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**UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAII**

)	No. 1:17-cv-00050-DKW-KJM
STATE OF HAWAI‘I,)	
)	DEFENDANTS’ MEMORANDUM
Plaintiff,)	OF LAW IN SUPPORT OF
)	EMERGENCY MOTION TO STAY
v.)	ALL DEADLINES PENDING
)	RESOLUTION OF APPELLATE
DONALD J. TRUMP, in his official)	PROCEEDINGS REGARDING
capacity as President of the United)	NATIONWIDE INJUNCTION
States; U.S. DEPARTMENT OF)	
HOMELAND SECURITY; JOHN F.)	Judge: Hon. Derrick K. Watson
KELLY, in his official capacity as)	
Secretary of Homeland Security; U.S.)	

DEPARTMENT OF STATE; REX)
TILLERSON, in his official capacity as)
Secretary of State; and the UNITED)
STATES OF AMERICA,)
)
Defendants.)
)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION TO STAY ALL DEADLINES PENDING
RESOLUTION OF APPELLATE PROCEEDINGS REGARDING
NATIONWIDE INJUNCTION

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INTRODUCTION

The State of Hawaii has filed a motion for a temporary restraining order against certain sections of an Executive Order signed by the President on January 27, 2017, titled “Protecting the Nation from Foreign Terrorist Entry into the United States.” *See* ECF No. 2. This Court set a deadline of Tuesday, February 7, for the Government’s response to the State of Hawaii’s motion, and also scheduled a hearing for Wednesday, February 8. *See* ECF No. 18. Since the Court set that schedule, however, there have been significant changed circumstances: the President’s Executive Order is now subject to a nationwide injunction pursuant to an order from the Western District of Washington, and that order is now on appeal before the United States Court of Appeals for the Ninth Circuit.

In light of these significant intervening events, there is no longer any urgency associated with the State of Hawaii’s motion. The order from the Western District of Washington already provided all the relief the State of Hawaii is seeking, so there is no longer any plausible basis for claiming imminent or ongoing irreparable harm to the State. Moreover, the Ninth Circuit is likely to rule on the similar (if not identical) claims brought by the State of Washington in relatively short order. Particularly given that the purported emergency justifying the State of Hawaii’s original motion has now disappeared, the interests of judicial economy

support a stay of these proceedings to allow the parties and this Court to have the benefit of whatever ruling is issued by the Ninth Circuit on these legal issues.

Accordingly, the Government hereby respectfully requests that the existing deadlines in this case be stayed pending resolution of the appeal of the Western District of Washington order. Alternatively, the Government requests that this Court issue such a stay pending resolution of the appeal, but provide that if the Western District of Washington's nationwide injunction is no longer in effect then the Government must respond to the State of Hawaii's motion for a temporary restraining order within 48 hours.

BACKGROUND

On Friday, January 27, 2017, the President issued the Executive Order that is the subject of this lawsuit. *See* Compl. (ECF No. 1) ¶ 2 & n.1. The State of Hawaii filed its Complaint on Friday, February 3, 2017. *Id.* That same day, the State also filed a motion for a temporary restraining order, *see* ECF No. 2, which sought to enjoin nationwide Sections 3(c), 5(a)-(c), and 5(e) of the Executive Order. *See* Proposed Order (ECF No. 2-3) at 3-4, ¶ 1. Later that same day, the Court set the following schedule regarding the State's motion for a temporary restraining order:

The Court is in receipt of Plaintiff State of Hawaii's Motion for Temporary Restraining Order ("TRO"). Dkt. No. 2. The Government shall file a response to the Motion for TRO by Tuesday, February 7,

2017 at 12:00 noon (HST). The Court will hold a hearing on the Motion for TRO on Wednesday, February 8, 2017 at 9:30 a.m (HST).

ECF No. 18.

