IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant-Appellant.

No. 17-2991

**DEFENDANT-APPELLANT'S OPPOSITION TO PLAINTIFF-APPELLEE'S MOTION TO STAY BRIEFING ON AND CONSIDERATION OF DEFENDANT-APPELLANT'S MOTION FOR A PARTIAL STAY PENDING APPEAL**

## INTRODUCTION

The Attorney General has asked this Court for a partial stay of the district court's preliminary injunction order of September 15, 2017, which enjoins the Department of Justice from including two challenged conditions in awards to states and localities that receive funds through the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG Program"). We have asked that the order be stayed insofar as it applies to applicants other than the City of Chicago—the only plaintiff in this case.

Chicago now asks this Court to suspend consideration of the motion for a partial stay. It bases this request on its filing, on October 13, of a motion to reconsider the denial of an injunction with respect to a third grant condition that is not at issue in the government's appeal or the motion for a stay. The City asserts that, by seeking reconsideration of the part of the case that it lost, it can deprive the federal government of the ability to seek a stay, thus locking the nationwide injunction in place.

Unsurprisingly, the City offers no authority that remotely supports its position. The Federal Rules of Appellate Procedure do not transform Federal Rule of Civil Procedure 59(e) into a weapon by which a party can preclude its opponent from pursuing a right of appeal provided by statute, or from seeking an immediate stay of a preliminary injunction from the court of appeals. Were it otherwise, any party could defeat its opponent's right to appeal an injunction under 28 U.S.C. § 1292(a)(1) by seeking reconsideration of a different part of a district court ruling. Plaintiff's theory accords with neither the case law nor sound policy. And, in any event, this Court would plainly have

jurisdiction to issue a stay in aid of its jurisdiction under the All Writs Act, 28 U.S.C. § 1651.

## STATEMENT

The federal government's stay motion, filed on October 13, explains that the City of Chicago sought to enjoin three conditions on funding awarded to states and localities through the Byrne JAG Program. On September 15, the district court issued a preliminary injunction as to two of these conditions, described by the district court as the "notice" and "access" conditions. The court did not limit the application of the injunction to Chicago. Instead, the court made the injunction "nationwide in scope." Merits Op., Dkt. 78, at 41.

The court denied Chicago's request for an injunction with respect to the third challenged condition, which the district court referred to as the "compliance" condition. That condition—which Chicago accepted in fiscal year 2016—requires grant recipients to certify compliance with 8 U.S.C. § 1373.

The federal government filed a notice of appeal on September 26, 2017, and, that same day, moved in district court for a partial stay insofar as the injunction applies to entities other than Chicago. The district court denied the stay on October 13, and the federal government filed a motion for a partial stay in this Court on the same day. Also on October 13, the City filed a Rule 59(e) motion for reconsideration in the district court, asking the district court to reconsider its determination that the compliance condition should not be enjoined.

On October 16, this Court ordered the City to respond to the stay motion by October 18. That same day, the City filed the motion currently at issue, asking this Court to suspend briefing on and consideration of the government's motion for a partial stay.

## ARGUMENT

### I. This Court has appellate jurisdiction.

Under 28 U.S.C. § 1292(a)(1), this Court has jurisdiction to review "[i]nterlocutory orders . . . granting . . . injunctions." The federal government is thus entitled to immediate appellate review of the first provision of the district court's September 15 decision, which states: "For the reasons stated herein, the Court grants the City a preliminary injunction against the Attorney General's imposition of the notice and access conditions on the Byrne JAG grant." Merits Op., Dkt. 78, at 40-41.

Chicago does not argue otherwise, but instead contends that the government has lost its ability to appeal because of a second, independent provision of the September 15 decision, which states: "The Court denies the City's Motion for a Preliminary Injunction with respect to the compliance condition, because the City has failed to establish a likelihood of success on the merits." Merits Op., Dkt. 78, at 41. According to Chicago, because the City has filed a reconsideration motion as to the denial of an injunction against the compliance condition, it has successfully prevented the United States from seeking immediate appellate review of the injunction against the notice and access conditions.

This unsupported theory has significant ramifications. The City's motion was filed on the 28th day after entry of judgment. Under the City's theory, this Court may not

undertake consideration of a stay and the appeal until the City's Rule 59(e) motion has been briefed and ruled on. The delay, for the reasons set out in the government's motion for a partial stay, would be particularly significant in this case, in which, absent a stay, the government will be forced to choose between issuing awards subject to the terms of the injunction and delaying the awards to the detriment of recipients across the country.

