

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

JOINT MOTION TO HOLD IN ABEYANCE

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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, and 31, the parties hereby jointly request to hold these proceedings in abeyance, to allow Defendants-Appellees to complete a rulemaking process in which they have proposed to repeal and replace the challenged regulation at issue here. There is currently no briefing schedule set for this matter.

As grounds for this Motion, the parties 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. On March 7, 2021, this Court granted Plaintiffs-Appellants’ request for a stay pending the Supreme Court’s resolution of related cases: *AMA, et al. v. Azar*, No. 20-429; *Azar v. Mayor & City Council of Baltimore*, No. 20-454; and *Oregon v. Azar*, No. 20-539 (collectively the “related cases”). The Court’s order stated: “If the matters are held over, the stay will remain in place pending a ruling on the certiorari petitions.” Order, No. 00117689255 (1st Cir. Jan. 6, 2021).
3. After granting certiorari in the related cases on February 22, 2021, the Supreme Court then ultimately dismissed them on May 17, 2021, upon the

stipulation and joint request of all parties thereto. Order, Case Nos. 20-429, 20-454, 20-539 (May 17, 2021).¹

4. In the intervening months during which the Supreme Court was considering the related cases, circumstances on the ground changed materially. On April 14, 2021, HHS issued a notice of proposed rulemaking (“NPRM”) for the Title X family planning program, entitled “Ensuring access to equitable, affordable, client-centered, quality family planning services,” 86 Fed. Reg. 19812 (Apr. 15, 2021). The proposed regulations would largely reinstate the rules that had been promulgated in 2000 (65 Fed. Reg. 41270), “with several modifications needed to strengthen the program and ensure access to equitable, affordable, client-centered, quality family planning services for all clients, especially for low-income clients.”²

¹ Plaintiffs-Appellees had previously sought an extension of time to file their opening brief, due to scheduling conflicts and the complexities of the case, which this Court granted. Order, No. 00117648064 (1st Cir. Sept. 25, 2020). 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—which this Court granted on November 2. Order, No. 00117663516 (1st Cir. Nov. 2, 2020). When the Petitions for Writ of Certiorari remained unresolved after 60 days, due to extensions granted by the Supreme Court, this Court granted a stay pending resolution of those cases by the Supreme Court. Order, No. 00117689255 (1st Cir. Jan. 6, 2021).

² See Fact Sheet: Notice of Proposed Rulemaking Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, HHS, *available at* <https://www.hhs.gov/about/news/2021/04/14/fact-sheet-notice-of-proposed->

5. The NPRM had a 30-day comment period, which concluded on May 17, 2021. All comments on the proposed rule received by the deadline are now under review.³

6. In light of these proposed regulations and the fact that Defendants-Appellees' rulemaking is already well-underway, the parties agree that judicial economy would be served by holding this case in abeyance until the rulemaking process is complete. The issuance of new rules is likely to be an important factor that informs the posture of this case going forward, particularly if those rules eliminate the very regulations at issue here.

7. The parties agree that holding this case in abeyance under these circumstances, which may avoid unnecessary briefing and Court review is especially warranted in this case, given the complex issues at stake in this matter. As stated in Plaintiffs-Appellants' previous motions, 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

[rulemaking-ensuring-access-to-equitable-affordable-client-centered.html](#) (last revised Apr. 14, 2021).

³*Title X Statutes, Regulations, and Legislative Mandates*, HHS Office of Population Affairs, available at <https://opa.hhs.gov/grant-programs/title-x-service-grants/title-x-statutes-regulations-and-legislative-mandates> (last viewed on March 23, 2021).

Administrative Procedure Act, 5 U.S.C. § 706(2)(A)–(C), and the United States Constitution.

8. Holding the case in abeyance will allow all parties here to proceed in a manner that serves judicial economy and preserves the resources of the parties.

WHEREFORE, the parties jointly request that the Court hold this case in abeyance until 30 days after the completion of HHS’s rulemaking process for “Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services,” 86 Fed. Reg. 19812, and order the Parties to submit a status report to the Court at that time.

Dated May 25, 2021

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).

9. 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 768 words.

10. 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: May 25, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 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: May 25, 2021

/s/ Emily Nestler

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