UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*, *Plaintiffs*, v. ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*, *Defendants*.	Civil Action No. CCB-20-00361

CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to Federal Rule of Civil Procedure 23(c)(1), Plaintiffs Kirsty Hambrick, Rebecca Barson, Mariel DiDato, and Tanja Hollander (the "Consumer Plaintiffs") hereby move for certification under Rule 23(b)(2) of a class comprised of themselves and all other persons similarly situated, namely, all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy (the "Proposed Class"). Plaintiff Planned Parenthood of Maryland, Inc. consents to and fully supports this Motion, but is not a movant because it is not a member of the class.

Consumer Plaintiffs believe that class certification is not necessary to obtain relief to benefit all of the Proposed Class members for the reasons set forth in Plaintiffs' Memorandum in

Support of their Motion Summary Judgment, ECF No. 29-1, Motion for Leave to File Amended and Supplemental Complaint, ECF. No. 39, and forthcoming Opposition to Defendants' Motion for Summary Judgment and Reply in Further Support of Plaintiffs' Motion for Summary Judgment. However, Consumer Plaintiffs file this Motion out of an abundance of caution to make certain that any relief this Court grants will protect all Proposed Class members from the Separate-Billing Rule's harms.

As detailed more fully in Consumer Plaintiffs' accompanying Memorandum in Support, the Proposed Class satisfies the requirements of Federal Rule of Civil Procedure 23(a) because: (1) joinder of more than three million consumers located in multiple states across the country plus the District of Columbia is impracticable; (2) the claims of all Proposed Class members turn on common questions, including whether the Separate-Billing Rule is arbitrary, capricious, and contrary to law, and whether it was adopted without notice and comment, in violation of the Administrative Procedure Act ("APA"); (3) the Consumer Plaintiffs' claims are typical of those claims of the Proposed Class members because they are all comparably injured by the same conduct—Defendants' failure to follow the substantive and procedural mandates of the APA in promulgating the Separate-Billing Rule—their claims are all based on the same legal theory—that the Final Rule violates the APA in multiple ways—and their injuries will be remedied by the same relief—an order declaring the Rule unlawful and vacating it or enjoining its enforcement; and (4) the Consumer Plaintiffs, as well as their attorneys in this case, will adequately and fairly represent the interests of the class and prosecute this action vigorously. Finally, the Proposed Class satisfies the requirements of Rule 23(b)(2) because the Defendants' unlawful promulgation of the Separate-Billing Rule applies generally to the Proposed Class, thereby making final relief appropriate with respect to the class as a whole.

For these reasons, Consumer Plaintiffs respectfully request that, to the extent this Court is inclined to grant Plaintiffs' Motion for Summary Judgment but determines Plaintiffs are not entitled to nationwide vacatur of the Separate-Billing Rule, this Court should certify the Proposed Class as defined above and appoint the Consumer Plaintiffs' attorneys from the American Civil Liberties Union Foundation and Brown, Goldstein & Levy, LLP as class counsel. In support of this Motion, Consumer Plaintiffs submit the accompanying (1) memorandum, (2) declarations of Andrew D. Freeman (Ex. A), Meagan M. Burrows (Ex. B), Kirsty Hambrick (Ex. C), Rebecca Barson (Ex. D), Mariel DiDato (Ex. E), and Tanja Hollander (Ex. F) and (3) proposed order.

Dated: May 19, 2020

Respectfully submitted,

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Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

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CONSUMER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This action challenges Defendants' Separate-Billing Rule (or "the Rule" or "the Final Rule")[1] as arbitrary, capricious, contrary to law, and adopted without procedures required by law under the Administrative Procedure Act ("APA"). As set forth in Plaintiffs' Memorandum in Support of their Motion for Summary Judgment, ECF No. 29-1 (hereinafter "Pls.' MSJ"), Defendants' Separate-Billing Rule reinterprets Section 1303 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18023, to, *inter alia*, require insurers offering insurance plans with abortion coverage through ACA individual-market health benefit exchanges (hereinafter, "issuers") to send two separate bills to consumers of such plans each month—one for the abortion-related portion of their premium and the other for all other coverage—and to instruct consumers to pay their premium in two separate monthly transactions. Pls.' MSJ at 14–15. If implemented, the Separate-Billing Rule will impact more than three million consumers nationwide, including Plaintiffs Kirsty Hambrick, Rebecca Barson, Mariel DiDato, and Tanja Hollander (the "Consumer Plaintiffs"), who have enrolled in individual-market ACA exchange plans that include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used. *Id.* at 18–19. These consumers will be forced to pay more in health insurance premiums and to expend valuable time navigating the separate billing and payment requirements for no benefit to them, and will be exposed to the risk of losing access to essential healthcare coverage, all in service of a rule that

[1] *See* Patient Protection and Affordable Care Act; Exchange Program Integrity, Final Rule, 84 Fed. Reg. 71,674 (Dec. 27, 2019) (to be codified at 45 C.F.R. pts. 155, 156); Patient Protection and Affordable Care Act; Exchange Program Integrity, Notice of Correction, 85 Fed. Reg. 2,888 (Jan. 17, 2020); Medicare and Medicaid Programs, Basic Health Program, and Exchanges; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program, Interim Final Rule, https://www.federalregister.gov/documents/2020/05/08/2020-09608/medicare-and-medicaid-programs-basic-health-program-and-exchanges-additional-policy-and-regulatory (May 8, 2020).

achieves no quantifiable benefits and is simply designed to advance an anti-abortion agenda. *Id.* at 18–19, 26–29.

