



U.S. Department of Justice  
Civil Division, Federal Programs Branch  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530

**By ECF**

October 26, 2020

The Honorable Steven M. Gold  
United States Magistrate Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 10007

Re: *Tanya Asapansa-Johnson Walker, et al. v. Alex M. Azar II, et al.*, No. 20-cv-02834 (FB) (SMG)

Dear Judge Gold:

The Department of Justice represents defendants Alex M. Azar II, in his official capacity as the Secretary of the United States Department of Health and Human Services (“HHS”), and HHS. Defendants (collectively, the “Defendants” or the “agency”) respectfully ask that the Court stay further district court proceedings pending the final resolution of Defendants’ appeal from this Court’s Order granting Plaintiffs’ motion for preliminary injunction. Such a stay would not prejudice Plaintiffs in light of the preliminary injunctions currently in place (both from this Court and from another district court in the District of Columbia), and would conserve resources of the Court and the parties, and minimize the risk of conflicting decisions. Alternatively, Defendants respectfully submit that the Court should at least stay further proceedings until the Court resolves the pending dispute as to the proper scope of the Court’s preliminary injunction order. In any event, should this Court choose to deny Defendants’ request for a stay, Defendants respectfully ask, in the alternative, for an extension of time to respond to the complaint until twenty-one days after any such denial. Defendants have conferred with Plaintiffs’ counsel about the relief sought in this letter, but Plaintiffs’ counsel did not provide Defendants’ counsel with their position as of the time of filing.

By way of background, this action challenges the validity of a 2020 rule (the “2020 Rule”) promulgated by HHS to implement Section 1557 of the Affordable Care Act, the statute’s anti-discrimination provision. Plaintiffs sought a preliminary injunction, focusing on the alleged future impact of the rule’s repeal of a 2016 definition of discrimination on the basis of sex. Defendants argued, *inter alia*, that Plaintiffs lack standing, and that they were unlikely to succeed on the merits of their challenge. On August 17, 2020, this Court preliminarily enjoined defendants from enforcing the repeal of this provision (the “PI Order”). ECF No. 23. Plaintiffs thereafter asked the Court to “confirm” that the Court had preliminarily enjoined the 2020 Rule “in its entirety,” not just the repeal of the 2016 definition. At the Court’s request, the parties submitted letter briefs outlining their respective positions on this issue. On October 17, Defendants appealed this Court’s PI Order to the Second Circuit Court of Appeals. *See* Notice of Appeal, ECF No. 32. Defendants’ deadline to answer or otherwise respond to the complaint is currently October 30, 2020.

1. Defendants respectfully submit that the Court should stay further proceedings, including the deadline to respond to the complaint, pending resolution of Defendants’ appeal of the PI Order to the Second Circuit. “[T]he power to stay proceedings is incidental to the inherent power in every court to ‘control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96 (2d Cir. 2012) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254, (1936)). “In deciding whether a stay

is appropriate, courts typically consider: ‘(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.’ *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 621–22 (S.D.N.Y. 2012). “[W]here it is efficient for a trial court’s docket and the fairest course for the parties, a stay is proper, even in cases where the issues in [other] proceedings are not necessarily controlling on the action before the court.” *Id.* at 622 (internal formatting omitted).

Here, the Court should stay further district court proceedings pending appeal because a ruling by the Second Circuit is likely to provide substantial, if not dispositive, guidance to this Court and the parties in resolving the jurisdictional and merits issues presented in this case. Moreover, a stay could not possibly prejudice Plaintiffs (or anyone else) because the Court has already granted Plaintiffs’ request for a preliminary injunction.

Weighing the relevant factors confirms that a stay is warranted. First, a stay of proceedings will not prejudice Plaintiffs because the Court has already granted their request for a preliminary injunction. The proposed stay would not affect the preliminary injunction at all, and would merely stay further litigation in the district court pending a decision from the Second Circuit on potentially dispositive issues. *See, e.g., Washington v. Trump*, 2017 WL 1050354, at \*5 (W.D. Wash. Mar. 17, 2017) (finding that any prejudice to plaintiffs from stay would be “minimal” in light of the preliminary injunctive relief already in effect); *Hawaii v. Trump*, 233 F. Supp. 3d 850, 855 (D. Haw. 2017) (same); *Boardman v. Pac. Seafood Grp.*, 2015 WL 13744253, at \*2 (D. Or. Aug. 6, 2015) (granting stay of proceedings while defendants pursued appeal of preliminary injunction, and finding stay would not harm plaintiffs because of the injunction in place).

