The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	No. 2:17-cv-00141-JLR STATES' RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

TABLE OF CONTENTS

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

I. INTRODUCTION

Defendants seek an indefinite stay pending the Ninth Circuit's decision in *Hawai'i v. Trump*. Plaintiffs face significant harm if a stay is granted. Crucial relevant evidence, which Defendants disclaim any responsibility to locate or preserve, may be lost. Memories of critical witnesses will fade. The Ninth Circuit is unlikely to resolve the discovery objections Defendants raise, and even less likely to overrule its recent holding that intent evidence is relevant. Defendants have not met their burden and the stay should be denied.

II. RELEVANT PROCEDURAL BACKGROUND

The States of Washington, California, Maryland, Massachusetts, New York, and Oregon (States) challenge Executive Orders 13769 (First Executive Order) and 13780 (Second Executive Order). Second Am. Compl., ECF 152 ¶¶ 1-4. The States allege that both orders violate constitutional guarantees including Equal Protection and Due Process, as well as the Establishment Clause's prohibition on government attempts to establish a disfavored religion. *Id.* ¶¶ 194-210, 237-44. The States also allege a number of substantive and procedural statutory violations. *Id*. ¶¶ 211-36.

After the Ninth Circuit upheld this Court's injunction against provisions of the First Executive Order, Defendants asked this Court "to postpone any further proceedings in the district court" pending "[f]urther proceedings in the Ninth Circuit." ECF 76 at 3. The Court denied Defendants' request for a stay pending appeal and "direct[ed] the parties to proceed with this litigation." ECF 78 at 5. Now, less than two months later, Defendants again ask the Court to stay this case based on Ninth Circuit proceedings, this time involving an appeal of a preliminary injunction against the Second Executive Order in a different case. Defs.' Mot. to Stay District Court Proceedings Pending Resolution of Appeal in *Hawaii v. Trump* (Stay Motion), ECF 175. The States oppose a stay.

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

III. ARGUMENT

A. Defendants Bear a Heavy Burden in Seeking an Indefinite Stay

The Court's inherent power to control its docket includes the power to stay proceedings. *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). While this power permits a stay to await a decision from another court, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109-10 (9th Cir. 2005) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)).

Courts weigh three competing factors in determining whether to grant a stay: (1) the possible damage that may result from a stay, (2) the hardship or inequity a party may suffer from being required to go forward, and (3) 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). This analysis includes an evaluation of the type of relief sought—a stay is more difficult to justify in a case involving allegations of continuing harm and a request for "injunctive or declaratory relief" than in a suit seeking "only damages." *See Lockyer*, 398 F.3d at 1112-13 (vacating stay where "the Attorney General seeks injunctive relief against ongoing and future harm"). And "[a] stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Levya v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979).

The moving party bears the burden to show that a stay is warranted. *Clinton*, 520 U.S. at 708. A heightened burden applies where "there is even a fair possibility that the stay . . . will work damage to some one else." *Landis*, 299 U.S. at 255. If such possibility exists, the party seeking the stay "must make out a clear case of hardship or inequity in being required to go forward." *Id.*

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

If the moving party meets its burden to establish the need for a stay, additional limitations govern the stay's duration and scope. "Generally, stays should not be indefinite in nature." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). "[T]he general policy favor[s] stays of short, or at least reasonable, duration," and imposition of a longer stay may constitute an abuse of discretion. *Id.* at 1066-67 (reversing where "it [was] unclear when the stay might lift"); *see also Landis*, 299 U.S. at 256 (district court abuses its discretion by granting "a stay of indefinite duration"). Finally, the moving party must also justify the proper scope of the stay. *See Clinton*, 520 U.S. at 708 (recognizing that trial of an action may be stayed even though discovery proceeds); *In re Galena Biopharma, Inc. Derivative Litig.*, 83 F. Supp. 3d 1033, 1046 (D. Or. 2015) (staying discovery only until resolution of a pending motion to dismiss in a related case between the same parties and before the same court).

