IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NICHOLAS HARRISON ET AL., PLAINTIFFS, V. RICHARD V. SPENCER ET AL., DEFENDANTS.	CIVIL NO. 1:18-CV-00641
RICHARD ROE et al., Plaintiffs, v. RICHARD V. SPENCER et al., Defendants.	CIVIL NO. 1:18-cv-01565

PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO STAY SUMMARY JUDGMENT AND TRIAL

I. INTRODUCTION

Defendants' motion to stay should be denied because they waited too long to make it and the stay factors weigh heavily in favor of keeping the current schedule.

More than five months ago, on February 15, 2019, this Court entered a preliminary injunction to prevent the imminent discharge of active-duty service members in the Air Force merely because they have HIV. *See Roe v. Spencer*, 18-cv-1565, Order and Mem. Op. Granting in Part Pls.' Mot. for Prelim. Inj., Dkt. 72–73. Defendants appealed that decision two months later, on the last possible day. *Roe*, Notice of Appeal, Dkt. 112. One month after that, on May 16, 2019 the parties appeared before the Court for a final pretrial conference, during which the Court scheduled a trial to start on September 9, 2019. *Roe*, Final Pretrial Conf., Dkt 129; *Harrison v. Spencer*, 18-cv-641, Final Pretrial Conf., Dkt. 166. Two more months have passed as the parties worked to finalize preparations for trial—ensuring witnesses could attend, making logistical arrangements, and preparing and exchanging their witness lists, exhibit lists, and other pre-trial disclosures. Not once did Defendants express any concern that the pending interlocutory appeal could have a significant detrimental impact on "judicial and party resources" or "the efficient resolution of these matters." Defendants instead waited until July 15th—two months after the final pretrial conference—to suggest that this case needs to be stayed to prevent a newly conjured "hardship and inequity" to the government. Defendants fall far short of showing that clear and convincing circumstances favor staying these cases.

As explained below, Defendants take a myopic view of the three stay considerations in their motion and fail to acknowledge considerations that weigh heavily against a stay. Defendants' motion should be denied.

II. LEGAL STANDARDS

Courts have the inherent power to stay a case "to control the disposition of the cases on its docket with the economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). Various factors should be balanced when evaluating a motion to stay. These factors are "relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket." *United States v. Ga. Pac. Corp.*, 562 F.2d 294, 296 (4th Cir. 1977). Proper use of the Court's discretion "calls for the exercise of judgment which must weigh competing interests and maintain an even balance. The party seeking a stay must 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). If there is "even a fair possibility that the stay" will harm the non-movant, the movant must prove "a clear case of hardship or inequity in being required to go forward." *Id.* (quoting *Landis*, 299 U.S. at 255).

Three factors are considered: (1) judicial economy, (2) the hardship and equity to the movant in the absence of a stay, and (3) the prejudice to the non-movant if the stay is granted. *White v. Ally Fin. Inc.*, 969 F. Supp. 2d 451, 462 (S.D. W. Va. 2013). Each one weighs against a stay here.

III. ARGUMENT

A. Judicial Economy Does Not Favor a Stay at This Late Stage of Litigation.

Defendants contention that the interests of judicial economy weigh "strongly in favor of staying summary judgment and trial" (*Roe*, Motion to Stay, Dkt. 214 at 4, *Harrison*, Motion to Stay, Dkt. 219 at 4) is based on an incomplete view of the facts and an important oversight of law. As to the facts, Defendants never adequately explain how the appeal of the preliminary injunction

in *Roe* would impact the *Harrison* case. Nor do Defendants really address how the result of the interlocutory appeal could impact the *Roe* case. Defendants also overlook the fact that a judgment on the merits—that the discharges of HIV-positive Airmen were improper—would moot the appeal. Therefore, this factor does not weigh in favor of granting a stay.

