IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DANIEL A. HORWITZ,	)	
	)	
Plaintiff,	)	
	)	Case No. 3:24-cv-1180
v.	)	JUDGE GIBBONS
	)	
U.S. DISTRICT COURT FOR THE	)	
MIDDLE DISTRICT OF TENNESSEE, *et al.*	)	
	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS (ECF 32)

Mr. Horwitz filed this lawsuit on October 1, 2024, after 27 months of trying in vain to get the Middle District to vindicate his First Amendment rights by ruling on the constitutionality of Local Rule 83.04. Then, on November 1, he sought a preliminary injunction to prevent the Middle District from enforcing its unconstitutional rule as this case proceeds. ECF 21. While that motion was pending, on December 13, CBS News asked to interview Mr. Horwitz about some of his cases in the Middle District. *See* ECF 30-4. Mr. Horwitz tried to confer with the Judicial Defendants about how he could participate in that interview without violating Rule 83.04(a)(2)'s vague presumptions of prejudice, but the Judicial Defendants would not offer him any leeway. As a result, Mr. Horwitz filed a motion to renew and expedite his request for preliminary injunction (or, in the alternative, for a temporary restraining order) so that he could participate in the CBS News interview. ECF 30.

Since then, the Judicial Defendants have filed successive motions attempting to delay this Court's consideration of the merits of Mr. Horwitz's case and his urgent requests for preliminary and temporary relief. First, on December 23, they filed a short motion to dismiss on sovereign-immunity grounds, asserting that this Court cannot resolve the pending motions for injunctive relief until it rules on the new motion to dismiss. ECF 31-1 at 7. Then, just one day later, the Judicial Defendants filed this motion to stay the proceedings entirely.[1] The motion for stay revealed that, back in July 2024, the Middle District decided to convene an advisory committee, which will soon begin considering amendments to several of the Middle District's local rules, including Rule 83.04. ECF 32-1 at 2–3. The advisory committee will eventually make recommendations and seek public comments on any proposed changes through mid-March before the Judicial Defendants can then consider amending the rules. *Id.* Even though this process will take several months or more and produce no certain outcome, the Judicial Defendants ask for a stay until at least March 15, 2025, just in case a potential change to Rule 83.04 fixes the rule's constitutional issues.

[1] The Judicial Defendants did not confer with Mr. Horwitz before filing their Motion to Stay. *See* L.R. 7.01(a)(1).

Mr. Horwitz is pleased to learn that the Middle District has belatedly begun to work its way through the process of possibly considering some changes to its unconstitutional local rule, maybe, at some future date. But he cannot wait several more months to find out whether he's allowed to talk about his cases without risking sanctions. Rule 83.04—in its current unconstitutional form—remains in effect and continues to inflict further irreparable injury on Mr. Horwitz's First Amendment rights each and every day it continues to chill his speech. That is why Mr. Horwitz sought expedited consideration of his motions for injunctive relief. *See* ECF 21, 30. A stay of proceedings would only guarantee further injury to Mr. Horwitz's First Amendment rights on the off chance that the Middle District may eventually fix its broken rule, nearly three years after Mr. Horwitz first challenged that rule's legitimacy.

I. Legal Standard

As the Sixth Circuit has explained, "[a] stay is an intrusion of the ordinary processes of administration and judicial review." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016). "A stay is not a matter of right"; instead, it is an exercise of the Court's discretion that must "'be guided by sound legal principles.'" *ProCraft Cabinetry, Inc. v. Sweet Home Kitchen & Bath, Inc.*, 343 F. Supp. 3d 734, 738 (M.D. Tenn. 2018) (Crenshaw, J.) (quoting in part *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (Marshall, C.J.)). "While the Court has the inherent discretionary power to stay proceedings as part of its ability to manage its docket," Chief Judge Campbell has emphasized that the Court "must 'tread carefully' in granting a motion to stay, because every party has a 'right to a determination of its rights and liabilities without undue delay.'" *FemHealth USA, Inc. v. Williams*, 640 F. Supp. 3d 809, 812 (M.D. Tenn. 2022) (quoting *Ohio Env't Council v. U.S. Dist. Ct. for S.D. Ohio*, 565 F.2d 393, 396 (6th Cir. 1977)). The Court should consider "the relative benefits and burdens of a stay on the parties, the court, and the public." *Id.* "Regardless of the reason for requesting the stay, the burden to demonstrate a stay is warranted is always on the party seeking the stay." *Id.* The moving party must "show that there is pressing need for delay, and

that neither the other party nor the public will suffer any harm from entry of the order." *Ohio Env't Council*, 565 F.2d at 396.