Chicago cites no case in which review of a preliminary injunction has been thwarted in this fashion. Instead, it merely cites cases for the unremarkable proposition that a timely reconsideration motion by any party regarding the same order and judgment that is on appeal suspends the effectiveness of a notice of appeal. *See* Mot. 4-6. Those cases might be relevant if the district court were considering a timely reconsideration motion regarding the preliminary injunction at issue in this appeal, or if this Court's jurisdiction were premised on 28 U.S.C. § 1291, which requires a judgment to be final in all respects. But this Court's jurisdiction is premised on 28 U.S.C. § 1292(a)(1), which contemplates interlocutory review of injunctions, and the district court is not reconsidering its decision to issue an injunction. The cases on which Chicago relies are thus entirely inapposite.

The D.C. Circuit has recently confirmed that appellate jurisdiction over an injunction is not defeated by a motion for reconsideration of a separate ruling by the district court. In *Fitzgerald v. Federal Transit Administration*, No. 17-5132 (D.C. Cir. July 19, 2017) (unpub.) (attached), the district court had entered a final judgment granting injunctive relief and vacating the agency's Record of Decision, but the plaintiff had sought reconsideration in order to expand the relief. The D.C. Circuit acknowledged

that "the appellees' timely Rule 59(e) motion deprived the judgment of finality," but held that "[u]nder 28 U.S.C. § 1292(a), this court may grant the [appellant's] motion for stay pending appeal of the district court's grant of injunctive relief." *Id.* at 1 (brackets and quotation marks omitted). The court explained that "the pending Rule 59(e) motion in this case does not pertain to the district court's grant of injunctive relief that is the subject of the . . . motion for stay pending appeal," but rather "is, atypically, a motion by the parties who prevailed on their request for injunctive relief." *Id.* at 2. The D.C. Circuit noted that the movants "do not question vacatur of the Record of Decision; their motion is 'limited to seeking clarification or confirmation' of the breadth of the further environmental review the district court separately required." *Id.* The court thus granted a stay pending appeal. *Id.*

Here, similarly, the pending motion for reconsideration does not pertain to the grant of injunctive relief that is the subject of the government's appeal, and is instead a motion by the party that prevailed on its request for injunctive relief. This case is distinguishable from *Fitzgerald* only in that *Fitzgerald* involved a final judgment, and the motion for reconsideration transformed the final judgment (originally appealable under 28 U.S.C. § 1291) into an interlocutory decision, part of which was immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order granting injunctive relief. This case is more straightforward: the district court's injunction of the notice and access provisions was always appealable under 28 U.S.C. § 1292(a)(1), and the fact that Chicago has sought

reconsideration of the simultaneously issued order denying an injunction as to the compliance condition has no bearing on this Court's jurisdiction.

The D.C. Circuit's decision properly applied the general principle, long made clear by the Supreme Court, that a district court can enter an appealable order and a nonappealable order in the same document. In *Waco v. United States Fidelty & Guaranty Co.*, 293 U.S. 140 (1934), "the District Court, in a single decree, . . . entered one order dismissing a cross-complaint against one party, and another order remanding because there was no diversity of citizenship in light of the dismissal." *Powerex Corp v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 236 (2007) (describing *Waco*). While "appellate jurisdiction existed to review the order of dismissal," the Supreme Court "repeatedly cautioned that the remand order itself could not be set aside." *Id.*

Similarly, in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), the Supreme Court considered an appeal from the denial, in a single document, of motions for summary judgment by a group of individual defendants and by a city and a county commission. The Supreme Court explained that although the court of appeals had "undisputed jurisdiction over the individual defendants' qualified immunity pleas" under the collateral order doctrine, *id.* at 40, the court of appeals lacked jurisdiction to "review at once the unrelated question of the county commission's liability," *id.* at 51.

The policies animating Federal Rule of Appellate Procedure 4 underscore why it should not be applied in a manner that would allow appellate jurisdiction under § 1292(a)(1) over an order granting injunctive relief to be defeated by reconsideration of

an independent order. The point of the suspension provided by Rule 4 is to "prevent unnecessary appellate review." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982). As the Advisory Committee notes explain, "it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from." Fed. R. App. P. 4 (1979 Advisory Committee Notes). Here, of course, there is no final judgment, so the only order at issue in this appeal is the injunction against the notice and access conditions. Chicago's Rule 59(e) motion does not concern the injunction on appeal and a ruling on that motion will have no effect on this Court's review of that injunction.

Rule 4 avoids the clash of district court and appellate jurisdiction by ensuring that the court of appeals' review will not be preempted by a grant of reconsideration. The City's theory would produce the opposite result, by depriving—or, in this case, divesting—the court of appeals of jurisdiction over an appeal, and preventing the issuance of a stay, merely because the district court was reconsidering an order that is not part of the appeal. There is no basis for that result in Rule 4, nor can it be reconciled with Congress's express intent that preliminary injunctions be subject to immediate appeal, *see* 28 U.S.C. § 1292(a)(1).

## II. A stay would also be appropriate under the All Writs Act.

Even if Chicago's motion for reconsideration could temporarily deprive this Court of appellate jurisdiction, it would not strip this Court of the ability to stay the district court's order. The All Writs Act, 28 U.S.C. § 1651(a), authorizes courts to "issue all writs

necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Exercise of that authority would be warranted here.

