UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE FAMILY PLANNING ASSOCIATION OF MAINE D/B/A MAINE FAMILY PLANNING *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:19-cv-00100-LEW**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND PRELIMINARY INJUNCTION ORDER, OR IN THE ALTERNATIVE, FOR INJUNCTION PENDING APPEAL

In this lawsuit, Plaintiffs challenge a Department of Health and Human Services (HHS) rule, a materially indistinguishable version of which has already been upheld by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991). Accordingly, this Court denied Plaintiffs' motion for a preliminary injunction, concluding that it was "not free to disregard binding Supreme Court precedent that addresses the controversy before [it]." Decision and Order on Mot. for Prelim. Inj. (PI Order) at 27, ECF No. 77. Now, in their motion to amend the Court's preliminary injunction order, or in the alternative, for an injunction pending appeal, ECF No. 78 (Motion), Plaintiffs seek the same relief they have already been denied. They do not, however, present any new grounds for granting injunctive relief that this Court has not already considered and rejected. Just as there was no basis for granting that relief in the first instance, there is no basis for this Court to reconsider its ruling or grant an injunction pending appeal. Plaintiffs' Motion should be denied.

ARGUMENT

I. PLAINTIFFS' MOTION PROVIDES NO BASIS FOR THIS COURT TO RECONSIDER ITS ORDER DENYING A PRELIMINARY INJUNCTION

Plaintiffs primarily seek relief pursuant to Federal Rule of Civil Procedure 59. Rule 59(e)[1] permits a motion to alter or amend a judgment, but as the First Circuit has cautioned, "revising a final judgment is an extraordinary remedy and should be employed sparingly." *Ira Green, Inc. v. Military Sales & Serv. Co.*, 775 F.3d 12, 28 (1st Cir. 2014). "The general rule in this circuit is that the moving party must either clearly establish a manifest error of law or must present newly discovered evidence." *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7 n.2 (1st Cir. 2005) (citation omitted).

Plaintiffs do not come close to satisfying this standard. Their only argument is that the Court "erred" in opining that a new state law,[2] which was passed after briefing on Plaintiffs' preliminary injunction motion had concluded, has "serious implications for Plaintiff's preliminary injunction showing," and in particular the Court's statement that, in light of the law, the "portrayal of driving burdens" in Plaintiffs' preliminary injunction briefing was not "calibrated to existing conditions." Pls.' Mem. at 3 (quoting PI Order at 25 n. 23). Although Plaintiffs argue that the Court should amend its Order to "grant Plaintiffs' request for a preliminary injunction," *id*. at 7, they do not even contend that the Court's denial of a preliminary injunction was "premised on a manifest error of law or fact." *Ira Green*, 775 F.3d at 28. The Court never cited to this new state law in the "Discussion" section of its opinion, and the Court found that Plaintiffs were unable to

[1] Although Plaintiffs do not specify, it appears they are proceeding under Rule 59(e), which provides for a party to file a motion to "alter or amend a judgment." Fed. R. Civ. P. 59(e); *see* Pls.' Mem. in Support of Mot. to Amend Prelim. Inj. Order (Pls.' Mem.) at 3, ECF No. 78-1 (addressing request for "amended judgment").

[2] An Act to Authorize Certain Health Care Professionals to Perform Abortion, P.L. 2019, ch. 262, §§ 1596 to 1599-A.

show a likelihood of success on the merits on any of the asserted claims entirely independent of the state law that is the subject of Plaintiffs' filing. Plaintiffs thus do not even attempt to argue that, had the Court characterized the new state law in Plaintiffs' preferred fashion, it would have reached the alternative conclusion that any of Plaintiffs' claims were instead likely to succeed.

In any event, Plaintiffs do not identify any error—let alone any manifest error—in the Court's treatment of the new Maine law. Plaintiffs submit a declaration that purports to show that the Court's assumptions about the new state law are "not supported by the record submitted in support" of Plaintiffs' preliminary injunction motion and "inconsistent with the burden that the Rule will impose on Plaintiffs." Pls.' Mem. at 2. But on the first point, Plaintiffs merely rehash their arguments about abortion access in Maine that the Court has already extensively considered. *See* PI Order at 22-26 (summarizing the declarations and exhibits submitted with Plaintiffs' preliminary injunction motion and concluding that "I have reviewed and considered these exhibits carefully"). Plaintiffs, however, "cannot use a Rule 59(e) motion to rehash arguments previously rejected." *Soto-Padro v. Pub. Bldgs. Auth.*, 675 F.3d 1, 9 (1st Cir. 2012).

As to Plaintiffs' second point, that the Court's predictions about the effect of the new state law underestimate the harm the Rule will cause Plaintiffs and their patients, Plaintiffs have likewise identified no manifest error. As the First Circuit has recognized, a "manifest error is an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law." *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004) (quoting BLACK'S LAW DICTIONARY 563 (7th ed. 1999)). Here, the Court's predictions about the new law's impacts were eminently reasonable. And the language Plaintiffs identify does not "disregard controlling law"; indeed, it does not even apply any law at all or state any conclusion necessary to

the Court's judgment that Plaintiffs are not likely to succeed on the merits of any of the claims asserted in their preliminary injunction motion.