By contrast, requiring Defendants to defend this action without waiting for the Second Circuit’s views on jurisdictional and merits issues raised in this case would be a wasteful and potentially pointless exercise. *See, e.g., Bahl v. New York Coll. of Osteopathic Med. of New York Inst. of Tech.*, 2018 WL 4861390, at \*3 (E.D.N.Y. Sept. 28, 2018) (finding that it would prejudice defendant to deny stay where related proceedings would “have a direct impact on the instant action”). If the district court proceedings continue while the appeal is ongoing, Defendants will have to litigate the same issues in this Court that will be under review in the Second Circuit, including threshold jurisdictional issues pertaining to Plaintiffs’ standing, as well as the merits of their challenge to the 2020 Rule. It makes no sense to litigate such issues simultaneously. Indeed, the Second Circuit ruling could very well prove fully or partly dispositive of the case, as the appellate court might agree with Defendants (for example) that Plaintiffs lack standing to assert their challenge. *See Washington v. HHS*, 2020 WL 5095467, at \*12 (W.D. Wash. Aug. 28, 2020) (dismissing challenge to the 2020 Rule on standing grounds and finding, *inter alia*, that plaintiff had failed to show that the repeal of the 2016 definition would lead to increased discrimination). In any case, given the “significant overlap” between the issues on appeal and the issues in this Court, and the lack of any prejudice to Plaintiffs, the first two factors support granting Defendants’ request for a stay. *See Bahl*, 2018 WL 4861390, at \*3 (“significant overlap” in issues is a “solid ground upon which to issue a stay”) (quoting *Fried v. Lehman Bros. Real Estate Assocs. III*, 2012 WL 252139, at \*5 (S.D.N.Y. Jan. 25, 2012)).

Given the obvious benefits to judicial economy of awaiting further guidance from the Second Circuit, the remaining factors also support a stay pending appeal of the PI Order. *See id.* (considering third, fourth and fifth factors together); *Gonzales*, 2020 WL 738150, at \*3 (considering factors together “because issues of judicial economy affect the interests of non-parties and the public”). As noted above, the Second Circuit ruling may prove dispositive. *See, e.g., McCracken v. Verisma Sys.*, 2018 WL

4233703, at \*4 (W.D.N.Y. Sept. 6, 2018) (public has an interest in judicial economy, which weighs “against the investment of court resources that may prove to have been unnecessary.”); *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 644 (S.D.N.Y. 2012) (same). And even if it is not, that court’s opinion would certainly provide guidance on relevant legal issues, and facilitate further proceedings in this case. See *Marine Travelift, Inc. v. K. Graefe & Sons Corp.*, 2016 WL 8711453, at \*2 (S.D.N.Y. June 3, 2016) (stay warranted pending other proceedings because decision at least “may narrow the issues and simplify this case”); *Nuccio v. Duve*, 2015 WL 1189617, at \*5 (N.D.N.Y. Mar. 16, 2015) (“Permitting this action to proceed while judicial resources elsewhere are already devoted to determining the exact legal questions at issue here would be an inefficient use of judicial time and resources.”); *United States ex rel. Wood v. Allergan, Inc.*, 2017 WL 1843288, at \*2 (S.D.N.Y. May 4, 2017) (“[A]s the Court sees little reason to proceed until the Second Circuit resolves whether to accept the case for interlocutory review (and, if it does, until the Circuit rules on appeal), the case is stayed until [the defendant’s] time to file a notice of interlocutory appeal lapses or, if it does file a notice of interlocutory appeal, until the Second Circuit either declines to grant interlocutory review or resolves the case on appeal.”). A stay will also minimize the risk of conflicting decisions that could result from simultaneously litigating the same issues in this Court and in the Second Circuit. See *Babl*, 2018 WL 4861390, at \*4 (finding that a stay will serve court’s interests because it will “minimize the possibility of conflicts between different courts”) (citing cases).

