. Individual conscience rights are paramount, regardless of a person's job title or role. Decades of Supreme Court caselaw teach that complicity in an act creates an unconstitutional conscience burden.

---

[1] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in SELECTED WRITINGS OF JAMES MADISON 21–27 (Ralph Ketcham ed. 2006).
[2] James Madison, *Property* (1792), in MADISON, supra note 1, at 223.

Nor are conscience rights limited to particular aspects of health care. Plaintiffs' suggestion that conscientious objections should be largely limited to "abortion and sterilization," *see* CA Compl. ¶ 66, CCSF Compl. ¶ 32, ignores a serious reason the Rule is necessary: there are many significant controversial aspects of medicine that implicate ethical quandaries. The government may not pick and choose which particular views or topics deserve protection.[3]

The purpose and effect of the Rule is to meaningfully effectuate the laws that Plaintiffs claim they adhere to. Specific examples show that existing legal protections for medical conscience rights have not been enough to prevent egregious violations or to stave off efforts to force moral conformity. Millions of American health care workers will have their rights safeguarded by the fortified protections of the Conscience Rule.

I. Longstanding foundational constitutional principles support the legality of the Rule.

The Conscience Rule is a straightforward application of the basic conscience rights that have been secured since the inception of this nation. The American Republic was established to be a refuge for conscience;[4] as Samuel Adams put it, "freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country as their last asylum."[5] Thomas Jefferson agreed that conscience "could not [be] submit[ted]" to governmental oversight or authority.[6]

Liberty of conscience was the cornerstone of the Constitution. As Jefferson put it, "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[7] Government infringement on

---

[3] Besides, Plaintiffs seek to have the Rule invalidated as to *all* conscience-based objections, even the ones like abortion and sterilization they concede are protected under multiple existing laws.

[4] Lynn D. Wardle, *Conscience Exemptions*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 77, 78–79 (2013) (explaining that protecting "conscience was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of the Bill of Rights").

[5] Samuel Adams, *American Independence*, Speech in Philadelphia (Aug. 1, 1776), https://en.wikisource.org/wiki/American_Independence.

[6] Thomas Jefferson, Notes on the State of Virginia 169 (1782), https://docsouth.unc.edu/southlit/jefferson/jefferson.html.

[7] Letter from Thomas Jefferson to Richard Douglas, February 4, 1809, https://founders.archives.gov/documents/Jefferson/99-01-02-9714

conscience was intolerable and inconceivable to the Founders. Shortly before the Bill of Rights was adopted, George Washington insisted that if the "Government might ever be so administered as to render the liberty of conscience insecure," he would be the first "to establish effectual barriers against the horrors of spiritual tyranny and every species of religious persecution."[8] John Jay, the first Chief Justice of the Supreme Court, agreed that conscience protections are a constitutional guarantee: "Adequate security [under our Constitution] is given to the rights of conscience and private judgment. They are by nature subject to no control but that of Deity." And Joseph Story, one of our nation's most prominent Supreme Court justices, said that "rights of conscience are … beyond the just reach of any human power. They … [must] not be encroached upon by human authority."[9]

The First Amendment itself protects a cluster of rights that depend on freedom of mind. Freedom of speech, freedom of religious exercise, and freedom of assembly are concerned with guaranteeing that individuals can live consistently with their own thoughts and beliefs. This same right of conscience has also been essential to the practice of medicine for millennia, as evidenced by the Hippocratic Oath's reverence for human life, and medicine's status as an autonomous profession concerned with doing right and avoiding wrong.[10]

In the context of health care, the U.S. Supreme Court has repeatedly acknowledged the sanctity of medical conscience rights. In *Roe v. Wade*, for example, the Supreme Court cited a resolution of the American Medical Association confirming that "no party to the procedure should be required to violate personally held moral principles. … Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral

---

[8] George Washington to the United Baptist Churches of Virginia, May 1789 (New York) https://founders.archives.gov/documents/Washington/05-02-02-0309

[9] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1870 (1833).