Chicago asks this Court to delay consideration of the government's motion for a stay until after the district court's resolution of the reconsideration motion. But due to the exigencies documented in our stay motion, a stay issued at that time might well be inadequate to redress the government's irreparable harm. Chicago does not dispute that this Court will ultimately have jurisdiction over the federal government's appeal, even if Chicago were correct in asserting that its Rule 59(e) motion temporarily divested the Court of jurisdiction. It has long been settled that a court's authority under the All Writs Act "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). *See also Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1303 (1976) (Rehnquist, J., in chambers) (All Writs Act can be invoked to vacate a stay "where it appears that the rights of the parties to a case pending in the court of appeals . . . may be seriously and irreparably injured by the stay").

## CONCLUSION

For the foregoing reasons, the motion to suspend briefing should be denied.

Respectfully submitted,

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OCTOBER 2017

## CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 2,167 words. This opposition was prepared using Microsoft Word 2013 in Garamond, 14-point font, a proportionally-spaced typeface.

*s/ Daniel Tenny*
Daniel Tenny

## CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*s/ Daniel Tenny*
Daniel Tenny

**ATTACHMENT**

*Fitzgerald v. Federal Transit Admin.*,
**No. 17-5132 (D.C. Cir. July 19, 2017)**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 17-5132** **September Term, 2016**

**1:14-cv-01471-RJL**

**Filed On:** July 19, 2017

John M. Fitzgerald, et al.,

Appellees

v.

Federal Transit Administration, et al.,

Appellees

State of Maryland,

Appellant

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Consolidated with 17-5161

**BEFORE:** Millett, Pillard, and Wilkins, Circuit Judges

## O R D E R

Upon consideration of the emergency motion for stay pending appeal, the opposition thereto, and the reply; the motion to dismiss, the opposition thereto, and the reply; and the motion to expedite, the opposition thereto, and the reply, it is

**ORDERED** that the motion to dismiss be denied. Although the appellees' timely Rule 59(e) motion "deprive[d] the judgment of finality," see Derrington-Bey v. Dist. of Columbia Dep't of Corrections, 39 F.3d 1224, 1225 (D.C. Cir. 1994), the notice of appeal will "become[] effective to appeal [the] judgment . . . when the order disposing of the [pending Rule 59] motion is entered," Federal Rule of Appellate Procedure 4(a)(4)(B)(i). Under 28 U.S.C. § 1292(a), this court may grant the State of Maryland's motion for stay pending appeal of the district court's grant of injunctive relief. See United States v. Philip Morris USA Inc., 840 F.3d 844, 849 (D.C. Cir. 2016); Comm. on the Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 910-11 (D.C. Cir. 2008). The district court granted appellees' request for injunctive relief by vacating the Record of

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 17-5132** **September Term, 2016**

Decision, which, as the district court noted in this case, had the direct and intended effect of preventing the use of federal funds and halting the project. See Friends of the Capital Crescent Trail v. Fed'l Transit Admin., 200 F. Supp. 3d 248, 254 (D.D.C. 2016), and Amended Complaint at 59-60 (seeking to set aside the Record of Decision and enjoin defendants "from spending any federal funding on . . . or otherwise proceeding with" the challenged project). The May 22, 2017, order that denied reinstating the Record of Decision effectively "continu[ed]" or "refus[ed] to dissolve" the injunction, 28 U.S.C. § 1292(a)(1). See HonoluluTraffic.com v. Fed'l Transit Admin., 742 F.3d 1222, 1229 (9th Cir. 2014); Sierra Club v. Van Antwerp, 526 F.3d 1353, 1358 (11th Cir. 2008); Sierra Club v. Glickman, 67 F.3d 90, 94 (5th Cir. 1995). Moreover, the pending Rule 59(e) motion in this case does not pertain to the district court's grant of injunctive relief that is the subject of the State of Maryland's motion for stay pending appeal. The Rule 59(e) motion is, atypically, a motion by the parties who prevailed on their request for injunctive relief. They do not question vacatur of the Record of Decision; their motion is "limited to seeking clarification or confirmation" of the breadth of the further environmental review the district court separately required. It is

**FURTHER ORDERED** that the emergency motion to stay the portion of the August 3, 2016, order that vacated the Record of Decision and the portion of the May 22, 2017, order that denied reinstating the Record of Decision be granted and the Record of Decision be reinstated pending appeal. The State of Maryland has satisfied the stringent requirements for a stay pending appeal. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2017). It is

**FURTHER ORDERED** that consideration of the motion to expedite be deferred pending further order of this court, while the district court acts on the pending Rule 59 motion. We are confident the district court will act promptly in this matter.

The Clerk is directed to transmit a copy of this order to the district court.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk