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19
20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**

22 AIDEN STOCKMAN; NICOLAS
TALBOTT; TAMASYN REEVES;
23 JAQUICE TATE; JOHN DOES 1-2;
JANE DOE; and EQUALITY
24 CALIFORNIA,

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-CV-01799-JGB-KK
**PLAINTIFFS' SUPPLEMENTAL
BRIEFING REGARDING *DOE V.
TRUMP*, NO. 17-CV-01597-CKK
(D.D.C. OCT. 30, 2017)**

1 Plaintiffs submit this supplemental briefing in response to the Court’s
2 Minute Order issued on November 2, 2017 [ECF No. 42] (the “Minute Order”).

3 The Minute Order asks the parties to address two questions:

- 4 1. Whether the *Doe* decision affects this case and, if so, how; and
- 5 2. Whether this Court should stay this matter pending further
6 proceedings in *Doe*.

7 The short answers to these questions are: (1) The *Doe* decision preliminarily
8 enjoins Defendants from enforcing portions of President’s Trump’s ban—
9 specifically as related to accession and military service by transgender people—
10 including against the Plaintiffs in this case; and (2) A stay is not warranted because
11 it would subject Plaintiffs to serious harms, because Defendants would suffer no
12 hardship from denial of a stay, and because a stay would not meaningfully simplify
13 or expedite the Court’s consideration of the issues in this case. The *Doe* injunction
14 does not address the full range of irreparable injuries Plaintiffs seek to enjoin—
15 injuries that they will continue to suffer if the Court stays the proceedings.
16 Moreover, the *Doe* injunction is preliminary in nature and may be stayed, reversed
17 or limited on appeal—an option Defendants concede they are considering—and in
18 any event, a decision on the merits by the D.C. Circuit will not be binding on this
19 Court or the Ninth Circuit, nor will it address all of Plaintiffs’ claims for relief in
20 this action. In these circumstances, a discretionary stay is unwarranted.

21 **I. THE *DOE* INJUNCTION AFFORDS PLAINTIFFS PARTIAL AND**
22 **PRELIMINARY RELIEF**

23 Plaintiffs brought this lawsuit seeking both a preliminary and permanent
24 injunction related to President Trump’s order banning military service by
25 transgender people, and denying them essential medical care. *See Military Service*
26 *by Transgender Individuals*, 82 Fed. Reg. 41319 (Aug. 30, 2017) (“the ban”). As
27 Plaintiffs explain in their Motion for Preliminary Injunction [ECF No. 15], the ban
28 has three components. *First*, it imposes a blanket and indefinite extension of the

1 ban on enlistment by openly transgender persons. (*Id.* at § 2(a) (“Accession
2 Ban”).) *Second*, it “halt[s] all use of DOD or DHS resources to fund sex
3 reassignment surgical procedures for military personnel,” except in limited
4 circumstances. (*Id.* at § 2(b) (“Sex Reassignment Surgery Directive”).) *Third*, it
5 bans the retention of transgender service members and requires their separation
6 from the military by directing, no later than March 23, 2018, a “return” to the pre-
7 June 2016 rules that excluded transgender people from serving openly. (*Id.* at §§
8 1(b), 3 (“Retention Ban”).)

9 There are four parallel actions each challenging the ban: (i) this action; (ii)
10 an action pending in the U.S. District Court for the District of Columbia (“*Doe v.*
11 *Trump*”); (iii) an action pending in the U.S. District Court for the District of
12 Maryland (“*Stone v. Trump*”); and (iv) an action pending in the U.S. District Court
13 for the Western District of Washington (“*Karnoski v. Trump*”).

14 On October 30, 2017, the court in *Doe v. Trump* granted partial preliminary
15 relief by enjoining Defendants “from enforcing the Accession and Retention
16 Directives, corresponding with sections 1(b) and 2(a) of the Presidential
17 Memorandum, until further order of the Court or until this case is resolved.” *Doe*
18 *v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at *2 (D.D.C. Oct. 30,
19 2017). The court, however, granted Defendants’ motion to dismiss Plaintiffs’
20 claims with regard to the Sex Reassignment Surgery Directive, on grounds that the
21 plaintiffs in that case lacked standing to challenge it because the court concluded
22 that no plaintiff had relevant medical care planned after the effective date of the
23 Sex Reassignment Surgery Directive. *See id.* at *33.

24 The *Doe* injunction, which rests entirely upon its conclusion that plaintiffs
25 are likely to succeed on the merits of its Fifth Amendment equal protection claim,
26 preliminarily enjoins Defendants from enforcing the Accession Ban and Retention
27 Ban against the Plaintiffs in this case pending the final judgment of the D.C.

