

1 Jeffrey T. Sprung, WSBA #23607  
Kristin Beneski, WSBA #45478  
2 Paul M. Crisalli, WSBA #40681  
*Assistant Attorneys General*  
3 ROBERT W. FERGUSON  
ATTORNEY GENERAL  
4 Washington Attorney General's Office  
800 Fifth Avenue, Suite 2000  
5 Seattle, WA 98104  
(206) 464-7744  
6

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

9 STATE OF WASHINGTON,

10 Plaintiff,

11 v.

12 ALEX M. AZAR II, et al.,

13 Defendants.

NO. 1:19-cv-3040-SAB

STATE OF WASHINGTON'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO STAY  
PROCEEDINGS

June 24, 2019  
Without Oral Argument

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

16 Plaintiffs,

17 v.

18 ALEX M. AZAR II, et al.,

19 Defendants.  
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22

## I. INTRODUCTION

1 The Ninth Circuit has “repeatedly admonished district courts not to delay  
2 trial preparation to await an interim ruling on a preliminary injunction.”  
3 *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). Defendants’ (collectively,  
4 HHS) request for an indefinite stay of these proceedings pending appeal of the  
5 Court’s preliminary injunction disregards the Ninth Circuit’s admonitions. HHS  
6 fails to meet its burden to show any genuine “hardship or inequity” in moving  
7 forward, and disregards the very real harm to the State in stalling these  
8 proceedings for all purposes. *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936).  
9 Instead, HHS broadly invokes the fact of its appeal, and this Court’s discretion  
10 to efficiently manage its docket, which are insufficient reasons to impose a stay.  
11 Because HHS falls far short of its burden to justify a stay, the Court should deny  
12 its Motion (ECF No. 79) (Mot.).

## II. BACKGROUND

13 This case challenges HHS’s unlawful Final Rule,<sup>1</sup> which drastically alters  
14 regulations governing the Title X family planning services program in violation  
15 of several federal statutes. On April 25, 2019, the Court ruled that Plaintiffs were  
16 entitled to a preliminary injunction because “all four factors tip in their favor,”  
17 finding Plaintiffs were likely to succeed on the merits, presented “substantial  
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21 <sup>1</sup> Compliance with Statutory Program Integrity Requirements, 84 Fed.  
22 Reg. 7714 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

1 evidence” showing a likelihood of irreparable harm absent preliminary relief, and  
2 demonstrated the balance of equities and the public interest “strongly favors a  
3 preliminary injunction[.]” ECF No. 54. The Court preliminarily enjoined HHS  
4 from implementing or enforcing the Final Rule in any manner or in any respect  
5 and required it to preserve the status quo. *Id.*

6 At the preliminary injunction hearing, the Court instructed the parties that  
7 “I want to be aggressive on moving this case forward” because, given “the  
8 interests on both sides,” this case “should be decided quickly.” Verbatim Report  
9 of Proceedings (April 25, 2019) at 10:5–7. On May 13, 2019, the parties filed a  
10 Joint Certificate of Rule 26(f) Conference and Proposed Discovery Plan in which,  
11 *inter alia*, they agreed to confer and propose a plan for briefing dispositive  
12 motions following production of the administrative record, and Plaintiffs stated  
13 they would be amenable to further extending HHS’s deadline to respond to the  
14 Complaints (which may be in the form of a motion to dismiss). ECF No. 71 at 6–  
15 7. After holding a scheduling conference, the Court issued an order setting June  
16 24 as the deadline for HHS to produce the administrative record, and striking  
17 Defendants’ deadline to respond to Plaintiffs’ Complaints, with a new deadline  
18 to be set after a status conference on August 1. ECF No. 81.

19 Meanwhile, HHS moved to stay the preliminary injunction pending appeal,  
20 ECF No. 58, which Plaintiffs opposed, ECF Nos. 72, 73. On June 3, 2019, the  
21 Court denied that motion to stay. ECF No. 82. HHS now moves to stay *all*  
22 proceedings in this Court pending its appeal of the preliminary injunction.

### III. ARGUMENT

#### A. Legal Standard

The option to stay proceedings falls within this Court's discretion to control its docket to promote efficient case resolution, *Landis*, 299 U.S. at 254, but "case management standing alone is not necessarily a sufficient ground" for a stay. *Dependable Hwy. Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). In determining whether to stay proceedings, courts weigh "the competing interests which will be affected by the granting or refusal to grant a stay," including "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).

