



U.S. Department of Justice

United States Attorney
Southern District of New York

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New York, New York 10007

June 22, 2020

By ECF

Honorable Mary Kay Vyskocil
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Family Equality, et al. v. Azar, et al.*, No. 20 Civ. 2403 (MKV)

Dear Judge Vyskocil:

This Office represents the U.S. Department of Health and Human Services (“HHS”) and Alex M. Azar, sued in his official capacity as the Secretary of HHS, in the above-referenced matter. I write to respectfully request a pre-motion conference regarding the Government’s anticipated motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1), or, in the alternative, for a stay pending issuance of an amended 45 C.F.R. § 75.300.

A. Background

In this Administrative Procedure Act (“APA”) action, plaintiffs challenge portions of the November 19, 2019, Notification of Nonenforcement of a Health and Human Services Grants Regulation, 84 Fed. Reg. 63809 (the “Notice”). Among other things, the Notice stated that HHS would not enforce 45 C.F.R. § 75.300(c) and (d) until the provisions had been repromulgated to address concerns about compliance with the requirements of the Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601, *et seq.*¹ Section § 75.300(c) provides that no person may be “denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.” *Id.* Section § 75.300(d) provides that “all recipients must treat as valid the marriages of same-sex couples.” *Id.*

On the same day as the Notice was published, HHS also issued a notice of proposed rulemaking (“NPRM”) to amend § 75.300(c) and (d). *See* 84 Fed. Reg. 63,831. The comment period for the NPRM ended last December, and HHS then considered these comments in drafting a final rule. Pursuant to Executive Order (“EO”) 12,866, on or about May 26, 2020, HHS submitted the rule to the Office of Management and Budget (“OMB”) for review. Absent an extension or return to the agency, OMB’s review period extends only until August 26, 2020.

¹ In particular, HHS was concerned that it had failed to perform a proper RFA analysis or certify that the economic impact on “small entities” would not be “significant.” 84 Fed. Reg. 63,809.

See EO 12,866, § 6(b)(2)(B).²

B. The Court Lacks Subject Matter Jurisdiction Because Plaintiffs Lack Standing

The doctrine of constitutional standing requires that a plaintiff have “a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). At its “irreducible constitutional minimum,” the standing doctrine requires a plaintiff, as the party invoking the Court’s jurisdiction, to establish three elements. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102-03 (1998). “First and foremost,” a plaintiff must allege an “injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical.” *Id.* at 103 (internal quotations omitted). Where plaintiffs lack standing, the district court lacks subject matter jurisdiction and the complaint must be dismissed. See *John v. Whole Foods Market Group, Inc.*, 858 F.3d 732, 735 (2d Cir. 2017).

Here, Plaintiffs fail to allege that they have suffered an injury-in-fact. An organizational plaintiff has standing “where the defendant’s conduct or policy interferes with or burdens [the] organization’s ability to carry out its usual activities” or compels the organization “to act with a consequent drain on its resources.” *Citizens for Responsibility and Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 190 (S.D.N.Y. 2017) (internal quotation marks and alteration omitted) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). However, an organization’s “mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected” so as to confer standing. *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) (internal quotation marks omitted).

Plaintiffs have not adequately alleged that the Notice interferes with or burdens their usual activities. On the contrary, the specific tasks Plaintiffs allege the Notice will cause them to take are the same type of outreach and advocacy activities they ordinarily engage in. Plaintiff Family Equality, for instance, asserts that it ordinarily advances its mission by (1) “conduct[ing] outreach and education,” and (2) “work[ing] on the federal and state levels to ensure that adoption and foster care services do not discriminate[.]” Am. Compl. ¶ 10. As a consequence of the Notice, Family Equality asserts that it is “conducting a widespread and comprehensive education and outreach campaign” with LGBTQ youths and families regarding the Notice. *Id.* ¶ 79. Similarly, Plaintiff True Colors United asserts that it advances its mission, among other things, by offering “training, education, and technical assistance programs to homelessness service providers;” and “work[ing] at the federal, state, and local levels to promote funding, policies, systems, and protections.” *Id.* ¶ 13. In response to the Notice, the organization alleges it is, among other things, reviewing state regulations and programs, and conducting outreach to state governments. *Id.* ¶ 84. Finally, SAGE asserts it runs a technical assistance resource center aimed at improving the support offered to LGBTQ older people and provides direct services to

² The review process may be extended once, by no more than 30 calendar days, upon the written approval of the Director of OMB. See EO 12866, § 6(b)(2)(C). In addition, the OMB has the option of returning some or all of the provisions of the rule to the agency for further consideration. *Id.* § 6(b)(3).

LGBTQ individuals, while also “work[ing] at the federal- and state-levels to ensure that policies, systems, and protections are in place to meet the needs of LGBTQ older people.” *Id.* ¶ 16. In response to the Notice, SAGE alleges that has spent time “designing a proposed new program to research and educate state policymakers on the need for state-level protections,” and that it “will continue to conduct an education and outreach campaign” regarding the impact of the Notice. *Id.* ¶ 91.

Plaintiffs’ allegations that they will shift resources to state-level (as opposed to federal) efforts as a consequence of the Notice, allegations that specific work will be necessary to address the alleged “confusion” caused by the Notice, or allegations that their work is impeded by the loss of a “tool,” i.e. § 75.300(c) and (d), do not adequately allege an injury-in-fact. Plaintiffs must show “harms beyond interference with their ability to advocate on an issue of interest.” *Taylor v. Bernanke*, No. 13-CV-1013, 2013 WL 4811222, at *11 (E.D.N.Y. Sept. 9, 2013); see also *Ctr. for Law & Educ.*, 396 F.3d 1152 at 1161-62 (D.C. Cir. 2005) (organization did not have standing where it was forced to change method of “address[ing] advocacy issues [to] an expensive State-by-State basis”); *Privacy Info. Ctr. v. U.S. Dep’t of Educ.*, 48 F. Supp. 3d 1, 23-24 (D.D.C. 2014) (organization’s “expenditure of funds to promote its legislative agenda through research, education, outreach . . . , and litigation is a normal and critical part of its mission”); *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 542 (S.D.N.Y. 2006) (organization lacked standing where its “entire reason for being is to pursue the sort of advocacy . . . that it has pursued in this case”).

C. In the Alternative, the Action Should be Stayed Pending Regulatory Amendments

District courts “have the power to stay proceedings.” *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 621 (S.D.N.Y. 2012). This power “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). To determine whether a stay is appropriate, courts typically consider:

- (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

Sikhs for Justice, 893 F. Supp. 2d at 621. Here, the relevant factors favor staying this case. HHS has submitted the amended § 75.300(c) and (d) to OMB for review, and OMB’s review period extends only until August 26, 2020. Staying this action until the new rule is promulgated will not prejudice Plaintiffs, and the interests of the defendants, the Court, and the public interest weigh in favor of avoiding wasteful, soon-to-be-outmoded litigation.

For the reasons stated above, I respectfully request a pre-motion conference regarding the Government’s anticipated motion to dismiss, or, in the alternative, motion for a stay. The Government further reserves the right to raise any additional arguments in support of its anticipated motion, including seeking dismissal on the ground that the Notice is unreviewable under the APA as an agency action that is “committed to agency discretion by law,” pursuant to 5 U.S.C. § 701(a)(2).

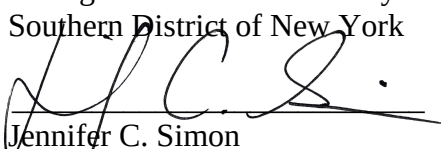
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I thank the Court for its consideration of this request.

Respectfully,

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