

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

AMERICAN COLLEGE OF
OBSTETRICIANS AND
GYNECOLOGISTS, *on behalf of its members
and members' patients*,
COUNCIL OF UNIVERSITY CHAIRS OF
OBSTETRICS AND GYNECOLOGY, *on
behalf of its members and members' patients*,
NEW YORK STATE ACADEMY OF
FAMILY PHYSICIANS, *on behalf of its
members and members' patients*,
SISTERSONG WOMEN OF COLOR
REPRODUCTIVE JUSTICE COLLECTIVE,
*on behalf of its members and members'
patients*, and
HONOR MACNAUGHTON, M.D.,

Plaintiffs,

v.

UNITED STATES FOOD AND DRUG
ADMINISTRATION,
STEPHEN M. HAHN, M.D., *in his official
capacity as Commissioner of Food and Drugs,
and his employees, agents and successors in
office*,
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES and
ALEX AZAR, J.D., *in his official capacity as
Secretary, United States Department of
Health and Human Services, and his
employees, agents and successors in office*,

Defendants.

Civil Action No. TDC-20-1320

MEMORANDUM OPINION

On July 13, 2020, this Court granted a Motion for a Preliminary Injunction filed by Plaintiffs and thus enjoined Defendants, including the United States Food and Drug Administration

(“FDA”), the United States Department of Health and Human Services (“HHS”), and Secretary of Health and Human Services Alex Azar (“the Secretary”), from enforcing during the COVID-19 pandemic FDA requirements that mifepristone, an oral medication used as part of a regimen to induce an abortion, must be dispensed in person after the patient has signed a Patient Agreement Form. Prelim. Inj. at 2-3, ECF No. 92. Pending before the Court is Defendants’ Renewed Motion to Stay the Preliminary Injunction and for an Indicative Ruling Dissolving the Preliminary Injunction, which is now fully briefed. Upon inquiry by the Court on October 15, 2020, the parties stated that they do not request a hearing on the Motion, and, in the absence of identified factual disputes, the Court finds that no hearing is necessary. See D. Md. Local R. 105.6. For the reasons set forth below, the Motion will be DENIED.

BACKGROUND

The claims in this case, and the findings of fact and conclusions of law on which the Court based the issuance of the July 13, 2020 preliminary injunction (“the Preliminary Injunction”) are fully described in the Court’s memorandum opinion of that date, which is incorporated herein by reference. See *Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin.*, ___ F. Supp. 3d ___, No. TDC-20-cv-1320, 2020 WL 3960625, at *1-7 (D. Md. July 13, 2020) (“ACOG”). Additional background information and facts specific to the Motion are provided below.

I. Procedural History

On July 13, 2020, the Court issued the Preliminary Injunction enjoining Defendants from enforcing the FDA’s in-person dispensing and signature requirements for mifepristone (“the In-Person Requirements”) until 30 days after the end of the public health emergency (“PHE”), as declared by the Secretary pursuant to 42 U.S.C. § 247d(a), relating to the COVID-19 pandemic. On July 22, 2020, Defendants appealed the Preliminary Injunction to the United States Court of

Appeals for the Fourth Circuit. On July 24, 2020, Defendants filed with this Court a Motion to Stay the Preliminary Injunction pending the appeal, which was denied on July 30, 2020. Defendants then filed a Motion to Stay with the Fourth Circuit, which denied it on August 13, 2020.

On August 26, 2020, Defendants filed with the United States Supreme Court an Application for a Stay of the Preliminary Injunction pending appeal. *Mot. Stay Prelim. Inj., U.S. Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (U.S. Aug. 26, 2020). On October 8, 2020, the Supreme Court issued an order holding Defendants' application "in abeyance to permit the District Court to promptly consider a motion by the Government to dissolve, modify, or stay the injunction, including on the ground that relevant circumstances have changed." *Order, U.S. Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (U.S. Oct. 8, 2020). The Supreme Court further stated that "[t]he District Court should rule within 40 days of receiving the Government's submission." *Id.* On October 30, 2020, Defendants filed their Renewed Motion to Stay the Preliminary Injunction and for an Indicative Ruling Dissolving the Preliminary Injunction ("the Motion"), arguing that changed circumstances render Plaintiffs unlikely to succeed on the merits of their underlying claim, such that a stay or dissolution of the Preliminary Injunction is now warranted.

