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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Gilbert Davidson**, in his official capacity as Interim Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

Case No. CV-19-00035-TUC-RM (LAB)

REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING U.S. SUPREME COURT DECISION IN *R.G. & G.R. HARRIS FUNERAL HOMES V. E.E.O.C.*, 2019 WL 1756679 (2019)

Defendants State of Arizona, Gilbert Davidson, and Paul Shannon ("State Defendants") submit this Reply in Support of their Motion to Stay Proceedings (Doc. 41). This Court should temporarily stay the proceedings in this case pending the U.S. Supreme Court's Decision in *R.G. & G.R. Harris Funeral Homes v. EEOC*, 2019 WL 1756679 (2019) ("*Harris Funeral Homes*"). Plaintiff concedes *Harris Funeral Homes* may impact and provide guidance on his Title VII and equal protection claims for sex discrimination. Indeed, in the Response, Plaintiff admits the *Harris Funeral Homes* "decision may impact Dr. Toomey's Title VII claim for sex discrimination." (Doc. 43, p. 3) Plaintiff further admits *Harris Funeral Homes* "may provide guidance for Dr. Toomey's equal protection claim based on sex discrimination." (Doc. 43, p. 3)[1] Thus, it is clear that *Harris Funeral Homes* could resolve - or at a minimum significantly limit and simplify - issues presented in this case.

Here, Toomey claims the gender reassignment surgery exclusion constitutes discrimination under (1) Title VII based on transgender status and gender nonconformity; and (2) the Equal Protection Clause based on transgender status and gender nonconformity. (Doc. 1, ¶¶ 60-62, 72-74). In the Motion to Stay, the State Defendants point to cases showing a connection between Title VII and Equal Protection Clause claims under §1983. (Doc. 41, p. 8-9) These cases (*Okwuosa*, *Etsitty,* and *Drake*) illustrate that where a plaintiff did not set forth facts giving rise to a *prima facie* case of discrimination under Title VII, courts have determined that the Equal Protection Clause claim fails as well. As presented in the State Defendants' Motion to Dismiss, the facts as pled in this case are insufficient to give rise to a *prima facie* case of discrimination under Title VII

[1] Plaintiff contends the State Defendants did not present arguments in support of a stay in their Reply in Support of the Motion to Dismiss and, therefore, has "reversed course" by filing the Motion to Stay. Not so. The State Defendants determined it was appropriate to complete briefing on the Motion to Dismiss within the strict 11-page limit and briefing timeline set forth in the Local Rules and address the substantive arguments set forth in the Motion and Response. The State Defendants filed the Motion to Stay just 13 days after filing their Reply in Support of the Motion to Dismiss. It cannot be said that the State Defendants "reversed course"; the State Defendants have not presented inconsistent positions on this issue.

and (for similar reasons) are also insufficient to give rise to a *prima facie* case of discrimination under the Equal Protection Clause. Therefore, the two claims are directly connected.

Plaintiff points to language in *Etsitty v. Utah Transit Auth*., 502 F.3d 1215, 1227-28 (10th Cir. 2007) where the court says "[b]ecause Etsitty does not argue there was a violation of the Equal Protection Clause separate from her Title VII sex discrimination claim, her Equal Protection claim fails for the same reasons." Plaintiff then argues *Etsitty* is distinguishable because Toomey has alleged discrimination based on transgender status "separate" from his Title VII claim based on sex discrimination. But Toomey has not alleged "separate" types of discrimination here – he has alleged the exact same form of discrimination – based on transgender status and gender nonconformity – under both Title VII and the Equal Protection Clause. (Doc. 1, ¶¶ 60-62, 72-74) Toomey has not argued a violation of the Equal Protection Clause separate from his Title VII discrimination claim, so *Etsitty* provides guidance here. *Etsitty*, 502 F.3d at1227-28.[2]

