

No. 20-1781

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**FAMILY PLANNING ASSOCIATION OF MAINE, on behalf of itself, its
staff, and its patients doing business as MAINE FAMILY PLANNING; J.
DOE, DO, MPH, individually and on behalf of Dr. Doe's patients,**

Plaintiffs-Appellants,

v.

**UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; ALEX MICHAEL AZAR II, in his official capacity as Secretary
of Health and Human Services; OFFICE OF POPULATION AFFAIRS;
DIANE FOLEY, MD, in her official capacity as Deputy Assistant Secretary
for Population Affairs,**

Defendants-Appellees.

On Appeal from the United States District Court for the District of Maine in Case
No. 1:19-cv-00100-LEW, Judge Lance Walker

UNOPPOSED MOTION FOR A STAY

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Dated: December 15, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants certify that they include a non-profit organization, which has no parent corporation and in which no public company owns any interest, and an individual physician.

Pursuant to Federal Rules of Appellate Procedure 27, and 31(a)(1), and First Circuit Local Rules 27, 31, and 32.4, Plaintiffs-Appellants hereby request to stay proceedings pending the United States Supreme Court's final judgment in *Mayor of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020), *petition for cert. filed*, No. 20-454 (Oct. 8, 2020) and *California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020), *petition for cert. filed*, No. 20-429 (Oct. 1, 2020). These two cases concern related matters that may decide some of the issues in this appeal. Counsel for the parties have conferred regarding this motion, and Defendants-Appellees consent to the request for a stay.

As grounds for this Motion, Plaintiffs-Appellants state as follows:

1. This case challenges the legality of the final rule titled *Compliance with Statutory Program Integrity Requirements* (the "Rule"), published by the United States Department of Health and Human Services ("HHS") on March 4, 2019. 84 Fed. Reg. 7714 (Mar. 4, 2019).

2. In addition to the instant case, the Rule has been challenged in several other district courts that reached final judgments on cross-motions for summary judgment, which cases were then appealed to the Fourth Circuit Court of Appeals, Case Nos. 19-1614, 20-1215, and the Ninth Circuit Court of Appeals, Case Nos. 19-35386, 19-353394, 19-15979. The *en banc* Fourth Circuit invalidated the Rule on the grounds that it was arbitrary and capricious and contrary to law. *Mayor of*

Baltimore v. Azar, 973 F.3d 258 (4th Cir. 2020), *petition for cert. filed*, No. 20-454 (Oct. 8, 2020). The *en banc* Ninth Circuit upheld the Rule despite similar claims. *California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020), *petition for cert. filed*, No. 20-429 (Oct. 1, 2020).

3. On October 1, 2020, the American Medical Association and others filed a Petition for Writ of Certiorari from the Ninth Circuit's decision. Petition for Writ of Certiorari, *AMA, et al. v. Azar*, No. 20-429 (U.S. Oct. 1, 2020). The government filed its response on December 4, 2020. Br. for the Fed. Resp'ts, *AMA, et al. v. Azar*, No. 20-429 (U.S. Dec. 4, 2020).

4. On October 7, 2020, the government filed a Petition for Writ of Certiorari from the Fourth Circuit's decision. Petition for Writ of Certiorari, *Azar v. Mayor & City Council of Baltimore*, No. 20-454 (U.S. Oct. 7, 2020). Baltimore filed its response on December 14, 2020. Br. for Resp'ts, No. 20-454 (U.S. Dec. 14, 2020).

5. Plaintiffs-Appellants believe it is unlikely that the Supreme Court will resolve the related cases before briefing in this case comes due. Under the current briefing schedule, Plaintiffs-Appellants' opening brief and appendix are due on January 11, 2021. Order, No. 20-1781, Doc. No. 00117663516 (1st Cir. Nov. 2, 2020). Defendants-Appellees' brief is due 30 days following service of Plaintiffs-Appellants' opening brief, and Plaintiffs-Appellants' reply brief is due 21 days

thereafter. Fed. R. App. Proc. 31(a)(1). Plaintiffs-Appellants respectfully request that the Court stay the proceedings in this case until the Supreme Court's resolution of *AMA, et al. v. Azar*, No. 20-429, and *Azar v. Baltimore*, No. 20-454. If this request is granted, Plaintiffs-Appellants propose to file their opening brief 60 days from the Supreme Court's final resolution of those matters, whether by denying the petitions for writ of certiorari or by reaching a final judgment on the merits.

