UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING, on behalf of itself, its staff, and its patients, *et al.*;	)	Case No. 1:19-cv-00100-LEW
Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND PRELIMINARY INJUNCTION ORDER, OR IN THE ALTERNATIVE, FOR INJUNCTION PENDING APPEAL, AND FOR EXPEDITED BRIEFING**
v.	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*;	)	
Defendants.	)	

Pursuant to Federal Rules of Civil Procedure 59 and 60, Plaintiffs, The Family Planning Association of Maine d/b/a Maine Family Planning ("MFP"), on behalf of itself, its staff, and its patients; and J. Doe, DO, MPH, individually and on behalf of Dr. Doe's patients, hereby respectfully request that this Court amend the Decision and Order on Motion for Preliminary Injunction (ECF No. 77) (the "Order"), to clarify the factual and legal impact of a recently-enacted Maine law, An Act to Authorize Certain Health Care Professionals to Perform Abortion, P.L. 2019, ch. 262 §§ 1596 to 1599-A (the "New Law"), which was signed into law on June 10, 2019. Alternatively, pursuant to Federal Rule of Appellate Procedure 8(a)(1), Plaintiffs respectfully request that this Court enjoin the challenged regulation, *Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7714-01 (March 4, 2019) (the "Rule"), pending resolution of Plaintiffs' Appeal of the Order to the First Circuit. Finally, because this matter is time sensitive, Plaintiffs further request expedited briefing and decision on this motion. Defendants oppose both requests for injunctive relief but consent to expedited briefing.

On July 3, 2019, the Court denied Plaintiffs' Motion for Preliminary Injunction. In the Order, the Court deemed the New Law material to its decision that certain of Plaintiffs' claims are unlikely to succeed. *See, e.g.*, Order at 25 n.23 (stating that the New Law "has serious implications for Plaintiffs' preliminary injunction showing"). In particular, the Court stated that "[g]iven it is now lawful for APRNs to provide abortion services, Plaintiffs' portrayal of driving burdens is not calibrated to existing conditions." *Id.* The Court's conclusion is manifestly erroneous. As detailed below and in the attached Supplemental Declaration of George Hill (the "Supplemental Hill Declaration"), the Court's assumptions about the impact of the New Law are not supported by the record submitted in support of the Motion for Preliminary Injunction and are inconsistent with the burden that the Rule will impose on Plaintiffs.

In actuality, the New Law, which will allow APRNs to perform abortions in Maine, does not lessen the Rule's impact on clinics in Maine and the resulting increase in travel distances, nor any other fundamental facts at stake in Plaintiffs' Motion for Preliminary Injunction. The New Law does not affect Maine Family Planning's need, under the Rule, to either stop providing abortion services at its 17 directly-operated clinics if it remains in the program, or else leave the program and close at a minimum 11 clinics entirely. If anything, the Rule will additionally harm Plaintiffs by undermining the benefits of the New Law, which otherwise would have reduced the burdens that women currently face in accessing abortion care in Maine by allowing more scheduling options at MFP's satellite clinics.

Indeed, now that the Rule has gone into effect and HHS has stated that it will require compliance as of July 15, MFP has been forced to decide to leave the Title X program, thereby losing 39% of its family planning funding. *See* Ex. 1, Supp. Hill Decl. ¶ 12. Plaintiffs' Motion for Preliminary Injunction detailed the harms that will result from MFP being forced out of the

Title X program, which will be devastating for Plaintiffs and their patients—and these harms are in no way alleviated by the New Law. Although MFP will use its limited financial reserves to keep clinics open in the immediate future, it continues to anticipate that it will be required to close many of its sites as a result of the Rule. *Id.* ¶¶ 11-14.

Accordingly, the Court should amend the Order to clarify these facts about the impact of the New Law and grant the Motion for Preliminary Injunction based on this information.

Alternatively, if the Court denies Plaintiffs' Motion to Amend the Order, Plaintiffs respectfully request that this Court enjoin the Rule pending resolution of Plaintiffs' forthcoming Appeal to the First Circuit in order to prevent irreparable harm to Plaintiffs in the interim.

