
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: MEMBERS, JOINT COMMITTEE ON FINANCE

FROM: Anne Sappenfield, Director

RE: Department of Justice Settlement

DATE: June 17, 2021

This memorandum summarizes the proposed settlement for the case that the Department of Justice (DOJ) submitted to the Joint Committee on Finance (JCF) pursuant to s. 165.08 (1), Stats., in a letter dated June 2, 2021. The case is summarized below. DOJ seeks approval of DOJ's notice of dismissal without prejudice for the case.¹

STATE OF OREGON V. AZAR

State of Oregon, et al., v. Azar, et al. (U.S. Dist. Ct. for the District of Oregon, Case No. 19-cv-00317) is an action brought by 20 states, including Wisconsin, challenging the authority of the U.S. Department of Health and Human Services' (DHHS) to promulgate a rule regarding the Title X family planning program.² According to DOJ,³ the parties have agreed to dismiss the action because DHHS has proposed a new rule. The new rule is substantially similar to the one in effect prior to promulgation of the rule that is challenged in the action.

DOJ is requesting that JCF approve DOJ's notice of dismissal of the action without prejudice.

Please let me know if I can provide any further assistance.

AS:ksm

¹ When a case is dismissed without prejudice, the plaintiff is not precluded from bringing another suit based on the same grounds.

² Title X provides funding for family planning services, with a priority given to low-income families. The provisions of the rule challenged in *State of Oregon v. Azar* relate to referrals for abortion services.

³ See letter from Charlotte Gibson, Administrator, and Corey F. Finkelmeyer, Deputy Administrator, Division of Legal Services, DOJ, to JCF, dated June 2, 2021.

CORRESPONDENCE/MEMORANDUM

DEPARTMENT OF JUSTICE

Date: June 2, 2021

To: Legislative Committee on Joint Finance

From: Charlotte Gibson
Administrator, Division of Legal Services,
DOJ

Corey F. Finkelmeyer
Deputy Administrator, Division of Legal
Services, DOJ

Subject: Request for approval of dismissal under Wis. Stat. § 165.08(1)

This memorandum seeks your Committee's review of a notice of dismissal without prejudice.

For purposes of this memo, we take no position as to whether the notice would constitute a "discontinu[ance]" under § 165.08. But in the interest of avoiding uncertainty over the legal effect of the notice, we are also seeking the Committee's approval to file it.

This matter is time sensitive because the plaintiff States seek to dismiss without prejudice before June 28, the deadline to file a joint status report and the event triggering the U.S. Department of Justice's deadline to file an answer with the court.

State of Oregon, et al., v. Azar, et al. (U.S. Dist. Ct. for the District of Oregon, Case No. 19-cv-00317)

This case was brought by twenty States, including Wisconsin, and the District of Columbia against the U.S. Department of Health and Human Service (HHS), its Secretary, the Office of Population Affairs, and its Deputy Assistant Secretary regarding HHS's 2019 final rule ("Final Rule") that altered the family planning program established by Title X of the Public Health Services Act, 42 U.S.C. § 300 *et seq.*

The complaint's claims challenged the Final Rule as violating (1) the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), requiring the court to "hold unlawful and set aside agency action" that it finds to be "not in accordance with law," and specifically, that the Final Rule was not in accordance with the Consolidated Appropriations Act of 2018; (2) the APA, 5 U.S.C. §§ 706(2)(A) and (C), because the Final Rule was "not in accordance with" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" as set forth by the Affordable Care Act, 42 U.S.C. § 18114; (3) the APA, 5 U.S.C. § 706(2)(A), requiring the court to "hold unlawful and set aside agency action, findings and conclusions" that it finds to be arbitrary, capricious, or an abuse of discretion"; (4) the APA, 5 U.S.C. §

706(2)(B), requiring courts to “hold unlawful and set aside agency action” that is “contrary to constitutional right, power, privilege, or immunity,” and specifically that the Final Rule was unconstitutionally vague; (5) the APA, 5 U.S.C. § 706(2)(D), requiring that courts “hold unlawful and set aside agency action” that is “without observance of procedure required by law”; and (6) the U.S. Constitution because it induced States to violate the First Amendment in order to secure Title X funding.

This case has an extensive procedural history. The plaintiff States filed a motion for a preliminary injunction seeking to enjoin implementation of portions of the Final Rule. The district court granted that motion on April 29, 2019, but that decision was appealed to the U.S. Court of Appeals for the Ninth Circuit, and a stay of the district court’s preliminary injunction was granted. The Ninth Circuit ultimately reversed the district court and vacated the injunction on February 24, 2020. It found that in light of the U.S. Supreme Court’s approval of similar 1988 regulations and the broad deference that must be afforded to agencies’ interpretations of the statutes they are charged with implementing, the plaintiff States’ legal challenges to the Final Rule failed.

The plaintiff States filed a petition for writ of certiorari seeking review by the U.S. Supreme Court on October 5, 2020. The petition was granted on February 22, 2021.

In March 2021, HHS determined that it would commence a notice- and-comment rulemaking process proposing to replace the Final Rule with a rule that is substantially similar to the rule that had been in place from 2000 to 2019. That proposed rule was published on April 15, 2021. Given this, the plaintiff States and the U.S. Department of Justice filed a joint stipulation to dismiss the petition.

Before dismissing the petition, the U.S. Supreme Court asked the U.S. Department of Justice whether the federal government intended to continue to enforce the challenged rule and regulations until the completion of notice and comment period. The U.S. Department of Justice responded that HHS would continue enforcing the Final Rule and regulations for as long as they remained operative, and that if further litigation were brought against the Final Rule, it would either oppose that litigation on threshold grounds or seek to hold the litigation in abeyance pending the completion of the notice and comment process. In light of those representations, the Supreme Court dismissed the certiorari petition.

The case has now been remanded back to the district court. In light of the proposed changes to the Final Rule, which are expected to take effect at the end of this year, the plaintiff States have agreed to voluntarily dismiss their claims without prejudice.

Legislative Committee on Joint Finance
June 2, 2021
Page 3

Wisconsin Stat. § 165.10 is not implicated. The plaintiff States did not seek or obtain monetary relief.

This resolution is time sensitive. The plaintiff States seek to file the notice of dismissal before the June 28, 2020, deadline for filing a joint status report and before the stay in the district court is lifted. Those events would trigger the U.S. Department of Justice's answer deadline.

* * * * *

Please let us know when the Committee will be scheduling a hearing to consider this matter.