In seeking to stay these proceedings indefinitely, HHS bears the burden of justifying a deviation from the usual course of litigation, in light of the competing interests. *Clinton v. Jones*, 520 U.S. 681, 708 (1997) ("The proponent of a stay bears the burden of establishing its need."); *DeMartini v. Johns*, 693 F. App'x 534, 538 (9th Cir. 2017) (party seeking a stay "has the burden to 'make out a clear case of hardship or inequity in being required to go forward,' and the court must weigh the competing interests that will be affected by the granting of or refusal to grant the stay") (quoting *Landis*, 299 U.S. at 255). Where, as here, the

1 requested stay is of indefinite duration,<sup>2</sup> the proponent must demonstrate a  
2 “pressing need.” *Landis*, 299 U.S. at 255; *see also Dependable Hwy.*, 498 F.3d  
3 at 1066 (“Generally, stays should not be indefinite in nature.”). Review of an  
4 indefinite stay pending appeal is “somewhat less deferential” than the ordinary  
5 abuse of discretion standard. *Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000).

6 **B. HHS Fails to Carry Its Burden to Justify an Indefinite Stay**

7 HHS fails to demonstrate that any of the three *C*MAX factors justifies an  
8 indefinite stay. Its vague assertion that the Ninth Circuit may provide “guidance”  
9 relevant to the final disposition of this case fails to show any “clear . . . hardship  
10 or inequity” in moving forward, much less a “pressing need” for a stay. On the  
11 other hand, HHS ignores very real threats of harm to the State: an indefinite stay  
12 would needlessly hinder any efforts to ensure the administrative record is  
13 complete, and may otherwise negatively impact the State’s ability to prepare for  
14 dispositive motions practice or obtain needed interim relief. Continuing these  
15 proceedings as scheduled supports the orderly course of justice, consistent with  
16 the Ninth Circuit’s instruction that district court proceedings should continue  
17 pending a preliminary injunction appeal. *See California v. Azar*, 911 F.3d at 584.

18 \_\_\_\_\_  
19 <sup>2</sup> HHS’s requested stay is indefinite, because of the indeterminate time  
20 frame in which the Ninth Circuit will hear and decide the preliminary injunction  
21 appeal. *See Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000) (stay pending  
22 appeal is “indefinite” and “could remain in effect for a lengthy period of time”).

1 Staying these proceedings would only delay preparations that will be necessary  
2 *regardless* of the outcome of the pending appeal. *See id.*

3 **1. HHS fails to demonstrate hardship or inequity justifying an**  
4 **indefinite stay.**

5 HHS cannot obtain a stay absent “a clear case of hardship or inequity” in  
6 moving forward with the proceedings in this Court. *Landis*, 299 U.S. at 255.  
7 Indeed, because HHS seeks an indefinite stay, it must establish a “pressing need.”  
8 *Id.* It has not done so—nor could it.

9 The primary basis for HHS’s motion is that proceeding in the absence of  
10 “guidance” from the Ninth Circuit will “potentially result in inconsistent rulings”  
11 on merits issues. Mot. at 2–3, 6–8. This is not a valid reason for a stay. The threat  
12 of inconsistent rulings is unfounded, as courts weigh different considerations for  
13 preliminary injunctions and final relief, and appellate review of the former is  
14 limited. *See Melendres v. Arpaio*, 695 F.3d 990, 1001–02 (9th Cir. 2012) (“we  
15 emphasize that we are reviewing only the content of the preliminary injunction  
16 itself, not the reasoning that led to it” under abuse-of-discretion standard); *Trump*  
17 *v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (“The purpose  
18 of such interim equitable relief is not to conclusively determine the rights of the  
19 parties, but to balance the equities as the litigation moves forward”) (citation  
20 omitted).

1           Accordingly, the Ninth Circuit has “repeatedly admonished” district courts  
2     *not* to stay proceedings on precisely the grounds HHS invokes. *California v.*  
3     *Azar*, 911 F.3d at 583. As the Court explained:

4           Because of the limited scope of our review of the law applied by the  
5     district court and because the fully developed factual record may be  
6     materially different from that initially before the district court, our  
7     disposition of appeals from most preliminary injunctions may provide  
8     little guidance as to the appropriate disposition on the merits.

9     *Id.* at 584 (internal quotation marks omitted) (addressing stay pending appeal of  
10    preliminary injunction enjoining enforcement of HHS interim final rule).