As detailed below, Consumer Plaintiffs easily satisfy the requirements for class certification under Rule 23(a) because the "class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims . . . of the representative parties are typical of the claims . . . of the class; [and] the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Likewise, Consumer Plaintiffs satisfy Rule 23(b)(2)'s requirements because Defendants have "acted or refused to act on grounds that apply generally to the class" making "final injunctive relief or corresponding declaratory relief . . . appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Accordingly, in the event that the Court is inclined to rule for Plaintiffs on the merits but finds that they are not entitled to the presumptive remedy of nationwide vacatur, Plaintiffs respectfully request that the Court certify this case as a class action under Federal Rule of Civil Procedure 23(b)(2), define the class to include all enrollees in individual-market ACA exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to HHS may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy (the "Proposed Class"), and appoint Consumer Plaintiffs' counsel from the American Civil Liberties Union Foundation ("ACLU") and Brown, Goldstein & Levy, LLP as class counsel.

BACKGROUND

Plaintiffs incorporate by reference the facts submitted in Plaintiffs' Complaint, ECF No. 1, Proposed Amended and Supplemental Complaint, ECF No. 39-1, and in support of their Motion for Summary Judgment, ECF Nos. 29, 29-1.

ARGUMENT

Federal Rule of Civil Procedure 23 governs class actions in federal court, and a plaintiff whose suit meets that rule's requirements has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). To be certified as a class under Rule 23, a "suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Id.* (citing Fed. R. Civ. P. 23(b)); *see also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003).

"District courts have 'wide discretion in deciding whether or not to certify a proposed class,' and their decisions 'may be reversed only for abuse of discretion."' *Cent. Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993) (quoting *In re A.H. Robins*, 880 F.2d 709, 728–29 (4th Cir. 1989)); *see also Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654–55 (4th Cir. 2019) (appellate "review of class certification issues is deferential, cognizant of both the considerable advantages that our district court colleagues possess in managing complex litigation and the need to afford them some latitude in bringing that expertise to bear"). The Fourth Circuit has held that district courts "should give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells*, 348 F.3d at 424 (alteration in original) (internal quotation marks and citation omitted); *id.* (noting that "certification as a class action serves important public purposes," including the promotion of

"judicial economy and efficiency" and "afford[ing] aggrieved persons a remedy if it is not economically feasible to obtain relief through the traditional framework of multiple individual . . . actions" (internal quotation marks and citation omitted)).

As set forth below, the Proposed Class satisfies all four of Rule 23(a)'s requirements, and the action also satisfies Rule 23(b) because Defendants have "act[ed] on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

I. THIS ACTION SATISFIES THE CLASS CERTIFICATION REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23(A).

A. The Proposed Class members are so numerous that joinder is impracticable.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see also Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). "No specified number is needed to maintain a class action" under Rule 23; rather, "application of the rule is to be considered in light of the particular circumstances of the case." *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984). Generally, a class with as few as "25 to 30 members raises a presumption that joinder would be impracticable." *Cuthie v. Fleet Reserve Ass'n*, 743 F. Supp. 2d 486, 498 (D. Md. 2010) (quoting *Dameron v. Sinai Hosp. of Balt., Inc.*, 595 F. Supp. 1404, 1408 (D. Md. 1984)).

The Proposed Class easily satisfies the numerosity requirement. Defendants' own numbers show that the Separate-Billing Rule will affect more than three million consumer enrollees, including more than 156,000 Maryland residents, located in twenty-one states across the country, plus the District of Columbia. *See* 84 Fed. Reg. at 71,706 & 71,696. Even excluding any enrollees who have "opted out" of abortion coverage under the Final Rule, as Plaintiffs'

proposed class definition does, the Proposed Class would still contain millions of individual consumers in various states across the country. For example, during the open enrollment period for 2020, over two and a half million individual consumers purchased individual marketplace plans through the exchanges in just California, New York, Oregon, Maine, Illinois and Washington,[2] all of which require that plans offered on their health insurance marketplaces cover abortion and thus preclude the possibility of issuers maintaining an "opt-out" policy as contemplated by the Separate-Billing Rule. A class this large easily satisfies the numerosity requirement and makes joinder clearly impracticable. Indeed, the Fourth Circuit has approved of certification of classes that are much smaller. *See, e.g.*, *Cent. Wesleyan Coll.*, 6 F.3d at 183 (approving district court's finding "that some 480 potential class members would easily satisfy the numerosity requirement"); *Brady*, 726 F.2d at 145 (a "class as large as 74 persons is well within the range appropriate for class certification"); *Cypress*, 375 F.2d at 653 (affirming certification of class of 18 African-American doctors in civil rights lawsuit against publicly funded hospital); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983) (class of 229 persons "easily enough . . . demonstrate[s] the existence of a class").

While the "extremely large" size of the class alone permits this court "to presume impracticability of joinder," *Hewlett v. Premier Salons Int'l, Inc.,* 185 F.R.D. 211, 215 (D. Md. 1997), Proposed Class members' geographic dispersion across multiple states and the District of Columbia underscores that impracticability here. *See Newberg on Class Actions* (5th ed.) § 3:12 ("geographic dispersion . . . cuts in favor of certification"); *Hewlett*, 185 F.R.D. at 216 (finding that "[the plaintiffs] likely geographic dispersion" where the defendant operated "in all 50 states"

[2] Kaiser Family Found., *Marketplace Enrollment, 2014-2020, Timeframe: 2020*, https://www.kff.org/health-reform/state-indicator/marketplace-enrollment/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

was a factor favoring an inference of numerosity); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 675 (D. Md. 2013) (the fact that class members are dispersed throughout the country further militates against joinder); *Kohl v. Ass'n of Trial Lawyers of Am.*, 183 F.R.D. 475, 484 (D. Md. 1998) (finding joinder to be impracticable where "most members of the putative class live in states other than Maryland").