28

1 District Court, unless otherwise stayed, modified, or reversed. It does *not* address
2 Plaintiffs' challenge to the Sex Reassignment Surgery Directive.

3 **II. THE COURT SHOULD NOT STAY PROCEEDINGS IN THIS CASE**

4 In deciding whether to stay proceedings in light of other pending litigation,
5 courts consider (1) "the possible damage which may result from the granting of a
6 stay," (2) "the hardship or inequity which a party may suffer in being required to
7 go forward," and (3) "the orderly course of justice measured in terms of the
8 simplifying or complicating of issues, proof, and questions of law which could be
9 expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th
10 Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

11 Because the preliminary relief granted in *Doe* is subject to stay or reversal
12 and does not reach every aspect of the ban, Plaintiffs will continue to face the
13 irreparable harms if this action is stayed. By contrast, continuing to adjudicate
14 Plaintiffs' purely legal claims imposes no conceivable hardship upon Defendants.
15 Nor will a stay simplify resolution of this case, as this Court (and likely the Ninth
16 Circuit) will be required to exercise its independent judgment concerning the
17 merits of Plaintiffs' claims notwithstanding the persuasive value of any decision by
18 the D.C. District or Circuit courts.

19 **A. Plaintiffs Will Be Harmed If A Stay Is Granted.**

20 Although the *Doe* injunction prevents Defendants from enforcing the
21 Accession and Retention Bans on an interim basis, it does not provide the full
22 scope of relief Plaintiffs seek in this case. Granting a stay would therefore allow
23 many of the harms at issue in this case to continue unabated.

24 First, the *Doe* injunction does not insulate Plaintiffs from the loss of
25 essential medical services, because the injunction in that case did not reach the Sex
26 Reassignment Surgery Directive. *See Fishman v. Paolucci*, 628 F. App'x 797, 801
27 (2d Cir. 2015) (holding "a lack of medical services" constitutes "irreparable
28 harm"). Staying this case pending proceedings in *Doe* would thus withhold relief

1 necessary to remedy the full extent of the violation Plaintiffs suffer under the Fifth
2 and First Amendments, including the stigma and deprivation of constitutional
3 rights entailed by Defendants’ disparate treatment of Plaintiffs with respect to
4 needed medical care. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017)
5 (“It is well established that the deprivation of constitutional rights unquestionably
6 constitutes irreparable injury”) (internal citation and quotation marks omitted);
7 *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (holding that an
8 equal protection violation constitutes irreparable harm). The plaintiffs in *Doe* were
9 found to lack standing to challenge the prohibition on payment for sex-
10 reassignment surgery because none had transition-related surgeries planned after
11 March 22, 2018, and thus had not shown that they are “substantially likely to be
12 impacted by the Sex Reassignment Surgery Directive.” *Doe*, 2017 WL 4873042,
13 at *24. But unlike the *Doe* plaintiffs, several Plaintiffs here have gender transition
14 plans, developed in accordance with the pre-ban open service policy, that call for
15 them to undergo gender transition-related surgery *after* March 2018. (See John
16 Doe 1 Supp. Decl., ¶ 4; John Doe 2 Decl., ¶ 22; John Doe 2 Supp. Decl., ¶ 4.) For
17 example, Plaintiff John Doe 2’s transition plan currently includes a projected
18 surgery date of April 2018, with the specific date to be selected based on surgeon
19 availability. Under the ban’s prohibition on the DOD or DHS resources to fund
20 sex-reassignment surgical procedures, he will no longer be eligible for that surgery
21 after March 22, 2018.

22 Second, a stay would harm Plaintiffs because the *Doe* injunction is subject to
23 stay, reversal, or modification by the District Court or the D.C. Circuit. Serving
24 under such conditions subjects Plaintiffs to unnecessary and destabilizing
25 uncertainty, where their continued eligibility to serve is subject to revision at any
26 time depending on what happens in another case. Any delay in the resolution of
27 this case would exacerbate those harms, forcing Plaintiffs to make critical
28 decisions about their future plans for military service without knowing whether

1 those plans may be overturned, and their military careers abruptly terminated, by a
2 decision upholding the ban or staying the injunction in *Doe*.

