IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al.	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 17-cv-02459
	)	
DONALD J. TRUMP, et al.	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY, AND OPPOSITION TO DEFENDANTS' REQUEST FOR A STAY

After the completion of briefing on Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion to Dismiss, and less than 48 hours before the hearing this Court has scheduled on both motions, Defendants contend that "the Court should stay further proceedings." ECF No. 78 at 1. Although they do not say so expressly, Defendants' request appears to include cancelling the hearing scheduled for tomorrow. *Id.* at 2 (asserting that the Court could, at a later time, "reschedule the hearing currently set for Thursday, November 9"). This request, under the guise of a "Response to Plaintiffs' Notice of Supplemental Authority," is procedurally improper and should not be entertained. If Defendants wish to seek the extraordinary relief of a stay, they should so move.

But if the Court construes Defendants' "Response," and its statements about what this Court "should" do, as a motion for a stay, the Court should deny that motion.

Despite asking the Court to "stay further proceedings," Defendants do not mention the standard that governs such a request, or the heavy burden on the party making it. "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another

settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255–56 (1936). "[T]he suppliant for a stay must make out a *clear case* of hardship or inequity in being required to go forward." *Id.* at 255 (emphasis added). As the Fourth Circuit has explained, a stay request "calls for the exercise of judgment which must weigh competing interests and maintain an even balance," and requires the party seeking the stay to "justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). A court will thus deny a stay request when "even a fair possibility exists that the stay . . . will work damage." *Balt. Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721, 730–31 (D. Md. 2001) (quoting and citing *Landis*) (rejecting stay request when non-movant faced "considerable potential damage from delay").

Defendants have identified no "hardship or inequity" they will suffer if this Court moves forward to consider and resolve motions that have already been fully briefed and that are scheduled to be heard tomorrow.[1] Defendants are plainly not harmed by an Article III court deciding on a fully-briefed motion whether the Government's actions are unconstitutional and should be enjoined. Indeed, the Federal Programs Branch of the Justice Department's Civil Division has recently extolled 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." Defendants' Brief in *City and Cty of San Francisco v. Sessions*, No. 3:17-cv-04642-WHO, ECF No. 36 (N.D. Cal. filed Aug. 28, 2017).

On the other hand, there is much more than a "fair possibility" that the requested stay will work damage. Defendants conspicuously refrain from stating that they will not appeal the

[1] To do otherwise would not promote judicial efficiency, but only serve to undermine it.

preliminary injunction in *Doe v. Trump*. ECF No. 78 at 1 ("Defendants . . . [are] considering whether to appeal."). Nor do Defendants say whether they will seek to stay the application of the *Doe* injunction beyond the plaintiffs in that case, the approach the Government has vociferously argued in this and other cases. *See, e.g.*, ECF No. 52-1 at 35; *see also City of Chicago v. Sessions*, No. 1:17-cv-05720, ECF No. 81 (N.D. Ill. Sept. 26, 2017) (pending motion by the Government seeking to stay nationwide effect of a preliminary injunction, including argument that "both constitutional and equitable principles require" that an injunction be limited to the plaintiffs). Plaintiffs here can hardly take comfort in the speculative possibility that Defendants *might* abandon their strongly held legal positions and decide not to appeal a decision they describe as "plainly erroneous." ECF No. 77 at 2 n.1. Notwithstanding the Government's arguments to the contrary, it is not the least bit unusual, much less inappropriate, for multiple district courts to consider, and where appropriate grant, overlapping preliminary injunctions. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2084 (2017) (discussing overlapping preliminary injunctions against President Trump's travel ban issued in the District of Maryland and the District of Hawaii); *Hawai'i v. Trump*, --- F. Supp. 3d ---, 2017 WL 4639560 (D. Haw. Oct. 17, 2017), *appeal filed*, No. 17-17168 (9th Cir. Oct. 24, 2017); *Int'l Refugee Assistance Project v. Trump*, --- F. Supp. 3d ---, 2017 WL 4674314 (D. Md. Oct. 17, 2017), *appeal filed*, No. 17-2240 (4th Cir. Oct. 23, 2017).

Moreover, although Defendants assert that the *Doe* injunction protects the Plaintiffs here "in large measure," they do not dispute that the *Doe* court did not enjoin Section 2(b) of the President's memorandum, the provision concerning surgical care. *See* ECF No. 78 at 1. Defendants thus do not argue that the *Doe* injunction resolves Plaintiffs' claims concerning Section 2(b). They simply repeat their standing arguments—that Plaintiffs here, "like the

plaintiffs in *Doe*, are not harmed." *Id.* at 2. That is not a basis for a stay but rather is a disputed question raised by the pending motions—motions that Defendants do not want this Court to decide. In any event Defendants are wrong.[2] Of the two active service members claiming medical injury in *Doe*, the court found that one did "not demonstrate[] that she will not receive the surgery" she requires prior to March 23, and that the other faced significant "uncertainties" due to her present deployment and "the fact that she has yet to begin any transition treatment." *Doe v. Trump*, 2017 WL 4873042 at *24 (D.D.C. Oct. 30, 2017). Here, Plaintiffs Stone and Cole have demonstrated that (1) they have a medical need for surgery that but for the President's directive they would receive, and (2) they will not be able to complete all surgeries they require before the March 23 effective date of the directive. ECF Nos. 66 at 10–11, 66-8, and 66-13.

Defendants thus cannot meet their heavy burden of establishing that proceedings in this case should be stayed just because another district court has preliminary enjoined some of the President's unconstitutional directives. They present no evidence, much less a "*clear case* of hardship or inequity," that should persuade this Court to refrain from proceeding with a hearing tomorrow and issuing decisions on two fully-briefed motions. At the same time there is substantially more than "a fair possibility [] that the stay . . . will work damage" on Plaintiffs. *Landis*, 299 U.S. at 256. Defendants' eleventh-hour, procedurally improper request for a stay should be denied.

[2] For the same reasons Plaintiffs would be harmed by a stay, the decision in the *Doe* case does *not* undermine Plaintiffs' clear showing of irreparable harm absent a preliminary injunction.

Dated: November 8, 2017

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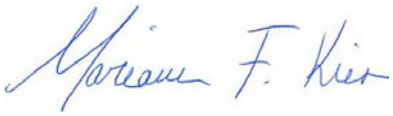
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2017, copies of the foregoing were served via CM/ECF on all counsel of record.



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