The Honorable Kymberly K. Evanson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABRAHAM FLAXMAN and AMY HAGOPIAN, individually and for a proposed class, Plaintiffs, v. BOB FERGUSON, in his official capacity as the Attorney General of the State of Washington, and KATE REYNOLDS, in her official capacity as Executive Director of the Executive Ethics Board of the State of Washington, Defendants.	NO. 2:23-cv-01581-KKE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR EXTENSION OF DEADLINE FOR FED. R. CIV. P. 26(F) CONFERENCE AND ASSOCIATED LATER DEADLINES NOTE ON MOTION CALENDAR: DECEMBER 1, 2023 Without Oral Argument

I. INTRODUCTION

Plaintiffs do not—and cannot—dispute the central premise of Defendants' motion, that a pending motion to dismiss on justiciability grounds is good cause to stay discovery. Instead, Plaintiffs argue that this well-accepted and common-sense principle should not be applied here because, in their view, Defendants are unlikely to succeed on their motion to dismiss.[1] Plaintiffs' response misses the mark on multiple levels.

[1] After Defendants filed their Motion for Extension of Deadlines, Plaintiffs opted not to respond to the Motion to Dismiss and instead filed an Amended Complaint, which they contend "moot[s]" Defendants' motion. Dkt. 17. For the reasons detailed herein (and in Defendants' forthcoming Motion to Dismiss the First Amended

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I. ARGUMENT

A. A Stay Is Appropriate Because Defendants' Motion to Dismiss Raises Multiple Threshold Justiciability Arguments

In determining whether to extend the deadline for a FRCP 26(f) conference, this Court need not wade into the merits of the parties' positions. Whether a stay is appropriate is determined by "the nature of the arguments raised in . . . motions to dismiss," *Blackstone Int'l, Ltd. v. E2 Ltd.*, C20-1686-RSM, 2022 WL 522950, at *2 (W.D. Wash. Feb. 22, 2022), not whether those motions are ultimately successful. *See also Williams v. Sampson*, C17-0092-JCC, 2017 WL 1330502, at *2 (W.D. Wash. Apr. 11, 2017) (staying discovery based on "the nature of the arguments raised in the dispositive motions"); *Williams v. Washington*, 2:23-CV-914-TL-DWC, 2023 WL 5579589, at *1 (W.D. Wash. Aug. 29, 2023) (granting stay where "Defendants' pending motion to dismiss could potentially resolve all claims in this case and can be decided without discovery"). Indeed, Plaintiffs' argument defies common sense, as it would require Defendants to effectively win their motion to dismiss to obtain a stay of discovery. Here, as in *Blackstone* and related cases, Defendants' motion raises colorable threshold bars to Plaintiffs' claims, and it is appropriate to stay discovery pending its resolution.

Plaintiffs try unsuccessfully to distinguish most (but not all)[2] of the cases cited by Defendants in which stays of discovery were granted, primarily by arguing that the motions to dismiss in those cases raised different threshold issues. This is a distinction without a difference. What matters is that Defendants raise colorable threshold bars to Plaintiffs' complaint, any one of which justifies staying discovery. And in any event, numerous courts have stayed discovery pending resolution of dispositive motions raising precisely the theories Defendants raise here. *See, e.g.*, *Serafine v. Abbott*, 1:20-CV-1249-RP, 2021 WL 3616102, at *2 (W.D. Tex. May 12, 2021) (*Younger* abstention); *Ashley W. v. Holcomb*, 3:19-CV-00129-RLY-MPB,

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Complaint), Plaintiffs' FAC has no bearing on Defendants' arguments for dismissal, as it fails to address the many fundamental deficiencies in Plaintiffs' case.

[2] Plaintiffs do not address *Williams v. Washington*, 2:23-CV-914-TL-DWC, 2023 WL 5579589 (W.D. Wash. Aug. 29, 2023), which also featured a claim involving a State agency and supports a stay here.

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2019 WL 9673894, at *2 (S.D. Ind. Oct. 31, 2019) (same); *Brantley Cnty. Dev. Partners, LLC v. Brantley Cnty., Georgia*, 5:19-CV-109, 2020 WL 3621319, at *3 (S.D. Ga. July 2, 2020) (ripeness)); *Viehweg v. City of Mount Olive*, 21-CV-3126, 2021 WL 4432821, at *2 (C.D. Ill. Sept. 27, 2021) (same)).

