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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

STATE OF OREGON et al., Plaintiffs, v. ALEX M. AZAR II et al., Defendants.	Case No. 19-cv-00317-MC (Lead Case) Case No. 6:19-cv-00318-MC (Trailing Case) PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL OF THIS COURT'S PRELIMINARY INJUNCTION
AMERICAN MEDICAL ASSOCIATION et al., Plaintiffs, v. ALEX M. AZAR II et al., Defendants.	

OPPOSITION TO HHS'S MOTION FOR STAY OF PROCEEDINGS

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INTRODUCTION

The Ninth Circuit has "repeatedly admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). It has also commended courts for "proceed[ing] to trial and otherwise mov[ing] towards a final judgment … without waiting for [the Court of Appeals'] interlocutory review" of a preliminary injunction. *Melendres v. Arpaio*, 695 F.3d 990, 1003 (9th Cir. 2012). HHS has nonetheless moved to stay these proceedings pending the Ninth Circuit's review of the Court's preliminary-injunction order. There is no reason to depart from the regular practice, however. To the contrary, all relevant factors weigh in favor of continuing district-court proceedings during the pendency of an appeal—as the Ninth Circuit has directed should be the norm and as the two other district courts considering challenges to the Rule at issue have already found.

First, a stay would cause Plaintiffs and the public severe harm. In issuing a preliminary injunction, this Court recognized the harms that HHS's rulemaking would cause—including forcing Planned Parenthood, numerous States, and other providers out of the Title X program, compelling medical professionals to decide whether to continue providing Title X care under regulations that would violate their professional ethics, and impeding patients' access to affordable reproductive health care. The preliminary injunction has been stayed pending appeal, however, and the Rule is in effect. Unless the Ninth Circuit reinstates the preliminary injunction, Plaintiffs and the public will thus be harmed until this case reaches a final judgment and the Court makes a determination of the Rule's lawfulness. That harm would be extended by a stay.

Second, HHS does not—and cannot—argue that it would be harmed by moving this case forward. HHS apparently seeks a stay only to avoid the inconvenience of having to maintain a defense. But as this Court has made clear, "having to litigate itself is not hardship warranting the

stay of a case." *Accentcare Home Health of Rogue Valley, LLC v. Bliss*, 2017 WL 2464436, at *1 (D. Or. June 7, 2017) (McShane, J.).

Third, HHS argues that the Ninth Circuit's decision on appeal of the preliminary injunction may substantially narrow or clarify the legal issues involved in this case. But it also may not. Because of the standard applicable to preliminary injunctions, the Ninth Circuit may not rule clearly on the underlying legal issues. It may, for example, assess only the *likelihood* that Plaintiffs will prevail on the merits, or determine only whether Plaintiffs have raised *serious questions* on the merits. The mere possibility that the Ninth Circuit's decision will provide guidance—a possibility in virtually every appeal of a preliminary injunction—does not warrant disregarding the Ninth Circuit's repeated admonition not to stay district court proceedings pending an appeal of a preliminary injunction.

Thus, the Court should deny HHS's motion and proceed to resolve the case on the merits. Plaintiffs are prepared to move expeditiously for summary judgment so the Court can proceed to a final judgment.

STATEMENT

A. District Court Proceedings

On March 4, 2019, HHS issued the Rule at issue. *See Compliance with Statutory Program Integrity Requirements*, 84 Fed. Reg. 7,714 (Mar. 4, 2019). Plaintiffs filed this lawsuit the next day, alleging that the Rule is contrary to law, arbitrary and capricious, unconstitutional, and promulgated without procedure required by law. Dkt. 1.[1] Plaintiffs then promptly moved for a preliminary injunction. Dkt. 42.

[1] Unless otherwise noted, "Dkt." references are to the docket in this case, *American Medical Ass'n v. Azar*, No. 6:19-cv-00318-MC (D. Or.). "CA9 Dkt." references are to the docket in the appeal from this case, *Oregon v. Azar*, No. 19-35386 (9th Cir.).

