IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:15-cv-00675
SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY RESPONSE DEADLINE, OR, IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME

Two months after the filing of Plaintiffs' complaint, the government now seeks a stay of its obligation to respond pending resolution of the government's newly filed motion to transfer this case to the District of Arizona, where an action asserting similar legal claims was filed some forty days after this action was initiated. Plaintiffs consent to granting the government an additional 14 days, but Plaintiffs oppose an indefinite extension pending resolution of the government's motion to transfer. As set forth below, the government's request does not satisfy this Court's standard for a stay of proceedings pending a motion to transfer.

This Court applies a rigorous "clear and convincing" standard when considering requests to stay proceedings pending a transfer motion: "A party seeking a stay 'must justify it by clear and convincing circumstances,' and these circumstances must weigh more heavily than the potential harm to the party against whom the stay applies." *Aventis Pharma Deutschland GMBH v. Lupin Ltd.*, 403 F. Supp. 2d 484, 489 (E.D. Va. 2005) (quoting *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983)). Courts considering motions to stay pending transfer typically weigh three factors: "'(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; [and] (3) potential prejudice to the non-moving party.'" *Sehler v. Prospect Mortg., LLC*, No. 1:13-cv-473, 2013 WL 5184216, at *2 (E.D. Va. Sept. 16, 2013) (citations omitted) (quoting *Johnson v. DePuy Orthopaedics, Inc.*, No. 3:12-cv-2274, 2012 WL 4538642, at *2 (D.S.C. 2012)). In any case, the stay applicant "'must make out a clear case of hardship or inequity in being required to go forward.'" *Aventis*, 403 F. Supp. 2d at 489 (quoting *Williford*, 715 F.2d at 127); *see also Fisher v. United States*, No. 3:13-mc-08, 2013 WL 6074076, at *4 (E.D. Va. Nov. 18, 2013). The government's motion falls far short of this standard.

1. Judicial economy. Staying the government's obligation to respond to Plaintiffs' complaint would not advance judicial economy in any substantial way. The filing of an answer by the government would not implicate *judicial* resources at all. And to the extent the government is concerned that its filing of a motion to dismiss might cause the Court to "proceed with, and engage, the merits of this action," that hardly "would be a waste of judicial resources." Mot. ¶ 4.

Plaintiffs' complaint raises important challenges to the constitutionality of the Indian Child Welfare Act ("ICWA") and the Bureau of Indian Affairs' ("BIA") published directives as

to how that statute is to be applied. Undeniably, ICWA and the BIA's directives relating to it are affecting hundreds—if not thousands—of child dependency and adoption proceedings, including those of Plaintiff T.W. and the child of Plaintiffs D.V. and N.L. Prompt resolution of these legal challenges would not be a "waste."

The government's motion suggests that transfer of this earlier-filed case to Arizona would entail no additional work for the Arizona court. But that is not correct. While there is some overlap between the claims in this case and those in the later-filed Arizona case, Compl., *A.D. et al. v. Washburn et al.*, No. 2:15-cv-01259 (D. Ariz. July 6, 2015) ("Arizona Compl."), there also are substantial differences in the two actions. For example, while both cases allege that the BIA's recent directives concerning the application of ICWA violate the Administrative Procedure Act ("APA"), Plaintiffs in this action claim that the BIA directives violate the APA's notice-and-comment requirement, Compl., ECF No. 1, ¶¶ 171–80; *see* NCFA's Mem. in Support of its Mot. for Partial Summ. J., ECF No. 21, at 10–14, while plaintiffs in the Arizona action challenge the directives on the ground that they violate ICWA itself, *see* Arizona Compl. ¶¶ 119–23. And here, Plaintiff National Council for Adoption ("NCFA") has moved for summary judgment on its APA claim, while no substantive motions have been filed in the Arizona action.

To the extent that this Court and the Arizona court each adjudicate claims common to both actions, that also would not be a "waste." Where important questions of federal law—constitutional challenges to federal law chief among them—are at issue, judicial economy is advanced by a system that works swiftly to resolve those questions and brings an end to legal uncertainty. The design of our federal judiciary is such that cases raising similar claims or defenses can be—and very often are—considered simultaneously in different geographic districts and appealed to different Circuits. *Compare King v. Burwell*, 759 F.3d 358 (4th Cir. 2014)

(deferring to IRS interpretation of the Patient Protection and Affordable Care Act), *with Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014) (vacating IRS interpretation of the same statute), *and Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (holding Section 3 of the Defense of Marriage Act unlawful under heightened scrutiny), *with Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (applying different standard to invalidate the same provision). And if the Circuits divide over the question, the Supreme Court may resolve the split and establish a uniform, nationwide rule. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013). The most efficient route to that destination is traveled when district courts faced with such questions promptly consider and decide them. Judicial economy is not promoted by consolidation of all similar questions in a single court in the Ninth Circuit.