Furthermore, courts in this Circuit have found joinder of all members of a class to be impracticable when proposed class members would be "unlikely to seek vindication of their rights" outside of a class-action lawsuit, whether because they "likely lack financial resources" or "lack familiarity with the U.S. Court system." *Moodie v. Kiawah Island Inn Co., LLC*, 309 F.R.D. 370, 377 (D.S.C. 2015). Here, there can be little doubt that some class members would lack financial resources to seek vindication of their rights outside the class-action context. Seventy-one percent of consumers who enrolled in marketplace plans in the 38 states that use the HealthCare.gov platform during the 2020 open enrollment period had an income between 100 percent and 250 percent of the federal-poverty level,[3] and many enrollees, including some of the Consumer Plaintiffs, already struggle just to afford their current insurance premiums and other basic necessities each month. *See* Decl. of K. Hambrick in Supp. of Pls.' MSJ, ECF No. 29-3 ¶¶ 11–14; Decl. of M. DiDato in Supp. of Pls.' MSJ, ECF No. 29-5, ¶¶ 11–13; Decl. of T. Hollander in Supp. of Pls.' MSJ, ECF No. 29-6, ¶¶ 8–10. Accordingly, there can be no doubt that the Proposed Class meets the numerosity requirement.

[3] *See* Centers for Medicare & Medicaid Services, *Health Insurance Exchanges 2020 Open Enrollment Report*, Apr. 1, 2020, https://www.cms.gov/files/document/4120-health-insurance-exchanges-2020-open-enrollment-report-final.pdf. Likewise, eighty-seven percent of consumers in 38 states that use the HealthCare.gov platform received financial assistance to pay for their premiums in the 2020 open enrollment period. *Id.*

B. The Proposed Class presents common questions of law and fact.

Federal Rule of Civil Procedure 23(a)(2) requires the existence of "questions of law or fact common to the class." To satisfy this requirement, the common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 458 (D. Md. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). While "the rule speaks in terms of common questions," courts use the commonality requirement to determine "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014) (quoting *Wal-Mart*, 564 U.S. at 350). For purposes of commonality, "[a] single common question will suffice," *id*., and "[f]actual differences among class members will not necessarily preclude certification 'if the class members share the same legal theory.'" *Stanley v. Cent. Garden & Pet Corp.*, 891 F. Supp. 2d 757, 771 (D. Md. 2012) (quoting *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 557 (D. Md. 2006)).

Here, Defendants have issued a Final Rule that applies to ACA individual marketplace plans in states throughout the country, and will, if implemented, cause injury to Proposed Class members by driving up their health insurance premiums, forcing them to expend more time navigating the new requirements for billing and payment transactions, and/or causing them to lose access to abortion care coverage or even access to healthcare coverage entirely. The claims that Consumer Plaintiffs bring on behalf of the Proposed Class turn on common questions of law, including:

- Whether the Separate-Billing Rule is arbitrary and capricious under the APA and thus invalid because, *inter alia*, (1) its justifications are illogical and rest on non-existent

benefits, (2) it will impose massive costs of over $1.26 billion on consumers, issuers, states, and the federal government for no discernible benefit, (3) Defendants ignored significant costs that the Rule will have on the most vulnerable parties affected, and (4) Defendants adopted an arbitrary implementation deadline for the Rule, *see* Pls.' MSJ at 21–32;

- Whether the Separate-Billing Rule is contrary to law and in excess of Defendants' statutory authority under the APA and thus invalid because it contravenes Sections 1554 and 1303 of the ACA, *see* Pls.' MSJ at 32–37;
- Whether the Separate-Billing Rule is unlawful and should be set aside under the APA because Defendants failed to observe the APA's requirement that they provide the public with notice of the rule and an opportunity to comment on it, *see* Pls.' MSJ at 37–38.

Any one of these common issues, standing alone, is enough to satisfy Rule 23(a)(2)'s permissive standard. *Buchanan v. Consol. Stores Corp.*, 217 F.R.D. 178, 187 (D. Md. 2003) (noting that "the commonality requirement is relatively easy to satisfy"). Furthermore, because this case—like APA cases generally—will be resolved on motions for summary judgment and the administrative record before this Court, there is nothing about any individual class member's situation or other characteristics that would have any relevance to the legal questions outlined above, and the resolution of these questions will produce common answers—indeed, identical answers—as to all class members. *See, e.g.*, *Healthy Futures of Tex. v. Dep't of Health & Human Servs.*, 326 F.R.D. 1, 7 (D.D.C. 2018) (commonality satisfied where 23(b)(2) class certification sought in APA action because the Court "would be deciding in one fell stroke whether or not the agency practice that allegedly injured the putative class members was legally permissible"); *Nio*

v. United States Dep't of Homeland Sec., 323 F.R.D. 28, 32 (D.D.C. 2017) (commonality satisfied, even where "factual variations [exist] among class members," because such variations "do not impact overarching questions common to class," including whether the "defendants implement their new policies and practices in accordance with the strictures of the APA"). Thus, the Proposed Class satisfies Rule 23(a)(2).

C. The claims of the Consumer Plaintiffs are typical of the claims of the members of the Proposed Class.

Rule 23(a)(3) requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class members. The typicality requirement tends to merge with the commonality requirement, as "[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). However, while the commonality requirement focuses on the claims of the class as a whole, the typicality requirement is concerned with whether "the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart*, 564 U.S. at 349; *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998).

