

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STATE OF TENNESSEE, STATE OF MISSISSIPPI, STATE OF ALABAMA, STATE OF GEORGIA, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, COMMONWEALTH OF VIRGINIA, AND STATE OF WEST VIRGINIA,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MELANIE FONTES RAINER, in her official capacity as the Director of the Office for Civil Rights; CENTERS FOR MEDICARE AND MEDICAID SERVICES; and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services,

Defendants.

Civil Action No. 1:24-cv-161-LG-BWR

PLAINTIFFS' CONSOLIDATED SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR ENTRY OF BRIEFING SCHEDULE AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

The Plaintiff States brought this suit to challenge the U.S. Department of Health and Human Services' ("HHS") recently promulgated rule that unlawfully interprets the Affordable Care Act's ("ACA") prohibition against discrimination "on the basis of sex" to include several gender-identity mandates, *Nondiscrimination in Health Programs and Activities*, 89 Fed. Reg. 37,522 (May 6, 2024) ("2024 Rule"). Faced with steep costs to comply with the 2024 Rule and the unjustifiable choice between

enforcing their duly enacted laws and regulations and losing more than one hundred *billion* dollars in federal funds, the Plaintiff States initially sought preliminary relief. This Court granted the Plaintiff States a preliminary injunction and § 705 stay—holding that the 2024 Rule is likely unlawful, will cause the Plaintiff State irreparable harm, and is not in the public interest. Mem. Op. at 11-27, ECF No. 29. Two other district courts agreed. See *Texas v. Becerra*, No. 6:24-cv-211-JDK, 2024 WL 3297147, at *1 (E.D. Tex. July 3, 2024); *Florida v. U.S. Dep’t of Health and Human Servs.*, 8:24-cv-1080-WFJ-TGW, 2024 WL 3537510, at *8-10, *12-13 (M.D. Fla. July 3, 2024).

HHS has now appealed this Court’s preliminary relief decision, Notice of Appeal, ECF No. 42. The Fifth Circuit has set forth a briefing schedule in that matter, Text Order, 24-60462 (5th Cir. Oct. 1, 2024). Under that schedule, briefing will close in January.

In the meantime, this Court should proceed to the full merits of the Plaintiff States’ challenge to the 2024 Rule. HHS’s appeal of the order granting preliminary relief does not divest this Court of jurisdiction to proceed on the merits of the case. And this case is well positioned to move toward final judgment, which would promote much-needed clarity to the Plaintiff States for structuring important state programs. Indeed, as this Court recognized in denying Defendants’ motion to stay proceedings in a parallel challenge to the 2024 Rule, if Defendants succeed in their appeal of the preliminary injunction order the Plaintiff States “will no longer be protected from ... the Final 2024 Rule.” Order at 3, ECF No. 34, *McComb Children’s Clinic, LTD v. Becerra*, No. 5:24-cv-48 (S.D. Miss. Sept. 18, 2024) (“*McComb* Order”). “As a result, ... a stay is unwarranted in the present case,” *id.* The Court should thus deny Defendants’ motion to stay proceedings [ECF No. 46] and enter a summary-judgment briefing schedule that would advance this case towards resolution.¹

¹ To the extent the Local Rules require Plaintiffs to file both a response to Defendants’ motion to stay proceedings and a memorandum of law in support of their response, Plaintiffs respectfully request the Court waive any such requirement.

ARGUMENT

I. This Court may proceed to the merits of this case.

This Court requested additional briefing concerning whether this case can proceed “while the appeal of the Court’s Preliminary Injunction is pending” given “the general rule that a district court is divested of jurisdiction upon the filing of the notice of appeal with respect to any matters involved in the appeal.” Order at 2, ECF No. 44 (citing *Alice L. v. Dusek*, 492 F.3d 563, 564-65 (5th Cir. 2007)). Because that “general rule” does not apply here, this Court retains jurisdiction to proceed in this case. See *Satanic Temple, Inc. v. Texas Health & Human Serv. Comm’n*, 79 F.4th 512, 514 (5th Cir. 2023). That includes resolving the merits. *Id.*