I. REQUEST FOR AMENDED JUDGMENT

Under Rule 59, the Court may alter or amend a judgment within twenty-eight days of its entry: (1) "to correct manifest errors of law or fact," (2) to "present newly discovered or previously unavailable evidence," (3) "to prevent manifest injustice," and (4) to address "an intervening change in controlling law." *See Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7 n.2 (1st Cir. 2005).[1] Here, the Court erred in concluding that the New Law "has serious implications for Plaintiffs' preliminary injunction showing" based on its assumption that because "it is now lawful for APRNs to provide abortion services, Plaintiffs' portrayal of driving burdens

[1] Courts regularly assess motions to amend orders granting or denying preliminary injunctions under Federal Rule of Civil Procedure 59 ("Altering or Amending a Judgment") on the basis that such orders are immediately appealable and therefore constitute "judgments" under the definition of Rule 54(a). *See, e.g.*, *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397 (2d Cir. 2000); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1123 n.6 (9th Cir. 2005); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3rd Cir. 1993). However, because neither this Court nor the First Circuit appears to have addressed this question, out of an abundance of caution, Plaintiffs move in the alternative pursuant to Federal Rule of Civil Procedure 60. Under Rule 60, the Court may provide "relief from a judgment or order" based on, *inter alia*, "mistake, inadvertence, surprise, or excusable neglect," "newly discovered evidence that, with reasonable diligence cold not have been discovered in time to move for a new trial," or "any other reason that justifies relief." Relief under Rule 60 is warranted here for the same reasons that it is justified under Rule 59.

is not calibrated to existing conditions." Order at 25 n.23. The Court offered no support for those conclusions, which are inconsistent with the evidence presented.

Plaintiffs' Motion for Preliminary Injunction provided a detailed account of how the Rule will drastically affect the services MFP is able to offer its patients, which was supported by multiple fact declarations from individuals with personal knowledge. ECF 17-1 at 10-13 ("PI Mem."); Decl. of George Hill, ECF 17-2 ("Hill Decl."); Decl. of Evelyn Kieltyka, ECF 17-3 ("Kieltyka Decl."); Decl. of Julie A. Jenkins, ECF 17-7; Decl. of Nurse Practitioner, ECF 15-1.[2] Plaintiffs provided evidence that, in order to implement the Rule, MFP would be forced to stop abortion-related activities at 17 of the 18 sites that currently offer those services, regardless of what kind of medical provider was offering abortion services. PI Mem. at 10; Hill Decl. ¶ 30-38. And Plaintiffs also provided evidence that, if MFP is forced to leave the Title X program and thus loses 39% of its current annual funding for family planning services, it will ultimately need to close 11-15 of its directly-controlled sites absent any alternative long-term funding source. PI Mem. at 12; Hill Decl. ¶ 26. Under either scenario, the driving distances for women seeking abortion access would increase exponentially under the Rule. *See* Lindo Decl. ¶¶ 9-39. And it is clear that the driving distances under either scenario are not impacted by the New Law.

First, Plaintiffs' Motion for Preliminary Injunction made clear that MFP's need to close clinics upon being forced out of the Title X program is the result of its loss of 39% of its *family planning budget*. Hill Decl. ¶¶ 23-25; *see also* Supp. Hill Decl. ¶ 14. That result is in no way impacted by the New Law. Supp. Hill. Decl. ¶ 14.

[2] Plaintiffs' Motion for Preliminary Injunction was further supported by several expert declarations. *See* Decl. of Martha Bailey, Ph.D., ECF 17-4; Decl. of Dr. Matthew K. Wynia, M.D., ECF 17-5; Decl. of Jason M. Lindo, PH.D., ECF 17-6 ("Lindo Decl.").

Second, the New Law does not change the fact that MFP would have been forced to stop providing abortion at 17 out of its 18 current locations in order to implement the Rule. Plaintiffs provided evidence demonstrating that MFP could not comply with the Rule by creating separate abortion facilities at or near its seventeen satellite clinics. First, Plaintiffs detailed the numerous challenges in locating sites for separate, abortion-only facilities. Hill Decl. ¶¶ 34-35. Even assuming those challenges could be surmounted, standalone facilities are not financially viable. MFP provides approximately 500 abortions per year, approximately 75% of which typically are performed at its Augusta clinic. Compl. ¶ 114; Kieltyka Decl. ¶ 20. As previously set forth, there are relatively few abortions performed at MFP's satellite clinics primarily because the rural nature of Maine results in sparse populations in large parts of the state. For example, five of MFP's satellite clinics are located in Aroostook and Washington Counties, where MFP cannot reasonably expect that there will ever be more than two or three patients seeking abortion services per week. Hill Decl. ¶¶ 10, 37. It is in precisely these remote counties that the closure of clinics will increase driving distance to abortion providers by over 75 miles. Lindo Decl. ¶¶ 11-13. Another four clinics are in the thinly-populated Somerset, Franklin, and Oxford counties. Hill Decl. ¶ 10. And even in comparatively more populated counties, Maine's rurality plays a dominant role in limiting the volume of abortion services, while the Physician-Only Law has been only one contributing factor restricting access. Hill Decl. ¶ 37.[3] *Id.* In short, as Plaintiffs explained, because each of MFP's non-Augusta clinics has only provided 26 or fewer abortions per year to date, the practical reality is that this volume of services is not sufficient to support the financial and logistical needs of a standalone abortion clinic, regardless of whether

[3] The New Law is set to go into effect on September 19, 2019. Maine State Legislature, http://legislature.maine.gov/ (last accessed July 16, 2019).

physicians or APRNs are providing those abortion services. *Id.*[4] In other words, the viability of separate abortion facilities in these areas is largely constrained by demand, not supply.