[10] Edmund D. Pellegrino, *Toward a Reconstruction of Medical Morality*, AM. J. OF BIOETHICS, 6(2):65–71, 2006 ("[m]edicine is a moral enterprise … conducted in accordance with a definite set of beliefs about what is right and wrong"). "The physician, therefore, cannot be expected to lay aside or ignore his deeper personal beliefs, values, or religious commitments. Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. CONTEMP. HEALTH L. & POLICY 47, 52 (1994).

principles." 410 U.S. 113, 143 n.38 (1973). The same day, the Supreme Court decided a companion case, *Doe v. Bolton*, and noted with approval that the statute at issue expressly protected conscience, allowing "a physician or any other employee … the right to refrain, for moral or religious reasons, from participating in the abortion procedure." 410 U.S. 179, 197–98 (1973). This, the Court said, "afford[ed] appropriate protection to the individual and to the denominational hospital." *Id.* at 198.

The Supreme Court was soon confronted with problems stemming from conscience and the doors *Roe v. Wade* opened. Cases like *Maher v. Roe* and *Harris v. McRae* confirmed that individuals may, through the states, effect policies reflecting "a value judgment favoring childbirth over abortion," *Maher*, 432 U.S. 464, 474 (1977), and be free from forced subsidization of abortion through taxpayer dollars, *McRae*, 448 U.S. 297, 318 (1980).

The Court in *McRae* gave careful consideration to conscience concerns, and even the plaintiffs—a group of women wanting the government to fund their abortions—acknowledged that whether to have an abortion "is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before God." 448 U.S. at 321. Surely the same is true for whether to assist in an abortion.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), conscience issues came up again. The plurality opinion began with a reminder that what was decided in *Roe* as a legal matter is in fact a much bigger question of conscience that cannot be settled or ignored:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality.

Id. at 850 (plurality op.).

The Court explained that "the abortion decision originate[s] within the zone of conscience and belief." *Id.* at 852. Then the Court highlighted serious questions of conscience *for all Americans* implicated by abortion: "Abortion is a unique act. It is an act *fraught with consequences for others*: for the woman who must live with the implications of her decision; for the persons who *perform and assist in* the procedure; for the spouse, family, and society which

must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, consequences for the life or potential life that is aborted." *Id.* at 852.

It is critical for the law to be clear about what happens in these moral, ethical, religious, and philosophical dilemmas. The Rule does just that.

II. The Conscience Rule buttresses legal protections long established by Congress as the will of the people but not always effectively enforced.

Congress has repeatedly passed laws demonstrating a bipartisan intent that health care professionals not be coerced into violating their beliefs. The potential threat to conscience rights triggered by *Roe* set off a chain of federal and state laws enacted to protect individuals and institutions that objected to participating in abortion. The first of these laws, the Church Amendments, 42 U.S.C. § 300a–7 et seq., were enacted in the 1970s to provide protections for health care professionals who object to performing abortions, sterilizations, and other procedures based on their moral convictions or religious beliefs. [11]

But despite the Supreme Court's pronouncements and the protections of the Church Amendments, public medical schools began pressuring students to undergo mandatory abortion training. In 1996, a bipartisan Congress again defended conscience rights with the Coats–Snowe Amendments, 42 U.S.C. § 238n, prohibiting the federal government and any state or local government receiving federal funds from discriminating against health care professionals based on a conscientious refusal to participate in abortions, abortion training, or abortion referrals.

But as attacks on conscience continued, a bipartisan Congress again saw a need to intervene, passing the 2004 Weldon Amendment, Pub. L. No. 108–447, an appropriations rider prohibiting funds from the Departments of Health, Labor, or Education from flowing to any

[11] Plaintiffs are wrong when they claim that the Rule greatly expands the range of health care activities protected by existing conscience laws. The Church Amendments, for example, expressly prohibit discrimination based on participation in or refusal to participate in "*any* lawful health service or research activity … on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity." 42 U.S.C. § 300a–7(c)(2)(B) (emphasis supplied).

federal, state, or local government or program that discriminates against individual or institutional health care providers for their refusal to "provide, pay for, provide coverage for, or refer for abortions." *Id.* at Tit. V, § 508(d)(1). This conscience protection was met with great resistance and lawsuits by abortion advocates, but courts rejected the challenges, and the Weldon Amendment has been renewed in each subsequent budget bill.