II. Additional Facts

With the Motion, Defendants have supplemented the record with declarations from state government officials of seven different states describing changes to public health restrictions and guidance in their states during the COVID-19 pandemic. Defendants also cite to publicly available media reports, scientific articles, and government websites and ask the Court to take judicial notice of additional facts "from sources whose accuracy cannot reasonably be questioned," including government websites. *Renewed Mot. Stay ("Mot.")* at 6, ECF No. 141-1 (quoting Fed. R. Evid.

201(b)(2)). Accordingly, and pursuant to the approach agreed to by the parties at the hearing on the original Motion for a Preliminary Injunction, the Court will take judicial notice of updated facts and circumstances from federal and state government websites relating to the state of the COVID-19 pandemic up to the date of the issuance of this opinion. *See* Fed. R. Evid. 201(b)(2); *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (“This court and numerous others routinely take judicial notice of information contained on state and federal government websites.”). In opposing the Motion, Plaintiffs also cite various media, scientific, and government sources and have submitted the declarations of five expert witnesses consisting of two epidemiologists, a physician and public health expert, a reproductive health physician, and an economist. The parties generally do not contest the facts and opinions offered by the other side.

A. The COVID-19 Pandemic

According to the Centers for Disease Control and Prevention (“CDC”), a component of HHS, as of July 2020, the United States had had over three million cases of COVID-19 resulting in over 130,000 deaths, with the number of new cases per day surpassing 44,000 each day in July leading up to the Court’s issuance of the Preliminary Injunction on July 13, 2020. *See ACOG*, 2020 WL 3960625, at *4. As of December 5, 2020, the United States has had approximately 14.5 million total cases of COVID-19 and has sustained more than 280,000 deaths from the coronavirus. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, U.S. Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (last visited Dec. 8, 2020) [hereinafter “CDC, *COVID-19 Data*”] (United States “Cases” and “Deaths” by “Total”). On that date, the nation had 206,992 new cases and had surpassed 100,000 cases for 28 straight days, with cases surpassing 150,000 20 times during that time period. *Id.* (United States “Cases” by “Daily Trends”). In the seven days leading

up to December 5, over 1.3 million new cases were reported, for a seven-day moving average of 188,504 new cases per day. *Id.*

As of November 12, 2020, the daily number of new cases was increasing in 46 states. Reingold Decl. ¶ 8, Opp'n Mot. Ex. 1, ECF No. 142-1. In 49 states and the District of Columbia, the seven-day moving average number of new COVID-19 cases is higher now than when the Preliminary Injunction was issued in July 2020. *See CDC, COVID-19 Data* ("Cases" by "Daily Trends" for each state).

The current data thus shows that infection rates are increasing dramatically as compared to July 2020. According to Dr. Arthur Reingold, Division Head of Epidemiology at the University of California at Berkeley School of Public Health, because the rates of hospitalizations and positive tests are also increasing, the higher cases numbers reflect a true rise in the incidence of COVID-19 nationwide. Reingold Decl. ¶¶ 9-10. Dr. Reingold has concluded that the severity of the pandemic will likely intensify in the coming months, both because the risk of infection will only increase as Americans travel for the holidays and gather indoors during the winter, and because of recent studies that have shown that the coronavirus can become aerosolized and therefore spread more easily. *Id.* ¶¶ 15, 28. Consistent with this opinion, on November 2, 2020, Dr. Deborah Birx, Coordinator of the White House Coronavirus Task Force, issued a report stating that the nation is "entering the most concerning and most deadly phase of this pandemic." *Id.* ¶ 18.

According to Dr. Mary Travis Bassett, Director of the François-Xavier Bagnoud Center for Health and Human Rights at Harvard University, this ongoing resurgence of COVID-19 presents a particularly significant risk to abortion patients because more than half of all abortion patients identify as Black or Hispanic, and at least 75 percent are low-income, while the death rate from COVID-19 is approximately three times higher among Black and Hispanic individuals as

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