1. The Interlocutory Appeal Was Filed in One Case, but Defendants Seek To Have Both Cases Stayed.

Staying all claims in two cases based on the interlocutory appeal of a preliminary injunction as to some counts in one of the cases is not warranted. This is particularly true here because Defendants are raising judicial and party economy at the last possible minute, even though the facts upon which they base their motion remain largely unchanged since before the final pretrial conference.

Defendants claim that the *Harrison* and *Roe* suits "challenge most of the same regulations" and that Central Command's deployment policy applies to all plaintiffs. *Roe,* Motion to Stay, Dkt. 214 at 5, *Harrison*, Motion to Stay, Dkt. 219 at 5. While there is some overlap in the regulations at issue in both cases, only the Airmen-plaintiffs in *Roe* and those whose interests are being represented by OutServe in that case have been unlawfully separated contrary to regulations precluding discharges based solely on HIV status. *See* AFI 44-178, § 2.4.1 ("HIV seropositivity alone is not grounds for medical separation or retirement for ADAF members."). The Army does not separate Soldiers just because they have HIV, and no such claim is asserted in the *Harrison* complaint.[1]

[1] Harrison and OutServe did move for a preliminary injunction to enjoin the involuntary separation of service members based on the policy announced via a memorandum from the Office of the Secretary of Defense, commonly referred to the "Deploy or Get Out" or "DOGO" policy. *See Harrison,* Motion for Prelim. Inj., Dkt. 25. In response, Defendants relied on the regulation codifying the DOGO policy (DoDI 1332.45), promulgated after Plaintiffs filed their motion, to argue Plaintiffs were misunderstanding the effect of the DOGO policy—now superseded by DoDI 1332.45—on service members with HIV. *Harrison*, Defs.' Opp. to Pls.' Mot. for Prelim. Inj. and Mem. in Supp. of Defs.' Mot. to Dismiss, Dkt. 40 at 8-9.

Therefore, the impact of a Fourth Circuit decision on the *Harrison* case is highly questionable, and forcing Sgt. Harrison to await the disposition of the appeal is unfair.

The *White* case cited by Defendants is instructive. Prior to trial in *White*, the Supreme Court had granted *certiorari* in a case that might have influenced a pending motion to dismiss in *White*; but there was "a stronger likelihood that" it would not influence that motion. *White v. Ally Fin. Inc.*, 969 F. Supp. 2d 451, 462 (S.D. W.Va. 2013). The parties were one month from the close of discovery; dispositive motions were scheduled for briefing and argument; and a trial was scheduled for about two months later. *Id.* Even though the Supreme Court's decision had the potential to affect the trial court's jurisdiction, the district court denied the stay. *Id.* at 462-63. The facts here are even more stark: discovery is finished; dispositive motions have been filed; and trial is in six weeks; therefore, the motion to stay should be denied here as well.

None of Defendants' other cases counsel in favor of staying these cases. In *McCrory v. North Carolina*, No. 14-65, 2014 WL 2048068 (W.D.N.C. May 19, 2014), a stay was granted pending a Fourth Circuit appeal of a law defining marriage. Unlike here, that appeal could have mooted an entire case and a pleading responding to the complaint had not even been filed. *Id.* at *1-3. And in *Wilt v. Household Life Insurance Co.*, the court stayed discovery and other motions until it could decide the merits of a motion to dismiss and a motion to compel arbitration when the case was "early in the discovery process." No. 14-31400, 2015 WL 5501751 (S.D. W.Va. Sept. 16, 2015). Of course, *Harrison* and *Roe* are not "early in the discovery process." In *International Refugee Assistance Project v. Trump*, the court observed that the next step in the litigation was for the government to file an answer or motion to dismiss. 323 F. Supp. 3d 726, 733 (D. Md. 2018). Given this observation, it is apparent that case also was in its earliest stages. In each of the cases

in which a stay was granted, trial was not imminent and discovery either had not yet begun or has not progressed far.

Here, trial is a little over a month away, only a few of lingering discovery matters remain,[2] and the parties have made strides preparing for the upcoming trial. There are just as many efficiencies associated with proceeding as there may be with bringing a halt to these proceedings (and the momentum the parties have generated as the case hurtles toward trial), only to pick them back up again once the Fourth Circuit decides the appeal.