The Fifth Circuit has long recognized that even after a party appeals a district court’s order granting or denying preliminary relief, there is “no reason” why the case cannot “proceed[] to a trial on the merits” while the appeal is pending. *Nalco Chem. Co. v. Hall*, 347 F.2d 90, 92 (5th Cir. 1965). And it has reiterated that instruction. See, e.g., *Ry. Lab. Executives’ Ass’n v. City of Galveston, Tex., By & Through Bd. of Trustees of the Galveston Wharves*, 898 F.2d 481, 481 (5th Cir. 1990); *Ester v. Nacogdoches Cnty., Texas*, 193 F.3d 518 (5th Cir. 1999) (per curiam); *Chase Home Fin. LLC v. Hall*, 325 F. App’x 392 (5th Cir. 2009). Just last year, the Fifth Circuit emphasized in *Satanic Temple* that the “[t]he district court had jurisdiction to proceed on the merits of the case” while the plaintiff appealed the denial of its preliminary injunction motion because “[a]n appeal from a grant or denial of a preliminary injunction does not inherently divest the district court of jurisdiction or otherwise restrain it from taking other steps in the litigation.” 79 F.4th at 514. Other circuits agree. See, e.g., *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012); *W. Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986). The nature and posture of appeals from motions for preliminary relief are significantly different than those where the “general rule” applies. When, for example, a defendant appeals the denial of qualified immunity, a total pause of claims against that defendant is essential to preserve his “entitlement to be

free from the burdens of time-consuming pre-trial matters and the trial process itself.” *See Alice L.*, 492 F.3d at 565 (citation omitted). Or in a case that has been decided on the merits, further proceedings in the district court risk undermining the integrity or finality of the judgment on appeal. Here, by contrast, the full merits of the case remain unresolved, and neither party has an interest in avoiding a definitive ruling on the legality of the 2024 Rule.

II. This Court should proceed to the merits of this case.

This case is well positioned to move expeditiously toward final judgment. Because this case is brought under the Administrative Procedure Act (“APA”), there is no need for discovery. *See Fla. Power & Light Co v. Lorion*, 470 U.S. 729, 743 (1985). And because this Court has already considered and thoroughly addressed the legal questions at issue—finding that the 2024 Rule exceeds HHS’s statutory authority—its task in deciding the merits should not be particularly cumbersome. Mem. Op. at 22 (“HHS acted unreasonably when it relied on *Bostock*’s analysis in order to conflate the phrase ‘on the basis of sex’ [in the ACA] with the phrase ‘on the basis of gender identity.’”); *see also Texas*, 2024 WL 3297147, at *1 (finding the 2024 Rule likely unlawful and enjoining its enforcement); *Florida*, 2024 WL 3537510, at *8-10 (same). The relevant statutory provisions and the 2024 Rule’s interpretation of those provisions are what they are. Neither delay nor additional briefing will bridge the chasm between the two.

Expeditious resolution of this case would promote much-needed clarity and is necessary to provide the States with full relief from the 2024 Rule. While the Plaintiff States are currently protected against the 2024 Rule by this Court’s preliminary injunction order, such relief is just that—preliminary. Should Defendants succeed on their preliminary injunction appeal, the Plaintiff States would be forced to choose between undertaking costly compliance efforts or putting at risk billions of dollars in federal healthcare funding for some of their most vulnerable citizens while continuing to litigate the merits of the 2024 Rule—costs that Plaintiffs could never recover, even if they are ultimately successful on the

merits. Only full vacatur of the 2024 Rule will provide the Plaintiff States full relief and compliance certainty. *See McComb* Order at 3.

Defendants' counterarguments in favor of a stay lack merit. *See* Defs.' Mem. in Supp. of Mot. for Stay at 3-6, ECF No. 47. Defendants deny the Plaintiff States would be "prejudice[d]" by a stay because the 2024 Rule is currently enjoined nationwide. *Id.* at 3. But, as explained, while the Plaintiff States are "*currently* protected by this Court's Preliminary Injunction," that protection is cold comfort given that "Defendants are currently seeking to overturn [that] decision on appeal." *McComb* Order at 3. And delaying resolution of the merits of this case risks placing the Plaintiff States in a confusing compliance limbo.

Nor would advancing this case prove "a wasteful exercise." Defs.' Mem. in Supp. of Mot. for Stay at 4. If, as Defendant's claim (at 4), the issues on appeal are markedly similar to those remaining here, addressing them in parallel is a minimal burden on the parties. Especially so for Defendants, who will already be briefing these issues "in overlapping legal forums," *id.*, given this Court's decision declining to stay proceedings in *McComb*. *McComb* Order at 3.

