

BakerHostetler

Baker&Hostetler LLP

45 Rockefeller Plaza
New York, NY 10111

T 212.589.4200
F 212.589.4201
www.bakerlaw.com

Edward J. Jacobs
direct dial: 212.589.4674
ejacobs@bakerlaw.com

September 15, 2020

VIA ECF

Honorable Frederic Block
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Tanya Asapansa-Johnson Walker, et al. v. Alex M. Azar II, et al.*, Civ. No. 20-CV-02834
(FB) (SMG)

Dear Judge Block:

Plaintiffs in the above-referenced matter submit this letter in response to the Court's Order on September 8, 2020 (the "Order"). Respectfully, it is Plaintiffs' position that the Court's injunction, ECF Doc. No. 23, should cover the entire 2020 Rule for the reasons outlined in Plaintiffs' briefing on the motion and further summarized below.¹

As this Court held, Defendants acted unlawfully, arbitrarily, and capriciously in promulgating the 2020 Rule *after* the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) ("*Bostock*"), without accounting for the decision in their rulemaking. *See* Memorandum and Order, ECF Doc. No. 23, pp. 25–26. That failure—along with Defendants' other arbitrary and capricious conduct—permeates Defendants' entire rulemaking endeavor and, therefore, the entirety of the 2020 Rule should be enjoined.² Indeed, it

¹ *See* Memorandum in Support of Plaintiffs' Expedited Motion for Preliminary Injunction ("Plaintiffs' Motion"), ECF Doc. No. 8-1, pp. 17–31; Plaintiffs' Reply Memorandum in Support of Plaintiffs' Expedited Motion for Preliminary Injunction ("Plaintiffs' Reply"), ECF Doc. No. 21, pp. 1–14.

² As set forth in Plaintiffs' Motion and Plaintiffs' Reply, even in the absence of *Bostock*, the 2020 Rule is unlawful because: (1) Defendants failed to consider the impact of the 2020 Rule on the LGBTQ community and the reliance interests that had developed on the 2016 Rule, (2) the 2020 Rule was inconsistent with the entire purpose of the Patient Protection and Affordable Care Act (the "ACA"), and (3) the 2020 Rule was contrary to case law existing at the time the ACA was passed that reflected a broader understanding of "on the basis of sex."

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was Defendants' efforts to narrow the scope of the 2016 Rule to exclude coverage on the basis of gender identity and sexual orientation that prompted them to engage in this rulemaking in the first place. In these circumstances, enjoining the entirety of the 2020 Rule is appropriate and warranted. *See New York v. Dep't of Health and Human Servs.*, 414 F. Supp. 3d 475, 577 (S.D.N.Y. 2019) (enjoining entire rule, which created over thirty statutory "conscience provisions" that allowed individuals to refuse to participate in various medical care provision and research activities, and stating that "a decision to leave standing isolated strands of the Rule that have not been found specifically infirm would ignore the big picture: that the rulemaking exercise here was sufficiently shot through with glaring legal defects as to not justify a search for survivors"); *see also Mayor & City Council of Baltimore v. Azar*, 439 F. Supp. 3d 591, 615 (D. Md. 2020) (striking down an entire rule affecting numerous provisions of Title X's family planning regulations despite a severability provision); *Flores v. Barr*, 407 F. Supp. 3d 909, 930 (C.D. Cal. 2019) (explaining that severability was improper because, among other reasons, the regulations utterly failed to achieve their principal purpose).

Plaintiffs further respectfully submit that a complete injunction of the 2020 Rule best serves the interests of justice and most efficiently effectuates such injunction's purpose, which is to prevent the irreparable harm detailed in Plaintiffs' Complaint (ECF Doc. No. 1, ¶¶ 216–43) and Plaintiffs' Motion (pp. 11–17) while this lawsuit is pending. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018). This is particularly true since enjoining the entire 2020 Rule will not prejudice Defendants at all. As of the date of this letter, Defendants have not issued any public statement regarding which portion of the 2020 Rule, if any, is effective given this Court's order; thus, there is no risk of any public confusion regarding the application of the 2020 Rule if it is enjoined in its entirety, which would be in the public interest and prevent irreparable harm to Plaintiffs and other members of the LGBTQ community.

Additionally, this Court granted Defendants' August 28, 2020, request for an extension of time to respond to Plaintiffs' Complaint to October 30, 2020 to "permit defendants an opportunity to review further this Court's order, as well as forthcoming orders from related actions in other jurisdictions, before determining how to respond to plaintiffs' complaint." ECF Doc. No. 26. This extension will effectively provide Defendants with more than four months to formulate a response to the Complaint, a Complaint that seeks to enjoin the 2020 Rule in its entirety. Thus, it appears that on the basis of Defendants' lack of urgency in effectuating any portion of the 2020 Rule, there will be no prejudice to Defendants if the 2020 Rule is enjoined pending the outcome of the litigation and any questions of severability can be adjudicated and decided on the merits at a later date.

