

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., a New Jersey membership corporation; SOCIETY OF AMERICAN LAW TEACHERS, INC., a New York corporation; COALITION FOR EQUALITY, a Massachusetts association; RUTGERS GAY AND LESBIAN CAUCUS, a New Jersey association; PAN NICKISHER, a New Jersey resident; LESLIE FISCHER, a Pennsylvania resident; MICHAEL BLAUSCHILD, a New Jersey resident; ERWIN CHEMERINSKY, a California resident; and SYLVIA LAW, a New York resident,

Plaintiffs-Appellants,

No. 03-4433

v.

DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense; ROD PAIGE, in his capacity as U.S. Secretary of Education; ELAINE CHAO, in her capacity as U.S. Secretary of Labor; TOMMY THOMPSON, in his capacity as U.S. Secretary of Health and Human Services; NORMAN Y. MINETA, in his capacity as U.S. Secretary of Transportation; and TOM RIDGE, in his capacity as U.S. Secretary of Homeland Security,

Defendants-Appellees.

**MOTION FOR CLARIFICATION OR ALTERNATIVELY FOR
RECONSIDERATION OF THE COURT'S JANUARY 20, 2005 ORDER**

INTRODUCTION

On January 20, 2005, this Court issued an order in connection with the government's motion to stay the mandate pending petition to the Supreme Court for a writ of certiorari. The Order, which states that it is being issued pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure, stays the mandate in the above-captioned appeal "until further order of the Court." The Order refers to an "Answer due" date of January 28, 2005. Subsequent to the Order, both Plaintiffs and the government proceeded to file additional submissions relating to the government's stay motion, and the motion is now fully briefed.

Notwithstanding its reference to an answer date, the Order is not pursuant to Rule 41(d)(1), under which the mandate is stayed only temporarily, pending disposition of the underlying stay motion. After discussions with the Office of the Clerk of the Court, Plaintiffs remain unable to ascertain whether the Order in fact provided only such a temporary stay under Rule 41(d)(1), or ordered a final stay under Rule 41(d)(2), in effect granting the government's motion.

Plaintiffs respectfully request clarification on this point. Alternatively, if the Order indeed was intended to be a resolution on the merits of the government's motion for stay, Plaintiffs respectfully move for reconsideration. The Court did not give reasonable notice to the parties that it intended to decide the government's motion prior to the expiration of the 8-day time period allowed for a response

under Federal Rule of Appellate Procedure 27(a)(3)(A). Had it, Plaintiffs would have filed their opposition on a date earlier than indicated on the order that issued. In any case, this Court now has the full submissions of the parties. Plaintiffs respectfully submit that the government's motion for stay should be decided after consideration of all of these submissions. Therefore, Plaintiffs ask that this Court reconsider its January 20 order to the extent it is intended as a final order resolving the government's motion for stay.

FACTUAL BACKGROUND

On Friday, January 14, 2005, the government moved this Court pursuant to Federal Rule of Appellate Procedure 41(d) for a stay of the mandate. Because of the holiday, the Court was next open for business on Tuesday, January 18. On that day, counsel for Plaintiffs called the designated case manager in the Office of the Clerk of the Court and left a voicemail message to notify the Court that Plaintiffs planned to file a response to the government's motion, and to confirm the Court's understanding that a response filed on January 27 would be timely. Declaration of Sharon E. Frase ("Frase Decl.") ¶ 3. On Wednesday, January 19, the case manager returned counsel's call, and left a voice message in which she acknowledged that Plaintiffs would be responding to the government's motion. *Id.* ¶ 4.

The next day, Thursday, January 20, the Court issued an Order staying the mandate in this appeal. Counsel for Plaintiffs received their copy of the Order on

Wednesday, January 26. *Id.* ¶ 5. Consistent with counsel’s exchange with the case manager, the Order referred to January 28, 2005 as the due date for an “Answer.” Plaintiffs filed their response to the government’s stay motion on January 27, 2005. *Id.*

The government also appears to have proceeded under the belief that its motion remains pending. On Thursday, January 27, the government notified the Court that, in response to an inquiry from the Plaintiffs, it would be filing a Motion for Leave to File Amended Declaration. The Government filed its motion, along with the corrected Declaration of Maj. Gen. Jack L. Rives, on Friday, January 28. The government also filed a Reply to Appellants’ Opposition to Motion to Stay the Mandate in support of their original Motion to Stay the Mandate on Monday, January 31.

After filing its responses to the government’s motions, counsel learned that recruiters from various branches of the armed forces were contacting law schools and informing them that the Court had granted the government’s motion for a stay while the government petitioned the Supreme Court for a writ of certiorari. Frase Decl. ¶ 9. Counsel contacted the Office of the Clerk of the Court on Monday, January 31, to seek clarification regarding the January 20 Order. *Id.* ¶ 10. After failing to reach the case manager assigned to this appeal, counsel spoke with another case manager in the Clerk’s office, who confirmed her interpretation that

the Order effected only a “temporary” stay of the mandate pending resolution of the government’s motion. *Id.* After counsel noted the reference in the Order to Rule 41(d)(2), the case manager told counsel she would contact chambers and confirm that her interpretation was correct. *Id.* Counsel confirmed the substance of this conversation in a January 31 cover letter to the Clerk of the Court enclosing Plaintiffs’ Statement of Opposition in Response to Appellees’ Motion for Leave to File Amended Declaration.

On Wednesday, February 2, the case manager contacted counsel. The case manager explained that her interpretation had not been correct—that according to the Court, the January 20 order was a “final” resolution of the stay motion under Rule 41(d)(2). *Id.* ¶ 11. That same day, counsel also spoke with the case manager assigned to the appeal, who, after pointing out the phrase in the Order that the mandate was stayed “until further order of the Court,” said that the Court had received Plaintiffs’ response. *Id.* ¶ 13.

