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JOSEPH H. HUNT
Assistant Attorney General
JOSEPH H. HARRINGTON
United States Attorney
MICHELLE R. BENNETT
Assistant Branch Director
R. CHARLIE MERRITT
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
919 East Main Street, Suite 1900
Richmond, VA 23219
Tel.: (202) 616-8098
Fax: (804) 819-7417
robert.c.merritt@usdoj.gov

Counsel for Defendants

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA**

STATE OF WASHINGTON,

Plaintiff,

v.

ALEX M. AZAR II, in his official
capacity as Secretary of the United
States Department of Health and
Human Services; and UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

Nos. 1:19-cv-3040-SAB; 1:19-cv-
3045-SAB

**MOTION TO STAY
PROCEEDINGS PENDING
APPEAL**

June 24, 2019
Without Oral Argument

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NATIONAL FAMILY PLANNING &
REPRODUCTIVE HEALTH
ASSOCIATION, FEMINIST
WOMEN’S HEALTH CENTER,
DEBORAH OYER, M.D., and
TERESA GALL, F.N.P.,

Plaintiffs,

v.

ALEX M. AZAR II, in his official
capacity as United States Secretary of
Health and Human Services, UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIANE FOLEY, M.D., in her official
capacity as Deputy Assistant Secretary
for Population Affairs, and OFFICE
OF POPULATION AFFAIRS,

Defendants.

Defendants respectfully move this Court to stay further proceedings in these consolidated cases pending final resolution of Defendants’ appeal from this Court’s Order granting Plaintiffs’ motions for preliminary injunction.

As explained below, the Ninth Circuit’s ruling is likely to provide substantial, if not dispositive, guidance to this Court and the parties in resolving

1 the central merits issues presented in this case. Proceeding in the absence of such
2 guidance would be inefficient, waste the resources of the Court and the parties,
3 and potentially result in inconsistent rulings that may need to be corrected in light
4 of the Ninth Circuit's decision. Plaintiffs will not be harmed by a stay pending
5 appeal while this Court's preliminary injunction remains in place. And to the
6 extent the preliminary injunction is lifted, it will be because of the Ninth Circuit's
7 determination that Plaintiffs are not entitled to preliminary relief during the
8 pendency of the appeal. Either way, Plaintiffs are not harmed by a stay. The
9 Court should, therefore, grant Defendants' motion to stay proceedings pending
10 appeal.

11 **PROCEDURAL HISTORY**

12 On March 4, 2019, the Department of Health and Human Services (HHS)
13 published the final rule at issue in this litigation. *See* Compliance with Statutory
14 Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or
15 Rule). One day later, the State of Washington filed its complaint asserting
16 Administrative Procedure Act (APA) and constitutional challenges to the Rule.
17 *See* Compl., ECF No. 1 (Wash. Compl.). The National Family Planning &
18 Reproductive Health Association Plaintiffs (NFPRHA) filed two days after that,
19 on March 7, asserting substantially similar claims. *See NFPRHA v. Azar*, No.
20 1:19-cv-03045-SAB, Compl., ECF No. 1 (NFPRHA Compl.). The Court
21 consolidated the two cases on March 18. *See* Order, ECF No. 8. Plaintiffs in both
22 cases moved for preliminary injunctions on March 22. *See* ECF Nos. 9 & 18.

1 The Court granted the motions and enjoined Defendants from
2 “implementing or enforcing the [Rule] in any manner or in any respect.” Order
3 Granting Pls.’ Mots. For Prelim. Injunction at 18-19, ECF No. 54 (PI Order). On
4 May 3, 2019, Defendants filed a notice of appeal of the PI Order to the Ninth
5 Circuit, ECF No. 61, and moved the Court for a stay of the preliminary injunction
6 pending appeal, ECF No. 58. Defendants also moved for expedited consideration,
7 requesting that the Court rule on its stay motion on or before May 10, 2019. ECF
8 No. 59. The Court denied the motion to expedite the next day and set a hearing
9 on the motion to stay the preliminary injunction pending appeal for May 23, 2019.
10 *See* ECF No. 66. On May 13, Defendants moved the Ninth Circuit for a stay of
11 the preliminary injunction pending its consideration of Defendants’ appeal. *See*
12 *Mot. for Stay Pending Appeal, Washington v. Azar*, No. 19-35394 (9th Cir. May
13 13, 2019), Dkt. Entry No. 9. A federal district court in Oregon has also issued a
14 nationwide injunction against the Rule, and Defendants have appealed that
15 injunction. *See Oregon v. Azar*, No. 6:19-cv-00317-MC (D. Or.), ECF Nos. 142
16 and 149. Another federal district court in California has enjoined enforcement
17 of the Rule in California, and Defendants have appealed that injunction. *See*
18 *California v. Azar*, No. 3:19-cv-01184 (N.D. Cal.), ECF Nos. 103 and 108.