On April 29, the Court granted that motion and issued a nationwide preliminary injunction. Dkt. 135.[2] The Court concluded that Plaintiffs are "likely to succeed on the merits of their claim that the Final Rule is contrary to law." *Id.* at 4. The Court explained that the Gag Requirement compels Title X projects to steer patients toward continuing a pregnancy to term and away from abortion, likely in contravention of appropriations acts that require that all pregnancy counseling provided by Title X be nondirective. *Id.* at 15-20. Furthermore, the Court held, the Rule likely creates unreasonable barriers to care and impedes timely access to care in contravention of §1554 of the Affordable Care Act, 42 U.S.C. §18114. *Id.* at 23-24. The Court further found that the Rule is likely arbitrary and capricious because HHS failed adequately to consider that "the Final Rule appears to force medical providers to either drop out of the program or violate their codes of professional ethics," *id.* at 24, and "failed to adequately account for the impact the Final Rule will have on women, particularly women in rural areas," *id.* at 28.

On the equitable factors, the Court found that Plaintiffs, patients, and public health would be irreparably harmed absent an injunction. Dkt. 135 at 29-30. The Rule will force large numbers of Title X providers—including Planned Parenthood, which serves about 40% of all Title X patients—to leave the program. *Id.* at 28, 30. "Planned Parenthood's absence" alone "would create a vacuum for family planning services" that other safety-net clinics would be unable to fill. *Id.* at 28. And the Court found that whereas "the risk of irreparable damage to the health of women and communities is grave," preserving the status quo "poses no harm to Defendants." *Id.* at 4.

[2] To be published at __ F. Supp. 3d __, 2019 WL 1897475 (D. Or. Apr. 29, 2019).

Two other district courts in this Circuit also preliminarily enjoined the Rule. *See Washington v. Azar*, 376 F. Supp. 3d 1119, 1132 (E.D. Wash. 2019); *California v. Azar*, __ F. Supp. 3d __, 2019 WL 1877392, at *44 (N.D. Cal. Apr. 26, 2019).

B. Ninth Circuit Proceedings

HHS appealed all three preliminary injunctions and moved for a stay of the injunctions pending appeal. CA9 Dkt. 15. On June 20, a motions panel of the Ninth Circuit—on abbreviated briefing, without oral argument, and in the middle of briefing HHS's merits appeal—issued an order staying the preliminary injunctions. CA9 Dkt. 58. Plaintiffs immediately moved for temporary administrative relief (CA9 Dkt. 59) and then sought reconsideration en banc (CA9 Dkt. 61).

On July 3, 2019, the Ninth Circuit granted rehearing en banc of the stay motion. CA9 Dkt. 85. In so doing, it ordered that the motions panel order "not be cited as precedent by or to any court of the Ninth Circuit." *Id.* at 3. On July 11, 2019, however, the en banc Court issued a divided order stating that the "the order granting reconsideration en banc did not vacate the stay order itself, so it remains in effect." CA9 Dkt. 118 at 3. The en banc Court further stated that it would "proceed expeditiously to rehear and reconsider the merits of [HHS's] motions for stay of the district courts' preliminary injunction orders pending consideration of the appeals on the merits." *Id.*[3]

On June 29, the Ninth Circuit set en banc oral argument for the week of September 23, 2019, nearly two months away. CA9 Dkt. 127. (The actual date and time are still to be determined. *Id.*) That order did not specify the scope of oral argument—namely, whether it

[3] Plaintiffs subsequently moved for emergency reconsideration of the July 11, 2019 order by the full Court or limited en banc Court (CA9 Dkt. 125), which remains pending as of this filing.

would involve only the issue of HHS's stay or also the merits appeal. The Ninth Circuit then issued another order three days later (August 1) directing the parties to "be prepared to discuss at oral argument the district courts' preliminary injunction orders on the merits." CA9 Dkt. 129. That order suggests that the en banc Court may address the merits appeal, but also may not. HHS's stay remains the only issue that the Ninth Circuit has ordered to be heard en banc.

