No. 17-1443

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re RHONDA EZELL, JOSEPH BROWN,
WILLIAM HESPEN, ACTION TARGET, INC.,
SECOND AMENDMENT FOUNDATION, INC.,
AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners.

On Petition for a Writ of Mandamus to the
United States District Court for the
Northern District of Illinois, Eastern Division
No. 10 C 5135
The Honorable Virginia M. Kendall, Judge Presiding.

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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ISSUE PRESENTED

Whether the extraordinary remedy of mandamus is warranted when plaintiffs seek entry of judgment on the basis of arguments that they did not present to the district court; the City does not deny that plaintiffs are entitled to judgment; and the parties have not completed litigation of the City's motion to stay the effective date of the court's injunction or judgment.

STATEMENT OF THE CASE

On January 18, 2017, this court issued an opinion in which it affirmed the district court's invalidation of M zoning for shooting ranges in section 17-5-0207 of the Chicago Municipal Code, and reversed the district court's decision upholding the constitutionality of the 500-foot distancing requirement in section 17-9-0120, as well as the age restriction for shooting ranges in section 4-151-100(d). Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017). This court remanded the matter to the district court "with instructions to modify its injunction consistent with this opinion." Id. at 898. The court's mandate issued on February 9, 2017. R. 303.

On February 14, 2017, the City filed a motion seeking a 180-day stay of "the effective date of any injunction and judgment entered by the court consistent with the opinion issued in this case by the United States Court of Appeals for the Seventh Circuit on January 18, 2017." Petition, Addendum 3 at 1. The City also moved the district court to continue to stay, for that same period, the effective date of the district court's prior opinion and judgment dated September 29, 2014, that

invalidated the restriction on hours of operation in section 17-5-0207 of the Chicago Municipal Code. The City explained that the time was necessary to enact reasonable regulations governing the location and operation of gun ranges in Chicago and a regulatory scheme allowing for minors to patronize gun ranges to protect public safety while also respecting Second Amendment rights, and that a similar period of time for new legislation had been allowed following adverse decisions in cases that had invalidated other aspects of gun regulation. Petition, Addendum 3 at 2-3.

On February 21, 2017, the district court set a briefing schedule for the City's motion. R. 309. Plaintiffs' response is due March 7, 2017, and the City's reply on March 14, 2017. R. 303. Plaintiffs have not filed anything in the district court since this court's mandate issued.

Instead, on February 28, 2017, plaintiffs filed a petition for writ of mandamus in this court, seeking a writ directing the district court "to immediately, without any further delay or variance, execute and enter judgment upon this Court's mandate." Petition for Writ of Mandamus 1.

The City has never taken the position, either in its motion to stay the effective date of the injunction and judgment or anywhere else, that this court's mandate should be stayed, or that the district court should not promptly enter judgment consistent with that mandate.

ARGUMENT

Plaintiffs' request for the extraordinary relief of a writ of mandamus requiring the district court to enter judgment consistent with this court's mandate should be denied. The district court has not refused to enter such judgment, and the City concedes plaintiffs' entitlement to entry of that judgment. Plaintiffs also did not present to the district court any of the arguments they have raised in their petition, and thus those arguments are not properly presented in this court. Beyond waiver, this court's intervention through a writ of mandamus is unnecessary. Plaintiffs have a readily available remedy to address concerns they have about any delay in the entry of judgment: they can bring it to the district court's attention and ask the court to enter judgment. Since the City would not have contested the request to enter judgment, the district court surely would have entered judgment consistent with the court's mandate.

To the extent that plaintiffs are asking this court to order the district court to enter an injunction that is effective immediately, that request should be denied as well. As an initial matter, plaintiffs did not present an argument to the district court against a stay of enforcement, either. Moreover, plaintiffs conflate the entry of judgment with the separate question whether the judgment should be immediately effective. This court's mandate provides no clear right to an injunction with an immediate effective date. Plaintiffs are not entitled to a writ of mandamus directing in the first instance the manner in which the district court should rule on

the City's motion for a stay of the effective date of any injunction or judgment. Plaintiffs' petition should therefore be denied.

