IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. 1:16-cv-01300-SS
JOHN HELLERSTEDT, M.D.,	)	
	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STAY

Defendant has sought a stay of proceedings in this Court pending his appeal of the Court's preliminary injunction. Def.'s Mot. to Stay Merits Proceeding Pending Resolution of Appeal of Prelim. Inj., ECF No. 57 (hereinafter "Def.'s Mot."). The Court should deny Defendant's extraordinary motion because Defendant has not met his two burdens of showing a need for a stay and lack of prejudice to the Plaintiffs.

"Generally, the moving party bears a heavy burden to show why a stay should be granted absent statutory authorization, and a court should tailor its stay so as not to prejudice other litigants unduly. Where a discretionary stay is proposed, something close to genuine necessity should be the mother of its invocation." *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n.6. (5th Cir. 1985) (citation omitted). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

"[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer v. Mirant Corp.*, 398 F.3d 1098,

1112 (9th Cir. 2005). *Accord, e.g., Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1485 (10th Cir. 1983) ("the consideration of judicial economy . . . should rarely if ever lead to such broad curtailment of the access to the courts [by way of stay of proceedings]."); *GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 193 (D.D.C. 2003) ("[T]he interests of efficiency and judicial economy . . . [do not] establish a 'clear case of hardship' [under *Landis*].").[1] "[T]he 'unflagging obligation' of the federal courts to exercise the jurisdiction given them 'is particularly weighty when those seeking a hearing in federal court are asserting . . . their right to relief under 42 U.S.C. § 1983.'" *Signad, Inc. v. City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir. 1985) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) and *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir.1980)).

In *Landis*, the Supreme Court reversed a district court's grant of a stay pending appeal in a parallel case in which, as here, a law's constitutionality was at issue. *See* 299 U.S. at 259. The court held that "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the petitioners." *Id*. at 256. Finding that a stay pending the parallel appeal could last a year or more from the date of the district court's still-forthcoming decision in that case, the court ruled the stay in the case at bar "immoderate and hence unlawful." *Id*. at 257.

Given *Landis*'s holding, and litigants' and courts' shared interest in "the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, it is vanishingly rare for a district

[1] *See also, e.g., Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1414 (Fed. Cir. 1997) (reversing stay pending resolution of other proceedings as abuse of discretion absent "pressing need"); *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977) ("the burden is on the party seeking the stay to show that there is pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order"); *McSurely v. McClellan*, 426 F.2d 664, 672 (D.C. Cir. 1970) (vacating stay of discovery in civil case pending appeal in related criminal case, and holding "an indefinite stay . . . should not be entered unless no alternative is available").

court to stay proceedings pending a litigant's appeal of a preliminary injunction. Defendant has not cited a single example. The stays pending "appellate review, including on questions of the merits of [p]laintiffs' constitutional claims" cited in Defendant's brief, Def.'s Mot. ¶ 4, were all granted pending the Supreme Court's disposition of a different case, the outcome of which could control whether the matter at bar would go forward at all and, if so, according to what procedures.[2] None of them were granted merely so a party could avoid undertaking discovery in the ordinary course, while an ordinary preliminary injunction appeal was pending.

To the contrary, district courts in this Circuit have repeatedly denied motions, like Defendant's, in which the sole aim is to avoid moving forward in district court during an interlocutory appeal. A general interest in "judicial economy" simply does not satisfy a movant's "heavy burden" under *Landis* and *Coastal* to compel the opposing party to cease litigating in district court while the movant's appeal is decided. *E.g.*, *David v. Signal Int'l, LLC*, 37 F. Supp. 3d 836, 840 (E.D. La. 2014) (denying motion to stay pending mandamus petition to Fifth Circuit on discovery issue which would not eliminate need for discovery or trial; ruling "hardship and inconvenience that would result from a stay substantially outweighs any benefit"); *Payne v. Universal Recovery, Inc.*, No. 3:11-CV-1672-D-BH, 2011 WL 7415414, at *2-3 (N.D. Tex. Dec. 7, 2011) (denying motion for stay pending appeal because "[a]side from his general

[2] *Tax Analysts & Advocates v. Internal Revenue Serv.*, 405 F. Supp. 1065, 1067 (D.D.C. 1975) (granting a post-judgment stay where a certiorari petition was pending on an issue that might control the defendants' obligations when complying with the judgment); *Coombs v. Diguglielmo*, No. CIV.A. 04-1841, 2004 WL 1631416, at *1 (E.D. Pa. July 21, 2004) (staying habeas proceedings where petitioner's sole theory of relief was the subject of a pending certiorari petition); *Felix v. United States*, No. C-91-0946-BAC, 1992 WL 361745, at *1 (N.D. Cal. Apr. 29, 1992) (granting a 104-day stay of a deportation hearing to allow time for a certiorari petition regarding the timeframe in which the hearing in question had to be held). Similarly, the Fifth Circuit in *Carty v. Rodriguez*, 211 Fed. Appx. 292, 294 (5th Cir. 2006), granted a stay pending appeal of threshold qualified immunity question that, if granted, would have by definition entitled movants to be free of any obligation to litigate.