B. The Appeal of Preliminary Relief in *Hawai'i* Does Not Justify an Indefinite Stay Here

Applying the rules detailed above, Defendants cannot justify the indefinite and complete stay they seek. Defendants bear a heightened burden because of the real possibility that a stay will harm the States' ability to conduct timely, complete discovery. Any benefit to judicial economy from a stay is minimal where the case on appeal involves a grant of preliminary relief on one claim, and the case before this Court involves merits issues on eight constitutional and statutory claims. Finally, Defendants' alleged burden is merely the burden of defending this suit. The stay should be denied, or at minimum be time-limited and tailored to allow the States to conduct third party discovery.

1. An Indefinite Stay Harms Plaintiffs

There is a significant possibility that an indefinite stay will harm the States' ability to obtain complete and accurate discovery. This factor weighs heavily against a stay.

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

The States allege eight constitutional and statutory causes of action. Second Am. Compl., ECF 152 ¶¶ 194-244. Some of these claims may be proven through evidence that the Executive Orders were implemented for an illegal reason. *Id.* ¶¶ 194-200 (Equal Protection); 201-205 (Establishment Clause); 211-220 (Immigration and Nationality Act). Other claims may be proven by showing that the Executive Orders were implemented through defective process or with unlawful results. *Id.* ¶¶ 206-210 (Procedural Due Process); 211-220 (Immigration and Nationality Act); 221-225 (Religious Freedom Restoration Act); 226-236 (Administrative Procedure Act); 237-44 (Tenth Amendment). Given the breadth of the alleged violations, the States require discovery regarding the underlying factual basis, intent, design, issuance, and effects of the Executive Orders. *See* Joint Status Report & Discovery Plan (Joint Status Report), ECF 177 at 5.

The availability and quality of probative evidence is jeopardized by a stay. Delay "increase[s] the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death [or other unavailability] of a party." *Clinton*, 520 U.S. at 707-08; *see also I.K. ex rel. E.K. v. Sylvan Union Sch. Dist.*, 681 F. Supp. 2d 1179, 1193 (E.D. Cal. 2010) ("While the stay is in effect, through no fault of the parties, relevant evidence could be lost or destroyed, memories could fade, and pertinent witnesses could move out of the jurisdiction.") (citing *New York v. Hill*, 528 U.S. 110, 117 (2000) ("Delay can lead to a less accurate outcome as witnesses become unavailable and memories fade.")); *Shim v. Kikkoman Int'l Corp.*, 509 F. Supp. 736, 740 (D.N.J. 1981) ("Stays . . . are to be avoided if at all possible if only because of the importance that discovery and trial testimony be as fresh and close to the event as possible, and to avoid the loss of evidence through fading memories and the death of individuals."), *aff'd sub nom. Woohyung Shim v. Kikkoman Int'l Corp.*, 673 F.2d 1304 (3d Cir. 1981).

Here, the risk of lost evidence is acute. During the Rule 26(f) conference, the States requested that Defendants take steps to identify and preserve relevant documents and

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

information held by anyone who was "involved in and/or consulted regarding the design of the Executive Orders, before and after President Trump took office." Joint Status Report, ECF 177 at 9. In response, Defendants disclaimed any obligation to locate or preserve information (1) held by third parties, or (2) that predates January 20, 2017. *Id.* Thus, according to Defendants, third parties are free to destroy evidence at any time, and even Defendants themselves may discard probative evidence if it was created prior to Inauguration Day.

An example illustrates the negative potential results. The States have submitted evidence that Rudolph Giuliani played a critical role in crafting the First Executive Order. He claims to have convened a "commission" in response to then-candidate Trump's request for a "Muslim ban" that would be legal. Second Am. Compl., ECF 152 ¶ 168; ECF 152-1 at 232-33. Some or all of the commission's work may have taken place before January 20, 2017, and been performed by individuals who, like Giuliani, are not current federal employees. A stay of proceedings raises the very real specter that critical evidence held by Giuliani and the other commission members will disappear or fade from memory. This potential loss of evidence creates more than a "fair possibility that the stay . . . will work damage" to the States. *See Landis*, 299 U.S. at 255.

Defendants make two arguments in an effort to downplay the States' harm from an indefinite stay. Neither is persuasive.