B. Although This Court Need Not Consider the Merits, Defendants Are Likely to Succeed on Their Motion to Dismiss

Even if this Court accepted Plaintiffs' invitation to weigh the merits at this early stage, that would only further support a stay. As detailed in Defendants' initial motion, Dkt. 12, Plaintiffs' Complaint was subject to dismissal on multiple grounds, including constitutional ripeness, prudential ripeness, and *Younger* abstention. Plaintiffs' First Amended Complaint (FAC) completely fails to remedy these fundamental defects, and Plaintiffs' contrary arguments are unavailing.

1. Plaintiffs first try to spin *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965), into a rule that abstention does not apply to First Amendment cases. But this reading of *Dombrowski* was flatly rejected in *Younger* itself. *Younger v. Harris*, 401 U.S. 37, 53-54 (1971). In *Younger*, Mr. Harris alleged that California's Criminal Syndicalism Act "inhibited him in the exercise of his rights of free speech and press," but the Court nonetheless held abstention was required and discussed *Dombrowski* at length. *Id.* at 38-39, 48. The Court emphasized that *Dombrowski* had been an unusual case in which the plaintiffs' "complaint made substantial allegations that[] 'the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.'" *Id.* at 48 (quoting *Dombrowski*, 380 U.S. at 482). Under these unique circumstances—plainly distinguishable from this case—the Court found "the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in

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good faith that had always been considered sufficient to justify federal intervention." *Id.* But, as the Court held, "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it," absent a "showing of bad faith, harassment, or any other unusual circumstance . . ." *Younger*, 401 U.S. at 54.

2. Following *Younger*, courts routinely abstain from deciding First Amendment challenges to ongoing state proceedings—including in nearly identical circumstances in *Samples v. Washington State Executive Ethics Board*, No. C12-5418 BHS, 2012 WL 5285202, at *1 (W.D. Wash. Oct. 25, 2012). *See also Citizens for Free Speech v. Cnty. of Alameda*, 953 F.3d 655, 657 (9th Cir. 2020); *Gilbertson v. Albright*, 381 F.3d 965, 982 (9th Cir. 2004); *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1096 (9th Cir. 2008) ("[P]olitical speech is vitally important. But the Supreme Court has never suggested that the importance of the interest asserted by a federal plaintiff affects the analysis of the *Younger* factors."). As Defendants outlined in their initial Motion to Dismiss, and as remains true notwithstanding Plaintiffs' futile amendment, each of the elements of *Younger* abstention is easily satisfied here. Dkt. 12 at 12-18.

The First Amendment nature of Plaintiffs' claims likewise has no bearing on ripeness.[3] In *Twitter v. Paxton*, the Ninth Circuit found plaintiff's claims constitutionally unripe, notwithstanding that the plaintiff had alleged First Amendment violations. 56 F.4th 1170, 1172-73 (9th Cir. 2022) (cited at Dkt. 12 at 7). And, similarly, courts routinely dismiss First Amendment claims as prudentially unripe. *See, e.g.*, *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016); *CBA Pharma, Inc. v. Harvey*, 3:21-CV-014, 2022 WL 983143, at *2 (E.D. Ky. Mar. 30, 2022); *Beam v. Gonzales*, 548 F. Supp. 2d 596, 605 (N.D. Ill. 2008).

[3] As set forth in Defendants' initial motion, *see* Dkt. 12 at 19-21, it is worth noting that Plaintiffs' entire characterization of the relevant First Amendment issues—including their conclusory allegation that a State-run email listserv for UW professors where Plaintiffs act as content moderators somehow constitutes a "public forum"—is incorrect and contrary to law. *See, e.g., Knudsen v. Washington State Exec. Ethics Bd.*, 156 Wn. App. 852, 863-66, 235 P.3d 835 (2010).

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Simply put, an unripe claim does not somehow become ripe simply by invoking the First Amendment.

3. Plaintiffs next contend discovery should proceed because Defendants' prudential ripeness and *Younger* abstention arguments are based on the "mistaken[]" view that this suit seeks to halt an ongoing state enforcement proceeding. Resp. at 2, 5. Plaintiffs point to a new allegation in their FAC stating that, although they are challenging the Ethics in Public Service Act as applied to them and are seeking both injunctive and declaratory relief against the EEB, they "are not asking the Court to interfere with any administrative proceeding pending before the EEB." Resp. at 3. The problem with this illogical argument is that by seeking to enjoin enforcement of the Ethics in Public Service Act as applied to their use of a specific UW listserv, Plaintiffs are necessarily seeking to halt the EEB's ongoing investigations into their conduct.

