UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

EDEN ROGERS and

BRANDY WELCH,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

ALEX AZAR, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

ADMINISTRATION FOR CHILDREN AND FAMILIES;

LYNN JOHNSON, in her official capacity as Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES;

STEVEN WAGNER, in his official capacity as Principal Deputy Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES;

HENRY MCMASTER, in his official capacity as Governor of the STATE OF SOUTH CAROLINA; and

MICHAEL LEACH, in his official capacity as State Director of the SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Defendants.

Case No. 6:19-cv-01567-TMC

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT HENRY MCMASTER'S MOTION TO STAY PROCEEDINGS AND SECOND MOTION FOR AN EXTENSION OF TIME, DEFENDANT MICHAEL LEACH'S SECOND MOTION FOR EXTENSION OF TIME IN WHICH TO ANSWER OR OTHERWISE PLEAD, AND THE FEDERAL DEFENDANTS' MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT

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Plaintiffs Eden Rogers and Brandy Welch ("Plaintiffs") respectfully submit this memoradum of law in opposition to Defendant Henry McMaster's Motion to Stay Proceedings (ECF No. 31) ("MTS") and Second Motion for an Extension of Time (ECF No. 32), Defendant Michael Leach's Second Motion for Extension of Time in Which to Answer or Otherwise Plead (ECF No. 33), and the Federal Defendants' Motion for Extension of Time to Respond to Complaint (ECF No. 36).

PRELIMINARY STATEMENT

Defendant McMaster alone seeks an open-ended stay of proceedings in this case pending resolution of the motions to dismiss in *Maddonna v. United States Department of Health and Human Services, et al.*, No. 6:19-cv-00448-TMC (D.S.C.). The other Defendants do not join in that motion or its reasoning;[1] they simply request that all Defendants be subject to the same deadline for responding to the Complaint. And for good reason because Defendant McMaster's motion is wholly without merit.

First, Defendant McMaster's motion to stay (as well as his request for an extension of time) is untimely and should be denied on that basis alone. Over a month ago, Defendant McMaster *agreed* to the deadline he now seeks to stay or extend, and Defendant McMaster cannot and does not even purport to suggest that there are any changed circumstances to justify moving that deadline at all, much less for belatedly filing motions for a stay and an extension that could not be decided under this Court's Local Civil Rules until after the deadline had already passed.

Second, Defendant McMaster's argument that it would be more efficient to

[1] Defendant McMaster says only that "[a]ll the Defendants' counsel have consented to" his motion. (MTS at 1 n.3.)

resolve the motions to dismiss in the *Maddonna* case before the parties even brief motions to dismiss in this case is specious. Defendant McMaster was fully aware of the *Maddonna* case, the issues it raises, and the motion to dismiss briefing in that case at the time he agreed on June 27 to respond to the Complaint in this case by July 30. If Defendant McMaster's efficiency arguments had any merit (and they do not), they could have been and should have been raised and resolved at that time. In any event, given that there are both signficant similarities and differences between this case and *Maddonna,* it is inevitable that there will be separate motion to dismiss briefing in this case. Thus, the most efficient course is not to stay this case but rather to have motion to dismiss briefing proceed so the Court can consider and resolve the motions to dismiss in both cases at the same time.

Third, Plaintiffs here seek injunctive and declaratory relief to remedy egregious violations of their fundamental constitutional rights so they can pursue being foster parents without being excluded by any of the state-contracted child placing agencies ("CPAs") available to other prospective foster parents. No argument offered by Defendant McMaster could possibly outweigh Plaintiffs' interest in a timely vindication of their rights.