First, Defendants liken their Stay Motion to the Court's recent *sua sponte* order staying consideration of a temporary restraining order (TRO) against provisions of the Second Executive Order. *See* ECF 164. Defendants assert that, as with the TRO motion, the injunction granted in *Hawai'i* alleviates any harm to the States from a stay here. *See* Stay Motion, ECF 175 at 11-12. But equating the limited stay of the TRO motion with a complete stay of all proceedings on the merits is comparing apples and oranges. The TRO motion was stayed because, by the time it came before the Court for decision, "the federal district court of Hawai'i's nationwide injunction already provide[d] Plaintiffs the [preliminary] relief they

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

[sought] in their TRO motion." ECF 164 at 8. By contrast, a stay here would forestall any progress on the States' claims for *permanent* injunctive relief—something no court has yet to consider or decide.

Moreover, the *Hawai'i* injunction is based entirely on the likelihood that plaintiffs there will prevail on their Establishment Clause claim. *Hawai'i v. Trump*, No. 17-cv-50-DKW-KSC, 2017 WL 1167383, at *5-6 (D. Haw. Mar. 29, 2017); *id.*, 2017 WL 1011673, *11-16 (Mar. 15, 2017). The *Hawai'i* court expressed no view on the merits of the other constitutional or statutory claims. *Id.*, 2017 WL 1167383, at *5 n.3. Here, the States seek adjudication of eight constitutional and statutory claims, and the harm from delay and risk of lost evidence are not ameliorated by a preliminary determination that the *Hawai'i* plaintiffs are likely to prevail on one overlapping claim. *See I.K.*, 681 F. Supp. 2d at 1193 ("Another form of potential damage to Plaintiffs if this case is stayed is the inability, during the stay, to conduct timely discovery and gather evidence as to non-overlapping aspects of the federal litigation."); *cf. In re Galena Biopharma, Inc.*, 83 F. Supp. 3d at 1043 (finding only minimal harm from a stay where future discovery was likely from parties that "will remain under an obligation to preserve evidence").

Defendants' second reason for dismissing any harm from a stay is their insistence that the proposed stay will be a "brief delay." Stay Motion, ECF 175 at 11. The States see no reason to believe that will be the case. The duration of the proposed stay is not limited to a ruling from the Ninth Circuit panel that will hear argument on May 15. *See* ECF 179 at 2 n.1. Instead, Defendants propose a stay pending resolution of the entire appeal. Stay Motion, ECF 175 at 1. As the Court has noted, President Trump has vowed to pursue the appeal "as far as it needs to go, including all the way up to the Supreme Court." ECF 164 at 6 (quoting Donald J. Trump, Remarks by the President at Make America Great Again Rally (Mar. 15, 2017)). The Supreme Court's final arguments for the current term are scheduled for April 2017, before the Ninth Circuit will rule on the *Hawai'i* appeal. Supreme Court consideration of the *Hawai'i* appeal is therefore unlikely before October 2017, with a decision sometime thereafter. A stay

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

to await the outcome of that appeal is precisely the sort of "indefinite" and "immoderate" delay that the Supreme Court directs against. *See Landis*, 299 U.S. at 251, 255-56, 259 (vacating the stay requested by the federal government "until the validity of [a challenged federal law] has been determined by the Supreme Court of the United States" in a related case); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732 (D.C. Cir. 2012) (citing party's characterization that "indefinite" stays "encompass all possible appeals").

The possibility of harm to the States from indefinite delay and lost evidence is significant and unmitigated by the *Hawai'i* injunction or Defendants' prediction that a stay may be brief. The harm to the States counsels heavily against a stay. *See Landis*, 299 U.S. at 255.

2. An Indefinite Stay Does Not Benefit Judicial Economy

Defendants bear the burden to show a benefit to "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.*, 300 F.2d at 268. They fall short.

