UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR *et al.*,

Defendants.

Civil Action No. 18-cv-1747 (JDB)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, TO ENTER DEFENDANTS' PROPOSED BRIEFING SCHEDULE AND OPPOSITION TO PLAINTIFFS' MOTION FOR THE COURT TO ENTER PLAINTIFFS' PROPOSED BRIEFING SCHEDULE

The Plaintiff States' summary judgment motion—filed well before the time within which the Department has to raise its threshold Rule 12 defenses *and* before the Department has had an opportunity to compile the administrative record on which the Plaintiff States' Administrative Procedure Act claims must be resolved (assuming that the Court has jurisdiction to reach the merits of their claims)—is premature. Nevertheless, the Plaintiff States ask this Court to order the Department to address both jurisdiction and the merits of Plaintiffs' motion and to compile the administrative record by October 1, 2018—nine days before the deadline for the Department to file its first responsive pleading. *See* Fed. R. Civ. P. 12(a)(2)-(3). This request is unreasonable. It would require a full and expedited briefing on the validity of the regulation before giving the Department a chance to compile the administrative record, identify any jurisdictional defects, or raise other threshold Rule 12 defenses.

Allowing the Department to properly brief these threshold issues is precisely the reason that the Department moved to stay its response to the Plaintiff States' early summary judgment motion

pending the Court's resolution of the Department's forthcoming motion to dismiss. None of the Plaintiff States' attempts to convince this Court otherwise has merit. The Plaintiff States complain about the challenged rule's "harm on the insurance market," which they claim "will only grow" over the coming months and, according to them, weighs in favor of "prompt resolution" of this matter. Pls.' Mem. of Points & Authorities in Opp. to Defs.' Mot. to Stay Summ. J. Proceedings or to Enter Defs.' Proposed Briefing Schedule & in Support of Pls.' Cross-Mot. to Enter Pls.' Proposed Briefing Schedule ("Pls.' Opp. Br.") at 4-5, ECF No. 37-1 (Sept. 7, 2018). But if such alleged harm is the genuine concern motivating the Plaintiff States here, there is a mechanism that allows for expedited briefing: Rule 65. Yet the Plaintiff States have not invoked Rule 65 by filing a motion for preliminary injunction; rather, they have attempted to bypass it by proposing a merits briefing pursuant to which the Department would have less than three weeks to simultaneously compile the administrative record and coordinate the drafting and filing of a brief that raises Rule 12 threshold defenses and merits arguments. In essence, they seek to use Rule 56 as a back door to obtain expedited injunctive relief, effectively avoiding their burden to show imminent, irreparable harm under Rule 65. The Court should not permit the Plaintiff States to circumvent the requirements of under Rule 65 under the guise of expedited summary judgment briefing.

Similarly unavailing is the Plaintiff States' suggestion that a litigation schedule agreed to in an entirely different matter should support entry of a similar schedule here. The reliance on briefing schedules entered in other Department cases that are procedurally and substantively inapposite to this one is an insufficient basis with which to deviate from the ordinary course of litigation.

Accordingly, for the reasons set forth below and in the Department's opening brief, the Court should grant the Department's stay motion. Alternatively, the Court should enter the Department's proposed briefing schedule.

ARGUMENT

I. The Plaintiff States Present No Justification For Denying A Stay of Summary Judgment Briefing.

This Court has the inherent authority to "control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also* Defs.' Mot. to Stay Summ. J. Proceedings or to Enter Defs.' Proposed Briefing Schedule & in Support of Pls.' Cross-Mot. to Enter Pls.' Proposed Briefing Schedule ("Defs.' Stay Mot.") at 5, ECF No. 35 (Sept. 4, 2018) (citing *United States v. W. Elec. Co.*, 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995); *United States v. W. Elec. Co.*, 158 F.R.D. 211, 220 (D.D.C. 1994)). A stay of summary judgment briefing here is appropriate given the Plaintiff States' lack of immediate—indeed, any—harm and the time needed to compile the administrative record; this in turn preserves resources for the Court and the parties by avoiding potentially unnecessary summary judgment proceedings.

The Plaintiff States present no legal reason why the Court cannot first permit briefing on its jurisdiction before addressing summary judgment. Instead, the Plaintiff States complain about the regulation's purported "harm on the insurance markets" that "will only grow" between now and April 1, 2019.[1] *See* Pls.' Opp. Br. at 4-5. But this merely alleges harm to "insurance markets"—*not* direct