BACKGROUND

Plaintiffs are a same-sex couple who were rejected as prospective foster parents by Miracle Hill Ministries ("Miracle Hill")—South Carolina's largest CPA—because they failed to meet Miracle Hill's religious requirements for prospective foster parents. (Compl. ¶¶ 2, 8, ECF No. 1.) On May 30, Plaintiffs brought this suit against Defendants for unlawfully authorizing and enabling state-contracted, government-funded CPAs, like Miracle Hill, to use religious eligibility criteria to exclude qualified families from fostering children in the public child welfare system. (*Id.* ¶ 1.) Plaintiffs have brought claims for Establishment Clause

violations and Equal Protection violations (for discrimination based on religion, sex, sexual orientation and exercise of the fundamental right to marry), and seek declaratory and injunctive relief. (*Id.* ¶ 1, Counts I-IV, Prayer for Relief.)

Also before this Court is *Maddonna*, a separate case brought by a Catholic woman against substantially the same defendants. (*Maddonna* Compl. ¶¶ 12, 15-20, ECF No. 1.) Unlike Plaintiffs here, Plaintiff Aimee Maddonna did not apply to be a foster parent but, instead, she and her husband and children were denied the opportunity by Miracle Hill to volunteer to work with foster children. (*Id.* ¶¶ 25, 35, 40, 42.) In addition to claims for Establishment Clause violations and Equal Protection violations (for discrimination based on religion), Maddonna brought claims under the Administrative Procedure Act and for Substantive Due Process violations. (*Id.* Counts I-VII.)

Briefing on the motions to dismiss in *Maddonna* was complete on June 10. (*Maddonna*, ECF Nos. 33, 34, 42.) Pursuant to Federal Rule of Civil Procedure 12(a)(1), Defendants Leach's and McMaster's responses to the Complaint in this case were due June 26 and July 2, respectively—21 days from the date each Defendant was served with the Complaint. (ECF Nos. 18, 19.) In late June, Defendants Leach and McMaster both sought and received Plaintiffs' consent to extend their time to respond to the Complaint until July 30, the same day the Federal Defendants' response was due pursuant to Federal Rule of Civil Procedure 12(a)(2). (ECF No. 7.) Defendant Leach filed his motion for an extension on June 25 (ECF No. 25), and Defendant McMaster filed his on June 27. (ECF No. 28.) The Court granted both motions. (ECF Nos. 27, 29.) Since then, nothing material has changed in either this case or *Maddonna* prior to Defendants' filing the instant motions on July 23 and 24. (ECF Nos. 31, 32, 33, 36.)

ARGUMENT

I. DEFENDANTS' MOTIONS FOR A STAY AND AN EXTENSION ARE UNTIMELY.

This Court need not reach the merits of any of the current motions because they are all untimely and should be denied on that basis alone. Under this Court's Local Civil Rule 7.03, "[a]ttorneys are expected to file motions immediately after the issues raised thereby are ripe for adjudication". Here, from the day the Complaint in this case was filed, Defendants knew of the *Maddonna* case, the issues it raises and the pendency of the motion to dismiss briefing in that case. Indeed, Defendants here are also defendants in *Maddonna* and participated in the motion to dismiss briefing there. Yet no Defendant raised with Plaintiffs the issues Defendant McMaster now raises in support of a stay at the time the schedule for responding to the Complaint was set in June. Nor did they promptly raise those issues thereafter. Instead, Defendant McMaster waited until July 23—just one week before the agreed upon deadline for responding to the Complaint—to file his motions for a stay and an extension, and then the other Defendants followed with their copycat motions for an extension. By delaying in this way, Defendants guaranteed that their motions could not be briefed and decided according to the schedule prescribed by this Court's Local Civil Rules[2] before the agreed deadline for responding to the Complaint had passed. But Defendants neither sought expedited briefing on their motions, nor even alerted the Court to the timing issue created by their delay.