C. HHS's Enforcement Of The Rule

On July 15, 2019, HHS informed all Title X grantees that the Ninth Circuit "has made clear that HHS may begin enforcing the Final Rule," and that HHS accordingly "shall now require compliance with the Final Rule." Schoenfeld Decl. in Supp. of Pls.' Opposition to Defendants' Motion for Stay (August 2, 2019), Ex. 1 at 2. On July 20, HHS sent further guidance reaffirming that "compliance with the 2019 Final Rule, except for the physical separation requirement, was required as of July 15, 2019," and threatened "enforcement actions" against those failing to make "good-faith efforts to comply." *Id.*, Ex. 2 at 2. Moreover, HHS set enforcement deadlines of August 19 and September 18 by which Title X grantees must provide written "assurance[s]" of compliance and "action plan[s]." *Id.*

Planned Parenthood is deeply dedicated to its Title X patients and to the Title X program, which it has served for nearly 50 years. But Planned Parenthood cannot comply with the Rule, which would force its providers to violate principles of medical ethics. Thus, as Planned Parenthood direct grantees informed HHS by letter dated July 24, 2019, they have stopped using Title X funds to provide services to their patients—using emergency sources of non-Title X funds instead—to avoid violating the Rule while they continue to seek emergency judicial relief. *See* Schoenfeld Decl., Ex. 3. Moreover, some Planned Parenthood subgrantees have already formally notified their grantees that they must leave the program.

D. Previous Requests By HHS To Stay District Court Proceedings

Before moving for a stay of this case, HHS moved for a stay of proceedings pending appeal in the *California* and *Washington* cases before Judges Chen and Bastian, respectively. Both of those motions were denied. *California v. Azar*, 2019 WL 2996441 (N.D. Cal. July 9, 2019); *Washington v. Azar*, No. 19 Civ. 3040 (SAB) (E.D. Wash. June 14, 2019), Dkt. 86.

Judge Chen—ruling while the preliminary injunctions were still in effect—explained that "[d]elaying the ultimate resolution of the Final Rule's lawfulness would expose Plaintiffs to … harm if the Ninth Circuit dissolves the preliminary injunction and the final adjudication of this case is delayed because of an extended stay. 2019 WL 2996441, at *2. The court stated that, in contrast, "Defendants do not articulate any injury they would suffer if the lawsuit were to proceed." *Id.* He further noted that the Ninth Circuit has "'repeatedly admonished'" courts not to stay proceedings "'to await an interim ruling on a preliminary injunction,'" and that the Ninth Circuit's disposition of the preliminary-injunction appeals "'may provide little guidance as to the appropriate disposition on the merits.'" *Id.* at *1 (quoting *California*, 911 F.3d at 583-584).

LEGAL STANDARD

HHS's appeal of the preliminary injunction does not "divest the [Court] of jurisdiction to continue with other phases of the case," including proceeding to a final judgment. *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). When presented with a motion to stay proceedings, a district court must weigh:

> the 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.

Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)); *see also Accentcare*, 2017 WL 2464436, at *1 (denying motion

because the "orderly course of justice weighs against a stay" where it is "unclear how long" the stay would last). As the "proponent of a stay," HHS "bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1995).

The Ninth Circuit has "repeatedly admonished district courts not to delay trial preparation [by issuing a stay] to await an interim ruling on a preliminary injunction." *California*, 911 F.3d at 583-584. Indeed, the Court of Appeals has urged parties to "pursue aggressively" a final judgment and decision whether to issue a "permanent injunction … rather than … awaiting the outcome of [an] appeal" of a preliminary injunction. *Global Horizons, Inc. v. U.S. Dep't of Labor*, 510 F.3d 1054, 1058-1059 (9th Cir. 2007); *see also Melendres*, 695 F.3d at 1002-1003.

ARGUMENT

I. PLAINTIFFS AND THE PUBLIC WILL BE HARMED BY A STAY

Plaintiffs are harmed by having to wait for a final ruling on the merits of their claims. This case concerns Title X, an extraordinarily successful federal program, and raises questions of exceptional importance about whether the Rule comports with federal law and whether HHS's actions were arbitrary and capricious. The Rule is now in effect nationwide, and Plaintiffs are eager to obtain a final judgment on the Rule's lawfulness.

As the Court has found, the Rule poses a "grave" "risk of irreparable damage to the health of women and communities." Dkt. 135 at 4. Absent further appellate relief permitting the preliminary injunction to take effect pending appeal, Planned Parenthood affiliates and many other providers will soon be forced out of the Title X program. Planned Parenthood is already suffering serious harm as it is utilizing non-Title X emergency funds to maintain its reproductive health care services temporarily. *See supra* p.5. And once Planned Parenthood is forced to cut

back services, the public health will suffer "in the form of an increase in sexually transmitted disease and unexpected pregnancies." *Id.* at 30.[4]

