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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **OAKLAND DIVISION**

16 AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, AMERICAN
17 CIVIL LIBERTIES UNION OF HAWAI'I,
AND AMERICAN CIVIL LIBERTIES UNION
18 OF UTAH,

19 Plaintiffs,

20 v.

22 U.S. DEPARTMENT OF HOMELAND
SECURITY and U.S. CUSTOMS AND
23 BORDER PROTECTION,

24 Defendants.

Case No.: 4:17-cv-01970-SBA

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS
PENDING DECISION ON MOTION TO
TRANSFER**

Date: June 14, 2017
Time: 1:00 p.m.
Judge: Hon. Sandra B. Armstrong
Courtroom: 210

INTRODUCTION

1
2 In their Motion to stay the proceedings, Defendants requested that this Court impose a
3 brief stay of the proceedings—likely only for a matter of weeks—while their motion to transfer
4 this and twelve other related actions filed by ACLU affiliates is pending before the Judicial Panel
5 on Multidistrict Litigation. Plaintiffs spend the bulk of their Opposition arguing against
6 consolidation. Plaintiffs repeatedly argue that this case is unrelated to the others, Pls.’ Opp’n at
7 2, 4, 9, 11-12 (ECF No. 19)—even though all of them were brought by ACLU affiliates as
8 admittedly “coordinated” lawsuits and even though they all concern parallel FOIA requests for
9 identical or nearly identical categories of records, *see* Transfer Mot. at 4-7 (ECF No. 15-3)—
10 because the plaintiffs are different ACLU affiliates and because the requests seek records from
11 different CBP field offices. Such arguments should instead be addressed to the JPML, which is
12 considering whether consolidated or coordinated pretrial proceedings would be appropriate (and
13 which has previously centralized FOIA actions over similar objections). As Defendants have
14 explained, a temporary stay of proceedings until the JPML can decide Defendants’ motion to
15 transfer serves the interests of judicial economy and avoids any significant burden to either party.
16 The JPML is likely to hear and decide the transfer motion only a few weeks after the first
17 deadline in this case. Any stay of this duration would have no effect on the timing of
18 Defendants’ release of responsive records, and thus Plaintiffs will suffer no prejudice.
19 Moreover, the strategic behavior of Plaintiffs and the other ACLU affiliates in unnecessarily
20 bringing the related actions as thirteen separate cases obviously imposes a burden on Defendants
21 from having to engage in parallel proceedings in thirteen courts. And Plaintiffs have not
22 explained why this Court should now expend its resources on pretrial proceedings—including
23 status reports, scheduling orders, and possible discovery—when those issues would need to be
24 re-litigated before the transferee court.

25 Stays pending a JPML motion, while not automatic, are routine. *See, e.g.*, Defs.’ Mot. at
26 3 (ECF No. 17) (collecting authorities); *see also, e.g., San Diego Unified Port Dist. v. Monsanto*
27 *Co.*, No. 15-cv-00578-WQH-JLB, 2016 WL 4496826, at *1 (S.D. Cal. Feb. 1, 2016) (“majority
28 of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings”);

1 *Automated Transactions, LLC v. Bath Sav. Inst.*, No. 2:12-cv-393-JAW, 2013 WL 1346470, at
 2 *2 (D. Me. Mar. 14, 2013) (courts grant stays “frequently”) *Bonenfant v. R.J. Reynolds Tobacco*
 3 *Co.*, No. 07-60301-CIV, 2007 WL 2409980, at *1 (S.D. Fla. July 31, 2007) (“common practice”
 4 to grant stays).¹ Contrary to Plaintiffs’ contention, there is no exception to the typical practice
 5 when the government seeks transfer of FOIA cases. Indeed, as discussed below, stays pending a
 6 decision of the JPML have been granted in numerous FOIA cases, and Plaintiffs identify no
 7 FOIA case in which such a stay was denied. In light of the limited duration of any potential stay
 8 here, the ACLU affiliates’ strategic approach to the litigation, and the burden that a piecemeal
 9 approach imposes on the government and the courts, this Court should grant Defendants’ request
 10 for a temporary stay.