Contrary to Plaintiffs' suggestion, the analysis under *Younger* is a practical one, not a purely formal one. In applying *Younger*, courts do not ask whether a plaintiff has explicitly sought to halt a state proceeding, but "whether the federal action would *effectively* enjoin the state proceedings." *Citizens for Free Speech, LLC*, 953 F.3d at 657 (emphasis added); *see also id.* ("[P]laintiffs' federal action could substantially delay the [state] proceeding, thus having the practical effect of enjoining it."). This is plainly the case here, as Plaintiffs' FAC specifically seeks "injunctive and declaratory relief to prevent the EEB from applying [its] policies" to their use of the listserv. Dkt. 15 at 28. This would necessarily require termination of the ongoing EEB matters, and the Court should reject Plaintiffs' superficial recitation that they are not seeking to do what they are obviously seeking to do. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("[T]he conclusory nature of respondent's allegations . . . disentitles them to the presumption of truth.").[4]

[4] Plaintiffs argue *Younger* abstention does not apply, as they "expect to prev[ail] in the proceedings before the EEB on non-constitutional grounds," and it is thus "likely there will never be an adjudication in state proceedings of the federal constitutional questions plaintiffs raise here." Resp. at 5. But if Plaintiffs succeed on the merits, they will lack any constitutional injury to adjudicate. Moreover, Plaintiffs' argument would render *Younger* meaningless, as there is *always* a possibility a party will succeed on the merits in the parallel state proceedings.

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4. Plaintiffs turn next to constitutional ripeness, arguing they have suffered a concrete injury under Article III because they have been "threatened with" unspecified fines (which are speculative and apply only if they are found to have violated the Ethics in Public Service Act). Resp. at 3-4. This is insufficient under the Ninth Circuit's recent *Twitter* decision. There, Twitter alleged a civil subpoena "will result in significant diminishment of the willingness of Twitter employees to speak candidly and freely in internal content moderation decisions." *Twitter*, 56 F.4th at 1175. But the Court concluded that such "speculative" claims "regarding the potential effects of" challenged conduct are insufficient to demonstrate an Article III injury. *Id*. So too were Twitter's "naked assertion[s]" that a government investigation chilled its speech. *Id*. In this case, no Plaintiff alleges they were actually fined, nor that EEB's actions "ha[ve] actually chilled [their] speech." *Id.* at 1175; *see also* Dkt. 12 at 6-9.

5. Finally, Plaintiffs assert Defendants are unlikely to succeed in their argument that Plaintiffs lack a protectable privacy interest in their emails. Dkt. 12 at 4-5. But as public employees, Plaintiffs' emails are public records, with limited exceptions. RCW 42.56.010(3); RCW 42.56.070; WAC 292-110-010(4). Plaintiffs try to wave this problem away, claiming in conclusory fashion that "disclosure of faculty emails is . . . subject to many privileges," Resp. at 4, although they tellingly fail to identify any such privileges that might be infringed upon by the EEB actions they challenge. For example, and as pointed out in Defendants' initial motion, Plaintiffs' reliance on FERPA is misplaced, as that statute does not give rise to any private right of action and would not apply here even if it did. Dkt. 12 at 8-9 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002)). Plaintiffs' lack of any protectable privacy interest in their State emails is yet another reason Defendants are likely to prevail.

C. An Extension Will Not Prejudice Plaintiffs

Plaintiffs do not argue they will be prejudiced by extending the initial discovery deadlines pending resolution of the motion to dismiss. The closest they come is their conclusory statement

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that "undue delay results in the unconstitutional suppression of protected speech," Resp. at 2, but this bare assertion is insufficient to overcome Defendants' showing of good cause.

An extension will not cause "undue delay," as the time required to rule on Defendants' motion will likely be relatively short. Further, there is no prejudice to Plaintiffs from an extension, as "Plaintiff[s are] not required to produce evidence at this stage to prove [their] factual allegations." *Williams*, 2023 WL 5579589, at *1. Defendants' dismissal arguments are purely legal, and Plaintiffs have not identified any discovery they need for their response. Given the multiple threshold defenses in Defendants' motion and the lack of any prejudice to Plaintiffs, an extension of the discovery deadlines is warranted.

II. CONCLUSION

Defendants respectfully request that the Court extend the deadline for the Fed. R. Civ. P. 26(f) conference and associated deadlines.

DATED this 1st day of December 2023.

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I certify that this document contains 2,098 words, in accordance with LCR 7(e)(2).

DECLARATION OF SERVICE

I declare that on this day I caused this document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 1st day of December 2023, at Seattle, Washington.

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