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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, et al.,

Defendants.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, et al.,

Defendants.

NO. 1:19-cv-3040-SAB

ALL PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' MOTION FOR EXPEDITED HEARING

Without Oral Argument

Defendants ask the Court to expeditiously (by Friday, May 10) entertain a motion to stay its preliminary injunction pending appeal. ECF No. 59. Defendants fail to establish good cause to expedite consideration of their motion to stay, which—despite the heavy burden that must be met to justify lifting a preliminary injunction—essentially amounts to a motion for reconsideration that merely rehashes Defendants' previous arguments. *See* ECF No. 58. While the motion to stay lacks merit, it is nevertheless a weighty request that should be briefed and considered with care. The briefing and this Court's ruling will become part of the record on appeal in this case, and should not be artificially and needlessly rushed. The Court should deny Defendants' motion to expedite as requested. If the Court is inclined to consider the motion to stay on an expedited basis, Plaintiffs submit that it should do so no earlier than May 17, 2019.[1]

* * *

Defendants fail to establish the "good cause" required for expedited consideration for several reasons. First, Defendants fail to show that the Motion to Stay Preliminary Injunction is "time sensitive." LCivR 7(i)(2)(C). The

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[1]Attorneys for both the State of Washington and the NFPRHA Plaintiffs have preexisting conflicts on May 6 and 7 that would hamper their ability to respond to the Motion to Stay by May 9 under Defendants' requested schedule. *See* LCivR 7(i)(2)(C) ("A response memorandum to an expedited motion is due the day before the hearing set for the expedited motion.").

preliminary injunction is currently preserving the longstanding status quo and preventing massive disruption to the Title X program while the legality of the Final Rule is being adjudicated, permitting providers and clinics in the meantime to continue delivering Title X family planning services to patients in need as Congress intended, subject to the same rules and regulations that have been in effect for decades (and that applied when their current grants were awarded). Defendants do not acknowledge this, nor do they offer any concrete reason why the Court should rush to consider disrupting the status quo. Moreover, Defendants' newfound sense of urgency has never been apparent prior to this point. The Trump Administration waited almost 18 months to propose the Final Rule, even though it now argues that that step is legally necessary. Then, more than nine months passed between HHS's publication of a proposed rule on June 1, 2018, and its publication of the Final Rule on March 4, 2019. HHS scheduled the Final Rule to go into effect 60 days after publication, on May 3, 2019. While commenters pointed out that this schedule did not allow sufficient time for public comments, agency review, or implementation, for present purposes the 11-month-long rulemaking schedule conveys no sense of immediacy on HHS's part. Defendants also waited for more than a week after the Court issued the preliminary injunction on April 25, 2019 to simultaneously move for a stay and seek expedited consideration. Their assertion that any further delay justifies a rapidly accelerated briefing schedule rings hollow.

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Second, Defendants fail to justify their request that the motion to stay be considered by May 10, 2019, which appears to be an arbitrary deadline. Their sole justification for the request to expedite in general is their "belief" that a preliminary injunction should not have been issued, which in turn is based on HHS's flawed interpretation of section 1008 of Title X. *See* ECF No. 59 at 3. The Court has already preliminarily found that HHS's interpretation is "likely" to be foreclosed by controlling statutes. *See* ECF No. 54 (Order Granting Motions for Preliminary Injunction) at 15. In addition, Defendants' position that expedited consideration is necessary here is inconsistent with their position in other cases challenging the Final Rule: HHS has not moved to stay the preliminary injunction issued in the matter of *California v. Azar*, even though that court too found that the plaintiffs were likely to succeed on the merits of their claim that HHS's interpretation of section 1008 is not in accordance with law. 2019 WL 1877392, at *14–26 (N.D. Cal. Apr. 26, 2019). If a stay were really so urgent, then presumably HHS would have moved to stay the California injunction as well as this one, particularly since "California's Title X network is the largest in the nation," and plaintiff Essential Access Health is "California's sole Title X grantee." *Id.* at *7. In any event, Defendants' "belief" that their position on the merits is correct does not establish good cause for expedited consideration of their motion to stay. Every party in litigation argues that its position is correct. More is required to justify a departure from the procedural rules, but Defendants have nothing more to offer.

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Third, the gravity of Defendants' request to stay the preliminary injunction (and throw the Title X program into chaos nationwide) merits a considered response that should be briefed on a schedule that is not unnecessarily rushed. Plaintiffs need more than a few days to respond to Defendants' over-length[2] motion to stay, in order to appropriately address the "extraordinary" request for relief therein. *Ruckelhaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) (a stay pending appeal is only available under "extraordinary circumstances"); *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (a stay pending appeal requires a "strong showing" of likely success on the merits and a likelihood of irreparable injury absent a stay, plus consideration of injury to other parties and the public interest). Plaintiffs' ability to respond on a highly expedited basis is already hampered by counsel's preexisting scheduling conflicts and by the need to address the instant, procedurally noncompliant motion to expedite.[3]

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[2] The motion to stay (ECF No. 58) is five pages over the 10-page limit. *See* LCivR 7(f)(2). Plaintiffs request that the Court strike the over-length motion and require Defendants to promptly re-file a motion that complies with the Local Civil Rules. Alternatively, at the very least, the Court should grant the State of Washington and the NFPRHA Plaintiffs leave to file responses of 15 pages each.

[3] A motion to expedite must set a hearing that is "not less than 7 days after the motion's filing." LCivR 7(i)(2)(C). Here, Defendants filed their motion to

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* * *

In sum, Defendants fail to demonstrate good cause to expedite consideration of their motion to stay the preliminary injunction pending appeal. The Court should deny their motion to expedite as requested. If the Court is inclined to consider the motion to stay on an expedited basis, Plaintiffs request that it do so no earlier than May 17, 2019.

DATED this 6th day of May, 2019.

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stay on Friday, May 3 (ECF No. 58), but did not file their motion to expedite (ECF No. 59) or the declaration in support of the motion to stay (ECF No. 60) until Saturday, May 4—less than 7 days before the requested hearing date of May 10.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 6th day of May, 2019, at Seattle, Washington.

/s/ Jeffrey T. Sprung
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