There is no justification for this delay and, importantly, no Defendant even

[2] Local Civ. Rule 7.06 (D.S.C.) ("Any memorandum or response of an opposing party must be filed with the court within fourteen (14) days of the service of the motion unless the court imposes a different deadline."); Local Civ. Rule 7.07 (D.S.C.) ("[A] party desiring to reply to matters raised initially in a response to a motion . . . shall file the reply within seven (7) days after service of the response").

attempts to offer an explanation or justification for their delay. This alone warrants denial of the motions under well-established precedent. *See Crescom Bank v. Terry*, 269 F. Supp. 3d 708, 710 (D.S.C. 2017) ("The issues the [Defendants] raise in their motion became ripe when the Court entered the July 6 order. Filing their motion nearly a month later—and after the order's deadlines expired—was in no way consistent with Rule 7.03. The untimeliness of the [Defendants'] motion is a sufficient basis for denying it.") (internal citation omitted); *Hoffman v. Price*, No. 2:15-cv-1527 DBP, 2019 WL 498991, at *5 (E.D. Cal. Feb. 8, 2019) ("[I]f these cases were legitimately linked in such a way that warranted a stay of the instant action . . . the last minute nature of the request to stay the action supports its denial . . . .") (internal citations omitted); *Tolonen v. Heidorn*, No. 12-cv-782-BBC, 2013 WL 6183828, at *1 (W.D. Wisc. Nov. 26, 2013), *aff'd on other grounds*, 599 F. App'x 591 (7th Cir. 2015) ("The last-minute nature of plaintiff's motion is reason enough to deny it . . . .").

The Court should not reward Defendants' dilatory conduct and should instead deny all the motions as untimely and set a prompt deadline by which Defendants must respond to Plaintiffs' Complaint.

II. THE CIRCUMSTANCES PRESENTED HERE DO NOT WARRANT EXERCISE OF THE COURT'S DISCRETION TO ISSUE A STAY.

None of the discretionary factors that this Court may consider favors issuance of a stay in this case: (1) judicial economy would be better served by the Court's denying the stay and deciding the motions to dismiss in this case and in *Maddonna* at the same time;

(2) Defendants will suffer no legally cognizable harm by responding to the Complaint;

(3) Plaintiffs would be left to suffer the effects of unremedied constitutional violations during the pendency of a stay; (4) both the *Maddonna* case and this case are in the same pleadings phase;

and (5) a stay would not serve to meaningfully simplify the matters at issue.[3] Even were the Court "satisfied that a pressing need [for a stay] exists", Defendant McMaster has not shown and cannot show that his "need" (delaying litigation he considers inconvenient) "outweighs any possible harm to the interests" of Plaintiffs (delaying vindication of their fundamental constitutional rights). *NAS*, 2011 WL 13141594, at *1 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)); *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) ("The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative."). Accordingly, Defendant McMaster's motion to stay should be denied.

A. Issuing a Stay Would Not Promote Judicial Economy.

Defendant McMaster argues that Plaintiffs' Complaint "presents factual and legal issues similar to those presented in Maddonna's complaint" such that judicial resources would be saved by staying this case until the motions to dismiss in *Maddonna* are decided. (MTS at 7.) That is wrong. Indeed, no judicial resources would be saved by staying proceedings as Defendant McMaster suggests because the Court's decision on the motions to dismiss in *Maddonna* will not dispose of Plaintiffs' claims here. *See Brown-Thomas*, 2019 WL 1043724, at *5 ("Although denying a stay can risk waste, the opposite can also be true: *granting* a stay may

[3] A court may consider the following factors when deciding whether to stay legal proceedings: "the potential prejudice to the non-moving party", "the hardship and inequity to the moving party if the action is not stayed" and "the judicial resources that would be saved by avoiding duplicative litigation if the case is in fact stayed". *Brown-Thomas v. Hynie*, No. 1:18-cv-02191-JMC, 2019 WL 1043724, at *3 (D.S.C. Mar. 5, 2019) (internal quotation marks omitted). In addition, a court may consider "whether discovery is complete and a trial date is scheduled" and "whether a stay would simplify the matters at issue". *Saferack, LLC v. Bullard Co.*, No. 2:17-cv-1613-RMG, 2018 WL 3696557, at *1 (D.S.C. Aug. 3, 2018) (quoting *NAS Nalle Automation Sys., LLC v. DJS Sys., Inc.*, No. CV 6:10-2462-TMC, 2011 WL 13141594, at *1 (D.S.C. Nov. 23, 2011) (Cain, J.)).