PLAINTIFFS ARE NOT ENTITLED TO A WRIT OF MANDAMUS.

Mandamus is a "drastic remedy traditionally used to confine a lower court to the lawful exercise of its jurisdiction or to compel it to exercise its authority when it has a duty to do so." United States v. Lapi, 458 F.3d 555, 560-61 (7th Cir. 2006). "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). The party seeking the writ must: (1) have no other adequate means to attain the relief he desires; (2) have a clear right to the writ; and (3) show that the writ is otherwise appropriate. Cheney v. U.S. District Court for District of Columbia, 542 U.S. 367, 380-81 (2004); In re Sandahl, 980 F.2d 1118, 1119 (7th Cir. 1992). Plaintiffs fail to meet these standards. This court should deny plaintiffs' petition, and allow these matters to be resolved by the district court in the first instance.

A. Mandamus Is Inappropriate Because Plaintiffs Have An Adequate Remedy To Obtain Entry Of Judgment.

Mandamus is not available where the party has an alternative, effective remedy. That is precisely the situation here. Plaintiffs seek the entry of judgment, which they argue is required by this court's mandate. Petition 19-21. The City agrees that plaintiffs are entitled to the entry of judgment, and did not ask the district court to delay the entry of judgment. Nor has the district court denied plaintiffs the relief they seek. To the contrary, plaintiffs did not even ask the

district court to enter judgment. Plaintiffs thus have a readily available remedy to obtain entry of judgment – they should simply ask the district court to enter judgment.

Plaintiffs' petition relies on nothing more than the passage of three weeks since this court issued its mandate and that, in the meantime, the district court set a briefing schedule on the City's motion to stay the effective date of the judgment. Petition 9. But the City's motion neither argued against entry of judgment nor urged any delay of its entry. To the contrary, the City's motion presumed that judgment, including an injunction, would be entered, and asked only that the effective date be stayed so that appropriate legislative action could be taken.

As for the passage of time, if plaintiffs believe the district court has been too slow in entering judgment, they should have filed an appropriate motion to bring their argument before the district court. Having failed to do so, they could fairly be charged with waiver of the arguments they raise in their petition. It is well settled that "[a] party waives any argument that it does not raise before the district court." Hojnacki v. Klein-Acosta, 285 F.3d 544, 549 (7th Cir. 2002). At a minimum, plaintiffs' failure to put before the district court the arguments they make before this court should disentitle them to the extraordinary remedy of mandamus, when they have not exhausted an easy and obvious alternative remedy – namely simply asking the district court to enter judgment. The petition should be denied on this basis.[1]

[1] Plaintiffs speculate that the City has "abusive purpose" in "avoiding a

B. Plaintiffs Have No Clear Right To An Injunction With An Immediate Effective Date.

To the extent plaintiffs are seeking, in addition to entry of judgment, an injunction that is effective immediately, they have no clear right to that relief, and mandamus should be denied on that basis as well. Throughout the petition, plaintiffs complain about the City's request for a stay of the effective date of any injunction once entered, suggesting that the City should not need or be entitled to additional time to develop appropriate zoning and age regulations following this court's decision. E.g., Petition 2, 7-8, 10, 18, 23-24. But plaintiffs rely only on this court's mandate as the source of its right to relief. Id. at 14-17. And the mandate does not direct the district court to enter an injunction that is effective immediately. Instead, this court's mandate directed the district court "to modify the injunction consistent with the opinion." Petition, Addendum 1. Because the mandate does not require an immediate effective date, or indeed say anything about the effective date of the injunction, the mandate does not itself supply a clear right to any relief concerning that effective date. Nor do plaintiffs identify any other source of such a right.

