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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his Official Capacity; and XAVIER BECERRA, Attorney General of California, in his Official Capacity,

Defendants.

Case No. 2:18-cv-490-JAM-KJN

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR A STAY

Plaintiff the United States files this reply to Defendants' response (ECF 208) to the United States' motion to stay proceedings (ECF 207) pending resolution of the appeal of this Court's preliminary injunction order and order on the motion to dismiss, which is docketed at the U.S. Court of Appeals for the Ninth Circuit as Case No. 18-16496.

First, although it is the primary focus of their opposition, ECF 208 at 4-6, Defendants in fact suffer at most limited harm from the ongoing preliminary injunction. The majority of California's challenged laws remain in effect pending resolution of the appeal. Only two discrete portions of AB 450—a very narrow portion of the overall litigation, which is on appeal—remain enjoined. Defendants made the choice not to appeal the injunction of those provisions. That "failure to pursue appellate (or other) review of" the preliminary injunction of those who provisions weighs against an assertion of immediate harm. *Anderson v. City of Boston*, 244 F.3d 236, 239 (1st Cir. 2001). Indeed, "[i]f relief was not so urgent [for Defendants] to justify interlocutory appeal, any urgency is even less" once the deadline to appeal has passed. *Samayoa by Samayoa v. Chicago Bd. of Educ.*, 783 F.2d 102, 104 (7th Cir. 1986); *see Cuomo v. Barr*, 7 F.3d 17, 19 (2d Cir. 1993) (stating that failure to pursue all avenues to receive more immediate relief "belie[s] the urgen[cy]" of the consequences alleged); *United States v. Washington*, No. C70-9213RSM, 2013 WL 6328825, *8 (W.D. Wash. Dec. 5, 2013) (holding that a party could not establish harm when it, among other factors, "fail[ed] to timely appeal the Court's ruling").

This Court already has spoken on California's interest in this particular case in the enjoined provisions of AB 450. *See* Order on Pl.'s Mot. for Prelim. Inj., ECF 193, at 57, 59 (noting that the public interest is not served in allowing a state to violate the Supremacy Clause and determining that there is "no harm from the state's nonenforcement of invalid legislation") (internal quotation marks and citation omitted). Defendants' harm arguments are essentially an attempt to re-litigate that decision without appealing that injunction. Yet, any remaining uncertainty that exists on that decision pending a final resolution of the merits is not harm enough to outweigh the inefficiencies of litigating this case on two separate tracks—especially where, as here, the Court has already held that the laws are in violation of the Supremacy Clause according to the heightened standard that applies to a mandatory injunction. ECF 193 at 5; *see, e.g.*, *Dehainaut v. Cal. Univ. of Pa.*, No. 2:10-CV-899, 2011 WL

3810132, *3 (W.D. Pa. Aug. 29, 2011) (holding that uncertainty was not enough to successfully block a stay); *McConnell v. Lassen Cty., Cal.*, No. CIVS 05-0909 FCD DAD, 2007 WL 4170622, *3 (E.D. Cal. Nov. 20, 2007) (Damrell, J.), *as amended* (Nov. 26, 2007) (noting that when defendants claim that they suffer from the burden of having litigation "hanging over their heads[,] . . . this burden is not sufficient to outweigh the cost and inefficiency of potentially holding two trials in this matter"). As such, Defendants cannot show that they would be significantly harmed by a stay.

Defendants contend that a stay is unwarranted because the appeal has "no specific end-date." Defs.' Resp. to Pl.'s Mot. for a Stay, ECF 208, at 5. However, the cases that Defendants cite in support of this claim involve stays pending resolutions of *separate* cases or other unique issues. *See Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) (involving a stay that had continued for two years awaiting resolution of arbitration in England, outside the American court system); *Yong v. I.N.S.*, 208 F.3d 1116, 1118, 11120 (9th Cir. 2000) (involving a habeas challenge to prolonged detention that was stayed pending resolution of a *separate* appeal in an unrelated case and, as a habeas, "implicate[d] special considerations that place *unique* limits on a district court's authority to stay a case") (internal quotation marks and citation omitted) (emphasis added); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (addressing a stay pending the outcome of a Texas bankruptcy proceeding that would be "unlikely to consider" the claim that was the subject of the case); *Clinton v. Jones*, 520 U.S. 681, 707 (1997) (holding that a case could not be stayed for the years-long length of a president's term in office). And there is particularly good reason to believe that the Ninth Circuit appeal process would be brief: Preliminary injunction appeals, per the Ninth Circuit rules, "receive hearing or submission priority."[1] Ninth Circuit Rule 34-3; *see* Case No. 18-16496, Clerk Order filed Aug. 9, 2018 (applying Rule 3-3). The United States submitted its brief on September 18, 2018, and Defendants will submit theirs on November 5, 2018. There is no reason to believe that the stay in this case would be indefinite.

