

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

THE FAMILY PLANNING ASSOCIATION OF)
MAINE D/B/A MAINE FAMILY PLANNING,)
on behalf of itself, its staff, and its patients;)
)
and)
)
J. DOE, DO, MPH, individually and on behalf of)
Dr. Doe’s patients,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
HEALTH AND HUMAN SERVICES;)
)
ALEX M. AZAR II, in his official capacity as)
Secretary of Health and Human Services;)
)
OFFICE OF POPULATION AFFAIRS;)
)
and)
)
DIANE FOLEY, M.D., in her official capacity as)
the Deputy Assistant Secretary for Population)
Affairs,)
)
Defendants.)

Case No. 1:19-cv-00100-LEW

**MOTION TO REOPEN
MOTION FOR PRELIMINARY
INJUNCTION AND FOR
EXPEDITED RULING**

**PLAINTIFFS’ MOTION TO REOPEN MOTION FOR PRELIMINARY
INJUNCTION AND FOR EXPEDITED RULING**

Plaintiffs, The Family Planning Association of Maine, d/b/a Maine Family Planning, on behalf of itself, its staff, and its patients; and Dr. J. Doe, DO, MPH, individually and on behalf of Dr. Doe’s patients, respectfully seek to reopen and renew their Motion for Preliminary Injunction (ECF No. 17), which was previously withdrawn without prejudice as moot (ECF No. 65).

Because previously-obtained nationwide injunctions against the challenged regulation,

Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714-01 (March 4, 2019) (the “Rule”), were stayed pending appeal yesterday, Plaintiffs’ need for immediate protection from irreparable harm has rearisen. Plaintiffs’ counsel has consulted with Defendants’ counsel, who have stated that they take no position on the instant motion at this time, but do intend to file a response. Defendants’ counsel have further stated that they will file their response with the Court no later than Tuesday, June 25, 2019.

As the Court is aware, Plaintiffs asserted in their original Motion for a Preliminary Injunction that implementation of the Rule would irreparably harm them and their patients because it would force Maine Family Planning (“MFP”) to make an impossible choice: remain in the Title X program and stop the provision of abortion services, abortion referrals, and non-directive pregnancy counseling at MFP’s sites and the sites of its subrecipients; or leave the program and losing a large chunk of its funding. Either route would harm numerous MFP patients, including through the loss of abortion services at 50-85% of the sites currently providing them in Maine and the possible closure of 11-15 family planning sites. On April 26, 2019, however, Plaintiffs withdrew their Motion for Preliminary Injunction without prejudice, expressly reserving the right to renew it (ECF No. 65). This withdrawal was based on an order issued by the United States District Court for the Eastern District of Washington in *Washington v. Azar*, 1:19-cv-03040-SAB (ECF No. 54), which granted a nationwide preliminary injunction stopping any implementation of the Rule, including as applied to Plaintiffs and throughout Maine. Accordingly, there was no longer an imminent threat of irreparable harm to Plaintiffs necessitating a preliminary injunction from this Court. Shortly thereafter, the District of Oregon also granted a nationwide preliminary injunction against the Rule in *Oregon v. Azar*, 6:19-cv-00317-MC; 6:19-cv-00318-MC. The Northern District of California also issued a statewide

injunction against the Rule in *California v. Azar*, 3:19-cv-01184-EMC, and *Essential Access Health v. Azar*, 3:19-cv-01195-EMC.

On June 20, 2019, the United States Court of Appeals for the Ninth Circuit issued a combined *per curiam* order in *Washington v. Azar*, No. 19-35394; *California v. Azar*, No. 19-15974, *Essential Access Health Inc. v. Azar*, No. 19-15979, and *Oregon v. Azar*, No. 19-15974 (the “Ninth Circuit Order”), attached as Exhibit A, granting Defendants’ motions to stay the preliminary injunctions pending appeal. Because the nationwide preliminary injunctions that previously protected Plaintiffs from the Rule are no longer in place, Plaintiffs are now subject to the Rule and once again face imminent, irreparable harm. (ECF No. 17 at 2).

Plaintiffs note that the Ninth Circuit Order is not binding on this Court and respectfully maintain that it was wrongly decided for the reasons set forth in Plaintiffs’ Memorandum of Law in Support of their Motion for Preliminary Injunction (ECF No. 17-1). Moreover, unlike the preliminary injunction sought by Plaintiffs here, the injunctions in the cases addressed by the Ninth Circuit Order were not based on constitutional claims. *Id.* at 31-46. Accordingly, the Ninth Circuit Order addresses only facial challenges brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2). The Ninth Circuit Order does not and could not address Plaintiffs’ constitutional claims based on violations of the First and Fifth Amendments to the United States Constitution. Indeed, no other court in the country has yet addressed those claims. In addition, because Plaintiffs’ constitutional claims include as-applied challenges to the Rule, which are grounded in specific facts relating to Plaintiffs and the state of Maine, the Ninth Circuit’s Order has no application to those claims. Finally, the Ninth Circuit’s Order does not assess the evidence submitted in this case of the specific harms that Mainers will experience as a result of the Rule.

Accordingly, Plaintiffs respectfully request that the Court reopen Plaintiffs' Motion for Preliminary Injunction and that the Court decide both this motion and the underlying Motion for Preliminary Injunction on an expedited basis.

Dated: June 21, 2019

Respectfully submitted,

/s/ Richard L. O'Meara

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**Admitted Pro Hac Vice*