6. Plaintiffs-Appellants previously sought an extension of time to file their opening brief, which this Court granted. Order, No. 20-1781, Doc. No. 00117648064 (1st Cir. Sept. 25, 2020). Plaintiffs-Appellants sought this unopposed 30-day extension in light of the complex issues presented by the appeal, to accommodate other professional obligations of Plaintiffs-Appellants' counsel, and due to personal and professional challenges faced by counsel during the COVID-19 pandemic. Motion for Extension of Time, *Family Planning Ass'n of Maine, et al. v. U.S. Dep't Health & Human Servs.*, Doc. No. 00117643491 (1st Cir. Sept. 16, 2020).

7. On October 27, 2020, Plaintiffs-Appellants sought a second unopposed 60-day extension, this time for a different reason—to account for the petitions for writ of certiorari that had subsequently been filed in the related cases. Motion for Extension of Time, *Family Planning Ass'n of Maine, et al. v. U.S.*

Dep't Health & Human Servs., Doc. No. 00117660933 (1st Cir. Oct. 27, 2020), which this Court granted, Order, No. 20-1781, Doc. No. 00117663516 (1st Cir. Nov. 2, 2020). Based on the Supreme Court deadlines in place at that time, Plaintiffs-Appellants believed that the Petitions for Writ of Certiorari would be resolved before the new briefing deadline in this case. However, due to extensions granted by the Supreme Court, those Petitions remain pending.

8. In light of the Petitions for Writ of Certiorari that remain pending with respect to the conflicting *en banc* Fourth and Ninth Circuit decisions, a stay is warranted here. Judicial economy would be served by waiting for the Supreme Court's decisions on the related matters before further briefing in this case. Because those petitions address the legality of the same Rule at issue in this case, the Supreme Court's decision to deny review or grant review and resolve the issue on the merits is likely to be an important factor that informs the posture of this case going forward. And given the ongoing uncertainty associated with the Supreme Court's review of those other cases, a stay would be the best way to address the variable ways that the Supreme Court could resolve those other matters, which could take divergent amounts of time depending on how the Supreme Court decides to proceed.

9. Moreover, staying the case in order to allow the parties and the Court to proceed with complete information from the Supreme Court is especially

warranted in this case, given the complex issues at stake in this matter. As stated in Plaintiffs-Appellants' previous motion, the administrative record associated with the Rule is voluminous, consisting of over 500,000 public comments. And this appeal raises multiple complex claims pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)–(C), and the United States Constitution.

10. A stay of proceedings would not prejudice Defendants-Appellees, who consent to this motion. A stay will allow all parties here to proceed in a manner that serves judicial economy and preserves the resources of the parties.

WHEREFORE, Plaintiffs-Appellants respectfully request that the Court grant a stay of proceedings until the Supreme Court's final judgment on the pending petitions regarding the Rule, and reset Plaintiffs-Appellants deadline to file their opening brief 60 days from the Supreme Court's final resolution of *AMA, et al. v. Azar*, No. 20-429, and *Azar v. Baltimore*, No. 20-454.

Dated December 15, 2020

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d) and 32(g), the undersigned hereby certifies that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

11. Exclusive of any accompanying documents as authorized by Fed. R. App. P. 27(a)(2)(B) and the exempted portions of the motion as provided by Fed. R. App. P. 27(d)(2) and 32(f), the motion contains 1,099 words.

12. The motion has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font as provided by Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: December 15, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2020, I filed a true and correct copy of the foregoing with the Clerk of Court through the ECF system, which automatically sent a Notice of Electronic Filing to all counsel of record.

Dated: December 15, 2020

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