assertion of judicial economy . . . Plaintiff has failed to show a genuine necessity for the proposed stay"), *report and recommendation adopted*, No. 3:11-CV-1672-D, 2012 WL 593483 (N.D. Tex. Feb. 17, 2012); *Grant v. Hauser*, 799 F. Supp. 2d 673, 675 (E.D. La. 2011) (denying motion for stay pending appeal because "the interest of judicial economy is a general court motivation, which, if considered to satisfy a defendant's 'heavy burden,' would tempt a court to abuse its inherent power," and because "Defendants have not shown how Plaintiffs will not be prejudiced by a stay"); *RA Invs. I, LLC v. Deutsche Bank AG*, No. 3:04-CV-1565-G, 2005 WL 6800974, at *6 (N.D. Tex. May 20, 2005) (denying motion for stay pending appeal of arbitrability issue as an improper "indefinite duration" stay under *Landis*, in violation of the "[p]ublic policy [that] dictates the timely conclusion of legal disputes") (quoting *Evans v. Bd. of Cty. Comm'rs*, 772 F. Supp. 1178, 1181 (D. Colo. 1991)); *see also U.S. ex rel. Banigan v. Organon USA, Inc.*, No. CIV.A. H-08-3314, 2013 WL 4786323, at *3 (S.D. Tex. Sept. 6, 2013) (denying defendant's request for 28 U.S.C. § 1292(b) certification and accompanying request to stay discovery pending appeal regarding defendants' claim that the district court misconstrued the legal test applicable to the defendants' motion to dismiss, where the appeal would not resolve the need for discovery and a trial).

Defendant here, as in all of the above cases, has not shown that a stay pending appeal is "close to genuine necessity." A stay would delay the case, while addressing no pressing need. Defendant simply wishes to postpone proceedings in hopes of receiving a more favorable merits decision in the Fifth Circuit before moving the case forward in this Court. Accordingly, Defendant's motion should be denied. Far from being necessary, the proposed stay would not provide any benefit either to the parties or to the Court. There is no possibility that the Court of Appeals' decision on Defendant's appeal would end or alter upcoming proceedings required in

this case, such that a stay might be justified, as in the examples cited in Defendant's brief. Defendant states that on appeal he intends to take issue with the Court's application of *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), to the preliminary record before it. Def.'s Mot. ¶¶ 6-9. However, Defendant states that, even under his interpretation of *Casey* (and putting aside the fact that, as noted in the Court's Order, ECF No. 49 at 14-15, the Supreme Court's most recent precedent on point is *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292 (2016), not *Casey*) further findings of fact will be necessary. *See* Def.'s Mot. ¶¶ 6-9 (arguing that under Defendant's view of the controlling caselaw, the Court would still have to determine whether the Amendments "present a substantial obstacle to abortion."). Thus, Defendant does not argue that, if the appeal were decided in his favor, it would allow the parties to forego discovery, nor the Court to forego summary judgment or a trial. This is precisely the same set of circumstances that lead the *David* and *Banigan* courts, *supra* at 3-4, to reject motions for stays pending appeal, applying the rule of *Landis* and *Coastal*.

Further, Defendant also does not state that he intends to appeal the Court's holding that the challenged Amendments are unconstitutionally vague. Therefore, even were he to prevail on his appeal, the preliminary injunction would presumably remain in place on the ground of unconstitutional vagueness, and any need for discovery, summary judgment, or trial, related to that claim—as well as related to Plaintiffs' Commerce Clause and Equal Protection claims, *see* Complaint, ECF No. 1, ¶¶ 97-100, which are not subject to the appeal—would be unaffected by Defendant's appeal.[3]

[3] Furthermore, in the unlikely event that the Fifth Circuit remanded for additional findings of fact or conclusions of law regarding Plaintiffs' preliminary injunction motion, or should the Fifth Circuit reverse, and thus Plaintiffs be required to seek preliminary injunctive relief on their remaining claims, additional proceedings would be necessary, accomplishing the exact opposite of Defendant's purported goal of avoiding duplicative litigation. To the extent Defendant, or this

