Nos. 13-17430, 14-15108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA et al.,

Plaintiffs-Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, et al.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY AND EXPEDITED REVIEW UNDER CIRCUIT RULE 27-3

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INTRODUCTION

The Army explained in its motion that maintenance of the *status quo* through a stay of the district court's injunction pending this Court's expedited consideration of the parties' appeals is warranted because the government has a substantial likelihood of prevailing in its cross-appeal challenging that injunction and the balance of harms warrants a stay pending appeal. In opposing the government's motion, plaintiffs offer no response whatsoever to the Army's merits argument that the injunction is likely to be reversed on appeal. Plaintiffs have thus expressly conceded that the Army has made the necessary showing of likely success on the merits required to obtain a stay.

The only argument plaintiffs have advanced in their opposition is that the Army has not shown that the balance of harms tips in its favor, which, in plaintiffs' view, makes the Army's strong showing of likely success on appeal irrelevant. As explained below, that argument fails on both legal and factual grounds. As a legal matter, this Court has confirmed "the continuing validity of the 'sliding scale' approach to preliminary injunctions," under which "a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2012). The Army's undisputed likelihood of success on the merits of its cross-appeal thus weighs heavily in favor of a stay here. More fundamentally, as a factual matter, plaintiffs have not refuted the government's showing that compliance with the district court's injunction will impose substantial burdens on the Army, including financial costs and the diversion of limited military

resources and manpower, which could never be recovered absent a stay. Nor have plaintiffs (or the district court) ever identified any information relevant to the health or well-being of past test participants that the Army has allegedly withheld, or offered any evidence that any class member has suffered any harms from the Army's alleged failure to provide adequate notice in this case. In short, the Army's showing of harm from compliance with the district court's injunction is real and unrefuted while plaintiffs' claim of injury is entirely speculative. Accordingly, this Court should grant a stay pending expedited consideration of the appeals in this case.

DISCUSSION

Because plaintiffs have not disputed the government's contention that the district court's "notice" injunction should be reversed, Govt. Mot. 9-15, there can be no serious doubt that the Army has satisfied the first requirement for a stay pending appeal: a strong showing of likely success on the merits. *Nken v. Holder*, 129 S. Ct 1749, 1761 (2009); *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). The only remaining question is whether the balance of harms favors maintenance of the *status quo* during the pendency of the expedited appeals in this case.

Like the district court, plaintiffs do not specifically challenge any of the estimated compliance costs, burdens, or other harms identified by the Army in the Declaration of Dee Dodson Morris. Plaintiffs assert that "[i]t is difficult to see how monetary expense is irreparable harm," Pl. Opp. 6, but they offer no response to our

argument that decisions holding that monetary harm is not "irreparable harm" are premised on the assumption that such harms can later be remedied by damages awards – a remedy that is plainly not available here. *See* Govt. Mot. 17-18.

Plaintiffs cite the district court's denial of the government's stay motion for the proposition "that the expedited nature of the underlying appeal and cross-appeal should keep the Army's resource expenditures contained." Pl. Opp. 7.[1] However, they provide no response to our argument (Govt. Mot. 17) that compliance with the injunction would impose significant resource and financial burdens on the Army, including serious legal consequences if it were to enter into a contract with an outside entity, such as the Institute of Medicine (IOM), and then need to terminate that contract if (as is likely) the injunction is vacated on appeal. The government should not be required to begin incurring the substantial costs, burdens and obligations of complying with an injunction that is subject to immediate appellate review, particularly one that rests on such a weak legal and factual foundation.

Moreover, plaintiffs completely ignore the government's showing that the harms at issue here extend well beyond the unnecessary expenditure of money. As

[1] Contrary to plaintiffs' argument, this Court does not simply review the district court's denial of a stay pending appeal for abuse of discretion. *See* Pl. Opp. 4 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). Although the decision whether to grant a stay pending appeal is undoubtedly a discretionary one similar to the decision whether to grant a preliminary injunction, this Court simply employs the relevant factors in evaluating a request for a stay pending appeal and does not defer to the district court's assessment of those factors. *See Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (exercising discretion to grant stay pending appeal based upon independent evaluation of equitable factors).

explained in the Morris declaration, "there is a substantial danger that the notifications contemplated by the injunction could create more harm than it prevents by unduly alarming test participants." Govt. Mot., Exh. C, ¶ 19. In order to minimize that risk, "the Army would need to carefully develop an appropriate risk communication plan for every communication that will potentially be disseminated to test subjects," a task the government found to be "extremely labor intensive" when the Department of Defense previously sent notification letters to test participants in conjunction with the Department of Veterans Affairs. *Id.* ¶ 19. Like the district court, plaintiffs do not even acknowledge the Army's prediction that new notification efforts may unduly alarm test participants – a judgment by the military that is entitled to considerable deference in evaluating likely harms. *See Winter v. Nat. Resources Defense Council, Inc.*, 129 S. Ct. 365, 378 (2008) (noting that district court "failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises").