Again, Rule 59(e), and for that matter, Rule 60(b)[3], "speak of motions to amend or vacate or modify the court's *judgment*. Dicta are not judgments [and a] motion to vacate a dictum is outside the scope of these rules." *Abbs v. Sullivan*, 963 F.2d 918, 925 (7th Cir. 1992).[4] Plaintiffs' Motion furnishes no basis whatsoever to disturb this Court's judgment. Indeed, in their alternative request for an injunction pending appeal, Plaintiffs do not even cite the new state law; nor do they rely on their supplemental declaration in the section arguing that they are likely to succeed on the merits. *See* Pls.' Mem. at 7-8. Plaintiffs' Motion should be denied.

II. PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION PENDING APPEAL

As Plaintiffs recognize, the standard for an injunction pending appeal of the denial of a preliminary injunction is effectively the same as the standard for seeking the preliminary injunction in the first instance. The Court must consider: "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties

[3] In a footnote, Plaintiffs "move in the alternative pursuant to Federal Rule of Civil Procedure 60," and argue that relief under that Rule "is warranted here for the same reasons that it is justified under Rule 59." Pls.' Mem. at 3 n.1. The First Circuit has held, however, that a "manifest error of law" is not a basis on which to seek relief under Rule 60(b). *Venegas-Hernandez*, 370 F.3d at 188-89 & n.4 (citing *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir. 1971)). In any event, the Court need not decide whether Plaintiffs' Motion arises under Rule 59 or Rule 60 because, as explained above, Plaintiffs have not carried their burden of demonstrating entitlement to relief of any sort from the Court's preliminary injunction denial, and their Motion fails under either standard.

[4] *See also U.S. Commodity Futures Trading Comm'n v. Wilson*, 19 F. Supp. 3d 352, 365 (D. Mass. 2014) ("The manifest error exception requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong, and to prevail on a Rule 59(e) motion based on manifest error of law, the moving party must demonstrate that errors were made which were so egregious that an appellate court could not affirm the district court's judgment." (citations omitted)).

interested in the proceeding; and (4) where the public interest lies." *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). "The first two factors are the most critical. Both require a showing of more than mere possibility. Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be likely absent an injunction." *Id*. Thus, as Plaintiffs also recognize, *see* Pls.' Mem. at 7 n.5, this Court's PI Order is fully controlling with respect to Plaintiffs' alternative request for an injunction pending appeal, and the Court should deny that request for the reasons it has already stated.

Indeed, with respect to the likelihood of success on the merits prong, Plaintiffs' Motion merely restates, in summary fashion, the arguments "detailed in full in their prior submissions." Pls.' Mem. at 7. Plaintiffs have thus offered no basis for the Court to alter its conclusion, after reviewing and thoroughly addressing each of the claims asserted in Plaintiffs' preliminary injunction motion, that Plaintiffs have failed to show a likelihood of success on the merits with respect to any of them. *See* PI Order at 29-60.

Plaintiffs further contend that an injunction is necessary to prevent irreparable injury, relying on the fact that, now that the Rule has taken effect, Plaintiff Maine Family Planning (MFP) has chosen to leave the Title X program. Pls.' Mem. at 9. But Plaintiffs made this threat, as well as the alleged harms supposedly associated with it, clear in their preliminary injunction papers. *See* Pls.' Mem. in Support of Mot. for Prelim. Inj. at 12-13, ECF No. 17-1 (noting that if MFP were to leave the Title X program, it would "need to close between 11 and 15 of its directly-controlled sites" absent a "permanent alternative source of funding"). In any event, as the Court has already recognized, its findings that Plaintiffs have not demonstrated a likelihood of success on the merits is sufficient to deny Plaintiffs' request for injunctive relief and render any inquiry into Plaintiffs' purported harm a "matter[] of idle curiosity." PI Order at 60.

The same is true with respect to the remaining factors. *See also* Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. (PI Opp'n) at 44-45, ECF No. 48 (explaining why the Rule does not cause Plaintiffs irreparable harm and why the balance of the equities and the public interest weigh in favor of denying Plaintiffs preliminary injunctive relief). And as David Johnson, Operations and Management Officer for the Office of Population Affairs, explains in the attached declaration, an injunction pending appeal will harm both the Government and Title X grantees by creating confusion about what will ultimately be required of grantees and uncertainty about HHS's administration of the Title X program going forward. *See* Decl. of David Johnson ¶¶ 4-6. These harms are compounded by the fact that the Rule has now taken effect and is being implemented across the country. *Id.* ¶ 2.