Under these circumstances, and based on this testimony, it was manifest error for the Court to assert that the New Law would materially alter this landscape—and that MFP could or would be able to maintain or expand its abortion sites—based solely on the fact that APRNs can now directly provide abortion services. Order at 25 n.23, 40-41; *see Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 82 (1st Cir. 2008) ("[A] motion for reconsideration should be granted if the court 'has patently misunderstood a party . . . or has made an error not of reasoning but apprehension.'" (quoting *Sandoval Diaz v. Sandoval Orozco*, No. 01-1022, 2005 WL 1501672, at *2 (D.P.R. June 24, 2005))). The medication abortions performed by MFP, even if performed by an APRN rather than a physician, still involve physical facilities in which ultrasounds are performed, the patient receives counseling, and medications are provided to the patient, Kieltyka Decl. ¶ 19—and the difficulty and expense of locating, building, and maintaining such physical facilities is unaffected by the New Law. Nor, as set forth above, is the long-term financial viability of those facilities meaningfully altered. Indeed, even assuming *arguendo* that the number of abortions at each site were to *double* under the New Law due to, for example, increased demand related to greater scheduling flexibility (a relatively implausible scenario given the rural realities of Maine and the total number of abortion services being provided by MFP), it is unreasonable to infer that the number of abortions provided at those sites would be high enough to support seventeen standalone facilities—or even a smaller number of such facilities. A standalone abortion facility requires hundreds of patients per year, not dozens,

[4] Notably, Defendants did not dispute any of the facts presented by Plaintiffs, nor did they offer any competing evidence regarding the economics of opening and staffing healthcare facilities in Maine.

to be financially viable, and MFP now provides approximately 120 abortions per year in total across *all* 17 of its satellite locations. Supp. Hill Decl. ¶ 9. The Court should accordingly amend its Order to grant Plaintiffs' request for a preliminary injunction.

II. REQUEST FOR INJUNCTION PENDING APPEAL

Alternatively, if the Court declines to reconsider the Order, Plaintiffs ask the Court to enjoin the Rule during the pendency of Plaintiffs' forthcoming appeal to the First Circuit. To obtain an injunction pending appeal, the moving party must show that: (1) the applicant has made a strong showing that he is likely to succeed on the merits; (2) the applicant will be irreparably injured absent an injunction; (3) the issuance of the injunction will not substantially injure the other parties interested in the proceeding; and (4) an injunction is in the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Plaintiffs respectfully maintain that analysis of these factors demonstrates that this Court should issue an injunction pending appeal.[5]

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs have presented ample evidence in support of their claims that the Rule's Gag Rule and Separation Requirements violate the Administrative Procedure Act ("APA"), Plaintiffs' patients' fundamental right to choose abortion before viability, and the First Amendment right to freedom of speech, as well as being unconstitutionally vague. Plaintiffs' arguments are detailed in full in their prior submissions. PI Mem., ECF No. 17-1. Plaintiffs respectfully disagree with the Court's contrary findings on those claims, including *inter alia* the Court's application of *Rust v. Sullivan*, 500 U.S. 173 (1991). Material statutory and constitutional changes have occurred in the thirty years since *Rust* was decided such that *Rust* no longer controls the Rule's validity.

[5] Plaintiffs recognize that, based on this Court's July 3, 2019 Order, this Court may continue to view preliminary injunctive relief as unwarranted such that it cannot grant the requested relief. If so, Plaintiffs request that this Court promptly dispose of the instant motion so as to allow Plaintiffs to fully pursue the matter in the Court of Appeals.

First, the Rule violates controlling statutes that have been enacted since *Rust v. Sullivan* was decided, including the Affordable Care Act, 42 U.S.C. § 18114 (2012), and the non-directive counseling mandate that has been included in the annual appropriations bill for Title X every year since 1996, *see, e.g.*, Continuing Appropriations Act, 2019, Pub. L. 115-245, 132 Stat. 2981, 3070-71 (2018). *See* PI Mem. at 14-19. The Rule also violates the APA because it is contrary to Congress's intent, as made clear by the Congressional response to *Rust*. *Id.* at 20-22. And the Rule is arbitrary and capricious because Defendants failed to provide reasoned analysis based on the current state of the Title X program and current medical ethics and standards of care, while also ignoring the acute reliance interests of the Title X provider network. *Id.* at 22-31. Defendants' conclusory statements in the Federal Register that they disagree with these facts, without any supporting evidence, do not constitute sufficient consideration under the APA.

