UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEFENSE DISTRIBUTED, et al., Plaintiffs,	§	
v.	§	No. 1:15cv372-RP
U.S. DEPARTMENT OF STATE, et al., Defendants.	§	

INDIVIDUAL DEFENDANTS' RESPONSE IN PARTIAL OPPOSITION TO PLAINTIFFS' MOTION TO STAY

The Supreme Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson v. Callahan*, 55 U.S. 223, 231-32 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). Despite this repeated emphasis, Plaintiffs seek to postpone consideration of the individual defendants' qualified immunity and other preliminary defenses until after the pending interlocutory appeal. This Court should reject Plaintiffs' request for a blanket stay. Not only is the individual defendants' motion to dismiss properly before this Court, but the balance of interests strongly favors resolution of that motion now.

BACKGROUND

This case involves two sorts of claims: (1) injunctive claims against the United States government itself, including official-capacity claims; and (2) a damages claim against federal employees as individuals. *See* Am. Compl. ¶¶ 42, 47, 51, 55, 58-59 (ECF No. 47); *see generally Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (explaining the difference between official-capacity and individual-capacity claims). The injunctive claims against the government are bound up with Plaintiffs' request for a preliminary injunction, the denial of which the Plaintiffs have appealed. (*See* ECF No. 43, 45.) The government is set to respond further after that interlocutory appeal. (*See* ECF No. 52.)

Meanwhile, the damages claim against the individual defendants has proceeded. Even before Plaintiffs noticed their interlocutory appeal, the individual defendants had moved to

dismiss. (*See* ECF No. 44.) After Plaintiffs amended their complaint to add additional allegations (ECF No. 47), the individual defendants renewed their motion to dismiss (ECF No. 61), and this Court set a briefing schedule (*see* ECF No. 56).

Plaintiffs have now moved to stay all further proceedings, including the already-scheduled briefing on the individual defendants' renewed motion to dismiss. In conference, the individual defendants, supported by the government, proposed instead that the motion to dismiss proceed, but that discovery and related matters be stayed. Plaintiffs rejected this approach.[1]

ARGUMENT

I. This Court has authority to decide the individual defendants' motion to dismiss.

Plaintiffs' appeal on the preliminary injunction did not divest this Court of jurisdiction to consider the individual defendants' motion to dismiss. "Although appeals transfer jurisdiction from the district court to the appellate court concerning those aspects of the case involved in the appeal, the district court is nonetheless free to adjudicate matters that are not involved in that appeal." *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011) (internal quotation marks omitted). A "narrow interpretation" of what aspects of the case are involved in the appeal is "normally appropriate." *Id.* "[A]n issue in the district court is only an 'aspect[] of the case involved in the appeal' if the appeal and the claims before the district court address the same legal question." *Id.* at 909; *see also Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 233 (5th Cir. 2009) (holding that district court could proceed even though issues before it were "practically identical" to those on appeal).

The legal questions raised by the motion to dismiss are not the same as those presented in the interlocutory appeal. The first basis for dismissal is the lack of a *Bivens* cause of action to sue individual federal employees. *See* Ind. Defs.' Renewed Mot.To Dismiss 6-9. A court will decline to create a *Bivens* action (1) if an alternative process for protecting a claimed interest already exists or (2) if special factors counsel against creating a new damages action. *de la Paz v. Coy*,

[1] In violation of Local Rule CV-7(i), Plaintiffs did not confer on their additional request for expedited briefing, *see* Pls.' Mot. To Stay 10. That request is now moot in any event.

786 F.3d 367, 375 (5th Cir. 2015). Addressing only the first of these alternative grounds, Plaintiffs argue that the Fifth Circuit will consider the adequacy of administrative processes created by arms-export control regulations. *See* Pls.' Mot. 3. But the issue Plaintiffs intend to raise in the Fifth Circuit is whether these administrative processes justify a purported prior restraint of speech. *See id.* at 7. In contrast, the question raised by the motion to dismiss is whether these administrative procedures suggest, explicitly or implicitly, that Congress would not expect the courts to engraft a *Bivens* action onto a pre-existing regulatory scheme. *See de la Paz*, 786 F.3d at 375. Moreover, the existence of alternative processes is not dispositive, for the Supreme Court has "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means of challenging a constitutional deprivation in federal court." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001). In this case, multiple special factors would counsel against creating a new *Bivens* action even if no alternative process already existed, so this Court may determine that a *Bivens* remedy is inappropriate without addressing alternative processes at all. *See* Ind. Defs.' Renewed Mot. To Dismiss 7-9. Therefore, determining that no *Bivens* action exists in this context would not "encroach upon" the Fifth Circuit's jurisdiction, as Plaintiffs suggest, *see* Pls.' Mot. 3.