waste judicial resources.") (citing *Gibbs v. Plain Green, LLC*, 331 F. Supp. 3d 518, 526 (E.D. Va. 2018)) (emphasis in original).[4]

Contrary to Defendant McMaster's contention, the two cases do not present identical questions. (*See* MTS at 6-7.) Although there certainly are overlapping questions presented, there also are issues presented here that will not be addressed in *Maddonna*. For example, Plaintiffs here challenge Miracle Hill's religious eligibility criteria that disqualify families headed by same-sex couples regardless of their faith. (Compl. ¶ 2.) There are no such allegations in *Maddonna*, and thus any decision on the motions to dismiss in that case will not address discrimination against same-sex applicants. (*See Maddonna* Compl. ¶¶ 1-12.) In addition, Plaintiffs here are prospective foster parents who applied to Miracle Hill and were turned away because they fail to meet the agency's religious requirements. (Compl. ¶ 8.) By contrast, Maddonna did not apply to be a foster parent through Miracle Hill and instead sought to volunteer with foster children (*Maddonna* Compl. ¶ 25), a distinction Defendant McMaster himself emphasized in his briefing in support of his motion to dismiss in that case. (*Maddonna*, Def. Henry McMaster's Reply In Supp. Of the Mot. To Dismiss (ECF No. 33), at 2 ("The Complaint does not allege or support an inference that Plaintiff ever applied to foster through Miracle Hill, any other CPA, or DSS directly.")) No matter how the Court rules in *Maddonna*, there will still be separate motion to dismiss briefing in this case, and judicial resources will not

[4] The cases cited by Defendant McMaster are inapposite. They involve either granting a stay while a higher court decides an issue in another case that would provide a binding resolution of the issues in the case at hand (*see Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 732-33 (D. Md. 2018)), or granting a stay where multiple suits or claims were brought by the same parties on virtually identical facts or claims (*see Bechtel Corp. v. Local 215, Laborers' Int'l Union of N. Am.*, 544 F.2d 1207, 1215 (3d Cir. 1976); *Kohlman v. Gen. Motors Fin. Co., Inc.*, No. 5:18-cv-300-BO, 2018 WL 6620888, at *2 (E.D.N.C. Dec. 18, 2018); *State Farm Life Inc. Co. v. Bolin*, No. 5:11-cv-1, 2011 WL 1810591, at *3 (W.D.N.C. May 11, 2011)).

be saved by a stay. In fact, the course of action that best promotes "the economy of time and effort for [the Court], for counsel, and for litigants" is for the Court to decide the motions to dismiss in both cases together, with the benefit of briefing from all parties. *See Landis*, 299 U.S. at 255 (vacating for abuse of discretion district court's order granting a stay of all proceedings pending the resolution of a separate case challenging the constitutionality of the same legislation at issue).

B. Defendants Do Not Face Unnecessary Hardship Absent a Stay.

Defendant McMaster's argument that he would face unnecessary hardship absent a stay fares no better. He asserts that "litigating substantially the same legal issues arising from very similar operative facts" forces Defendants to duplicate their efforts and that such supposed duplication "presents an unnecessary hardship".[5] (MTS at 7-8.) But that assumes that a decision in the *Maddonna* case might obviate the need for motion to dismiss briefing here, which, as discussed, is wrong because of the important differences between the two cases.[6] Having previously agreed that he would respond to the Complaint in this case prior to a ruling on the

[5] Cases cited by Defendant McMaster turned on specific factual scenarios that do not exist here. *See Israel v. Johnson & Johnson,* No. 12-cv-2953-JKB, 2012 WL 6651928, at *2-3 (D. Md. Dec. 9, 2012) (remand motions stayed pending transfer to an existing Multidistrict Litigation); *Davis v. Biomet Orthopedics, LLC*, No. 12-3738-JKB, 2013 WL 682906, at *2-3 (D. Md. Feb. 22, 2013) (same); *Arris Enters. LLC v. Sony Corp*., No. 17-cv-02669-BLF, 2017 WL 3283937, at *2-4 (N.D. Cal. Aug. 1, 2017) (stay granted where statutory arbitration would have required the court to sever a single action into two duplicative proceedings absent a stay).