For precisely these reasons, district courts in this Circuit frequently stay proceedings where issues in the litigation are pending before a higher court, see *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 622 (S.D.N.Y. 2012) (collecting cases), sometimes acting *sua sponte* to do so, see, e.g., *Jugmohan v. Zola*, 2000 WL 222186, at \*5 (S.D.N.Y. Feb. 25, 2000) (*sua sponte* staying case where Supreme Court granted certiorari on issue raised by defendant in a motion to dismiss); *Kunsmann v. Conkright*, 2018 WL 9781177, at \*1 (W.D.N.Y. June 25, 2018) (*sua sponte* staying case pending decision from the Second Circuit that would “likely impact issues pending in this case,” and explaining that it would be premature to rule on dispositive motions “without the benefit of an appellate ruling” creating the risk of inconsistencies with the Second Circuit ruling and further delay).

The grounds for such a stay are particularly compelling where, as here, the higher court will be considering issues bearing on Article III standing, and the district court’s jurisdiction to proceed at all. *Gonzalez*, 2020 WL 738150, at \*3 (“This is especially true for issues that determine a district court’s jurisdiction to hear a case under Article III.”); *Zink v. First Niagara Bank*, 2016 WL 787963, at \*4 (W.D.N.Y. Mar. 1, 2016) (finding *sua sponte*, in light of jurisdictional questions regarding plaintiffs’ standing, that a stay is appropriate pending relevant decision from Supreme Court). “The requirement that jurisdiction be established as a threshold matter ‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1988) (internal quotation omitted). And given that different courts have assessed standing to challenge this rule in different ways, the benefit of Second Circuit guidance on the issue is all the more important. See *Washington*, 2020 WL 5095467, at \*12 (dismissing challenge to the 2020 Rule on standing grounds because plaintiff had failed to show rule would result in increased discrimination); *Whitman-Walker Clinic, Inc. v. HHS*, 2020 WL 5232076 (D.D.C. Sept. 2, 2020) (finding that plaintiffs lacked standing to challenge certain aspects of the 2020 Rule).

For these reasons, Defendants respectfully request that the Court stay further proceedings pending resolution of Defendants’ appeal of this Court’s PI Order in the Second Circuit.

2. Alternatively, if the Court is not inclined to grant a stay of that duration, Defendants respectfully ask the Court to stay further proceedings, including Defendants’ October 30 deadline to

respond to the Complaint, until the Court resolves the pending dispute about the scope of this Court's PI Order. In asking the Court to enjoin the "entirety" of the 2020 Rule, or in the alternative, to enjoin some seventeen provisions that Plaintiffs have listed in their September 15 Letter to the Court, Plaintiffs are effectively seeking to expand the scope of relief granted in the PI Order beyond the terms of that order. *See* ECF No. 28. Defendants were previously granted an extension of the time to respond to the complaint until October 30, in large part to "review this Court's order . . . before determining how to respond to plaintiffs' complaint." ECF No. 25. But Plaintiffs' recent requests for additional relief under the PI Order, which were submitted in response to this Court's order, and which the Court has not yet denied, have created uncertainty about the scope of preliminary relief this Court intends to grant. Thus, Defendants respectfully submit that further proceedings should be stayed until the Court has resolved that uncertainty, at which time Defendants should be allowed twenty-one days to decide how to respond to the complaint in light of the Court's order.

3. Finally, if the Court decides to deny a stay of any sort, Defendants respectfully request an extension of the current October 30 deadline to respond to the Complaint until twenty-one days after any such denial. Good cause supports the requested extension. The requested extension would allow Defendants to obtain a Court ruling on their request for a stay, which Defendants have sought in good faith and which, in their view, is supported by good cause and the interests of judicial economy. Defendants further submit that twenty-one days is a reasonable amount of time to respond to this complaint, which is nearly seventy pages and 314 paragraphs long. Defendants also note that two of the attorneys assigned to these cases (including counsel of record in this case) have recently left the office to go on paternity leave and a detail, respectively. Defendants have requested one prior extension of time to respond to the complaint, which was granted.

Respectfully submitted,

JEFFREY BOSSERT CLARK  
Acting Assistant Attorney General

MICHELLE R. BENNETT  
Assistant Branch Director  
/s/ Liam C. Holland

LIAM C. HOLLAND  
STEPHEN EHRLICH  
Trial Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street NW  
Washington, D.C. 20005  
Telephone: (202) 514-4964  
Facsimile: (202) 616-8470  
Email: Liam.C.Holland@usdoj.gov

*Counsel for Defendant*

CC: All Counsel of Record (by ECF)