Defendants' primary argument based on judicial economy is that "[t]he Ninth Circuit's decision in *Hawaii* is likely to provide important guidance to the Court in resolving [discovery] disputes." Stay Motion, ECF 175 at 6. They claim that awaiting the Ninth Circuit's ruling will clarify discovery obligations because the Ninth Circuit might agree with Defendants, based on *Kleindienst v. Mandel*, 408 U.S. 753 (1972), that "Defendants need only demonstrate a 'facially legitimate and bona fide reason' for the Executive's exclusion of aliens," making any other evidence of intent irrelevant. Stay Motion, ECF 175 at 6. This argument makes no sense because the Ninth Circuit has already resolved this issue against Defendants in this case.

In ruling on Defendants' prior appeal in this case, the Ninth Circuit explicitly rejected application of the *Mandel* standard to executive policymaking like that at issue here, saying: "Such exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard." *Washington v. Trump*, 847 F.3d 1151, 1162 (9th

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Cir. 2017). Rather, the Court emphasized, "[i]t is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims." *Id.* at 1167; *see also McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005) (proper evidence of purpose for Establishment Clause claim includes "the historical context," "the specific sequence of events," and "change of wording from an earlier statute to a later one") (citation omitted).[1] Given that the Ninth Circuit already rejected *en banc* reconsideration of these conclusions, there is no plausible scenario in which the Ninth Circuit panel might alter these conclusions now.[2] Indeed, courts across the country have arrived at the same conclusion reached by the Ninth Circuit: the purpose and intent behind the Executive Orders is reviewable and relevant.[3]

To the extent that Defendants claim that the appeal in *Hawai'i v. Trump* may simplify other aspects of discovery, such as "the appropriate time frame for any discovery," the parties' "forthcoming privilege disputes," or "the appropriateness of experts," Stay Motion, ECF 175 at

[1] After holding that purpose and intent evidence is relevant, the Supreme Court remanded *McCreary* for the parties to engage in discovery. *See ACLU v. McCreary*, No. 6:99-cv-00507 (E.D. Ky. Jan. 17, 2006), ECF No. 104.

[2] *See Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) ("As a three-judge panel of this circuit, we are bound by prior panel decisions . . . and can only reexamine them when their 'reasoning or theory' of that authority is 'clearly irreconcilable' with the reasoning or theory of intervening higher authority." (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). "'This is a high standard.'" *Rodriguez*, 728 F.3d at 979 (quoting *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012)).

[3] *See Sarsour v. Trump*, No. 1:17-cv-00120-AJT-IDD, 2017 WL 1113305, at *11 (E.D. Va. Mar. 27, 2017) ("[T]he Court rejects the Defendants' position that since President Trump has offered a legitimate, rational, and non-discriminatory purpose stated in EO-2, this Court must confine its analysis of the constitutional validity of EO-2 to the four corners of the Order."); *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017) (rejecting *Mandel* as a limit on review of the purpose behind Second Executive Order in evaluating Establishment Clause claim); *Hawai'i*, 2017 WL 1011673, at *12 (D. Haw. Mar. 15, 2017) (rejecting argument that "the [Second] Executive Order's neutral text is what this Court must rely on to evaluate purpose"); *id.*, 2017 WL 1167383, *6 (D. Haw. Mar. 29, 2017) (rejecting *Mandel* as a limit on the court's inquiry into purpose because "[n]o binding authority . . . has decreed that Establishment Clause jurisprudence ends at the Executive's door"); *Aziz v. Trump*, No. 1:17-CV-116-LMB-TCB, 2017 WL 580855, at *8 (E.D. Va. Feb. 13, 2017) ("Moreover, even if *Mandel* did apply, it requires that the proffered executive reason be 'bona fide.' As the Second and Ninth Circuits have persuasively held, if the proffered 'facially legitimate' reason has been given in 'bad faith,' it is not 'bona fide.' That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.") (internal citations omitted).

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

7, there is no reason to think that is the case. None of these issues are on appeal in *Hawai'i*, as evidenced by their complete absence from Defendants' opening brief in that case. *See* Brief of Appellants, *Hawai'i v. Trump*, No. 17-5589 (9th Cir. Apr. 7, 2017) (Appellants' Br. in *Hawai'i*), ECF 23 at 20-54. This is most glaringly true for the seven of the States' eight causes of action that are not implicated by the *Hawai'i* appeal at all. The Ninth Circuit simply has no reason to reach any decision on those issues. Defendants' claims to the contrary are "overstated and unpersuasive." *I.K.*, 681 F. Supp. 2d at 1194.

