No. 18-2592

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE JEN HOBAN d/b/a MASTERPIECE VAPORS;
THE PLUME ROOM, LLC; J.H.T. VAPE, LLC;
LAKES VAPE SUPPLY, LLC; and
TOBACCO HARM REDUCTION 4 LIFE,

Petitioners,

Original Proceeding from the United States District Court,
District of Minnesota

SUPPLEMENTAL
BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Jen Hoban d/b/a Masterpiece Vapors; The Plume Room, LLC; J.H.T. Vape, LLC; Lakes Vape Supply, LLC; and Tobacco Harm Reduction 4 Life hereby certify that they have no parent companies and are not a publicly held corporations.

s/ Damien M. Schiff
DAMIEN M. SCHIFF

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INTRODUCTION

The Court has requested the parties to submit supplemental briefing addressing the following three questions:

I. Would issuing a stay have been within the discretion of the district court when it ruled on the transfer motion?

II. What is the plaintiffs' amenability to a stay as the case stands now?

III. Would the possibility of a stay affect this Court's review of the petition for a writ of mandamus or prohibition?

To summarize plaintiffs' position, the question of whether a stay is appropriate should be decided in the first instance by the district court. For that reason, if this Court's questions indicate that it is considering issuing a stay itself, it should not do so. Instead, this Court should give the district court the opportunity to consider the question after full briefing. At the district court level, plaintiffs would oppose a stay, because their interest in obtaining relief from a rule that has already gone into partial effect outweighs the instructive benefits of delaying this case until another district court has ruled on the legal issues involved.

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I.

WHETHER ISSUING A STAY WOULD HAVE BEEN WITHIN THE DISCRETION OF THE DISTRICT COURT WHEN IT RULED ON THE TRANSFER MOTION

"'[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Cottrell v. Duke*, 737 F.3d 1238, 1248 (8th Cir. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "This inherent power includes the power to stay proceedings sua sponte." *Kircher v. Putnam Funds Trust,* Nos. 06-cv-939-DRH, 06-cv-1001-DRH, 2007 WL 1532116, at *2 (S.D. Ill. May 24, 2007).

Thus, it is within a district court's power to issue a stay at any time. However, because the district court granted the government's motion to transfer, it is unlikely that the district court gave any consideration to whether a stay would have been warranted as an alternative to transfer. Such a question would only have arisen had the district court reached the conclusion that transfer was not warranted. Combined with the fact that the possibility of a stay was not raised or briefed by either side at the district court level, it is unlikely that the district court formed a view on

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whether a stay would have been appropriate in the event that transfer had been denied.

Nor does the district court's decision on the motion to transfer give any indication of how the district court might have ruled on a motion to stay. In granting the motion to transfer, the district court relied heavily on judicial economy concerns. Specifically, the court noted that, without transfer and consolidation, multiple judges would "consider the same questions" and "write opinions resolving the same issues." App. Ex. H at 7.

If this Court reverses the transfer order, then such efficiency concerns will no longer be at issue in the calculus of a potential stay. Even if a stay were imposed until the D.C. District Court reached a decision, such a decision would not be binding on the District of Minnesota. Thus, the district court below would ultimately be duty-bound to reach its own independent conclusion after consideration of the issues. If the transfer order is reversed, two separate judges will indeed consider the legal questions in this case regardless of whether a stay is issued.

Further, the harm to *plaintiffs* that would result from a stay would also be of a different kind than the harm that would result from a

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transfer. When the parties briefed the issue of a transfer, plaintiffs focused on the harm of having their case moved nearly a thousand miles from their home state, where they would be unable to view or participate in person. *See* App. Ex. E at 10–11, 25. Plaintiffs also emphasized the harm to the federal court system as a whole that would result from transfer and consolidation, as this would reduce the number of courts considering the legal issues involved in this case and therefore impede the percolation and development of those issues. *See id.* at 11–16.

In considering whether to grant a stay, however, neither of these potential harms would be salient. Instead, the primary harm to plaintiffs would be the indefinite delay imposed on them while they wait to have their day in court, a delay during which they would continue to be subject to many of the deeming rule's onerous restrictions. This would be the focal point of plaintiffs' argument against a stay at the district court level. But, given that the government did not move for a stay, the issue of the harm to plaintiffs from indefinite delay was not briefed at the district court level, and there is no reason to believe that the district court considered this point.