2. A Judgment Declaring the Discharge Decisions and the Air Force's Interpretation of Its Regulations Invalid Will Moot the Appeal, Conserving the Appellate Court's Judicial Resources.

Judicial economy will be best served by proceeding with summary judgment at the very least. As Plaintiffs informed the Court during the final pre-trial conference, Plaintiffs in the *Roe* case intended to move—and have now in fact moved (*Roe*, Mot. for Part. Summary Judgment, Dkt. 230)—for summary judgment on certain claims brought under the Administrative Procedure Act.[3] Ex. A, May 16, 2019 Hr'g Tr. 6:9-16. Since Defendants have repeatedly contended that the APA claims can be resolved on the record, they cannot contend that further discovery impedes the entry of judgment on the APA claims. *See, e.g.*, *Harrison*, Defs.' Trial Exhibit List, Dkt. 187 at 1, and Defs.' Witness List, Dkt. 188 at 1; *Roe*, Defs.' Trial Exhibit List, Dkt. 148 at 1, Defs.'

[2] Defendants contend that these matters make proceeding unfair to them. The fact that depositions are occurring based on documents that Defendants withheld throughout discovery and produced only in June and July is no fault of Plaintiffs, and any hardship that this may cause is because of Defendants' own tactical litigation decisions.

[3] Defendants appear to suggest there was something improper about Plaintiffs' indicating during a meet and confer on this topic that they intended to move for summary judgment. *Roe*, Mot. to Stay, Dkt. 214 at 9, *Harrison*, Mot. to Stay, Dkt. 219 at 9. The Local Rules indicate that the parties must move for summary judgment in sufficient time to allow the Court to rule on the motion before trial. E.D. Va. L.R. 56(A). Accordingly, Plaintiffs, informed Defendants that Plaintiffs believed they needed to move to comply with the Local Rules and to provide several weeks for consideration of their motion after the close of briefing.

Witness List, 149 at 1. Thus, the remaining discovery should be no impediment to proceeding with summary judgment further under Defendants' view of the applicability of discovery to the APA claims.

The appeal of the preliminary injunction would be mooted by a final judgment on Plaintiffs' claims under the APA and entry of an order permanently enjoining Defendants from failing to follow their own regulations, "because the former merges into the latter." *Grupo Mexicano de Desarrollo, S. A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314-15 (1999) ("The final injunction establishes that the defendant *should not have been engaging in the conduct that was enjoined.* Hence, it is reasonable to regard the preliminary injunction as merging into the final one: If the latter is valid, the former is, if not procedurally correct, at least harmless."); *Int'l Bhd. of Teamsters v. Airgas, Inc.*, 885 F.3d 230, 236 (4th Cir. 2018) ("In most cases, an appeal from the grant of a preliminary injunction will become moot when a permanent injunction is entered, because the former merges into the latter.") (internal quotation marks omitted).

Therefore, in considering judicial economy as a whole, there are efficiencies to the judicial system and to the parties with proceeding to resolution of the claims on the merits and allowing the entire case to proceed to appeal on a complete record. Allowing the actions to proceed to trial and, in the *Roe* case, to summary judgment will accomplish that goal because a judgment on the merits here could render the appeal as to the preliminary injunctive relief moot.

3. Defendants' Argument About the Economies of Allowing the Fourth Circuit To Render Its Decision on Appeal Is Speculative.

The lynchpin of Defendants' argument in favor of the stay is that they may well prevail on appeal, and even if they do not, the Fourth Circuit may say something that is helpful in resolving the merits of the case before this Court. Defendants' conclusion in this regard is speculative at best, because it is impossible to know how the Fourth Circuit will resolve the appeal. And in any

event, Defendants do not identify any particular issue the Fourth Circuit may clarify so as to be helpful in a trial on the merits.

