IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

U.S. PASTOR COUNCIL, et al., Plaintiffs, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al., Defendants.	Case No. 4:18-cv-00824-O

REPLY IN SUPPORT OF DEFENDANTS' CONDITIONAL STAY MOTION

INTRODUCTION

As set forth in Defendants' Conditional Stay Motion, in the event this Court determines that jurisdiction exists over this action, the Court should stay proceedings until the Supreme Court resolves three cases concerning the interpretation of Title VII: *Harris Funeral Homes v. EEOC*, No. 18-107, 139 S. Ct. 1599, 2019 WL 1756679; *Altitude Express v. Zarda*, No. 17-1623, 139 S. Ct. 1599, 2019 WL 1756678, and *Bostock v. Clayton County, Ga*., No. 17-1618, 139 S. Ct. 1599, 2019 WL 1756677.[1] A stay is logical and appropriate here because Plaintiffs are seeking a religious exemption from the specific interpretations of the statute currently presented to the Supreme Court for its review.

[1] This motion is conditional because the Court logically should not issue a stay and thereby sustain proceedings if jurisdiction is lacking. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998).

ARGUMENT

In their response to the Motion for Conditional Stay, Plaintiffs do not dispute that stays are frequently granted when the Supreme Court is reviewing related legal questions. *See* Br. in Support of Def's. Conditional Stay Mot. at 6-7, ECF No. 34 ("Def's Br.") (collecting cases). Rather, Plaintiffs contend that: (1) the interim "effects" of EEOC actions—which Plaintiffs allege to be "by way of threat" or "as a warning"[2]—tilt the interests of justice against a stay; and (2) there would be no benefit to a stay because the questions presented before the Supreme Court are different than those at issue here. *See* Pls. Resp. to the Gov.'s Conditional Mot. at 1-2, ECF No. 35 ("Opp. Br.") (citing *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982)). Neither argument is persuasive.

First, Plaintiffs misapprehend the scope of the interest-balancing inquiry involved in determining whether a stay is warranted. In the context of the instant motion, where Defendants urge a stay *only if* the Court concludes that jurisdiction exists, it is not enough to assert that there will be "'harm' to the named plaintiffs," because an injury will necessarily have been identified by the Court as part of its inquiry into standing. *See* Opp. Br. at n.1. The stay inquiry requires considering more, including "the possible damage which may result from the granting of a stay, the hardship or inequity . . . in being required to go forward, and the orderly course of justice." *Lockyer v. Mirant Corp*., 398 F.3d 1098, 1110 (9th Cir. 2005); *cf. GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985) (rejecting application for stay where party had not demonstrated that "based on a balancing of the parties' interests, there is a clear

[2] *See* "*in terrorem*," Black's Law Dictionary (11th ed. 2019).

inequity to the suppliant" or that an "order granting a stay can be framed to contain reasonable limits on its duration"). The absence of "commenced enforcement proceedings," Opp. Br. at n.1, thus goes not to whether there is harm at all, but to the acuteness of the harm, *i.e.*, the "possible damage" during a stay.

As Plaintiffs acknowledge, any stay of proceedings would likely be limited to a year in duration, which courts have recognized as reasonable in the context of Supreme Court review. *Compare* Opp. Br. at 2 *with, e.g.*, *Alessi & Koenig, LLC v. Palo*, 2016 WL 10860967 at *2, 2:15-cv-01946 (D. Nev. July 26, 2016) (finding a stay to be "efficient" and "fair[]" where a "decision will likely be issued within the next year per the Supreme Court's customary practice"); *Miller v. Trans Union, LLC*, 2015 WL 13649106 at *2, 3:12-cv-1715 (M.D. Pa. Aug. 3, 2015) (finding diminished harm from a stay where "a decision is expected [within approximately 11 months], in accordance with" usual Supreme Court timetable). Even if class certification and summary judgment are briefed "promptly," proceedings in this Court and any subsequent appeals are unlikely to dissipate what Plaintiffs describe as a "cloud of uncertainty" any sooner. Opp. Br. at 4, 5. Thus, the Court should not find that delay requires rejecting the stay motion. Indeed, this Court recently stayed proceedings for more than 17 months while awaiting agency action to avoid the risk that "the Court and the parties could waste limited resources litigating issues that may be mooted." *See* ECF No. 105, at 7, *Franciscan Alliance v. Azar*, No. 7:16-cv-00108-O (N.D. Tex. July 10, 2017). There is no reason to forge ahead here, when the Supreme Court should issue a decision no later than June 2020.