During the past four decades, most states have enacted their own conscience protections, modeled primarily after the Church Amendments but varied in terms of who and what is covered. Enforcement, however, has been inconsistent, in part because of deficient legal enforcement mechanisms.

Taken together, these laws show that at both the state and national level, the legislative intent is to protect medical professionals' conscience rights. But these laws are missing something the Conscience Rule provides: clear methods to ensure that they are enforced. *See infra* Section V. If, as Plaintiffs claim, they "fully compl[y] with all of these [health care conscience] laws," CCSF Compl. ¶ 32, then they should have no problem complying with the Rule that simply provides mechanisms for those laws to be meaningfully enforced.

III. Recent attacks on certain beliefs show that conscience rights are still very much under siege.

Unfortunately, threats persist. Professional organizations have taken aim at health care professionals whose exercise of conscience do not "conform[] to their own agenda."[12] Opponents to conscience in medicine, such as Plaintiffs, claim it "obstruct[s] access to goods and services,"[13] and constitutes an abdication of the medical practitioner's duty.[14] Some argue that physicians with moral objections to certain procedures should simply avoid practicing in a field

---

[12] Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine* at 6, INT'L J. FAMILY MED., VOL. 2013 (Article ID 587541), https://www.hindawi.com/journals/ijfm/2013/587541/

[13] Douglas Nejaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2566 (2015).

[14] *E.g.*, Julian Savalescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006) ("Conscience … can be an excuse … invoked to avoid doing one's duty").

that implicates their objections.[15] Others conclude that "health care professionals should be admonished that conscientious objections based on personal beliefs, as opposed to professional ethics, will entail consequences."[16] A group of philosophers and bioethicists recently went further, proposing that medical practitioners who exercise freedom of conscience "should be required to compensate society and the health system for their failure to fulfil their professional obligations."[17] Still others have claimed that "[a] doctor's conscience has little place in the delivery of modern medical care." [18]

Perhaps most alarming, even professional medical associations now question the role of conscience in the provision of medical care. The Committee on Ethics of the American College of Obstetricians and Gynecologists has opined that physicians have a duty to either refer for abortion and other related procedures or, in the alternative, when such referral is not feasible, "provide medically indicated and requested care regardless of the provider's personal moral objections."[19] After the Bush Administration sought to bolster federal medical conscience protections in 2008, the American Medical Association and other professional groups submitted comments in opposition, claiming that "[d]octors who follow their consciences might violate their 'paramount responsibility and commitment to serving the needs of their patients.'"[20]

States too have shown disregard for protecting the conscience rights of medical practitioners. In response to a prior federal attempt to shore up conscience protections, thirteen

---

[15] Julie Cantor, *Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009) ("Qualms about abortion, sterilization, and birth control? Do not practice women's health.").

[16] Martha S. Swartz, *Conscience Clauses*, 6 YALE J. HEALTH POL'Y, L. & ETHICS at 277.

[17] *Consensus Statement on Conscientious Objection in Healthcare*, PRACTICAL ETHICS (Aug. 29, 2016), http://blog.practicalethics.ox.ac.uk/2016/08/consensus-statement-on-conscientious-objection-in-healthcare/.

[18] Julian Savalescu, *Conscientious Objection in Medicine*, THE BRITISH MED. J. 294;332 (2006).

[19] American College of Obstetricians and Gynecologists, Committee on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine* at 5 (Nov. 2007).

[20] William L. Saunders & Michael A. Fragoso, *Conscience Protection in Health and Human Services*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 117 (July 2009) (quoting AMA comments, available at http://www.plannedparenthood.org/files/AMA_et__al__ Comments.pdf).

state attorneys general signed a letter denouncing the regulations,[21] and seven states later filed suit to block them.[22] More recently, Illinois amended its Healthcare Right of Conscience Act to require medical practitioners and institutions to provide abortion referrals.[23] Vermont regulatory agencies attempted to construe Act 39, the state's recently enacted assisted-suicide law, to *require* medical professionals to counsel (or refer for counseling) their terminal patients for physician-assisted suicide.[24] And California passed AB 775, requiring faith-based licensed medical centers offering free services to pregnant women to post signs advertising that California provides free or low-cost abortions.[25]

Extant federal conscience protections have proven incapable of combatting this pernicious trend, principally because, unlike the Rule, they lack meaningful enforcement mechanisms and frequently cover only a limited range of procedures and health care personnel.