HHS states (Mot. 9) that these harms flow from the stay of the injunction, not from any stay of proceedings in this Court, but that misses the point. For any amount of time that the Rule is allowed to remain in effect without a final ruling on the ultimate question of whether the Rule is lawful, Plaintiffs and their patients will be harmed. As Judge Chen explained in denying HHS's motion for a stay, "[d]elaying the ultimate resolution of the Final Rule's lawfulness would expose Plaintiffs to [irreparable] harm if the Ninth Circuit dissolves the preliminary injunction"—which it now has—"and the final adjudication of this case is delayed because of an extended stay." *California*, 2019 WL 2996441, at *2. That the Court's preliminary injunction has been stayed is reason to move quickly to final judgment, thereby minimizing the harms that this Court already found would occur absent such an injunction. It is no reason to delay resolution of the case.

II. HHS FAILS TO DEMONSTRATE HARDSHIP OR INEQUITY JUSTIFYING A STAY

The Supreme Court has stated that "if there is even a fair possibility that [a] stay … will work damage to someone else," the movant "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936); *see also Lockyer*, 398 F.3d at 1112. There is more than a "fair possibility" of harm to Plaintiffs, their patients, and the public health if the case is stayed (*see supra* Part I), but HHS does not even

[4] HHS cites (Mot. 9) the Ninth Circuit motions panel's order for the proposition that the harms the Rule would cause the Plaintiffs are "comparatively minor" (CA9 Dkt. 58 at 24). But the Ninth Circuit has granted reconsideration en banc and ordered that the motions panel's decision should not be cited as precedent in any court in this Circuit. CA9 Dkt. 85. In any event, the motion's panel did not address the harms to Planned Parenthood, which is directly injured through lost funding every day.

argue that it will suffer any cognizable hardship or inequity from proceeding with this case. Nor can HHS do so, and HHS's failure to demonstrate any hardship from proceeding is fatal to its motion. *See DeMartini v. Johns*, 693 F. App'x 534, 538 (9th Cir. 2017) ("The party who moves for a stay has the burden to 'make out a clear case of hardship or inequity in being required to go forward[.]'"); *California*, 2019 WL 2996441, at *2 ("There is clearly more than 'a fair possibility' that a stay would harm Plaintiffs here…. In contrast, Defendants do not articulate any injury they would suffer if the lawsuit were to proceed, much less 'make out a clear case of hardship or inequity in being required to go forward.'").

HHS does complain (Mot. 8) about having to "spend time and resources briefing and considering legal issues" that may be clarified by a decision of the Ninth Circuit in the pending appeal. But as the Ninth Circuit and this Court have recognized, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity'" warranting a stay. *Lockyer*, 398 F.3d at 1112; *see also Accentcare*, 2017 WL 2464436, at *1 ("[H]aving to litigate itself is not hardship warranting the stay of a case").

III. THE NINTH CIRCUIT'S DISPOSITION OF THE APPEAL MAY NOT SIMPLIFY OR NARROW THE REMAINING PROCEEDINGS

HHS discusses at length (Mot. 6-8) the various legal questions that it speculates may be resolved by the Ninth Circuit on appeal of the preliminary injunction. *If* the Ninth Circuit resolves some or all of those questions, it *may* narrow the issues before this Court on motions for summary judgment. But it is not certain that the Ninth Circuit will resolve those issues. Indeed, the Ninth Circuit has stated that its "disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits" given "the limited scope of [its] review of the law applied by the district court." *Melendres*, 695 F.3d at 1003. The Court of Appeals has thus discouraged parties from "appeal[ing] orders granting or denying

motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation." *Id.* In many cases, waiting for resolution of an appeal will simply "result in unnecessary delay to the parties and inefficient use of judicial resources." *Id.*; *see also California*, 911 F.3d at 583 ("We have repeatedly admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction."); *Global Horizons, Inc.*, 510 F.3d at 1058-1059 (noting that the plaintiff "would have been better served to pursue aggressively its permanent injunction claim in the district court, rather than apparently awaiting the outcome of this appeal").[5]

Even aside from the Ninth Circuit's instruction that district courts should not stay proceedings pending an appeal of a preliminary injunction, it is far from clear that the Ninth Circuit's decision on the pending appeal will substantially narrow the issues that would be before this Court on motions for summary judgment.

