

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

NICHOLAS HARRISON, ET AL.,

Plaintiffs,

v.

JAMES N. MATTIS, ET AL.,

Defendants.

CIVIL ACTION NO. 1:18-CV-00641

OPPOSITION TO MOTION TO ALTER BRIEFING SCHEDULE

Plaintiffs oppose consolidating their opposition to Defendants' forthcoming motion to dismiss with the reply in support of their motion for preliminary injunction. Simply put, Defendants' proposal does more harm than good, and Defendants have provided no good reason to depart from the orderly and conventional briefing for motions in this Court.

First, Defendants' Motion to Alter Briefing Schedule should be denied because motions to dismiss for failure to state a claim and for lack of subject matter jurisdiction and motions for preliminary injunction present different issues dictating distinct legal inquiries.¹ Whereas motions to dismiss examine the adequacy of the pleadings—and may be mooted by the filing of an amended complaint under Fed. R. Civ. P. 15(a)(1)(B)²—Plaintiff's motion for preliminary injunction examines four equitable factors and requires examining evidence far beyond the Complaint. *Compare Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (establishing standard for evaluating motion

¹ Defendants have indicated they intend to file motions under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

² Plaintiffs have not been provided with any detail about the issues Defendants intend to raise in their motions. Thus, they cannot say with confidence whether they will amend their complaint and moot Defendants' motion.

to dismiss for failure to state a claim), *and David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (evaluating a motion to dismiss for lack of standing), *with United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013) (describing four-factor equitable inquiry for preliminary injunction). Defendants' proposed motion to dismiss may be resolved by looking only to the Complaint. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). Then again, it may not. Defendants' motion may require examination of *different* issues far beyond the Complaint.³ The point is that with so little information from Defendants about the nature of their motion and the true degree of overlap, combined with the different legal standards involved in the motions, Defendants have not shown any good reason for the unusual combined briefing they seek.

Second, Defendants' motion should be denied because the constitutional issues presented here warrant full vetting through complete briefing. The existence of some overlap between motions is not surprising since this action is limited to a single count. But some overlap does not warrant limiting Plaintiffs' briefing to a single consolidated opposition and reply, especially with the complexity of the issues raised in Plaintiffs' motion for preliminary injunction. Defendants allude to some possible future "reasonable extension of [page] limits," Dkt. 36 at 2, and thus acknowledge that their proposal will prejudice Plaintiffs by limiting the pages Plaintiffs have. Yet, Defendants propose deferring those issues to a motion that Plaintiffs must later bring. *Id.* Defendants' invitation for further motion practice will be unnecessary if briefing proceeds in the ordinary course. Indeed, notwithstanding vague statements regarding overlap, Plaintiffs' significant constitutional claim should not be given the short shrift Defendants implicitly ask the

³ This may depend on whether Defendants intend to bring a factual or facial challenge to the Court's jurisdiction. Defendants have thus far refused to indicate what their intentions are in this regard.

Court to impose on Plaintiffs' opportunity to brief their motion and any opposition to Defendants' motion. Instead, each motion should be fully briefed following established procedures.

Third, while Plaintiff has and will continue to accommodate changes in the timing of briefing as a matter of professionalism, granting Defendants' motion would short-change Plaintiff's time to oppose Defendants' motion to dismiss by a day while extending Defendants' time to respond to the Complaint⁴ and file its reply. Under the Local Rule 7(F)(1), Plaintiffs have 14 days to respond to Defendants' forthcoming motion to dismiss. Yet, Defendants proposed briefing schedule seeks a 13-day turnaround. Defendants, on the other hand, ask for an additional 3 days beyond Local Rule 7(F)(1)'s standard 6 days to file their reply brief. Thus, Defendants shorten Plaintiffs' time in one instance while extending their own time twice.

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Alter Briefing Schedule be denied.

⁴ Defendants currently must answer or otherwise respond to the Complaint by August 13, 2018.

Dated: August 3, 2018

Respectfully submitted,

/s/ Scott A. Schoettes

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August 2018, I caused the foregoing to be filed electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: August 3, 2018

Respectfully submitted,

/s/ Andrew R. Sommer
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