"The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (citing *Broussard*, 155 F.3d at 340). The test for determining typicality is "whether the claim or defense arises from the same course of conduct leading to the class claims, and whether the same legal theory underlies the claims or defenses." *Robinson v. Fountainhead Title Group Corp.*, 252 F.R.D. 275, 287–88 (D. Md. 2008) (internal quotation omitted). As with commonality, factual differences do not render a claim

atypical, so long as the claims are "based on the same course of conduct and legal theory." *Gresser v. Wells Fargo Bank, N.A.*, No. CIV. CCB-12-987, 2014 WL 1320092, at *2 (D. Md. Mar. 31, 2014) (citing *Minter v. Wells Fargo Bank, N.A.*, 279 F.R.D. 320, 325 (D. Md. 2012)); *see also Hewlett*, 185 F.R.D. at 217 ("A plaintiff's claim may differ factually and still be typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." (internal quotation marks and citation omitted)). Where "[t]he representative party's interest in prosecuting his own case . . . simultaneously tend[s] to advance the interests of the absent class members," the typicality standard is satisfied. *Deiter*, 436 F.3d at 466.

Here, again like in other APA cases, the claims of the Consumer Plaintiffs and Proposed Class members all arise from the same conduct—Defendants' failure to follow the APA's substantive and procedural mandates in promulgating the Separate-Billing Rule—and are based on the same legal theory—that the Separate-Billing Rule violates the APA. *See, e.g.*, *Healthy Futures of Tex.*, 326 F.R.D. at 7 (typicality established where plaintiff's APA claims were "identical to (and thus plainly representative of) the claims of other members of the proposed class"); *Nio*, 323 F.R.D. at 32–33 (factual variations will not defeat typicality where claims concern legality of agency actions under the APA); *Doe v. Wolf*, 424 F. Supp. 3d 1028, 1043 (S.D. Cal. 2020) (typicality established where "[a]ll putative class members' claims—that the [defendants'] policy . . . violates the APA—are the same"). In sum, even though typicality does not require that "the plaintiff's claim and the claims of the class members be perfectly identical or perfectly aligned," *Deiter*, 436 F.3d at 467, they are so here. Moreover, the relief that the Consumer Plaintiffs seek—an order declaring the Separate-Billing Rule unlawful and vacating it

or enjoining its enforcement—is relief that would remedy the Proposed Class members' injuries. Thus, the Proposed Class easily satisfies the typicality requirement.

D. The Consumer Plaintiffs will fairly and adequately protect the interests of the Proposed Class and counsel are qualified to litigate this action.

The fourth threshold requirement for certification is a finding that the named Plaintiffs and their counsel will fairly and adequately protect the interests of the class, without a conflict of interest with the absent class members. *See* Fed. R. Civ. P. 23(a)(4) & (g)(1); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 179–80 (4th Cir. 2010). This requirement has two components: (1) the named plaintiffs' interests must not be opposed to those of other class members; and (2) the class counsel must be qualified, experienced, and able to conduct the litigation. *Cuthie*, 743 F. Supp. 2d at 499. With respect to the first component, a conflict of interest will not defeat the adequacy requirement when "all class members share common objectives, the same factual and legal positions, and the same interest in establishing the liability of defendants." *Ward*, 595 F.3d at 180 (internal citation and alterations omitted). Indeed, only a conflict that is "fundamental" and that "go[es] to the heart of the litigation" provides any basis for denying certification. *Gunnells*, 348 F.3d at 430–31 (citations omitted).

Here, there is no conflict; to the contrary, interests of the Consumer Plaintiffs are fully consistent with the interests of the Proposed Class. Like the Consumer Plaintiffs, members of the Proposed Class: (1) have purchased individual plans on ACA marketplaces that cover abortion care; and (2) have not opted out of that coverage. They will be injured by the Final Rule in one or more ways shared by the Consumer Plaintiffs, *i.e.*, by paying increased insurance premiums, spending unnecessary time navigating the new requirements for separate billing and payment transactions, and potentially losing coverage for abortion and/or health insurance entirely. Their

mutual goal is to obtain a declaration that Defendants' Separate-Billing Rule violates the APA and to have the Final Rule vacated so that they do not sustain these harms.

Plaintiffs' counsel is also more than adequate for the purpose of Rule 23. With respect to the adequacy of counsel, courts consider the work counsel has done to investigate the claims of the proposed class, counsel's experience in handling complex cases, counsel's knowledge of applicable law, and the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The Consumer Plaintiffs in this case are represented by counsel from the ACLU, and the law firm Brown, Goldstein, & Levy, LLP. They have also joined with Planned Parenthood of Maryland, Inc., represented by Planned Parenthood Federation of America ("PPFA"), to bring their claims and pool legal resources to respond to the demands of the litigation. *See* Fed. R. Civ. P. 23(g)(1)(A)(iv), 23(g)(B); *see also Ayzelman v. Statewide Credit Servs. Corp.*, 238 F.R.D. 358, 364 (E.D.N.Y. 2006) (considering experience of proposed class counsel's co-counsel in assessing adequacy of representation). These organizations, and the individual attorneys on this case, have expertise in class actions and impact litigation, as well as considerable experience defending reproductive freedom and challenging federal rules, regulations, and policies in federal court under the APA and the federal Constitution. *See* Decl. of A. D. Freeman in Supp. of Consumer Pls.' Mot. for Class Cert., attached as Ex. A to Consumer Pls.' Mot. for Class Cert.; Decl. of M. M. Burrows in Supp. of Consumer Pls.' Mot. for Class Cert., attached as Ex. B to Consumer Pls.' Mot. for Class Cert. They have also vigorously litigated the above-captioned case since its outset, including by requesting an expedited briefing schedule to ensure this Court has ample time to issue a decision on the merits before the Final Rule's implementation. Thus, there can be no doubt that Plaintiffs' counsel are competent and will adequately represent the class with zeal.

