

**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  
SECRETARY OF HEALTH AND HUMAN  
SERVICES; and U.S. DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

*Defendants.*

No. 1:19-cv-01672-GLR

**DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICES OF  
SUPPLEMENTAL AUTHORITY**

On November 7, 2019, Plaintiff submitted a "Notice of Supplemental Authority," ECF No. 96, attaching an order from the U.S. District Court for the Southern District of New York, which vacated the rule Plaintiff challenges in this case. *See New York v. Azar*, 1:19-cv-01672-SAB (S.D.N.Y. Nov. 6, 2019), ECF No. 248 (*New York Order*). Plaintiff submitted a second "Notice of Supplemental Authority" on November 8, 2019, attaching an order from the U.S. District Court for the Eastern District of Washington, which granted the State of Washington's motion for summary judgment in another case challenging the same rule. *See Washington v. Azar*, No. 2:19-CV-00183-SAB (E.D. Wash. Nov. 7, 2019), ECF No. 71 (*Washington Order*). Plaintiff provided these orders, Defendants presume, in order to suggest that they support granting Plaintiff the relief it requests here. In fact, however, those orders obviate any need for the preliminary injunction that Plaintiff seeks.

A showing of irreparable harm is of course necessary to obtain preliminary injunctive relief. *Pashby v. Delia*, 709 F.3d 307, 328 (4th Cir. 2013). In light of the decisions in *New York* and *Washington*, Plaintiff cannot make that showing. Indeed, by “vacat[ing] HHS’s 2019 Rule in its entirety,” *New York* Order at 146, the *New York* court provided Plaintiff here with all the relief it seeks. Similarly—although the *Washington* court has not issued a written opinion—it granted Washington’s motion for summary judgment, *see Washington* Order, in which Washington sought vacatur of the rule. The requirement that a party show irreparable harm restricts this Court’s authority to enter a preliminary injunction preventing implementation of a vacated rule. Because Plaintiff cannot show irreparable harm absent injunctive relief from this Court, the Court should at the very least stay consideration of Plaintiff’s motion for preliminary injunction. *Cf. Hawai’i v. Trump*, 233 F. Supp. 3d 850, 853 (D. Haw. 2017) (“[T]he Western District of Washington’s nationwide injunction already provides the State with the comprehensive relief it seeks in this lawsuit. As such, the State will not suffer irreparable damage.”).

The government is currently considering whether to appeal the *New York* and *Washington* Orders. Plaintiff thus might argue that it could suffer irreparable harm in the future, if both the *New York* Order and the *Washington* Order are overturned on appeal. But any injury that is expressly contingent on a future events is, by definition, not an imminent, irreparable injury. *See Di Biase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017) (“[T]he possibility of irreparable harm does not constitute a ‘clear showing’ that the plaintiff is entitled to relief.”); *Henke v. Dep’t of Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012) (“Injury that is hypothetical or speculative does not rise to the level of irreparable harm.”)

The Court may, of course, proceed to resolve the parties’ pending cross motions for summary judgment, which are fully briefed. However, unless and until the *New York* Order and

the *Washington* Order are overturned, the Court should stay consideration of Plaintiff's preliminary injunction motion. While the *New York* and *Washington* Orders remain in place, Plaintiff will not suffer irreparable harm absent an injunction from this Court, and there is accordingly no basis for the Court to resolve Plaintiff's motion for preliminary injunction at this time.

Plaintiff's November 7, 2019 Notice of Supplemental Authority also asks this Court to take judicial notice of the transcript of the hearing on the parties' cross motions for summary judgment in the *New York* proceeding. The Court should decline to do so. Federal Rule of Evidence 201 permits a court to take judicial notice of adjudicative facts that are "not subject to reasonable dispute" because they are either (1) "generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A proper request for judicial notice includes identification of specific facts the court is requested to notice as true. *See, e.g., Jackson v. Tenn. Dep't of Safety*, No. 3:05-CV-231, 2009 WL 1437570, \*5 (May 21, 2009); *Adonai Commc'ns, LTD v. Awstin Investments, LLC*, No. 3:10-CV-2642-L, 2011 WL 4760409, \*1 (N.D. Tex. Oct. 7, 2011); *Segura v. Felker*, No. CIV S-08- 2477 KJM P, 2010 WL 5313770, at \*1 n.1 (E.D. Cal. Dec. 20, 2010), *aff'd sub nom. Segura v. McGuire*, 474 F. App'x 608 (9th Cir. 2012). A court need not take judicial notice of irrelevant facts, even if contained in otherwise noticeable documents. *See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006); *Knop v. Johnson*, 667 F. Supp. 467, 485 (W.D. Mich. 1987); *see also* 21B Wright & Graham, *Federal Practice & Procedure: Evidence* § 5104 (2d ed. 2007).

Plaintiff has not met its burden of identifying any specific, relevant adjudicative facts in the 160-page rough transcript attached to its notice. Moreover, even if Plaintiff had attempted to

identify specific facts for the court to consider noticing as true, its motion should still be denied for several reasons.

First, the proceeding in *New York* was an oral argument, not an evidentiary hearing. Thus, the transcript contains only arguments of counsel, not factual testimony. Rule 201 applies only to adjudicative facts, not legislative facts. Fed. R. Evid. 201(a). “Adjudicative facts are facts about the parties and their activities, businesses, and properties; they usually answer the questions of who did what, where, when, how, why, and with what motive or intent.” *It’s My Party, Inc. v. Live Nation, Inc.*, No. CIV. JFM-09-547, 2012 WL 78795, at \*1 (D. Md. Jan. 10, 2012) (quotation omitted). Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” *Id.* (quoting advisory committee notes to Rule 201(a)). To the extent that Plaintiff suggests this Court should take notice of the legal arguments made by counsel in the transcript or statements by the judge presiding over that proceeding, such arguments and statements are not adjudicative facts in this case.

Second, the Court need not engage in any fact finding in this case to which any judicially noticed facts would be relevant. This case is brought under the Administrative Procedure Act (APA), and “[g]enerally speaking, district courts reviewing agency action under the APA’s arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.” *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (citations omitted). Likewise, as Defendants previously explained, review in this case should be limited to the administrative record, not some new factual record made in the reviewing court. 5 U.S.C. § 706; *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999)).

Furthermore, even if the transcript contained testimony regarding facts, as opposed to the arguments of counsel (which it does not), the transcript could not be judicially noticed for the truth of any facts stated therein. When a court takes judicial notice of a transcript, it may not take judicial notice of any “specific facts . . . for the purpose of resolving contested legal issues.” *S. Louisiana Area Rate Cases v. Fed. Power Comm’n*, 428 F.2d 407, 438 (5th Cir. 1970); *see also M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (stating the general rule that “a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it”). As a result, it is not clear what purpose judicial notice of the transcript would serve. The only fact it could reasonably establish is that an oral argument occurred in the *New York* case. But no one disputes that fact; nor is it relevant to this case.

Dated: November 12, 2019

Respectfully submitted,

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