UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING *et al*.	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-00100-LEW**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al*.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO REOPEN PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

After their motion for a preliminary injunction had been fully briefed and two days after this Court heard oral argument, Plaintiffs withdrew that motion without prejudice. ECF No. 65 ("Withdrawal Notice"). Plaintiffs explained that because the District Court for the Eastern District of Washington had issued a nationwide injunction against the same rule at issue in this case,[1] *see Washington v. Azar*, 19-cv-3040, 2019 WL 1868632 (E.D. Wash. Apr. 25, 2019), there was "no longer an imminent threat of irreparable harm to Plaintiffs necessitating a preliminary injunction from this Court." Withdrawal Notice at 2.

As it turned out, other courts did not share Plaintiffs' view that the Washington injunction rendered additional preliminary-injunction motions unnecessary. The District Court for the District of Oregon enjoined the Rule on a nationwide basis and the District Court for the Northern District of California issued an injunction limited to California.[2] In doing so, each court

[1] *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714-01 (Mar. 4, 2019) ("Rule").

[2] *Oregon v. Azar*, No. 19-cv-317, 2019 WL 1897475 (D. Oregon Apr. 29, 2019); *California v. Azar*, Nos. 19-cv-1184, 19-cv-1195, 2019 WL 1877392 (N.D. Cal. Apr. 26, 2019).

emphatically rejected the suggestion to withhold injunctive relief in light of the Washington injunction. *Oregon*, 2019 WL 1897475, at *16 n.9; *California*, 2019 WL 1877392, at *2 n.1. Over a month later, the District of Maryland likewise issued an injunction against the Rule, limited to Maryland, and likewise rejected the suggestion that the Washington injunction should cut against issuing such relief. *Mayor and City of Council of Baltimore v. Azar*, No. 19-1103-RDB, 2019 WL 2298808, at *2 n.3 (D. Md. May 30, 2019).

On June 20, however, a unanimous panel of the Ninth Circuit granted the Government's motion for a stay of the Washington, Oregon, and California injunctions pending appeal.[3] *California v. Azar*, --- F.3d ----, 2019 WL 2529259 (9th Cir. June 20, 2019). Now that the Ninth Circuit has stayed these three injunctions, Plaintiffs seek to reopen their previously withdrawn preliminary injunction motion here. ECF No. 73. Defendants do not take a position on Plaintiffs' motion to reopen their preliminary injunction motion now. Defendants nonetheless wish to make two points in connection with Plaintiffs' most recent motion.

1. First, although Defendants take no position on the motion to reopen as a purely procedural matter, Defendants continue to oppose that motion on the merits. Indeed, the Ninth Circuit's unanimous opinion underscores many of the reasons Plaintiffs' motion should fail. Concluding that the Government was likely to succeed on its appeals of the Washington, Oregon, and California injunctions, the Ninth Circuit rejected all of the plaintiffs' contrary arguments, many of which are materially identical to those Plaintiffs have asserted in this case.

Specifically, the Ninth Circuit held that: (1) the Rule is a reasonable interpretation of section 1008 of the Public Health Service Act, and *Rust v. Sullivan*, 500 U.S. 173 (1991), largely forecloses any attempt to argue otherwise; (2) neither the nondirective provision nor section 1554

[3] The Rule remains enjoined within Maryland; Defendants have sought both a stay of that injunction from the Fourth Circuit as well as an expedited briefing schedule.

of the Affordable Care Act impliedly repealed or amended section 1008; (3) the Rule does not conflict with the nondirective provision; (4) the plaintiffs' challenges based on section 1554 are likely waived because no commenter raised this statutory provision during the rulemaking process; (5) even if not waived, section 1554 likely does not affect section 1008's prohibition on funding programs where abortion is a method of family planning; and (6) the district courts likely erred in concluding that the Rule is arbitrary and capricious. 2019 WL 2529259, at *3-7.

The Ninth Circuit further held that the remaining stay factors (which are similar to the factors governing issuance of a preliminary injunction in the first instance) favored Defendants, concluding that Defendants and the public "are likely to suffer irreparable harm in the absence of a stay [of the injunctions], which are comparatively greater than the harms Plaintiffs are likely to suffer." *Id.* at *8. In particular, "[a]bsent a stay, HHS will be forced to allow taxpayer dollars to be spent in a manner that it has concluded violates the law, as well as the Government's important policy interest (recognized by Congress in § 1008) in ensuring that taxpayer dollars do not go to fund or subsidize abortions." *Id.* "Additionally, forcing HHS to wait until the conclusion of a potentially lengthy appeals process to implement the Final Rule will necessarily result in predictable administrative costs, and will beget significant uncertainty in the Title X program." *Id.*

2. Second, the course of this litigation—culminating in Plaintiffs' latest request—underscores the fundamental problems with the nationwide relief that Plaintiffs seek and with nationwide injunctions more generally. For example, "nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives," deny "non-parties . . . the right to litigate in other forums," and encourage "forum shopping." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018); *see also Baltimore*, 2019 WL 2298808, at *13 n.12 ("This Court further cautions against the danger of nationwide injunctions

leading to forum shopping."). They also create an inequitable "one-way-ratchet" under which any prevailing party can obtain relief on behalf of all others, whereas a victory by the government will not stop other potential plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part).

All of these problems are on full display here. Plaintiffs chose to bring this separate action, even though Plaintiff Maine Family Planning is in fact a member of one of the plaintiffs in the Washington action, the National Family Planning & Reproductive Health Association. After the Washington court issued its nationwide injunction, Plaintiffs were given essentially all of the benefits of that litigation with none of the risks. And because the Washington injunction largely rendered this litigation academic as long as that order remained in place, Plaintiffs immediately withdrew their preliminary-injunction motion here, notwithstanding the substantial time and efforts that the parties and this Court had already devoted to that fully briefed and argued motion. Similarly, although Defendants convinced the California court *not* to issue a nationwide injunction, that partial victory did not allow the Rule to go into effect in the 49 other states in light of the nationwide injunctions two other groups of plaintiffs had secured elsewhere. *See supra* page 1. And now that the Ninth Circuit has found that the Rule is likely lawful and has issued a decision staying the previous nationwide injunctions, Plaintiffs seek to resurrect their withdrawn preliminary-injunction motion and obtain a nationwide injunction from this Court—which in turn would render the unanimous decision of the Ninth Circuit largely academic. But there is no reason why the views of Plaintiffs—a local Maine physician and an entity operating solely in Maine—should dictate how Title X functions in the Ninth Circuit, much less throughout the entire country.

Dated: June 25, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Daniel Riess
R. CHARLIE MERRITT (VA Bar # 89400)
DANIEL RIESS
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St, NW
Washington, DC 20005
Telephone: (202) 353-3098
Daniel.Riess@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Daniel Riess
DANIEL RIESS