The second basis for dismissal is qualified immunity. *See* Ind. Defs.' Renewed Mot. 10-21. Plaintiffs suggest that this Court cannot address immunity because the interlocutory appeal may decide whether certain arms-export controls violate their constitutional rights. Pls.' Mot. 3. But immunity is not dependent on a finding that any application of arms-export controls was constitutional. Rather, "courts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). Thus, whatever the Fifth Circuit may decide about the constitutional questions before it, this Court may grant qualified immunity on the more limited ground that existing precedent did not put those questions "beyond debate." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). Moreover, Plaintiffs do not explain how the interlocutory appeal could conceivably address the

inadequacy of their factual allegations to show that two of the individual defendants took any action with respect to Defense Distributed, *see* Ind. Defs. Renewed Mot. 20-21. [2]

The third basis for dismissal is lack of personal jurisdiction. *See* Ind. Defs.' Renewed Mot. 22-25. Plaintiffs do not offer any reason why the Fifth Circuit would address this Court's personal jurisdiction over nonresident individual defendants, and there is none. Thus, this Court may consider that ground for dismissal as well.

The fourth basis for dismissal, at least as to any claims based on the purported rights of third parties, is lack of standing. *See* Ind. Defs.' Renewed Mot. 25. Although the Fifth Circuit may address Plaintiffs' standing to raise injunctive claims, there is no reason for the Fifth Circuit to address standing to raise damages claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 353, 352 (2006) (explaining that a party must demonstrate standing for each claim it seeks to press). Accordingly, the interlocutory appeal does not create any obstacle to deciding that issue either.

II. A blanket stay is unwarranted.

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). That burden is "heavy" in the absence of statutory authorization, and "[w]here a discretionary stay is proposed, something close to genuine necessity should be the mother of its invocation." *See Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n.6 (5th Cir. 1985). Moreover, "a court should tailor its stay so as not to prejudice other litigants unduly." *Id.* In exercising its inherent power to stay "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," a district

[2] Plaintiffs' reliance on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) aptly illustrates the distinction between the questions expected to be raised by their appeal and the ultimate question posed by the individual defendants' assertion of qualified immunity. *See* Pls.' Mot. 5-6. Plaintiffs argue that the issuance of *Reed* in June 2015 "altered our First Amendment jurisprudence" and "abrogated" prior circuit cases, leaving in its wake a "conflict that lower courts will have to struggle with." *See id.* (internal quotation marks omitted). Even if the Fifth Circuit must now "struggle with" the effect of *Reed*, that struggle would only reinforce the individual defendants' entitlement to qualified immunity. It is precisely when precedent is unsettled that qualified immunity protects government employees from suits for money damages. *See Wilson v. Layne*, 526 U.S. 603, 617-18 (1999).

must "weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

Plaintiffs propose that this Court weigh four factors: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." Pls.' Mot. 2 (citing *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983)). As the cases cited by Plaintiffs illustrate, however, this four-factor test typically applies when a court is asked to stay an *order*. *See Baylor*, 711 F.2d at 39; *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). In this case, because Plaintiffs are not seeking to stay the effect of any order, it is not immediately apparent that the four-factor test, as opposed to an assessment of the competing interests, should control. *See Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1107 n.1 (N.D. Cal. 2010) (explaining that the four-factor test is inapplicable where plaintiffs sought to stay proceedings rather than order).

Nevertheless, whether this Court demands a showing of genuine necessity in light of all competing interests or applies the four-factor test proposed by Plaintiffs (which requires an assessment of any competing interests in any event), the result is the same: a stay is unwarranted, especially in light of the individual defendants' strong interest in having their immunity defense addressed at this earliest possible stage, *see Pearson*, 555 U.S. at 231-32.

A. Plaintiffs have not made a strong showing that they are likely to succeed on the merits.

The first factor in the four-part test Plaintiffs favor is "whether the stay applicant has made a *strong* showing that he is *likely* to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (emphasis added) (applying four-factor test to motion to stay removal order). Even if this factor is relevant, Plaintiffs would not satisfy it. This Court has already explained, in a thorough opinion, that Plaintiffs have not shown a likelihood of success on the merits of their injunctive claims. *See* Order on Pls.' Mot. for Prelim. Inj. 16, 22, 24 (ECF No. 43). Plaintiffs

concede that this Court need not, in addressing their motion to stay, "conclude that its decision was in error." Pls.' Mot. To Stay 4.[3]

B. Plaintiffs have not shown a stay is necessary to avoid injury.

Plaintiffs have not shown the "genuine necessity" required to justify a discretionary stay, *see Coastal (Bermuda) Ltd.*, 761 F.2d at 203 n.6. Nor have they shown the sort of "irreparable injury" that would support a stay under the four-factor test they propose using, *see Nken*, 556 U.S. at 434.