II. THIS ACTION SATISFIES THE REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE 23(B)(2).

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also meet the requirements for class certification under Rule 23(b)(2), which is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015) (quoting Fed. R. Civ. P. 23(b)(2)). A class action may be certified under Rule 23(b)(2) "even if [the defendants' action or inaction] has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class," such that injunctive or declaratory relief would be appropriate with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966); *see also EQT Prod.*, 764 F.3d at 357; *Miller v. Balt. Gas & Elec. Co.*, 202 F.R.D. 195, 198 (D. Md. 2001) (explaining that certification under 23(b)(2) is appropriate "when injunctive or declaratory relief is sought on behalf of a class of similarly situated plaintiffs").

The instant case falls squarely within Rule 23(b)(2)'s requirement. All members of the Proposed Class have been injured by the same conduct—Defendants' unlawful promulgation of the Separate-Billing Rule. As mentioned above, the analysis of the Plaintiffs' APA claims does not turn on any facts specific to the individual members of the Proposed Class; it hinges solely on the substance of the Final Rule and the process by which it was adopted, based on the administrative record before this Court. Further, the final relief sought—a declaration that the Final Rule is unlawful and an order vacating it and enjoining its enforcement—is identical as to all class members. Like other cases brought under the APA, this case presents "precisely the situation that Rule 23(b)(2) envisions." *Healthy Futures of Tex.*, 326 F.R.D. at 9 (certifying class

under 23(b)(2) where plaintiffs challenged agency action as violation of APA, finding that agency action impacted the entire proposed class and the requested relief—an order declaring the agency action unlawful and enjoining its enforcement—would provide the same relief to all class members); *Wolf*, 424 F. Supp. 3d at 1044–45 (class was "particularly suited" for certification under 23(b)(2) in suit alleging that agency violated the APA because class members sought same injunctive and declaratory relief from agency practice applicable to all class members); *Ridgely v. Fed. Emergency Mgmt. Agency*, No. CIV.A. 07-2146, 2007 WL 1728725, at *3 (E.D. La. June 13, 2007) (plaintiffs adequately defined a Rule 23(b)(2) class action for injunctive and declaratory relief in case challenge agency action under, *inter alia*, the APA).

Finally, "Rule 23(b)(2) exists so that parties and courts . . . can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief." *DL v. Dist. of Columbia*, 860 F.3d 713, 726 (D.C. Cir. 2017). Permitting this case to proceed as a Rule 23(b)(2) class action would promote judicial economy by ensuring that this court can issue relief that would protect all class members, so that individual consumers are not forced to bring separate litigation, and use additional court resources, to litigate the same claims, against the same Defendants, in order to obtain the same relief sought here. Accordingly, certification under Rule 23(b)(2) is appropriate.

CONCLUSION

In sum, because the Proposed Class satisfies all the requirements of Rule 23, Plaintiffs respectfully request that the Court grant this Motion and enter the attached proposed order defining and certifying the Proposed Class as set forth above, so that all class members may benefit from the relief sought.

May 19, 2020

Respectfully submitted,

/s/ Andrew D. Freeman
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**Admitted pro hac vice*

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

Declaration of Andrew D. Freeman in
Support of Consumer Plaintiffs' Motion for Class Certification

1. I, Andrew D. Freeman, am over the age of eighteen and am competent to testify.

2. I am one of Plaintiffs' counsel in this case, and I submit this affidavit in support of Plaintiffs' Motion for Class Certification.

3. I am a partner in the law firm of Brown, Goldstein & Levy, LLP.

4. Brown, Goldstein & Levy is one of Maryland's leading litigation and civil rights firms. We have been recognized as Pro Bono Firm of the Year by the Maryland State Bar Association and have received an outstanding achievement award from the Washington Lawyers' Committee for Civil Rights. Attorneys at Brown, Goldstein & Levy have successfully litigated numerous class action and collective action cases.

5. I am a 1986 graduate of Stanford Law School and a 1981 graduate of Harvard College. Following law school, I was a law clerk to Judge Norman P. Ramsey of this Court. I have been a partner at Brown, Goldstein & Levy since January 1994, and was previously an associate with the firm starting in November 1987. I have been a member of the Maryland Bar

since 1986. I am also a member of the bar of, and have argued before, the Court of Federal Claims and several United States Circuit Courts, including the Fourth Circuit. I am a Fellow of the American College of Trial Lawyers. My litigation and advocacy efforts have been honored by the Lawyers' Committee for Civil Rights Under Law, the Equal Justice Council of the Maryland Legal Aid Bureau, the Maryland Food Committee, and the Coalition to End Childhood Lead Poisoning and recognized with an AV rating by the Martindale-Hubbell Law Directory. I received The Daily Record's "Leadership in Law" award in 2006 and was selected as the Maryland Trial Lawyer of the Year for 2000 by the Maryland Trial Lawyers Association. I was also selected as *Best Lawyers* Baltimore Mass Tort Litigation/Class Actions – Plaintiffs "Lawyer of the Year" in 2014 and received the same honor in 2019.

6. I have successfully litigated numerous class actions, collective actions, and other complex cases in federal and state trial and appellate courts. I have been counsel for plaintiffs in such class actions as *Thompson v. U.S. Department of Housing and Urban Development* (D. Md. Civ. MJG-95-309) (class action challenging racial discrimination in Baltimore City's public housing), *Wilkins v. Maryland State Police* (D. Md. No. CCB-93-468) (class action challenging racial profiling by state police), *Anthony v. Durham School Services, L.P.* (D. Md. No. RDB-13-00757) (class action challenging wage and hour violations for school bus drivers), *Kashmiri v. Regents of the University of California* (San Francisco Super. Ct. Case No. CGC-03-422747) (class action on behalf of students challenging university fee increases as breaches of contracts), and *Luquetta v. Regents* (San Francisco Super. Ct. Case No. Case No. CGC-05-443007) (similar), and was appointed by this Court as lead counsel in *McIntyre v. Carter* (D. Md. No. PJM-95-190) (Maryland state prisoners injured by second-hand tobacco smoke; not a class action, but resulted in relief for all state prisoners). The plaintiffs in all of these cases obtained

significant relief, including tens of millions of dollars for the plaintiff classes in the *Kashmiri* and *Luquetta* cases and hundreds of millions of dollars for the class in the *Thompson* case.