On the other side of the ledger, plaintiffs offer nothing more than *ipse dixit* to support their contention that a brief stay of the injunction pending appeal would cause them any harm. As noted, neither the plaintiffs nor the district court have ever identified any significant new information regarding possible effects on the well-being of test participants that the Army has not disclosed, and there was thus no proper factual predicate for the district court to conclude that the Army failed to do something it had a discrete and mandatory duty to do. *See* Govt. Mot. 13-14. Nor

have plaintiffs ever offered *any* evidence that *any* class member has suffered any harms from the Army's alleged failure to provide notice in this case. It is undisputed that DoD has provided notice to test participants in the form it believes is most appropriate and continues to make such information available in a variety of different ways, including through the operation of a public website and the provision of service member test files (on request) containing the information DoD has about past testing programs. No class member has testified or submitted a declaration indicating that a putative "lack of notice" about any specific health effects impeded his or her efforts to obtain necessary health care, and plaintiffs' assertion that "test subjects *can* be impeded in their ability to obtain meaningful medical care because of their lack of notice," Pl. Opp. 6, is thus pure speculation. Indeed, the cite plaintiffs provide to support this contention – the lynchpin of their claim of irreparable harm – is a footnote in their summary judgment motion, Pl. Opp. 6 (citing C.R. 490 at 5 n.4), which likewise merely asserts that, if some unspecified, additional notice is not provided, it may be harder for veterans to obtain necessary health care.

Finally, even assuming plaintiffs had identified some non-speculative harm flowing from the Army's continued failure to disclose certain information (which they have not), they nowhere explain why a brief delay in compliance with the district court's injunction would suddenly cause them irreparable harm. At no prior point in this case have plaintiffs ever sought expedited or emergency relief, and no basis now exists for plaintiffs to demand immediate compliance with an injunction they are

either unable or unwilling to defend on the merits.[2] Moreover, as the Morris declaration makes clear, even if the Army were required to begin compliance with the injunction, it will not be in a position to provide any new information to class members (assuming any such information exists) until long after this Court has ruled on the propriety of the injunction – and likely vacated it. In short, whatever "benefit" may accrue to class members is a long way off, while the harms to the Army arising from compliance with the injunction are substantial, unrefuted, and imminent.

At bottom, the question presented in this case is whether the Army should be required to undertake substantial new and burdensome obligations under the district court's continuing oversight pursuant to an injunction that plaintiffs have not even attempted to defend on the merits. Because the Army has shown that it will suffer irreparable harm absent a stay and plaintiffs have not demonstrated that a brief stay during the pendency of these appeals will harm them, this Court should grant a stay

[2] Ignoring their own failure to request expedition at any prior point in this case, plaintiffs suggest that the Army's request for this Court to stay the district court's injunction is somehow too late or improper. *See* Pl. Opp. 5 (noting that the court "issued its injunction more than two months before the Army moved to stay it"). As this Court is well aware, however, the government must obtain authorization from the Solicitor General before seeking any appellate relief, 28 C.F.R. § 0.20(b), and the time allotted to file an appeal in cases where the government is a party is accordingly 60 days, rather than the 30 days normally allotted in cases involving private parties. *See* Fed. R. App. 4(a)(1)(B). In this case, the government timely filed its notice of cross-appeal on January 21, 2014, and filed its stay motion in district court just a day later. The district court denied that motion on February 5, and the government filed its emergency stay motion in this Court on the very next day. In short, the government has in no way "delayed" seeking relief in this case.

pending appeal. "The authority to hold an order in abeyance pending review allows an appellate court to act responsibly," *Nken*, 129 S. Ct. at 1757, and this Court should exercise that authority under the unique circumstances presented here.

CONCLUSION

For the foregoing reasons, and those stated in our motion, this Court should stay the district court's injunction pending resolution of the expedited appeals in this case. In the alternative, this Court should enter an administrative stay no later than February 18, 2014 pending its resolution of the government's stay motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2014, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Charles Scarborough
CHARLES SCARBOROUGH