No. 13-16248

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DREAM ACT COALITION; JESUS CASTRO-MARTINEZ; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; AND NATALIA PEREZ-GALLEGOS,

Plaintiffs-Appellants,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; and STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona,
No. 2:12-cv-02546-DGC

APPELLEES' RESPONSE TO APPELLANTS' RULE 8 MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Appellants filed their notice of appeal 14 months ago. They waited until just recently, however, to request an injunction pending appeal, pursuant to Rule 8, Federal Rules of Appellate Procedure. This significant delay undermines their argument that an injunction is necessary to prevent them from suffering irreparable harm between now and when the mandate issues. If Appellants were concerned about suffering irreparable harm during the pendency of the appeal, they would, and should, have sought Rule 8 relief over a year ago.

In addition, courts only grant Rule 8 relief to prevent a party's claim from becoming moot by preserving the status quo. Here, there is no risk that Appellants' claims will become moot between now and when the mandate issues. In fact, rather than preserve the status quo, an injunction would upend the status quo by requiring driver's licenses to be issued to Appellants when Appellees have never before done so. Upon resolution of Appellees' Petition for Rehearing and Rehearing *En Banc*, Appellees may then have to cancel those licenses. There is good reason for why Rule 8 relief is only granted in limited circumstances. The Court could change or reverse the panel ruling on rehearing and, therefore, the state of the case should not be altered from what existed when Appellants first appealed. Accordingly, Appellants' Motion should be denied.

PROCEDURAL HISTORY

Appellants filed their notice of appeal on June 17, 2013. Appellants did not request an injunction pending appeal at that time. The parties briefed the appeal from July 2013 to August 2013. The Court then heard oral argument on December 3, 2013 and, shortly thereafter, ordered the parties to brief the effects of the 2013 revisions to Policy 16.1.4 (the "2013 Policy") on the issues pending before the Court. Appellants filed their supplemental brief on December 24, 2013 in which they requested, for the first time, an injunction pending appeal. (Dkt. 57-1, at 20.) The Court's July 7, 2014 Opinion on Appellants' preliminary injunction appeal (Dkt. 62-1) (the "Opinion") did not address Appellants' request for an injunction pending appeal.

On July 18, 2014, Appellees filed their Petition for Rehearing and Rehearing *En Banc* (the "Petition"). (Dkt. 63-1.) The Court subsequently ordered Appellants to file a response to the Petition, which was filed August 21, 2014 (Dkt. 72), and invited the United States to file an amicus brief, due September 30, 2014. (Dkt. 65, 70, 71.)

On July 21, 2014, Appellants moved the district court for an injunction pending appeal pursuant to Fed. R. Civ. P. 62(c). (Plaintiffs' Motion Pending Appeal, *Arizona DREAM Act Coalition v. Brewer*, No. 2:12-cv-02546-DGC (D. Ariz. July 21, 2014), ECF No. 282.) On August 1, 2014, the district court denied

the motion, declining to issue an injunction until the mandate issues. (Order, *Arizona DREAM Act Coalition v. Brewer, No*. 2:12-cv-02546-DGC (D. Ariz. July 21, 2014), ECF No. 291.)

ARGUMENT

I. RULE 8 DOES NOT CONTEMPLATE GRANTING AN INJUNCTION PENDING APPEAL AT THIS LATE STAGE IN THE APPELLATE PROCESS.

A. There Is No Risk That Appellants' Claims Will Become Moot Between Now And Issuance Of The Mandate Because The Status Quo Will Be Preserved Without An Injunction.

Appellants misstate Rule 8's intended purpose. "The purpose of a stay or injunction, pursuant to Federal Rule of Civil Procedure 62 or Federal Rule of Appellate Procedure 8, *is to prevent a party's claim from being moot* by preserving the status quo pending resolution of an appeal." *S.E.C. v. Janvey*, 404 F. App'x 912, 916 (5th Cir. 2010) (citing *Neeley v. Bankers Trust Co. of Tex*., 848 F.2d 658, 661 (5th Cir.1988) (emphasis added)). Such interim relief is only intended to preserve the appellate process. *See id*. ("If proceedings are not stayed, then an event may occur while a case is pending appeal that makes it impossible for the court to grant any effectual relief.") (citation omitted)).