19 Defendants now respectfully submit this motion to stay further proceedings
20 in this Court pending appeal of the PI Order. Unlike Defendants’ motions,
21 currently pending before this Court and the Ninth Circuit, for a stay of this Court’s
22 preliminary injunction itself, this motion simply requests that the Court exercise

1 its discretion to stay further district court litigation until the Ninth Circuit resolves
2 the pending appeal. Because such a stay would not prejudice Plaintiffs in light of
3 the nationwide preliminary injunctions currently in place (both from this Court
4 and the court in Oregon), and would conserve resources of the Court and the
5 parties, the Court should grant the motion.

6 STANDARD OF REVIEW

7 “The District Court has broad discretion to stay proceedings as an incident
8 to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706
9 (1997). The Ninth Circuit has described various factors that should be considered
10 when evaluating a motion to stay:

11 Where it is proposed that a pending proceeding be stayed, the
12 competing interests which will be affected by the granting or refusal to
13 grant a stay must be weighed. Among these competing interests are the
14 possible damage which may result from the granting of a stay, the
15 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.

16 *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *Ass’n of Irrigated Residents*
17 *v. Fed Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) (“Although
18 the filing of an interlocutory appeal does not automatically stay proceedings in the
19 district court, the district court has broad discretion to decide whether a stay is
20 appropriate to promote economy of time and effort for itself, for counsel, and for
21 litigants” (citation omitted)). As to the last factor, courts frequently grant stays
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1 pending resolution of proceedings that may “bear upon the case,” because a stay
2 is most “efficient for [the Court’s] own docket and the fairest course for the
3 parties.” *Levy v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir.
4 1979).

5 **ARGUMENT**

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

10 1. In its PI Order, the Court determined that Plaintiffs had “presented
11 reasonable arguments that indicate they are likely to succeed on the merits,” PI
12 Order at 14, and in particular that the Final Rule “violates Title X regulations, the
13 Non-directive Mandates and Section 1554 of the Affordable Care Act[, is]
14 arbitrary and capricious[, and] likely violates the central purpose of Title X,” *id.*
15 at 15. In reviewing this Order, the Ninth Circuit will thus have to evaluate the
16 central merits questions presented in Plaintiffs’ complaints, *i.e.*, whether the Rule
17 likely “(i) violates Congress’s Nondirective Mandate; (ii) violates Section 1554
18 of the [Affordable Care Act]; (iii) violates the Title X statute, exceeds the
19 program’s proper scope, and contravenes its purpose; and (iv) is an arbitrary and
20 unfounded rulemaking on numerous scores.” NFPRHA Compl. ¶ 16; *see also*
21 Wash. Compl. ¶ 6 (“In addition to violating three distinct statutory mandates—the
22

1 Nondirective Mandate, the ACA, and Title X itself—the Final Rule is also
2 arbitrary and capricious for a host of reasons.”).¹

3 If the district court proceedings continue while the appeal is ongoing, the
4 parties will have to address these very issues. Defendants are currently scheduled
5 to respond to the complaints on June 24, and the parties agree that this case is
6 likely to be ultimately resolved on the basis of dispositive motions (*i.e.*, cross-
7 motions for summary judgment that may also include Defendants’ motion to
8 dismiss). *See* Joint Certificate of Rule 26(f) Conference and Proposed Discovery
9 Plan at 5, ECF No. 71 (Rule 26(f) Statement). Those filings will necessarily
10 address the same merits questions that the Ninth Circuit is now considering:
11 whether the Final Rule violates Title X, Section 1554 of the Affordable Care Act,
12 or the “Non-directive Mandates,” and whether it is arbitrary and capricious.

