

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, CITY OF
NEW YORK, STATE OF
COLORADO, STATE OF
CONNECTICUT, STATE OF
DELAWARE, DISTRICT OF
COLUMBIA, STATE OF HAWAII,
STATE OF ILLINOIS, STATE OF
MARYLAND, COMMONWEALTH
OF MASSACHUSETTS, STATE OF
MICHIGAN, STATE OF
MINNESOTA, STATE OF NEVADA,
STATE OF NEW JERSEY, STATE
OF NEW MEXICO, STATE OF
OREGON, COMMONWEALTH OF
PENNSYLVANIA, STATE OF
RHODE ISLAND, STATE OF
VERMONT, COMMONWEALTH
OF VIRGINIA, STATE OF
WISCONSIN, CITY OF CHICAGO,
and COOK COUNTY, ILLINOIS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN
SERVICES; ALEX M. AZAR II, *in
his official capacity as Secretary of the
United States Department of Health
and Human Services*; and UNITED
STATES OF AMERICA,

Defendants.

CIVIL ACTION NO. 1:19-cv-04676-PAE

DECLARATION OF SUSAN HERBST

I, Susan Herbst, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true and correct based on my personal knowledge and belief:

1. I am over the age of eighteen and believe in the obligations of an oath.
2. I am the President of the University of Connecticut (“UConn” or “the University”).
3. I have been employed at the University in my present capacity since 2011. Previously I served as executive vice chancellor and chief academic officer of the University System of Georgia, where I led 15 university presidents and oversaw the academic missions for all 35 public universities in Georgia. Before arriving in Georgia, I was provost and executive vice president at the University at Albany (SUNY), and also served as officer in charge of the university, effectively the acting president, from 2006 to 2007. I also previously served as the dean of the College of Liberal Arts at Temple University. I initially spent 14 years at Northwestern University, joining the faculty in 1989 and serving until my departure to Temple University. At Northwestern I held a variety of positions including professor of political science and chair of the department. I earned my doctorate in communication theory and research from the University of Southern California’s Annenberg School for Communication in Los Angeles in 1989 and a Bachelor of Arts from Duke University in 1984.
4. As President, I am the chief executive officer of UConn, its schools and colleges, and its other divisions and units, including the UConn Health Center located in Farmington, Connecticut (“UConn Health”).
5. I have either personal knowledge of the matters set forth below or, with respect to those matters for which I do not have personal knowledge, I have reviewed information gathered by the University administrative and professional staff, all of whom report to me.
6. I submit this Declaration in support of the State of Connecticut’s litigation against the United States Department of Health and Human Services (“HHS”), Alex M. Azar II, in his

official capacity as Secretary of the United States Department of Health and Human Services, and United States of America regarding the recently issued rule entitled Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (“Final Rule”).

I. UConn Health Is A Leading Provider Of Healthcare, Medical Training And Research In The State Of Connecticut.

7. UConn Health is Connecticut’s flagship public academic medical center, with an integrated 3-part mission focused around education, research and patient care.

8. UConn Health includes UConn School of Medicine (“SOM”); UConn School of Dental Medicine (“SODM”); the Graduate School; UConn John Dempsey Hospital; UConn Medical Group (“UMG”); University Dentists; and UConn Health Pharmacy Services, Inc.

9. UConn Health is a critical source of the State of Connecticut’s future health care professionals, with 37% of medicine and 44% of dental graduates practicing in the State.

10. UConn Health is also an essential provider of healthcare and dental services to underserved populations.

11. In 2017, UConn Health had a total operating budget of more than \$1 billion, including approximately \$235 million in state appropriations annually and employed nearly 5,000 full- and part-time individuals across the clinical, research, and academic missions, with over 2,300 devoted to the clinical work.

12. In 2017, UConn Health discharged approximately 10,000 inpatients, and had 1.1 million outpatient encounters and over 35,000 ER visits. It also received over \$87 million in federal and non-federal research grants and contracts that year.

13. UConn Health received an average of \$53 million in each of the last five full fiscal years in grant funding from HHS for biomedical research and health-related research

education and training initiatives. In addition to this direct funding from HHS, UConn Health also received about \$10 million per fiscal year of HHS grant funding passed through to it from other institutions that received HHS funding, for purposes similar to those for which UConn Health received direct HHS funding. A portion of the \$53 million per year received by UConn Health, about \$9 million per year, is passed through from UConn Health to other institutions for similar purposes.

