IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF RETILE KEEPERS, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	**Civ. No. 1:13-cv-02007-RDM**
THE HONORABLE SALLY JEWELL, *et al.*	)	
Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING THE COURT'S QUESTIONS FROM THE MAY 18, 2015 STATUS CONFERENCE

On May 18, 2015, this Court held a Status Conference to determine the scope of any preliminary injunction entered and whether a stay would be appropriate. (Mem. Op. (Dkt. No. 52) at 49 (May 12, 2015).) Two additional questions emerged at the hearing: (1) whether it would be permissible for this Court to grant a temporary stay of any preliminary injunction to allow Defendants, the Honorable Sally Jewell and United States Fish and Wildlife Service ("FWS"), time to decide whether to file a Notice of Appeal and an application for an emergency stay of any such injunction; and (2) how this Court should manage the litigation if FWS does decide to appeal. Plaintiffs answer these remaining questions below.

I. THE DISTRICT COURT HAS NO OBLIGATION TO STAY THE INJUNCTION WHILE FWS DECIDES WHETHER TO APPEAL

Federal Rule of Civil Procedure 62(a)(1) provides that the entry of an injunction is immediately effective "unless the court orders otherwise …." The approach recognizes that the harm inflicted by a stay against a prevailing plaintiff is often irreparable. The Court has addressed irreparable harm both in its Memorandum Opinion and in court yesterday.

That being said, a court does have both statutory and inherent authority to stay execution of its orders for the purposes of promoting efficient and economical judicial proceedings. As an initial matter, however, granting Defendants the full seventy-five days they have requested to decide what to do next would: (1) allow Defendants to inflict the irreparable harm that a preliminary injunction is intended to avoid; and (2) not promote efficiency or economy, especially considering if the Court had issued a final injunction, Defendants would only have sixty days to file a Notice of Appeal. Fed. R. App. P. 4(a)(1)(B).

If the Court does decide to delay any preliminary injunction's effective date, Plaintiffs would respectfully request that the Court be very clear in explaining why it is doing so, and what the Court intends the procedural effect of such a delayed effective date to be. Clarifying where the Court and Parties would be if the Court delays a preliminary injunction's effective date is important to ensuring the efficient conduct of these proceedings. Any procedural delay and confusion will only benefit Defendants.

More specifically, the party seeking to stay the effectiveness of a court's order must "ordinarily move first in the district court …." Fed. R. App. P. 8(a)(1). Under the Federal Rules of Appellate Procedure, Defendants could proceed directly to the D.C. Circuit with a motion for a stay only if they can show either that "moving first in the district court would be impracticable" or that the district court had denied their motion for a stay. Fed. R. App. P. 8(a)(2).

When presented with such a motion to stay, the Court (and/or the D.C. Circuit) would apply four well-established criteria: (1) a showing of a likelihood of success on the merits, (2) a showing of irreparable harm if the stay is not granted, (3) whether granting the stay will harm other parties, and (4) whether granting the stay will serve the public interest. *See* D.C. Cir. Rule 8(a)(1). These standards are generally the same as the injunctive standards themselves. *See*

Acevado-Garcia v. Vera-Monroig, 296 F.3d 13, 16 (1st Cir. 2002) ("Stays of injunctive orders … are evaluated under the traditional four-part standard applied to injunctions.").

A district court is under no obligation to enter such a stay, even after the United States has entered an appeal, including in high-profile cases. *See, e.g., State of Texas, et al. v. U.S.*, Case No. 1:14-cv-00254, Mem. Op. and Order Denying Emergency Expedited Mot. to Stay, at 14 (S.D. Tex., Apr. 7, 2015) (decision relating to 26-state challenge to the Department of Homeland Security's Deferred Action for Parents of Americans and Lawful Permanent Residents); *Strange v. Searcy*, No. 14A840, 135 S. Ct. 940 (Feb. 9, 2015); *Armstrong v. Brenner*, No. 14A650, 135 S. Ct. 890 (Dec. 19, 2014); *Wilson v. Condon*, No. 14A533, 135 S. Ct. 702 (Nov. 20, 2014); *Moser v. Marie*, No. 14A503, 135 S. Ct. 511 (Nov. 12, 2014) (Supreme Court denies all requests for stays of injunction in marriage equality cases with appeals pending in Alabama, Florida, South Carolina, and Kansas, following denials at the district court or Court of Appeals level); *see also ADT Security Services, Inc. v. Lisle-Woodridge Fire Protection Dist.*, 807 F. Supp. 2d 742, 745-46 (N.D. Ill. 2011) (denying motion to stay finding stay would cause plaintiffs irreparable harm by barring their legitimate business).

