IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants*.	Case No. 1:19-cv-01103-RDB

MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL

Defendants respectfully move for a stay of further district court proceedings pending appeal of this Court's Order granting Plaintiff's Motion for Preliminary Injunction, ECF No. 44. The reasons for this Motion are set forth in the accompanying Memorandum of Points and Authorities.

Dated: July 22, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ R. Charlie Merritt
BRADLEY P. HUMPHREYS
(D.C. Bar No. 988057)
R. CHARLIE MERRITT
(VA Bar No. 89400)
Trial Attorneys, U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Phone: (202) 616-8098
E-mail: robert.c.merritt@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff*, v. ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS, *Defendants*.	Case No. 1:19-cv-01103-RDB

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL

INTRODUCTION

The Court should stay further district court proceedings pending appellate review of the Court's order granting a preliminary injunction because, as explained below, a ruling by the Fourth Circuit is likely to resolve the central merits issues presented in this case. At the very least, the Fourth Circuit's disposition of the appeal is almost certain to substantially shape and significantly narrow the issues in this Court. Under these circumstances, litigating this case to a decision now would be inefficient, waste the resources of the Court and the parties, and potentially result in inconsistent rulings that may need to be corrected in light of the Fourth Circuit's decision.

Plaintiff, moreover, will not be harmed for much the same reason: because the appeal is likely to be outcome-determinative with respect to key issues in this case, Plaintiff cannot plausibly be harmed by failing to conduct proceedings now that will likely be superseded by whatever the Fourth Circuit decides. And as the Fourth Circuit has already determined in granting Defendants' motion for a stay of the preliminary injunction pending appeal, Plaintiff cannot satisfy the standard for emergency injunctive relief pending appeal, including by showing any irreparable harm. The Court should, therefore, grant Defendants' motion to stay proceedings pending appeal.

PROCEDURAL HISTORY

On March 4, 2019, the Department of Health and Human Services (HHS) published the final rule at issue in this litigation. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule). More than a month later, on April 12, 2019, Plaintiff filed its complaint asserting Administrative Procedure Act (APA) and

constitutional challenges to the Rule. ECF No. 1 ("Compl."). Plaintiff moved for a preliminary injunction on April 16. ECF No. 11.

On May 30, the Court granted Plaintiff's motion and ordered that the Final Rule is "enjoined as to enforcement in the State of Maryland." ECF No. 44 (PI Order). On June 6, Defendants filed a notice of appeal of the PI Order to the Fourth Circuit, ECF No. 48, and moved this Court for a stay of the preliminary injunction pending appeal, ECF No. 49. The Court denied the motion on June 19. ECF No. 56. On June 20, Defendants moved the Fourth Circuit for a stay of the preliminary injunction pending its consideration of Defendants' appeal, *see* Mot. for Stay Pending Appeal, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir. June 20, 2019), ECF No. 9, and a divided Fourth Circuit panel granted that motion on July 2, Order, *id*., ECF No. 23. Plaintiff has since moved for reconsideration en banc, Emergency Mot. for Reh'g En Banc to Vacate Stay of Inj., *id*., ECF No. 27, and Defendants have opposed that motion, Appellants' Resp. to Appellee's Emergency Mot. for Recons. En Banc, *id*., ECF No. 36. The Fourth Circuit has expedited consideration of the merits of Defendants' appeal, with briefing set to conclude on

August 19, 2019, and oral argument scheduled for September 18, 2019. *See* Order, *id*., ECF No. 24.

Although two district courts in Oregon and Washington issued nationwide preliminary injunctions against the Rule, both injunctions have been stayed pending appeal, *see California v. Azar*, 927 F.3d 1068 (9th Cir. 2019), and the Final Rule is currently in effect nationwide.[1]

STANDARD OF REVIEW

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). It may exercise this discretion to promote "economy of time and effort for itself, for counsel, and for litigants." *DeRosa v. Walsh*, 541 F. App'x. 250, 252 (4th Cir. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "When considering a discretionary motion to stay, courts typically examine three factors: (1) the impact on the orderly course of justice, sometimes referred to as judicial economy, measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected from a stay; (2) the hardship to the moving party if the case is not stayed; and (3) the potential damage or prejudice to the non-moving party if a stay is granted." *Int'l Refugee Assistance Project v. Trump ("IRAP")*, 323 F. Supp. 3d 726, 731 (D. Md. 2018) (collecting cases).