7. Monica Basche is an associate at Brown, Goldstein & Levy. She is a 2016 graduate of the University of Maryland Francis King Carey School of Law and a 2006 graduate of the University of Wisconsin-Madison. Ms. Basche joined Brown Goldstein & Levy in September 2019. Prior to joining the firm, she was a law clerk to Judge George L. Russell, III of this Court and to Judge Sally D. Adkins on the Court of Appeals of Maryland. During law school, she was the Executive Articles Editor for the Maryland Law Review. She received the 2016 Elizabeth Maxwell Carroll Chesnut Prize, known as the "Dean's Award," which is given to a member of the graduating class for excellence in legal scholarship and writing.

8. My firm, Ms. Basche, and I have no conflict of interest that would prevent us from vigorously prosecuting this action on behalf of the class.

9. Together with the lawyers of the American Civil Liberties Union, Ms. Basche and I will more than adequately represent the interests of the proposed plaintiff class in this case. We have the necessary skills, experience, and resources and are fully prepared to litigate vigorously the claims of the Named Plaintiffs and the class they seek to represent.

I declare under penalty of perjury that the foregoing is true and correct.

Andrew D. Freeman

Executed on May 18, 2020, in Baltimore, Maryland.

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

DECLARATION OF MEAGAN M. BURROWS IN SUPPORT OF CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Meagan Marlis Burrows, declare as follows:

1. I am a Staff Attorney at the American Civil Liberties Union Foundation ("ACLU") and have been representing Plaintiffs Kirsty Hambrick, Rebecca Barson, Mariel DiDato and Tanja Hollander (the "Consumer Plaintiffs") in the above-captioned matter since February of 2020. I am over the age of eighteen, and have personal knowledge of the matters stated herein and am competent to testify to them.

2. I graduated from Columbia Law School in 2014. I then spent two years working as litigation associate at the law firm of Cravath, Swaine, & Moore LLP, where my practice focused on complex commercial and intellectual property litigation, as well as antitrust regulation and litigation. Since January 2017, I have been employed as a Staff Attorney at the ACLU's Reproductive Freedom Project and have been counsel in cases involving classes, as well as numerous lawsuits challenging restrictions on access to comprehensive reproductive health care in federal courts, including: *Garza v. Hargan*, 304 F. Supp. 3d 145 (D.D.C.

2018), *aff'd in part, vacated in part, remanded sub nom. J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019), a class-action lawsuit challenging the U.S. Office of Refugee Resettlement's ban on abortion for pregnant unaccompanied immigrant minors; *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019), *appeal docketed*, No. 19-2690 (8th Cir. Aug. 9, 2019), a lawsuit challenging numerous Arkansas abortion restrictions, including a ban on abortion starting at 18 weeks, a ban on abortion based on a patient's reason for seeking care, and a medically unnecessary requirement that all abortion providers be board-eligible or board-certified in obstetrics and gynecology; *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019), a lawsuit challenging Alabama's near-blanket ban on abortion and Alabama's restrictions on access to abortion during the COVID-19 pandemic; *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807 (W.D. Ky. 2019), *appeal docketed sub. nom. EMW Women's Surgical Center, et al. v. Friedlander, et al.*, No. 19-5516 (6th Cir. May 15, 2019), a lawsuit challenging Kentucky's ban on the most common method of second-trimester abortion; and *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629 (W.D. Ky. 2017), *rev'd and remanded*, 920 F.3d 421 (6th Cir. 2019), lawsuit challenging a Kentucky display-and-describe ultrasound law.

3. I represent the Consumer Plaintiffs and the Proposed Class with Andrew Beck, a Senior Staff Attorney at the ACLU's Reproductive Freedom Project. Mr. Beck graduated from NYU School of Law in 2007, after which he clerked for the Hon. Julio M. Fuentes on the U.S. Court of Appeals for the Third Circuit and the Hon. Jerome B. Simandle on the U.S. District Court for the District of New Jersey. Mr. Beck has more than ten years' experience representing plaintiffs in federal litigation challenging restrictions on access to comprehensive reproductive health care, including the following cases: *FemHealth v. City of Mt. Juliet* (M.D. Tn.); *Robinson*

v. Marshall (M.D. Ala. and 11th Cir.); *W. Ala. Women's Ctr. v. Williamson* (M.D. Ala. and 11th Cir.); *EMW Women's Surgical Ctr. v. Beshear* (W.D. Ky. and 6th Cir.); *EMW Women's Surgical Ctr. v. Meier* (W.D. Ky. and 6th Cir.); *Reproductive Health Servs. v. Strange* (M.D. Ala. and 11th Cir.); *Bryant v. Woodall* (M.D.N.C. and 4th Cir.); *Planned Parenthood Se. v. Strange* (M.D. Ala.); *Stuart v. Loomis* (M.D.N.C. and 4th Cir.).

4. To pool resources and streamline this litigation, the Consumer Plaintiffs have brought their claims alongside co-plaintiff Planned Parenthood of Maryland, Inc. ("PPM"), which is represented by Julie Murray and Carrie Flaxman at Planned Parenthood Federation of America ("PPFA"). Although PPM and PPFA counsel do not seek to represent the proposed class, my co-counsel and I will be able to draw on their expertise as an additional resource to the class.