[6] Citing *Sam Yang (U.S.A.), Inc. v. ENI Dist, Inc*., No. JKB-16-2958, 2016 WL 7188447 (D. Md. Dec. 12, 2016), Defendant McMaster argues that Defendants would suffer by having to litigate two cases simultaneously "when the disposition of the claims in one case might result practically in the disposition of some or all the claims in the other". (MTS at 8.) But the ruling in *Sam Yang* turned on the fact that one action would "decide the predicate upon which [the other] case is based," as it would determine whether the plaintiff "actually has, or had, contractual rights that could have been violated by [the defendant]". 2016 WL 7188447, at *4. No similar circumstances are present here.

motions to dismiss in *Maddonna*, Defendant McMaster simply changed his mind and decided it might be more tactically advantageous to have this Court's decision on the motions to dismiss in *Maddonna* before responding to Plaintiffs' Complaint. But Defendant McMaster's litigation preferences are not the same as hardships. *See Brown-Thomas*, 2019 WL 1043724, at *6 ("potential inconvenience . . . alone does not rise to the level of a hardship or inequity") (citation and quotations omitted). Indeed, it is telling that none of the other Defendants joined in the motion to stay despite also having briefed motions to dismiss in *Maddonna*, suggesting they recognize that doing so here would not present a hardship.

Perhaps more importantly, it is well-established that, where, as here, a far-reaching government action is challenged, "it is not unfair to expect that the Government would be required to devote significant resources to litigation defending its action". *Int'l Refugee Assistance Project*, 323 F. Supp. 3d at 735 (holding that the factor of hardship to the moving party did not weigh in favor of a stay). Expending significant resources litigating motions to dismiss in cases such as this and *Maddonna* is normal and does not constitute a hardship justifying a stay. *See Gibbs*, 331 F. Supp. 3d at 526 (holding that "the risk of needless duplication of work and waste of judicial resources is low" where defendants faced litigating just three cases); *Williford*, 715 F.2d at 127-28 (holding that even the foreseeable need to litigate multiple, complex asbestos claims did not justify a stay).

C. Granting a Stay Would Result in Substantial Prejudice to Plaintiffs.

Defendant McMaster argues that a "stay that lasts until the motions to dismiss in *Maddonna* are resolved" (which he speculates, without basis, could be "relatively soon") would result only in a "short delay" and would not cause Plaintiffs any harm. (MTS at 8.) That is baseless and incorrect. During the pendency of a stay, Plaintiffs will continue to suffer irreparable harm from Defendants' unremedied constitutional violations and to face practical

barriers to their ability to foster a child. Undue delay in the vindication of constitutional rights is a legally cognizable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that even short term loss of constitutional freedoms constitutes irreparable harm); *Scott v. Clarke*, No. 3:12-CV-00036, 2014 WL 3734327, at *3 (W.D. Va. July 28, 2014) (noting that, after the "progress of this case to trial has already been delayed", any "further delay of plaintiffs' day in court would be prejudicial to plaintiffs' legitimate interest in a timely resolution of their [constitutional] claims"); *see also Williford*, 715 F.2d at 128 (recognizing "plaintiff's right to have his case resolved without undue delay").

Moreover, to the extent there are overlapping issues between this case and *Maddonna*, a stay would further prejudice Plaintiffs by essentially sanctioning the adjudication of their constitutional rights without affording them the opportunity to fully prosecute their claims. The Supreme Court has recognized that "[o]nly in rare circumstances will a litigant in one case be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255.

