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' REPLY IN SUPPORT OF MOTION
FOR STAY OF PROCEEDINGS PENDING APPEAL

INTRODUCTION

Plaintiff does not dispute that the Fourth Circuit is currently addressing legal questions that this Court, if it were to move forward with merits proceedings, would directly address during the pendency of the appeal. Thus, it is not contested that the Fourth Circuit's ruling on these legal questions—namely, whether the Department of Health and Human Services (HHS) Rule at issue in this litigation violates an appropriations rider or Section 1554 of the Affordable Care Act (ACA) (as well as whether Plaintiff has waived its Section 1554 facial challenge), or instead whether Plaintiff's statutory claims are foreclosed by *Rust v. Sullivan*, 500 U.S. 173 (1991)—will provide substantial guidance, narrow the issues before the Court, and shape the litigation moving forward.

It would be "inefficient" to brief or decide any merits issues here in the interim because any decision by this Court would "undoubtedly and justifiably" be "re-litigat[ed]" once the appeal has been resolved and provided "new guidance" on the central merits issues in this case. *Int'l Refugee Assistance Project v. Trump* ("*IRAP*"), 323 F. Supp. 3d 726, 734 (D. Md. 2018). This is true even though Plaintiff asserts certain claims in its complaint that are not directly presented in the appeal. As explained in Defendants' opening brief, a stay is appropriate so long as ongoing appellate proceedings are likely to "settle many" issues and "simplify" others, *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936), which the current appeal undoubtedly will. *See* Mem. in Support of Mot. for Stay of Proceedings Pending Appeal ("Defs.' Brief") at 5-6, ECF No. 62-1.

There is thus little to gain by moving forward now, and there is certainly much to lose—*i.e.*, significant waste of time and resources, for both the Court and the parties, in litigating and deciding issues in proceedings that may ultimately prove duplicative and unnecessary in light of the forthcoming guidance from the court of appeals. Common sense and judicial economy, then, point to a stay of proceedings.

Plaintiff tries to avoid this straightforward conclusion by focusing on the purported harms it will suffer as a result of the Rule's ongoing enforcement. As explained in Defendants' opening brief, however, those asserted harms are the same ones that a Fourth Circuit panel has already considered—and necessarily rejected—in staying this Court's preliminary injunction and deciding that the appropriate status quo during the pendency of Defendants' appeal is for the Rule to be in effect. *See* Defs.' Brief at 7.

It is thus far more sensible to wait until the appeal is resolved before moving forward with any merits proceedings, particularly given that those merits proceedings—*e.g.*, briefing on a motion to dismiss—would not themselves redress Plaintiff's purported harms. Because a stay of proceedings is the most efficient way to proceed and would impose no cognizable prejudice on Plaintiff, whom the Fourth Circuit has already determined is not entitled to relief from the harms it claims during the pendency of the appeal, the Court should grant Defendants' motion for a stay of proceedings pending appeal.

ARGUMENT

Plaintiff relies on inapt authorities addressing abstention in its attempt to paint stays of district court proceedings pending preliminary-injunction appeals as somehow anomalous. *See* Pl.'s Opp'n to Defs.' Mot. for Stay of Proceedings Pending Appeal ("Pl.'s Opp'n") at 1-2. But a limited stay pending appellate proceedings has nothing to do with any of the various abstention doctrines addressed by the cases on which Plaintiff relies. *See, e.g.*, *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 462 (4th Cir. 2005) (under abstention doctrines, "federal courts may decline [their virtually unflagging obligation to] exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest" (cleaned up)). Rather, the decision to stay proceedings is entrusted to the

"broad discretion" of the district court. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). And contrary to Plaintiff's suggestions, district courts routinely exercise this discretion to stay proceedings where the resolution of a preliminary-injunction appeal would provide guidance to the district court in deciding issues before it. *See IRAP*, 323 F. Supp. 3d at 731-32 ("[I]n cases where the validity of a preliminary injunction was before the circuit court or the Supreme Court, district courts have at times stayed proceedings for reasons of judicial economy." (collecting cases)).

I. The Orderly Course of Justice Favors a Stay

As explained in Defendants' opening brief, the Fourth Circuit's disposition of the preliminary-injunction appeal is likely to be controlling with respect to the central merits issues presented in this case, rendering any proceedings in the absence of the appellate court's guidance duplicative and potentially wasteful. *See* Defs.' Brief at 3-7. Plaintiff fundamentally fails to grapple with this argument,[1] instead devoting the majority of its opposition brief to rehashing its claims on the merits. *See* Pl.'s Opp'n at 6-9. The question, however, is not whether Plaintiff believes that it will ultimately prevail, but whether the Fourth Circuit's decision will provide

[1] Plaintiff argues that the appeal will not "definitively settle the claims" that the Fourth Circuit is considering because the Fourth Circuit is deciding those claims "only in the context of this Court's grant of a preliminary injunction." Pl.'s Opp'n at 9. Plaintiff does not explain, however, why the Fourth Circuit's decision on the questions of statutory interpretation before it would not control (or, at the very least, guide) this Court's analysis of those same legal questions in the context of a motion to dismiss or summary judgment. Indeed, the only "example" Plaintiff points to in support of this assertion is Defendants' argument that Plaintiff has waived its claim based on Section 1554 of the ACA. But the facts applicable to the waiver question—comments on the proposed rule—were publicly available (and extensively discussed) in the preliminary injunction briefing. And while Plaintiff contends that the administrative record "reveals HHS's actual knowledge and explicit consideration of [Section 1554] during the rulemaking process," *id*., its sole support for this makeweight assertion is a table listing 108 "sources" consulted during that process, which includes the "Affordable Care Act," "Section 1001," not Section 1554 in particular. *See* Exhibit C to Pl.'s Opp'n, ECF No. 63-3. Even assuming *arguendo* that analysis of Defendants' waiver argument could be affected by materials in the administrative record that were not previously publicly available, it would not demonstrate that the current procedural posture prevents the Fourth Circuit from "settl[ing]," Pl.'s Opp'n at 9, other important legal questions before it.

significant guidance to this Court in adjudicating Plaintiff's claims moving forward. And on that question, there can hardly be dispute. If Defendants' motion to stay proceedings is denied, Defendants will file a motion to dismiss on August 16, the day they are required to respond to Plaintiff's complaint. *See* ECF No. 61. As another Judge in this district has previously recognized in similar circumstances, "[t]o consider and resolve a motion to dismiss in advance of [appellate resolution] would be inefficient, regardless of whether that decision proves to be consistent or inconsistent with this Court's ruling on such a motion, because one or more parties would undoubtedly and justifiably seek re-litigation of the motion in light of the new guidance." *IRAP*, 323 F. Supp. 3d at 734.

For these reasons, Plaintiff's contention that a stay would "maximize the waste of judicial and party resources" if this Court rules for Plaintiff "on *any* issue at summary judgment," Pl.'s Opp'n at 5-6 (emphasis in original), is simply wrong. If, for example, the Court reaches summary judgment before the appeal is resolved, and rules in Plaintiff's favor on its claims that the Rule violates the nondirective provision or Section 1554 of the ACA, then that ruling would need to be re-visited if the Fourth Circuit later came to a different legal conclusion. Plaintiff does not explain why engaging in such an inefficient duplication of effort would "disserve[]" the "interests of judicial economy." *Id.* at 6.

Plaintiff also argues that a stay is inappropriate because eight of ten claims asserted in its complaint are "not even under consideration by the Fourth Circuit." Pl.'s Opp'n at 7. But this counting exercise is not the appropriate framework for multiple reasons. For one, the appeal will "settle," *Landis*, 299 U.S. at 256, the purely legal questions of whether the Rule violates the nondirective provision or section 1554 of the ACA, claims that are at the very heart of this case. Moreover, many of the additional claims are patently meritless and/or foreclosed by *Rust*, and

indeed four of them—Counts IV, V, VI, and IX—are not currently "under consideration by the Fourth Circuit" because Plaintiff declined to even *assert* them as a basis for preliminary-injunctive relief.

More fundamentally, and as highlighted in Defendants' opening brief, appellate proceedings need not "settle every question of . . . law" in order to justify a stay. *Landis*, 299 U.S. at 256. It is sufficient that the ongoing appeal is likely to "settle many" issues and "simplify" others, *id*., such that a stay will facilitate the orderly course of justice and conserve resources for both the Court and the parties. As discussed above, the ongoing appellate proceedings are likely to settle key legal issues, and the Fourth Circuit's forthcoming decision will "simplify" the Court's analysis with respect to other claims that Plaintiff did assert as a basis for preliminary-injunctive relief but that are not directly presented on appeal. For example, Plaintiff asserts that the Rule is "contrary to Title X." *See* Compl., Count III. But the Supreme Court has already held in *Rust* that the "broad language of Title X plainly allows" the materially indistinguishable 1988 regulations, 500 U.S. at 184, and the pending appeal directly presents the issue of whether that statutory holding has been implicitly repealed or superseded by subsequent statutory enactments. A Fourth Circuit ruling in Defendants' favor on Plaintiff's section 1554 and nondirective provision claims would very likely also dispose of the claim that the Rule violates Title X.

Similarly, as Defendants have explained, Defs.' Brief at 4-5, because HHS justified the Rule on the basis that it was necessary to implement HHS's interpretation of section 1008, the Fourth Circuit's analysis of Plaintiff's statutory claims is likely to answer the question whether HHS's decisionmaking was arbitrary and capricious. Plaintiff disagrees with the sufficiency of HHS's rationale, Pl.'s Opp'n at 7-8, but "the salient point for purposes of Defendants' stay motion is that resolution of the . . . appeal is likely to provide guidance to this court" on how *Rust*'s

statutory holding affects the arbitrary-and-capricious analysis here. *Washington v. Trump*, 2017 WL 2172020, at *2 (W.D. Wash. May 17, 2017). If the Fourth Circuit concludes, consistent with the Ninth Circuit panel that considered the issue, that the Rule "is a reasonable interpretation of § 1008," upheld by *Rust*, and, accordingly, its restrictions are "required" by that interpretation, *California v. Azar*, 927 F.3d 1068, 1075, 1079 (9th Cir. 2019), *rehearing en banc granted* 927 F.3d 1045 (9th Cir. 2019), then that holding would, at the very least, provide guidance relevant to the Court's consideration of Plaintiff's arbitrary-and-capricious claims.