ARGUMENT

The Court’s January 20 Order contains an ambiguity that Plaintiffs respectfully ask this Court to resolve. While the Order sets forth a January 28 due date, by which the Plaintiffs could respond to the government’s stay motion, it also states that Court is staying the mandate pursuant to Rule 41(d)(2), pending the government’s filing of a petition for a writ of certiorari. Despite multiple

conversations with the Office of the Clerk of the Court, Plaintiffs have been unable to ascertain whether the stay thus ordered is merely temporary, pending the resolution of the underlying motion, or is “final” and the Court intends to take no further action pending the Supreme Court’s resolution of any certiorari petition.

If the Order is indeed a “final” stay, Plaintiffs move, in the alternative, for reconsideration of the Order. According to Federal Rule of Appellate Procedure 27, Plaintiffs had 8 business days from January 14—until at least January 27—in which to respond to the government’s motion. Fed. R. App. P. 27(a)(3)(A). The Rule provides that a motion for stay may be granted before the termination of the 8-day period “only if the court gives reasonable notice to the parties that it intends to act sooner.” *Id.* Plaintiffs received no written notice of such an intention. Nor did the case manager who responded to counsel’s inquiry on January 19 mention that the Court intended to resolve the motion prior to considering Plaintiffs’ response.

Plaintiffs’ response to the government’s motion is not the only submission that warrants review before the motion is decided. By its own hand, the government undermined its irreparable harm argument in subsequent filings. After an inquiry from Plaintiffs prompted the government to review the survey results referenced in the Rives Declaration, counsel for the government informed the Court that it needed to correct certain assertions in that declaration that were not

supported by the underlying data. These “corrections” warrant close consideration before a decision is made regarding the stay motion, as they confirm Plaintiffs’ assertion that the government has failed to put forward any evidence of harm.

CONCLUSION

The Plaintiffs, the government, and representatives of the Clerk’s office have all understood the Court’s January 20, 2005 to effect only a temporary stay while the Court considered the merits of the government’s motion. If this is indeed what the Court intended, Plaintiffs request clarification, either by separate order or by final decision of the motion itself. Otherwise, Plaintiffs request reconsideration of that Order, so they may have the opportunity to respond to the government’s

motion allowed them under the Federal Rules, and upon reconsideration, for a denial of the government's motion for stay of the mandate.

DATED: February 2, 2005

Respectfully submitted,



E. Joshua Rosenkranz

Sharon E. Frase

Jean-David Barnea

HELLER EHRMAN WHITE & McAULIFFE LLP

120 West 45th Street

New York, NY 10036

Telephone: (212) 832-8300

Warrington S. Parker, III

Anagha Dandekar Clifford

HELLER EHRMAN WHITE & McAULIFFE LLP

333 Bush Street

San Francisco, CA 94104

Telephone: (415) 772-6000

Peter E. Gratzinger

HELLER EHRMAN WHITE & MCAULIFFE LLP

275 Middlefield Road

Menlo Park, CA 94025

Telephone: (650) 324-7000

Attorneys for Plaintiffs-Appellants

AFFIRMATION OF SERVICE

Jean-David Barnea, an attorney duly admitted to practice before the courts of the State of New York, affirms the truth of the following allegations under penalty of perjury:

I am an attorney with the firm of Heller Ehrman White & McAuliffe LLP, whose address is 120 West 45th Street, New York, NY 10036. On February 2, 2005, I caused to be served by Federal Express a true and correct copy of the foregoing Appellants' Motion for Clarification or Alternatively for Reconsideration of the Court's January 20, 2005 Order, and an accompanying declaration, dated February 2, 2005, upon the following:

Appellees:

Gregory G. Katsas, Deputy Assistant Attorney General
Douglas N. Letter, Attorney, Appellate Staff, Civil Division
Scott R. McIntosh, Attorney, Appellate Staff, Civil Division
U.S. Department of Justice
Civil Division, Room 9554
601 D Street, NW
Washington, D.C. 20530
(202) 514-4052

Counsel for Amici:

John L. Moore, Jr., Esq.
Louis Rouleau, Esq.
E. O'Brien Kelley, Esq.
Piper Rudnick LLP
1200 Nineteenth Street NW
Washington, D.C. 20036
(202) 861-3900

Paul M. Smith, Esq.
William M. Hohengarten, Esq.
Daniel Mach, Esq.
Jenner & Block LLP
601 13th Street NW
Suite 1200 South
Washington, D.C. 20005
(202) 939-6000

Lawrence S. Lustberg, Esq.
Philip G. Gallagher, Esq.
Jonathan L. Hafetz, Esq.
Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.
One Pennsylvania Plaza, 37th Floor

New York, NY 10119-3701
(212) 649-4700

Sam Heldman, Esq.,
Hillary Ball, Esq.
Gardner, Middlebrooks, Gibbons, Kittrell & Olsen
2805 31st Street NW
Washington, D.C. 20008
(202) 965-8884


Tyler M. Paetkau, Esq.
Melissa J. Goldberg, Esq.
Jonathan Kentner, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Walter Dellinger, Esq.
Pamela Harris, Esq.
Toby Heytens, Esq.
O'Melveny & Myers LLP
1625 Eye Street NW
Washington, D.C. 20006-4001
(202) 383-5300

Howard J. Bashman, Esq.
1250 Virginia Drive, Suite 1000
Fort Washington, PA 19034
(267) 419-1230

Steven W. Fitschen, Esq.
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

Dated: February 2, 2005
New York, NY


JEAN-DAVID BARNEA