ARGUMENT

A stay of district court litigation pending final resolution of Defendants' appeal of the PI Order is clearly warranted and is by far the most prudent course at this juncture. The Fourth

[1] Although the Ninth Circuit has granted reconsideration en banc of Defendants' motions for a stay of the preliminary injunctions pending appeal, the en banc court subsequently made clear that it had not vacated the panel's stay order, and then denied plaintiffs' motions for an administrative stay of the stay order. *See* Order, *California v. Azar*, No. 19-15974 (9th Cir. July 11, 2019), ECF No. 86.

Circuit's disposition of the appeal is almost certain to be controlling with respect to the central merits issues presented in this case, rendering additional proceedings duplicative and wasteful.

1. In its Memorandum Opinion supporting its PI Order, the Court determined that aspects of the Final Rule likely violate "provisions of the Affordable Care Act, 42 U.S.C. § 18114 . . . and Congress' nondirective mandate." Mem. Op. at 3, ECF No. 43 ("PI Opinion"). Defendants respectfully disagree with these conclusions but, regardless, whether the Rule violates these statutory provisions are questions of *law*. They are not factual questions the resolution of which might vary at different stages of the case. The Fourth Circuit's disposition of Defendants' appeal thus will likely resolve these issues.

The same is true of the antecedent question of whether Plaintiff has waived any challenge to the Rule under 42 U.S.C. § 18114 because no commenter invoked this provision. Although the Court did not address this issue, Defendants continue to press this legal theory on appeal. *See* Appellant's Opening Brief at 34-35, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir. June 27, 2019), ECF No. 18. And since the comments preceding the Rule were publicly available during the preliminary injunction briefing, analysis of this issue is unlikely to differ at a later stage of the case.

Thus, in reviewing the PI Order, the Fourth Circuit will have to resolve questions of law that are central to Plaintiff's Complaint. It is true that the Court's PI Opinion does not address all of Plaintiff's claims, including the claims that the Final Rule is arbitrary and capricious. But the Fourth Circuit's resolution of the legal questions described above will necessarily affect analysis of the arbitrary-and-capricious claims as well. If the Fourth Circuit were to conclude that neither the nondirective provision nor 42 U.S.C. § 18114 affects the Supreme Court's holding in *Rust v. Sullivan*, 500 U.S. 173 (1991), that would necessarily mean that HHS reasonably concluded that

the activities addressed by the Rule are *unlawful* under the best reading of the Title X statute, a conclusion that would necessarily affect whether a prohibition on those activities is arbitrary and capricious. *See* Defs.' Mem. in Opp'n to Pl's Mot. for Prelim. Inj. at 26-27, ECF No. 25. Simply put, the Government does not act arbitrarily or capriciously when it prohibits conduct within a Government program that it reasonably has concluded is *illegal* within that program.

And although Plaintiff's Complaint contains other claims, Plaintiff did not even seek preliminary-injunctive relief on the basis of several of them, including claims that are clearly foreclosed by the Supreme Court's decision in *Rust*. *Compare* Compl., Count V (claiming that the Rule violates the First Amendment), *with Rust*, 500 U.S. at 192-200 (holding that the materially indistinguishable 1988 regulations did not violate the First Amendment because, *inter alia*, the "Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way"). Contrary to Plaintiff's contention in the parties' recently filed scheduling proposal, ECF No. 59 at 3, these claims are not "meritorious." And their existence should not require wasteful and duplicative litigation of this *entire case* before the Court receives what will almost assuredly be controlling guidance with respect to claims that Plaintiff deemed meritorious enough to assert in its preliminary-injunction papers.

In any event, the appeal need not "settle every question of . . . law" to justify a stay, so long as it will streamline the Court's merits review and conserve judicial resources by "settl[ing]" some issues and "simplify[ing]" others. *Landis*, 299 U.S. at 256; *see also Manriquez v. DeVos*, No. 17-cv-7210, 2018 WL 5316174, at *3 (N.D. Cal. Aug. 30, 2018) (granting stay pending appeal of preliminary injunction, even though the appeal did not address "all of the claims alleged by

Plaintiffs," because "resolution on appeal has the potential to narrow the claims before the Court"). Such is the case here. Defendants' appeal places legal questions that are at the heart of the parties' dispute before the Fourth Circuit and will unquestionably narrow that dispute and streamline the case for resolution.

