

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COMMONWEALTH OF)
PENNSYLVANIA and)
STATE OF NEW JERSEY,)

Plaintiffs,)

v.)

Civil Action No. 2:17-cv-04540 (WB)

DONALD J. TRUMP, in his official)
capacity as President of the United States;)
ALEX M. AZAR II, in his official)
capacity as Secretary of Health and)
Human Services; UNITED STATES)
DEPARTMENT OF HEALTH AND)
HUMAN SERVICES; STEVEN T.)
MNUCHIN, in his official capacity as)
Secretary of the Treasury; UNITED)
STATES DEPARTMENT OF THE)
TREASURY; RENE ALEXANDER)
ACOSTA, in his official capacity as)
Secretary of Labor; and UNITED STATES)
DEPARTMENT OF LABOR,)

Defendants.)

FEDERAL DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING APPEAL

Federal Defendants respectfully move to stay proceedings in this case pending the resolution of the appeal of the current preliminary injunction, ECF No. 135. In support of this motion, Defendants respectfully refer the Court to the attached Memorandum of Points and Authorities. A proposed order is submitted herewith.

DATED: February 14, 2019

Respectfully submitted,

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Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

MICHELLE R. BENNETT
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/s/ Justin M. Sandberg _____
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CERTIFICATE OF SERVICE

I hereby certify that, on February 14, 2019, a copy of the forgoing document was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

DATED this 14th day of February, 2019.

/s/ Justin M. Sandberg
JUSTIN M. SANDBERG

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Defendants.)

**MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO STAY
PROCEEDINGS PENDING APPEAL**

INTRODUCTION

Federal Defendants request a stay of district court proceedings in this case while the appeal of this Court’s preliminary injunction proceeds. Such a stay will promote efficiency, avoid the needless expenditure of resources, and permit the parties to receive the benefit of the Third Circuit’s (and, potentially, the Supreme Court’s) reasoning. Moreover, a stay will not harm Plaintiffs because this Court’s preliminary injunction shields them from the operation of the final rules. Federal Defendants therefore respectfully request that the Court stay proceedings until the appeal of the Court’s preliminary injunction is resolved—as the Court did before with respect to Federal Defendants’ appeal as to the interim final rules.¹

BACKGROUND

After Federal Defendants issued two interim-final rules (“IFRs”) expanding the scope of exemptions to the Patient Protection and Affordable Care Act’s (“ACA”) requirement that health plans cover all FDA-approved contraceptives (“the contraceptive mandate”), Plaintiffs filed suit in this Court, alleging that the IFRs were inconsistent with a number of statutory and constitutional provisions. The Court entered a preliminary injunction enjoining enforcement of the IFRs. *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017). Federal Defendants appealed that decision and moved to stay proceedings in this Court while the appeal was pending, which this Court granted. Order, Feb. 9, 2018, ECF No. 73.

While their appeal of the preliminary injunction was pending, Federal Defendants promulgated final rules governing exemptions from the contraceptive mandate. At Plaintiffs’ request, the Court lifted the stay to permit Plaintiffs to challenge the final rules. Order, Dec. 14,

¹ Plaintiffs oppose this request; the Intervenor-Defendant does not.

2018, ECF No. 88. On January 14, 2019, the Court issued a nationwide preliminary injunction enjoining enforcement of the final rules. *Pennsylvania v. Trump*, 2019 WL 190324 (E.D. Pa. Jan. 14, 2019). Federal Defendants filed a notice of appeal of the Court’s decision on January 23, 2019. ECF No. 139. Intervenor have also appealed this decision to the Third Circuit. ECF No. 138. *See Pennsylvania v. President of the United States*, Nos. 19-1129, 19-1189 (3d Cir.).