[1] The Plaintiff States assert that the Court should enter their proposed briefing schedule because of their concerns about disruption to markets caused by the September 1, 2018 and January 1, 2019 applicability dates. Pls.' Opp. Br. at 2-3. As the Department explained in the Preamble to the Final Rule, the September 1, 2018 and January 1, 2019 applicability dates apply to entities over which the States already have some oversight. The September 1, 2018 date involves new or expanded fully-insured AHPs, which would obtain insurance from insurers currently regulated by the States, and the January 1, 2019 date involves the expansion of existing self-insured AHPs, which are similarly already regulated by the states. *See* 83 Fed. Reg. at 28954. In any event, the Preamble projects that "AHPs' growth and impacts are likely to be more gradual than the phased applicability dates alone would allow," noting that some comments suggested that many of the most substantial AHPs will delay modifying their programs until calendar year 2020. *Id.* The Plaintiff States have not identified any newly created AHPs. The Department's proposed briefing schedule, by requiring briefing to conclude months before the April 1, 2019 applicability date for new self-insured AHPs, is sensitive to States' asserted concerns about the creation of new, self-insured AHPs.

harm to the Plaintiff States themselves. It also provides further support to the Department's position that the Court should decide jurisdiction first, particularly the Plaintiff States' standing,[2] before the Court and the parties expend resources on summary judgment briefing and argument.

Lacking any particular justification for their request, the Plaintiff States also argue that as a procedural matter "nothing bars" the parties from briefing the merits and jurisdiction together. Pls.' Opp. Br. at 6. This is true. But Article III and judicial efficiency and economy counsel against parallel briefing of jurisdiction and summary judgment. *See, e.g.*, *United Transp. Serv. Employees of Am., CIO v. Nat'l Mediation Bd.*, 179 F.2d 446, 454 (D.C. Cir. 1949) (holding that until the court determines whether it has jurisdiction to reach the merits of plaintiffs' claim, defendants "should not be put to the trouble and expense of any further proceeding, and the time of the court should not be occupied with any further proceeding"). Neither this Court nor the parties' time is well-served by engaging in a "struggle over the substance of" the Plaintiffs States' claims given the Court's "first and fundamental" obligation to resolve the substantial question of its jurisdiction over this suit. *Democratic Rep. of Congo v. FG Hemisphere Assocs., LLC*, 508 F.3d 1062, 1064 (D.C. Cir. 2007) (jurisdictional defenses should be raised at the outset to avoid unnecessary litigation).

[2] The Court should not be persuaded by the Plaintiff States' attempt to brush aside the jurisdictional defect underlying their suit—namely, their lack of standing. In a footnote, the Plaintiff States assert harm as sovereigns based on a statement in the proposed rule regarding certain non-insurance laws, Pls.' Opp. Br. at 6 n.3 (citing 83 Fed. Reg. at 617), but the final rule clarifies "that [it] does not change existing ERISA preemption rules that authorize broad State insurance regulation of AHPs," Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 28,912-01, 28,925 (June 21, 2018) ("Final Rule"). States cannot expect their non-insurance laws related to ERISA to be saved from preemption. *E.g.*, 29 U.S.C. §§ 1144(a), (b)(2)(A), (b)(6); *see generally Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365-66 (2002). Similarly unavailing is the Plaintiff States' assertion that they have standing because the Final Rule allows States time to build and implement adequate supervision and possible infrastructure to prevent fraud and abuse. Pls.' Opp. Br. 6 n.3. While the regulation allows States time to build infrastructure, it does not dictate or mandate any particular course of action, and a State's choice to take certain actions does not give the State standing even if it incurs a cost as an incidental consequence of that choice. *See Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam).

Accordingly, for these reasons and those set forth in the Department's opening brief, the Court should grant the Department's stay motion pending resolution of the Department's forthcoming motion to dismiss.

II. Alternatively, the Court Should Enter the Department's Proposed Briefing Schedule.

The Department alternatively requests that the Court enter its proposed briefing schedule, which accounts for the Department's rights under the Federal Rules of Civil Procedure and the local rules, including the time needed to properly assemble the administrative record, and the Plaintiff States' interest in a "prompt resolution" of this matter. In response to the Department's alternative request, the Plaintiff States have proffered their own proposed briefing schedule pursuant to which the Department would be required to (1) file both its opening brief *and* the certified list of administrative record contents in fewer than three weeks (*i.e.*, by October 1, 2018); and (2) draft and coordinate the review of its reply brief during the Thanksgiving holiday in order to comply with a November 27, 2018 deadline. The Court should not countenance the Plaintiff States' effort to obtain expedited injunctive relief through the back door of Rule 56.

If, as the Plaintiff States claim, the challenged rule is "unleash[ing] harm on the insurance markets" that "will only grow" between now and April 1, 2019, *see* Pls.' Opp. Br. at 4-5, the proper course is to seek preliminary injunctive relief under Rule 65. The Plaintiff States' decision not to do so tacitly acknowledges that they suffer no risk of irreparable injury (nor, as the Department's forthcoming motion to dismiss will demonstrate, any injury at all). The Plaintiff States should not be permitted to use their early summary judgment motion as an attempt to circumvent their obligation to prove to this Court that their purported harms are imminent, irreparable, and are outweighed by the public interest as required for expedited injunctive relief.

