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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

STATE OF OREGON et al.,

Plaintiffs,

v.

ALEX M. AZAR II et al.,

Defendants.

AND

AMERICAN MEDICAL ASSOCIATION et al.,

Plaintiffs,

v.

ALEX M. AZAR II et al.,

Defendants.

Consolidated Civil Action Nos.
6:19-cv-00317-MC (Lead Case)
6:19-cv-00318-MC

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL OF THIS COURT'S PRELIMINARY INJUNCTION

Plaintiffs' oppositions only underscore that a stay is appropriate here. Plaintiffs do not deny that the dispositive questions at issue in this case are legal in nature, predominantly involving questions of statutory interpretation, nor that the Ninth Circuit is currently considering them. Although "it is difficult to make predictions, especially about the future,"[1] it is virtually impossible as a practical matter to imagine that the preliminary-injunction appeals (now fully briefed) will *not* address these questions. An en banc panel of the Ninth Circuit, moreover, has stated that it "will proceed expeditiously" to decide the merits of the Government's stay motions, CA9 Dkt. No. 118, scheduled oral argument for next month, CA9 Dkt. 127, and instructed the parties to be prepared to discuss the merits of the injunctions at argument, CA9 Dkt. 129—just as the three-judge motions panel extensively addressed the merits of the injunctions in its stay decision, CA9 Dkt. 58. In short, all indications are that the Ninth Circuit (1) will issue a decision; (2) soon; (3) that will address the legal questions at issue in this case; and (4) that will resolve this litigation entirely or, at the *very least*, narrow it substantially.

Consistent with other decisions from district courts in this circuit granting stays under similar circumstances, this Court should stay proceedings for at least a brief period here. A stay need not be lengthy or open-ended. For example, the Court could grant a stay for a short period (e.g., two to three months), subject to revisiting depending on the course of the en banc proceedings. But there is no good reason to consider the same issues simultaneously with the Ninth Circuit now, wasting judicial resources and risking inconsistent rulings in the process.

Despite having convinced the Ninth Circuit to grant en banc review of the three-judge panel decision granting Defendants' motions to stay the injunctions, Plaintiffs now urge the Court to

[1] *See* https://quoteinvestigator.com/2013/10/20/no-predict/ (investigating attribution of this aphorism to, among others, Yogi Berra and Mark Twain).

move expeditiously to a final judgment while the Ninth Circuit is considering overlapping issues. *See* ECF No. 181 ("AMA Mem."); ECF No. 183 ("States Mem."). But Plaintiffs' arguments do not withstand scrutiny. Plaintiffs assert that the Ninth Circuit's disposition of the appeal may not simplify or narrow the remaining proceedings, but that is highly unlikely and borders on implausible. And although Plaintiffs argue that *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), instructs district courts not to stay proceedings pending a preliminary-injunction appeal regardless of the case-dispositive nature of the issues on appeal, that argument misstates both *California* and the law more generally, as multiple post-*California* decisions have recognized. *See* p. 10, *supra*. Plaintiffs' remaining arguments are likewise unpersuasive. We address each in turn.

1. Plaintiffs invoke the Ninth Circuit's observation that "disposition of appeals from most preliminary injunctions *may* provide little guidance as to the appropriate disposition on the merits." AMA Mem. at 9 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1003 (9th Cir. 2012)) (emphasis added). But Plaintiffs' observation that *some* preliminary-injunction appeals may provide little guidance on the merits says nothing about whether *these* appeals will provide such guidance. On that point, Plaintiffs do not meaningfully engage with the specifics of this case or the arguments in Defendants' stay motion. Most notably, Plaintiffs do not dispute that the legal issues in this case—for example, whether the Rule conflicts with the appropriations rider or Section 1554 of the Affordable Care Act, and whether Plaintiffs have waived any facial challenge to the Rule under Section 1554—are legal in nature. *See* ECF No. 176 ("Stay Mem.") at 6-7. Other decisions have granted stays pending preliminary-injunction appeals under similar circumstances, notwithstanding the Ninth Circuit's observation that a stay may not be appropriate under *other* circumstances. *See E. Bay Sanctuary Covenant v. Trump*, 2019 WL 1048238, at *2–3 (N.D. Cal. Mar. 5, 2019) (granting stay and noting that because, among other reasons, "the

central legal issue here . . . presents an issue of pure statutory interpretation" and "[t]he parties' disputes over threshold questions of standing are likewise predominantly legal at this point," "the Ninth Circuit's resolution of the pending appeal will provide significant, and possibly conclusive" direction); *Kuang v. United States Dep't of Def.*, 2019 WL 1597495, at *4–7 (N.D. Cal. Apr. 15, 2019) (similar).

