IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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.

No. 1:20-cv-361-CCB

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Section 1303(b)(2)(B) of the Affordable Care Act ("ACA") requires issuers of qualified health plans ("QHPs") to "collect . . . a separate payment" from enrollees for the portion of their premium attributable to the provision of coverage for certain abortion services (commonly referred to as "non-Hyde abortion services"), if the issuer chooses to offer such coverage in its plans. The U.S. Department of Health & Human Services ("HHS") promulgated the regulation at issue in this case to better align issuer billing with that statutory mandate, by requiring issuers to bill enrollees separately for the coverage of non-Hyde abortion services and for coverage of all other services, and to instruct enrollees to pay the separate bill in a separate transaction. *See, e.g.*, 84 Fed. Reg. 71,674, 71,683-84 (Dec. 27, 2019) ("Rule"). When publishing the Rule, HHS also announced an enforcement posture under which it would not take enforcement action against any issuer that modifies the benefits of a plan to effectively allow enrollees to opt-out of coverage of non-Hyde abortion services by not making the separate payment for that portion of the premium. *Id.* at 71,687.

Plaintiffs, a non-profit corporation that provides reproductive health services and four individuals enrolled in QHPs (the "Consumer Plaintiffs"), challenge the Rule under the Administrative Procedure Act, arguing that it violates several provisions of the ACA and constitutes arbitrary and capricious agency action. After Plaintiffs and Defendants had each filed motions for summary judgment, Plaintiffs moved to amend their complaint to include class action allegations pursuant to Federal Rule of Civil Procedure 23. *See* Pls.' Mot. for Leave to Amend & Suppl. Compl. for Decl. Relief as to Named Pls. and Proposed Class, ECF No. 37. The Consumer Plaintiffs have now moved to certify a class consisting of

> 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.

Consumer Pls.' Mot. for Class Cert., ECF No. 40 at 1 ("Class Cert. Mot.").

Because the Consumer Plaintiffs have not established that the proposed class satisfies the requirements of Rule 23, class certification is not available here, and the motion for class certification should be denied. At a minimum, the proposed class is overbroad and should exclude potential class members who reside in the States of California, Colorado, Maine, Maryland, New York, Oregon, Vermont, and Washington and the District of Columbia, which have brought separate but overlapping challenges to the Rule.

ARGUMENT

I. THE COURT SHOULD RULE ON THE CONSUMER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION BEFORE PROCEEDING TO THE MERITS.

To start, the Consumer Plaintiffs' motion for class certification is procedurally improper. They ask the Court to evaluate the merits and to certify a class only "to the extent this Court is inclined to grant Plaintiffs' Motion for Summary Judgment but determines that Plaintiffs are not entitled to nationwide vacatur of the Separate-Billing Rule." Class Cert. Mot. at 3. However, considering whether class certification is appropriate only after considering the merits puts the cart before the horse and would potentially prejudice Defendants.

As this Court has explained, "[r]uling on dispositive motions prior to class certification may run the risk of encouraging class members to take advantage of a favorable ruling while not having to run the risk of an unfavorable ruling, a practice known as 'one-way intervention.'" *White v. Bank of Am., N.A.*, Civil No. CCB-10-1183, 2012 WL 1067657, at *4 (D. Md. Mar. 27, 2012). "By allowing putative class members to wait while the merits of a claim are decided, these

members are given the ability to watch the proceedings without any risk [that] their individual claims . . . would be precluded by an adverse ruling on the merits." *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997); *see also Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1058 (7th Cir. 2016).

That "abusive practice" is essentially what the Consumer Plaintiffs are proposing here. *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 311 n.5 (D.D.C. 2018). If the Court holds for the Consumer Plaintiffs, then potential class members will be assured of victory as well. But if the Court holds for the government, only the named Consumer Plaintiffs will lose their claims; the potential class members will be free to seek to litigate in another potentially more favorable forum.