IV. The Rule could have prevented many recent violations.

The travails of individual medical practitioners show that federal conscience protections, although many in number and often long on the statute books, have been inadequate to protect the very rights to conscience they were crafted to vindicate. Had the Conscience Rule been in place, it is likely that few of these gut-wrenching dilemmas, much less the burdensome litigation, would have occurred.

---

[21] *See* Saunders & Fragoso, *supra* note 20, at 117 (citing Press Release, Terry Goddard Urges Proposed Abortion Rule Be Withdrawn (Sept. 24, 2008), https://www.azag.gov/press-release/terry-goddard-urges-proposed-abortion-rule-be-withdrawn) (criticizing the legal protections as "single-minded focus on protecting a health care provider's right to claim a personal moral or religious belief").

[22] *Id*. (describing complaint allegations).

[23] Complaint, *Pregnancy Care Center of Rockford v. Rauner*, No. 2016MR000741 (17th Jud. Cir. Ill. filed Aug. 5, 2016).

[24] Complaint, *Vermont Alliance for Ethical Healthcare v. Hoser*, No. 16-cv-00205 (D. Vt. Jul. 19, 2016).

[25] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __, 138 S. Ct. 2361 (2018) (concluding that the law was likely unconstitutional viewpoint discrimination in violation of the First Amendment).

A. Cathy Cenzon-DeCarlo was forced to participate in abortion.

Cathy Cenzon-DeCarlo is a devout Catholic and a surgical nurse at Mount Sinai Hospital in New York City.[26] Because of her religious belief that abortion is the unwarranted taking of a human life, DeCarlo told Mount Sinai that she is unwilling to participate in abortion, and completed paperwork to that effect upon hiring. That agreement was ignored when hospital officials compelled DeCarlo to assist in the abortion of a 22-week-old preborn baby. Hospital officials threatened DeCarlo with charges of "insubordination and patient abandonment" if she did not immediately assist in the abortion, even though the case did not involve emergency circumstances.[27] Despite federal protections designed precisely to protect her in this situation, DeCarlo was unable to convince her supervisors to relent. Faced with losing her job or her nursing license, DeCarlo was compelled to assist in the abortion. When she filed suit against the hospital, the action was dismissed because the court found that she had no private right of action.[28] DeCarlo was instead beholden to the federal bureaucracy to pursue the complaint her attorneys filed with HHS, which finally investigated the incident after a delay but did not ultimately resolve it.

Although Mount Sinai eventually revised its policies to respect conscience rights, DeCarlo's ordeal inflicted emotional and psychological trauma that have left lasting scars. Her crisis shows that federal conscience protections—even when clearly applicable—will do little to prevent abuses, without meaningful enforcement mechanisms and a knowledge on the part of health care facilities that HHS will enforce regulations swiftly and consistently.

B. The Stormans were required to distribute abortion-causing drugs.

The Stormans family owns and operates Ralph's Thriftway, a fourth-generation grocery and pharmacy in Olympia, Washington.[29] As Christians, they object to destroying human life. They refrain from stocking abortifacient drugs in their pharmacy, because such medications can kill an embryo. If the Stormans receive a request for abortifacients, they typically refer customers

---

[26] Complaint, *Cenzon-DeCarlo v. Mt. Sinai Hospital*, No. 09-cv-3120 (E.D.N.Y. Jul. 21, 2009).
[27] *Id*. at ¶¶ 97–123.
[28] *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698–99 (2d Cir. 2010).
[29] *See Stormans, Inc. et al., v Selecky*, No. 07-cv-05374-RBL, Findings of Fact and Conclusions of Law at ¶¶ 1–2, 11–12 (W.D. Wash. filed Feb. 22, 2012).

to nearby pharmacies that regularly stock and dispense them—all within five miles of Ralph's. Such referrals are commonplace in the pharmacy practice.