A stay is likewise warranted here, because the Ninth Circuit's decision will similarly "provide significant, and possibly conclusive" guidance. Indeed, a Ninth Circuit ruling that the Rule does (or does not) conflict with the appropriations rider, that the Rule does (or does not) conflict with Section 1554, or that Plaintiffs have (or have not) waived their Section 1554 facial challenge—even if issued in the context of a preliminary-injunction appeal—would likely resolve those issues. The Ninth Circuit's decision is also likely to resolve, or at the very least substantially narrow, Plaintiffs' claims that the Rule is arbitrary and capricious. *See* Stay Mem. at 7-8. Likewise, the relevant remedial questions—whether any judgment against the Government should extend nationwide and to all the private plaintiffs' members and affiliates, as well as whether severance is appropriate—are squarely before the Ninth Circuit.[2]

All of these issues, moreover, are central to this case—and central to the preliminary injunction this Court issued. Regardless of what the Ninth Circuit ultimately decides, it is virtually impossible to imagine that the court will simply *not address* them. Plaintiffs' argument that "it is far from clear that the Ninth Circuit's decision on the pending appeal will substantially narrow the issues," AMA Mem. at 10, is wholly divorced from the realities of this case.

[2] Moreover, although Plaintiffs asserted additional constitutional claims in their complaints that were not raised at the preliminary injunction stage, Plaintiffs' oppositions do not invoke these claims as a basis for denying a stay, presumably recognizing (as the Court did at oral argument on the preliminary injunction motions) that those claims are meritless. *See* Stay Mem. at 11.

2. Relatedly, Plaintiffs emphasize that "the Ninth Circuit applies a 'limited and deferential' abuse-of-discretion standard in reviewing a preliminary injunction," "and thus the Ninth Circuit's decision may not provide a clear statement of its own views on the merits of Plaintiffs' claims." AMA Mem. at 10 (quoting *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007)). But although the grant or denial of a preliminary injunction is "[i]n general" reviewed for abuse of discretion, a district court necessarily abuses its discretion when it bases its preliminary-injunction decision on an error of law, and legal issues are of course reviewed *de novo* in a preliminary-injunction appeal. *Boise*, 490 F.3d at 1047. Where, as here, the underlying issues are predominantly legal in nature, there is every reason to expect the Ninth Circuit's decision to provide significant (and arguably conclusive) guidance on the merits.

3. Plaintiffs argue that the Ninth Circuit's decision may supply little guidance because the Ninth Circuit may opine only on the "likely" application of the law or whether Plaintiffs have raised serious questions on the merits. AMA Mem. at 10. But even granting Plaintiffs this possibility, such a hypothetical decision would nevertheless substantially narrow the case. For example, if the Ninth Circuit issues a reasoned opinion which "only" holds that Plaintiffs are (or are not) "likely" to succeed on the merits of their claims—involving purely or predominantly legal issues, after full briefing and argument—such a decision would obviously still provide significant (and arguably conclusive) guidance as to the appropriate disposition on the merits. And if the Ninth Circuit reverses this Court's preliminary injunction because it concludes that Plaintiffs have failed to even raise serious questions on the merits, that legal conclusion would effectively terminate the need for further district court litigation (as would a far more likely decision simply deciding the legal issues here as a matter of law). Either way, Plaintiffs have wholly failed to articulate a persuasive reason why the Ninth Circuit's decision is not worth waiting at least a brief period for.

No less importantly, Plaintiffs do not even attempt to argue that their speculation about the scope of a future Ninth Circuit opinion is likely to be correct, and common sense suggests that it is not. The relevant issues in this case are legal in nature; they have been fully and exhaustively briefed in this Court and the Ninth Circuit; they have been the subject of three district court opinions in this Circuit, two other district court opinions outside this Circuit, a three-judge Ninth Circuit motions panel decision, a Fourth Circuit motions panel decision, an en banc call and vote, a divided vote rejecting Plaintiffs' motion to vacate the stay order, and (soon) an en banc argument that the Court has already suggested will encompass the merits of the injunctions. Any suggestion that the Court of Appeals—after *all this*—will simply punt on the significant legal issues that Plaintiffs asked the Ninth Circuit to review en banc flies in the face of reason.