Finally, although Plaintiffs do not make clear the scope of their requested injunction pending appeal, their Motion—filed primarily for the purpose of arguing about the effect that a *Maine* law would have on abortion access *in Maine*, whose unique "rurality plays a dominant role in limiting the volume of abortion services," Pls.' Mem. at 5—only highlights the inappropriateness of a nationwide injunction pending appeal here, as this Court has already concluded. PI Order at 24; *see also* PI Opp'n at 45-49.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

Dated: July 23, 2019

Respectfully submitted,

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/s/ R. Charlie Merritt

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT

EXHIBIT A

UNITED STATES DISTRICT COURT
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DECLARATION OF DAVID JOHNSON

I, David Johnson, declare as follows:

1. I am the Operations and Management Officer for the Office of Populations Affairs, Department of Health and Human Services (DHHS), and I have served in that capacity since August 7, 2016. My duties in this role include oversight of Office of Population Affairs' (OPA) budget and organizational policies and procedures for the office. Additionally, I am responsible for the administrative oversight of the Title X grant program including providing guidance to grantees on program requirements.

2. The March 4, 2019, Title X rule at issue in this litigation (Rule) is currently effective and being implemented across the nation. As such, any stay of the Rule would result in administrative burdens for both the Department and grantees, and would compound the confusion created by a series of injunctions and stays of injunctions which have been entered nationwide.

3. On April 1, 2019, the agency awarded nearly $256 million dollars in fiscal year 2019 with the expectation that funds would be spent within that budget year, which ends on March 31, 2020. These funds are being spent for grants administered by 90 different grantees. Grantees have been spending the award money and will continue to do so while the Rule is implemented.

4. The Department has issued guidance for entities to come into compliance with the different provisions of the Rule, including the requirements for physical separation. Further delays in implementing the Rule will cause serious uncertainty among grantees as to what is required right now, particularly given multiple court orders and issuances from the Department.

5. With respect to physical separation, which is required March 4, 2020, any further injunction preventing implementation of the Rule will cause serious hardship for grantees who will not know whether they should take the steps needed to physically separate before the March 4, 2020 deadline, whether they should spend resources on separation, and whether they need to seek guidance from OPA on whether their separation plans are sufficient. There is no guarantee that, if HHS prevails on the merits, there will be enough, or even any, time left for grantees to comply with the Rule before Defendants would begin enforcing the physical separation requirement.

6. If the Rule is enjoined it will also cause significant uncertainty given the nature of the awards to grantees. Current grantees received awards on April 1, 2019 for a one-year budget period with the projected opportunity to renew for two additional years. Grantees must apply for continuation awards to receive funding for each of those subsequent years and will have to comply with any rules in place at that time. *See* 42

C.F.R. § 59.8(b), (c). If the Rule is enjoined pending appeal, the typical continuation award process could be significantly disrupted, because grantees will not know when or if any injunction may be lifted. For example, noncompeting continuation award guidance is likely to be posted on October 1, 2019, continuation applications are likely to be due January 1, 2020, and continuation grants will be awarded on April 1, 2020. At all points during this process, the uncertainty of which rules will be in effect creates significant confusion and burdens. Agency staff will be unable to effectively write continuation award guidance, not knowing which compliance regime will be in effect. In addition, applicants may write continuation applications responsive to one set of rules that changes after they have submitted applications, and, similarly, staff may be required to review and assess applications against one set of rules, even though those rules may no longer be in effect when/if grantees receive a continuation award.

7. OPA staff have begun to provide compliance guidance in a controlled rollout, including written guidance on July 15, 2019 and on July 20, 2019, and verbal guidance at the national grantee meeting held July 16-19, 2019. If the Rule is enjoined pending appeal, OPA staff will need to inform grantees of the change in status. Given there are 90 grantees, and approximately 3,800 clinical service sites, it could take several weeks to inform all recipients of Title X funds and will further exacerbate confusion.

8. Part of the regulation, § 59.5(a)(13), allows the agency to collect information on grantees and subrecipients in order to better make administrative and fiscal plans and ensure proper oversight. Without such information, it will be more difficult to ensure grantee compliance with this new provision. Additionally, it will be

harder for the agency to ensure that Title X beneficiaries are getting the proper distribution of scarce resources.

9. Another section, § 59.17, requires grantees to provide the agency with appropriate documentation demonstrating compliance with state reporting and notification laws regarding the abuse of minors. Additionally, it requires grantees to provide a plan, annual training, and protocols to ensure minors are aware of ways to resist sexual coercion. If the Rule is enjoined pending the outcome of an appeal, the agency will not have the ability to fully ensure compliance with this new provision, a provision that is essential to preventing or, at least reporting, sexual assault or abuse.

10. Finally, to ensure that Title X funds are not used to build infrastructure for prohibited purposes, § 59.18 requires grantees to provide a detailed plan or accounting for the use of grant dollars, both in their applications and in annual reporting, and to seek prior approval for any significant changes in the use of grant dollars. If the Rule is enjoined pending appeal, the agency will not have the ability to fully ensure compliance with this new provision.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing declaration is true and correct to the best of my knowledge, information, and belief.

Executed on July 23, 2019, in Rockville, Maryland