11           HHS’s cited authority does not support the all-purpose stay it seeks. *See*  
12    Mot. at 8. In both the *Hawai‘i* and *Washington* cases, the courts stayed their  
13    consideration of motions for temporary restraining orders in anticipation of the  
14    Ninth Circuit’s prompt review of TROs in related cases. *Hawai‘i v. Trump*,  
15    233 F. Supp. 3d 850, 856 (D. Haw. 2017); *Washington v. Trump*, No.  
16    C17-0141JLR, 2017 WL 1050354, at \*5 (W.D. Wash. Mar. 17, 2017). The stays  
17    were based on the likelihood that the Ninth Circuit’s decision would soon  
18    “change[] the applicable law or the relevant landscape of facts that need to be  
19    developed.” *Washington v. Trump*, 2017 WL 1050354, at \*5 (quoting *Hawai‘i*,  
20    233 F. Supp. 3d at 856). The circumstances here are markedly different. For one,  
21    HHS seeks a broad stay of *all* proceedings in this case while the Ninth Circuit  
22    reviews the preliminary injunction. *Contra Washington v. Trump*, 2017 WL  
1050354, at \*5 (staying “consideration of Plaintiffs’ TRO motion”; “The court,

1 | however, does not stay any other aspect of this litigation.”). For another, the  
2 | Ninth Circuit’s review of the preliminary injunction will not change “the  
3 | applicable law or relevant landscape of facts”; the parties will need to prepare for  
4 | a *final* adjudication on the merits based the “fully developed factual record”  
5 | regardless of the Ninth Circuit’s review of this Court’s interim ruling. *California*  
6 | *v. Azar*, 911 F.3d at 584; *see also Melendres*, 695 F.3d at 1001–02.

7 | *Leyva* is likewise inapposite. It permits a stay, where efficient and fair,  
8 | “pending resolution of independent proceedings which bear upon the case”;  
9 | there, the Ninth Circuit held that it may be appropriate for the district court to  
10 | stay employees’ non-arbitrable claims pending the resolution of their arbitrable  
11 | claims against their employer. *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d  
12 | 857, 863 (9th Cir. 1979). Here, by contrast, there are no “independent  
13 | proceedings” that create a risk of conflicting factual findings or inconsistent legal  
14 | obligations, as in *Levy*.<sup>3</sup> Again, this case will proceed to a final determination  
15 | regardless of the Ninth Circuit’s decision on the preliminary injunction.

16 | \_\_\_\_\_  
17 | <sup>3</sup> Even where such a risk exists, stays are warranted “[o]nly in rare  
18 | circumstances . . . .” *Landis*, 299 U.S. at 255; *see, e.g., Sanders v. Energy Nw.*,  
19 | No. 12-CV-0580-TOR, 2013 WL 12212554, at \*2 (E.D. Wash. Dec. 4, 2013)  
20 | (even where pending case may provide clarity, “the orderly course of justice is  
21 | not promoted by staying the case to await an answer now, before the parties have  
22 | filed their dispositive motions”); *Embree v. Ocwen Loan Servicing, LLC*, No.



1           Furthermore, even if there were a risk of “inconsistent rulings”—which  
 2 there is not, given the different applicable standards and “limited” scope of  
 3 appellate review<sup>4</sup>—such a risk would not justify a stay of *all* proceedings in this  
 4 case. Merits review is not imminent. No schedule for dispositive motions has  
 5 been set, and will not be set until—at the earliest—the next status conference  
 6 scheduled for August 1, 2019. *See* ECF No. 81. As HHS acknowledges, the next  
 7 step in this case is its production of the “voluminous” administrative record on  
 8 June 24, which Plaintiffs will have to review *prior* to merits briefing. Mot. at 9.  
 9 Plaintiffs have indicated they will need at least 30 days just to complete an initial  
 10 review of the record to assess its adequacy. ECF No. 71 at 5. Meanwhile, the  
 11 Court has stricken HHS’s previous June 24 deadline to respond to Plaintiffs’  
 12 Complaints (which may take the form of a motion to dismiss). *See* Mot. at 6; ECF  
 13 No. 81. Plaintiffs have repeatedly indicated they are amenable to further  
 14 extending the response deadline and are willing to collaborate with HHS on  
 15 \_\_\_\_\_  
 16 2:17-CV-00156-JLQ, 2017 WL 5632666, at \*3 (E.D. Wash. Nov. 22, 2017)  
 17 (declining to enter indefinite stay pending disposition of case that “could be  
 18 dispositive” of plaintiff’s claims).