Such "one-way intervention" was a principal target of the 1966 amendments to Rule 23. *Campbell*, 311 F. Supp. 3d at 311 n.5. Before those amendments, "members of the claimed class could in some situations await . . . final judgment on the merits in order to determine whether participation would be favorable to their interests." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). "The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *Id.* The amendments did so by adding a requirement that "the district court . . . determine whether a case may be maintained as a class action '[a]s soon as practicable after the commencement of [the] action.'" *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (D.C. Cir. 2001) (quoting the then-current Fed. R. Civ. P. 23(c)) (brackets in original). Although this requirement was loosened somewhat in 2003, and now requires determination of class status "[a]t an early practicable time," Fed. R. Civ. P.

23(c)(1)(A), the 2003 amendments did "not restore the practice of 'one-way intervention' that was rejected by the 1966 revision of Rule 23." Fed. R. Civ. P. 23 advisory committee's note (2003).

To the contrary, "Rule 23 'still disfavor[s] one-way intervention' and counsels against a court 'rul[ing] on motions that encroach on the merits of a final decision before class certification.'" *Koehler v. USAA Cas. Ins. Co.*, 2019 WL 4447623, at *5 (E.D. Pa. Sept. 17, 2019) (quoting *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 2015 WL 790081, at *2 (D. Kan. Feb. 25, 2015)) (alterations in original). Indeed, many circuits observe a "rule against one-way intervention." *Taha v. County of Bucks*, 862 F.3d 292, 298 (3d Cir. 2017); *Costello*, 810 F.3d at 1057 ("The rule against one-way intervention prevents plaintiffs from moving for class certification after acquiring a favorable ruling on the merits of a claim."); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 432 (6th Cir. 2012) ("The rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action."); *see London v. Wal-Mart Stores, Inc.* 340 F.3d 1246, 1252–53 (11th Cir. 2003).

The "usual order of disposition," which is "often more efficient and fairer to the parties," would have the Court "decide the class question first" and thereby require class members to opt-out or agree to be bound before the Court decides the merits. *Curtin*, 275 F.3d at 92. Defendants respectfully submit that the Court should decide the Consumer Plaintiffs' class certification motion before turning to the merits. And, for the reasons explained below, that motion should be denied.

II. THE CONSUMER PLAINTIFFS HAVE NOT ESTABLISHED THAT THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Therefore, "district courts must conduct a 'rigorous analysis' to ensure compliance with

Rule 23" before certifying a class. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006). "In seeking class certification under Rule 23, the plaintiff has the burden of demonstrating that the requirements for class-wide adjudication have been met." *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 654 (4th Cir. 2019).

To proceed as a class, Consumer Plaintiffs must meet all four requirements set forth in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). The Fourth Circuit has also "repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of the proposed class be 'readily identifiable.'" *EQT Production Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). The class that Consumer Plaintiffs propose here fails to satisfy the threshold requirement of ascertainability, as well as the requirements of typicality and commonality with respect to their challenge to the so-called "opt-out policy."

1. Ascertainability. "A class cannot be certified unless a court can readily identify the class members in reference to objective criteria," which courts commonly refer to as an "ascertainability" requirement. *Id.* That requirement "will not be deemed satisfied unless . . . it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* (quoting 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 2005) (internal quotation marks omitted). The Consumer Plaintiffs do not say how they propose to identify the members of the proposed class, and in particular, they offer no means of identifying the "enrollees who have 'opted out' of abortion coverage in such plans," whom they propose to exclude from the class. Class Cert. Mot. at 1. Identifying those enrollees will, at best, entail substantial administrative difficulties, as explained below. Having failed even to acknowledge

these difficulties, let alone propose an administratively feasible solution to them, Consumer Plaintiffs cannot meet their burden on class certification.

Consumer Plaintiffs have perhaps assumed that the class members can be readily identified based on records maintained by issuers subject to the Rule. Any such assumption is unwarranted and not sufficient for the Consumer Plaintiffs to meet their burden. To satisfy the ascertainability requirement, it is not enough "merely [to] identify a mass of data which could aid the process of identifying class members." *Spotswood v. Hertz Corp.*, Civil Action No. RDB-16-1200, 2019 WL 498822, at *6 (D. Md. Feb. 7, 2019). The "Plaintiff must also provide an efficient method of using this information." *Id.* Thus, the Fourth Circuit vacated and remanded a district court's class certification decision that relied on "local land records" to determine class membership, because "resolving ownership based on land records can be a complicated and individualized process" potentially requiring the resolution of "title defect issues." *EQT*, 764 F.3d at 359.