3 In similar circumstances, courts have issued their own injunctions rather
4 than requiring plaintiffs to rely on the uncertain protection of injunctions issued in
5 other circuits. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080,
6 2084 (2017) (discussing injunctions issued both in the District of Hawaii and the
7 District of Maryland); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d
8 539, 565-66 (D. Md. 2017) (issuing nationwide preliminary injunction against
9 enforcement of President Trump’s second travel ban even though *Hawai’i v.*
10 *Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) entered a nationwide temporary
11 restraining order enjoining enforcement of the travel ban one day prior); *Aziz v.*
12 *Trump*, 234 F. Supp. 3d 724, 738-39 (E.D. Va. 2017) (enjoining enforcement of
13 President Trump’s first travel ban against U.S. permanent residents even though
14 *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) entered an
15 even broader worldwide temporary restraining order enjoining enforcement of the
16 travel ban ten days prior); cf. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)
17 (“Only in rare circumstances will a litigant in one cause be compelled to stand
18 aside while a litigant in another settles the rule of law that will define the rights of
19 both.”).

20 Indeed, the Department of Justice recently has praised the ordinary and
21 typical federal practice of “multiple lower courts considering similar legal
22 questions,” which is “a process of value to the appellate courts and the
23 development of the law more generally.” Defendants’ Brief [ECF No. 36] in *City*
24 *and Cty. of San Francisco v. Sessions*, No. 3:17-cv-04642-WHO (N.D. Cal. filed
25 Aug. 28, 2017).

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1 **B. Defendants Will Suffer No Hardship Or Inequity From Being**
2 **Required To Go Forward With This Case.**

3 “[A party seeking] a stay must make out a clear case of hardship or inequity
4 in being required to go forward, if there is even a fair possibility that the stay for
5 which he prays will work damage to someone else.” *Landis*, 299 U.S. at 255. And
6 “[b]eing required to defend a suit, without more, does not constitute a “clear case
7 of hardship or inequity” within the meaning of *Landis*. *Lockyer*, 398 F.3d at 1112.
8 Defendants cannot plausibly identify any hardship they would suffer if this case
9 proceeds. In particular, this Court’s review would in no way impede their ability
10 to further study the issue of military service by transgender people. (*See* Defs.’
11 Mot. to Dismiss and Opp. to Pls.’ Mot. for Prelim. Inj. [ECF No. 36], at 36.) In the
12 absence of any hardship denial of a stay would impose upon Defendants, and
13 compared with the manifold irreparable injuries a stay would certainly inflict upon
14 Plaintiffs, a discretionary stay is not warranted here.

15 **C. A Stay Will Not Aid The “Orderly Course Of Justice” Or**
16 **Simplify Resolution Of The Issues Before The Court.**

17 Nor is this a case where considerations of judicial economy or efficiency
18 weigh in favor of a stay. Regardless of the outcome in *Doe* at either the District
19 Court or Circuit Court level, this Court will be required to consider the pending
20 motions on their merits and reach its own decision concerning Plaintiff’s likelihood
21 of success. While the District Court’s analysis in *Doe* may and should be
22 persuasive authority for this Court on many of the claims at issue here, and any
23 decision by the D.C. Circuit may be persuasive as well, neither of those courts’
24 decisions can render this Court’s consideration of the pending motions unnecessary
25 or provide binding authority that might narrow or resolve the issues before the
26 Court.

27 That fact distinguishes this case from cases such as *Ali v. Trump*, 241 F.
28 Supp. 3d 1147 (W.D. Wash. 2017), where a similar case arising in the same Circuit

1 resulted in preliminary injunctive relief. The *Ali* Court granted a stay because an
2 appeal in the other case meant that “guidance from the Ninth Circuit will be
3 available shortly.” *Id.* at 1153. Regardless of the final outcome before the D.C.
4 Circuit, *Doe* will not narrow or resolve any issue before the Court or meaningfully
5 simplify the Court’s resolution of the pending motions.

6 To the extent Defendants seek a stay based on an assumption that the
7 Supreme Court will grant certiorari in *Doe* and issue a decision resolving the issues
8 in this case, that possibility is entirely speculative at this stage. There presently are
9 four challenges to the ban pending in three different circuits. There simply is no
10 way of knowing at this time which of the pending cases, if any, may be subject to
11 Supreme Court review. Indeed, even a Supreme Court decision on the merits in
12 *Doe* would not fully resolve the issues before this Court, because Plaintiffs raise a
13 First Amendment claim that is not raised by the Plaintiffs in *Doe*.

14 In sum, there is no “clear case of hardship or inequity” that should persuade
15 this Court to refrain from proceeding with an already-scheduled hearing and
16 issuing decisions on the two fully-briefed motions now before it, and there is
17 substantially more than “a fair possibility [] that the stay . . . will work damage” on
18 Plaintiffs. *Landis*, 299 U.S. at 256. In these circumstances, no stay is warranted.

19 **III. CONCLUSION**

20 For the foregoing reasons, the Court should not stay this action and should
21 proceed to consider and decide the pending motions.

22 Dated: November 8, 2017

Respectfully submitted,

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25
26 By /s/ Adam S. Sieff

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