UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; and CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, *Plaintiffs*,	§	
	§	**CIVIL ACTION NO. 5:22-CV-00185**
v.	§	
XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services**; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS); KAREN L. TRITZ,** in her official capacity as Director of the Survey and Operations Group for CMS**; DAVID R. WRIGHT,** in his official capacity as Director of the Quality Safety and Oversight Group for CMS**,** *Defendants.*	§	

JOINT STATUS REPORT

In accordance with this Court's Order [Dkt. #24], the Parties submit this Joint Status Report regarding a proposed briefing schedule and hearing on Plaintiffs' Motion for Preliminary Injunction.

The Parties have conferred but are unable to agree to a briefing schedule and hearing date.

Plaintiffs' Position

Plaintiffs originally proposed that Defendants' Response would be due Thursday, August

11, 2022 and Plaintiffs' Reply would be due Tuesday, August 16, 2022 in advance of a hearing on Thursday, August 18, 2022.

Defendants objected to this proposal and would like a briefing schedule close to the 3-week response period the Local Rules would provide. Plaintiffs offered to move Defendants' response deadline to Friday, August 12, 2022—one week after counsel for Defendants appeared—but Defendants are not amenable to that proposed schedule.

Plaintiffs would like the opportunity for a hearing on their Motion for Preliminary Injunction. Texas faces an imminent, irreparable, sovereign injury from the Abortion Mandate, which purports to preempt any State law that differs from its requirements. Courts have made clear that preventing the State from enforcing its laws is itself an irreparable harm. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). AAPLOG and CMDA's members are similarly facing imminent and irreparable harm in the form of crippling fines from HHS and exclusion from Medicare, Medicaid, and CHIP on the one hand, or the need to violate State law and their religious and moral beliefs on the other. Because the Abortion Mandate is currently in effect, Plaintiffs respectfully request an expedited briefing schedule in advance of a hearing on Thursday, August 18, 2022. Plaintiffs believe the Parties can proceed on declarations in lieu of live witness testimony.

Defendants' Position

The Local Rules provide a defendant with twenty-one days to file a brief in response to a motion for a preliminary injunction. N.D. Tex. L.R. 7.1(e). Plaintiffs offer no sound reason to depart from that default timeline, particularly given their own delay in seeking preliminary relief, and doing so would substantially prejudice Defendants.

Plaintiffs challenge a July 11, 2022, guidance document issued by the Centers for Medicare

& Medicaid Service (CMS) that "reminds hospitals" that participate in Medicare "of their existing obligation to comply with EMTALA [the Emergency Medical Treatment and Labor Act]." ECF No. 23-1 at 3. The guidance notes that a provider that fails to meet its EMTALA obligations may be subject to administrative enforcement action, including civil monetary penalties. *Id.* at 7–8. And it explains that, to "file an EMTALA complaint," a patient should "contact the appropriate state survey agency." *Id.* at 8. By statute, "[i]n considering allegations of violations" of EMTALA, CMS "shall request" that the "appropriate quality improvement organization" assess the facts and provide a report on its findings. 42 U.S.C. § 1395dd(d)(3). And if a penalty were ultimately found appropriate, it would be subject to administrative and judicial review. *Id.* at § 1395dd(d)(1) (incorporating provisions of 42 U.S.C. § 1320a-7a). Here, Plaintiffs do not even allege that an EMTALA complaint has been filed against them, much less that any sort of administrative enforcement process has begun. Indeed, they waited nearly three weeks after their Complaint was filed to move for preliminary relief. That delay alone "demonstrat[es] that there is no apparent urgency to the request for injunctive relief." *Gonannies, Inc. v. GoAuPair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006) (quoting *Wireless Agents, L.L.C. v. T-Mobile USA, Inc.*, 2006 WL 1540587, *3 (N.D. Tex. June 6, 2006) (internal citations and punctuation omitted)).

Moreover, Plaintiffs' proposed date for Defendants' opposition—just five business days after undersigned counsel appeared, and three days after submission of this report—would substantially prejudice Defendants. Plaintiffs' motion relies on eight separate legal claims, grounded in a variety of constitutional, statutory, and administrative law doctrines, that will take significant time and effort to address, and considered briefing on those issues would be to the Court's benefit. In addition, Plaintiffs apparently devoted the nearly three weeks preceding the

filing of their motion to developing no fewer than seven supporting declarations. *See* ECF 23-1. These declarations purport to raise a host of factual issues relating to medical practice, reproductive healthcare, religious exercise, state health care plans and insurance reimbursements, and more. It is unreasonable to expect Defendants to attempt to address these factual allegations—including, as necessary, with any declarations of their own—on the extraordinarily condensed timetable that Plaintiffs propose.

For these reasons, Defendants respectfully submit that Plaintiffs have failed to show good cause to depart from the default schedule set forth in the local rules, and that the appropriate due date for Defendants' opposition to Plaintiffs' motion would be Friday, August 26, 2022—three weeks from their August 5 appearance in the case and acceptance of service of Plaintiffs' motion (which was not actually served until August 8, *see* ECF Nos. 28–29). If Plaintiffs wish to accelerate their filing of any reply brief, Defendants would have no objection. Defendants are amenable to a hearing on Plaintiffs' motion at the Court's convenience, and agree to Plaintiffs' proposal to forego live testimony provided that Plaintiffs agree not to file additional declarations with any reply brief; otherwise, Defendants reserve the right to call witnesses (and/or cross-examine Plaintiffs' declarants) at the hearing as needed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

CHRISTOPHER D. HILTON
Chief, General Litigation Division
Texas Bar No. 24087727
Christopher.Hilton@oag.texas.gov

/s/ Amy Snow Hilton
AMY SNOW HILTON
Assistant Attorney General
Texas Bar No. 24097834
Amy.Hilton@oag.texas.gov

WILLIAM D. WASSDORF
Assistant Attorney General
Texas Bar No. 24103022
Will.Wassdorf@oag.texas.gov

CHARLES K. ELDRED
Special Counsel for Legal Strategy
Texas Bar No. 00793681
Charles.Eldred@oag.texas.gov

Office of the Attorney General of Texas
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

COUNSEL FOR THE STATE OF TEXAS

/s/ Ryan L. Bangert
RYAN L. BANGERT
TX Bar No. 24045446
rbangert@ADFlegal.org

MATTHEW S. BOWMAN*
DC Bar No. 993261
mbowman@ADFlegal.org

Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
Telephone: (202) 393-8690
Facsimile: (202) 347-3622

COUNSEL FOR AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, AND CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS

**Application for admission forthcoming*

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General
JENNIFER RICKETTS
Director, Federal Programs Branch

ERIC B. BECKENHAUER
Assistant Branch Director

/s/ Alexander N. Ely
ALEXANDER N. ELY
KATE TALMOR
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Washington, DC 20005
Tel: (202) 616-8244; Fax: (202) 616-8470

alexander.n.ely@usdoj.gov
kate.talmor@usdoj.gov

COUNSEL FOR DEFENDANTS