In response to the Court's Order, Plaintiffs respectfully submit that Defendants' failure to consider *Bostock* impacts a substantial number of the provisions of the 2020 Rule. This is because Defendants justified the 2020 Rule (in full, or in part) on their erroneous and unlawful interpretation of the statute's gender-based protections. Defendants' justifications for the regulatory changes are grounded on, tied to, and cannot be separated from their erroneous and

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unlawful interpretation. Indeed, to justify the 2020 Rule, Defendants mentioned “gender identity” 262 times, “transgender” 96 times, and “sexual orientation” 123 times. *See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (vacating rescission of rule in entirety because judicial review is “limited to the grounds that the agency invoked when it took the action”). Accordingly, the Court should enjoin the entire 2020 Rule.

In the alternative, the Court should, at a minimum, enjoin the following provisions of the 2020 Rule that amend 42 C.F.R. parts 438, 440, and 460 and 45 C.F.R. parts 92, 147, 155, and 156. Plaintiffs note that certain regulations set forth in the 2020 Rule replace certain regulations set forth in the 2016 Rule. For example, 45 C.F.R. § 92.101, entitled “Discrimination Prohibited” in the 2016 Rule is amended in the 2020 Rule to be 45 C.F.R. § 92.101, entitled “Meaningful access for individuals with limited English proficiency.” Therefore, the below list of proposed enjoined regulations in the 2020 Rule is expansive:

Title 42 – Public Health:

- 42 C.F.R. § 438.3: Standard contract requirements.
- 42 C.F.R. § 438.206: Availability of services.
- 42 C.F.R. § 440.262: Access and cultural conditions.
- 42 C.F.R. § 460.98: Service delivery.
- 42 C.F.R. § 460.112: Specific rights to which a participant is entitled.

Title 45 – Public Welfare:

- 45 C.F.R. § 92.1: Purpose.
- 45 C.F.R. § 92.2: Nondiscrimination requirements.
- 45 C.F.R. § 92.3: Scope of application.
- 45 C.F.R. § 92.4: Assurances.
- 45 C.F.R. § 92.5: Enforcement mechanisms.
- 45 C.F.R. § 92.6: Relationship to other laws.
- 45 C.F.R. § 92.101: Meaningful access for individuals with limited English proficiency.
- 45 C.F.R. § 147.104: Guaranteed availability of coverage.
- 45 C.F.R. § 155.120: Non-interference with Federal law and non-discrimination standards.
- 45 C.F.R. § 155.220: Ability of States to permit agents and brokers to assist qualified individuals, qualified employers, or qualified employees enrolling in QHPs.
- 45 C.F.R. § 156.200: QHP issuer participation standards.
- 45 C.F.R. § 156.1230: Direct enrollment with the QHP issuer in a manner considered to be through the Exchange.

In staying the above-referenced regulations, the Court would be preserving the following provisions of the 2016 Rule (as previously codified in the CFR before August 18, 2020):

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- 45 C.F.R. § 92.1: Purpose and effective date.
- 45 C.F.R. § 92.2: Application.
- 45 C.F.R. § 92.4: Definitions.
- 45 C.F.R. § 92.6: Remedial action and voluntary action.
- 45 C.F.R. § 92.7: Designation of responsible employee and adoption of grievance procedures.
- 45 C.F.R. § 92.101: Discrimination prohibited.
- 45 C.F.R. § 92.206: Equal program access on the basis of sex.
- 45 C.F.R. § 92.207: Nondiscrimination in health-related insurance and other health-related coverage.
- 45 C.F.R. § 92.209: Nondiscrimination on the basis of association.
- 45 C.F.R. § 92.301: Enforcement mechanisms.
- 45 C.F.R. § 92.303: Procedures for health programs and activities administered by the Department.

Plaintiffs are available to provide any additional information necessary that may be of further assistance to this Court.

Very truly yours,

/s/ Edward J. Jacobs

Edward J. Jacobs

Partner

cc (via ECF):

Jason Edward Starr, Esq.

Kathryn M. Zunno-Freaney, Esq.

Katrina M. Quicker, Esq.

Michael A. Sabella, Esq.

Joshua D. Rovenger, Esq.

Ryan E. Harbin, Esq.

Jordan L. Von Bokern, Esq.

William K. Lane III, Esq.