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district court judgment" in order to construct an argument that plaintiffs "did not prevail for purposes of 42 U.S.C. § 1988." Petition 4. See id. at 11 (City's "expressed goal is to buy enough time to re-legislate prior to the judgment, effectively moot the case, and deny judgment altogether" so that it may mount a "scorched-earth 1988 defense centered on the lack of a district court judgment"). That accusation is unfair and unfounded. As we explain, the City did not contest the entry of judgment against it. Nor does the City intend to contest that plaintiffs are prevailing parties. But we reserve the right to challenge the fee petition on any other appropriate basis.

Plaintiffs conflate necessary entry of the modified injunction pursuant to the mandate with the setting of an appropriate effective date of that injunction. But those are separate issues. Plaintiffs cite no authority that precludes the district court, once it enters a modified injunction, from considering arguments for and against whether it is appropriate to delay the effective date of its injunction so that the City may develop alternative regulations and if so, for how long. And Fed. R. Civ. P. 62(a)(1) seems to contemplate that the district court retains discretion to stay even the "final judgment in an action for an injunction": there is no automatic stay in such cases, but the court is permitted to "orde[r] otherwise."

Nothing in this court's mandate curtails the district court's discretion on that issue, either. If anything, the court's opinion in this case recognizes that zoning regulations need to be "carefully drafted to serve actual public interests while at the same time making commercial firing ranges practicable in the city," Ezell II, 846 F.3d at 894, and such careful consideration takes time. Although plaintiffs criticize the City for not having an amended ordinance immediately at hand, Petition 13, they cite nothing that required the City to engage in the process of researching alternative approaches and drafting revised regulations before this court invalidated its existing regulations, and without the guidance of the court's analysis. Nor would that make sense as a burden to put on the government. The City prevailed below on the 500-foot buffer zoning and age restrictions, and the district court stayed its own injunction on the manufacturing zoning. The City was under no legal obligation to revise these while the case was pending in this court.

Beyond that, as the City's stay motion explains, it has been common in cases where legislation affecting public safety is invalidated to allow the government some period of time to enact new regulations. Petition, Addendum 3 at 3-4 (citing Shepard v. Madigan, 734 F.3d 748, 751 (7th Cir. 2013) (noting that plaintiffs' "insistence on 'first day' relief is "untenable"; staying mandate); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (staying mandate for 180 days so that State could "craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment"); Illinois Association of Firearms Retailers v. City of Chicago, 10 C 4184, R. 242 (N.D. Ill. Jan. 14, 2014) (granting 180-day stay of effective date of injunction to provide City sufficient time to draft and enact regulations regarding firearms sales). Plaintiffs assert that Moore and Shepard are different because there, this court stayed its own mandate. Petition 8. That is certainly true, and again, to be clear, the City's motion did not seek to avoid the effect of this court's mandate, or otherwise delay entry of judgment. Rather, as we explain, a stay of the mandate was not necessary – the mandate says nothing that limits the district court's ability to delay the effective date of the modified injunction. Plaintiffs also attempt to distinguish Moore and Shepard in other ways, Petition 12-13, but none of these differences undermines this court's recognition in those cases that some amount of time is necessary to enact a new gun law in response to an adverse decision by this court.

In short, plaintiffs have no clear right, free from the district court's discretion, to an immediately effective injunction that would allow the City no time

to put alternative regulations in place.

CONCLUSION

Plaintiffs' petition for writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 21(d)

In accordance with Fed. R. App. P. 21(d), I certify that the Answer to the Petition for Writ of Mandamus complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because it contains 2,209 words, beginning with the words "ISSUE PRESENTED" on page 1 and ending with the words "Respectfully submitted" on page 9. In preparing this certificate, I relied on the word count of the word-processing system used to prepare the brief, which was Microsoft Word.

/s Suzanne M. Loose
SUZANNE M. LOOSE, Attorney

CERTIFICATE OF SERVICE

I certify that on March 2, 2017, I electronically filed the attached Answer to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in this appeal are registered CM/ECF users who will be served by the CM/ECF system on March 2, 2017.

/s Suzanne M. Loose
SUZANNE M. LOOSE, Attorney