Second, the Rule violates Plaintiffs' patients' fundamental right to choose abortion before viability because it will lead to large-scale clinic closures, forcing patients in Maine to travel great distances for abortion services and delaying care or preventing it altogether. *Id.* at 31-39. The Rule imposes burdens that vastly outweigh any potential benefits as applied to Plaintiffs' patients. *Id.* Nothing in *Rust* prevents this Court from weighing the burdens the Rule will impose on *Plaintiffs' patients' access to abortion* against the benefits to the government that Defendants claim the Rule will further.

Third, the Rule violates MFP's First Amendment rights by imposing content- and viewpoint-based government control over the speech of medical professionals, *id.* at 39-44, and it likewise imposes unconstitutional condition on MFP's receipt of Title X funds. *Id.* at 45-46.

Finally, the Rule is unconstitutionally vague, as it provides so little guidance that providers will be vulnerable to arbitrary enforcement. *Id.* at 46-47.

B. An injunction pending appeal is needed to prevent irreparable injury.

Implementation of the Rule will irreversibly gut the provision of family planning services in Maine and nationwide, as many Title X providers will be forced out of the program and others will be forced to reduce services. PI Mem. at 47-48. In Maine, the Rule has forced MFP to announce it will leave the Title X program, which ultimately will force MFP to close a minimum of 11 directly-controlled sites and to stop funding subgrantees absent an alternative funding source (which it does not currently have). Supp. Hill. Decl. ¶¶ 12-13. In the short term, MFP will attempt to fill the gap with its limited financial reserves—but absent a preliminary injunction, those reserves are not sufficient to sustain MFP and its network for the long term and for the likely duration of this case. As a result, critical health care services, including clinical breast exams, pap tests, and contraceptive care, will fall out of reach for many women. *Id.*

At the same time, the Rule will force health care professionals to violate their ethical principles in communications with patients. *Id.* at 49. Women who are misled, or denied information about abortion providers, will sustain delays in receiving abortion care. Such delays in turn increase health risks and costs and will prevent some women from accessing their preferred type of abortion procedure and others from accessing abortion care altogether. *Id.*

C. A stay of the injunction will not harm Defendants and is in the public interest.

An injunction pending appeal will preserve the existing Title X program while questions about the lawfulness of the Rule's drastic changes to the Title X program are adjudicated. In the meantime, the integrity of the Title X program will continue to be protected under existing law.

Without a preliminary injunction, women seeking abortion and family planning services, as well as the medical professionals providing those services, will suffer unlawful harms to their legal rights and unjustified burdens to their constitutional rights.

III. REQUEST FOR EXPEDITED BRIEFING

Plaintiffs request that the Court require Defendants to file any opposition to the instant motion by July 23, with Plaintiffs' reply due July 29, and that the Court thereafter immediately issue its decision. Defendants have agreed to this briefing schedule.

Expedited briefing is necessary because Plaintiffs are now subject to the Rule such that they face imminent, irreparable harm. As the Court is aware, on June 20, 2019, the United States Court of Appeals for the Ninth Circuit issued a *per curiam* order staying two nationwide injunctions against the Rule pending appeal. *California v. Azar*, No. 19-35394, 2019 WL 2529259 (9th Cir. June 20, 2019) (the "Stay Order"). On July 3, 2019, the Ninth Circuit ordered "that these cases be reheard en banc" and directed that the Stay Order "shall not be cited as precedent." *California*, No. 19-15974, ECF 49, at 3 (9th Cir. July 3, 2019). While the parties initially understood this to vacate the Stay Order,[6] the Ninth Circuit then clarified on July 11 that the Stay Order "remains in effect." *California*, No. 19-15974, ECF 86, at 3 (9th Cir. July 11, 2019). HHS has publicly stated that it will require compliance with the rule as of July 15, 2019. Supp. Hill. Decl. ¶ 3.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court amend the Decision and Order on Motion for Preliminary Injunction, or alternatively grant injunctive relief until the First Circuit can decide the appeal.

[6] Prior to the July 11 clarification, Defendants described the Stay Order as "now vacated" and asked the Ninth Circuit for expedited en banc review to avoid harm to Defendants from the injunctions. *California*, No. 19-15974, ECF 83, at 2 (9th Cir. July 10, 2019).

Dated: July 16, 2019

Respectfully submitted,

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