As the Court recognized yesterday, moreover, if Defendants do elect to seek a stay, the burden of demonstrating the need for injunctive relief would switch from Plaintiffs to Defendants. Because a movant seeking a stay generally relies on the same standards as movants seeking a preliminary injunction, courts have reasoned that a motion to stay "essentially ask[s] [the] Court to reconsider its decision to issue a preliminary injunction," *see, e.g., State of Texas, supra*, at 2, albeit with the burden to demonstrate the need for relief switched.

Accordingly, Plaintiffs would respectfully request that, if the Court does decide to delay the effective date of any preliminary injunction that it may issue, any such delayed effectiveness

should be of short duration, given the irreparable harm currently accruing to Plaintiffs. No such stay should last longer than twenty-two days from May 12, 2015, the date the Court issued its Memorandum Opinion and Order, or June 2, 2015. As an objective matter, Plaintiffs filed their motion for a temporary restraining order twenty-two days after the 2015 rule was published in the Federal Register. For their part, Defendants claimed the twenty-two day period amounted to a prejudicial delay, but the Court considered this time period to be a reasonable one to prepare emergency papers seeking equitable, injunctive relief.

II. DEFENDANTS SHOULD PROCEED TO PRODUCE THE ADMINISTRATIVE RECORD WHETHER OR NOT THEY ELECT TO APPEAL ANY PRELIMINARY INJUNCTION THE COURT MAY ENTER

The court has authority to maintain jurisdiction and, at a minimum, order preparation of the administrative record during the pendency of any appeal. *See Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) (citing *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1528-29 (6th Cir. 1992) ("The district court retains some jurisdiction to continue deciding other issues during the pendency of an interlocutory appeal.")); *see also* 9 M. Moore, B. Ward & J. Lucas, MOORE'S FEDERAL PRACTICE 203.11, at 3-54 (2d ed. 1989) ("A district court retains jurisdiction to continue with the merits of the litigation while an appeal from an order granting or denying a preliminary injunction is pending."). It is appropriate for the Court to order Defendants to prepare the administrative record because any decision of the D.C. Circuit, if any, will not fully resolve any of Plaintiffs' claims. Thus, time will remain of the essence.

While Plaintiffs recognize the desirability of conserving the Court's, the agency's, and their own resources, the Government is in a predicament of its own making. As previously described, Defendants have failed to provide any indication of their planned next steps. Further,

Defendants have already had approximately a year to begin producing the administrative record; indeed, they did not move to dismiss all the counts of Plaintiffs' First Amended Complaint.

Plaintiffs do expect to narrow their claims, but they would like to understand better the course this case will take before doing so. It is also unclear whether the Defendants would want to litigate the merits based on an administrative record, even if this case only involved Plaintiffs' statutory construction claims.[1]

III. CONCLUSION

Plaintiffs respectfully request that the injunction be entered and take effect immediately. Any decision to stay the implementation of the injunction in an effort to give FWS a chance to weigh whether to file an appeal will only continue to irreparably harm Plaintiffs and delay the forward movement of this litigation. Plaintiffs would also like to take this opportunity to inform the Court that they intend to file an opposition to proposed Intervenors' Motion to Intervene as Defendants (Dkt. No. 55 (May 15, 2015)).

Dated: May 19, 2015

Respectfully submitted,

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[1] Given that these issues are already quite fully briefed, it may be appropriate for the Court ultimately to exercise its discretion to order "separate trials" of Plaintiffs' statutory claims "[f]or convenience, to avoid prejudice, or to expedite and economize." *See* Fed. R. Civ. P. 42(b); *see also Corvello v. N.E. Gas Co. Inc*., 247 F.R.D. 282, 286 (D.R.I. 2008) (in deciding whether to bifurcate claims, "the overarching consideration is whether separate trials will facilitate the fair and efficient adjudication of the case").

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