It is for this reason that the Plaintiff States' reliance on the merits briefing schedule entered in in *Chamber of Commerce of the United States, et al. v. Thomas E. Perez*, No. 1:16-CV-01476 (N.D. Tex. June

24, 2016) ("the *Chamber of Commerce* Texas litigation"), is entirely misplaced. In that case, the Department only agreed to an expedited merits briefing schedule because it had *previously* agreed to compile the administrative record and file cross-motions for summary judgment on an expedited schedule in *National Association for Fixed Annuities v. Department of Labor*, No. 1:16-CV-1035 (RDM) (D.D.C.) ("*NAFA*"). *NAFA*, which involved a challenge to the same rule at issue in the *Chamber of Commerce* Texas litigation, was filed one day after the latter case. However, unlike the plaintiffs in the *Chamber of Commerce* Texas litigation, the *NAFA* plaintiffs moved for preliminary injunctive relief on the same day that they filed their complaint. *NAFA*, ECF Nos. 1, 5 (June 2, 2016). During a June 6, 2016 status conference, the *NAFA* plaintiffs agreed to hold in abeyance their preliminary injunction motion in exchange for the Department's agreement to expedite summary judgment briefing in that case. *See* Scheduling Order (June 7, 2016).

Notably (and in direct contrast to the schedule that the Plaintiff States propose here), under the *NAFA* briefing schedule, the Department had almost two full months from the date of the June 6, 2018 status conference (*i.e.*, until August 1, 2016) to compile the administrative record in the case and file the certified list of administrative record in the case. *See id.* The Department had the same deadline in the *Chamber of Commerce* case, *i.e.*, August 1, 2016. *See* Scheduling Order at 2, ECF No. 45.

In this case, the Plaintiff States' proposed briefing schedule would give the Department fewer than three weeks to simultaneously compile a complete and accurate administrative record *and* brief Rule 12 defenses *and* summary judgment.[3] Contrary to the Plaintiff States' assertion, this is neither "feasible" nor reasonable. Pls.' Opp. Br. at 7. The need to expedite proceedings here is even less

[3] In addition to being in an entirely different procedural posture than this case, the Department did not raise threshold questions regarding plaintiffs' standing in either the *Chamber of Commerce* Texas Litigation or the *NAFA* (District of Columbia) case. This is in direct contrast to the Department's forthcoming motion to dismiss, which will directly challenge the Plaintiff States' standing to pursue their claims.

acute than in *NAFA* or *Chamber of Commerce* where there was a pending motion for preliminary injunction hanging over the proceedings. Indeed, under the Plaintiff States' proposed briefing schedule, the Department would in fact have *less* time to compile the administrative record than the agency was afforded in both *NAFA* and *Chamber of Commerce*.

Nor may the Plaintiff States' overcome this conclusion by speculating about the contents of, and the amount of time it will take to compile the administrative record. *See* Pls.' Opp. Br. at 7. It is the Department not the Plaintiff States which determines the contents of the administrative record in this case. *See Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. Nov. 4, 2009) ("[I]t is the responsibility of the deciding agency to compile the administrative record . . . ."). The Department has reasonably concluded that it will need until November 2, 2018, to compile a complete and accurate administrative record—about the same time as in *Chamber of Commerce*. *See* Defs.' Stay Mot. at 10.

Under these circumstances, if the Court is inclined to deny the Department's motion to stay its response to the Plaintiff States' summary judgment motion, the Department respectfully requests that the Court grant the agency's alternative request for entry of the following proposed briefing schedule, which, as the Department explained in its opening brief and herein, reasonably accounts for the Department's right under the Federal Rules of Civil Procedure and the Local Rules to raise its Rule 12 threshold defenses and the Plaintiff States' desire to obtain "a prompt resolution" of this matter:

November 2, 2018: The Department will file the certified list of administrative record contents.

November 9, 2018: The Department will file its combined motion to dismiss, or, in the alternative, cross-motion for summary judgment and opposition to the Plaintiff States' motion for summary judgment.

December 7, 2018: The Plaintiff States will file their combined opposition to the Department's motion to dismiss, or, in the alternative, cross-motion

for summary judgment and reply in support of the Plaintiff States' motion for summary judgment.

January 18, 2019: The Department will file its reply in support of its motion to dismiss, or, in the alternative, cross-motion for summary judgment.

CONCLUSION

Accordingly, for the foregoing reasons and those set forth in the Department's stay motion, the Court should grant the Department's motion and stay the Department's response to the Plaintiff States' summary judgment motion pending resolution of the Department's forthcoming motion to dismiss. If, however, the Court finds that a stay is not warranted, the Department respectfully requests that the Court enter the Department's proposed briefing schedule and deny the Plaintiff States' motion for entry of their proposed schedule.

Dated: September 12, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2018, I electronically filed the foregoing Reply in Support of Motion to Stay and in Opposition to Plaintiffs' Motion to Enter Plaintiffs' Proposed Briefing Schedule using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: September 12, 2018

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