11 ARGUMENT

12 **I. PLAINTIFFS WILL NOT SUFFER HARDSHIP FROM A TEMPORARY STAY**

13 Plaintiffs do not dispute that this case is in the early stages of litigation and that any stay
 14 would likely be of a brief duration—likely a matter of weeks, not months. Courts have readily
 15 found that plaintiffs suffer no prejudice in similar circumstances. *See* Defs.’ Mot. at 5-6.

16 Instead, Plaintiffs suggest that FOIA is different and that Plaintiffs will suffer “significant
 17 prejudice[]” because a stay would delay the release of responsive, non-exempt records by
 18 Defendants. Pls.’ Opp’n at 6-8. Contrary to Plaintiffs’ suggestion, there is no reason that stays
 19 in FOIA cases should be treated differently in this context. Plaintiffs cite no FOIA case in which
 20

21 ¹ Plaintiffs erroneously suggest that courts “frequently deny . . . requests for stays” pending a decision by the
 22 JPML. Pls.’ Opp’n at 11. Their Opposition relies primarily on non-JPML cases and only identifies four cases in
 23 which courts denied a stay pending a JPML decision. These cases are easily distinguishable, and, in any event, are
 24 against the clear weight of authority recognizing that stays in this context are routine. *See Sehler v. Prospect Mortg.,*
 25 *LLC*, No. 1:13cv473(JCC/TRJ), 2013 WL 5184216, at *3 (E.D. Va. Sept. 16, 2013) (denying stay where defendant
 26 agreed to decertification of class before moving for consolidation before the JPML and where stay would have
 27 delayed case by four to six months, during which time trial would occur); *Sullivan v. Cottrell, Inc.*, No. 11CV1076S,
 28 2012 WL 694825, at *5 (W.D.N.Y. Feb. 29, 2012) (holding that stay was not warranted where motion to remand
 raised issues regarding court’s jurisdiction and where court could decide remand motion and motion to dismiss
 before the JPML heard transfer motion); *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp.
 2d 596, 600-02 (D. Del. 2011) (denying stay where motion to remand was fully briefed by parties and was granted
 by court in same opinion as stay motion); *Barber v. BP, PLC*, No. 10-0263-WS-B, 2010 WL 2266760, at *2 (S.D.
 Ala. June 4, 2010) (denying stay motion in putative class action where district court had previously denied 23
 “substantively identical motions to stay” proceedings). Moreover, none of these cases addresses the key
 circumstances here—a weeks-long stay at an early stage of the litigation, where Plaintiffs would not be prejudiced,
 and where the need for consolidation arose because of Plaintiffs’ “coordinated” effort to file piecemeal actions.

1 a court denied a stay pending a decision by the JPML. Defendants are aware of two instances in
2 which the government sought centralization of FOIA actions by the JPML. *See* Transfer Mot. at
3 9-10. In both, transferor courts granted motions to stay the proceedings pending the JPML's
4 decision, and Defendants are not aware of any transferor court in these actions that denied a stay
5 motion. *See, e.g., Freedom Magazine v. IRS*, No. 91-cv-6813 (S.D. Fla.) (ECF No. 10);
6 *Freedom Magazine v. IRS*, No. 91-cv-2921 (D. Md.) (ECF No. 6); *Freedom Magazine v. IRS*,
7 No. 91-cv-12598 (D. Mass.) (ECF entry Feb. 7, 1992); *Freedom Magazine v. IRS*, No. 91-cv-704
8 (S.D. Ohio) (ECF No. 6); *Bach v. IRS*, No. 91-cv-20184 (N.D. Cal.) (ECF No. 13); *Chandler v.*
9 *IRS*, No. 91-cv-20183 (N.D. Cal.) (ECF No. 15); *Kimmich v. IRS*, No. 91-cv-20182 (N.D. Cal.)
10 (ECF No. 13); *Licciardi v. IRS*, No. 91-cv-148 (D.N.H.) (ECF No. 5). Plainly, then, stays
11 pending JPML decisions are equally justified in FOIA cases.