Finally, the "'human aspects' of the potential impact of a stay upon Plaintiffs are of 'particular significance in balancing the competing interests of the parties'."[7] *Int'l Refugee Assistance Project*, 323 F. Supp. 3d at 736 (citing *Williford*, 715 F.2d at 127-28). Even as Plaintiffs continue to suffer from the "painful and humiliating experience of government-funded discrimination", they remain "ready, willing, and able to serve as foster parents" with their two

[7] *Automated Tracking Sols., LLC v. Awarepoint Corp.*, No. 2:11-cv-424, 2012 WL 12893449, at *3 (E.D. Va. June 5, 2012), and *Sorenson ex rel. Sorensen Research & Dev. Trust v. Black & Decker Corp.*, No. 06-cv-l572-BTM, 2007 WL 2696590, at *4 (S.D. Cal. Sept. 10, 2007), cited by Defendant McMaster, are both inapposite because the courts in those cases recognized that damages were fully capable of compensating plaintiffs for any harm suffered during the pendency of a stay. That is not the case here. Monetary damages will not compensate Plaintiffs for the discriminatory harm they suffered and continue to suffer.

daughters, ages seven and ten, and have moved into a larger home to accommodate more children. (Compl. ¶¶ 8, 75, 77, 90.) Here, the substantial, continued prejudice Plaintiffs would suffer weighs heavily against issuing a stay.

D. Because Both Cases Are in the Pleading Stage, that *Rogers* Is in "Nascent Status" Is Largely Irrelevant.

Defendant McMaster asserts that the "nascent status" of this litigation counsels in favor of granting his motion to stay. (MTS at 9.) However, *Maddonna* is also in the pleading stage, and the cases cited by Defendant McMaster are thus inapposite. *See In re Mut. Funds Inv. Litig.*, No. 04-MD-15862, 2011 WL 3819608, at *2 (D. Md. Aug. 25, 2011) (staying District Court proceedings where related case had been decided, appealed and fully briefed to the Circuit Court); *see also Michelin Ret. Plan v. Dilworth Paxson LLP*, No. 616-CV-03604-HMH-JDA, 2017 WL 9292252, at *2-4 (D.S.C. May 10, 2017) (staying civil case where plaintiffs were "still in the process of properly serving all defendants" while a "related criminal case" was already in the sentencing phase).[8]

E. A Stay Would Not Meaningfully Simplify the Issues in this Case.

Although Defendant McMaster claims that "the resolution of the dispositive motions in *Maddonna* will likely simplify the resolution of similar issues in this case" (MTS at

[8] The two other cases Defendant McMaster cites do not compel a different result as they both involve staying patent litigation pending a necessary, predicate reexamination of a patent claim by a patent tribunal. *See Pleasurecraft Marine Engine Co. v. Indmar Prod. Co.*, No. 8:14-CV-04507-MGL, 2015 WL 5437181, at *2 (D.S.C. Sept. 15, 2015) (stay pending examination of patent claim by Patent Trial and Appeal Board, which "*must* be considered by the Court when construing a claim term") (emphasis added); *NAS*, 2016 WL 7209807, at *3 (stay pending *ex parte* reexamination proceeding before the United States Patent and Trademark Office, which was "not only appropriate, but *necessary*" because the result of the reexamination proceeding would "directly affect consideration of both Defendant's affirmative defenses and counterclaims") (emphasis added). In each case, the courts granted the stay out of necessity, not because the patent litigation was in "nascent status".

9-10), he fails to identify a single, specific issue that would be clarified by the issuance of a stay here. Defendant McMaster's request for a stay is merely a dilatory litigation tactic. For the same reasons explained in Section II.A, *supra,* Plaintiffs' Complaint raises issues distinct from those in *Maddonna* and merits equal consideration.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny all of Defendants' pending motions.

August 6, 2019

/s/ M. Malissa Burnette

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