In sum, the arguments of plaintiffs and the government concerning a stay would be significantly different from those pertaining to a transfer of venue. Given that fact, it would have been unreasonable for the district court to rule on a stay *sua sponte*, without the benefit of briefing. For the same reason, the consequences of granting or denying a stay are different enough from the consequences of granting or denying a transfer that the district court could not reasonably be interpreted, in granting transfer, as implying which way it would have ruled on a stay.

II.

PLAINTIFFS' AMENABILITY TO A STAY AS THE CASE STANDS NOW

Plaintiffs believe that it would not be appropriate for this Court or the district court to grant a stay in this case. A stay would prejudice plaintiffs through imposition of a litigation delay of unknown duration, with no corresponding benefit.

"'The proponent of a stay bears the burden of establishing its need.'" *Kreditverein der Bank Austria Creditanstalt fur Niederösterreich und Bergenland v. Nejezchleba*, 477 F.3d 942, 945 n.3 (8th Cir. 2007) (quoting *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). This burden includes a presumption favoring the party opposing a stay. *Jones v. Clinton*, 72

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F.3d 1354, 1365 (8th Cir. 1996) (Beam, J., concurring). And this burden is heavier "if there is even a fair possibility that the stay for which [a movant] prays will work damage to someone else." *Landis*, 299 U.S. at 255. In such cases, "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward . . . ." *Id.* In meeting this test, "an applicant for a stay has the burden of showing specific hardship or inequity if he or she is required to go forward." *Jones,* 72 F.3d at 1364 (citing *Landis*, 299 U.S. at 254–56). Most relevant to this case, "being 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).

When deciding whether to stay proceedings in light of pending proceedings in another tribunal, courts consider (1) "the possible damage which may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in 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." *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

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Because several aspects of the deeming rule have already gone into effect, any delay in plaintiffs' ability to litigate this case will indeed work significant damage to them. If a stay were instituted, then the delay in adjudicating plaintiffs' claims would add to the time that plaintiffs are subject to, and therefore burdened by, these restrictions. This is why courts have held that a stay is more difficult to justify in cases involving allegations of continuing harm and a request for "injunctive or declaratory relief" than in suits 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").

In this case, the deeming rule has already imposed a prior restraint on truthful statements related to reduced or nonexistent substances (the so-called "Modified Risk Tobacco Product" approval process). App. Ex. A at 13–14. Also currently in effect is a ban on offering free samples to adults. *Id.* at 12–13. The plaintiffs in this case are required to comply with these provisions, and they will be so required unless and until the deeming rule's enforcement against them is enjoined. The delay in adjudicating their claims and potentially winning relief from these regulations is a clear and significant hardship.

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A stay, even if just for the pendency of the D.C. District Court proceedings, would result in plaintiffs being subject to these restrictions for an indefinite and potentially significant length of time. As the Minnesota District Court has noted elsewhere, even a stay that would have lasted only until the issuance of a D.C. Circuit Court opinion in a case that had already been *briefed and argued* would have been of indeterminate length. *See Aquilar v. Ocwen Loan Servicing, LLC*, 289 F. Supp. 3d 1000, 1010 (D. Minn. 2018) ("[T]here is no indication of when the D.C. Circuit will issue its decision. As such, the duration of any stay would be unknown."). And a stay here would result in an even lengthier delay for plaintiffs' First Amendment claim, since the D.C. District Court has itself stayed the consideration of the First Amendment issue in that case until an opinion is issued in a pending D.C. Circuit case. *See* App. Ex. N.

The possibility that the plaintiffs in this case might potentially benefit from a favorable decision in the D.C. District Court case does not change this analysis or ameliorate the harm of a stay.

First, even if the plaintiffs in the D.C. District Court case should prevail, a favorable decision would not necessarily result in the setting

aside of the deeming rule nationwide. There is increasing controversy over the propriety of nationwide injunctions. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2424–2429 (2018) (Thomas, J. concurring). The government has likewise consistently argued in recent years that nationwide injunctions against federal rules are inappropriate, and is thus likely to do so in the D.C. case as well. *See, e.g.*, Defs' Mot. to Dismiss & Opp'n to Prelim. Injunc., *Karnoski v. Trump*, No. 2:17-cv-1297-MJP, Dkt. # 69, at 38 (W.D. Wash. Oct. 16, 2017) (opposing a nationwide injunction on the grounds that "[b]oth constitutional and equitable principles . . . require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries"); Defs' Mem. of Law in Sup. of Defs' Mot. to Stay Nationwide App. of Prelim. Injunction, *City of Chicago v. Sessions*, No. 1:17-cv-05720, Dkt. # 81, at 4–7 (N.D. Ill. Sept. 26, 2017) (arguing that both constitutional and equitable principles require that an injunction be limited to the plaintiffs). For that reason, plaintiffs here can only be assured of the opportunity to obtain relief once they are allowed to proceed with their *own* case.