Separately, the State of Washington—later joined by the State of Minnesota—also challenged the Executive Order. The State of Washington filed suit in the Western District of Washington on Monday, January 30, 2017. *See Washington v. Trump*, Case No. 2:17-cv-141-JLR (W.D. Wash.). Washington also filed that same day a motion for a temporary restraining order, seeking to enjoin nationwide enforcement of the Executive Order. *See Wash. v. Trump* (W.D. Wash.), ECF No. 3. The Court in that case required a written response from the Government, and scheduled a hearing on the motion for Friday, February 3, 2017. *See Wash. v. Trump* (W.D. Wash.), ECF No. 10 (Minute Entry of Jan. 31, 2017).

The hearing on Washington’s request for a temporary restraining order occurred as scheduled on February 3. At the conclusion of the hearing, the Court orally granted Washington’s motion, and enjoined enforcement of Sections 3(c), 5(a)-(c), and 5(e) on a nationwide basis—the same Sections of the Executive Order challenged by Hawaii. The Court followed its oral ruling with a written order memorializing the injunction. *See Wash. v. Trump* (W.D. Wash.), ECF No. 52.

The next day—February 4, 2017—the Government filed a notice of appeal of the order to the United States Court of Appeals for the Ninth Circuit. *See Wash. v. Trump* (W.D. Wash.), ECF No. 53; *see also Washington v. Trump*, Case No. 17-

35105 (9th Cir.). Later that day the Government filed an emergency motion to stay the district court's order. *See Wash. v. Trump* (9th Cir.), ECF No. 14. The Ninth Circuit rejected the Government's request for an immediate administrative stay, but set an expedited briefing schedule on the stay request:

The court has received appellants' emergency motion (Docket Entry No. 14). Appellants' request for an immediate administrative stay pending full consideration of the emergency motion for a stay pending appeal is denied.

Appellees' opposition to the emergency motion is due Sunday, February 5, 2017 at 11:59 p.m. PST. Appellants' reply in support of the emergency motion is due Monday, February 6, 2017 at 3:00 p.m. PST.

Wash. v. Trump (9th Cir.), ECF No. 15.¹

On February 5, 2017, the State of Hawaii filed a motion to intervene in the *Washington v. Trump* proceedings in the United States Court of Appeals or, alternatively, to participate as *amicus curiae*. *See Wash. v. Trump* (9th Cir.), ECF No. 21-1. The United States intends to oppose the State of Hawaii's intervention, but will not oppose Hawaii's participation as *amicus*.

Undersigned counsel for the United States contacted counsel for the State of Hawaii about staying the existing deadlines in this case, given that the Executive Order is currently enjoined nationwide, there are ongoing proceedings in the Ninth

¹ The Court of Appeals later changed the deadline for Appellees' opposition to be 1:00 a.m. PST on Monday, February 6, 2017, due to a regularly scheduled ECF outage. *See Wash. v. Trump* (9th Cir.), ECF No. 16.

Circuit, and the State of Hawaii seeks to participate in those proceedings. The Attorney General of the State of Hawaii informed undersigned counsel that the State opposes this motion to stay.

STANDARD OF REVIEW

“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). That power applies “especially in cases of extraordinary public moment,” when “a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” *Id.* at 707 (modifications omitted).

The Ninth Circuit has described various factors that should be considered when evaluating a motion to stay:

Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among these competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962). Related to the last factor, courts frequently grant stays when there are ongoing “independent proceedings which bear upon the case,” because a stay is most “efficient for [the court’s] own docket and the fairest course for the parties[.]” *Leyva v. Certified Grocers of*

California, Ltd., 593 F.2d 857, 863 (9th Cir. 1979). Courts also issue stays in order to respect “the general principle” that federal district courts should “avoid duplicative litigation.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1091 (9th Cir. 2012) (“It is well established that a district court has broad discretion to control its own docket, and that includes the power to dismiss duplicative claims.”).