In 2007, the Washington State Pharmacy Commission, stacked with abortion advocates, enacted a rule prohibiting conscience-based referrals. The Stormans had to sue to protect their conscience rights, and after years of litigation, a federal district court ruled that the new state regulations violated the Free Exercise Clause.[30] But the Ninth Circuit reversed the trial court, and the United States Supreme Court declined to hear the appeal, letting stand the nation's only state ban on conscience referrals by pharmacists.[31]

This case signals that states, along with advocacy groups and even medical associations, will sacrifice conscience in exchange for perceived political gain. It also shows that prior federal protections did not protect such abuses, even where intended to. The Rule prevents coercion to violate one's conscience by referring for any lawful procedure.

C. Trinity Health was sued for not performing abortions.

Trinity Health operates more than 200 facilities throughout the U.S., and is particularly dedicated to serving impoverished communities. [32] It provides health care in accordance with Roman Catholic teaching, hewing to the Ethical and Religious Directives issued by the United States Conference of Catholic Bishops.[33] Those directives state that "[a]bortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted."[34] The same directives permit Catholic hospitals to take steps

---

[30] *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007), *vacated and remanded*, 586 F.3d 1109 (9th Cir. 2009).

[31] *See Stormans v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015); *Stormans v. Wiesman*, 136 S. Ct. 2433 (June 28, 2016) (J. Alito, dissenting) (stating that the case "is an ominous sign" because "[i]f this is . . . how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern").

[32] *About Us*, TRINITY HEALTH, http://www.trinity-health.org/about-us.

[33] *Id.*

[34] *See* U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, ¶ 45, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-sixth-edition-2018.pdf.

to save the life of the mother, even if such steps may unintentionally and indirectly result in harm to her unborn baby.[35]

The ACLU sued Trinity Health, claiming that these convictions present a threat to women who might—for "health reasons"—need an abortion and might only have access to a Trinity facility. The ACLU alleged that Trinity Health's refusal to intentionally perform abortions violated the Emergency Medical Treatment and Active Labor Act and the Rehabilitation Act, and sought to compel Trinity Health to reject its Catholic beliefs by performing abortions.[36] A federal district court dismissed the case for lack of standing, but attacks on institutions like Trinity Health would likely continue unabated absent stronger conscience protections, like the Rule provides. The Conscience Rule's penalties for noncompliance should prevent frivolous claims like the one against Trinity Health from detracting from the saving work of these institutions going forward.

D. The need for the Rule is widespread and increasing.

These incidents are not isolated. Gallup and Pew polling consistently show that somewhere between 38–53% of Americans believe abortion should be illegal in most or all circumstances.[37] These individuals do not want to facilitate something that they believe should

---

[35] *Id.* at ¶ 47.

[36] Amended Complaint, *ACLU v. Trinity Health Corporation*, No. 15-CV-12611(GAD-RSW) (E.D. Mich. Oct. 1, 2015). Separately, the ACLU also sued Dignity Health—the nation's fifth largest health care provider—because one of its hospitals refused to perform a requested tubal ligation on a patient following a C-section delivery and another hospital refused to perform a hysterectomy on a biological woman who identifies as transgender. *Judge: California Hospital Doesn't Have To Do Tubal Ligation*, NBC NEWS (Jan. 14, 2016), www.nbcnews.com/news/us-news/fight-over-tubal-ligation-heads-court-california-n496516 (detailing one of ACLU's suit against Dignity Health and Mercy Medical Center); *Transgender patient sues Dignity Health for discrimination over hysterectomy denial*, THE SACRAMENTO BEE (Apr. 20, 2017), https://www.sacbee.com/news/local/health-and-medicine/article145477264.html (detailing the other). In both cases, the procedure sought—elective sterilization on healthy organs—was not in keeping with Catholic doctrine. *About Us*, DIGNITY HEALTH, www.dignityhealth.org/about-us.

