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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION

16 ESSENTIAL ACCESS HEALTH, INC.;
 MELISSA MARSHALL, M.D.,

17 Plaintiffs,

18 v.

19 ALEX M. AZAR II, Secretary of U.S.
 20 Department of Health and Human Services;
 U.S. DEPARTMENT OF HEALTH AND
 21 HUMAN SERVICES; and DOES 1-25,

22 Defendants.

Case No. 3:19-cv-01195-EMC

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' MOTION TO STAY
 PROCEEDINGS PENDING APPEAL**

Date: July 11, 2019
 Time: 1:30 p.m.
 Dept.: Courtroom 5 - 17th Floor
 Judge: Hon. Edward M. Chen

Date Filed: March 4, 2019

Trial Date: None Set

1 **I. INTRODUCTION**

2 In requesting a stay of all proceedings pending appeal of the Court’s preliminary
3 injunction, Defendants ignore the Ninth Circuit’s repeated admonition against such stays. The
4 only reason Defendants give for staying this case is to await the Ninth Circuit’s “guidance” on the
5 merits of the claims at issue in the appeal. But as the Ninth Circuit has explained many times,
6 appellate review of a preliminary injunction will not necessarily provide meaningful guidance on
7 the appropriate disposition of the merits of a case, and a stay of district court proceedings will
8 only result in unnecessary delay. In cases like this one, where the merits depend on a full review
9 of the factual record, the Ninth Circuit has instructed that the appropriate course of action is for
10 the district court to proceed diligently toward final judgment and a permanent injunction.

11 Nor does the balance of hardships between the parties justify a stay. Defendants do not
12 contend that they would be harmed by moving forward with the litigation. Plaintiffs, by contrast,
13 could suffer a devastating setback if these proceedings were halted. Indeed, at the same time
14 Defendants are asking to pause proceedings in this Court, they are asking the Ninth Circuit to
15 dissolve the preliminary injunction—in other words, they seek to put the Final Rule, with all its
16 harmful consequences, into effect while simultaneously hamstringing Plaintiffs from preparing
17 their case for final relief. The Court should deny Defendants’ motion.

18 **II. ARGUMENT**

19 As the movants, Defendants bear the burden to show that a stay is appropriate. *Clinton v.*
20 *Jones*, 520 U.S. 681, 708 (1997). When deciding whether to stay trial-level proceedings pending
21 the outcome of an interlocutory appeal, the Court must weigh “competing interests,” including:

22 the possible damage which may result from the granting of a stay, the hardship or
23 inequity which a party may suffer in being required to go forward, and the orderly
24 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.

25 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inv. v. Hall*, 300
26 F.2d 265, 268 (9th Cir. 1962)).

27 Defendants’ primary argument is that a stay would allow for the “orderly course of
28 justice” and simplify the issues. *See* Mot. at 4–5. As Defendants tell it, “the Ninth Circuit’s

1 disposition of the appeal is likely to be controlling with respect to the central merits issues
 2 presented in this case.” *Id.* at 4. Therefore, Defendants argue, this Court should await the Ninth
 3 Circuit’s “substantial, if not dispositive, guidance” before proceeding to a review of the
 4 administrative record and dispositive motions. *Id.* at 2, 4–5. Defendants’ argument, however, is
 5 squarely foreclosed by the Ninth Circuit’s clear instructions to the contrary.

6 **A. The Ninth Circuit Has Instructed Against Staying District Court Proceedings**
 7 **Pending Appeal of a Preliminary Injunction**

8 The Ninth Circuit has “repeatedly admonished district courts not to delay trial preparation
 9 to await an interim ruling on a preliminary injunction.” *California v. Azar*, 911 F.3d 558, 583
 10 (9th Cir. 2018); *see also Melendres v. Arpaio*, 695 F.3d 990, 1003 (9th Cir. 2012). The reason for
 11 this admonition is the “limited scope” of the Ninth Circuit’s review—the Ninth Circuit’s
 12 “disposition of appeals from most preliminary injunctions may provide little guidance as to the
 13 appropriate disposition on the merits.” *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d
 14 750, 753 (9th Cir. 1982); *see also Global Horizons, Inc. v. U.S. Dep’t of Labor*, 510 F.3d 1054,
 15 1058–59 (9th Cir. 2007). The Ninth Circuit has also repeatedly warned that a stay of district
 16 court proceedings pending appeal of a preliminary injunction “will often result in unnecessary
 17 delay to the parties and inefficient use of judicial resources.” *Id.* at 1058–59 (citing *Sports Form*,
 18 686 F.2d at 753). Although Defendants fail to even mention them, the Ninth Circuit’s
 19 instructions could not be clearer: district courts proceedings should proceed normally while
 20 preliminary injunctions are appealed. Those instructions apply with full force here.

