UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Vita Nuova Inc., on behalf of itself and others similarly situated, Plaintiff, v. **Alex M. Azar II**, in his official capacity as Secretary of Health and Human Services; **United States of America**, Defendants.	Case No. 4:19-cv-00532-O

PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S ORDER OF FEBRUARY 25, 2020

On February 24, 2020, the U.S. Court of Appeals for Ninth Circuit announced its ruling in *California by and through Becerra v. Azar*, 2020 WL 878528 (9th Cir. 2020) (en banc), which vacated three preliminary injunctions that federal district courts had entered against the Secretary's final rule of March 4, 2019. The following day, the Court asked us to address whether this ruling from Ninth Circuit affects the arguments we have made against the defendants' motion to dismiss. *See* Order (ECF No. 26).

The Ninth Circuit's en banc ruling does not affect Vita Nuova's standing to seek a judicial declaration of its rights under the Religious Freedom Restoration Act and the Title X statute. The final rule of March 4, 2019, had already taken effect before the Ninth Circuit's en banc ruling, and it had already repealed the 2000 rules that required Title X participants to provide abortion counseling and referrals. Vita Nuova acknowledged this in its first amended complaint and in its response to the defendants' motion to dismiss. *See* First Amended Complaint (ECF No. 16) at ¶¶ 17, 30; Br. in Opp. to Defs.' Mot. To Dismiss (ECF No. 18) at 2. And Vita Nuova has made clear that it is no longer challenging the 2000

rules—and it is not seeking any judicial relief that would vacate those rules or enjoin the defendants from enforcing them.[1]

Instead, Vita Nuova is seeking nothing more than a judicial declaration of its rights under the federal Declaratory Judgment Act. *See* 28 U.S.C. § 2201. Vita Nuova is seeking this declaratory relief because it intends to apply for the Title X funding that will be awarded in the spring of 2021—and it wants judicial assurance that it will remain eligible for Title X funding in 2021 regardless of whether a new Administration revokes the final rule of March 2, 2019, and regardless of whether a future court decides to enjoin its enforcement. *See* First Amended Complaint (ECF No. 16) at ¶¶ 31–38; Br. in Opp. to Defs.' Mot. To Dismiss (ECF No. 18) at 2–8. Vita Nuova's standing to seek this relief rests on the immediate, present-day injury that it is suffering on account of the *risk* that the rule might be revoked or enjoined in the future, which is crimping Vita Nuova's present-day fundraising and recruitment efforts. *See* Br. in Opp. to Defs.' Mot. To Dismiss (ECF No. 18) at 11. And in all events, the risk of future injury is itself enough to confer standing, so long as the requested relief will reduce the probability of the future injury's occurrence. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 525 n.23 (2007) ("[E]ven a small probability of injury is sufficient to

1. *See* Br. in Opp. to Defs.' Mot. To Dismiss (ECF No. 18) at 2 ("The Ninth Circuit's order of July 11, 2019, and the Secretary's decision to begin enforcing the 2019 rule on July 15, 2019, have mooted most—but not all—of Vita Nuova's original claims for relief concerning the Title X statute and the previous regime that the Secretary had been enforcing. Vita Nuova, for example, can no longer ask the Court to 'set aside' the 2000 rules under section 706 of the APA, because the courts have allowed the 2019 rule to take effect. *See* Original Complaint (ECF No. 1) at ¶¶ 36(c), 41(c), 45(c), 49(c). A court cannot 'vacate' a rule that has been superseded by a subsequent agency rule. In like manner, Vita Nuova's claims for injunctive relief against the Secretary's enforcement of the 2000 rule have become moot because the Secretary is no longer enforcing that rule and has no desire to resume its enforcement. *See* Original Complaint (ECF No. 1) at ¶¶ 36(b), 41(b), 45(b), 49(b). The first amended complaint has abandoned those claims—as it must—in response to these recent developments." (footnote omitted)).

create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability" (citation and internal quotation marks omitted)).

The Ninth Circuit's en banc ruling in *California v. Azar* has not eliminated the risk that Vita Nuova will be rendered ineligible to participate in the Title X program. The prospect remains that a new administration could take office in January of 2021 and immediately revoke the final rule of March 4, 2019. That would disqualify Vita Nuova from participating in the Title X program, and would waste the time and resources that Vita Nuova intends to invest in building its practice and preparing a credible application for Title X funds. There is also ongoing litigation against the final rule of March 4, 2019, in other jurisdictions. On February 14, 2020, a federal district court enjoined Secretary Azar from enforcing the final rule of March 4, 2019, in the State of Maryland. *See Mayor and City Council of Baltimore v. Azar*, No. CV RDB-19-1103, 2020 WL 758145 (D. Md. Feb. 14, 2020). The Secretary has appealed this decision to the U.S. Court of Appeals for the Fourth Circuit, No. 20-1215, which could result in yet another ruling that enjoins the final rule of March 4, 2019, on a nationwide basis.[2] A new lawsuit could also be brought against the final rule of March 4, 2019, at any time by any family-planning provider unhappy with its restrictions on abortion-promoting speech. And the Ninth Circuit's recent ruling is not even the final word in the *California v. Azar* litigation; the plaintiffs may seek additional review before the full en banc Ninth Circuit or in the Supreme Court of the United States.

Finally, the Ninth Circuit's en banc ruling in *California v. Azar* does nothing to affect Vita Nuova's standing to challenge 45 C.F.R. § 75.300(d) (Claim 2) or 42 U.S.C. § 300a-7(c)(1) (Claim 3).

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2. The Fourth Circuit has shown an especially strong propensity toward issuing nationwide injunctions. *See, e.g.*, *Roe v. Department of Defense*, 947 F.3d 207, 231–34 (4th Cir. 2020); *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 272–74 (4th Cir. 2018); *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 604–05 (4th Cir. 2018).

CONCLUSION

The defendants' motion to dismiss should be denied.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: March 6, 2020

CERTIFICATE OF SERVICE

I certify that on March 6, 2020, I served this document through CM/ECF upon:

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