The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

PLAINTIFFS' OPPOSITION TO DEFENDANTS' STAY REQUEST

The government's request for a stay of these proceedings is a tactical attempt to circumscribe further judicial review of the President's extraordinary attack on transgender Americans. Faced with one court determination that the President has engaged in unlawful discrimination, the government is understandably eager to cut short any further judicial inspection of its conduct—lest another court agree the government's defenses "wither away under scrutiny." *Doe v. Trump*, No. 17-1597, 2017 WL 4873042, at *1 (D.D.C. Oct. 30, 2017). But having publicly denigrated the contributions of thousands of transgender people who have put their lives at risk for our country, the government cannot now sweep its actions under the rug and defer judicial inspection of its conduct for another day or to another tribunal, all while working to assemble its *post hoc* justifications.

The government has not satisfied its burden for a stay of any scope. The government fails to show the requisite hardship to justify a stay, while on the flip side a stay would leave Plaintiffs exposed to irreparable harm and freeze the development of important legal issues affecting the rights of many. A preliminary injunction from a district court in Washington D.C. that enjoins only part of the Ban and that can be vacated or narrowed under different circuit precedent is not an adequate basis for staying the resolution of Plaintiffs' fully-briefed motion for preliminary injunction, let alone all proceedings in this case. *Preliminary* relief—designed merely to preserve the status quo while a case is litigated on the merits—is no basis to refrain from litigating the merits. That is doubly true here, where the ban on transition-related surgical care remains, Plaintiffs' raise claims that were not brought by the *Doe* plaintiffs, and the State of Washington presents unique interests not present or advanced in *Doe*, and which implicate Defendants' standing arguments central to every aspect of their defense.

I. The Government Cannot Meet the Standard for a Stay.

"Where it is proposed that a pending proceeding be stayed, the competing interests must be weighed." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). Among others,

> [t]hose interests include (1) the possible damage which may result from the granting of a stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be

expected to result from a stay.

Washington v. Trump, No 2:17-cv-00141-JLR, 2017 WL 4857088, at *5 (W.D. Wash. Oct. 27, 2017) (internal quotation marks omitted). This balancing test becomes inflexible, however, "if there is even a fair possibility that the stay . . . will work damage to someone else," *Lockyer*, 398 F.3d at 1112 (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936)). In such cases, the movant must "make out a clear case of hardship or inequity in being required to go forward." *Id.* "Only in rare circumstances" may a litigant be compelled to "stand aside while a litigant in another [case] settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255.

Lockyer's first and second factors alone foreclose the government's request for a stay. A stay would cause more than a "fair possibility" of harm, and the government accordingly "must" show hardship in being made to go forward. *Lockyer*, 398 F.3d at 1112. Because the government cannot meet that burden, its request for a stay should be denied. In any event, the government also cannot show how the orderly course of justice would be served by a stay.

A. A Stay Would Cause Harm to Plaintiffs.

Staying these proceedings would work a variety of harms. ***First***, the preliminary injunction issued by the District Court for the District of Columbia (the "D.C. injunction") does not enjoin the entirety of the Ban. The D.C. court explicitly found that the plaintiffs in that case lacked standing to challenge the government's discriminatory medical ban. *Doe*, 2017 WL 4873042, at *23-24. The government's assertion that Plaintiffs in this case have "largely obtained the relief they seek," Notice at 3, is blithely dismissive of the irreparable harms caused by the medical ban. Plaintiffs here have produced uncontroverted evidence of the harms absent in the *Doe* case. *See* Pls.' Opp. to Mot. to Dismiss, Dkt. #84, at 7, 17-18.

