

The Honorable Marsha J. Pechman

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs, and*

STATE OF WASHINGTON,

*Plaintiff-Intervenor,*

v.

DONALD J. TRUMP, in his official capacity  
as President of the United States, et al.,

*Defendants.*

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

**PLAINTIFFS’ RESPONSE TO THE  
COURT’S MAY 30, 2018 ORDER TO  
SHOW CAUSE**

1 On May 30, 2018, the Court entered an order asking for the parties' positions on whether  
2 the Court retains jurisdiction over Defendants' stay motion now that Defendants have filed a  
3 notice of appeal. As explained below, the Court does retain jurisdiction to decide Defendants'  
4 motion. In fact, by requiring parties to seek stays pending appeal in district courts first, before  
5 asking for such relief in the courts of appeals, the Federal Civil and Appellate Rules encourage  
6 district courts to decide stay motions in the first instance. This is because district courts are most  
7 familiar with the background proceedings and are typically in the best position to decide whether  
8 a stay should be ordered. Here, decision by this Court is especially appropriate, as Defendants'  
9 appeal is interlocutory, and proceedings thus are continuing in this Court while the appeal is  
10 pending. Indeed, a stay of this Court's preliminary injunction could have a significant impact on  
11 these continuing proceedings, including the Court's ability to enter full and effective final relief.  
12 The Court should therefore decide (and deny) Defendants' motion for a stay.

13 **A. The Court Has Jurisdiction to Decide Defendants' Motion To Stay.**

14 In its May 30, 2018 Order, the Court inquired whether it retained jurisdiction over  
15 Defendants' stay motion. The answer is yes—the Ninth Circuit (and other courts) to have  
16 considered this issue have concluded that district courts do retain jurisdiction in these  
17 circumstances.

18 In its order, the Court cited the general rule that “the filing of a notice of appeal generally  
19 ‘confers jurisdiction on the court of appeals and divests the district court of its control over those  
20 aspects of the case involved in the appeal.’” (Dkt. No. 274 at 2 (quoting *Griggs v. Provident*  
21 *Consumer Discount Co.*, 459 U.S. 56, 58 (1982))).

22 *Griggs* addressed a different issue—whether, under Federal Rule of Appellate Procedure  
23 4(a)(4), a notice of appeal is effective while a motion to amend or alter a judgment is pending in  
24 the district court. (*See* Fed. R. App. P. 4(a)(4).) The Third Circuit had taken jurisdiction of an  
25 appeal while a motion to amend the judgment being appealed was pending, but the Supreme  
26 Court reversed. 459 U.S. 56, 58-59 (1982). The Court explained that appeals generally divest  
27 district courts of jurisdiction, but Rule 4(a)(4) was meant to allow district courts to decide  
28

1 motions to vacate or amend judgments before an appeal, and thereby “prevent unnecessary  
2 appellate review.” *Id.* at 59.

3 Unlike the motion to amend the judgment in *Griggs*, motions to stay preliminary  
4 injunctions pending interlocutory appeal do not alter or amend a judgment, and do not threaten to  
5 render appellate review unnecessary. Federal Rule of Civil Procedure 62(c) thus allows district  
6 courts to decide such motions, even “while an appeal is pending.” They are an “exception to the  
7 jurisdictional transfer principle,” and may be considered so long as they do not “materially alter  
8 the status of the case on appeal.” *Nat. Res. Def. Council, Inc. v. SW Marine, Inc.*, 242 F.3d 1163,  
9 1166 (9th Cir. 2001) (holding that even modifying an injunction was permissible where  
10 modifications “left unchanged the core questions before the appellate panel”); *see also A&M*  
11 *Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098-99 (9th Cir. 2002) (holding that during the  
12 pendency of an appeal, a district court may decide motions to stay, and continue to supervise  
13 compliance with, an injunction); *Doe v. Trump*, 284 F. Supp. 3d 1172 (W.D. Wash. 2018)  
14 (holding that the district court had jurisdiction to decide a motion to stay pending appeal, and  
15 denying that motion); *Dennings v. Clearwire Corp.*, No. C10-1859JLR, 2013 WL 3553625, at \*2  
16 (W.D. Wash. July 11, 2013) (same). Because this Court’s decision on Defendants’ motion to stay  
17 will not change the core questions facing the Ninth Circuit, the Court has jurisdiction to decide  
18 that motion.<sup>1</sup>

19 **B. This Court Should Exercise Its Jurisdiction to Decide Defendants’ Motion.**

20 Not only do the Federal Civil and Appellate Rules give district courts jurisdiction over  
21 motions to stay, but they also expressly encourage district courts to exercise that jurisdiction to  
22 decide such motions in the first instance. While the rules permit a party moving for a stay  
23 pending appeal to seek relief both in the district court (under Fed. R. Civ. P. 62(c)), and in the  
24 appellate court (under Fed. R. App. P. 8), Federal Rule of Appellate Procedure 8(a) states that “a  
25 party must ordinarily move first in the district court” unless the party “show[s] that moving first  
26

27 <sup>1</sup> Indeed, though the parties did not bring up the issue during briefing on Defendants’ prior motion to stay the  
28 Court’s injunction, the Court denied that motion on Dec. 29, 2017 (Doc. No. 121), while an appeal was pending (and  
one day before that appeal was dismissed, *see* 12/30/2017 Order, 9th Cir. Case No. 17-36009). The Court’s prior  
decision during the pendency of an appeal was proper, and the Court may proceed similarly here.