Plaintiff argues against a stay, claiming the gender reassignment surgery exclusion violates the Equal Protection Clause because it is discrimination based on sex and transgender status. (Doc. 43, p. 4-5). With respect to Toomey's equal protection claim for discrimination based on sex, Toomey argues that claim "is subject to heightened scrutiny as discrimination based on sex." (*Id*., p. 4). As noted above, Toomey has conceded that *Harris Funeral Homes* may provide guidance for the equal protection claim based on sex discrimination. (*Id*., p. 3). If the U.S. Supreme Court in *Harris Funeral Homes* decides that discrimination based on transgender status is not discrimination "because of sex,"[3] how then can the gender reassignment surgery exclusion be "subject to

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[2] Moreover, in *Etsitty*, the court noted, "[i]n her complaint, she alleged the defendants [discriminated against] her because she was a transsexual and because she failed to conform to their expectations of stereotypical male behavior." *Id.* at 1218.

[3] In *Harris Funeral Homes*, the U.S. Supreme Court will review: Whether Title VII (prohibiting discrimination "because of sex") prohibits discrimination against transgender people based on (1) their status as transgendered or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). 2019 WL 1756679 (April 22, 2019).

heightened scrutiny as discrimination *based on sex*," as Toomey has alleged? (emphasis added) Moreover, multiple cases cited in the State's Motion to Dismiss establish that Toomey's equal protection claim for discrimination based on transgender status is subject to rational basis review. (Doc. 24, p. 13-14).

The tier of scrutiny will impact discovery in this case. Whether a claim is evaluated under heightened scrutiny versus rational basis alters the scope and extent of discovery needed because of the different burdens of proof and evidentiary standards used and levels of justification evaluated. The U.S. Supreme Court has set forth the standards used for claims involving rational basis review:

> We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a **strong presumption of validity.** Such a classification cannot run afoul of the Equal Protection Clause **if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose**. Further, a legislature that creates these categories **need not "actually articulate at any time the purpose or rationale supporting its classification**." Instead, a classification "must be upheld against equal protection challenge **if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."**
>
> A State, moreover, has **no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."** A statute is presumed constitutional and "[t]he **burden is on the one attacking the legislative arrangement** to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification **does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality**.'" "The problems of government are practical ones and may

> justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

Heller v. Doe, 509 U.S. 312, 319-21 (1993) (emphasis added) (internal citations omitted).

On the other hand, if a law "targets a suspect class or burdens the exercise of a fundamental right, we apply strict scrutiny and ask whether the statute is narrowly tailored to serve a compelling governmental interest. If a law discriminates against a quasi-suspect class, it is subject to intermediate scrutiny; to survive a constitutional challenge, such discrimination must substantially relate to an important governmental objective." *Seeboth v. Allenby*, 789 F.3d 1099, 1104 (9th Cir. 2015) (internal citations and quotations omitted).

Thus, the State Defendants contend that this matter should be stayed and the Motion to Dismiss (which seeks dismissal of both Plaintiff's Title VII and equal protection claims) held in abeyance until the U.S. Supreme Court has issued its guidance in *Harris Funeral Homes*. After *Harris Funeral Homes* has been decided (a decision that could likely impact the scope of Plaintiff's claims in this case and necessary discovery), the Court could then rule on the State Defendants' Motion to Dismiss with the latest U.S. Supreme Court guidance at hand. Thus, it would conserve both judicial and the parties' resources to stay the case until *Harris Funeral Homes* has been decided.

In addition, a stay in this case would prevent a clear case of hardship and inequity to the State Defendants and conserve judicial resources. Plaintiff has already conceded that *Harris Funeral Homes* may impact and provide guidance on his Title VII and equal protection claims for sex discrimination. Thus, it is clear that if the case is not stayed, there is a strong possibility of rulings (on both the Motion to Dismiss and other types of motions) that will be inconsistent with recent Supreme Court guidance, and those previous rulings would need to be reconsidered, untangled, and/or reversed, in addition to additional briefing that may be required by the parties. In sum, a stay would serve "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).