21 *First*, contrary to what Defendants claim, the Ninth Circuit’s review of the preliminary
 22 injunction will not necessarily include an evaluation of the “central merits questions presented in
 23 Plaintiffs’ complaint,” and will not amount to a duplication of dispositive briefing before this
 24 Court. *See Mot.* at 5. “In considering a preliminary injunction appeal, [the Ninth Circuit]
 25 ordinarily do[es] not decide the ultimate merits of the case, but only the temporal rights of the
 26 parties until the district court renders judgment on the merits of the case based on a fully
 27 developed record.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th
 28 Cir. 2005). Thus, the Ninth Circuit will determine *only* whether this Court abused its discretion

1 in deciding that (1) Plaintiffs have a likelihood of success on the merits of four of their six
 2 claims,¹ (2) Plaintiffs are likely to suffer irreparable harm absent the injunction, and (3) the
 3 balance of equities tips in Plaintiffs' favor. *See Winter v. Natural Res. Def. Council, Inc.*, 555
 4 U.S. 7, 22 (2008) (setting forth the standard for a preliminary injunction); *Sw. Voter Registration*
 5 *Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (explaining that preliminary
 6 injunctions are reviewed for abuse of discretion).

7 *Second*, the Ninth Circuit's review will also be based on only a partial factual record.² By
 8 contrast, deciding the merits of Plaintiffs' claims will require an evaluation of the full
 9 administrative record, especially with respect to Plaintiffs' claims that the Final Rule is arbitrary
 10 and capricious. *See Wyo. v. U.S. Dep't of Interior*, No. 2:15-cv-043-SWS, 2015 WL 9463708, at
 11 *2 (D. Wyo. Dec. 17, 2015) ("Certainly factual development is essential to Petitioners' arguments
 12 that the Fracking Rule is arbitrary and capricious."); *id.* at *3 (denying a stay because it would
 13 "needlessly delay Petitioners' right to pursue all grounds for setting aside the Fracking Rule based
 14 on a complete administrative record"). Because the Ninth Circuit will decide the current appeal
 15 based only on a partial factual record, its ruling on the preliminary injunction may not provide
 16 conclusive guidance as to the merits of Plaintiffs' claims. *See Azar*, 911 F.3d at 583; *Duncan v.*
 17 *Becerra*, No. 3:17-cv-1017-BEN, 2017 WL 4518498, at *2 (S.D. Cal. Oct. 10, 2017) ("[A] ruling
 18 on the propriety of a preliminary injunction will not necessarily decide the ultimate constitutional
 19 issues to be tried."); *Wyoming*, 2015 WL 9463708, at *3 ("Whatever the Tenth Circuit rules in
 20 reviewing this Court's preliminary injunction will not control what is or is not a part of the
 21 administrative record"). Accordingly, this Court must not halt its progress toward a full merits
 22 determination.

23 *Finally*, the cases upon which Defendants rely are inapposite. Defendants cite the district-

24 _____
 25 ¹ Defendants are wrong to downplay the significance of Plaintiff's constitutional claims, which
 26 are not at issue in the current appeal. Mot. at 5 n.1. Because the appeal has nothing to do with
 27 those claims, "judicial economy" would not be served by a stay. *See 23andMe, Inc. v.*
Ancestry.com DNA, LLC, No. 18-cv-02791-EMC, 2018 WL 5793473, at *3 (N.D. Cal. Nov. 2,
 2018) (denying a stay where the claims at issue in the appeal involved different factual and legal
 issues than the claims remaining in the district court).

28 ² The administrative record will not be compiled and served until June 24, 2019. Mot. at 6.

1 court decisions in *Hawai‘i v. Trump* and *Washington v. Trump* for the proposition that a stay of
2 proceedings would promote the “orderly course of justice.” Mot. at 5. But Defendants’ reliance is
3 misplaced. In those cases, the court stayed consideration of a pending motion for a temporary
4 restraining order during the appeal of a substantively identical TRO issued by a different court in
5 parallel litigation. *See Washington v. Trump*, No. C17-0141JLR, 2017 WL 1050354, at *5 (W.D.
6 Wash. Mar. 17, 2017) (imposing a “limited stay” pending appeal of the preliminary injunction
7 issued in *Hawai‘i v. Trump*);³ *Hawai‘i v. Trump*, 233 F. Supp. 3d 850, 856 (D. Haw. 2017)
8 (staying deadlines pending appeal of an earlier preliminary injunction in *Washington v. Trump*).
9 Because in each case the court had yet to rule on the pending TRO, the Ninth Circuit’s
10 consideration of an identical TRO would likely be dispositive *of the issues presented by the*
11 *pending TRO*. *See Hawai‘i v. Trump*, 233 F. Supp. 3d at 855 (“In particular, the Ninth Circuit’s
12 ruling—and any subsequent appellate pronouncement—will likely be dispositive of, or at least
13 dispositive of many of the issues presented by, the State’s Motion for TRO.”). Neither of those
14 cases held that the Ninth Circuit’s review of an injunction would be dispositive of or provide
15 guidance on the *ultimate merits*—nor would they, given that the Ninth Circuit has repeatedly
16 admonished district courts not to wait on appellate review of preliminary injunctions for guidance
17 on the merits. *See Azar*, 911 F.3d 583. Here, the Court has already ruled on Plaintiffs’ motion
18 for a preliminary injunction, so there is no need to wait on the Ninth Circuit’s review of the
19 injunction—or any other court’s injunction—for guidance, as there was in *Washington v. Trump*
20 and *Hawai‘i v. Trump*. For the same reason, there is no risk of “inconsistent rulings” from the
21 appeal and a merits determination in this Court.