Further, even if another decision in another district court should set aside some or all of the deeming rule, plaintiffs would still have an

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interest in litigating their own case as soon as possible, given that only a win in their own case would protect them from the possibility that the other court might dissolve the injunction. *Cf. Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 435 (E.D.N.Y. 2018) ("If Judge Alsup or the Ninth Circuit were to lift the injunction in *Regents*, then Plaintiffs would no doubt suffer irreparable harm. Defendants cite no authority for the proposition that Plaintiffs cannot establish irreparable harm simply because another court has already enjoined the same challenged action."). Courts have often proceeded to the merits of a dispute and imposed preliminary injunctions against rules even when another district court has already enjoined the same rule. *See, e.g.*, *Int'l Refugee Assistance Project v. Trump,* 241 F. Supp. 3d 539, 565–66 (D. Md. 2017) (issuing nationwide preliminary injunction against enforcement of President Trump's second immigration executive order even though *Hawai'i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017), entered a nationwide temporary restraining order enjoining enforcement of the same executive order one day prior); *Aziz v. Trump*, 234 F. Supp. 3d 724, 738–39 (E.D. Va. 2017) (enjoining enforcement of President Trump's first immigration executive order against U.S. permanent residents even

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though *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), entered an even broader worldwide temporary restraining order that enjoined enforcement of the same executive order ten days prior).

In contrast to this significant harm to plaintiffs resulting from a stay, the government would suffer no hardship or inequity from the denial of a stay. A stay would only determine at what time the government would have to litigate in the district court; the government will have to expend the resources to do so eventually in either event. And regardless, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' . . . ." *Lockyer*, 398 F.3d at 1112. For this reason alone, any stay motion should be denied on the basis that "the 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*, 299 U.S. at 255.

But even if the third relevant factor were considered, its weight in favor of a stay would be minimal to none. The government will likely argue that waiting for an opinion from the D.C. District Court would

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"simplify[] . . . questions of law" at issue in the case. But such a decision would *at best* provide only instructive precedent, not the real simplification obtained by allowing another court to issue *binding* precedent.[1] Even after a potential stay and decision in D.C., the Minnesota District Court will be required to exercise its independent judgment concerning the merits of plaintiffs' claims notwithstanding any persuasive value of a decision by the D.C. District Court.

A stay cannot be routinely justified solely based on the fact that cases in other circuits involving other parties are litigating the same legal issues. Such a rule would make stays far more common, in conflict with the fact that "the Supreme Court has counseled moderation" in the use of stays. *Bae Sys. Land & Armaments L.P. v. Ibis Tek, LLC*, 124 F. Supp. 3d 878, 890 (D. Minn. 2015) (internal quotations omitted) (citing *Landis*,

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[1] Stays are more appropriate when a pending case will issue *binding* precedent on at least one question of law, thereby actually simplifying the issues to be decided. *See, e.g.*, *Rumble v. Fairview Health Services*, No. 14–CV–2037 (SRN/FLN), 2017 WL 401940, at *4 (D. Minn. Jan. 30, 2017) ("[T]he Supreme Court's review of *Gloucester County* . . . warrants a stay of these proceedings as to Plaintiff's Section 1557 claim."); *Busch v. Bluestem Brands, Inc.*, No. 16-cv-0644 (WMW/HB), 2017 WL 5054391, at *2 (D. Minn. Feb. 22, 2017) ("[T]he forthcoming decision in *ACA International* will have precedential value in this Court, which weighs in favor of granting Bluestem's motion for a stay.").

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299 U.S. at 255); *accord KK Motors, Inc. v. Brunswick Corp.*, No. 98–cv–2307 (JRT/RLE), 1999 WL 246808, at *2 (D. Minn. Feb. 23, 1999) (noting that "a stay is the exception and not the rule").

