

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

ROBERT W. FERGUSON
ATTORNEY GENERAL
Kristin Beneski, WSBA #45478
Laura K. Clinton, WSBA #29846
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 474-7744

**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;
UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES;
SEEMA VERMA, in her official
capacity as Administrator of the
Centers for Medicare and
Medicaid Services; and
CENTERS FOR MEDICARE
AND MEDICAID SERVICES,

Defendants.

NO. 2:20-CV-00047

JOINT MOTION TO
EXPEDITE AND TO SET A
BRIEFING SCHEDULE

FEBRUARY 27, 2020
WITHOUT ORAL
ARGUMENT

1 The parties in the above-captioned case move for expedited consideration
2 of this joint motion under Local Civil Rule 7(i)(2)(C). The parties respectfully
3 move the Court to set a briefing schedule for anticipated dispositive motions, as
4 set forth in the parties' positions below. Alternatively, the parties stand ready to
5 participate in a status conference to determine a briefing schedule should the
6 Court so desire.

7 On February 20, 2020, the parties met and conferred telephonically, but
8 could not reach an agreement on a briefing schedule. The parties primarily
9 disagree on whether to set a bifurcated schedule for anticipated summary
10 judgment motions. Good cause exists for this joint motion because it would be
11 more efficient to proceed on a determined briefing schedule prior to both parties'
12 anticipated dispositive motion filing dates, and to ensure the just and speedy
13 resolution of this case.

14 The parties' respective positions are set out more fully below.

15 Plaintiff State of Washington's Position:

16 On January 31, 2020, Plaintiff State of Washington filed and served its
17 Complaint in this matter against Defendants. ECF No. 1. The State of
18 Washington challenges Defendants' newly-promulgated regulation at 84 Fed.
19 Reg. 71,674 that requires health insurance carriers to send two separate bills each
20 month to enrollees in certain health care coverage plans, and instruct enrollees to
21 pay the separate bills in two separate transactions. *Patient Protection and*
22 *Affordable Care Act: Exchange Program Integrity*, 84 Fed. Reg. 71,674 (Dec. 27,

1 2019) (the Rule). Under this Rule, one bill must cover the premium cost of
2 coverage for all health care services except abortion, and the second bill must
3 address only the cost of covering abortion services. *Id.* The relevant provisions
4 of the Rule are scheduled to go into effect on June 27, 2020. 84 Fed. Red. 71,684,
5 71,710 (future 45 C.F.R. § 156.280).

6 In Counts I and II of its Complaint, the State of Washington contends that
7 if the Rule is enforced in Washington, it will impermissibly conflict with a
8 Washington statute mandating single-invoice billing, Wash. Rev. Code
9 § 48.43.074, in violation of non-preemption provisions in the Patient Protection
10 and Affordable Care Act. ECF No. 1 at ¶¶ 2, 4, 9, 35-36, 73, 80-85. In Counts
11 III–VII of its Complaint, the State contends the Rule violates the Administrative
12 Procedure Act in multiple respects, and that the Rule violates the Tenth
13 Amendment of the U.S. Constitution. *Id.* at ¶¶ 86-112.

14 In the interest of expediency and efficiency, the State of Washington
15 desires to initially move for partial summary judgment on Counts I and II, which
16 present purely legal issues: namely, whether the Rule improperly preempts
17 Washington state law in violation of the Affordable Care Act. Such a bifurcated
18 briefing schedule, with the first stage limited to the adjudication of Counts I and
19 II, promotes convenience and judicial economy without prejudicing Defendants.
20 The State’s anticipated motion for partial summary judgment on Counts I and II
21 would present purely legal issues; would not require any factual findings; would
22 not require examination of the administrative record or any other evidentiary

1 submissions external to the motion papers; and may resolve the case in its
 2 entirety, or at least simplify and streamline later briefing. Additionally, if the
 3 preemption issue is not resolved sufficiently in advance of the Rule's effective
 4 date of June 27, 2020, the resulting legal uncertainty would continue to cause
 5 prejudice for the State and the health insurance issuers providing qualified health
 6 care plans within Washington.

7 The State of Washington respectfully requests that the Court enter the
 8 following bifurcated briefing schedule, with proposed hearing dates for oral
 9 argument:

10 **Stage 1**: Plaintiff's Motion for Partial Summary Judgment (Counts I and II)

<u>Filing/Event</u>	<u>Deadline</u>
Plaintiff's Motion for Partial Summary Judgment	March 6, 2020
Defendants' Response	March 20, 2020
Plaintiff's Reply	March 27, 2020
Oral Argument	April 6, 2020, or at the Court's earliest convenience

Stage 2 (if applicable): Cross-Dispositive Motions on Remaining Counts

<u>Filing/Event</u>	<u>Deadline</u>
Defendants' Motion for Summary Judgment	April 17, 2020
Plaintiff's Cross-Motion/Response	May 8, 2020
Defendants Response/Reply	May 22, 2020
Plaintiff's Reply	June 5, 2020
Oral Argument	June 15, 2020, or at the Court's earliest convenience

Because the relevant provisions of the Rule are scheduled to go into effect on June 27, 2020, the State of Washington requests a ruling on the merits no later than June 26, 2020.