[37] *Abortion*, GALLUP NEWS, https://news.gallup.com/poll/1576/abortion.aspx; *Views about Abortion by State*, PEW RESEARCH CENTER, https://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/state/.

be outlawed. They may well agree with Amici that "[p]regnancy is not a disease, and the killing of human beings in utero is not medical care."[38]

Other polling shows that 6 in 10 U.S. adults profess a belief in the Bible,[39] which states that humans are created as one of two sexes: male or female.[40] These individuals are likely to find it morally unacceptable to, for example, inject puberty blockers and cross-sex hormones into adolescents as a way to "treat" gender dysphoria.[41] In fact, a group of Christian health care providers recently had to seek and obtain relief in federal court when a new regulation "require[d] them to perform … gender transitions …, regardless of their contrary religious beliefs or medical judgment." *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). Those providers, like Amici and many health care professionals, "believe[] that a person's sex is ascertained biologically, and not by one's beliefs, desires, or feelings," and they therefore "do[] not believe transition-related procedures are ever in the best interests of … patients." *Id.* Indeed, the Hippocratic obligation "[t]o act only for the benefit of a patient"[42] precludes its oath takers from mutilating healthy organs, causing sterility, or otherwise assisting in gender transitions, which have been shown to significantly increase suicide, suicide attempts, and psychiatric hospitalization among patients.[43]

With roughly 20 million people in the U.S. health care workforce,[44] there are necessarily millions of individuals who share pro-life and biblical views, and do not want to be forced into a

---

[38] AAPLOG Comm. Op. 1: Hippocratic Objection to Killing Human Beings in Medical Practice at 8 (May 8, 2017), https://aaplog.org/wp-content/uploads/2017/05/AAPLOG-CO-1.-Hippocratic-Objection-to-Killing-Human-Beings-in-Medical-Practice.pdf.

[39] *Research Releases in Faith & Christianity*, BARNA (Jul. 10, 2018), https://www.barna.com/research/state-of-the-bible-2018-seven-top-findings/.

[40] *See* Genesis 1:27, 5:2; Matthew 19:4; Mark 10:6.

[41] *E.g.*, Christian Medical & Dental Ass'ns, *CMDA Position Statement on Transgender Identification*, D.2. ("Hormones prescribed to a previously biologically healthy child for the purpose of blocking puberty inhibit normal growth and fertility"), https://cmda.org/article/transgender-identification/

[42] AAPLOG Comm. Op. 1, *supra* note 38, at 2.

[43] *See, e.g.*, Cecilia Dhejne, Paul Lichtenstein, et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden* (Feb. 22, 2011), https://doi.org/10.1371/journal.pone.0016885.

[44] *Industries at a Glance—Health Care and Social Assistance*, BUREAU OF LABOR STATISTICS https://www.bls.gov/iag/tgs/iag62.htm#workforce.

decision between violating their convictions or keeping their jobs. They may conscientiously refuse to "participate in or perform the killing of their patients" through euthanasia, abortion, or assisted suicide.[45] After all, many nurses, doctors, midwives, and support staff go into health care because they want to *heal*.

California's complaint that the Rule "greatly expands the breadth of these [existing] laws, which (at most) address only exemptions to abortion and sterilization procedures," CA Compl. ¶ 66, misses the key point that conscience rights are not limited to particular topics. It is also incorrect. *See supra* note 11. California's assertion that its existing state laws "protect employees from discrimination based on religious beliefs, unless accommodation of those beliefs would result in undue hardship to the employer," CA Compl. ¶ 23, misses the point that conscience rights should not give way to business interests.

California also objects that the Rule expands current conscience protections "to include 'health care personnel,' as distinct from a 'health care professional,' such as a doctor, nurse or other licensed medical provider." CA Compl. ¶ 68. But conscience rights are not limited to people holding certain job titles. *But see id.* (suggesting with disdain that "even a receptionist" with "moral objections" might be protected by the Rule). Anyone working in the medical field may have conscientious objections to facilitating certain acts they believe are morally wrong. An individual's moral beliefs are just as sacred regardless of whether they are a considered a "professional."

The Rule assures the proper breath of legal protections, so that certain viewpoints or individuals are not left vulnerable to attacks on their constitutional rights.