19           <sup>4</sup> Appellate courts apply a “limited and deferential” abuse-of-discretion  
 20 standard of review for preliminary injunctions. *Cnty. House, Inc. v. City of Boise*,  
 21 490 F.3d 1041, 1047 (9th Cir. 2007); *see also Sports Form, Inc. v. United Press*  
 22 *Int’l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982).

1 scheduling matters. *See, e.g.*, ECF No. 71 at 6–7; ECF No. 80. A broad, indefinite  
2 stay is too drastic a response to any scheduling-related concerns that may exist.

3 **2. An indefinite stay would harm the State.**

4 HHS insists that “Plaintiffs will not suffer any harm from a stay,” Mot. at  
5 8, but disregards that a stay would harm the State’s ability to prepare its case,  
6 unduly delaying the ultimate resolution. As noted above, HHS’s deadline to  
7 produce the administrative record is June 24, 2019. Plaintiffs have raised the  
8 possibility that supplementation of the record and/or discovery may be needed  
9 before the case can be resolved on the merits. *See* ECF No. 71 at 5–6. An  
10 indefinite stay of all proceedings in this Court would prevent the State from  
11 pursuing such efforts—leaving it unable to prepare its case based on the full and  
12 complete record, and ultimately delaying the final resolution of its claims, for no  
13 valid reason. HHS ignores this completely, and its bare assertion that the State  
14 will not be harmed as long as this or another nationwide preliminary injunction  
15 remains in place—injunctions that HHS has appealed and asked multiple courts  
16 to stay—is meritless. *See* Mot. at 8.

17 Moreover, if the Ninth Circuit were to overturn or vacate this Court’s  
18 preliminary injunction, the immediate threat of severe, ensuing harm to  
19 Washington and its residents would likely impel the State to swiftly seek relief  
20 in this Court, such as an interim or permanent injunction (consistent with any  
21 appellate directives). Again, a stay of *all* proceedings pending appeal, which  
22 would have to be lifted prior to any further action, would delay the State’s efforts

1 to obtain such relief—especially if it had been unable to prepare in the interim  
2 with the benefit of the complete record. *Cf. Lockyer v. Mirant Corp.*, 398 F.3d  
3 1098, 1112 (2005) (vacating stay as abuse of discretion; “Unlike the plaintiffs in  
4 *CMAX* and *Levya*, who sought only damages for past harm, the Attorney General  
5 seeks injunctive relief against ongoing and future harm,” establishing “more than  
6 just a ‘fair possibility’ of harm”).

7 **3. An indefinite stay would undermine the orderly course of justice.**

8 For the reasons discussed above, this case should proceed as currently  
9 scheduled. A stay would disrupt the orderly course of justice and unduly harm  
10 the State without helping HHS avoid any “hardship or inequity.” Merely “being  
11 required to defend a suit” does not justify a stay. *Dependable Hwy.*, 498 F.3d at  
12 1066. Moving these proceedings forward promotes efficiency and serves the  
13 interests of justice because it enables the parties to prepare for an ultimate  
14 determination in this Court—which they must do regardless of the Ninth Circuit’s  
15 ruling on the preliminary injunction—and accounts for the seriousness of the  
16 interests at stake and the need for a timely resolution. *See California v. Azar*,  
17 911 F.3d at 584 (stay pending appeal was inappropriate; “this case could well  
18 have proceeded to a disposition without the delay in processing the interlocutory  
19 appeal”).

20 **IV. CONCLUSION**

21 The State of Washington respectfully requests that the Court deny  
22 Defendants’ Motion to Stay Proceedings Pending Appeal.

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DATED this 7th day of June, 2019.

ROBERT W. FERGUSON  
Attorney General

*/s/ Kristin Beneski*

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KRISTIN BENESKI, WSBA #45478  
JEFFREY T. SPRUNG, WSBA #23607  
PAUL M. CRISALLI, WSBA #40681  
Assistant Attorneys General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98014  
(206) 464-7744  
KristinB1@atg.wa.gov  
JeffS2@atg.wa.gov  
PaulC1@atg.wa.gov  
*Attorneys for Plaintiff State of Washington*

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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 day of June, 2019, at Seattle, Washington.

/s/ Kristin Beneski  
KRISTIN BENESKI, WSBA #45478  
Assistant Attorney General