13 _____
14 ¹ Plaintiffs’ Complaints also assert certain constitutional claims that the
15 Plaintiffs did not present as a basis for preliminary injunctive relief and which the
16 PI Order did not address. *See* Wash. Compl. at 84-86 (Counts V and VI);
17 NFPRHA Compl. at 71-74 (Counts Five and Six). But the appeal need not “settle
18 every question of . . . law” to justify a stay, so long as it will streamline the Court’s
19 merits review and conserve judicial resources by “settl[ing]” some issues and
20 “simplify[ing] others.” *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936). There
21 can be no dispute that the appeal here, which presents the majority of Plaintiffs’
22 claims, will do so.

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

17 2. In contrast to the wasteful drain on resources that will result if this
18 case proceeds before Defendants’ appeal is resolved, Plaintiffs will not suffer any
19 harm from a stay because the Final Rule is enjoined nationwide by multiple courts.
20 Although Defendants have moved this Court and the Ninth Circuit for a stay of
21 these injunctions pending appeal, any such stay is speculative at this point. And
22 even if a stay is granted, that could be based only upon a judicial determination

1 that Plaintiffs have not satisfied the factors for obtaining preliminary injunctive
2 relief. *See, e.g., Innovation Law Lab v. McAleenan*, --- F.3d ----, 2019 WL
3 2005745, at *1 (9th Cir. May 7, 2019) (same four-factor test governing requests
4 for preliminary injunction also governs request for stay of injunction pending
5 appeal). Such a determination would itself demonstrate that Plaintiffs would
6 suffer no harm requiring emergency relief during the pendency of this litigation.

7 Moreover, Defendants have agreed to produce the administrative record in
8 this case by no later than June 24, regardless of the outcome of this stay motion.
9 *See* Rule 26(f) Statement at 2. Plaintiffs will thus have the opportunity to review
10 the voluminous record and prepare for merits briefing or any other further
11 proceedings that may be necessary once the appeal is resolved and the stay is
12 lifted.

13 **CONCLUSION**

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

16 Dated: May 24, 2019

17 Respectfully submitted,

18 JOSEPH H. HUNT
Assistant Attorney General

19 JOSEPH H. HARRINGTON
United States Attorney

20 MICHELLE R. BENNETT
Assistant Branch Director

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/s/ R. Charlie Merritt
R. CHARLIE MERRITT
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs
Branch
919 East Main Street, Suite 1900
Richmond, VA 23219
Tel: (202) 616-8098
Fax: (804) 819-7417
robert.c.merritt@usdoj.gov

Counsel for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT
Trial Attorney
U.S. Department of Justice

1 JOSEPH H. HUNT
Assistant Attorney General
2 JOSEPH H. HARRINGTON
United States Attorney
3 MICHELLE R. BENNETT
Assistant Branch Director
4 R. CHARLIE MERRITT
Trial Attorney
5 U.S. Department of Justice
6 Civil Division, Federal Programs Branch
7 919 East Main Street, Suite 1900
Richmond, VA 23219
8 Phone: (202) 616-8098
9 Fax: (804) 819-7417
robert.c.merritt@usdoj.gov

10 *Counsel for Defendants*

11
12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF WASHINGTON**
AT YAKIMA

14 STATE OF WASHINGTON,

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18 ALEX M. AZAR II, in his official
capacity as Secretary of the United
19 States Department of Health and
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20 STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
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22 Defendants.

Nos. 1:19-cv-3040-SAB; 1:19-cv-
3045-SAB

[PROPOSED] ORDER

June 24, 2019
Without Oral Argument

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NATIONAL FAMILY PLANNING &
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DEBORAH OYER, M.D., and
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DIANE FOLEY, M.D., in her official
capacity as Deputy Assistant Secretary
for Population Affairs, and OFFICE
OF POPULATION AFFAIRS,

Defendants.

IT IS HEREBY ORDERED that Defendants’ motion to stay proceedings pending appeal is GRANTED. The Court STAYS further proceedings in this case pending final resolution of Defendants’ appeal from this Court’s Order granting Plaintiffs’ motions for preliminary injunction.

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SO ORDERED.

Dated: _____

Stanley A. Bastian
U.S. District Court Judge