While Plaintiffs firmly believe the Fourth Circuit will affirm the Court's grant of a preliminary injunction should it reach the merits of it, Defendants' position is based primarily on its supposition that it will prevail on appeal in whole or in part. For example, Defendants contend that even if the Court was correct about its interpretation of the law and regulations, it nonetheless erred in balancing the equities. *See Roe*, Mot. to Stay, Dkt. 214, *Harrison*, Mot. to Stay, Dkt. 219, Ex. A at 36-38 (Appellant's Br.). Even if Defendants were to get traction with this argument before the Fourth Circuit, there is no indication the equities would balance the same way for a *permanent* injunction to be entered after either summary judgment or trial. Therefore, a decision touching on this point would not necessarily affect the remainder of these proceedings. [4]

4. Conclusion: Judicial Economy Does Not Favor Staying These Actions.

In sum, judicial economy does not favor staying these actions. Given the late stage and the speculative nature of the impact of the appeal on the litigation, judicial economy—also referred to as "the impact on the orderly course of justice," *IRAP*, 323 F. Supp. 3d at 731—does not warrant a stay of these actions. Instead, the expeditious trial and disposition of these actions is warranted.

B. Plaintiffs Will Experience Hardship Because of Defendants' Proposed Stay.

Plaintiffs will experience prejudice by the proposed stay in several ways. First, a stay would upend the calendars of witnesses and counsel, who canceled and rearranged schedules based on the current trial date. In setting the trial dates for this case, Plaintiffs navigated the schedules

[4] Further, Defendants read too much into the Fourth Circuit's willingness to grant their motion to schedule oral argument in September—a motion on which Plaintiffs took no position as a matter of professional courtesy. Although the Court granted this unopposed motion, the appeal is not, as Defendants assert, "expedited." *Roe*, Mot. to Stay, Dkt. 214 at 7; *Harrison*, Mot. to Stay, Dkt. 219 at 7. This ministerial act does not mean that the court "has acknowledged the importance of the issues on appeal." *Id.* at 9.

of their party witnesses, their expert witnesses, and key trial counsel to come up with dates that were acceptable to the parties and the Court for trial. As part of this effort, Dr. Hendrix, one of Plaintiffs' key expert witnesses, had to cancel his attendance at a conference in South Africa scheduled to take place during the week of the scheduled trial. Plaintiffs have already started to make logistical arrangements for housing for witnesses and out-of-town counsel. To cancel trial at this time would therefore prejudice Plaintiffs.

Second, Sgt. Harrison, whose case is not involved on appeal will need to continue to wait for judgment on his claim that the denial of his commission as a JAG officer violated equal protection under the Fifth Amendment. There is no good reason to delay Sgt. Harrison's day in court.

Third, should the Court enter judgment on the APA claims that are the subject of Plaintiffs' motion for partial summary judgment and permanently enjoin those discharges, the appeal will be moot. Plaintiffs have litigated for this advantage, and Defendants would have the Court take it from them. Additionally, requiring Plaintiffs' counsel to attend oral argument on an appeal that ought to be moot following a permanent injunction will be wasteful and prejudicial to Plaintiffs.

C. Defendants' Claims of Hardship Are Largely Due to Their Own Litigation Decisions—Not the Absence of a Stay.

Defendants make several points in claiming they will experience "significant hardship" if a stay is not entered. Each is insufficient to warrant a stay at this late stage of the case, particularly in light of the hardship to Plaintiffs and their witnesses, as discussed below.

Defendants contend that there will be prejudice because of "Plaintiffs' failure to produce evidence establishing standing for Plaintiff OutServe-SLDN." *Roe*, Mot. to Stay, Dkt. 214 at 8; *Harrison*, Mot. to Stay, Dkt. 219 at 8. The blame for the need to conduct additional discovery—which has been over for nearly three weeks now—does not rest only with Plaintiffs. Defendants failed to seek any discovery on this issue until the last day to serve discovery in these cases, and

then asked a lone interrogatory seeking an explanation about how "OutServe has suffered direct injury in *Harrison* or *Roe*." *Roe*, Ex. A to Pls.' Opp. to Renewed Mot. to Dismiss (Pls.' Resp. to Defs.' Interrogs.), Dkt. 131-1 at 8; *Harrison*, Ex. A to Pls.' Opp. to Renewed Mot. to Dismiss (Pls.' Resp. to Defs.' Interrogs.), Dkt. 168-1 at 8. The fact that direct injury was not explored by Defendants' more fully during discovery is a direct consequence of Defendants' lack of diligence during discovery.