14. These HHS funds are essential to functioning of UConn Health and to maintaining public health within the State of Connecticut and training its next generation of medical professionals.

II. UConn Health Protects The Rights of Employees To Decline To Participate In Activities To Which They Have Religious, Moral or Ethical Objections.

15. UConn Health seeks to accommodate the religious, moral and ethical concerns of its employees who may wish to decline to participate in certain medical care. Our policies are consistent with both federal and Connecticut state laws regarding religious and moral objection accommodation. We train our employees about the importance of valuing and respecting individual diversity and differences, including religious and ethical differences. Our administrators and staff are trained that differences can enhance interactions and organizational productivity.

16. At UConn John Dempsey Hospital (“JDH”), the State’s only public acute care hospital, there is a written conscience objection policy. JDH balances a respect for individual employee diversity (including cultural values, ethics, and religious beliefs) with its mission of providing high quality patient care.

17. JDH employees may request to not participate in procedures, including but not limited to: blood product administration; termination of pregnancy; initiation and/or cessation of

life support; end of life decisions; administration of pharmacological agents to terminally ill; harvesting of human organs; and sterilization and reproductive technologies. These are the areas that JDH has concluded are most likely to lead to an employee request for an accommodation.

18. In order to accommodate an employee request, while also protecting our patients, JDH requires that a requesting employee make a request in advance, where feasible, and in all circumstances continue to provide appropriate patient care until arrangements for a transfer of care to another provider can be made. JDH does not permit patient care to be compromised under any circumstances.

19. An employee who knows that he or she does not wish to participate in these or other patient care services is required to put the request in writing as soon as he or she first becomes aware of the possible conflict. JDH does not permit an employee to refuse to provide care at the time a patient is in need of immediate care or treatment.

20. An employee's written request must detail the tasks expected to be performed by the employee and the reason for the request not to participate. JDH policy requires the institution to address employee requests in a reasonable time frame and inform the employee of its decision.

21. If the employee request is granted, the supervisor or manager must document the accommodation(s) made for adequate delivery of patient care services.

22. If the request is denied, the employee is expected to perform all duties of his/her position.

III. The Final Rule Will Impact Operations At UConn Health When It Becomes Effective.

23. My understanding of the Final Rule suggests that its implementation could seriously jeopardize UConn Health's ability to deliver on its core mission of serving the health needs of the people of Connecticut.

24. Of particular concern are the expanded definitions of key terms such as: "assist in the performance," "discrimination," "health care entity," and "referral or refer for." Expanded definitions of these terms, or any ambiguity regarding the scope of those terms, will affect how UConn Health functions.

25. This new uncertainty generated by expanded definitions in the Final Rule seriously undermines UConn Health's ability to provide health care safely, effectively and reliably. I am concerned that allowing employees to opt out of providing care without prior notice will create unsafe and unethical situations with potentially awful results for our patients and staff.

26. If the Final Rule definitions are as expansive as they appear to be, UConn Health seemingly could no longer inquire of prospective candidates whether they can perform the essential functions of a particular position. This could have serious consequences on our ability to provide care to the citizens of Connecticut.

27. As just one example, if UConn Health was staffing for a nurse position in the midst of a communicable disease epidemic, the Rule would prohibit UConn Health from asking if the candidate had a religious objection to administering vaccinations. The Final Rule also seems to permit a broader range of employees – some of whom may have no direct role in providing actual health care, such as receptionists, to refuse to perform the functions of their job, and without any advance notice, no matter the risk to others.

28. UConn Health will now have to expend staff time and resources to plan for the contingencies caused by the Final Rule. This will be extremely costly. For example, UConn Health will be forced to examine whether it must double-staff emergency functions in light of limits the Final Rule places on requiring advance notice of objections. Our existing budget simply does not permit us to double-staff our emergency departments or other departments, which may necessitate scaling back and/or eliminating certain types of services and care to avoid violating the Final Rule.

29. The Final Rule will require UConn Health to retrain staff for compliance with the Rule. However, the ambiguity surrounding the meaning of the Final Rule would make training to comply with it very difficult.