Similarly, another judge of this Court denied class certification to a proposed class that sought to utilize Wells Fargo customer data because the relevant records did not exist in a searchable format. *Piotrowski v. Wells Fargo Bank, NA*, Civil Action No. DKC 11-3758, 2015 WL 4602591, at *18 (D. Md. July 29, 2015). It is not enough "that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Id.* (quoting *Kahru v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015) (internal quotation marks omitted)).

Yet another judge of this Court has likewise denied class certification to a proposed class based on searching Hertz's "database of rentals involved in accidents . . . to determine which Hertz Gold Members were charged the disputed fees." *Spotswood*, 2019 WL 498822, at *7. That

proposal ignored "the difficulties accompanying a search of Hertz's records for the desired information," which was not administratively feasible. *Id.* at *8. As the court put it, "a plaintiff may not simply point to a defendant's computer records and demand[] that it conjure up a class." *Id.*

The administrative issues presented by the Consumer Plaintiffs' proposal to exclude from the definition of the proposed class enrollees who "opt-out" of non-Hyde abortion coverage are an order of magnitude greater than the difficulties in those cases, and the Consumer Plaintiffs do not even attempt to offer any means for identifying those enrollees. They offer no evidence that any issuer has offered, or that any enrollee has exercised, the opportunity to opt-out of non-Hyde abortion coverage. Nor have the Consumer Plaintiffs offered any basis even to identify which issuers *might* provide an opt-out to enrollees. States, rather than HHS, are the primary enforcers of regulatory requirements for the Exchanges, *see* 42 U.S.C. § 300gg-22(a)(1), and nothing in the Rule requires States to adopt the same enforcement approach as HHS—or even to announce their enforcement postures up front, as HHS has done. *See* 84 Fed. Reg. at 71,686 ("We encourage states and State Exchanges to take an enforcement approach that is consistent with the one we intend to take."). The set of issuers that are or will be in a position to offer an opt-out thus remains unknown. So, too, for the identities of the issuers that might decide to provide that option, and for the identities of enrollees who ultimately decide to opt-out.

Even if the Consumer Plaintiffs *could* identify which issuers might provide opt-outs, there is no reason to believe that this Court will be able to identify those enrollees who exercise that option. Issuers will need to take "appropriate measures" to distinguish between inadvertent failures to pay the portion of the premium accounting for non-Hyde abortion coverage and deliberate opt-outs. *See id.* at 71,687. But HHS has not mandated any particular uniform standard for doing so,

beyond suggesting that issuers might provide "a check box or option button." *Id.* There is thus ample scope for variation among issuers, and among States, in the methods used to identify true opt-outs.

Putting that difficulty aside, many others remain. The records that would be necessary to identify enrollees who have opted out belong not to a single defendant but rather to the nearly one hundred issuers subject to the Rule. Nothing requires those issuers to employ uniform record-keeping standards to record opt-outs, or to ensure that any such records will be readily searchable for the information the Consumer Plaintiffs require or compatible with the record-keeping systems of other issuers. Moreover, none of the issuers whose records will be needed to determine the class are before the Court.

Finally, even if the Consumer Plaintiffs could secure the relevant records in a readily searchable manner, determining that any given enrollee actually affirmatively chose to opt-out, rather than inadvertently missing a payment or checking an opt-out box, would require individualized mini-trials under an unknown number of as-yet-unwritten opt-out policies.

In short, identifying the members of the Consumer Plaintiffs' proposed class will depend on records that do not yet exist, belonging to potentially dozens of separate issuers—none of whom are before the Court—using who knows how many different record-keeping systems, with no uniform approach to the "appropriate measures" for distinguishing between deliberate opt-outs and inadvertent missed payments, and no guarantee that any issuer's records will be readily searchable for the information that the Consumer Plaintiffs require. To put it mildly, Consumer Plaintiffs have not come close to demonstrating an administratively feasible means of identifying the members of their proposed class.

2. Typicality and commonality. As the Supreme Court has explained, both the typicality and commonality requirements of Rule 23(a) "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," and the inquiries under each requirement "tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Whatever label is applied, the problem for the putative class's attempt to challenge the "opt-out policy" is the same as that facing the named Plaintiffs: they can point to no concrete or imminent injury that they face as a result of HHS's enforcement posture. *See Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337, 343 (4th Cir. 2017) ("In a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiff." (internal quotation marks and citation omitted)).