First, the Ninth Circuit applies a "limited and deferential" abuse-of-discretion standard in reviewing a preliminary injunction, *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007), and thus the Ninth Circuit's decision may not provide a clear statement of its own views on the merits of Plaintiffs' claims.

Second, the relevant inquiry at the preliminary-injunction stage is whether the plaintiff is "*likely* to succeed on the merits," *California*, 911 F.3d at 575 (emphasis added), or raises serious questions going to the merits. Thus, just as this Court found, for example, that §1554 of the

[5] HHS argues (Mot. 10) that the Ninth Circuit's statement in *California* means only that *preparation* for trial should continue during the pendency of a preliminary-injunction appeal. But the Ninth Circuit's statements elsewhere make clear that district courts should proceed expeditiously to a final judgment as well. *See Melendres*, 695 F.3d at 1003 ("Here, it appears that the district court heeded our direction to proceed to trial and otherwise move towards a final judgment in this case without waiting for our interlocutory review.").

ACA "likely" applies to the Rule, Dkt. 135 at 23, the Ninth Circuit may similarly opine only on the *likely* application of the laws or whether Plaintiffs have raised "serious questions" on the merits of their claim, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011); *see also California*, 911 F.3d at 578-579 (finding that "the agencies *likely* did not have good cause for bypassing notice and comment" and that the agencies' argument to the contrary "*likely* fails" (emphasis added)). Indeed, "[t]he purpose of such interim equitable relief [as a preliminary injunction] is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citation omitted).

The cases HHS cites are not to the contrary. In *Washington v. Trump*, 2017 WL 1050354 (W.D. Wash. Mar. 17, 2017), and *Hawai'i v. Trump*, 233 F. Supp. 3d 850 (D. Haw. 2017), the district courts stayed determination of a pending motion for a temporary restraining order while the Ninth Circuit considered an appeal from a substantively identical TRO issued by a different court. *See Washington*, 2017 WL 1050354, at *5; *Hawai'i*, 233 F. Supp. 3d at 851. Moreover, the courts made clear that the stays would last only as long as the first TRO remained in place and protected the plaintiffs. *See Washington*, 2017 WL 1050354, at *4; *Hawai'i*, 233 F. Supp. 3d at 852. Here, in contrast, the issue before the Ninth Circuit—the propriety of a preliminary injunction—is distinct from the underlying merits of the claims that the Court will consider if the case proceeds, and Plaintiffs are not protected from the harms caused by the Rule because the Court's preliminary injunction has been stayed.

Moreover, HHS's requested stay could be lengthy because the Ninth Circuit is unlikely to rule on the merits of the preliminary-injunction appeal any time soon. *See Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000) (noting "somewhat less deferential" standard of review of a

district court's order granting a potentially lengthy stay); *Accentcare*, 2017 WL 2464436, at *1 (a stay "would not serve the interests of justice because it was unclear how long before [parallel proceedings] would be fully resolved"). As noted, the en banc Court recently scheduled oral argument for the week of September 23. That date is nearly two months away—an extraordinarily long time for Title X grantees, including Planned Parenthood, hanging in the Title X program by a thread while facing the perpetual threat of HHS enforcement action. Moreover, that oral argument may not even address the merits appeal. And, regardless, even after oral argument, it could take multiple months to a year for the en banc Court to issue its decision. *See, e.g.*, *The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit* 17 (June 2017). Moreover, the losing party will likely seek further appellate review, including by petition for certiorari to the Supreme Court.

In short, it may take a year or more until the preliminary-injunction appeal is finally resolved. In all that time, the Court could advance these proceedings to a final judgment on the merits of Plaintiffs' claims that the Rule is contrary to law, arbitrary and capricious, and unconstitutional. The interests of justice counsel against such a lengthy stay.

IV. THE COURT SHOULD MOVE EXPEDITIOUSLY TO A FINAL JUDGMENT

This case presents no compelling circumstances to depart from the Ninth Circuit's "direction to … move towards a final judgment" without waiting for disposition of the preliminary-injunction appeal. *Melendres*, 695 F.3d at 1003. Plaintiffs are prepared to move expeditiously for summary judgment so the Court can proceed to a final judgment in this case.

CONCLUSION

HHS's motion for a stay of proceedings pending appeal (Dkt. 160) should be denied.

Date: August 2, 2019

Respectfully submitted.

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