[1] Indeed, since the U.S. Courts of Appeals do not provide preset decision dates, under Defendants' rationale, the existence of an appeal itself would always weigh against the grant of a stay pending its resolution. However, if that were the case, it would permit a party to decline to file a cross-appeal so that it could claim harm from the exercise of the appellate process and attempt to moot out the appeal.

Second, contrary to Defendants' assertion, ECF 208 at 5-6, discovery is not necessary to rule on the United States' facial challenge to the provisions of AB 450 that remain before this Court. The Court ruled that the "law and facts clearly" show that the provision prohibiting consent "impermissibly discriminates against those who choose to deal with the Federal Government." ECF 193 at 26. It made no indication that discovery was warranted on that provision. This Court only provided the disclaimer that "a more complete evidentiary record could impact the Court's analysis at a later stage of this litigation" solely regarding the reverification prohibition provision. *Id.* at 29-30. Even so, it still determined that, while applying the heightened standard for a mandatory injunction, "*[b]ased on a plain reading of the statutes*, the prohibition on reverification appears to stand as an obstacle to the accomplishment of Congress's purpose in enacting IRCA." *Id.* at 30 (emphasis added). The United States maintains that the Court's determination was proper and no additional evidence is needed to determine either of these two provisions' constitutionality. *See, e.g.*, *5035 Vill. Tr. v. Durazo*, No. 215CV00747GMNNJK, 2016 WL 6246304, *1 (D. Nev. Oct. 24, 2016) (holding that discovery is unnecessary and may likely "never be required" in a suit making purely legal challenges).

Defendants nevertheless claim that in the event the Court does believe discovery is necessary, a stay will harm them because evidence relevant to their defense may become "stale" and witnesses may become "difficult to locate." ECF 208 at 5. Defendants have not met their heavy burden of demonstrating that there may be spoilage of evidence during a stay. Defendants merely speculate that evidence may become stale and potential witnesses may become difficult to locate if this case is stayed. *Id.* Yet, they "have not identified any evidence that they believe will become stale or any witnesses they fear will become unavailable." *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, No. CV 08-01467 BRO (PLAx), 2015 WL 13385916, *4 (C.D. Cal. May 14, 2015). Nor have they made any allegations "such as a custodian's practice of destroying records" or "spoilage or destruction [that] will occur in the due course of business activities." *Wangson Biotech Grp., Inc. v. Tan Trading Co., Inc.*, No. C 08-04212 SBA, 2008 WL 4239155, *7 (N.D. Cal. Sept. 11, 2008) (involving expedited discovery). Further, the presumption of regularity applies to "the official acts of public officers," and, as such, decreases any concern about staleness. *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). And there is no basis

to believe that any potential U.S. government witnesses will disappear during a temporary stay.

Where, as here, the Ninth Circuit is engaging in expedited review per its own Rules, "any concern over undue delay" is "minimize[d]." *Nat. Res. Def. Council, Inc.*, 2015 WL 13385916, *4. Meanwhile, it is very likely that the evidence for all claims would overlap. For example, if this Court determined that discovery was warranted in this case, deponents for AB 450's notice provision, currently on appeal, would be the same as the deponents for the other enjoined provisions. And it is similarly likely that the deponents for AB 103 and SB 54 would also be deposed for AB 450's two enjoined provisions. It would thus preserve judicial and parties' resources to stay the case until the Ninth Circuit has provided guidance.

For these reasons and those in its Memorandum in Support of its Motion for a Stay, ECF 207-1, the United States respectfully requests that the Court grant the United States' motion to stay proceedings pending resolution of the Ninth Circuit's appeal.

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Respectfully Submitted,

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