



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

December 7, 2020

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Azar v. Mayor and City Council of Baltimore, No. 20-454

Dear Mr. Harris:

The petition for a writ of certiorari in the above-captioned case was filed on October 7, 2020. The response is currently due, after one extension, on December 9, 2020. On December 5, 2020, respondent sought a further extension of time to and including February 5, 2021 within which to file its response. The Secretary of Health and Human Services and the other petitioners (collectively, HHS) oppose any such further extension.

The district court entered the permanent injunction here on February 14, 2020. Pet. App. 133a-134a. On September 3, 2020, the court of appeals affirmed that injunction. *Id.* at 1a-132a. The government filed its petition for a writ of certiorari well before it was due and early enough to ensure that even if respondent received a 30-day extension of the time for filing its response, the Court would still be able to consider the petition at its January 8, 2021 Conference and, if it grants the petition, hear argument in the case this Term. The government acted with expedition because of the divergent regulatory regimes that the en banc Fourth Circuit's decision has created. The injunction here requires HHS to administer the Title X grant program differently in the State of Maryland than in the rest of the country, given that the en banc Ninth Circuit has upheld the rule as valid, see Pet. 31-32. And by forcing HHS to disburse taxpayer dollars in a manner that it has determined violates Congress's command not to fund "programs where abortion is a method of family planning," 42 U.S.C. 300a-6, the injunction here undermines the government's weighty interest in avoiding the use of federal funds to promote or subsidize abortion. Pet. 32-33. Because the conflicting decisions were issued by en banc courts, only this Court can resolve the conflict, and the government and the public have a strong interest in obtaining such resolution as quickly as possible.

Granting respondent's request for a further extension of time, however, would—absent a departure from this Court's ordinary practices—prevent the Court from even considering the

petition until at least its March 19, 2021 Conference, and would prevent the Court from hearing argument in the case until October Term 2021. No sound basis exists for such delay.

Respondent speculates that HHS may choose in the future to rescind the rule. But this Court recently denied similar extension requests by the respondents in challenges to the public-charge rule, notwithstanding similar speculation. See *Department of Homeland Sec. v. New York*, petition for cert. pending, No. 20-449 (motion denied Nov. 27, 2020); *Wolf v. Cook County*, petition for cert. pending, No. 20-450 (motion denied Nov. 27, 2020). And it recently granted petitions to consider HHS's approval of Medicaid work requirements, notwithstanding the similar possibility of a future policy change. See *Azar v. Gresham*, No. 20-37 (cert. granted Dec. 4, 2020); *Arkansas v. Gresham*, No. 20-38 (cert. granted Dec. 4, 2020).

Even if respondent's speculation about the agency's future actions were to prove true, HHS would need to go through notice-and-comment rulemaking before making any final determination—a process that would itself likely be subject to further litigation. Indeed, after HHS's current rule was enjoined, other plaintiffs brought challenges contending that the rule's predecessor, which required Title X recipients to provide abortion referrals, was unlawful. See, e.g., *Vita Nuova, Inc. v. Azar*, 458 F. Supp. 3d 546 (N.D. Tex. 2020) (dismissing some, but not all, claims under Article III). Thus, even if HHS were to revert to the rule's predecessor, the Judiciary would need to address the scope of the agency's authority in this area. This Court should provide clarity now on the statutory-authority question that has divided the circuits, rather than inviting another round of litigation by granting respondent's request.

Respondent notes that after the en banc Fourth Circuit refused to stay the permanent injunction pending appeal, the government did not seek a stay from this Court. But declining to seek a stay of a statewide injunction pending appeal should not be held against the government when it has sought timely review in this Court of a conflict between two en banc courts of appeals. From the fact that the government did not seek extraordinary relief, it does not follow that the government should be required to accept a further year's delay before its rule can be enforced in Maryland. Such a result would only incentivize parties to seek extraordinary relief in this Court.

Respondent's request for delay would be particularly harmful given that the petitions to review the Ninth Circuit's conflicting decision are currently on pace to be considered at this Court's January 8, 2021 Conference and, if granted, to be argued and decided this Term. See *American Medical Ass'n v. Azar*, petition for cert. pending, No. 20-429 (filed Oct. 1, 2020); *Oregon v. Azar*, petition for cert. pending, No. 20-539 (filed Oct. 5, 2020). The government agrees that both those petitions (as well the one here) should be granted, and it filed its response on December 4, 2020, thereby permitting the Court to consider the case at its January 8 Conference. At a minimum, therefore, if this Court were to grant respondent's request here, it should not allow that to delay consideration of the petitions in the Ninth Circuit case.

Respondent's alternative request—an extension to and including December 17, 2020—should likewise be denied. That request would come at the expense of the government, which would be forced to file a reply either on a highly compressed schedule before the petition is distributed on December 23 or over the holidays and after the petition is distributed. Respondents

have identified no material need for a second extension warranting imposition of such burdens on the government.

Accordingly, the government respectfully requests that the Court grant no further extension of time within which to respond to the government's petition in this case.

Sincerely,

Jeffrey B. Wall
Acting Solicitor General

cc: See Attached Service List

20-0454

ALEX M. AZAR II, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.
MAYOR AND CITY COUNCIL OF BALTIMORE

JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 FIRST STREET, NW
SUITE 600
WASHINGTON, DC 20001
616-450-4235
JBURSCH@ADFLEGAL.ORG

DREW A. HARKER
ARNOLD & PORTER KAYE SCHOLER LLP
601 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20001
202-942-5022
DREW.HARKER@ARNOLDPORTER.COM

DANA PETERSEN MOORE
BALTIMORE CITY LAW DEPARTMENT
OFFICE OF LEGAL AFFAIRS
100 NORTH HOLLIDAY STREET
BALTIMORE, MD 21212
410-396-3659
LAW.DANAPMOORE@BALTIMORECITY.GOV

SUZANNE SANGREE
BALTIMORE CITY LAW DEPARTMENT
OFFICE OF LEGAL AFFAIRS
100 NORTH HOLLIDAY STREET
ROOM 156
BALTIMORE, MD 21212
443-388-2190
SUZANNE.SANGREE2@BALTIMORECITY.GO
V

PRISCILLA JOYCE SMITH
YALE LAW SCHOOL INFORMATION SOCIETY
PROJECT
319 STERLING PLACE
BROOKLYN, NY 11238
718-399-9241
PRISCILLA.SMITH@YALE.EDU

FAREN M. TANG
YALE LAW SCHOOL
127 WALL STREET
NEW HAVEN , CT 06511
203-432-1082
FAREN.TANG@YLSCLINICS.ORG

STEPHANIE TOTI
LAWYERING PROJECT
25 BROADWAY
9TH FLOOR
NEW YORK, NY 10004
516-967-4110
STOTI@LAWYERINGPROJECT.ORG

ANDREW TUTT
ARNOLD & PORTER
601 MASSACHUSETTS AVE., NW
WASHINGTON, DC 20001-3743
202-942-5242
ANDREW.TUTT@ARNOLDPORTER.COM