Thus, as other courts have recognized in similar circumstances, a stay is appropriate notwithstanding the fact that the appeal might "leave various issues unresolved before this court." *Washington*, 2017 WL 2172020, at *3 (granting stay of proceeding pending preliminary-injunction appeal, even though the appeal did not address all of the issues raised in the plaintiffs' complaint, where appellate decision "will also likely help the court in resolving Defendants' motion to dismiss"); *see also IRAP*, 323 F. Supp. 3d at 734; *Manriquez v. DeVos*, 2018 WL 5316174, at *3 (N.D. Cal. Aug. 30, 2018); *Fairview Hosp. v. Leavitt*, 2007 WL 1521233, at *3 n.7 (D.D.C. May 22, 2007); *In re Literary Works in Elec. Databases Copyright Litig.*, 2001 WL 204212, at *3 (S.D.N.Y. Mar. 1, 2001).

II. Plaintiff's Arguments Regarding Purported Harms Do Not Counsel Against a Stay

The crux of Plaintiff's opposition to a stay is its claim that Plaintiff "suffers irreparable harm from every moment's delay" resolving this case. Pl.'s Opp'n at 2. But Plaintiff suffers this purported harm because the Fourth Circuit determined that, while the preliminary-injunction appeal is pending, the Rule should be allowed to go into effect. In reaching that conclusion, the Fourth Circuit necessarily rejected, as a basis for awarding temporary injunctive relief, the same sorts of alleged harms on which Plaintiff now relies. *Compare, e.g.*, Pl.'s Opp'n at 2-4, *with*

Appellee's Resp. in Opp. to Mot. for Stay Pending Appeal at 25-27, *Mayor and City Council of Baltimore v. Azar*, No. 19-1614, (4th Cir. June 26, 2019), ECF No. 15. Given that Plaintiff's purported harms were insufficient to convince the Fourth Circuit of the need for an injunction pending appeal, those harms should likewise be insufficient to justify further merits proceedings during that same time period. Plaintiff's dissatisfaction with the Fourth Circuit's decision is no reason to move forward with merits proceedings, particularly where doing so, as discussed above, would almost certainly lead to the wasteful and duplicative expenditure of party and judicial resources.

Plaintiff's opposition brief offers no serious response to the Fourth Circuit's rejection of Plaintiff's arguments. Plaintiff points out that it has moved for en banc review of the Fourth Circuit panel's stay decision. Pl.'s Opp'n at 5. But even if Plaintiff is successful in moving the Fourth Circuit to vacate the stay and reinstate the Court's preliminary injunction, then that injunction, which applied to the entire Rule throughout the state of Maryland, would necessarily protect Plaintiff from any harm it claims results from the Rule. Either way, Plaintiff would not be harmed by a stay of those proceedings pending resolution of the preliminary-injunction appeal.[2]

Finally, any stay here is likely to be of relatively short duration, further mitigating any possible harms. The Fourth Circuit has granted the government's motion to expedite the appeal, and oral argument will be held on September 18, 2019. *See* Order, *Mayor and City Council of*

[2] Plaintiff also contends that the stay motion should be denied because a moving party "must make out a clear case of hardship or inequity in being required to go forward" any time there is "a fair possibility" of harm to the non-movant. Pl.'s Opp'n at 5 (quoting *Landis*, 299 U.S. at 254-55). But such a showing of hardship to Defendants is not required here because Plaintiff cannot show any cognizable harm resulting from a stay of proceedings pending appeal, let alone "a fair possibility" of such harm. In any event, as this Court recognized in *IRAP*, where, as here, "judicial economy weighs strongly in favor of a stay," a district court is within its discretion to enter a stay, even where the "potential harm or prejudice to Plaintiffs resulting from a stay is . . . significant" and the "potential prejudice to the Government" does not provide a "compelling basis for a stay." 323 F. Supp. 3d at 735-36.

Baltimore v. Azar, No. 19-1614 (4th Cir. July 2, 2019), ECF No 24. At the very least, principles of restraint and judicial economy counsel in favor of granting a stay for a brief period of time (perhaps 60 to 90 days) to see if the Fourth Circuit issues an opinion shortly after an oral argument that is now barely a month away.

CONCLUSION

For the reasons set forth above, and in Defendants' motion for a stay, the Court should stay all district court proceedings pending final resolution of Defendants' appeal.

Dated: August 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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
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