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13 **UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA**

15	STATE OF CALIFORNIA, by and through	)	
16	ATTORNEY GENERAL XAVIER	)	Case No.: 3:19-cv-01184-EMC
17	BECERRA,	)	
18		)	<b>MOTION TO STAY</b>
19	Plaintiff,	)	<b>PROCEEDINGS PENDING</b>
20		)	<b>APPEAL</b>
21	v.	)	
22		)	Date: July 11, 2019
23	ALEX M. AZAR, in his OFFICIAL	)	Time: 1:30 p.m.
24	CAPACITY as SECRETARY of the U.S.	)	Place: Courtroom 5, 17th Floor
25	DEPARTMENT of HEALTH & HUMAN	)	450 Golden Gate Ave., San Francisco,
26	SERVICES; U.S. DEPARTMENT of HEALTH	)	CA
27	& HUMAN SERVICES,	)	Judge: Hon. Edward M. Chen
28		)	
	Defendants.	)	

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on July 11, 2019, at 1:30 p.m., before the Honorable Edward  
3 M. Chen, in Courtroom 5 of the 17th Floor of the San Francisco Courthouse, 450 Golden Gate  
4 Avenue, San Francisco, CA 94102, Defendants, by and through undersigned counsel, will move  
5 the Court to stay further district court proceedings pending final resolution of Defendants' appeal  
6 from this Court's Order granting Plaintiff's motion for preliminary injunction. Defendants  
7 respectfully request that the Court decide this motion on the papers submitted, without oral  
8 argument, pursuant to Civil L.R. 7-1(b).

9 **MOTION TO STAY**

10 Defendants hereby move to stay further district court proceedings pending final resolution  
11 of Defendants' appeal from this Court's Order granting Plaintiff's motion for preliminary  
12 injunction. The reasons for this motion are set forth in the following memorandum of points and  
13 authorities.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **INTRODUCTION**

16 The Court should stay further district court proceedings pending appeal because, as  
17 explained below, a ruling by the Ninth Circuit is likely to provide substantial, if not dispositive,  
18 guidance to this Court and the parties in resolving the central merits issues presented in this case.  
19 Proceeding in the absence of such guidance would be inefficient, waste the resources of the Court  
20 and the parties, and potentially result in inconsistent rulings that may need to be corrected in light  
21 of the Ninth Circuit's decision. Plaintiff will not be harmed by a stay pending appeal while this  
22 Court's preliminary injunction remains in place. And to the extent the preliminary injunction is  
23 lifted, it will be because of the Ninth Circuit's determination that Plaintiff is not entitled to  
24 preliminary relief during the pendency of the appeal. Either way, Plaintiff is not harmed by a stay.  
25 The Court should, therefore, grant Defendants' motion to stay proceedings pending appeal.

26 **PROCEDURAL HISTORY**

27 On March 4, 2019, the Department of Health and Human Services (HHS) published the  
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1 final rule at issue in this litigation. *See* Compliance with Statutory Program Integrity  
2 Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule). That same day, Plaintiff  
3 filed its complaint asserting Administrative Procedure Act (APA) and constitutional challenges to  
4 the Rule. *See* Compl., ECF No. 1. Plaintiff moved for a preliminary injunction on March 21. *See*  
5 ECF No. 26.

6 On April 26, the Court granted the motion in substantial part and ordered that the Final  
7 Rule is “enjoined as to enforcement in the state of California.” Order Granting in Part and Denying  
8 in Part Pls.’ Mots. For Prelim. Inj. at 78, ECF No. 103 (PI Order). On May 6, Defendants filed a  
9 notice of appeal of the PI Order to the Ninth Circuit, ECF No. 108, and moved the Court for a stay  
10 of the preliminary injunction pending appeal, ECF No. 109. The Court denied the motion on May  
11 8, and amended its preliminary injunction to “exclude from its scope sections 59.3 and 59.5(a)(13)  
12 of the Final Rule.” *See* ECF No. 115 at 4. On May 10, Defendants moved the Ninth Circuit for a  
13 stay of the preliminary injunction pending its consideration of Defendants’ appeal. *See* Mot. for  
14 Stay Pending Appeal, *California v. Azar*, No. 19-15974 (9th Cir. May 10, 2019), Dkt. Entry No.  
15 8. Federal district courts in Oregon and Washington have issued nationwide injunctions against  
16 the Rule, and Defendants have appealed both injunctions. *See Oregon v. Azar*, No. 6:19-cv-  
17 00317-MC (D. Or.), ECF Nos. 142 & 149; *Washington v. Azar*, No 1:19-cv-03040-SAB (E.D.  
18 Wash.), ECF Nos. 54 & 57.