Plaintiffs warn of the purportedly "extreme prejudice of simultaneously having to litigate the same issues in two courts." Pls.' Mot. 8. As discussed above, the issues raised by the motion to dismiss are not the same as those on appeal. *See supra* pp. 2-4. And if Plaintiffs' professed concern about litigating in two courts were genuine, they could have filed their motion to stay weeks ago, rather than filing their Amended Complaint, awaiting the filing of a renewed motion to dismiss, and haggling over a briefing schedule for that motion. Now, given their delay, not only must they produce a motion to stay and presumably a reply, but they also will likely have to file (or at least prepare) a response to the motion to dismiss in any event.

The amount of briefing Plaintiffs must produce does not prejudice them either. Plaintiffs do not offer any reason why their team of six attorneys from four different organizations cannot respond to the motion to dismiss and file an appellants' brief. And Plaintiffs could have reduced their own workload (as well as this Court's, *see infra* pp. 9-10) by simply responding to the motion to dismiss rather than litigating over a stay.

[3] Plaintiffs argue that they should only have to show "a *substantial* case on the merits." *Id.* (emphasis added). But a court applying the four-factor test must find *strong* showing of *likely* success, "except where there is a serious legal question involved *and the balance of equities heavily favors a stay*." *Weingarten*, 661 F.3d at 910 (emphasis added); *see also Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992) (highlighting additional requirements). Even assuming Plaintiffs' appeal would raise a "serious legal question," the equities do not heavily favor a stay, *see infra* pp. 6-10, so a "substantial case" would not be enough.

C. A stay will substantially harm the individual defendants by denying prompt consideration of their motion to dismiss asserting qualified immunity.

Plaintiffs have disregarded entirely the strong interest that the individual defendants have in prompt resolution of their motion to dismiss. Claims against individual government employees "'can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Because these substantial social costs can accrue even before liability is imposed, the Supreme Court "'repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson v. Callahan*, 55 U.S. 223, 231-32 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). A stay would prevent resolution of the individual defendants' immunity at this earliest possible stage, and instead force them to wait through an appeal on separate issues before their immunity defense is even considered.

That a stay would also postpone discovery would not eliminate injury to the individual defendants. To be sure, protection from discovery is "one of the most salient benefits of qualified immunity," and discovery is not allowed unless the pleadings "'assert facts which, if true, would overcome the defense of qualified immunity.'" *Backe v. LeBlanc*, 691 F.3d 645, 648 (2012).[4] But the disruption caused by discovery is not the only problem qualified immunity is designed to address. Qualified immunity also guards against the risk that "fear of personal monetary liability" will "unduly inhibit officials in the discharge of their duties," *Anderson*, 483 U.S. at 638, and "deter[] . . . able citizens from acceptance of public office," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Even aside from the anxiety associated with having one's personal assets

[4] For this reason, a stay of proceedings in the district court is necessary when an individual defendant immediately appeals the denial of a motion to dismiss asserting qualified immunity, as is his or her right. *See Williams v. Brooks*, 996 F.2d 728, 730 n.2 (5th Cir. 1993). In contrast, a plaintiff's interlocutory appeal of some other issue in a case involving qualified immunity does not trigger any automatic stay, for the entitlement to avoid pretrial proceedings belongs to the defendant employee, not the plaintiff, *see Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (explaining that qualified immunity "is meant to give *government officials* a right, not merely to avoid standing trial, but also to avoid the burdens of such pre-trial matters as discovery") (emphasis added, internal quotation marks omitted).

at risk, individual federal employees named as defendants encounter complications obtaining home or education loans, since many loan applications require the disclosure of pending lawsuits. Nor is discovery the only way that individual-capacity claims can threaten to disrupt the operations of government. As this case illustrates, plaintiffs seeking to interfere in the rule-making process may use individual-capacity claims against regulators to lend a false veneer of credibility to spurious assertions about conflicts of interest. *See* Pls.' Notice re: Defs.' Recent Proposed Rules 2 n.1 (ECF No. 30). Promptly addressing motions to dismiss asserting qualified immunity, like the one now before this Court, helps minimize these burdens, which accrue even in the absence of discovery.[5]

Plaintiffs express concern that the individual defendants "could suffer substantial harm in incurring substantial time and costs in litigating issues that will be moot if the Fifth Circuit rules in the government's favor." Pls.' Mot. 8. But that concern is misplaced. Because the individual defendants agree that pre-trial matters other than their motion should be stayed, their only further responsibility in this Court during the pendency of Plaintiffs' appeal will be a reply in support of their motion to dismiss. Moreover, a stay is unlikely to moot the need to brief and consider the individual defendants' threshold defenses, for the only scenario in which Plaintiffs' proposed stay would eliminate this need depends on a string of contingencies. First, the Fifth Circuit would have to address Plaintiffs' constitutional arguments, which it need not do; instead, it may affirm this Court's denial of a preliminary injunction on the alternative basis that this Court did not abuse its discretion in weighing the equities, *see* Order on Prelim. Inj. 6-7. Second, the Fifth Circuit would have to rule against Plaintiffs on those constitutional questions, despite Plaintiffs' insistence that it should not, *see* Pls.' Mot. 4-8. Third, Plaintiffs would have to voluntarily dismiss their claims in response to the Fifth Circuit's ruling, which they have not yet agreed to do. If any of these contingencies fails to occur, the proposed stay would simply delay, rather than

