IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STATE OF MARYLAND,	*	
Plaintiff,	*	
v.	*	
UNITED STATES OF AMERICA, *et al.*,	*	Case No.: 1:18-cv-2849-ELH
Defendants.	*	

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PLAINTIFF'S OPPOSITION TO MOTION TO STAY

Defendants have filed a request that this Court stay its January 2 Order for supplemental briefing in this case. To the extent this motion is intended, or would have the effect, of delaying disposition of Maryland's pending motion relating to Matthew Whitaker's designation as Acting Attorney General, Plaintiff opposes it as unnecessary and severely prejudicial. Plaintiff respectfully suggests that the Court either proceed to rule on the Whitaker motion without supplemental briefing or deny the stay request and require the Government to respond to the supplemental briefing order.

Any delay in ruling on the Whitaker motion would be severely prejudicial, little different from denying the motion altogether. As explained in the briefs and at oral argument, the Government is presently engaged in a variety of deliberations—including how to respond to an impending appeal in the Texas litigation and whether to continue to enforce the Affordable Care Act pending that appeal—that will inevitably involve the Attorney General. Absent a ruling from this Court, those functions of the office will be

carried out by a person who, Plaintiff has shown, does not lawfully hold that office. The Federal Government should not be permitted to evade a ruling on the legality of that conduct on account of a budget impasse.

As Defendants effectively acknowledge, the Department of Justice's lack of appropriations does not prevent this Court from ruling on any of the submitted motions. That is why, Defendants say, they did not previously ask for a stay, and it is why, presumably, they ask only for a stay of the Court's order for supplemental briefing, not a stay of the case in general.

But Defendants do ask for a delay in supplemental briefing, which could presumably have the same effect as a general stay of the case. Such a stay is unnecessary, however. It is unclear from Defendants' motion whether the shutdown actually prevents Defendants' lawyers from responding to the Court's invitation to file a supplemental brief. *See* Mot., ECF 46 ¶ 3 (stating that Department of Justice attorneys are permitted to continue working in "very limited circumstances," but listing only one). However, the Court could remove any doubt by ordering Defendants to file the supplemental brief in light of the exigency arising from the need to resolve the Whitaker motion. *See* U.S. Dep't of Justice, *FY 2019 Contingency Plan* 3 (Sept. 11, 2018), https://www.justice.gov/jmd/page/file/1015676/download (requiring Department of Justice to file stay requests but stating that "[i]f a court denies such a request and orders a case to continue, the Government will comply with the court's order, which would constitute express legal authorization for the activity to continue").

Alternatively, the Court could proceed to decide the pending motions without supplemental briefing. Maryland has explained why its standing to seek relief regarding Mr. Whitaker is not dependent on the Court finding that Plaintiff has standing in its underlying suit. *See* Pl.'s Suppl. Br., ECF 40 at 9-12. In particular, the Court may resolve the legitimacy of Mr. Whitaker's designation through an exercise of its inherent supervisory authority to control the litigation before it and to ensure substitution of the proper official upon the resignation of former Attorney General Sessions. *See* Pl.'s PI Reply Br., ECF 31 at 3-4. The Court's power to manage a case pending before it, and to ensure proper substitution, does not depend on the Plaintiff's standing to bring the underlying action. *Id*. And for that reason, the stay in the Texas litigation has no bearing on the Court's authority to resolve the lawfulness of Mr. Whitaker's designation.

In addition, even if Maryland were required to establish standing in the underlying litigation in order to seek its preliminary injunction, it is only necessary at this stage for the Court to find that Plaintiff is *likely* to succeed in establishing standing; it need not conclusively resolve the question at this point. *See, e.g.*, *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 255-56 nn.3-4 (6th Cir. 2018); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015); *Ams. for Safe Access v. DEA*, 706 F.3d 438, 443 (D.C. Cir. 2013); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). The Texas stay, even if potentially relevant to the Court's final standing determination, does not materially affect Maryland's ability to meet the preliminary injunction standard. As briefed and discussed at oral argument, the Complaint plausibly alleges that the State is suffering a *present* injury-in-fact by virtue of the uncertainty created by Defendants'

conduct and statements, which indicate a willingness to comply with any eventual court order declaring the ACA unenforceable in whole or in part, and even to cease enforcing the Act at some point this year regardless of any court order. *See* Pl.'s Opp. to MTD, ECF 27 at 10, 15-16; Pl.'s Suppl. Br. 8-9; *see also* Pl.'s Opp. to MTD 5-12 (explaining why the allegation of impending non-enforcement is plausible and the various injuries that would arise if Defendants stop enforcing the statute in whole or part). The Texas stay does not eliminate that harmful uncertainty.

Accordingly, the Court could proceed to resolve all pending motions without the need for supplemental briefs on the effect of the Texas stay. But, at the very least, it should promptly rule on the motion seeking relief regarding Mr. Whitaker's unlawful designation.

Dated: January 3, 2019

Respectfully submitted,

THE STATE OF MARYLAND

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