V. The Rule provides clear mechanisms for compliance and enforcement that are lacking in existing law.

The Conscience Rule fills in gaps where other conscience-protecting laws are silent. Its compliance and enforcement mechanisms are critical to ensuring that conscience rights are adequately protected, even where other laws purport to do so. While Plaintiffs' approach would drive good-faith, skilled health care workers from the profession and enshrine barriers to entry, the Rule has the opposite effect, keeping doors open for a wider range of individuals who are

[45] AAPLOG Comm. Op. 1, *supra* note 38, at 1.

willing to serve in the field of medicine. The Rule's "outreach, investigation, compliance, technical assistance, and enforcement practices," Final Rule at p. 44, provide a multi-faceted legal structure for medical practitioners.

The Rule's specific provisions are appropriate measures to guarantee effectiveness. It contains protections like those in the Civil Rights Act, allowing increased oversight through written assurances, notice to employees, and certificates of compliance. These voluntary compliance mechanisms help to avoid unnecessary disputes and litigation. The Rule also provides for outreach and education to ensure that conscience rights are known, understood, and respected. And the Rule provides for investigations into alleged violations and vigorous enforcement of the laws. These are the teeth that have long been needed to ensure that the crucial bark of conscience laws is no longer ignored.

Conclusion

For these reasons and those submitted by Defendants, this Court should grant Defendants' motion for summary judgment.

Respectfully submitted this the 21st day of August, 2019.

By: *s/Denise M. Harle*

Denise M. Harle, CA Bar No. 275561
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dharle@adflegal.org

*Kevin H. Theriot, AZ Bar No. 030446
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
ktheriot@adflegal.org

**Pro hac vice admission pending*

Attorneys for Amici Curiae Catholic Medical Association, American College of Pediatricians, Catholic Medical Association, and National Catholic Bioethics Center

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following:

Dennis J. Herrera
City Attorney for the City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

Jaime Marie Huling Delaye
San Francisco City Attorney's Office
Deputy City Attorney
Fox Plaza
1390 Marke Street, Sixth Floor
San Francisco, CA 941025342

Ronald P. Flynn
San Francisco City Attorney's Office
Chief Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-5408

Sara Jennifer Eisenberg
San Francisco City Attorney's Office
Chief of Strategic Advocacy
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Yvonne Rosil Mere
San Francisco City Attorney's Office
Chief of Complex and Affirmative Litigation
Fox Plaza 1390 Market Street, Sixth Street
San Francisco, CA 94102

Attorneys for Plaintiff

Benjamin Thomas Takemoto
U.S. Department of Justice
Civil Division, Federal Programs Branch
450 Golden Gate Ave.
Ste. 7-5395
San Francisco, CA 94102

//

Kathleen Boergers
California Department of Justice
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244

Attorney for Movant State of California

Lee H. Rubin
Mayer Brown LLP
Two Palo Alto Square
Suite 300
Palo Alto, CA 94306-2112

Attorney for Interested Party County of Santa Clara

Denise Antonia Grab
Institute for Policy Integrity
New York University School of Law
139 MacDougal St.
Third Floor
New York, NY 10012

Jack Lienke
Institute for Policy Integrity
139 MacDougal St.
Wilf Hall, NYU Law School
New York, NY 10012

Justin Gundlach
Institute for Policy Integrity at NYU School of Law
139 MacDougal Street
New York, NY 10012

Attorneys for Amicus Institute for Policy Integrity

Shannon Rose Selden
Debevoise and Plimpton LLP
919 Third Avenue
New York, NY 10022

//
//

Rebecca M. Kopplin
United States Department of Justice
Civil Division
1100 L Street NW
Washington, DC 20005

Attorneys for Defendant

Xochitl A. Lopez
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501

Attorney for Amicus Service Employees International Union, Local 1021

Anna Augusta Moody
Debevoise and Plimpton LLP
801 Pennsylvania Avenue NW
Suite 500
Washington, DC 20004

Sourabh Mishra
Hueston Hennigan LLP
523 W. 6th St.
Suite 400
Los Angeles, CA 90014

Attorneys for Amicus American College of Obstetricians and Gynecologists

s/*Denise M. Harle*
Denise M. Harle