1 in the district court would be impracticable” or that the district court has already “denied the  
2 motion.” *See* Fed. R. App. P. 8(a)(1)(C) & (a)(2)(A). Defendants have not made such a showing  
3 here. Instead, in violation of Rule 8, they asked the Ninth Circuit for a stay without awaiting this  
4 Court’s decision. *See* 9th Cir. Case No. 18-35347, Doc. No. 3 (Defendants’ May 4, 2018 motion  
5 for a stay); *see also* *Smith v. L.A. Sch. Dist.*, 830 F.3d 843, 846 (9th Cir. 2016) (denying motion  
6 for an interim injunction where appellants failed to move first in the district court).

7 The Rules require that parties move for a stay first in the district court because the district  
8 court has “superior abilities . . . to hear evidence, draw from prior experience with the case, and  
9 frame and enforce an injunction.” Wright & Miller, 16 Fed. Prac. & Proc. § 3921.2 (3d ed.). The  
10 appellate court can thus have the benefit of the district court’s insight, and afford it “appropriate  
11 deference.” *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986); *see also* *Regents of Univ. of*  
12 *Ca. v. Am. Broad. Co., Inc.*, 747 F.2d 511, 522 n.7 (9th Cir. 1984) (noting that “we also find no  
13 abuse of discretion in the trial court’s denial of a stay pending appeal . . . we find no cause to  
14 disturb the trial court’s ruling under Rule 62(c) of the Federal Rules of Civil Procedure”); *United*  
15 *States v. Quigley*, 5 F.3d 543 (9th Cir. 1993) (unpublished) (“We review the district court’s order  
16 denying Quigley’s motion for a stay pending appeal for abuse of discretion.”).

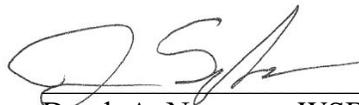
17 These considerations apply with particular force here. This Court is intimately familiar  
18 with the parties’ claims, the likelihood that Plaintiffs will prevail on the merits, and the relative  
19 harm to the parties and public if a stay were to issue. The Ninth Circuit will therefore benefit  
20 from this Court addressing the parties’ arguments in the first instance, as the drafters of Federal  
21 Appellate Rule 8 intended.

22 Finally, it bears mention that Defendants’ appeal is interlocutory, and a decision by this  
23 Court on Defendants’ stay motion would be particularly appropriate given that proceedings  
24 remain ongoing in this case. “[A]n appeal from an interlocutory order does not stay proceedings”  
25 and “does not divest the trial court of jurisdiction to continue with other phases of the case.”  
26 *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (holding that grant of final  
27 judgment during pendency of interlocutory appeal was proper). Indeed, “interlocutory injunction  
28 appeals would come at high cost if the trial court were required to suspend proceedings pending

1 disposition of the appeal,” especially as “cases involving injunctive relief are apt to present an  
2 urgent need for action.” Wright & Miller, 16 Fed. Prac. & Proc. § 3921.2. Here, the decision on  
3 Defendants’ motion also may permanently affect whether some transgender people receive  
4 medical care, begin military careers, or stay in military service. A stay thus implicates the  
5 Court’s ability to afford full and effective final relief, and for this reason as well, the Court is in  
6 the best position to evaluate and weigh the equities and effects of Defendants’ motion to stay.  
7 The Court should decide Defendants’ motion to stay in the first instance, and deny it for the  
8 reasons set forth in Plaintiffs’ May 14, 2018 opposition.

9  
10 Respectfully submitted June 6, 2018.

11  
12 **NEWMAN DU WORS LLP**

13  
14 

15 Derek A. Newman, WSBA #26967  
*dn@newmanlaw.com*  
16 Jason B. Sykes, WSBA #44369  
*jason@newmanlaw.com*  
17 2101 Fourth Ave., Ste. 1500  
18 Seattle, WA 98121  
(206) 274-2800

19  
20 **LAMDBA LEGAL DEFENSE AND  
EDUCATION FUND, INC.**

21 Tara Borelli, WSBA No. 36759  
*tborelli@lambdalegal.org*  
22 Camilla B. Taylor (admitted pro hac vice)  
23 Peter C. Renn (admitted pro hac vice)  
24 Sasha Buchert (admitted pro hac vice)  
Kara Ingelhart (admitted pro hac vice)  
Carl Charles (admitted pro hac vice)

25 **OUTSERVE-SLDN, INC.**

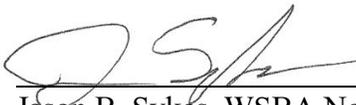
26 Peter Perkowski (admitted pro hac vice)  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**KIRKLAND & ELLIS LLP**  
James F. Hurst, P.C. (admitted pro hac vice)  
Jordan M. Heinz (admitted pro hac vice)  
Scott Lerner (admitted pro hac vice)  
Vanessa Barsanti (admitted pro hac vice)  
Daniel I. Siegfried (admitted pro hac vice)  
  
Counsel for Plaintiffs

**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 June 6, 2018.



\_\_\_\_\_  
Jason B. Sykes, WSBA No. 44369  
*jason@newmanlaw.com*  
2101 Fourth Ave., Ste. 1500  
Seattle, WA 98121  
(206) 274-2800

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28