ARGUMENT

This Court possesses the inherent power to stay proceedings in cases before it. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). The exercise of this power is especially important “in cases of extraordinary public moment” where a party “may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” *Clinton v. Jones*, 520 U.S. 681, 707 (1997) (quoting *Landis*, 299 U.S. at 256). In considering whether to grant a motion to stay, district courts are to evaluate: “(1) the length of the requested stay; (2) the hardship that the movant would face if the stay was not granted; (3) the injury that a stay would inflict on the non-movant; and (4) whether granting a stay would streamline the proceedings by simplifying issues and promoting judicial economy.” *Vasvari v. Rite Aid Corp.*, No. 09–2069, 2010 WL 3328210, at *2 (M.D. Pa. Aug. 23, 2010) (citing *Landis*, 299 U.S. at 254–55).

I. The Issues Before This Court Will Be Greatly Simplified by Appellate Review of the Preliminary Injunction.

Here, both Federal Defendants and Intervenor have appealed the preliminary injunction issued in this case. The appeals raise questions as to whether Federal Defendants’ now-enjoined final rules expanding the religious and moral exemptions to the contraceptive mandate are procedurally and substantive sound under the Administrative Procedure Act, as well as Federal Defendants’ statutory authority to issue exemptions to the mandate under the ACA, and whether

such exemptions are permitted or required in order to comply with the Religious Freedom Restoration Act (“RFRA”). The result of those appeals will no doubt have significant, if not dispositive, impact on the resolution of this case on the merits. Conducting further proceedings in the district court while these same issues are under consideration on appeal would, in essence, result in parallel proceedings on the same issues, resulting in an unnecessary expenditure of the Court’s judicial resources. Conversely, a stay would save both this Court’s time and that of all parties involved, thus serving to “conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 124 (D.C. Cir. 1984).

Indeed, for reasons of judicial economy, district courts examining the enforcement of the contraceptive mandate at issue in this case have granted stays of proceedings to permit the parties to appeal preliminary injunction rulings. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), for example, after the district court’s denial of a preliminary injunction to prevent the enforcement of the mandate had been appealed, *see id.* at 2766, the district court granted the parties’ joint motions to stay proceedings pending decisions from the Court of Appeals and, later, the Supreme Court. *See Orders Granting Joint Motions to Stay, Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE (W.D. Okla. Dec. 12, 2012 and Sept. 24, 2013). Other courts entered similar stays. *See, e.g., Dordt College v. Burwell*, No. C 13-4100-MWB, 2014 WL 5454649 (N.D. Iowa Oct. 27, 2014) (staying proceedings in case challenging mandate while defendants pursued appeal of preliminary injunction); *Univ. of Notre Dame v. Burwell*, No. 3:13-cv-01276 (N.D. Ind. Jan. 2, 2014) (staying proceedings in case challenging mandate while plaintiff pursued appeal of denial of preliminary injunction); *Diocese of Cheyenne v. Burwell*, No. 14-cv-21 (D. Wyo. June 2, 2014) (same).

The Third Circuit has previously recognized the value of staying proceedings regarding permanent injunctions while the appeals of preliminary injunctions are resolved. *See Smith v. Aleppo*, No. 05-3060, Order Granting Motion by Appellant for Stay of the District Court’s Order Pending Appeal (3rd Cir. Aug. 10, 2005) (attached as Exhibit A) (“This Court has not decided the appropriate standard for a claim of First Amendment retaliation by a public official against other public officials. . . . As this issue will have important bearing on the final outcome of this case, judicial economy warrants a stay of further proceedings in the District Court regarding a permanent injunction while this Court considers the appeal from the preliminary injunction[.]”). Here, as in *Smith*, novel legal issues are involved on appeal which make a stay particularly appropriate.² Indeed, this Court previously recognized the value of a stay pending appeal when it granted Federal Defendants’ prior request to stay district court proceedings pending Federal Defendants’ appeal of the preliminary injunction against the IFRs.

A stay will also simplify the eventual litigation of Plaintiffs’ constitutional claims, which Plaintiffs chose not to advance in pressing for the preliminary injunction, in the event that Plaintiffs later seek to litigate them. Although nominally distinct, the constitutional claims cannot be separated from the legal questions surrounding RFRA. If RFRA authorized or required Federal Defendants to promulgate the exemptions to the mandate, as Federal Defendants contend, then Plaintiffs’ constitutional claims likely would fail. At the very least, resolution of the RFRA questions raised in the preliminary injunction appeal will affect this

² Although the Third Circuit opined on questions regarding whether RFRA requires exemptions to the contraceptive mandate in *Geneva College v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422 (3rd Cir. 2015), that ruling has since been vacated by the Supreme Court, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), and thus the legal issues at the heart of this case remain uncertain.