5. Julie Murray graduated from Harvard Law School in 2009 and clerked for the Hon. Marsha S. Berzon on the U.S. Court of Appeals for the Ninth Circuit. She completed a fellowship with the National Women's Law Center in 2010-2011 and worked as a staff attorney at Public Citizen Litigation Group from 2011 to 2018, where she represented plaintiffs or intervenors in public-interest cases at all levels of the federal courts, including in the following APA cases in which she served as lead counsel: *National Ass'n of Manufacturers v. U.S. Securities and Exchange Commission* (D.D.C. and D.C. Cir.); *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review* (D.D.C. and D.C. Cir.); *Zacarias Mendoza v. Perez* (D.D.C. and D.C. Cir.); *Public Interest Arbitration Bar Ass'n v. U.S. Securities and Exchange Commission* (D.C. Cir.); *Texas Ass'n of Manufacturers v. Consumer Product Safety Commission* (5th Cir.); *California Ass'n of Private Postsecondary Schools v. DeVos* (D.D.C.); and *Center for Science in the Public Interest v. Food and Drug Administration* (D.D.C.). Ms.

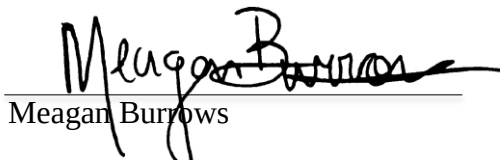
Murray has been a frequent speaker on topics related to the APA and suits against the government. She has also served as class counsel in federal litigation, *Houser v. Pritzker* (S.D.N.Y.), and represented amici in litigation involving the proper application of Rule 23, *see In re Nexium Antitrust Litigation* (1st Cir.). Ms. Murray is now a staff attorney at PPFA, where she litigates cases on behalf of Planned Parenthood affiliates around the country to protect access to reproductive healthcare and sexuality education.

6. Carrie Flaxman graduated from Yale Law School in 1996, where she was the Executive Editor of the Yale Law Journal. After law school she served as a law clerk to Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit, and following that worked at the law firms of Wilmer, Cutler & Pickering in Washington, D.C. from 1997–1999 and Dechert, Price & Rhoads in Philadelphia, Pennsylvania from 1999–2000. She has been an attorney with PPFA from 2000–2004 and from 2012 to the present, most recently since 2016 as Deputy Director of PPFA's Public Policy Litigation and Law department. During her career at PPFA, she has been lead counsel or otherwise involved in numerous cases challenging federal and state actions that impact access to comprehensive reproductive health care services and sexuality education, including in several APA cases. *See, e.g.*, *American Medical Association v. Azar* (D. Oregon and 9th Cir.); *Planned Parenthood of Wisconsin, Inc. v. Azar* (D.D.C. and D.C. Cir.); *Planned Parenthood of Greater Wash. & N. Idaho v. HHS* (E.D. WA and 9th Cir.); *Planned Parenthood of NYC v. HHS* (S.D.N.Y.); *Planned Parenthood of Greater Ohio v. Hodges* (S.D. Ohio and 6th Cir.); *Planned Parenthood Gulf Coast v. Gee* (M.D. La and 5th Cir.); *Planned Parenthood of Wis. v. Schimel* (W.D. Wis and 7th Cir.); *Planned Parenthood Se. v. Bentley* (M.D. Ala.); *Planned Parenthood of Sw. and Cent. Fla. v. Philip* (N.D. Fla.)

7. I believe that I and my co-counsel will fairly and adequately represent the interests of the class proposed to be certified in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York, on May 19, 2020.



Meagan Burrows

Counsel for Consumer Plaintiffs and Proposed Class

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*, *Plaintiffs*, v. ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*, *Defendants*.	Civil Action No. CCB-20-00361

DECLARATION OF KIRSTY HAMBRICK IN SUPPORT OF CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Kirsty Hambrick, declare as follows:

1. I am one of the named Plaintiffs in the above-referenced matter and am familiar with the claims at issue in this case. The facts contained in this declaration are within my personal knowledge, and I could and would testify truthfully to those facts if called to do so under oath.

2. I submit this declaration in support of my request that this Court certify this case as a class action, appoint me and my co-consumer plaintiffs as class representatives, and appoint my counsel from the American Civil Liberties Union Foundation and Brown, Goldstein & Levy, LLP, as class counsel.

3. I have actively participated in this litigation by providing detailed information to my counsel for the Complaint; submitting a declaration in support of Plaintiffs' Motion for Summary Judgment, *see* Decl. of K. Hambrick, ECF No. 29-3; keeping up on developments in the case; and working with my attorneys to advance the lawsuit by moving for class certification.

4. I understand the obligations and responsibilities associated with serving as a class representative in a class action lawsuit. Specifically, I understand that, as a class representative, I have an obligation to assert and protect the interests of other class members and not to act just for my own personal benefit.

5. I am willing to serve as a class representative for similarly situated individuals, namely, all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy.

6. I am committed to actively pursuing this case on behalf of all class members and will do my best to continue to protect the interests of other class members. I am not aware of any conflicts with other class members, nor am I aware of any facts that may give rise to any conflicts.

7. Based on my interactions and relationship with my attorneys, I also believe my attorneys will fairly and adequately represent me and the class.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in MARYLAND, on May 18, 2020.

Kirsty Hambrick

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*, *Plaintiffs*, v. ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*, *Defendants*.	Civil Action No. CCB-20-00361

DECLARATION OF REBECCA BARSON IN SUPPORT OF CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Rebecca Barson, declare as follows:

1. I am one of the named Plaintiffs in the above-referenced matter and am familiar with the claims at issue in this case. The facts contained in this declaration are within my personal knowledge, and I could and would testify truthfully to those facts if called to do so under oath.