Here, an injunction pending appeal is not necessary to preserve Appellants' right to appellate review as plainly evidenced by the current stage of this appeal. The Court already has issued its Opinion, and the parties are awaiting the Court's decision on the Petition and issuance of the mandate. In the short period of time

between now and issuance of the mandate, no set of circumstances will moot Appellants' claims or make it impossible for them to obtain the relief they seek, in the event the Court determines they are entitled to such relief. Indeed, an injunction would upset, rather than preserve, the status quo. *Cf. Pac. Merch. Shipping Ass'n v. Cackette*, CIVS062791WBSKJM, 2007 WL 2914961, at *1 n. 4 (E.D. Cal. Oct. 5, 2007) (concluding that the "status quo" means "the status quo as of the filing of the appeal" (citing *Natural Res. Def. Council, Inc. v. Sw. Marine Inc*., 242 F.3d 1163, 1166 (9th Cir. 2001) and *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir.1988))). At the time Appellants filed their notice of appeal, Appellees did not issue them driver's licenses. If the Court were to grant an injunction now, Appellees would have to issue Appellants driver's licenses, only to potentially cancel those licenses in a matter of months, upon resolution of the Petition and issuance of the mandate. *See Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2008) ("Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn. . . ."). Accordingly, because an injunction is not necessary to preserve Appellants' right to appellate review, and would unnecessarily upend the status quo shortly before the mandate is issued, the Court should decline to issue an injunction pending appeal.

B. Appellants Will Not Suffer Irreparable Harm If The Court Denies Their Request For An Injunction Pending Appeal.

Appellants will not suffer irreparable harm between now and when the mandate is issued. In the context of an injunction pending appeal, the irreparable harm analysis only focuses on whether Appellants will suffer harm during the time period pending appeal. *See Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993) (concluding that, where city Board of Elections argued that it would suffer irreparable injury if candidate's name appeared on ballot notwithstanding its prior decision removing it from the ballot, "[t]he reason such alleged injury would be irreparable is the unlikelihood that there would be enough time for the appeal to be heard and decided before the General Election"); *Bluth v. Laird*, 435 F.2d 1065, 1067 (4th Cir. 1970) (noting that Rule 8 relief had been previously granted in the case "[i]n order to avoid the possibility that Major Bluth might be sent overseas before the disposition of this appeal . . . .").

Although Appellants argue that they will suffer irreparable harm between now and when the mandate is issued, their own actions belie this argument. Appellants waited months after Appellees commenced their drivers' license policy before filing their complaint in this matter. (*See* ER 64-95.) Additionally, Appellants did not request an injunction pending appeal when they initially filed their notice of appeal. Instead, they waited to make their first request in their supplemental briefing—over six months later—and without first moving the

district court for such relief, as required by Rule 8. Had Appellants believed they would suffer irreparable harm during the pendency of the appeal, they would, and should, have sought an injunction 14 months ago. Appellants' delay in filing their Rule 8 motion "severely undermines [their] argument that absent [Rule 8 relief] irreparable harm would result." *Cf. Hirschfeld*, 984 F.2d at 39.

II. THE COURT SHOULD NOT ISSUE AN INJUNCTION PENDING APPEAL BECAUSE THE DISTRICT COURT MUST FIRST REVIEW THE 2013 POLICY.

For the reasons set forth in the Petition, the Court should not entertain Appellants' request for an injunction until the district court has analyzed the 2013 Policy. *See* Petition at 15-16.

CONCLUSION

For the foregoing reasons, the Court should deny Appellants' request for an injunction pending appeal.

RESPECTFULLY SUBMITTED: August 28, 2014.

FENNEMORE CRAIG, P.C.

By *s/ Douglas C. Northup*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response to Appellants' Rule 8 Motion for Injunction Pending Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 28, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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