Second, Plaintiffs are mistaken that a stay is unwarranted because they "are litigating a different issue than the questions presented to the Supreme Court in *Harris*,

Zarda, and *Bostock*." Opp. Br. at 4. As illustrated by cases cited in Defendants' opening brief and ignored by Plaintiffs, district courts frequently stay proceedings in favor of Supreme Court resolution of questions that are related, not just those that are identical. *See* Def's Br. at 6-7. For example, in *Centeno v. Inslee*, 310 F.R.D. 483 (W.D. Wash. 2015), the district court granted a stay pending a Supreme Court decision, even though the district court recognized that it would be dispositive in only certain circumstances, such as if the district court accepted a threshold "argument [that] face[d] an uphill battle." 310 F.R.D. 491. Nevertheless, because "the reasoning the Supreme Court uses . . . [would be] highly likely to influence [the district] [c]ourt's understanding of the issue," the district court found that "judicial economy would be served" by a stay. *Id.*; *see also Matera v. Google, Inc.*, 2016 WL 454130 at *3, No. 15-cv-04062-LHK (N.D. Cal. Feb. 5, 2016) (granting a stay where Supreme Court decision "is likely to be instructive . . . regardless of whether it is formally controlling or directly addresses" the same issues). So too here, where it is undeniable that a Supreme Court decision addressing the application of Title VII to sexual orientation and gender identity is likely to shape these proceedings.[3] *See* Def's Br. at 2-4.

[3] Plaintiffs' suggestion that this Court should proceed to the merits to "assist the Supreme Court in resolving the statutory-interpretation questions presented in *Harris Funeral Homes, Zarda*, and *Bostock*," Opp. Br. at 5, puts the caboose before the engine. It is more appropriate for this Court to adjudicate the scope of religious exemptions once the meaning of Title VII has been settled by the Supreme Court than to press ahead with an opinion that may be rendered unnecessary by the Supreme Court's resolution of those questions. This is particularly important in the context of religious exercise, where the Supreme Court has often taken a more incremental approach. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("[O]ur decision in these cases is concerned solely with the contraceptive mandate."); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 196 (2012) ("There will be time enough to address the applicability of the [ministerial] exception to other circumstances if and when they arise").

Plaintiffs err in their implicit assumption that the spectrum of outcomes in *Harris*, *Zarda*, and *Bostock* is binary, *i.e.*, that the Supreme Court will either "agree[] with the EEOC" or "on the other hand, hold[] that sexual orientation and gender identity are not protected categories under Title VII." Opp. Br. at 4-5. Because the Supreme Court is not constrained to each of two diverging roads, Plaintiffs' speculation about these\ specific possibilities takes too limited a view to demonstrate that Supreme Court action will fail to "simplify[] issues . . ., proof, and questions of law." *Lockyer*, 398 F.3d at 1110. Indeed, it is quite possible that the Supreme Court would opine on the interests served by Title VII in a way that could be relevant to the RFRA analysis, which is always conducted with respect to a specific religious objector, burden, and governmental interest. This litigation deserves to be stayed because of the uncertainty over the nature and scope of a Supreme Court decision. *See* Def's Br. at 7-9 (explaining likely effects on litigation of Supreme Court action).

Finally, Plaintiffs' effort to rely on the "longstanding position of the Department of Justice . . . that Title VII does not reach discrimination based on sexual orientation or gender identity," Opp. Br. at 3, as a basis to forestall a stay misses the mark. The Department of Justice and the EEOC are both defendants in this action, and, as Defendants previously noted, there have been "divergent interpretations of this provision among Defendants." Def's Br. at 10. As the filings in this case have made clear, the EEOC has not brought its interpretation into alignment with that of the Department of Justice. *See* MTD Br. at 3-5. For this reason, Plaintiffs' simplistic characterization of Defendants' position as being a "concession" regarding the merits of this case is incorrect. *See* Opp. Br. at 3. To the contrary, because the Supreme Court "may provide

substantial guidance" to Defendants regarding their positions, the divergence of views also countenances in favor of a stay. *Cf. Miller*, 2015 WL 13649106 at *2 ("A brief delay will provide this litigation with welcome certainty on a difficult question").

CONCLUSION

As explained above, and for the reasons set out in Defendants' opening brief, the Court should grant Defendants' motion to stay, if the Court denies Defendants' motion to dismiss.

Dated: June 14, 2019

Respectfully submitted,

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