Defendants never meaningfully argue that resolution of the *Hawai'i* appeal will narrow the merits issues this Court will eventually have to resolve, and with good reason—there is no reason to think that it will. The Ninth Circuit proceedings in *Hawai'i* will resolve a narrow issue: "[w]hether the district court abused its discretion in entering a nationwide preliminary injunction barring enforcement of Section 2 and 6 of the [Second Executive] Order." Appellants' Br. in *Hawai'i* at 5 (Statement of the Issue). While the decision is likely to provide guidance to this Court in ruling on the States' motion for a TRO against the same provisions of the Second Executive Order, a stay of that motion is already in place. ECF 164.

Defendants suggest in passing that the Ninth Circuit's decision could help the Court resolve Defendants' anticipated motion to dismiss the Second Amended Complaint. Stay Motion, ECF 175 at 6. It will not. There are fundamental differences between the *Hawai'i* appeal and this case that critically limit the "factual or legal benefit" that can derive from that appeal. *I.K.*, 681 F. Supp. 2d at 1197. For example, the preliminary injunction in *Hawai'i* involves *only* the Second Executive Order, while the States' Second Amended Complaint challenges both Executive Orders. *See* Second Am. Compl., ECF 152 ¶ 4. And the Ninth Circuit has already determined that Washington has standing to challenge the First Executive Order, *Washington*, 847 F.3d at 1161, a challenge that is not moot and in which the States seek

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

declaratory and injunctive relief.[4] *See Lockyer*, 398 F.3d at 1112-13 (vacating stay where California Attorney General sought "injunctive relief" and not "only damages"). Similarly, the *Hawai'i* appeal involves solely the Establishment Clause, while the States here present seven other claims. Meanwhile, this Court has already rejected Defendants' request to indefinitely stay their obligation to answer or move to dismiss in *Ali v. Trump*, No. 2:17-cv-00135-JLR (W.D. Wash. Apr. 5, 2017), ECF 91 at 4, which challenges the same Executive Orders. Defendants will therefore have to file an answer or motion to dismiss in that case by April 14, before the Court will have ruled on this motion. *Id.* Defendants fail to meaningfully explain why they are able to file a responsive pleading in that case but unable to in this one.

Simply put, the *Hawai'i* appeal "is unlikely to decide, or to contribute to the decision of, the factual and legal issues before the district court" such that it would justify a stay of all proceedings in this case. *Lockyer*, 398 F.3d at 1113. The procedural posture and issues in the two cases are different, and Defendants cannot show any plausible danger that continuing the present litigation while the *Hawai'i* appeal is pending "could result in 'inconsistent rulings' that will need to be 'disentangle[d].'" *Cf.* Stay Motion, ECF 175 at 9 (citing *Washington*, 2017 WL 1050354, at *5 (W.D. Wash. Mar. 17, 2017)).

3. Defendants Will Not Incur Hardship or Inequity Absent a Stay

Due to the "fair possibility" of damage to the States, Defendants face a "heightened burden" to obtain a stay and "must make out a clear case of hardship or inequity." *Zillow, Inc.*

[4] Voluntarily "revoking" the First Executive Order did not moot the States' challenge to it. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 660-62 (1993) (concluding controversy was not moot where City "repealed" and "replaced" challenged ordinance, though new ordinance differed in certain respects from the prior one, because it disadvantaged complainants "in the same fundamental way"); *see also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996) ("The Supreme Court has held that where a new statute 'is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues' the controversy is not mooted by the change . . . ." (alteration in original) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 662 n.3)); *Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 287 (7th Cir. 2014) ("When a challenged policy is repealed or amended mid-lawsuit—a 'recurring problem when injunctive relief is sought'—the case is not moot if a substantially similar policy has been instituted or is likely to be instituted." (quoting *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 724 F.3d 854, 864 (7th Cir. 2013))).

