IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

RACHEL WELTY and AFTYN BEHN,	§	
Plaintiffs,	§	
v.	§	Case No. 3:24-cv-00768
BRYANT C. DUNAWAY, JASON LAWSON, JENNINGS H. JONES, ROBERT J. CARTER, RAY WHITLEY, ROBERT J. NASH, GLENN FUNK, STACEY EDMONSON, BRENT COOPER, RAY CROUCH, and HANS SCHWENDIMANN,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS [DOC. 48]

I. INTRODUCTION

The Defendants have moved this Court to stay proceedings here pending resolution of the Defendants' interlocutory appeal. *See* Doc. 48. But to support their motion, the Defendants have paired unpersuasive reasoning with the wrong legal standard. For these reasons, the Defendants' motion to stay should be **DENIED**.

II. ARGUMENT

"A stay is an 'intrusion into the ordinary processes of administration and judicial review[.]'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). Accordingly, a stay is "'is not a matter of right, even if irreparable injury might otherwise result to the appellant[.]'" *See id.* (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672

(1926)); *see also Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) ("[A]n appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits.'") (quoting *Moltan Co. v. Eagle–Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir.1995) (in turn quoting 9 M. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 203.11, at 3–54 (2d ed. 1989))). "Notably, the United States Supreme Court has previously observed that 'the other proceedings in the lower court are not to be stayed' pending the 'granting or continuing an injunction[.]'" *S. Glazer's Distributors of Ohio, LLC v. Great Lakes Brewing Co.*, No. 2:16-CV-861, 2016 WL 10637077, at *2 (S.D. Ohio Dec. 14, 2016) (quoting *Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 161 (1906). Further,

> More recent authority, including authority from this circuit, also anticipates that "the case will proceed forward expeditiously in the district court despite the pendency of" an interlocutory appeal. *United States v. Price*, 688 F.2d 204, 215 (3d Cir. 1982). *See also Pharm. Care Mgmt. Ass'n v. Maine Atty. Gen.*, 332 F.Supp.2d 258, 260 (D. Me. 2004) (finding "no inconsistency here between the interlocutory appeal and proceeding toward final resolution of the merits" and denying motion to stay discovery pending an appeal of an order granting a preliminary injunction); *Chrysler Motors Corp. v. Auto Body Panels of Ohio*, No. C-1-89-393, 1990 WL 32749, at *1-2 (S.D. Ohio Jan. 22, 1990) (concluding that a "stay of discovery pending the decision of the Federal Circuit will not necessarily promote the just, speedy, and inexpensive resolution of this action" and that "it would be an abuse of discretion to grant a stay of proceedings in this case"); *S.E.C. v. Crofters, Inc.*, 351 F. Supp. 236, 265 (S.D. Ohio 1972) (denying requested stay because factual questions remained for resolution "as they are not in a posture, at present, for disposition by an appellate court" and the denial of the stay "is consistent with the rule that 'an appeal from the denial or granting of a temporary injunction should not ordinarily delay the final trial of the case on its merits' " (internal citations omitted)), *rev'd on other grounds*, 493 F.2d 1304 (6th Cir. 1974); 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3921.2 (3d ed. update Apr. 2016) ("Interlocutory injunction appeals would come at high cost if the trial court were required to suspend proceedings pending disposition of the appeal.... [C]ases involving injunctive relief are apt to present an urgent need for action.").

Id. at *2.

"While the Court has the inherent discretionary power to stay proceedings as part of its ability to manage its docket, it must 'tread carefully' in granting a motion to stay, because every party has a 'right to a determination of its rights and liabilities without undue delay.'" *FemHealth USA, Inc. v. Williams*, 640 F. Supp. 3d 809, 812 (M.D. Tenn. 2022) (quoting *Ohio Envtl. Council v. U.S. Dist. Ct., S.D. Ohio*, 565 F.2d 393, 396 (6th Cir. 1977) (in turn citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936)); *see also Gray v. Bush*, 628 F.3d 779, 785 (6th Cir. 2010) (same). Nevertheless, "[p]ursuant to Fed. R. Civ. P. 62(c), the Court in its discretion may stay . . . litigative proceedings . . . pending interlocutory appeal of a preliminary injunction." *Ne. Cable Television, LLC v. DIRECTV, LLC*, No. 4:18-CV-2559, 2019 WL 13241955, at *1 (N.D. Ohio Aug. 12, 2019).

> Four factors govern the consideration whether to grant a stay pending interlocutory appeal: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)). Those four factors are essentially identical to those considered when issuing a preliminary injunction in the first instance, *Hilton*, 481 U.S. at 776, but to show a likelihood of success on the merits at this stage, [a movant] must "demonstrate to a reviewing court that there is a likelihood of reversal" on interlocutory appeal. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Id.

Here, the Defendants do not attempt to satisfy these standards. *See generally* Doc. 48. That is because they have drawn their proposed standard, *id.* at 2, from a case that involved an "overlap of issues in criminal and civil proceedings," which implicates materially different considerations. *See F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 628 (6th Cir. 2014). Further, to the extent the Defendants' response does touch on

relevant considerations, it does so unpersuasively.