12 Moreover, notwithstanding their conclusory assertions of “delay,” Pls.’ Opp’n at 8,
13 Plaintiffs fail to explain how a temporary stay would have any effect on the timing of the release
14 of responsive records in this case. Currently, Defendants’ response to the complaint is due June
15 26, 2017, and the Court has instructed the parties to meet and confer regarding initial disclosures,
16 alternative dispute resolution, and a discovery plan no later than August 14, 2017. (ECF No. 18.)
17 Defendants anticipate that their motion to transfer will be heard by the JPML on July 27, 2017
18 and decided shortly thereafter. As Defendants explained in their Motion, even if a stay is
19 imposed, Defendants will continue to compile and review records during the pendency of the
20 stay. Defs.’ Mot. at 6. Indeed, Defendants recently granted Plaintiffs’ request for expedited
21 treatment and have placed the coordinated requests of all the ACLU affiliates in the expedited
22 processing queue, ahead of all non-expedited requests and later expedited requests. Thus,
23 Defendants’ response to Plaintiffs’ request will proceed on the same track with or without the
24 stay.²

25 Further, Plaintiffs do not identify anything that will occur in this Court before the JPML’s
26

27 ² Plaintiffs grasp at straws when they suggest that “CBP’s concern that the court might ‘set a schedule’” is a
28 “tacit admission” that Defendants have not begun processing Plaintiffs’ request. Pls.’ Opp’n at 12. As Defendants
have already explained, CBP headquarters is currently in the process of compiling and reviewing records for
responsiveness to the FOIA requests in the related actions. *See supra* Pt. I; Defs.’ Mot. at 6.

1 decision that would actually hasten the release of responsive documents. Though Defendants
2 will process Plaintiffs' request "as soon as practicable," 6 C.F.R. § 5.5(e)(4), there is no reason to
3 believe—particularly in light of the substantial volume of recent FOIA requests received by
4 Defendants and the complexity of Plaintiffs' request—that production of all responsive records
5 will be complete by the time the JPML decides Defendants' transfer motion. Indeed, Plaintiffs
6 do not claim it would be, as they "have not yet asked the Court to set a [production] schedule"
7 and believe that only "limited activity [is] likely to occur in this case before the MDL motion is
8 decided." Pls.' Opp'n at 11-12. It is difficult to square these assertions with Plaintiffs' dire
9 warnings of unspecified "delay."

10 **II. SIMULTANEOUS AND DUPLICATIVE PROCEEDINGS IN THIRTEEN** 11 **PARALLEL ACTIONS WILL IMPOSE AN UNNECESSARY BURDEN**

12 As Defendants explained, proceeding in this case (and the other related cases) while their
13 motion to transfer is pending forces them to engage in simultaneous proceedings in thirteen
14 separate cases before thirteen different courts. *See* Defs.' Mot. at 5. Plaintiffs disregard this
15 burden as not a "real hardship" and claim that Defendants are only seeking to avoid "having to
16 defend this action on a normal schedule." Pls.' Opp'n at 9.

17 Plaintiffs' attempt to minimize the obvious burden to Defendants requires looking at this
18 case in isolation from the other related actions. But, as a direct result of the ACLU's coordinated
19 strategy to gerrymander these FOIA requests into thirteen separate cases, *see* Transfer Mot. at 4-
20 8, Defendants must simultaneously answer complaints, appear in status conferences, and submit
21 joint status reports in the thirteen related actions. In this action in particular, Defendants would,
22 at a minimum, be required to respond to the complaint and confer with Plaintiffs on initial
23 disclosures and a discovery plan. This work would be duplicated in the other related actions and
24 in the transferee court, and "litigating essentially the same claims in courts all over the country is
25 no doubt burdensome." *Bd. of Trustees of Teachers' Retirement Sys. of Illinois v. Worldcom, Inc.*,
26 244 F. Supp. 2d 900, 905 (N.D. Ill. 2002).