19 Defendants now respectfully submit this motion to stay further proceedings in this Court  
20 pending appeal of the PI Order. Unlike Defendants’ motions, denied by this Court and currently  
21 pending before the Ninth Circuit, for a stay of this Court’s preliminary injunction itself, this motion  
22 simply requests that the Court exercise its discretion to stay further district court litigation until  
23 the Ninth Circuit resolves the pending appeal. Because such a stay would not prejudice Plaintiff  
24 in light of the preliminary injunctions currently in place (both from this Court and from the courts  
25 in Oregon and Washington), and would conserve resources of the Court and the parties, the Court  
26 should grant the motion.

## STANDARD OF REVIEW

“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). The Ninth Circuit has described various factors that should be considered when evaluating a motion to stay:

Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

*CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *Ass’n of Irrigated Residents v. Fed Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) (“Although the filing of an interlocutory appeal does not automatically stay proceedings in the district court, the district court has broad discretion to decide whether a stay is appropriate to promote economy of time and effort for itself, for counsel, and for litigants” (citation omitted)). As to the last factor, courts frequently grant stays pending resolution of proceedings that may “bear upon the case,” because a stay is most “efficient for [the Court’s] own docket and the fairest course for the parties.” *Levy v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979).

## ARGUMENT

A stay of district court litigation pending final resolution of Defendants’ appeal of the PI Order is the most prudent course at this juncture, as the Ninth Circuit’s disposition of the appeal is likely to be controlling with respect to the central merits issues presented in this case.

1. In its PI Order, the Court determined that the Final Rule is “contrary to law and arbitrary and capricious,” PI Order at 3, and in particular that the Final Rule likely “violate[s] the Nondirective Counseling Provision of the Appropriations Acts,” *id.* at 35, is “not in accordance with Section 1554 [of the Affordable Care Act],” *id.* at 46, and is arbitrary and capricious on a number of grounds, *see id.* at 46-74. In reviewing this Order, the Ninth Circuit will thus have to evaluate the central merits questions presented in Plaintiff’s complaint. *See Compl.* at 41-43

1 (counts one through three).<sup>1</sup>

2 If the district court proceedings continue while the appeal is ongoing, the parties will have  
3 to address these very issues. Defendants are currently scheduled to respond to the complaint on  
4 June 21, and because Plaintiff brings suit under the APA, this case is likely to be ultimately  
5 resolved on the basis of dispositive motions. *See, e.g., Gill v. Dep't of Justice*, 246 F. Supp. 3d  
6 1264, 1268 (N.D. Cal. 2017). Those filings will necessarily address the same merits questions that  
7 the Ninth Circuit is now considering: whether the Final Rule violates Section 1554 of the  
8 Affordable Care Act or the “Nondirective Counseling Provision,” and whether it is arbitrary and  
9 capricious.

10 Rather than having the parties and the Court waste time and resources briefing and  
11 considering legal issues that are to be determined by the Ninth Circuit, the more prudent and  
12 efficient course is to await final resolution of the appeal before proceeding to any such briefing  
13 and/or consideration, if necessary. *See Washington v. Trump*, 2017 WL 1050354, at \*5 (W.D.  
14 Wash. Mar. 17, 2017) (granting a stay pending appeal and concluding that because “many of the  
15 legal arguments” presented in a motion for preliminary relief were “likely to be before the Ninth  
16 Circuit,” it would “waste judicial resources to decide these issues . . . when guidance from the  
17 Ninth Circuit is likely to be available soon”); *Hawaii v. Trump*, 233 F. Supp. 3d 850, 855 (D. Haw.  
18 2017) (staying district court proceedings pending appellate review of a nationwide injunction to  
19 “facilitate the orderly course of justice”). Doing so would reduce the risk of “inconsistent rulings”  
20 between this Court and the Ninth Circuit that will need to be “disentangle[d].” *Washington*, 2017  
21 WL 1050354, at \*5. A stay, therefore, is most “efficient for [the Court’s] own docket and the  
22 fairest course for the parties.” *Levy*, 593 F.2d at 863.