22 In sum, the Ninth Circuit’s limited interlocutory review will not necessarily dispose of the
23 ultimate merits issues, which will depend instead on an examination of the full factual record. As
24 such, this case falls squarely within the category of cases that the Ninth Circuit has repeatedly
25 warned should not be stayed pending the appeal of a preliminary injunction.

26
27 ³ In *Washington v. Trump*, the court did not stay *all* proceedings; it stayed only its consideration
28 of the plaintiff’s motion for a TRO. *See Washington*, 2017 WL 1050354, at *5 (“The court,
however, does not stay any other aspect of this litigation.”).

B. The Other Factors Militate Against a Stay

1 **B. The Other Factors Militate Against a Stay**
2 Just as the “orderly course of justice” does not warrant a stay of proceedings, neither does
3 the balance of hardships. “If there is even a fair possibility that a stay” of district court
4 proceedings “will work damage” to Plaintiffs, Defendants “must make out a clear case of
5 hardship or inequity” in being required to go forward. *Lockyer*, 398 F.3d at 1112 (citing *Landis v.*
6 *N. Amer. Co.*, 299 U.S. 248, 255 (1936)). Defendants have failed to do so.

7 *First*, a stay of district court proceedings will harm Plaintiffs. If proceedings in this Court
8 are paused and the Ninth Circuit allows the Final Rule to go into effect—either by granting
9 Defendants’ pending motion to stay the injunction or by reversing the injunction after full
10 briefing—Plaintiffs will be caught at a severe disadvantage with months of litigation to undergo
11 before they can obtain a permanent injunction. All the while, Plaintiffs will suffer immediate
12 harm as the Final Rule goes into effect, as the Court has already found. *See* Dkt. No. 78 at 14–24.
13 Specifically, the Final Rule will “compromise providers’ ability to deliver effective care and force
14 them to obstruct and delay patients with pressing medical needs.” *Id.* at 15. Plaintiff Essential
15 Access’s network will be decimated, and access to quality reproductive and related health care
16 services substantially curtailed, as sub-recipients exit the Title X program or cut back on services.
17 *Id.* at 14–19. “The net effect of so many providers leaving Title X will be a significant reduction
18 in the availability of important medical services.” *Id.* at 16. Absent Title X funding, 85 percent
19 of Essential Access sub-recipients will be forced to lay off staff, cut training and reduce outreach
20 and education activities. *Id.* A third of sub-recipients will have to reduce clinic hours, and some
21 will have to shut down core services and programs entirely. *Id.* “Patients in California
22 accordingly stand to lose access to a wide range of vital health services, many of which have
23 nothing to do with abortion, since Title X providers serve as a trusted entry point for medical care
24 generally.” *Id.* at 16-17 (internal citations omitted). Essential Access will also suffer irreparable
25 economic harm as soon as the Final Rule takes effect, as it will be forced to divert substantial
26 monetary resources from its core operations and mission to compliance with the Final Rule’s
27 stringent physical separation requirement. *Id.* at 19, 22. Staying the district court proceedings
28 will extend the time during which Plaintiffs will suffer these harms before Plaintiffs can obtain a

1 permanent injunction.

2 *Second*, Defendants’ assertion that “Plaintiffs will not suffer any harm from a stay because
3 the Final Rule is enjoined” in this Court and others is disingenuous. Mot. at 6. At the same time
4 they are seeking to halt all proceedings in this Court, Defendants are asking the Ninth Circuit to
5 stay the injunctions against the Final Rule. Mot. at 6. And contrary to what Defendants suggest,
6 Plaintiffs will lose precious time even if Defendants provide the administrative record while
7 proceedings are paused. Indeed, Defendants have informed Plaintiffs that they will move to
8 dismiss the Complaints rather than answer, belying their suggestion that the parties can
9 immediately proceed to merits briefing once the appeal is resolved and a stay lifted. *See id.*

10 On the other side of the ledger, Defendants have made no effort to explain how they
11 would suffer any hardship from having to move forward with the district court proceedings. Nor
12 could they, as “being required to defend a suit, without more, does not constitute a ‘clear case of
13 hardship or inequity’ within the meaning of *Landis*.” *Lockyer*, 398 F.3d at 1112. Accordingly,
14 the balance of hardships tips sharply in Plaintiffs’ favor, militating against a stay.

15 **III. CONCLUSION**

16 For the foregoing reasons, the Court should deny Defendants’ motion to stay proceedings
17 pending their appeal of the Court’s preliminary injunction.

18
19 Dated: June 7, 2019

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20
21 By: /s/ Michelle Ybarra

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