Defendant's motion also fails, as in the cases discussed *supra* 3-4, to show that a stay would not prejudice Plaintiffs. A stay here would, in fact, prejudice everyone. "Interlocutory injunction appeals would come at high cost if the trial court were required to suspend proceedings pending disposition of the appeal. The delay and disruption alone would be costly." 16 Fed. Prac. & Proc. Juris. ("Wright & Miller") § 3921.2 (3d ed.).[4] Postponing all district court proceedings pending interlocutory appellate review is, by definition, extraordinary delay. *See United States v. Lynd*, 321 F.2d 26, 28 (5th Cir. 1963) (citing "general proposition that an appeal from the denial or granting of a preliminary injunction should not ordinarily delay the final trial of the case on its merits"). The median time to decision of a civil appeal noticed in the Fifth Circuit is 9.5 months. U.S. Courts, *Table B-4A. U.S. Courts of Appeals—Median Times for Civil and Criminal Cases Terminated on the Merits*, at 2 (Sept. 30, 2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2016.pdf. In this case, involving important constitutional issues, and where oral argument is anticipated, the time may well be longer. District courts in this Circuit have repeatedly held that delays of this length are immoderate and improper under *Landis*. *E.g.*, *Basinkeeper v. U.S. Army Corps of Eng'rs*, No. CV 15-6982, 2016 WL 7476173, at *5 (E.D. La. Dec. 29, 2016) (denying motion for nine-and-a-half-month continuance of stay); *David*, 37 F. Supp. 3d at 839-840 (denying motion for stay pending time to appeal to Fifth Circuit); *Saxon Innovations, LLC v. Palm, Inc.*, No. 6:09-CV-272, 2009 WL

Court, deem it proper for the Fifth Circuit to address the controlling legal standard before the Court's next ruling on the merits of Plaintiffs' claims, this could be accomplished, as in *RA Invs.*, *supra* at 4, by allowing the case to proceed in the ordinary course, with a trial set for no earlier than late this year, by which time the Fifth Circuit will have had a chance to rule. Delaying *all* proceedings until after that time is simply not necessary to accomplish this end.

[4] It is a rule of very long standing in our courts that litigation continues while a party appeals a preliminary injunction. 16 Fed. Prac. & Proc. Juris. ("Wright & Miller") § 3921.2 (3d ed.) (tracing rule back to late nineteenth century).

3755041, at *2 (E.D. Tex. Nov. 4, 2009) (denying motion for stay of "at least eight months"). "[A] lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial." *Clinton v. Jones*, 520 U.S. 681, 707 (1997).

The interests in a speedy trial and in finality are particularly strong in a case, such as this, which is a 42 U.S.C. § 1983 civil rights action, and which also involves Plaintiffs regulated by Defendant, seeking to know what their compliance obligations are, prospectively, and not merely, as in the ordinary case, to establish financial liability for past acts. *Cf. Landis*, 299 U.S. at 256 ("An application for a stay in suits so weighty and unusual will not always fit within the mould appropriate to an application for such relief in a suit upon a bill of goods."). The general public also has an interest in knowing what the law is. *See id.* Accordingly, Plaintiffs have submitted a relatively brief proposed scheduling order, which would close discovery at the end of June. A delay here, for the better part of a year, or possibly more, would be unjust, as harmful to the Plaintiffs' and the public's interests in finality and in the speedy resolution of this case.

Further, a stay would, as in *Landis*, inappropriately deprive Plaintiffs of the ability to modify the protections of the Court's preliminary injunction, should this become necessary before Defendant's appeal is resolved. *See id.* at 257 (reversing stay in part because, "the respondents are to be stayed by the terms of the challenged order . . . [and] are not even at liberty, in case of an adjudication of partial invalidity [of the statute challenged in the parallel case], to bring themselves within the class adjudged to be exempt"). The Texas Legislature is currently considering legislation to codify into statute a somewhat different version of the interment or cremation requirement than that included in the Amendments. Alex Zielinski, *Texas Senator Shatters Table Trying to Silence Woman Testifying Against Anti-Abortion Bill*, San Antonio Current (Feb. 16, 2017 12:30 PM), http://www.sacurrent.com/the-daily/archives/

2017/02/16/texas-senator-shatters-table-trying-to-silence-woman-testifying-against-anti-abortion-bill. A stay would prevent Plaintiffs from seeking further preliminary injunctive relief in this Court, were any to become necessary, regarding that legislation.

In sum, Defendant has not met his heavy burden to show that it is "close to genuine necessity" to prevent Plaintiffs from litigating their case here until after his appeal is resolved, and that a stay would not harm Plaintiffs or others. Lasting for likely the better part of a year, or longer, Defendant's proposed stay would postpone discovery and delay the final outcome of this case. It would threaten injury to the Plaintiffs' and the public's interests in a speedy trial and in finality, and to Plaintiffs' ability to seek further preliminary relief, as might become necessary. It would pointlessly delay the case, and provide no benefit to anyone. Accordingly, Defendant's motion should be denied.

Dated: March 2, 2017

Respectfully submitted,

/s/ David Brown

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of March, 2017, I electronically filed a copy of the above document with the Clerk of the Court using the CM/ECF system, which will send notification to counsel of record.

/s/ David Brown
David Brown