Let's put all this aside, however, and suppose that the Ninth Circuit issues a decision that bypasses the underlying legal issues almost entirely: an opinion that concludes that Plaintiffs have raised serious merits questions, and that this Court did not abuse its discretion in balancing the remaining preliminary-injunction factors, or in the scope of the relief ordered. Even if that scenario unfolds—and even indulging the dubious assumption that such a hypothetical opinion would not provide significant guidance on the merits—Plaintiffs will have lost little from the brief delay: this Court's injunction would presumably go back into effect and the Court could proceed to consider the merits with that injunction in place. In short, even if it is (barely) conceivable that the Ninth Circuit's decision will not provide significant guidance or substantially narrow this case, Plaintiffs have provided no compelling reason not to wait at least a brief period—at least giving the en banc court an opportunity to address the merits of the stay motions that Plaintiffs convinced the en banc court to take up—before plunging ahead to address the merits.

4. Plaintiffs contend that, now that the Rule is in effect nationwide, they are harmed by having to await a final ruling on the merits. AMA Mem. at 7-8. But the Rule is in effect nationwide because the Ninth Circuit *has permitted* it to go into effect nationwide—after the panel concluded, *inter alia*, that the harms Plaintiffs would likely suffer if the Rule goes into effect "are comparatively minor." CA9 Dkt.58 at 24. Plaintiffs note that the panel *opinion* has been vacated, AMA Mem. at 8 n.4, but the en banc court did not vacate the stay order itself.[3]

Any stay here is also likely to be of relatively short duration, further mitigating any possible harms. Plaintiffs suggest that it could take "multiple months to a year" for the en banc court to issue its decision, AMA Mem. at 12, but this speculation ignores the en banc court's actual word on the matter, *i.e.*, that it will proceed "expeditiously." *See also* Hosp. of Barstow, Inc. v. Sebelius, 2012 WL 893784, at *3 (C.D. Cal. Mar. 13, 2012) (granting stay and noting that "because the cases before the Ninth Circuit are appeals of preliminary injunctions, consideration is expedited").

And even if this Court were concerned about the possibility of extended delay in the Ninth Circuit—or the possibility that the losing party will seek Supreme Court review, *see* AMA Mem. at 12—that would not be a basis for denying a stay *entirely*. Instead, the Court could grant a stay for only a fixed period of time (e.g., two or three months), subject to revisiting at that time. At a minimum, it would make sense to grant a stay for the brief period of time necessary to see if the Ninth Circuit issues an opinion shortly after the en banc oral argument that is now barely six weeks

[3] Plaintiffs also contend that "the motion's panel did not address the harms to Planned Parenthood, which is directly injured through lost funding every day." AMA Mem. at 8 n.4. But in granting a stay (a stay order the en banc court declined to disturb), the panel considered the entire preliminary-injunction record, and the alleged impact of the Rule on Planned Parenthood featured prominently in Plaintiffs' arguments and in this Court's preliminary-injunction decision. *See* ECF No. 142 at 28. Indeed, even the States tacitly admit that their claimed harms now that the Rule has gone into effect are not meaningfully different than what they presented at the preliminary-injunction stage. *See* States Mem. at 3 (contending that "[t]he State Plaintiffs and all grantees and subgrantees within the states are now faced with precisely the disruption we previously predicted").

away. *Cf.* *Boardman v. Pac. Seafood Grp.*, 2015 WL 13744253, at *2 (D. Or. Aug. 6, 2015) (McShane, J.) (noting, in August 2015, that a requested stay pending appeal of an order compelling arbitration "should be relatively short because the Ninth Circuit is holding oral argument on the interlocutory appeal in October 2015").

Furthermore, even if the Court were to allow this matter to proceed, that would not necessarily bring this case any closer to resolution. For the reasons noted above, any district-court proceedings occurring now would be litigated in the shadows of the Ninth Circuit appeals—at any point, the Ninth Circuit could issue a decision effectively resolving this case (either in Plaintiffs' favor or the Government's). And even if the Ninth Circuit's decision does not end this case, any merits issues litigated now would almost certainly need to be re-litigated in light of the legal framework announced by the Ninth Circuit.

Most fundamentally, Plaintiffs' oppositions do not grapple with the question-begging nature of their prejudice arguments. As we explained in our opening brief, Plaintiffs' assertion of prejudice based on a brief delay in district court proceedings is only logical if one presupposes that the Ninth Circuit's forthcoming decision will not effectively resolve the merits issues in these cases one way or the other. *See* Stay Mem. at 12. Since the Ninth Circuit's decision is likely to provide conclusive direction, judicial restraint counsels in favor of waiting a brief period for that decision—not plunging ahead to resolve merits issues that the Ninth Circuit is likely to decide in just a few months and that may need to be relitigated once the Ninth Circuit decision issues.