Notably, Defendants have also now asserted in litigation that a service member with a submitted or approved transition plan "may" qualify for an exception to the medical ban for circumstances where one has already begun treatment. *See Stone v. Trump*, No. 1:17-cv-2459-MJG, Dkt. #77, at 9 (D. Md. Nov. 3, 2017). While that half-hearted speculation cannot defeat standing for individuals like Plaintiff Stephens who have an approved treatment plan, it certainly does not address the medical needs of those who have not yet taken steps to transition like

Plaintiff Jane Doe. Supp. Doe Decl. ¶¶ 3-4 (filed herewith). The D.C. injunction highlights that preliminary relief may rise or fall on standing-related facts, and Plaintiffs Stephens and Doe and those similarly situated to them are entitled to preliminary relief based on their circumstances.

Second, a *preliminary* injunction granted by a different court, in a different circuit, does not justify preventing this Court from reaching Plaintiffs' preliminary injunction motion—much less proceeding toward the merits. Should the government succeed in narrowing, staying, or reversing the D.C. injunction, or should it otherwise expire on its own terms, Plaintiffs will be left wholly bereft of relief. Like the Interim Guidance upon which Defendants rely to oppose preliminary relief, the D.C. injunction is no substitute for an injunction that runs to Plaintiffs here and lasts through judgment in this case. The government cannot have it both ways by insisting, on the one hand, that Plaintiffs can simply rely on the D.C. injunction, while also arguing, on the other hand, that the injunction was "plainly erroneous," as it has made clear in its filings. *Stone*, Dkt. #77, at 2 n.1.

Defendants have also consistently argued in this and other cases that injunctive relief cannot reach beyond the particular plaintiffs before a court. *See* Defs.' Mot. to Dismiss & Opp. to Preliminary Injunction, Dkt. #69, at 41-43; *see also City of Chicago v. Sessions*, No. 1:17-cv-05720, Dkt. #81 (N.D. Ill. Sept. 26, 2017) (government's motion to stay nationwide effect of a preliminary injunction arguing that "both constitutional and equitable principles require" that an injunction be limited to the plaintiffs). That argument seeks to deprive Plaintiffs of any protection from relief ordered in another case and highlights the continuing need for a preliminary injunction here.

Regardless of how litigation in the D.C. Circuit may unfold, Plaintiffs are entitled to press their own claims in a court "in their view and reach rather than in remote parts of the country . . . they can learn of . . . by report only." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). They are also entitled to the benefit of Ninth Circuit precedent that will not be binding upon courts considering similar issues elsewhere. *See, e.g.*, *Witt v. Dept. of Air Force*, 527 F.3d 806 (9th Cir. 2008); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). Indeed, Plaintiffs allege distinct constitutional violations based on the First Amendment not even asserted in the *Doe* case.

Conversely, neither this Court nor the Ninth Circuit will be bound by developments in the D.C. Circuit. Granting a stay would therefore manifestly injure Plaintiffs while providing no countervailing benefit, as discussed below.

Third, staying these proceedings would also deprive Plaintiffs of an injunction supported by interests not present in *Doe*. The State of Washington has shown harms to its quasi-sovereign, proprietary, and sovereign interests distinct from the interests of private litigants. Those distinctions are legally significant. *Cf. Washington*, 2017 WL 4857088, at *6 (recognizing the significance of quasi-sovereign and proprietary interests of the State of Washington but concluding that similar interests were already asserted in litigation by the State of Hawaii). The centerpiece of Defendants' opposition to the preliminary injunctions sought in litigation challenging the Ban (and which Defendants would certainly continue to press in any appeal) is that the plaintiffs at issue supposedly lack standing—but those arguments do not apply to the range of harms suffered by the State of Washington. For example, Defendants argue that whether any particular transgender service member will be discharged is supposedly speculative; but the impairment to the legal *scope* of state nondiscrimination protections occurs regardless of what happens to any particular individual. In short, the State of Washington supports an independent basis for standing and injunctive relief not reflected in the *Doe* case.