[5] Plaintiffs' promise of an "expedited" appeal, *see* Pls.' Mot. 8, is empty. Even if the Fifth Circuit expedites the briefing schedule, and even if the Fifth Circuit then decides the appeal expeditiously, no party to the appeal has yet ruled out a petition for certiorari.

obviate, the need for briefing and consideration of the of the individual defendants' motion to dismiss.

D. A stay would not be in the interest of the public or this Court because it would likely delay the resolution of this case without preserving judicial resources.

Plaintiffs' discussion of the public interest focuses on proposed revisions to arms-export regulations, but Plaintiffs do not explain how postponing consideration of the individual defendants' motion to dismiss would hasten any decision on the proposed rules. *See* Pls.' Mot. 9-10. Plaintiffs express concern about "resolving constitutional issues" that this case raises, *id.* at 10, but their proposed blanket stay would only forestall final resolution of this case, and thus would cut against "economy of time and effort" for this Court and the litigants, *see Landis*, 299 U.S. at 254.

After a blanket stay, the individual defendants would likely renew their motion to dismiss, and the parties would have to brief that motion. While that motion is pending, no discovery could proceed. *See Backe*, 691 F.3d at 648. And if the motion were denied, the individual defendants would have a right to interlocutory appeal, *see id.*, during which pretrial proceedings in this Court would be stayed, *see Williams*, 996 F.2d 728 at n.2 (5th Cir. 1993). Not even discovery purportedly unrelated to the individual-capacity claims could proceed, since qualified immunity protects the individual defendants from having to "participate in the [discovery] process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position." *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009). Thus, Plaintiffs' approach creates a risk of successive interlocutory appeals during which this case could not proceed beyond the most preliminary stage.[6]

[6] If the individual defendants' motion were denied while preliminary-injunction appeal is pending, the individual defendants could appeal immediately. *See Backe*, 691 F.3d at 648. If that occurred, however, the preliminary-injunction appeal and the qualified-immunity appeal could be consolidated or at least resolved closer in time, so that whatever claims remained after the appeals would return more expeditiously to this Court in a posture conducive to further proceedings. Plaintiffs' vague warning of "potential complications that might arise if further litigation in the district court generated a second interlocutory appeal," Pls.' Mot. 8, is therefore unfounded.

Moreover, this delay would not be likely to conserve judicial resources. *Cf. Landis*, 299 U.S. at 254-55. The Fifth Circuit's decision may not provide dispositive guidance on the individual defendants' threshold defenses, which raise issues different from the questions before the Fifth Circuit, *see supra* pp. 2-4, 8. This Court will probably address those threshold defenses in any event. Indeed, Plaintiff's insistence on a blanket stay has only added to this Court's burden. If Plaintiffs had simply responded to the motion to dismiss, this Court would have only that motion to consider. Instead, this Court will now have to decide Plaintiffs' motion for a stay, which will necessitate review of the motion to dismiss anyway to understand why the defenses it raises do not implicate the interlocutory appeal, *see supra* pp. 2-4.

III. A more tailored stay would be appropriate.

Plaintiffs' motion need not be denied in its entirety. Instead, a stay can be "tailor[ed] . . . so as not to prejudice other litigants unduly," as the Fifth Circuit has directed, *Coastal (Bermuda) Ltd.*, 761 F.2d at 203 n.6. Because discovery is disallowed until a district court determines that a complaint alleges facts that overcome qualified immunity, *see Backe*, 691 F.3d at 648, the parties have appropriately refrained from any discovery. Even if the individual defendants' motion to dismiss were not granted in full, any discovery allowed would have to be tailored to the question of immunity. *See id.* And at this juncture, it is neither practical nor feasible to present a discovery plan, *see* Fed. R. Civ. P. 26(f), or a proposed scheduling order, *see* Local Rule CV-16. Thus, while Plaintiff's request for a blanket stay should be denied, a stay of discovery and related pre-trial proceedings should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion to stay only insofar as it seeks a stay of discovery and related proceedings and deny Plaintiff's motion insofar as it seeks to postpone consideration of the individual defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 29, 2015, I electronically filed this document with the Clerk of Court using the CM/ECF system, which will send notification to

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