Court's later resolution of the constitutional claims. Given their connection to the issues on appeal, the Court should not deny a stay on the basis of these as-yet-unlitigated claims. *See Landis*, 299 U.S. at 256 (explaining that a stay was appropriate even though a different case on appeal would "not settle every question of fact and law," when it appeared that "in all likelihood" a decision in the other case would "settle many [issues] and simplify them all"); *Fairview Hosp. v. Leavitt*, No. 05-1065RWR, 2007 WL 1521233, at *3 n.7 (D.D.C. May 22, 2007) (granting stay pending the resolution of another matter that would likely settle or simplify issues even though resolution of the other matter "would not foreclose the necessity of litigation in [the stayed] case"); *In re Literary Works in Elec. Databases Copyright Litig.*, No. 00 CIV 6049, 2001 WL 204212, at *3 (S.D.N.Y. Mar. 1, 2001) (same).

II. Federal Defendants Are Moving Quickly to Appeal the Preliminary Injunction.

Federal Defendants are making every effort to try to resolve the appeal of the preliminary injunction in an expeditious matter. A notice of appeal was filed only six business days after the Court issued the preliminary injunction. Moreover, the parties have proposed a compressed briefing schedule in the Third Circuit under which briefing will be completed by April 8, 2019. *See* Joint Status Report at 4-5, Nos. 17-3753, 18-1253, 19-1129, 19-1189 (3rd Cir. Jan. 28, 2019) (attached as Ex. B). Federal Defendants and Intervenors have also called the Third Circuit's attention to "the statutory entitlement to expedition in a preliminary-injunction appeal." *See id.* at 5 (citing 28 U.S.C. § 1657(a)). And Federal Defendants and Intervenors have specifically requested that oral argument be scheduled "as soon as practicable following the completion of briefing." *Id.*

III. The Balance of the Equities Weighs in Favor of a Stay.

A stay of these proceedings represents the most efficient way for all parties to obtain finality on the legal questions at the heart of this case, which have been unresolved since Federal Defendants first instituted the contraceptive mandate and promulgated an exemption from it in 2011. By contrast, Plaintiffs can claim no prejudice to their interest due to a stay in this case. Plaintiffs already have a nationwide preliminary injunction preventing the final rules from going into effect. *See, e.g., Boardman v. Pac. Seafood Grp.*, No. 1:15-108-CL, 2015 WL 13744253, at *2 (D. Or. Aug. 6, 2015) (granting stay of proceedings while defendants pursued appeal of preliminary injunction, and finding stay would not harm plaintiffs because of the injunction in place). In addition, a stay would not delay any further factual development because Plaintiffs' claims challenge agency action and thus review must be limited to the administrative record developed during the rulemaking. In any event, Plaintiffs have not indicated an intent to seek discovery on their claims. Plaintiffs' claims, therefore, will not grow stale if the case is stayed while the legal issues central to the viability of the claims are vetted on appeal.

CONCLUSION

For the reasons stated above, Federal Defendants respectfully request that the Court stay proceedings in this case until Federal Defendants' appeal of the order granting a preliminary injunction is finally resolved.

DATED: February 14, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Justin M. Sandberg
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DATED this 14th day of February, 2019.

/s/ Justin M. Sandberg
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Defendants.)

[PROPOSED] ORDER

Upon consideration of Federal Defendants’ motion to stay proceedings in this case, any response thereto, and for good cause shown, it is hereby **ORDERED** that the motion is **GRANTED**.

It is further **ORDERED** that this case is **STAYED** pending further action by this Court.

SO ORDERED.

Date: _____

The Honorable Wendy Beetlestone
United States District Judge