Although a potential *Supreme Court* decision in the litigation currently pending in the D.C. District Court would bind the Minnesota District Court (and thus simplify its task), a stay of proceedings until a parallel case has been reviewed at all three levels of the federal judicial system is *per se* excessive. *See Landis*, 299 U.S. at 256:

> We are satisfied that the limits of a fair discretion are exceeded in so far as the stay is to continue in effect . . . until the determination by [the Supreme Court] of any appeal . . . . Already the proceedings in the District Court have continued more than a year. With the possibility of an intermediate appeal to the Circuit Court of Appeals, a second year or even more may go by before this court will be able to pass upon the Act.

Thus, "the uttermost limit" of a stay is "the date of the first decision in the suit selected as a test." *Id.* at 256–57.

Further, even the *instructive* value of a future D.C. District Court opinion is uncertain, given that the D.C. District Court's opinion will be governed by several D.C. Circuit precedents which do not bind the courts of this Circuit. On the Appointments Clause issue, these precedents include *Fed. Election Comm'n v. Legi–Tech, Inc.*, 75 F.3d 704 (D.C. Cir.

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1996); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012); and *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 821 F.3d 19 (D.C. Cir. 2016). And on the First Amendment issue, this will include *Nicopure Labs, LLC v. FDA*, No. 17-5196. That case is pending in the D.C. Circuit, and the D.C. District Court has stayed review of the First Amendment claim until *Nicopure* has been decided. *See* App. Ex. N.

In sum, the direct and immediate harm to plaintiffs of continuing to be subject to the deeming rule is why they are opposed to a stay. Given that the government would not suffer any harm from moving forward with this case, a stay should be rejected for this reason alone. *Landis*, 299 U.S. at 255. And further, this harm would outweigh any judicial efficiency gained from reviewing a D.C. District Court opinion as instructive precedent.

III.

WHETHER THE POSSIBILITY OF A STAY AFFECTS THIS COURT'S REVIEW OF THE PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

Whether the district court abused its discretion in granting transfer and whether a stay is warranted are two distinct legal issues. Only the issue of transfer has been fully briefed at both the district court and

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circuit court levels in this case, and for that reason this Court should limit its decision to the transfer order. If the petition for writ of mandamus or prohibition were to be granted and the transfer order reversed, the government would be able to file a motion to stay with the district court, and this issue could be fully briefed at the district court level.

The district court, rather than the circuit court, is the proper forum to decide a stay motion in the first instance, after full briefing. Eighth Circuit precedents on the discretion to impose a stay consistently presume that it is the *district* court which will make such a decision in the first instance. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006) ("A *district court* has broad discretion to stay proceedings when appropriate to control its docket . . . .") (emphasis added) (citations omitted). In the district court, plaintiffs would be able to present more detailed evidentiary support for the burdens a stay would impose on the individual plaintiffs, by means of declarations. The government would likewise be able to present its own evidence for any burdens allegedly placed upon it by moving forward with this case. *Cf.* *Landis*, 299 U.S. at 258 (remanding to the district court and holding that

“there must be a new appraisal of the facts by the court whose function it is to exercise discretion”). Finally, the normal pattern of sequential briefing in the district court, in which the movant makes its case first and the party opposing can then respond, would allow plaintiffs to more specifically address the government’s arguments. Simultaneous briefing in this Court does not afford the same opportunity.

Further, if a stay were to be granted, a district court would be better equipped than this Court to consider the length of stay appropriate and to periodically reconsider the length of stay as circumstances change. *See, e.g.*, *Christianson v. Ocwen Loan Servicing, LLC*, No. 17-1525 (DWF/TNL), 2017 WL 5665211, at *2 (D. Minn. Nov. 20, 2017) (granting stay pending a D.C. Circuit decision that would be potentially dispositive of issues in the case but noting that “should a decision not be issued in the next sixty days, the parties will submit a status report outlining their respective positions on continuing or lifting the stay”).

Both the decision whether to impose a stay and the length of such a potential stay are matters best left to the district court in the first instance. This Court should grant the petition for writ of mandamus or prohibition, reverse the transfer order, and remand to the district court,

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where the government will be free to file a motion to stay if it believes that one is appropriate.

DATED: November 23, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by 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 CM/ECF system.

s/ Damien M. Schiff
DAMIEN M. SCHIFF

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DATED: November 23, 2018.

s/ Damien M. Schiff
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Eighth Circuit Court of Appeals

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