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

v. Trulia, Inc., No. 2:12-cv-01549-JLR, 2013 WL 594300, *3 (W.D. Wash. Feb. 15, 2013) (quoting *Lockyer*, 398 F.3d at 1109-11).

Defendants make no such showing. Defendants claim that they will suffer an "enormous burden" if "Plaintiffs are permitted to pursue discovery before the Ninth Circuit resolves the *Hawaii* appeal." Stay Motion, ECF 175 at 10. This alleged burden stems from the fact that, in compiling the Joint Status Report, the States indicated their intent to seek the categories of discovery provided by the Federal Rules of Civil Procedure: written discovery, document requests, and depositions. *Id.* Although beginning discovery would mean Defendants "must proceed toward trial in the suit," it is well established that "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity.'" *Lockyer*, 398 F.3d at 1112 (quoting *Landis*, 299 U.S. at 255)). As a matter of law, the simple reality that litigation requires a responsive pleading and participation in discovery is insufficient to justify a stay.

Defendants' burden argument is just a restatement of Defendants' familiar position that discovery is unavailable because the States' challenge must be limited to the four corners of the Executive Orders. *See* Stay Motion, ECF 175 at 10 (questioning the "appropriateness" of discovery); Joint Status Report, ECF 177 at 4 ("Defendants do not believe any discovery is appropriate in this case"); *accord* Appellants' Br. in *Hawai'i* at 46 (renewing argument that "courts evaluating a presidential policy decision should not second-guess the President's stated purpose by looking beyond the policy's text and operation"). The Ninth Circuit has already rejected this argument. *Washington*, 847 F.3d at 1167 ("It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.").

In sum, Defendants' burdens related to discovery do not overcome the harm to the States from the proposed stay. And, given the differences between the preliminary injunction

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

on appeal and the merits claims pending in this Court, a stay will not benefit the orderly course of justice. The Court should deny the request for an indefinite and complete stay.

C. Even if a Limited Stay is Granted, Third Party Discovery Should Proceed

At minimum, the States should be allowed to proceed with third party discovery so that relevant non-party records and information are not lost. The Rule 26(f) conference process required the parties to discuss the preservation of evidence and acknowledge their duty to "preserve potentially relevant information." Joint Status Report, ECF 177 at 16. But there is no similar mechanism by which non-parties can be made to commit to preserve evidence relevant to this litigation. Despite the States' request, Defendants disclaim any role in ensuring preservation of evidence by "third parties who were involved in and/or consulted regarding the design of the Executive Orders, before and after President Trump took office." Joint Status Report, ECF 177 at 7, 9. Under Defendants' view, highly probative evidence may be destroyed or lost in the ordinary course, including during the stay they seek. Third party discovery is the only mechanism available to the States to obtain, and thereby preserve, documents and information from non-party witnesses.

"The proponent of a stay bears the burden of establishing its need." *Clinton*, 520 U.S. at 708. Defendants do not establish any basis to stay third party discovery, or any burden to them should the Court allow third party discovery to proceed. "The district court has wide discretion in controlling discovery." *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Because a stay of third party discovery would be unfair to the States and would not burden Defendants, the Court should allow third party discovery to proceed even if it grants a limited stay of party discovery.

IV. CONCLUSION

The Court should deny Defendants' motion to stay the district court proceedings pending resolution of the appeal in *Hawai'i v. Trump*. If a limited stay is granted, the States respectfully request that they be permitted to conduct third party discovery.

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

RESPECTFULLY SUBMITTED this 10th day of April 2017.

ROBERT W. FERGUSON
Washington Attorney General

s/ Noah G. Purcell
ROBERT W. FERGUSON, WSBA #26004

NOAH G. PURCELL, WSBA #43492
Solicitor General

COLLEEN M. MELODY, WSBA #42275
Civil Rights Unit Chief

ANNE E. EGELER, WSBA #20258
Deputy Solicitor General

MARSHA CHIEN, WSBA #47020
PATRICIO A. MARQUEZ, WSBA #47693
Assistant Attorneys General

Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
Noahp@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 10, 2017

/s/ *Noah G. Purcell*
NOAH G. PURCELL, WSBA 43492

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744