5. Plaintiffs note the general principle that "having to litigate itself is not hardship warranting the stay of a case." AMA Mem. at 1-2 (quoting *Accentcare Home Health of Rogue Valley, LLC v. Bliss*, 2017 WL 2464436, at *1 (D. Or. June 7, 2017) (McShane, J.)). But putting aside that the hardship to the Government of overlapping proceedings consists of more than the

ordinary burdens of litigation,[4] Plaintiffs miss the point. The Government's argument is not *merely* that duplicative and wasteful litigation is burdensome for the Government (and the Court), though it assuredly is. The Government's argument is also that "the orderly course of justice," *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962), and in particular principles of judicial economy, support a stay. "Considerations of judicial economy are highly relevant in determining whether the orderly course of justice weights in favor of a stay." *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 2016 WL 9021536, at *2 (N.D. Cal. Mar. 22, 2016) (quotation marks omitted). "In particular, judicial economy favors granting a stay where conducting further proceedings would require conducting a trial that may ultimately be unnecessary because such proceedings could result in the unnecessary expenditure of judicial resources." *Id.* (quotation marks omitted); *accord Manriquez v. DeVos*, 2018 WL 5316174, at *2–4 (N.D. Cal. Aug. 30, 2018). Indeed, these considerations are sufficient to justify a stay even absent a showing of prejudice to the Government. *See IRAP v. Trump*, 323 F. Supp. 3d 726, 735-36 (D. Md. 2018) (granting stay even though court did "not find that potential prejudice to the Government provides a compelling basis for a stay" because "the court is convinced that proceeding with this now does not necessarily mean that Plaintiffs will receive a faster resolution" given that the Supreme Court was considering the same merits issues). Rather than expending resources that will either be wholly wasteful (if the Ninth Circuit's decision effectively resolves Plaintiffs' challenges), or at the very least will need to be substantially

[4] The Government explained in its motion to stay the preliminary injunction pending appeal how the preliminary injunction would likely cause confusion among grantees of what will ultimately be required, *see* ECF No. 151 ¶¶ 4-7, and these considerations likewise apply in this context. The Government's and the public's strong interest in orderly administration of the Title X program is best served by allowing the Court of Appeals a reasonable period to resolve the important legal issues presented by these cases, as opposed to engaging in overlapping proceedings in different courts addressing substantially similar issues, with all the attendant risks of confusion and inconsistent rulings.

relitigated in light of the Ninth Circuit's decision, the orderly course of justice counsels in favor of a short stay to await the Ninth Circuit's likely controlling decision—or at the very least waiting for the results of an en banc proceeding that Plaintiffs themselves asked for, and that the en banc court has announced will be resolved expeditiously.

6. Finally, Plaintiffs invoke the Ninth Circuit's recent statement that "[w]e have repeatedly admonished district courts not to delay *trial preparation* to await an interim ruling on a preliminary injunction." *California*, 911 F.3d at 583 (emphasis added); *accord* *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." (emphasis added)). But putting aside *California*'s reference to "trial preparation," the Ninth Circuit explained the *reason* for that general admonition: "our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits." 911 F.3d at 583-84 (quotation marks omitted). Where, as here, that reason plainly does not apply, *California* does not obligate district court judges to disregard principles of judicial economy and expend judicial resources that are virtually certain to be wasteful and duplicative of outcome-determinative proceedings on appeal. Multiple decisions following *California* have recognized this. *See* *E. Bay Sanctuary Covenant*, 2019 WL 1048238, at *2–3 (granting stay pending preliminary-injunction appeal and noting that, although "the Court takes seriously [the points articulated in *California*], it concludes that they carry less force in this particular case" "[g]iven the legal nature of the issues presented and the relatively fixed state of the record"); *Kuang*, 2019 WL 1597495, at *6-7 (similar).[5] The same result is warranted here.

[5] Unlike in this case, in *East Bay Sanctuary Covenant* the full administrative record was before the Ninth Circuit in the preliminary-injunction appeal. But that does not warrant a different result

CONCLUSION

The Court should grant Defendants' motion for a stay of district court proceedings pending appeal.

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Respectfully submitted,

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here, for reasons Defendants previously explained and to which Plaintiffs' oppositions do not respond. *See* Stay Mem. at 11.