Fourth, a stay would "thwart the development of important questions of law" by preventing this Court and the Ninth Circuit from weighing in on whether Plaintiffs have shown a likelihood of success on the merits of their claims. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Courts favor parallel litigation involving the government because it facilitates the "thorough development of legal doctrine" through "litigation in multiple forums." *Id.* at 163 (rejecting offensive use of collateral estoppel against the federal government). This interest more than justifies denying the government's motion for a stay in any respect. Preventing undue "freezing" of the law is an interest powerful enough to modify normal rules of collateral estoppel, as input from multiple courts "increase[s] the probability of a correct disposition." *Gherebi v. Bush*, 352 F.3d 1278, 1304 (9th Cir. 2003) (vacated on other grounds and internal quotes omitted); *see, e.g.*, *Mendoza*, 464 U.S. at 160; *Coeur D'Alene Tribe of Idaho v. Hammond*,

384 F.3d 674, 690 (9th Cir. 2004) (rejecting issue preclusion against a state agency, lest an "important legal issue [be] inadequately considered"). Furthering the normal growth of federal law on important questions justifies reaching a decision even where other considerations might suggest a stay. *See Gherebi*, 352 F.3d at 1304 (rejecting view that the court should "defer . . . decision in this case until after the Supreme Court has decided the pending Guantanamo detainee case in which certiorari has been granted"). Harm caused by the loss of Plaintiffs' and the State of Washington's unique circumstances and claims, as well as the views of this Court on important questions of Ninth Circuit and federal law, weighs heavily against a stay.

There is nothing unique about district courts in different circuits granting preliminary injunctions enjoining the same government policy. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2084 (2017) (discussing injunctions issued both in the District of Hawaii and the District of Maryland); *Aziz v. Trump*, 234 F. Supp. 3d 724, 738-39 (E.D. Va. 2017) (enjoining enforcement of President Trump's first travel ban even though Judge Robart had previously entered an even broader worldwide temporary restraining order enjoining enforcement of the travel ban); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1305-06 (N.D. Fla. 2011) (enjoining Affordable Care Act's individual mandate); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 811 F. Supp. 2d 1086 (M.D. Pa. 2011) (same). Tellingly, even the Department of Justice has recently praised the virtues of "multiple lower courts considering similar legal questions," which is "a process of value to the appellate courts and the development of the law more generally." *City and Cty of San Francisco v. Sessions*, No. 3:17-cv-04642-WHO, Dkt. #36 (N.D. Cal. Aug. 28, 2017). The government's request for a stay should be denied in its entirety.

B. The Government Faces No Hardship If This Litigation Proceeds

Because a stay works far more than a "fair possibility" of harm, *Lockyer*'s second factor is mandatory—the government "must make out a clear case of hardship or inequity" in being required to go forward. *Lockyer*, 398 F.3d at 1112 (quoting *Landis*, 299 U.S. at 255). Here, the government fails to explain how proceeding with this case would cause it hardship. "[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity'

within the meaning of *Landis*." *Lockyer*, 398 F.3d at 1112. Nor is "case management standing alone . . . necessarily a sufficient ground to stay proceedings." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059 (9th Cir. 2007). Because the government does not demonstrate any hardship in being made to defend its discriminatory policies, it cannot meet its burden of establishing entitlement to a stay of Plaintiffs' motion for a preliminary injunction, much less these entire proceedings.

C. Staying These Proceedings Would Disserve the Orderly Course of Justice.

The absence of any hardship dooms the government's stay request without consideration of *Lockyer*'s third factor—the extent to which a stay would serve or disserve the orderly course of justice. 398 F.3d at 1110. But even if the Court were to weigh this factor, it too would militate against a stay. Plaintiffs must prosecute their case to judgment, and a stay of proceedings here to await non-binding developments in the D.C. Circuit will only delay the work that inevitably lies ahead. A stay would freeze development of an important issue of law, *supra*, which disserves justice not just here, but also in related cases as they percolate through the courts.