As Defendants explained in their Motion for Summary Judgment, Plaintiffs cannot show that the opt-out policy harms them—or their proposed class—in any way. Defs.' Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. at 11-12, ECF No. 35-1 ("Defs.' Mem."). To establish Article III standing, a plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). Plaintiffs bear the burden of demonstrating standing for each claim and form of relief they seek. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Neither the named Plaintiffs nor any potential members of the putative class can show an "actual or imminent" harm from the opt-out policy, which merely describes an enforcement posture that HHS intends to take with respect to issuers and creates no direct burdens or obligations on any individual enrollee. Nor is any injury that Plaintiffs speculate might arise as a knock-on

effect of the opt-out policy, such as increased premiums, sufficiently concrete or imminent to create standing. The States, not HHS, have primary enforcement authority under the ACA. *See* 42 U.S.C. § 300gg-22(a)(1). It is currently entirely speculative whether any given State will take an enforcement posture consistent with HHS's, and thus whether any issuer will even be permitted to offer the possibility of opting out of non-Hyde abortion coverage. Even if a State chooses to permit issuers to offer opt-outs, it is speculative whether any issuer will decide to do so. To add still more layers of speculation, it is entirely unknowable how many enrollees will take advantage of the possibility of opting out, what the financial impact on any given issuer will be, and to what extent, if any, issuers will pass that financial burden along to enrollees in the form of higher premiums.

The same reasoning defeats the Consumer Plaintiffs' claims of typicality and commonality. Plaintiffs can point to no reason to believe that any of the States in which the named Plaintiffs reside will permit opt-outs, let alone that any of the QHPs in which they are enrolled will do so. They thus cannot demonstrate any common class-wide question over the validity of the opt-out policy, or that the claims of any of the named Plaintiffs are typical of those of the proposed class.

III. PLAINTIFFS' PROPOSED CLASS IS OVERBROAD.

Even if the Court were to conclude that the Consumer Plaintiffs have met their burden to satisfy the requirements of Rule 23, the Court should nevertheless limit the proposed class by excluding potential class members who reside in the States of California, Colorado, Maine, Maryland, New York, Oregon, Vermont, and Washington and the District of Columbia. Those States have all separately sought to challenge the Rule on similar grounds as the Plaintiffs in this case. *See* Am. Compl., *California v. Azar*, No. 3:20-cv-00682 (N.D. Cal.), ECF No. 25; Compl., *Washington v. Azar*, 2:20-cv-00047-SAB (E.D. Wash.), ECF No. 1. If the States prevail, members of the proposed class residing in those States would likely obtain the same or similar relief as the Consumer Plaintiffs seek in this case. Indeed, a court in the Eastern District of Washington has

declared the challenged portions of the Rule invalid within the State of Washington based on State law not applicable here. *See* Order Granting Pl.'s Mot. for Partial Summ. J., *Washington v. Azar*, 2:20-cv-00047-SAB, ECF No. 17 (Apr. 9, 2020), *appeal docketed*, No. 20-35521 (9th Cir. June 10, 2020), and therefore members of the proposed class who live in Washington have *already* obtained relief pending the outcome of Defendants' appeal to the Ninth Circuit. *Cf, e.g.*, *Fisher v. Rite Aid Corp.*, 2010 WL 2332101, at *2 (D. Md. June 8, 2010) (dismissing putative class action in light of related litigation in another district when "the underlying legal and factual issues in the cases are the same")

Thus, under the same principles that should prevent this Court from issuing a nationwide vacatur of the Rule, a nationwide class—or even a class limited to States that permit qualified health plans to include coverage for non-Hyde abortion services—would be overbroad. *See* Defs.' Mem. at 40-41. If the Court were to certify the Consumer Plaintiffs' proposed class, and if the Court were to conclude Plaintiffs should prevail on the merits, a government victory in the Northern District of California or the Ninth Circuit would be largely meaningless as a practical matter.

CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to deny the Consumer Plaintiffs' motion for class certification.

Dated: June 19, 2020

Respectfully submitted,

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