

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

**EXPEDITED UNOPPOSED MOTION FOR EXTENSION PENDING
RESOLUTION OF UNOPPOSED MOTION TO STAY**

Emily Nestler
Rabia Muqaddam
Arielle Humphries
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3600
enestler@reprorights.org
rmuqaddam@reprorights.org
ahumphries@reprorights.org

Dated: January 6, 2021

Attorneys for Plaintiffs-Appellants

Emily Ullman
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000
eullman@cov.com

Richard L. O'Meara
Murray Plumb & Murray
75 Pearl Street
Portland, ME 04104
Telephone: (207) 773-5651
romeara@mpmlaw.com

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 26(b), 27, and 31(a)(1) and First Circuit Local Rules 27, 31, and 32.4, Plaintiffs-Appellants hereby request an extension of time within which to file their opening brief, pending resolution of their Unopposed Motion to Stay that was filed on December 15, 2020 and which has not yet been decided. (Doc. 00117681689). The current deadline for Plaintiff-Appellants' opening brief is January 11, 2021. In the event, a stay is denied, Plaintiffs-Appellants request a 14-day extension from the date of that Order. If a stay is granted, the instant motion for an extension would become moot.

Plaintiffs-Appellants moved to stay this case pending final resolution by the United States Supreme Court of *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). Because those two cases concern matters that may decide some of the issues in this appeal, a stay would allow all parties here to proceed in a manner that serves judicial economy and preserves the resources of the parties. Extending the briefing deadline in this case to allow for consideration of the Plaintiffs-Appellants' pending motion to stay would serve the same purpose, since needless briefing is the very thing that the motion to stay seeks to avoid.

Because the first briefing deadline in this case is on January 11, and thus fast approaching, Plaintiffs-Appellants respectfully request that this motion be

considered on an expedited basis. Counsel for the parties have conferred regarding this motion, and Defendants-Appellees consent to this request for an extension.

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. Because Plaintiffs-Appellants believed it unlikely that the Supreme Court would resolve the related cases before briefing in this case comes due. Plaintiffs-Appellants filed a motion to 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. Defendants-Appellees did not oppose that motion.

6. Plaintiffs-Appellants had 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. As Plaintiffs-Appellants' explained in their Motion to Stay, judicial economy would be served by waiting for the Supreme Court to finish its review of the conflicting *en banc* Fourth and Ninth Circuit decisions before further briefing in this case. Because those matters 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. For similar reasons, an extension of time for Plaintiffs-Appellants opening brief also would allow this case to proceed in a manner that serves judicial economy and preserves the resources of the parties. Because the current deadline is January 11, 2021, which is less than a week away, pressing forward before the motion to stay is addressed would undermine the very purpose of the stay itself—since needless briefing is the very thing that the Motion to Stay seeks to avoid. On the other hand, were the Court to deny the Motion to Stay, a limited extension of fourteen days would give Plaintiffs-Appellants time to adjust their briefing accordingly, which is particularly justified here given the complex nature of the case.

WHEREFORE, Plaintiffs-Appellants respectfully request that the Court extend Plaintiffs-Appellants deadline to file their opening brief, pending resolution of their Unopposed Motion to Stay.

Dated January 6, 2020

Respectfully submitted:

Emily Ullman
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
Telephone: (202) 662-6000
eullman@cov.com

/s/ Emily Nestler
Emily Nestler
Rabia Muqaddam
Arielle Humphries
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3600
enestler@reprorights.org
rmuqaddam@reprorights.org
ahumphries@reprorights.org

Richard L. O'Meara
Murray Plumb & Murray
75 Pearl Street
Portland, ME 04104
Telephone: (207) 773-5651
romeara@mpmlaw.com

Counsel for Plaintiffs-Appellants

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 1,222 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: January 6, 2021

/s/ Emily Nestler
Emily Nestler
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3600

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2021, 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: January 6, 2021

/s/ Emily Nestler
Emily Nestler
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3600

Counsel for Plaintiffs-Appellants