A stay also would not promote judicial economy here because—as will be spelled out in detail in Plaintiffs' forthcoming opposition memorandum—the government's motion to transfer this action to Arizona is baseless. As the first-filed action, this case holds a "strong presumption of priority" over the later-filed Arizona action. *Fed. Home Loan Mortg. Corp. v. Mortg. Guar. Ins. Corp.*, No. 1:12-cv-539, 2012 WL 2673151, at *4 (E.D. Va. 2012). And none of the four factors that courts consider in deciding whether to grant a motion to transfer under 28 U.S.C. § 1404(a)—"(1) plaintiff's choice of forum, (2) convenience of the parties, (3) witness convenience and access, and (4) the interest of justice," *Heinz Kettler GMBH & Co. v. Razor USA, LLC*, 750 F. Supp. 2d 660, 667 (E.D. Va. 2010)—weighs in favor of transfer here.

a. The Plaintiffs have chosen the Eastern District of Virginia as their forum, as they are entitled to do under 28 U.S.C. § 1391(e)(1). This choice is given "substantial weight." *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, --- F.3d

---, No. 13-2403, 2015 WL 3940851, at *5 (4th Cir. June 29, 2015) (quoting *Bd. of Trs. v. Sullivant Ave. Props., LLC*, 508 F. Supp. 2d 473, 477 (E.D. Va. 2007)).

b. The government cannot seriously maintain that it is inconvenienced by litigating this case mere miles from the main office of the Department of Justice. And they have no standing to argue that *Plaintiffs* will be inconvenienced when Plaintiffs have accepted any potential inconvenience by choosing to file in this Court. And at least one Plaintiff—NCFA—would be seriously inconvenienced by a transfer. NCFA has only one office, which is located in Alexandria, Virginia. Johnson Decl., ECF No. 21-1, ¶ 2. Moreover, NCFA's entire staff and legal team reside in the Eastern District of Virginia or in the Washington, D.C., metro area, and a substantial portion of the injuries it has suffered has occurred in this District. *Id.* As a nonprofit, *see id.* ¶ 5, it would significantly burden NCFA to litigate in Arizona.

c. This case primarily implicates legal issues over which there are no disputes of fact. As a result, it is unlikely that fact witnesses will be needed to resolve this case. ECF No. 29, at 14. To the extent there is evidence that bears upon the constitutionality of ICWA and the legality of the BIA's actions, it is far more likely to be located in Washington, D.C., than in Arizona.

d. Transfer would impose a substantial hardship on Plaintiffs and their pro bono counsel, while litigating in the Eastern District of Virginia poses no hardship at all to the government. The interests of justice thus would not be advanced by transferring this action.

2. Hardship to the government. The government claims no hardship from having to file an Answer or a motion to dismiss this action by August 18—a 14-day extension to which Plaintiffs consent. Nor could it. The U.S. Attorney's Office in this District historically has had no difficulty in filing such motions in civil cases within the ample time afforded it by the federal

rules. The fact that this case has attracted the attention of Main Justice only makes clearer that the government has sufficient resources to enable it to file its motion by August 18, nearly three months after the filing of the complaint.

3. Harm to Plaintiffs. A stay would severely prejudice Plaintiffs by significantly delaying resolution of important questions of federal law that will affect time-sensitive and life-altering decisions. The Guidelines for State Courts and Agencies in Indian Child Proceedings ("2015 Guidelines") are a set of commands that were made "effective immediately" upon release and are imposing significant burdens on state adoption and foster agencies, birth parents, and children. 80 Fed. Reg. 10,146, 10,147 (Feb. 25, 2015). Accordingly, the 2015 Guidelines are already having legal consequences on child-placement determinations and causing harm to Plaintiffs and those similarly situated. Indeed, Plaintiffs D.V. and N.L. and their child have already experienced significant harm from the delays caused by the 2015 Guidelines, which require them or their placement agency to conduct a nationwide search for parties who are willing to adopt their child and fall within ICWA's placement preferences—all while the child, and the adoptive family D.V. and N.L. have chosen for him—wait in limbo for a potential competing placement. As the Supreme Court recently recognized, a delay of just a few months is significant in the life of a small child. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013) ("In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in her" permanent home). The government has offered no legitimate justification for further delay at the expense of Plaintiffs D.V. and N.L.'s son and the thousands of similarly situated children in this country who are in foster care or awaiting a foster or adoptive placement and are classified as "Indian" under ICWA and the 2015 Guidelines.

* * *

The government's bare desire for delay does not amount to "clear and convincing circumstances" that "weigh more heavily than the potential harm" to Plaintiffs. *Aventis*, 403 F. Supp. 2d at 489 (internal quotation marks omitted). The government's motion should therefore be denied to the extent it requests an extension of its time to respond to Plaintiffs' complaint greater than 14 days.

Date: July 31, 2015

Respectfully submitted,

/s/ Jacob S. Siler

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2015, I will cause to be electronically filed the foregoing with the Clerk of the Court for the Eastern District of Virginia using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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