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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF WASHINGTON**
10 **AT YAKIMA**

11 STATE OF WASHINGTON,

12 Plaintiff,

13 v.

14 ALEX M. AZAR II, et al.,

15 Defendants.

No. 1:19-cv-03040-SAB

THE NATIONAL FAMILY
PLANNING & REPRODUCTIVE
HEALTH ASSOCIATION
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
STAY ALL PROCEEDINGS
PENDING APPEAL

16 NATIONAL FAMILY PLANNING &
17 REPRODUCTIVE HEALTH
18 ASSOCIATION, et al.,

19 Plaintiffs,

20 v.

21 ALEX M. AZAR II, et al.,

22 Defendants.

23 June 24, 2019
Without Oral Argument

1 Defendants ask the Court to stay all district court proceedings (ECF No. 79)
2 (“Mot.”) while the Ninth Circuit considers their appeal of this Court’s preliminary
3 injunction. But Defendants have not shown they face any hardship from the
4 ordinary course of litigation continuing here or established any other factors that
5 militate in favor of halting district court proceedings. Instead, a stay of
6 proceedings now would contradict the Ninth Circuit’s “repeated[]
7 admonish[ment]” that district courts should not delay all further proceedings
8 pending resolution of a preliminary injunction appeal. *California v. Azar*, 911
9 F.3d 558, 583 (9th Cir. 2018). A stay now would harm Plaintiffs by delaying
10 availability of the full factual record and stopping any progress toward final,
11 permanent relief.

12 The parties should continue to move forward, as specified by the Court in its
13 May 24, 2019, order (ECF No. 81) and as projected in their joint Rule 26(f) report
14 (ECF No. 71), in order to be prepared for the future cross-dispositive motions. In
15 addition, both the parties and the Court will have more information as of the next,
16 August 1, 2019, status conference, and further necessary steps toward a final
17 determination of Plaintiffs’ claims should be scheduled at or after that conference.

18 **ADDITIONAL PROCEDURAL HISTORY**

19 Beyond Defendants’ summary of the case to date, this additional history is
20 relevant to the Court’s assessment of Defendants’ motion:

21 On May 13, 2019, the parties filed the Rule 26(f) report. In that report,
22 Defendants committed to producing the Administrative Record on June 24, 2019,
23 and Plaintiffs set forth the immediate next steps that would need to occur after that

1 production. In particular, Plaintiffs made clear that after an initial review of the
2 Administrative Record, there may be the need for follow up with Defendants
3 and/or motion practice regarding (i) completing or supplementing the
4 Administrative Record (ECF No. 71 ¶ 6(a)); (ii) other necessary discovery (*Id.* ¶
5 6(a)); and/or (iii) issues as to the manner in which the record was produced and its
6 accessibility for the parties and the Court (*Id.* ¶ 11). Plaintiffs also indicated their
7 willingness to consider further extensions of Defendants’ deadline to respond to
8 the Complaints and to work with Defendants to propose a schedule for cross-
9 dispositive motions, which can occur once any issues regarding the Administrative
10 Record and discovery are resolved. *Id.* at 7. Plaintiffs suggested that the parties
11 confer with the Court approximately 30-45 days after Defendants’ production of
12 the Administrative Record to determine next steps and their timing. *Id.* at 7-8.

13 The Court then held this matter’s first scheduling conference on May 23,
14 2019, and generally endorsed that sequence of events. The Court scheduled a
15 subsequent conference for August 1, 2019—after Defendants’ promised production
16 of the Administrative Record and Plaintiffs’ initial review. The Court also
17 explained to the parties that due to the Court’s schedule, any new motions filed in
18 this case would not be resolved prior to the August 1 conference.

19 Defendants filed the present motion to stay all proceedings on May 24,
20 2019. Next, that same day, Defendants filed an unopposed motion to extend their
21 time to respond to the Complaints (ECF No. 80), which would make their
22 responses due, at the earliest, three weeks after resolution of this stay motion.

1 Also on May 24, 2019, the Court issued an order memorializing the
2 occurrence of the May 23 conference; striking the prior, June 24, 2019, date for
3 Defendants' responses to the Complaints and making clear that a new response
4 deadline would be set after the August 1 conference; and confirming that June 24,
5 2019, is the deadline for Defendants' production of the Administrative Record. In
6 addition, the Court ordered the parties to file a joint status report ten days prior to
7 August 1 that addresses the following:

- 8 (1) The need for discovery or supplementation of the record;
- 9 (2) The status of Defendants' answer;
- 10 (3) The status of Defendants' anticipated motion to stay; and
- 11 (4) A proposed schedule for the anticipated Motions for Summary Judgment.

12 ECF No. 81.

13 On June 3, 2019, this Court denied Defendants' motion to stay the
14 preliminary injunction pending appeal. ECF No. 82. Defendants filed the opening
15 brief in their appeal of the preliminary injunction in the Ninth Circuit on May 31,
16 2019. Plaintiffs' opposition brief is due on June 28, 2019, and any reply brief is
17 due within 21 days of that filing.

18 **STANDARD OF REVIEW**

19 As the Ninth Circuit has summarized,

20 Where it is proposed that a pending proceeding be stayed, the
21 competing interests which will be affected by the granting or refusal
22 to grant a stay must be weighed. Among those competing interests are
23 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.

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

3 The “proponent of a stay bears the burden of establishing its need.” *Clinton*
4 *v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis v. North American Co.*, 299 U.S.
5 248, 255 (1936)). If there is “even a fair possibility” of harm to the opposing
6 party, the moving party “must make out a clear case of hardship or inequity in
7 being required to go forward.” *Landis*, 299 U.S. at 255; *Lockyer*, 398 F.3d at
8 1112. “[B]eing required to defend a suit, without more, does not constitute a ‘clear
9 case of hardship or inequity.’” *Lockyer*, 398 F.3d at 1112.

10 ARGUMENT

11 Defendants contend that an immediate stay of all district court proceedings
12 should occur in order to avoid what they portray as imminent substantive
13 deadlines, including responses to the Complaints and merits briefing. Mot. at 6-7.
14 Yet Defendants simultaneously admit that the next stage of this case involves
15 production of the Administrative Record, review of that production, and potential
16 proceedings related to that record or to discovery, as will be necessary for the
17 parties to even be “prepare[d] for merits briefing” of later dispositive motions. *See*
18 *id.* at 9. This preparatory work must be completed regardless of whether
19 Defendants prevail on their pending interlocutory appeal.

20 Defendants have identified no harm to them from allowing these next
21 proceedings to continue or from other progress toward final resolution in this
22 Court. Defendants’ current motion conflicts with the Ninth Circuit’s warnings
23 “not to delay trial preparation to await an interim ruling on a preliminary

1 injunction” and that ““disposition of appeals from most preliminary injunctions
2 may provide little guidance as to the appropriate disposition on the merits,””
3 because of the limited abuse-of-discretion review and the preliminary factual
4 record involved in an appeal from an early injunction, as here. *California v. Azar*,
5 911 F.2d at 583-84 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1003 (9th Cir.
6 2012)). Plaintiffs, by contrast, would necessarily be harmed by the requested stay,
7 because it would (1) relieve Defendants of any further obligations to cooperate in
8 ensuring that the Administrative Record is complete and available, (2) preclude
9 Plaintiffs from litigating any issues regarding the record or any additional
10 discovery needs, and (3) impede *any* progress toward dispositive motion practice
11 and a final resolution of Plaintiffs’ claims for permanent injunctive relief.

12 Moreover, Defendants’ request for a stay of all proceedings is especially
13 premature when the Ninth Circuit has yet to rule on Defendants’ request that it stay
14 the preliminary injunction pending appeal, when Defendants have not yet complied
15 with their commitment to produce the record, and while the parties’ scheduling
16 discussions remain ongoing. By August 1, 2019—after the date for production of
17 the Administrative Record, after Plaintiffs have had an initial opportunity to review
18 the record production, and after the Ninth Circuit likely will have ruled on
19 Defendants’ stay motion—the parties and this Court will have greater information.
20 An ongoing schedule for the orderly and efficient resolution of the important issues
21 raised in this case should be entered at that time.

1 1. Defendants establish no harm to them from further district court
2 proceedings. The proponent of a stay bears the burden of showing that a stay is
3 needed at the current stage of litigation. *Clinton v. Jones*, 520 U.S. at 708
4 (rejecting a stay entered prematurely). On this motion, Defendants have not done
5 so.

6 First, Defendants focus on purported merits concerns when this case is not
7 yet ready or poised for merits review. Defendants face no rapidly approaching
8 deadline to answer or to brief dispositive motions. By May 23, Plaintiffs had
9 consented to Defendants' request for additional time to respond to the Complaints,
10 as reflected in the motion Defendants filed on May 24; and Plaintiffs have
11 consistently committed to work with Defendants to craft a mutually-agreeable
12 schedule for cross-dispositive motions after any issues concerning the factual
13 record in this case have been resolved. Nevertheless, in this motion Defendants
14 still cite and attempt to rely upon an eclipsed date of June 24, 2019, which had
15 been the deadline for them to respond to the Complaints *before* Plaintiffs agreed to
16 an extension and before the discussion with the Court during the May 23 status
17 conference made clear that the June date would not control. Continuing with the
18 extant schedule in this case imposes no harm on Defendants and any further
19 scheduling remains to be determined at the August 1 conference or thereafter.

20 Second, Defendants offer no reason to stay the necessary next steps to
21 prepare this case to reach the merits stage, including potential motion practice
22 regarding the completeness of the record, its possible supplementation, necessary
23 discovery, or issues with the manner of production. Defendants have not and

1 cannot explain how they could be harmed from proceeding in the ordinary course
2 of litigation to ensure that the Administrative Record and any appropriate
3 additional facts are available to the parties and the Court.

4 Finally, each one of the cases on which Defendants rely—to argue “waste”
5 or “potential conflict” in further proceedings—involved a materially different
6 situation than exists here. In those cases, a stay was entered in one, later case
7 because *another independent case or proceeding* had already raised the same
8 issues and was approaching resolution; the stay of the later case avoided different
9 outcomes on the same issues in two *different* matters. *See, e.g., Levya v. Certified*
10 *Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (holding that entry of
11 stay can be appropriate pending resolution of independent judicial, administrative,
12 or arbitral proceedings, and remanding for district court’s consideration of stay
13 pending arbitration); *Washington v. Trump*, 2017 WL 1050354 at *5 (W.D. Wash.
14 Mar. 17, 2017) (staying TRO proceedings where same TRO had been entered in
15 another district court and was already the subject of an expedited Ninth Circuit
16 appeal). In *Washington v. Trump*, moreover, the Court pointedly stayed only the
17 TRO motion, which raised the same issues in the same TRO procedural posture as
18 the other matter in which a TRO was already on appeal, and but did “not stay any
19 other aspect of [that] litigation” in the district court. 2017 WL 1050354 at *5.

20 None of Defendants’ cases support enjoining district court proceedings to
21 complete the factual record or to otherwise progress toward a permanent merits
22 determination during the appeal of a preliminary injunction in that same case,
23 which appeal will be decided on a different record and under a different standard

1 (abuse of discretion) than the ultimate merits. To the contrary, as noted *supra*, the
2 Ninth Circuit has cautioned against staying all district court proceedings pending
3 resolution of a preliminary injunction appeal, both because such appeals typically
4 provide little guidance on permanent disposition of the claims and because
5 significant litigation steps remain: The preliminary injunction appeal affects “the
6 rights of the parties only until the district court renders judgment on the merits of
7 the case, at which time the losing party may again appeal.” *Melendres v. Arpaio*,
8 695 F.3d at 1003 (9th Cir. 2012) (quoting *Sports Form, Inc. v. United Press Int’l*,
9 *Inc.*, 686 F.2d 750, 753 (9th Cir. 1982)) (praising district court for moving toward
10 final disposition while preliminary injunction on appeal); *see also California v.*
11 *Azar*, 915 F.3d at 583-84.

12 2. Plaintiffs would be harmed by a stay. Defendants have also failed to
13 show the absence of any “possible damage” to Plaintiffs from the requested stay.
14 *Lockyer*, 398 F.3d at 1110-12. A stay would obviously cause Plaintiffs harmful
15 delay in reaching final resolution of their claims. It would expose them to
16 considerable risk of other damage too, because Defendants continue to press the
17 Ninth Circuit for the preliminary injunction itself to be stayed. If Defendants
18 should prevail in that request, Plaintiffs need to be free to pursue new interim relief
19 or permanent relief without any impediment or delay. But a stay of all proceedings
20 in the district court now will create such an impediment, prevent the factual record
21 from being finalized, defer any discovery or other pre-merits disputes, likewise
22 delay merits briefing, and hamper Plaintiffs’ ability to bring this case to a final
23 resolution.

1 Defendants are incorrect that a stay of the preliminary injunction “could be
2 based only upon” Ninth Circuit determinations that Plaintiffs would suffer no harm
3 from the Final Rule taking effect and do not satisfy “the factors for obtaining
4 preliminary injunctive relief.” Mot. at 8-9. Defendants themselves argue in their
5 stay motion to the Ninth Circuit that the District Court supposedly applied the
6 “wrong” legal standard for “likelihood of success” on preliminary injunction
7 motions. Ninth Cir. Case No. 19-35394, Dkt. No. 9 at 8-9. Were the Ninth Circuit
8 to agree with Defendants’ argument and enter a stay pending this Court’s
9 reconsideration under a different legal standard, that development would not
10 mean—contrary to Defendants’ assertions—that no preliminary injunction is
11 warranted and that no harm will come to Plaintiffs without one, Mot. at 8-9. This
12 Court has already determined that Plaintiffs, in fact, *are* likely to suffer irreparable
13 injury, and that Plaintiffs have submitted “substantial evidence” of that harmful
14 impact, if a preliminary injunction does not remain in place. ECF No. 54 at 16-17.
15 A stay of all district court proceedings should not be erected now as a new
16 roadblock to Plaintiffs’ continuing to protect themselves against such irreparable
17 harm, should further proceedings in this Court be necessary to do that.

18 In addition, and even assuming the preliminary injunction stays in place
19 pending appeal, a stay of all proceedings in this Court would harm Plaintiffs by
20 causing unnecessary delay in preparing their case for its ultimate, merits
21 disposition. The Supreme Court has emphasized that a “lengthy and categorical
22 stay [that] takes no account whatever of the [plaintiff’s] interest in bringing the
23 case to trial,” like the one Defendants request here, is inappropriate. *Clinton v.*

1 *Jones*, 520 U.S. at 707. In the *Clinton* case, the Court also emphasized that delay
2 of the final merits proceeding, there a trial, was at a minimum premature since the
3 litigation had not yet reached that stage. *Id.* at 708. The same is true here:
4 Plaintiffs have important interests in maintaining their ability to pursue whatever
5 motion practice, discovery, or record supplementation may be necessary to
6 complete the relevant factual record, and to prepare their case for final dispositive
7 motion practice—a later and final stage of the case for which there is not yet any
8 schedule. *See Clinton*, 520 U.S. at 707. Plaintiffs should not, as Defendants
9 propose, be barred from any further steps toward timely permanent resolution.

10 3. The parties should continue to confer with regard to future scheduling.

11 This opposition to Defendants’ stay motion is due almost two months before the
12 August 1, 2019, status conference and the planned discussion then of the necessary
13 next steps in this Court. In the meantime, Defendants are due to produce the
14 Administrative Record and Plaintiffs will conduct their initial review. While this
15 litigation needs to continue to move forward, Plaintiffs agree with Defendants that
16 efforts should be made to do that fairly and efficiently, *see* Mot. at 6. Plaintiffs
17 therefore reiterate that they will continue to confer with Defendants about
18 scheduling. The parties will have more information to report to the Court in their
19 status report just prior to the August 1, 2019, status conference.

20 **CONCLUSION**

21 For all the foregoing reasons, Defendants’ motion to stay all further
22 proceedings in this Court pending resolution of Defendants’ preliminary injunction
23 appeal should be denied.

1 DATED: June 7, 2019

Respectfully Submitted,

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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 7th of June, 2019, at Seattle, Washington.

/s/ Emily Chiang
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