The Defendants begin by asserting that "Defendants would be unfairly prejudiced absent a stay." Doc. 48 at 2. As ostensible support for this claim, they assert that they moved to dismiss Ms. Welty and Ms. Behn's claims based on the Defendants' claimed "entitlement to sovereign immunity"—which confers "an *immunity from suit*" when it applies—and that this Court's rejection of that claim is appealable under the collateral order doctrine. *See id.* at 2–3. The Defendants further argue that, "[i]f the Sixth Circuit reverses the denial of sovereign immunity, which is at least 'conceivable,' then this Court would lack jurisdiction over Plaintiff's remaining claims." *Id.* at 3.

There are two significant problems with this argument:

First, in denying the Defendants' motion to dismiss, this Court ruled that the Ms. Welty and Ms. Behn have Article III standing to maintain their claims. *See* Doc. 40 at 21 ("Welty and Behn have clearly and credibly asserted that they intend to engage in behavior for which the defendants could prosecute them under the recruitment provision."); *id.* at 20–26. That determination—which is the law of the case and is not pending appeal—necessarily precludes the Defendants' sovereign immunity defense and forecloses it, at least until after a final judgment issues. As the Sixth Circuit has explained:

> It would be a perverse reading of *Young* to say that, although Russell might have an Article III injury before the Attorney General directly communicates his intent to prosecute him, the Eleventh Amendment would nonetheless simultaneously bar us from enjoining the Attorney General's initiating a prosecution. Rather, **at the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy this element of *Ex parte Young*.** *See Young*, 209 U.S. at 154–55, 28 S.Ct. 441. Russell properly named Conway as a defendant, and the district court properly denied Conway's motion to dismiss.

Russell v. Lundergan-Grimes, 784 F.3d 1037, 1047 (6th Cir. 2015) (emphasis added).

Second, as to the Defendants' argument that it is "conceivable" that the Sixth Circuit will reverse this Court's denial of sovereign immunity, *see* Doc. 48 at 3, Ms. Welty and Ms. Behn call the Court's attention to what it has already said it thinks of the Defendants' argument on the matter in a passage of its order that speaks for itself:

> For such an argument ever to prevail in an actual case, the bar for establishing an imminent threat of enforcement in connection with *Ex parte Young* would have to be higher than the bar for establishing pre-enforcement standing. Otherwise, this sovereign immunity argument would be, by definition, redundant; it could only prevail if the court lacked jurisdiction anyway. As Welty and Behn have pointed out, however, the Sixth Circuit has flatly rejected the idea that *Ex parte Young* requires a greater likelihood of enforcement than the standing analysis does, holding that "[i]t would be a perverse reading of Young to say that, although [a plaintiff] might have an Article III injury before [a prosecutor] directly communicates his intent to prosecute him, the Eleventh Amendment would nonetheless simultaneously bar [the courts] from enjoining the" prosecution. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015).
>
> In the defendants' Reply, they accuse Welty and Behn of having "mischaracterize[d]" the defendants' position by suggesting "that *Young* 'requires more than the credible threat of enforcement necessary to establish an Article III injury.'" (Doc. No. 33 at 3 (quoting Doc. No. 29 at 24).) The defendants assure the court that they "have argued nothing of the sort." (Doc. No. 33 at 3.) If Welty and Behn did mischaracterize the defendants' position, they did so only by assuming that the defendants were advancing the version of the argument that would actually make sense. Now that the defendants have clarified their position, **their argument regarding sovereign immunity, by definition, fails**. For most of the plaintiffs' claims, they have established a sufficient threat of enforcement to give rise to an Article III injury, which is also sufficient for *Ex parte Young* purposes.

See Doc. 40 at 28–29 (emphasis added).

For these reasons, the Defendants cannot credibly premise their claim to a stay here on a duplicative sovereign immunity defense that is precluded by this Court's unappealed standing ruling and which, "by definition, fails." Doc. 40 at 29. That unpersuasive argument also accounts for nearly the Defendants' entire asserted

justification for seeking a stay here. *See* Doc. 48 at 2–4.

The Defendants next assert that "a stay would not unfairly prejudice Plaintiffs" because "[t]his Court has preliminarily enjoined Defendants from enforcing the 'recruitment' provision against Plaintiffs, other than in the limited circumstances described in the Court's order[,]" and "the preliminary injunction protects Plaintiffs from any enforcement action against them by any of these Defendants under the Act's recruitment provision during the pendency of the appeal." *See* Doc. 48 at 4. Such an argument would be true of *any* request for a stay that follows an interlocutory appeal of a preliminary injunction, though. But it does not, by itself, warrant a stay, the Defendants have failed to account for the facts that "[a] stay is an 'intrusion into the ordinary processes of administration and judicial review'" and interferes with litigants' right to timely resolution of their claims. *Nken*, 556 U.S. at 427 (cleaned up). Thus, rather than mechanically granting defendants a stay pending appeal of a district court order granting a preliminary injunction because a plaintiff necessarily has the protection of an injunction under such circumstances, courts "must 'tread carefully' in granting a motion to stay, because every party has a 'right to a determination of its rights and liabilities without undue delay.'" *FemHealth USA, Inc.*, 640 F. Supp. 3d at 812 (cleaned up).