23 2. In contrast to the wasteful drain on resources that will result if this case proceeds

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24  
25 <sup>1</sup> Plaintiff’s complaint also asserts a constitutional claim that Plaintiff did not present as a basis for  
26 preliminary injunctive relief and which the PI Order did not address. *See* Compl. at 43-44 (count  
27 four). But the appeal need not “settle every question of . . . law” to justify a stay, so long as it will  
28 streamline the Court’s merits review and conserve judicial resources by “settling” some issues  
and “simplify[ing] others.” *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936). There can be no  
dispute that the appeal here, which presents the majority of Plaintiff’s claims, will do so.

1 before Defendants' appeal is resolved, Plaintiff will not suffer any harm from a stay because the  
2 Final Rule is enjoined as to enforcement in California by this Court and nationwide by multiple  
3 other courts. Although Defendants have moved the Ninth Circuit for a stay of these injunctions  
4 pending appeal, any such stay is speculative at this point. And even if a stay is granted, that could  
5 be based only upon a judicial determination that Plaintiff has not satisfied the factors for obtaining  
6 preliminary injunctive relief. *See, e.g., Innovation Law Lab v. McAleenan*, --- F.3d ----, 2019 WL  
7 2005745, at \*1 (9th Cir. May 7, 2019) (same four-factor test governing requests for preliminary  
8 injunction also governs request for stay of injunction pending appeal). Such a determination would  
9 itself demonstrate that Plaintiff would suffer no harm requiring emergency relief during the  
10 pendency of this litigation.

11 Moreover, Defendants have agreed to produce the administrative record in the Washington  
12 action by no later than June 24, *see Washington*, No 1:19-cv-03040-SAB (E.D. Wash.), ECF No.  
13 71 at 2, and will provide Plaintiff here with the administrative record by that date, regardless of  
14 the outcome of this stay motion. Plaintiff will thus have the opportunity to review the voluminous  
15 record and prepare for merits briefing or any other further proceedings that may be necessary once  
16 the appeal is resolved and the stay is lifted.

### 17 CONCLUSION

18 For the foregoing reasons, the Court should grant Defendants' motion to stay district court  
19 proceedings pending final resolution of Defendants' appeal.

20  
21 Dated: May 24, 2019

Respectfully submitted,

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25 JAMES M. BURNHAM  
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 20 **UNITED STATES DISTRICT COURT**  
 21 **NORTHERN DISTRICT OF CALIFORNIA**

22	STATE OF CALIFORNIA, by and through	)	
23	ATTORNEY GENERAL XAVIER	)	Case No.: 3:19-cv-01184-EMC
24	BECERRA,	)	
25		)	<b>[PROPOSED] ORDER ON</b>
26	Plaintiff,	)	<b>DEFENDANTS' MOTION TO</b>
27		)	<b>STAY PROCEEDINGS PENDING</b>
28	v.	)	<b>APPEAL</b>
29		)	
30	ALEX M. AZAR, in his OFFICIAL	)	
31	CAPACITY as SECRETARY of the U.S.	)	
32	DEPARTMENT of HEALTH & HUMAN	)	
33	SERVICES; U.S. DEPARTMENT of HEALTH	)	
34	& HUMAN SERVICES,	)	
35		)	
36	Defendants.	)	

1 The Court, having considered Defendants' Motion to Stay Proceedings Pending Appeal,  
2 hereby orders as follows:

3 IT IS HEREBY ORDERED that Defendants' Motion is GRANTED. The Court STAYS  
4 further proceedings in this case pending final resolution of Defendants' appeal from this Court's  
5 Order granting Plaintiff's motion for preliminary injunction.

6 **IT IS SO ORDERED.**

7  
8 Dated:

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11 \_\_\_\_\_  
12 The Honorable Edward M. Chen  
13 United States District Judge  
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