IV. The Final Rule Subjects UConn Health To Potentially Conflicting Legal Obligations.

30. The Final Rule is not the only law or regulation with which UConn Health must comply. I am concerned that the Final Rule will place UConn Health in the untenable position of having to choose whether to comply with our obligations under other laws and regulations, agreements, and grant terms or the Final Rule.

31. For example, JDH, as a public hospital, has obligations under federal law to provide care to **all** patients who present at the emergency department for emergency treatment, regardless of their ability to pay. This federal law, the Emergency Medical Treatment & Labor Act (EMTALA), imposes specific obligations on Medicare-participating hospitals, like UConn Health's JDH to medically screen every patient who seeks emergency care and to stabilize or transfer those with an emergency medical condition (including active labor). If a UConn Health employee is allowed by law to simply refuse to provide the required medical screening or

stabilizing care (or transfer) without any advance notice or planning, UConn Health risks violating EMTALA (not to mention placing the patient's health at significant risk). Such action could expose UConn Health to EMTALA penalties and possibly other regulatory enforcement action.

32. I am also concerned about the impact of the Final Rule on particular groups of individuals served by UConn Health. UConn Health serves many vulnerable populations, and the Final Rule may impede our ability to provide the highest level of care to those populations.

33. For example, UConn Health serves many deaf and hearing impaired patients perhaps due in part to our proximity to the American School for the Deaf, located in an adjacent town. As part of caring for this unique population, UConn Health is required to provide auxiliary aids and translator services. In fact, in 2016, the United States Department of Justice ("US DOJ") investigated UConn Health for an alleged failure to provide adequate translator services in a timely manner to a hearing impaired patient. Thereafter, in December 2016, the US DOJ and UConn Health entered into an agreement whereby UConn Health was required to satisfy certain specific requirements for serving this population in a timely manner.

34. If an American Sign Language ("ASL") translator is empowered under this Final Rule to refuse to provide services to a hearing-impaired patient, for whatever reason, UConn Health could risk falling short of our mission to our patients, which in turn could invite another investigation or enforcement action by the US DOJ. ASL translators, and other language translators for that matter, are not always able to be replaced quickly or easily.

35. UConn Health physicians and staff also serve patients with HIV/AIDS, and UConn Health conducts clinical trials on new therapies for HIV/AIDS.

36. UConn Health is a Ryan White service provider that offers HIV primary medical care, essential support services, and medications for low-income people living with HIV who are uninsured and underserved. Under the terms of the Ryan White Program grant, UConn Health must provide care to this population without discrimination. If the Final Rule permits an employee to refuse to provide care to a person with HIV/AIDS, without prior notice and for any reason, UConn Health could be in violation of its obligations under this valuable grant program.

37. I am also concerned about UConn Health's ability to continue to comply with both Connecticut law and the Final Rule. To highlight just one potential conflict caused by the Final Rule, UConn Health could be forced to violate a state law requirement to provide emergency contraception. Connecticut law provides that emergency treatment to a victim of sexual assault includes the provision of emergency contraception to the victim of sexual assault at the facility upon the request of such victim. Conn. Gen. Stat. § 19a-112e(b)(3). The Final Rule seems to empower a pharmacist or treating physician or nurse at UConn Health to simply refuse to provide this care without notice. This would clearly violate state law, which as an arm of the State, would be especially problematic for UConn Health.

V. **The Final Rule Could Have Lasting Effects on UConn Health's Next Generation of Health Care Providers.**

38. Lastly, UConn Health is proud of its role in training the next generation of Connecticut's and the nation's physicians and medical personnel. The Final Rule could tarnish the ability of UConn Health to provide medical students with the breadth and depth of training and knowledge required to be the best-trained health care providers possible. If a physician, nurse or other medical personnel who is employed to train students refuses to provide care in an emergent or non-emergent situation based on the Final Rule, students will be deprived of the

invaluable learning opportunity that this practical on-the-job training provides. The loss of this educational opportunity could have serious repercussions in the future if health care providers lack the training required to address the full range of medical needs of our citizens.

39. In addition to the grave financial impact the Final Rule could have on UConn Health, the Final Rule may erode UConn Health's ability to deliver care in a manner consistent with our values and mission for many years to come.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed on this 11th day of June, 2019



SUSAN HERBST
PRESIDENT OF THE UNIVERSITY
OF CONNECTICUT