The Defendants' next asserted justification for a stay is that "a stay of all proceedings pending resolution of the appeal would advance judicial economy and sufficiency." *See* Doc. 48 at 4. But

> The Sixth Circuit will not make a final determination as to whether [the Plaintiffs] will prevail on the merits of [their] claims. Instead, the Sixth Circuit will review this Court's legal conclusions de novo and its factual findings for clear error and will apply a "highly deferential" abuse of discretion standard of review when evaluating this Court's grant of the preliminary injunction.

S. Glazer's Distributors of Ohio, LLC, 2016 WL 10637077, at *3 (quoting *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (in turn quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007))). Furthermore,

> [A] stay is not likely to simplify this case. Defendants' appeal is of a preliminary ruling, so even if the Court of Appeals were to reverse granting of the preliminary injunction, that ruling would be unlikely to narrow the case or change the scope of discovery required to resolve the case. The [Sixth] Circuit will not be making a final determination as to any of the issues presented, including standing.

Indiana State Conf. of Nat'l Ass'n for Advancement of Colored People v. Lawson, No. 1:17-CV-02897-TWP-MPB, 2018 WL 4853567, at *3 (S.D. Ind. Oct. 5, 2018).

For these reasons, this Court should not be "persuaded that continuing with discovery and the merits determination in this action will result in duplicative and unnecessary proceedings." *S. Glazer's Distributors of Ohio, LLC*, 2016 WL 10637077, at *3. The limited review that the Sixth Circuit will undertake on appeal will have no bearing on either the Defendants' obligation to answer or the discovery that needs to be taken in this case. A stay also is particularly improper here because the Defendants have raised fact-based standing challenges, "the record at a preliminary injunction stage is not complete, and conclusions reached at this stage 'are not binding at trial.'" *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 276 (6th Cir. 2015) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)).

This Court also need not ignore what is really going on here, which has nothing to do with prejudice, or judicial economy, or anything of the sort. Simply put: The Defendants are seeking a stay because they want as much advance judicial guidance as possible before they are required to file an answer and bind themselves to a position. *See*

Doc. 43-1 (acknowledging "the effect the court's ruling will likely have on [the Defendants'] response to the plaintiffs' complaint[.]"). That is because the Defendants' position on the issue that lies at the heart of this case is shamelessly malleable; as this Court has already noted: "it is still unclear what the defendants are suggesting that the provision *does* mean—other than, generally, that it means something that would prevent them from losing this case." *See* Doc. 40 at 36–37.

For all of these reasons, this Court should deny the Defendants' motion for a stay. "The movant for a stay bears the heavy burden of showing a discretionary stay is necessary, and the stay should not prejudice the non-moving litigant unduly." *Ackison Surveying, LLC v. Focus Fiber Sols., LLC*, No. 2:15-CV-02044, 2016 WL 4208145, at *2 (S.D. Ohio Aug. 10, 2016) (citing *Vaughn v. Marshall*, No 2:09-cv-00097, 2009 WL 3260382, at *2 (S.D. Ohio Oct. 8, 2009)); *see also Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 568 (6th Cir. 2020) ("Defendants, as the movants, bear the burden of showing that a stay is warranted under the circumstances."). But a stay here would significantly delay the orderly progression of this case; it would not likely narrow the case or change the scope of discovery required to resolve it; and the Defendants have failed to meet their heavy burden of showing that a discretionary stay is necessary. Thus, the Defendants' motion should be denied.

III. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Stay Proceedings (Doc. 48) should be **DENIED**.

Respectfully submitted,

/s/ Daniel A. Horwitz

DANIEL A. HORWITZ, BPR #032176
MELISSA DIX, BPR #038535
SARAH L. MARTIN, BPR #037707
HORWITZ LAW, PLLC
4016 WESTLAWN DR.
NASHVILLE, TN 37209
daniel@horwitz.law
melissa@horwitz.law
sarahmartin1026@gmail.com
(615) 739-2888

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2024, a copy of the foregoing and all exhibits and attachments were sent via CM/ECF, USPS Mail, and/or via email, to:

STEVEN J. GRIFFIN (BPR# 040708)
MATTHEW D. CLOUTIER (BPR# 036710)
DONNA L. GREEN (BPR# 019513)
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-9598
Steven.Griffin@ag.tn.gov
Matt.Cloutier@ag.tn.gov
donna.green@ag.tn.gov

Counsel for Defendants

/s/ Daniel A. Horwitz
Daniel A. Horwitz, BPR #032176