Because Plaintiff brings suit under the APA, this case will ultimately be resolved on the basis of dispositive motions. *See Audubon Naturalist Soc'y of The Cent. Atl. States v. U.S. Dep't of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. 2007). Thus, if district court proceedings continue while the appeal is ongoing, the parties will necessarily address, through those filings, the same merits questions that the Fourth Circuit is now considering: whether the Final Rule violates section 1554 of the Affordable Care Act or the "nondirective mandate." Rather than having the parties and the Court spend time and resources briefing and considering these legal issues that are to be determined by the Fourth Circuit, the more prudent and efficient course is to await final resolution of the appeal before proceeding to any such briefing and/or consideration, if necessary. *See IRAP*, 323 F. Supp. 3d at 732, 7333 (granting stay where the resolution of issues on appeal "will likely have a direct impact on the future course of this case" and "simplify this Court's task in resolving a motion to dismiss"); *Manriquez*, 2018 WL 5316174, at *3 (granting stay pending appeal because, without it, the Court would have been "forced to address the summary judgment claims in piecemeal fashion" and would "have to wait until the issue on appeal is resolved before deciding the final relief, if any"). Doing so would eliminate the risk of this Court issuing a ruling that "would be subject to revisitation and potential modification" once the Fourth Circuit rules. *IRAP*,

323 F. Supp. 3d at 733. "[C]onsiderations of judicial economy," then, "strongly counsel in favor of a stay." *Id*. at 734.

The Ninth Circuit's decision in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), cited by Plaintiff in the joint scheduling proposal, ECF No. 59 at 3, does not counsel a different result. There, the district court "failed to give any particular reason for the stay." 911 F.3d at 584. And the Ninth Circuit admonished the district court "not to delay *trial preparation*," where a "fully developed factual record may be materially different from that initially before the district court." *Id*. at 583-84 (emphasis added). Here, as noted above, the merits are likely to be resolved on the basis of the administrative record and dispositive motions practice (not trial), and the dispositive issues are legal in nature. This is thus plainly not a case in which the appellate court's decision "may provide little guidance as to the appropriate disposition on the merits." *Id*. at 584.

2. In contrast to the wasteful drain on resources that will result if this case proceeds before Defendants' appeal is resolved, Plaintiff will suffer no harm, and in particular no harm that would justify the award of any judicial relief during the pendency of this litigation, as the Fourth Circuit has already determined in granting Defendants' motion for a stay of this Court's preliminary injunction pending appeal. *See Rose v. Logan*, No. 13-cv-3592, 2014 WL 3616380, at *2 (D. Md. July 21, 2014) (Bennett, J.) (noting that "because a preliminary injunction and stay pending appeal are both forms of preliminary equitable relief, this Court and other courts have applied the preliminary injunction test . . . when considering a stay pending appeal"); *cf. California*, 927 F.3d at 1081 (staying preliminary injunction against same rule at issue in this case and noting that the harm to the plaintiffs from such a stay would be "comparatively minor").

But even assuming arguendo that Plaintiff is harmed by a stay of *the injunction*, it is still not harmed by a stay of *district court proceedings*. As discussed above, the Fourth Circuit's

disposition of the preliminary-injunction appeal is likely to be controlling with respect to the central merits issues in this case. Plaintiff cannot be harmed by a failure to conduct district court proceedings that, depending on the Fourth Circuit's decision, will either be wholly wasteful (if the Fourth Circuit effectively resolves Plaintiff's challenges), or at the very least will need to be substantially relitigated in light of the Fourth Circuit's decision.

Finally, Defendant has already provided Plaintiff with the voluminous administrative record in this case, affording Plaintiff the opportunity to review it and prepare for merits briefing so that the case can proceed expeditiously once the appeal is resolved and the stay is lifted.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for a stay of district court proceedings pending final resolution of Defendants' appeal.

Dated: July 22, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ R. Charlie Merritt
BRADLEY P. HUMPHREYS
(D.C. Bar No. 988057)
R. CHARLIE MERRITT
(VA Bar No. 89400)
Trial Attorneys, U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Phone: (202) 616-8098
E-mail: robert.c.merritt@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ R. Charlie Merritt
R. CHARLIE MERRITT