The hardship the State Defendants face without a stay is not merely proceeding in the ordinary course of litigation. Instead, it is proceeding through discovery toward potential class certification in the face of a pending decision that likely could resolve (or at a minimum limit and simplify) issues in this case. In addition, Plaintiff has brought this case as a class action, which will require extensive class certification discovery and briefing by the State Defendants. There is a clear case of hardship and inequity if the State Defendants are required to move forward with fact discovery, class discovery, and class certification briefing while a U.S. Supreme Court decision is pending that likely could resolve, limit and/or simplify the issues in this case.

Plaintiff cites *Lockyer v. Mirant Corp*., 398 F.3d 1098 (9th Cir. 2005) in arguing against a stay. But *Lockyer* is inapposite. *Lockyer* was a lawsuit filed by the California Attorney General seeking divestiture of three electrical generating plants (which allegedly amounted to about 44% of the northern California wholesale spot electricity market). *Id.* at 1100. The *Lockyer* Court found the Attorney General's suit fell within the government's "police or regulatory power" exception to an automatic stay under 11 U.S.C. § 362(b)(4) when a bankruptcy petition is filed. *Id.* at 1107-09. As the *Lockyer* Court explained, "We are aware of no case, other than this one, in which a district court has entered a *Landis* stay of a suit falling within the 'police or regulatory power' exception to the automatic stay, and counsel has cited none. . . . [A] suit qualifying under the exception [is] brought to protect an important governmental interest." Further, "[b]ecause a suit permitted under § 362(b)(4) is thus distinct from the bankruptcy proceeding, it is relatively unlikely that resolution of the bankruptcy proceeding will significantly assist the district court in the decision of the factual and legal issues before it." *Id*. at 1112. Here, in contrast, Toomey's claims do *not* involve the assertion of a "police or regulatory power" and it *is* likely that the resolution of *Harris Funeral Homes*

"will significantly assist the district court in the decision of the factual and legal issues before it." *Id*.

Moreover, the *Lockyer* Court even noted, "We recognize the importance of the district court having the ability to control its own docket, particularly in this time of scarce judicial resources and crowded dockets. We do not intend that this opinion be read to restrict unduly the ability of the district court, in appropriate cases, to issue *Landis* stays, or to issue stays under other doctrines….We hold only that a *Landis* stay is improper ***in the circumstances of this case*** – where the power of the district court to decide whether the automatic stay applies is clear, where the inapplicability of the automatic stay is also clear, and where the proceeding in the bankruptcy court is unlikely to decide, or to contribute to the decision of, the factual and legal issues before the district court." *Id.* at 1112-13 (emphasis added). Those circumstances are simply not present here.

Toomey alleges he will be prejudiced by the stay because a stay will cause "irreparable harm." (Doc. 43, p. 3) But Plaintiff did not seek preliminary injunctive relief or allege irreparable harm in the Complaint. It was only when presented with the possibility of a stay in light of the Supreme Court granting review in *Harris Funeral Homes* that he alleged irreparable harm. Despite Toomey's attempts to dismiss the failure to file a motion for preliminary injunction (one element of which is "irreparable harm"), this fact favors a stay. In *Matera v. Google, Inc.,* in evaluating possible harm to plaintiff resulting from a stay, the court determined,

> In contrast with a case where a stay might disrupt proceedings after years of litigation, this case is at an early stage of litigation. No discovery has been taken and only motions to dismiss and stay have been filed. Indeed, the only harm from a brief stay identified by Plaintiff is the potential harm resulting from delaying the injunctive relief sought in this case. Like all litigants, Plaintiff has a substantial interest in obtaining a prompt adjudication of his claims and a determination of whether the conduct of which he complains warrants injunctive relief. However, Plaintiff has not moved for a preliminary injunction, and any prospective injunctive relief is

> unlikely to be addressed by this Court before the U.S. Supreme Court issues a decision in *Spokeo*.

