UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ELIZABETH VAN DUYNE, *et al.*, Plaintiffs, v. CENTERS FOR DISEASE CONTROL AND PREVENTION, *et al.*, Defendants.	Civil Action No. 4:22-cv-00122-O

DEFENDANTS' RESPONSE TO PLAINTIFF VAN DUYNE'S MARCH 30, 2022 BRIEF

The Court ordered "the parties" to provide their views on a narrow, purely procedural question: "whether the Court should consolidate the preliminary injunction hearing with a trial on the merits" under Federal Rule of Civil Procedure 65(a)(2). Mar. 17, 2022 Order, ECF No. 15. Defendants did so, explaining (1) why this case warrants no exception from the principle that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits" using Rule 65(a)(2), *Univ. of Tex. v. Camensich*, 451 U.S. 390, 395 (1981); and (2) in the alternative, that to the extent the Court concludes that any atypical expedition is appropriate here, it should deny Plaintiff Van Duyne's motion for a preliminary injunction, and then set a schedule for expedited briefing on cross-motions for summary judgment. *See* Defs.' Resp. to the Court's Mar. 17, 2022 Order, ECF No. 19.

Plaintiff Van Duyne, by contrast, submitted fulsome briefing *on the merits*, covering everything from five different canons of statutory interpretation, to "[t]he history of federal quarantine and disease control," to a dissenting opinion about the nondelegation doctrine. *See* Pl. Van Duyne's Br. in Resp. to the Court's Order, ECF No. 18, at 7-9, 11, 14. Plaintiff Van Duyne's 16-page filing does not cite Rule 65(a)(2) once, and seems to all but abandon her motion for a preliminary injunction—instead, now advocating for "quick resolution" based on a misinterpretation of Federal Rule of Civil

Procedure 56(f). And Plaintiff the State of Texas—one of "the parties" seemingly covered by the Court's order, ECF No. 15—submitted no filing whatsoever.

Defendants will respond to Plaintiff Van Duyne's merits arguments at the appropriate time. But as for the subject of the Court's order, Defendants respectfully note that no party has made any filing that supports Rule 65(a)(2) consolidation, and the Court should therefore not take that unusual step here, for all the reasons in Defendants' prior filing, ECF No. 19.

As for what comes next: there is still a fully briefed motion for a preliminary injunction pending before the Court. Plaintiff Van Duyne, however, seems to have largely abandoned pursuit of that relief. For example, the argument section of her latest filing begins by asserting that "[t]he only question before the Court is a legal one" about whether "Congress authorize[d] the CDC to issue" the order in question. ECF No. 18 at 1. But that could only be true if Plaintiff has withdrawn her request for a preliminary injunction, which is of course governed by a familiar four-factor test, only one of which is about the merits. Plaintiff Van Duyne also repeatedly suggests that her preliminary-injunction motion should be "converted to a motion for summary judgment," *id.* at 15. In any event, regardless of Plaintiff Van Duyne's preferences, the motion for a preliminary injunction should be denied for all the reasons in Defendants' opposition brief, ECF No. 13—either with or without any consideration of likelihood of success on the merits. Defendants respectfully submit that the Court should thus deny that motion now, and that the case should then proceed in the normal course.[1]

Once the preliminary-injunction motion is resolved, there would seem to be minimal daylight between Plaintiff Van Duyne and Defendants (although Texas's position remains unknown). Defendants agree with Plaintiff Van Duyne that "a trial is not necessary in this case," ECF No. 18 at 15, and did not interpret the Court's order, which directly quoted Rule 65(a)(2), to be contemplating a factfinding trial in a case like this. Defendants also agree that the issues in this case "are appropriate for summary judgment." *Id.* at 4. And although Defendants continue to believe that no atypical expedition is necessary or appropriate here—particularly given Plaintiff Van Duyne's failure to seek

[1] Absent further order of the Court, Defendants' deadline to answer or otherwise respond to Plaintiffs' complaint is April 19. *See* Fed. R. Civ. P. 12(a)(2).

time-sensitive injunctive relief for over a year, and Plaintiff Texas's failure to seek such relief at all—Defendants remain amenable to expedited briefing on cross-motions for summary judgment, if the Court shares Plaintiff Van Duyne's desire for an expedited resolution. (Any such briefing schedule could and should account for the possibility of relevant policy developments between now and April 18, 2022, a possibility that is described in greater detail in Defendants' prior filing.[2])

Importantly, however, to the extent that Plaintiff Van Duyne is suggesting that the Court could enter summary judgment *now* (or after a hearing)—without any further briefing from the parties—she is mistaken. Rule 56(f) provides as follows:

> (f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:
>
> (1) grant summary judgment for a nonmovant;
>
> (2) grant the motion on grounds not raised by a party; or
>
> (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Fed. R. Civ. P. 56(f). As a threshold matter, "Rule 56(f)(1) is a tool to be used by the Court; it is not a substitute for filing a motion for, or cross-motion to, summary judgment." *Johnson v. State Farm*, No. 12-cv-00534, 2013 WL 3818707, at *2 (S.D. Ala. July 23, 2013); *accord CertainTeed Corp. v. Mayfield*, No. 19-cv-400, 2020 WL 1953615, at *7 (E.D. La. Apr. 23, 2020) ("[W]hile Rule 56(f)(1) codifies a *court's* authority to *sua sponte* grant summary judgment to a nonmoving party after providing notice and a reasonable time to respond, Rule 56(f)(1) does not afford *parties* a separate mechanism for seeking summary judgment.") (emphases added) (quoting *Hartford Fire Insur. Co. v. Trynex, Inc.*, No. 11-cv-

[2] *See* ECF No. 19 at 5 ("On March 10, 2022, CDC announced that, in advance of April 18, 2022, it 'will work with government agencies to help inform a revised policy framework for when, and under what circumstances, masks should be required in the public transportation corridor.' CDC, *Mask Use on Public Transportation* (Mar. 10, 2022), https://perma.cc/RFK6-ADFA. CDC further explained that '[t]his revised framework will be based on the COVID-19 community levels, risk of new variants, national data, and the latest science.' *Id.* The result of those deliberations could have significance for this litigation—perhaps as early as April 18—which further weighs against unnecessarily accelerating these proceedings in the interim.").

13360, 2013 WL 12183610, at *1 (E.D. Mich. July 25, 2013), and collecting cases). There is therefore no basis in the Federal Rules simply to "construe Plaintiff's motion for a preliminary injunction as a motion for summary judgment under Rule 56(f)" and grant her final judgment with no further ado, as Plaintiff Van Duyne appears to suggest. ECF No. 18 at 3.

More importantly, however, "the court" has not provided the requisite "notice and a reasonable time to respond," Fed. R. Civ. P. 56(f)—which is unsurprising, since this idea came from Plaintiff Van Duyne, not from this Court. So, currently, the Rule 56(f) mechanism is unavailable, and entering summary judgment against Defendants on the present record would be reversible error. *See, e.g.*, *D'Onofrio v. Vacation Public'ns, Inc.*, 888 F.3d 197, 210 (5th Cir. 2018) ("[T]he district court granted summary judgment on Karen's hostile work environment claim despite there being no pending motion for summary judgment on that claim. It erred by failing to give notice of its intent to grant summary judgment *sua sponte*, as required by Rule 56(f)."). Indeed, in interpreting a prior version of Rule 56, the Fifth Circuit has explicitly rejected the argument that preliminary-injunction proceedings provide sufficient notice and opportunity to develop a record that could justify entry of summary judgment. *Georgia S. & F. Ry. Co. v. Atl. Coast Line R. Co.*, 373 F.2d 493, 497-98 (5th Cir. 1967) ("ACL's argument that the hearing on preliminary injunction effectively presented all of the issues which GS&F could or would have presented at a hearing on summary judgment is inapposite, for loss of a motion for preliminary injunction means only temporary lethality. Final judgment is not then a possibility. When such a limited adjudication is the order of the day, we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available."). It is not clear that Plaintiff Van Duyne even disputes this understanding of the Rule 56(f), as at one point she acknowledges that the Rule "allows for the Court to consider summary judgment *after* giving notice and a reasonable time to respond[.]" ECF No. 18 at 2 (emphasis added).

Regardless, here, even if the Court were to provide the requisite notice under Rule 56(f), Defendants would then exercise their right to a "reasonable time to respond"—that is, by filing a summary-judgment brief, which would likely address (among many other things) the additional merits

arguments that Plaintiff Van Duyne made (for the first time) in her reply brief in support of her motion for a preliminary injunction, ECF No. 14, as well those in her response to the Court's order about Rule 65(a)(2) consolidation, ECF No. 18. Accordingly, invoking Rule 56(f) provides no advantage over (and no mechanism for quicker resolution than) Defendants' alternative proposal: expedited briefing on cross-motions for summary judgment. Defendants' proposal also has the benefit of being far more typical and straightforward.

Accordingly, for these reasons, and the reasons in their prior filings, Defendants respectfully submit that the Court should (1) deny Plaintiff Van Duyne's motion for a preliminary injunction, and (2) then order all parties—including the State of Texas—to meet and confer to propose a summary-judgment briefing schedule (or separate proposals, if the parties cannot reach agreement). Defendants further suggest that that joint filing be due no earlier than a reasonable time after April 18, so that the parties have a meaningful opportunity to confer regarding the significance of any relevant policy developments between now and April 18, 2022.

Dated: April 6, 2022

Respectfully submitted,

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