Additionally, because the D.C. injunction leaves Plaintiffs defenseless against the harms inflicted by the medical ban, the Court should at the very least determine whether Plaintiffs have shown a likelihood of success on the merits of their claims against it, and should preliminarily enjoin that policy. That analysis necessarily reaches questions at the core of all of Plaintiffs' claims—including whether the Ban is subject to heightened scrutiny and whether any of the Defendants' justifications survive that scrutiny—at which point judicial economy considerations favor the Court resolving Plaintiffs' request for a preliminary injunction on those claims as well. *Cf. United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (noting that "considerations of economy, convenience and fairness to litigants" often justify deciding related claims over which courts exercise even only pendent jurisdiction). Indeed, the same is true for consideration of Defendants' motion to dismiss: those legal issues must inevitably be decided here, and because they are intertwined with the issues presented by the preliminary injunction, it would be efficient to resolve the preliminary injunction simultaneously.

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The government's contrary arguments are rooted in the view that its "policy concerning service by transgender persons is under review," and that the military may "adopt[]" some different "final policy early next year." Dkt. #89, at 4. But as Plaintiffs explain in their Opposition to Defendants' Motion to Dismiss, the "operative" policy is the President's Memorandum, which leaves no doubt as to the reality that the accession and retention bans will be enforced starting on March 23, 2018. *See* Dkt. #84, at 4. The government's theory that future developments could moot this case is not only speculative, but also implausible. *Id*.

The government's reliance on Judge Robart's order in *Washington v. Trump*, No 2:17-cv-00141-JLR, 2017 WL 1050354 (W.D. Wash. Mar. 17, 2017), is similarly misplaced. That order, which stayed a request for a TRO against one of the President's immigration orders, concluded that the orderly course of justice favored a stay because the Ninth Circuit was already considering a case on the issue that, as binding precedent, would "potentially control" the court's ruling. *Id.* at *7. Here, by contrast, no pending Ninth Circuit decision promises to clarify the law in this Circuit. Far from it: the government's request that this Court do nothing in anticipation of a non-binding D.C. Circuit opinion would *hamper* the Ninth Circuit's ultimate resolution of controlling questions of law. Staying the case would thus obstruct rather further the orderly course of Ninth Circuit law, and the government's request for a stay fails the third *Lockyer* factor too.

II. Plaintiffs Continue to Face Irreparable Harm Absent Preliminary Relief.

Last, the government contends that the Court should deny Plaintiffs' motion for preliminary injunction because, with the D.C. injunction in place, Plaintiffs no longer show a likelihood of irreparable harm. That argument fails for the same reasons discussed above, including that the D.C. injunction did not reach the ban on medical care and that it is subject to being vacated or narrowed for any number of reasons in further proceedings. Indeed, taking the government at its word, Plaintiffs are likely to suffer harms from the Ban before judgment in this case—the proper measuring point for injunctive relief—because the government continues to maintain that the D.C. injunction committed plain error and cannot stand.

More fundamentally, the government's argument misconceives the standard for a preliminary injunction. Whether Plaintiffs satisfy the irreparable harm requirement for a

preliminary injunction is judged by whether they would likely suffer such harm "in the absence of preliminary relief." *Herb Reed Enters., LLC v. Florida Ent'mt Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013). In the government's view, it may dodge that question on the theory that preliminary relief is no longer absent. But the answer to the question, "would Plaintiffs suffer irreparable harm absent preliminary relief" is still "yes," regardless of whether another court has answered "yes" already. A contrary view would freeze development of the law whenever one court issues a preliminary injunction, violating the principles set forth in *Mendoza* and *Hammond* and discussed above. It would also be perverse, as it would transform the D.C. injunction—meant to protect transgender individuals—into a vehicle for making Plaintiffs worse off by denying them even a chance at particularized relief. Because Plaintiffs face irreparable harm both as a general matter and based on any narrowing, stay, or reversal of the D.C. injunction, a preliminary injunction—protecting them personally and issued from this Court—should be granted.

CONCLUSION

Plaintiffs respectfully request that the Court deny the government's request for a stay in its entirety and grant Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 9th day of November, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on November 9, 2017.

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