2016 WL 454130, *4 (N.D. Cal. 2016). Here, too, this case is "at an early stage of litigation," "no [written] discovery has been taken," no depositions have been taken, and "only motions to dismiss and stay have been filed." *Id.* Also, the fact that Plaintiff is seeking injunctive relief does not weigh against the granting of the stay. *Synthes v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico,* 2010 WL 669733, *4 (S.D. Cal. 2010) ("Synthes argues that it will be unduly prejudiced because this case 'has never been about the recovery of money damages' but about injunctive relief. It contends that the stay will unduly delay such relief. This argument implies that Synthes requires a speedy injunctive remedy; however, it rings hollow because in the three years since it had filed this case, Synthes has not requested a preliminary injunction").

Plaintiff argues the State Defendants "attempt to trivialize the harm that a stay would inflict on Dr. Toomey and the Proposed Class by comparing this case to *Gustavson v. Mars, Inc*., 2014 WL 6986421, *3 (N.D. Cal. 2014)." But this is an inaccurate portrayal of the Motion to Stay. By citing *Gustavson,* the State Defendants were simply outlining the factors the court used in favor of granting a motion to stay where the opposing party did not file a preliminary injunction. As the *Gustavson* Court explained, "[a]s Defendant points out, this action is at an early stage of litigation, Plaintiff has not moved for a preliminary injunction, and any prospective injunctive relief is unlikely to be addressed by this Court or a jury before the Ninth Circuit issues a decision in *Jones.*" *Id*.

Plaintiff argues a stay will cause irreparable harm and cites cases that involve a discussion of irreparable harm in the context of a plaintiff who was seeking preliminary injunctive relief. (Doc. 43, p. 8). But, again, Plaintiff did not seek preliminary injunctive relief in this case. Plaintiff argues he did not seek a preliminary injunction because of "the need for discovery" that he wants to obtain "as expeditiously as possible." (Doc. 43, p. 9) But courts routinely allow expedited discovery in conjunction with preliminary injunction

motions: "Expedited discovery has been ordered where it would 'better enable the court to judge the parties' interests and respective chances for success on the merits' at a preliminary injunction hearing." *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.,* 202 F.R.D. 612 (D. Ariz. 2001) (citing *Edudata Corp. v. Scientific Computers, Inc.*, 599 F.Supp. 1084, 1088 (D.Minn.1984), *aff'd. in part, rev'd in part on other grounds*, 746 F.2d 429 (8th Cir.1984), and *Ellsworth Assoc., Inc., v. U.S.*, 917 F.Supp. 841, 844 (D.D.C. 1996) (ordering expedited discovery where it would "expedite resolution of [plaintiffs'] claims for injunctive relief")). As noted in *Ellsworth*, "expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings. Thus, courts have routinely granted expedited discovery in cases involving challenges to constitutionality of government action." 917 F.Supp. at 844.

A stay pending the ruling in *Harris Funeral Homes* would also be reasonable. Even if, as Plaintiff alleges, a decision is not issued until June 2020 (which is in one year), the State Defendants' Motion to Stay includes several cases finding that stays of one year to eighteen months were reasonable and not unduly prejudicial. (Doc. 41, p. 10) Plaintiff acknowledges the State Defendants cited cases in which courts granted stays for comparable lengths of time, but argues those cases do not involve "ongoing allegations of irreparable harm." However, there are no "ongoing allegations of irreparable harm" in this case as there were no such allegations of irreparable harm in the Complaint. In addition, Plaintiff "has not moved for a preliminary injunction [arguing irreparable harm], and any prospective injunctive relief is unlikely to be addressed by this Court before the U.S. Supreme Court issues a decision in" *Harris Funeral Homes*. *Madera,* 2016 WL 454130, *4.

For all of the reasons set forth above, and in the Motion to Stay, the State Defendants respectfully request the Court stay proceedings in this case pending the U.S. Supreme Court decision in *Harris Funeral Homes*.

RESPECTFULLY SUBMITTED this 17th day of June, 2019.

BURNSBARTON PLC

By *s/C. Christine Burns*
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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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