Moreover, Plaintiffs' identification of additional depositions was necessitated by the production of hundreds of additional documents that Defendants themselves have had access to throughout the discovery period. This is also not harm that will befall Defendants because of a lack of a stay. Instead, the late production of documents was a strategic choice by Defendants.

With respect to the supplemental expert report of Dr. Hendrix, the supplemental report addresses new documents produced pursuant to the Court's orders regarding deliberative process privilege and additional information that came to light once Plaintiffs received Defendants' trial exhibits—some of which were not provided during discovery. Defendants should not be able to obtain the benefit of a stay because their own litigation decisions have resulted in additional work for both parties in the weeks leading up to trial and summary judgment.

Finally, Defendants contend they will expend "significant time and monetary resources briefing summary judgment and preparing for and conducting trial," and that an "unnecessary" or "duplicative" trial would burden certain witnesses. *Roe*, Mot. to Stay, Dkt. 214 at 8; *Harrison*, Mot. to Stay, Dkt. 219 at 8. This argument is based on the premise that a trial will not need to take place in these cases and is based on pure conjecture, as explained above.[5]

[5] This does nothing to explain why Defendants believe summary judgment deadlines should also be stayed.

IV. CONCLUSION

When balanced against one another, the factors do not counsel in favor of staying summary judgement and trial in these cases. If it truly was more efficient to await the result of the appeal of the preliminary injunction, surely Defendants would have said something before agreeing to a trial date. Moreover, Defendants' busy trial schedule does not outweigh the harm to Plaintiffs in having a stay granted. Therefore, Plaintiffs respectfully request that the Court deny Defendants' motion to stay.

Dated: July 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on the 24th day of July, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: July 24, 2019

Respectfully submitted,

/s/ *John W.H. Harding*
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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NICHOLAS HARRISON and OUTSERVE-SLDN, INC.,	.	Civil Action No. 1:18cv641
Plaintiffs,	.	
vs.	.	Alexandria, Virginia
	.	May 16, 2019
MARK T. ESPER, Acting Secretary of Defense, et al.,	.	9:14 a.m.
Defendants.	.	
RICHARD ROE; VICTOR VOE; and OUTSERVE-SLDN, INC.,	.	Civil Action No. 1:18cv1565
Plaintiffs,	.	
vs.	.	
MARK T. ESPER, Acting Secretary of Defense, et al.,	.	
Defendants.	.	

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

(Pages 1 - 13)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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issues are the only remaining discovery issues that you've got?

MR. SOMMER: That -- that's right, Your Honor.

THE COURT: All right. Well, I think realistically, it might take another four or five weeks to get them all resolved if you still have some before Judge Davis because he'd have to rule, and then depending upon what he does, at least one side is going to be unhappy, so that means there's going to be an appeal to us. So I think that's a realistic approach.

So we're looking at probably towards the end of June before the discovery is 100 percent finished. At that point, is there an anticipation of filing dispositive motions?

MR. SOMMER: For plaintiffs in the Roe case, Your Honor, yes. Those plaintiffs anticipate moving for summary judgment on the APA-related claims, at least some of them. In the Harrison case, at this time, Mr. Harrison does not anticipate filing a motion for summary judgment.

THE COURT: All right. And how about from the government's standpoint?

MR. NORWAY: Your Honor, the government intends to file a dispositive motion in both cases.

THE COURT: All right. So we're probably looking at sometime in early July when that might be appropriate or mid-July. I think the best thing in this case is to go ahead and we'll set a trial date so at least we have it on the calendar.