Defendants' Position:

Defendants contend that the Rule faithfully implements the Affordable Care Act's mandate that insurers offering plans on exchanges that cover certain abortion services "collect . . . a separate payment" for the portion of an enrollee's premium representing the actuarial value of those services, 42 U.S.C. § 18023(b)(2)(B), and more accurately reflects Congressional intent than the interpretation it supersedes.

This case can most fairly and efficiently be resolved with a single set of cross-motions for summary judgment and replies on all of Plaintiff's claims together. Indeed, the schedule Plaintiff proposes risks prolonging the very

1 | uncertainty that it complains about, as it contemplates at least two rounds of
2 | briefing with the possibility of piecemeal appeals to the Ninth Circuit.
3 | Defendants’ proposal, by contrast, would resolve the case in a single round of
4 | briefing on a faster schedule.

5 | Moreover, while Plaintiff’s first two claims do present pure questions of
6 | law amenable to resolution on the papers, that is also true of three other claims in
7 | the Complaint: Counts III and IV allege that the Rule contravenes 42 U.S.C.
8 | §§ 18023 and 18144 respectively, and Count VII alleges that the Rule violates
9 | the Tenth Amendment. Only two counts even arguably implicate the
10 | Administrative Record—Count V, alleging that the Rule is arbitrary and
11 | capricious, and Count VI, alleging that the intended exercise of enforcement
12 | discretion described in the preamble to the final rule was not presented for public
13 | notice and comment. And even these claims present purely legal issues, for in
14 | APA cases, district courts “do not resolve factual issues, but operate instead as
15 | appellate courts resolving legal questions.” *James Madison Ltd. by Hecht v.*
16 | *Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996); *see also Herguan Univ. v.*
17 | *Immigration & Customs Enforcement*, 258 F. Supp. 3d 1050, 1063 (N.D. Cal.
18 | 2017) (“When a party seeks review of agency action under the APA before a
19 | district court, the district court judge sits as an appellate tribunal.” (cleaned up)).
20 | Here, the Rule acknowledges and responds to each of the various policy concerns
21 | that Plaintiff raises, and the Court need only determine whether Defendants
22 | considered the relevant factors in promulgating the Rule, rather than

1 independently assess the weight due to each factor. *See Motor Vehicle Mfrs.*
 2 *Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).
 3 Likewise, even if an agency's intent to exercise enforcement discretion were
 4 subject to notice and comment, the Court would need only decide whether it was
 5 a "logical outgrowth of comments" received during the rulemaking process. *See,*
 6 *e.g., Envmt'l Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 852 (9th Cir. 2003).

7 In short, a single round of summary judgment briefing would avoid
 8 unnecessarily delaying the Court's consideration of challenges to the Rule, avert
 9 piecemeal appeals, and allow for an expeditious resolution of the entire case on
 10 a faster schedule than Plaintiff proposes. To that end, Defendants propose the
 11 following schedule for cross-motions for summary judgment:

Filing/Event	Deadline
Defendants to file certified Administrative Record	March 20, 2020
Plaintiff's Motion for Summary Judgment	April 3, 2020
Defendants' Response and Cross- Motion for Summary Judgment	April 24, 2020
Plaintiff's Reply and Response to Defendants' Cross-Motion	May 15, 2020
Defendants' Reply	May 29, 2020
Oral Argument	At the Court's convenience

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

DATED this 27th day of February, 2020.

ROBERT W. FERGUSON
Attorney General

/s/Kristin Beneski

Kristin Beneski, WSBA #45478
Laura K. Clinton, WSBA #29846
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98014
(206) 464-7744
kristin.beneski@atg.wa.gov
laura.clinton@atg.wa.gov

Counsel for Plaintiff

JOSEPH H. HUNT
Assistant Attorney General

JOSEPH H. HARRINGTON
United States Attorney

ERIC B. BECKENHAUER
Assistant Branch Director

/s/ Bradley P. Humphreys

BRADLEY P. HUMPHREYS
CORMAC A. EARLY
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-0878
Fax: (202) 616-8460
Email: Bradley.Humphreys@usdoj.gov

Counsel for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

I hereby certify 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 27th day of February, 2020 at Seattle, Washington.

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

ROBERT W. FERGUSON
ATTORNEY GENERAL
Kristin Beneski, WSBA #45478
Laura K. Clinton, WSBA #29846
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 474-7744

**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;
UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES;
SEEMA VERMA, in her official
capacity as Administrator of the
Centers for Medicare and
Medicaid Services; and
CENTERS FOR MEDICARE
AND MEDICAID SERVICES,

Defendants.

NO. 2:20-CV-00047

ORDER GRANTING JOINT
MOTION TO EXPEDITE
AND TO SET A BRIEFING
SCHEDULE
[PROPOSED]

FEBRUARY 27, 2020
WITHOUT ORAL
ARGUMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

ORDER

The parties' Joint Motion to Expedite and Set a Briefing Schedule is **GRANTED**.

Based upon the joint motion of the parties, **IT IS ORDERED** that the following briefing schedule will apply with respect to the parties' forthcoming motions:

DATED this ____ day of February, 2020.

THE HONORABLE STANLEY A. BASTIAN

Presented by:
ROBERT W. FERGUSON
Attorney General

/s/Kristin Beneski
Kristin Beneski, WSBA #45478
Laura K. Clinton, WSBA #29846
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98014
(206) 464-7744
kristin.beneski@atg.wa.gov
laura.clinton@atg.wa.gov

Counsel for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

I hereby certify 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 27th day of February, 2020 at Seattle, Washington.

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