27 Plaintiffs' suggestion that "answering the Complaint and conferring on a joint discovery
28 plan . . . would not be wasted effort even if this case were transferred by the JPML," Pls.' Opp'n

1 at 12, is plainly wrong. If the cases are consolidated, Defendants may not need to answer
2 thirteen individual complaints at all, because the transferee court would likely require all of the
3 ACLU affiliate plaintiffs to file a single amended consolidated complaint, which would require
4 only one answer. *See, e.g.*, Manual for Complex Litigation § 20.132, at 224 n.668 (4th ed.
5 2004). And if the cases are transferred to Defendants' proposed forum, this action would be
6 exempt under the local rules from any requirement to engage in a Rule 16 conference or confer
7 on a joint discovery plan. *See* Transfer Mot. at 15. Thus, absent a stay, Defendants will be
8 required to undertake time-consuming work—in as many as thirteen separate cases—that may
9 otherwise prove unnecessary.

10 Moreover, Plaintiffs do not disclaim any intent to request either discovery or a production
11 schedule while Defendants' transfer motion is pending. *See* Pls.' Opp'n at 12. Any decision that
12 this Court may reach on these issues clearly may conflict with those of other courts and/or the
13 transferee court. Defs.' Mot. at 5. Any such inconsistency would be plainly prejudicial—it
14 would likely place competing demands on the same agency personnel responsible for processing
15 the responses to the requests in each of the related cases. *Id.* And, if Defendants' motion to
16 transfer is granted, Defendants would be forced to re-litigate these exact same issues before the
17 transferee court. *Id.* Plaintiffs ignore this fact.

18 Courts routinely find that the burden in time and expense from rearguing the same issues
19 in different courts and the potential for inconsistent rulings justify a temporary stay pending a
20 decision by the JPML on a motion to transfer. *See id.* (collecting cases); *see also, e.g., Cooper v.*
21 *Siddighi*, No. EDCV 13-00345 JGB (SPx), 2013 WL 12140988, at *4 (C.D. Cal. May 8, 2013);
22 *Oregon ex rel. Kroger v. Johnson & Johnson*, No. 11-CV-86-AC, 2011 WL 1347069, at *6 (D.
23 Or. Apr. 8, 2011); *Paul v. Aviva Life & Ann. Co.*, No. 09-1038, 2009 WL 2244766, at *2 (N.D.
24 Ill. July 27, 2009); *Palmer v. Am. Honda Motor Co.*, No. CV 07-1904-PHX-DGC, 2008 WL
25 54914, at *1 (D. Ariz. Jan. 3, 2008). For those same reasons, a stay is warranted here as well.

26 **III. A STAY WOULD SERVE JUDICIAL ECONOMY BY AVOIDING**
27 **UNNECESSARY AND DUPLICATIVE PROCEEDINGS**

28 Plaintiffs also try to minimize the waste of judicial resources from duplicative

1 proceedings in the related cases by arguing essentially that there are no duplicative proceedings
2 because this action has nothing to do with the other related actions. Pls.' Opp'n at 11-12. As
3 discussed above, Plaintiffs are simply wrong. In any event, Plaintiffs' argument speaks more to
4 whether transfer is appropriate than to whether this Court should stay proceedings while the
5 JPML considers the appropriateness of transfer. There can be no doubt that, if the case is
6 transferred, any time this Court has devoted to pretrial proceedings will have been for naught.

7 Finally, Plaintiffs suggest that a stay would be "premature" because they "have not yet
8 asked the Court to set a schedule." Pls.' Opp'n at 12. As discussed, the imminent deadlines
9 Defendants face in this and the twelve other related cases make Defendants' stay motion
10 anything but premature. In any event, that Plaintiffs have not "yet" asked the Court to set a
11 schedule does not mean Plaintiffs will not seek to do so before the JPML decides Defendants'
12 motion, or that they will not engage in other unnecessary proceedings. A stay would make it
13 unnecessary for the Court to devote its time to resolving any disputes over such pretrial matters.
14 *Cf. Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (granting stay in
15 interests of judicial economy because absent stay "this Court will have needlessly expended its
16 energies familiarizing itself with the intricacies of a case that would be heard by another judge").

17 CONCLUSION

18 For the foregoing reasons and those stated in Defendants' Motion, this Court should grant
19 Defendants' request for a temporary stay of proceedings.

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21 Dated: May 31, 2017

Respectfully submitted,

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