2. I submit this declaration in support of my request that this Court certify this case as a class action, appoint me and my co-consumer plaintiffs as class representatives, and appoint my counsel from the American Civil Liberties Union Foundation and Brown, Goldstein & Levy, LLP, as class counsel.

3. I have actively participated in this litigation by providing detailed information to my counsel for the Complaint; submitting a declaration in support of Plaintiffs' Motion for Summary Judgment, *see* Decl. of R. Barson, ECF No. 29-4; keeping up on developments in the case; and working with my attorneys to advance the lawsuit by moving for class certification.

4. I understand the obligations and responsibilities associated with serving as a class representative in a class action lawsuit. Specifically, I understand that, as a class representative, I have an obligation to assert and protect the interests of other class members and not to act just for my own personal benefit.

5. I am willing to serve as a class representative for similarly situated individuals, namely, all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy.

6. I am committed to actively pursuing this case on behalf of all class members and will do my best to continue to protect the interests of other class members. I am not aware of any conflicts with other class members, nor am I aware of any facts that may give rise to any conflicts.

7. Based on my interactions and relationship with my attorneys, I also believe my attorneys will fairly and adequately represent me and the class.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in WASHINGTON, DC, on May 17, 2020.

Rebecca Barson

Rebecca Barson

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

DECLARATION OF MARIEL DIDATO IN SUPPORT OF CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Mariel DiDato, declare as follows:

1. I am one of the named Plaintiffs in the above-referenced matter and am familiar with the claims at issue in this case. The facts contained in this declaration are within my personal knowledge, and I could and would testify truthfully to those facts if called to do so under oath.

2. I submit this declaration in support of my request that this Court certify this case as a class action, appoint me and my co-consumer plaintiffs as class representatives, and appoint my counsel from the American Civil Liberties Union Foundation and Brown, Goldstein & Levy, LLP, as class counsel.

3. I have actively participated in this litigation by providing detailed information to my counsel for the Complaint; submitting a declaration in support of Plaintiffs' Motion for Summary Judgment, *see* Decl. of M. DiDato, ECF No. 29-5; keeping up on developments in the case; and working with my attorneys to advance the lawsuit by moving for class certification.

4. I understand the obligations and responsibilities associated with serving as a class representative in a class action lawsuit. Specifically, I understand that, as a class representative, I have an obligation to assert and protect the interests of other class members and not to act just for my own personal benefit.

5. I am willing to serve as a class representative for similarly situated individuals, namely, all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy.

6. I am committed to actively pursuing this case on behalf of all class members and will do my best to continue to protect the interests of other class members. I am not aware of any conflicts with other class members, nor am I aware of any facts that may give rise to any conflicts.

7. Based on my interactions and relationship with my attorneys, I also believe my attorneys will fairly and adequately represent me and the class.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New Jersey, on May 17, 2020.

Mariel DiDato

EXHIBIT F

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

DECLARATION OF TANJA HOLLANDER IN SUPPORT OF CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, Tanja Hollander, declare as follows:

1. I am one of the named Plaintiffs in the above-referenced matter and am familiar with the claims at issue in this case. The facts contained in this declaration are within my personal knowledge, and I could and would testify truthfully to those facts if called to do so under oath.

2. I submit this declaration in support of my request that this Court certify this case as a class action, appoint me and my co-consumer plaintiffs as class representatives, and appoint my counsel from the American Civil Liberties Union Foundation and Brown, Goldstein & Levy, LLP, as class counsel.

3. I have actively participated in this litigation by providing detailed information to my counsel for the Complaint; submitting a declaration in support of Plaintiffs' Motion for Summary Judgment, *see* Decl. of T. Hollander, ECF No. 29-6; keeping up on developments in the case; and working with my attorneys to advance the lawsuit by moving for class certification.

4. I understand the obligations and responsibilities associated with serving as a class representative in a class action lawsuit. Specifically, I understand that, as a class representative, I have an obligation to assert and protect the interests of other class members and not to act just for my own personal benefit.

5. I am willing to serve as a class representative for similarly situated individuals, namely, all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy.

6. I am committed to actively pursuing this case on behalf of all class members and will do my best to continue to protect the interests of other class members. I am not aware of any conflicts with other class members, nor am I aware of any facts that may give rise to any conflicts.

7. Based on my interactions and relationship with my attorneys, I also believe my attorneys will fairly and adequately represent me and the class.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Auburn, ME, on May 19, 2020.

Tanja Hollander

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

[PROPOSED] ORDER GRANTING CLASS CERTIFICATION

Upon consideration of Consumer Plaintiffs' Motion for Class Certification, dated May 19, 2020, the memoranda of law and exhibits submitted in support and in opposition thereto, and the entire record herein, the Court finds and concludes, for the specific reasons required under Federal Rule of Civil Procedure 23(a), that Consumer Plaintiffs have shown (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class, and Plaintiffs' counsel will adequately represent the class.

The Court further finds that the class is maintainable under Rule 23(b)(2) because Consumer Plaintiffs' claims turn on questions that uniformly apply to all class members, so that final injunctive and declaratory relief is appropriate for the class as a whole. **Accordingly,** it is hereby:

ORDERED that Consumer Plaintiffs' Motion for Class Certification is **GRANTED**; it is further

ORDERED that Plaintiffs Kirsty Hambrick, Rebecca Barson, Mariel DiDato and Tanja Hollander are certified as the representatives of a class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is defined as all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's opt-out policy; it is further

ORDERED that the Court appoints Plaintiffs' counsel from the American Civil Liberties Union Foundation and Brown, Goldstein & Levy, LLP as class counsel.

Date: _____

_____
United States District Court Judge
Catherine C. Blake