The proceedings in the Fifth Circuit should not stall this Court. In reality, the merits of the Plaintiff States' challenge to the 2024 Rule are only one component of the equity-balancing matter in the current appeal, and even then, the question there is whether the Plaintiff States are *likely* to succeed on their merits arguments. *See Netflix, Inc. v. Babin*, 88 F.4th 1080, 1096 (5th Cir. 2023) (distinguishing "likely success on the merits" from "establishing actual success on the merits") (citation omitted). Moreover, this Court ruled on only one of the Plaintiff States' many merits claims. Mem. Op. at 11-23 (finding the 2024 Rule exceeds HHS's statutory authority); *see* Compl. ¶¶ 100-24, ECF 1 (raising additional claims under the APA against the 2024 Rule). Thus, the Fifth Circuit's decision may be illuminating, but it will not necessarily be "fully or partially *dispositive*." Defs.' Mem. in Supp. of Mot. for Stay at 4 (emphasis added). And there is no guarantee when that decision may come. *See*

Practitioners' Guide to the U.S. Court of Appeals for the Fifth Circuit at 4, *available at* <https://perma.cc/59S2-V4FA> (“As of Jun 30, 2024, ... the median time from filing the notice of appeal to issuance of the court’s opinion was 7.8 months.”). There is no need to indefinitely place this matter on ice.

For similar reasons, Defendants are wrong that delay promotes “judicial economy.” Defs.’ Mot. for Stay at 4-5. Expedient review of this matter now would allow for potential consolidation of this Court’s merits decision with the appeal now pending before the Fifth Circuit. On the other hand, waiting on the Fifth Circuit means that this matter will languish on this Court’s docket indefinitely, only to be revived potentially months or more down the road, when the issues are less fresh. That’s why courts regularly proceed with the merits of a case even while an appeal of a decision on preliminary relief is pending. *See, e.g.,* Order, *Carroll Indep. Sch. Dist. v. U.S. Dep’t of Educ.*, No. 4:24-cv-00461, ECF No. 57 (N.D. Tex. Aug. 8, 2024) (setting expedited summary judgment schedule); *Tennessee v. Cardona*, Civil Action No. 2:24- 072, 2024 WL 3584361, at *2 (E.D. Ky. July 16, 2024) (denying defendants’ motion to stay the proceedings pending appeal and issuing summary judgment schedule); Order, *Kansas v. U.S. Dep’t of Educ.*, No. 24-4041, ECF No. 77 (D. Kan. Aug. 13, 2024) (setting dispositive motions schedule).

As in *McComb*, this Court should deny Defendants’ stay request. *Contra* Defendants (at 5), it makes no difference that the cases have different plaintiffs. After all, the legal issues overlap, and both sets of plaintiffs enjoy only preliminary protection from the 2024 Rule. Allowing that case to proceed while delaying this one “compel[s]” the Plaintiff States to “stand aside while a litigant in another case settles the rule of law that will define the rights of both”; this Court has explained that is an unacceptable outcome. *McComb* Order at 3 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)).

CONCLUSION

This Court has jurisdiction to proceed on the merits of the Plaintiff States' case and should enter a summary-judgment briefing schedule to advance this case to resolution.

Date: October 2, 2024.