ARGUMENT

Since the Court issued the briefing and scheduling order in this case, *see* ECF No. 18, there have been changed circumstances that have eliminated the need for urgent action by this Court. *First*, there is now a nationwide injunction in place that has provided the State of Hawaii with all of the relief requested in its own motion for a temporary restraining order. Thus, there is no present urgency requiring this Court’s involvement on an emergency, expedited basis. *Second*, the United States has appealed that nationwide injunction to the United States Court of Appeals for the Ninth Circuit, which is expected to issue a ruling in relatively short order. That ruling is likely to have substantial bearing on—if not entirely resolve—how this Court should analyze the claims raised by the State of Hawaii here. Together, these changed circumstances offer compelling reasons for the Court to stay the deadlines in this case pending resolution of the appeal of the

Western District of Washington’s order. At a minimum, the Court should stay the deadlines pending resolution of that appeal, but provide that if the Western District of Washington’s nationwide injunction is no longer in effect then the Government must respond to the State of Hawaii’s motion for a temporary restraining order within 48 hours.

I. Compelling Reasons Justify Granting a Stay Pending a Ruling from the Ninth Circuit.

Turning to the particular factors identified by the Ninth Circuit—prejudice to each party and simplification of the issues resulting from a stay—they all convincingly weigh in favor of a stay. The changed circumstances above have eliminated any need for this Court to undertake expedited, emergency consideration of the important issues at stake in this lawsuit.

A. There Is No Urgency Requiring Immediate Proceedings Regarding the State’s Request for a Temporary Restraining Order.

The fundamental premise of a party’s request for a temporary restraining order is that irreparable harm is so imminent that immediate action is needed. *Cf. R.F. v. Delano Union Sch. Dist.*, --- F. Supp. 3d ----, 2016 WL 7338597, at *4 (E.D. Cal. Dec. 19, 2016) (noting that a temporary restraining order “is granted only if there is a true emergency which requires ‘preserving the status quo and preventing irreparable harm’” (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974))).

Here, however, there is no such immediate danger of irreparable harm: the challenged provisions of the Executive Order are currently enjoined on a nationwide basis. Indeed, the order entered by the District Court in the State of Washington litigation provides exactly the same relief that Hawaii is seeking in its motion for a temporary restraining order. *Compare* Hawaii’s Proposed TRO (ECF No. 2-3) at 3-4 ¶ 1 (requesting nationwide injunction prohibiting enforcement of “Sections 3(c), 5(a)-(c), and 5(e) of the Executive Order”), *with Wash. v. Trump* (W.D. Wash.), TRO Order (ECF No. 52) at 5-6 ¶¶ 1-2 (“This TRO is granted on a nationwide basis and prohibits enforcement of Sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Executive Order[.]”).

Given that there is no threat of irreparable injury to the State of Hawaii for as long as the Western District of Washington’s nationwide injunction remains in place, there is simply no need for expedited, emergency proceedings in this action. To the extent the State of Hawaii seeks to ensure a nationwide injunction remains in effect, it is free to make those arguments before the Ninth Circuit as an *amicus curiae*, which the Government does not oppose. But given that the State of Hawaii cannot plausibly claim there is any present urgency—the Executive Order is enjoined nationwide—there is simply no need for this Court to continue with the expedited briefing and hearing schedule previously ordered.

B. Granting a Stay Is Supported by Judicial Economy and Simplification of the Proceedings.

The nationwide injunction issued by the Western District of Washington is now on appeal before the Ninth Circuit. Staying the proceedings in this case pending resolution of that appeal makes eminent sense because it would support judicial economy, and would allow the parties here to address the relevant issues with the benefit of any ruling from the Ninth Circuit.

As the State of Hawaii itself argued to the Ninth Circuit, the resolution of that appeal “could have a binding effect” on the present lawsuit. *See Wash. v. Trump* (9th Cir.), ECF No. 21-1 at 4-5; *see also id.* at 9. Given that many (if not all) of the critical legal issues presented in Hawaii’s motion for a temporary restraining order are now before the Ninth Circuit, it makes little sense for this Court (and the parties) to expend the resources necessary for a full presentation of those issues at this time. It would be far more efficient for the parties to await a decision from the Ninth Circuit, at which point most (if not all) of the legal issues may then have definitive resolution, and briefing and consideration of any remaining legal issues would be better informed by having the benefit of the Ninth Circuit’s analysis. There can be no question, therefore, that a stay would serve “the orderly course of justice” by “simplifying . . . issues, proof, and questions of law” that this Court would need to confront. *CMAX*, 300 F.2d at 268; *see also Leyva*, 593 F.2d at 863 (“A trial court may, with propriety, find it is efficient for its own

docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.”).

The Government’s request in the Ninth Circuit for a stay of the nationwide injunction is being heard on an extremely fast timeline—the Government has less than 24 hours to prepare its reply brief, which is scheduled to be submitted later this evening. *See Wash. v. Trump* (9th Cir.), ECF No. 15. Particularly given that the appeal proceedings are occurring on such an expedited timeline, a stay of these proceedings is warranted. *See Unitek Solvent Servs., Inc. v. Chrysler Grp. LLC*, 2014 WL 12576648, at *3 (D. Haw. Jan. 14, 2014) (“Plaintiff’s appeal has been expedited in accordance with Ninth Circuit rules relating to preliminary injunction appeals, and briefing will already be completed this month. Under this timeline, the Court finds that a delay pending appeal is reasonable and does not preclude the issuance of a stay.” (citation omitted)).

Staying these proceedings to allow the parties and the Court to have the benefit of the Ninth Circuit’s ruling makes eminent sense. A stay here is well-supported by judicial economy and conserving the parties’ resources.

C. A Stay of Proceedings Would Avoid Any Potential Harm to the Government.

Granting a stay of the district court proceedings in this case would also avoid potential harm to the Government. Specifically, the Government should not be required to defend against the State of Hawaii’s identical legal claims in two cases

simultaneously. Nor should the Government be compelled to submit briefing on an expedited, emergency basis when there is no longer any plausible claim of urgency by the State—especially given the important public policy issues at stake. *Cf. Clinton*, 520 U.S. at 707 (explaining that “especially in cases of extraordinary public moment, a plaintiff may be required to submit to delay” (modifications omitted)). For all these reasons, a short stay of district court proceedings is amply warranted.

II. Defendants’ Proposed Approach Is the Most Sensible Way to Proceed.

Consistent with the above reasons for granting a stay, the Government requests a stay of these proceedings until the conclusion of all appellate proceedings regarding the Western District of Washington’s nationwide order. This stay would further the interests of judicial economy, by ensuring that any rulings necessary in this case would have the full benefit of the Ninth Circuit’s (and potentially the Supreme Court’s) analysis on similar (if not identical) claims presented by the State of Washington.

At a minimum, this Court should stay district court proceedings pending resolution of the appeal, but provide that if the Western District of Washington’s nationwide injunction is no longer in effect then the Government must respond to the State of Hawaii’s motion for a temporary restraining order within 48 hours. This could occur, for example, if the Ninth Circuit were to grant the Government’s

request for a stay of the injunction pending appeal. As long as the Western District of Washington's nationwide injunction remains in effect, however, there is no need for expedited proceedings in this Court. While the injunction remains in effect, there is no plausible harm to the State of Hawaii in awaiting the outcome of the appellate proceedings. And this proposed schedule would not impose any meaningful delay or harm on the State of Hawaii; any slight delay is amply justified by the interests of judicial economy and avoiding duplicative litigation.

CONCLUSION

The Government respectfully requests a stay of these proceedings until the conclusion of all appellate proceedings regarding the Western District of Washington's nationwide order. Alternatively, the Government respectfully requests that this Court stay the existing deadlines pending resolution of that appeal, but provide that if the Western District of Washington's nationwide injunction is no longer in effect then the Government must respond to the State of Hawaii's motion for a temporary restraining order within 48 hours.

Dated: February 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the foregoing memorandum complies with the word limitation specified in Local Rule 7.5(c) of the Local Rules of Practice for the U.S. District Court for the District of Hawaii. The memorandum is set in Times New Roman 14-point type and, according to the word-count facility of the word processing system used to produce the memorandum, contains 2897 words.

Date: February 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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