Respectfully submitted,

LYNN FITCH

Attorney General

/s/ Scott G. Stewart

SCOTT G. STEWART

Solicitor General

Bar No. 106359

JUSTIN L. MATHENY

Deputy Solicitor General

Bar No. 100754

MISSISSIPPI ATTORNEY GENERAL'S OFFICE

P.O. Box 220

Jackson, Mississippi 39205

(601) 359-3680

scott.stewart@ago.ms.gov

justin.matheny@ago.ms.gov

Counsel for Plaintiff State of Mississippi

JONATHAN SKRMETTI

Attorney General & Reporter

/s/ Steven J. Griffin

STEVEN J. GRIFFIN

Senior Counsel for Strategic Litigation

Bar No. 103218

WHITNEY HERMANDORFER*

Director of Strategic Litigation

HARRISON GRAY KILGORE*

Strategic Litigation Counsel and Assistant Solicitor General

OFFICE OF THE TENNESSEE ATTORNEY GENERAL

P.O. Box 20207

Nashville, Tennessee 37202

(615) 741-3491

steven.griffin@ag.tn.gov

whitney.hermandorfer@ag.tn.gov

harrison.kilgore@ag.tn.gov

Counsel for Plaintiff State of Tennessee

STEVE MARSHALL

Attorney General

/s/ A. Barrett Bowdre

A. BARRETT BOWDRE*

Principal Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL

STATE OF ALABAMA

501 Washington Avenue

P.O. Box 300152

Montgomery, Alabama 36130-0152

(334) 242-7300

barrett.bowdre@AlabamaAG.gov

Counsel for Plaintiff State of Alabama

CHRISTOPHER CARR

Attorney General

/s/ Stephen Petranj

STEPHEN PETRANY*

Solicitor General

OFFICE OF THE ATTORNEY GENERAL OF GEORGIA

Georgia Department of Law

40 Capitol Square SW

Atlanta, Georgia 30334

(404) 458-3408

spetrany@law.ga.gov

Counsel for Plaintiff State of Georgia

THEODORE E. ROKITA

Attorney General

/s/ James A. Barta

JAMES A. BARTA*

Solicitor General

INDIANA ATTORNEY GENERAL'S OFFICE
IGCS – 5th Floor
302 W. Washington St.
Indianapolis, Indiana 46204
(317) 232-0709
James.Barta[atg.in.gov
Counsel for Plaintiff State of Indiana

KRIS W. KOBACH

Attorney General

/s/ Jay Rodriguez

JAY RODRIGUEZ*

Assistant Attorney General

OFFICE OF THE KANSAS ATTORNEY
GENERAL
120 SW 10th Ave.
Topeka, Kansas 66612
(785) 296-4733
jay.rodriguez[atg.ks.gov
Counsel for Plaintiff State of Kansas

RUSSELL COLEMAN

Attorney General

/s/ Justin D. Clark

JUSTIN D. CLARK*

Civil Chief

LINDSEY R. KEISER*

Assistant Attorney General

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
justind.clark@ky.gov
lindsey.keiser@ky.gov
Counsel for Plaintiff Commonwealth of Kentucky

ELIZABETH B. MURRILL

Attorney General

/s/ Kelsey Smith

KELSEY SMITH*

Deputy Solicitor General

OFFICE OF THE LOUISIANA ATTORNEY
GENERAL
1885 N. 3rd St.
Baton Rouge, Louisiana 70802
smithkel[atag.louisiana.gov
Counsel for Plaintiff State of Louisiana

MICHAEL T. HILGERS

Attorney General

/s/ Lincoln J. Korell

LINCOLN J. KORELL*

Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL OF
NEBRASKA
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
lincoln.korell@nebraska.gov
Counsel for Plaintiff State of Nebraska

DAVE YOST

Attorney General

/s/ T. Elliot Gaiser

T. ELLIOT GAISER*

Solicitor General

OFFICE OF THE OHIO ATTORNEY GENERAL
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
Thomas.Gaiser@ohioago.gov
Counsel for the State of Ohio

GENTNER DRUMMOND

Attorney General

/s/ Garry M. Gaskins, II

GARRY M. GASKINS, II*

Solicitor General

OKLAHOMA OFFICE OF THE ATTORNEY
GENERAL

313 NE 21st Street

Oklahoma City, Oklahoma 73105

(405) 312-2451

Garry.Gaskins@oag.ok.gov

Counsel for the State of Ohio

ALAN WILSON

Attorney General

/s/ Thomas T. Hydrick

THOMAS T. HYDRICK*

Assistant Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
OF SOUTH CAROLINA

1000 Assembly Street

Columbia, South Carolina 29201

(803) 734-4127

thomashydrick@scag.gov

Counsel for Plaintiff State of South Carolina

MARTY J. JACKLEY

Attorney General

/s/ Clifton Katz

CLIFTON KATZ*

Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL

STATE OF SOUTH DAKOTA

1302 E. Hwy. 14, Suite #1

Pierre, South Dakota 57501

(605) 773-3215

clifton.katz@state.sd.us

Counsel for Plaintiff State of South Dakota

JASON S. MIYARES

Attorney General

/s/ Kevin M. Gallagher

KEVIN M. GALLAGHER*

Principal Deputy Solicitor General

BRENDAN T. CHESTNUT*

Deputy Solicitor General

VIRGINIA ATTORNEY GENERAL'S OFFICE

202 North 9th Street

Richmond, Virginia 23219

(804) 786-2071

kgallagher@oag.state.va.us

bchestnut@oag.state.va.us

Counsel for Plaintiff Commonwealth of Virginia

PATRICK MORRISEY

Attorney General

/s/ Michael R. Williams

MICHAEL R. WILLIAMS*

Principal Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL OF
WEST VIRGINIA

State Capitol Complex

Building 1, Room E-26

Charleston, WV 25301

(304) 558-2021

michael.r.williams@wvago.gov

Counsel for Plaintiff State of Virginia

*Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2024, a true and correct copy of the foregoing document was filed using the Court's electronic court-filing system, which sent notice of filing to all counsel of record.

/s/ Steven J. Griffin
STEVEN J. GRIFFIN