II. The Judicial Defendants Cannot Carry Their Burden to Justify a Stay

The Judicial Defendants' perfunctory motion to stay does not come close to satisfying their burden of persuasion. A stay would impose severe hardship on Mr. Horwitz and the public more broadly in exchange for little benefit to the Judicial Defendants, who have no legitimate interest in the continued enforcement of an unconstitutional rule. The Judicial Defendants have made no real attempt to show otherwise. *See Ohio Env't Council*, 565 F.2d at 396; *see also Int'l Bd. of Elec. Workers, Loc. Union No. 2020 v. AT&T Network Sys.*, 879 F.2d 864, 1989 WL 78212, at *8 (6th Cir. 1989) (the most important consideration when considering a motion to stay "is the balance of hardships").

As Mr. Horwitz has explained, a stay of proceedings would not merely put off the merits of Mr. Horwitz's constitutional challenge to the Middle District's local rule—it would prevent this Court from granting the preliminary injunctive relief that Mr. Horwitz requires to safeguard his First Amendment rights and resume speaking about his ongoing litigation in the Middle District. *See Sisters for Life, Inc. v. Louisville-Jefferson County*, 56 F.4th 400, 408 (6th Cir. 2022) (a First Amendment injury, "for even minimal periods of time," is irreparable). Of course, if this Court were to grant Mr. Horwitz's pending motions for preliminary injunctive relief *before* ruling on the motion for stay, that would lessen the interim constitutional harm. But even then, the Middle District has held that a plaintiff still "has an interest in timely adjudication of [his] claims" when there's a preliminary injunction in place. *FemHealth*, 640 F. Supp. 3d at 813.

Moreover, a stay is not warranted because there "is no certainty" that the Middle District will amend Rule 83.04 at all—let alone in a way that cures its constitutional infirmities. *See id.* That is especially true when, as here, the judges for the Middle District continue to defend their rule as constitutional in its current form. *Cf.* ECF 33 (Opp. to Prelim. Inj.) at 8–10; *see also Gordon v. CoreCivic of Tenn., LLC*, No. 23-cv-01195, ECF 40 (upholding

Rule 83.04 against Mr. Horwitz's First Amendment challenge based on the court's general power to "restrict the free expression" of attorneys). Indeed, one of the reasons the Judicial Defendants oppose Mr. Horwitz's motions for injunctive relief is because the Supreme Court in *Gentile* did not address "th[e] kind of burden" that Rule 83.04(a)(2) imposes on attorneys. ECF 33 at 9. If anything, this position just confirms that the Judicial Defendants and the Middle District's advisory committee would benefit from this Court's guidance on the ways in which Rule 83.04 is unconstitutional.

Nor will a stay serve the public interest. In addition to the public's "interest in the prompt resolution of the cases that will be tried in their District," *FemHealth*, 640 F. Supp. 3d at 815 (cleaned up), the public also has an interest in hearing what Mr. Horwitz (like every other attorney admitted to the Middle District) has to say about his litigation. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) (discussing the public's "reciprocal" First Amendment right to listen). Mr. Horwitz is trying to discuss matters of public importance on which he has unique expertise with a national television broadcaster. The public interest is not served by prolonging the chill on his speech.

On the other side of the ledger, a stay offers little to no benefit to the Judicial Defendants. Aside from saying that it would be "extraordinary" to "dismantle" a local rule, the motion for stay fails to articulate any interest in insulating that rule from judicial review while they consider possible amendments. The Judicial Defendants have no interest in enforcing an unconstitutional rule while they consider amending it. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

* * *

In short, there are only two possible relevant outcomes of the Middle District's upcoming rules revision: Either the Middle District revises Rule 83.04 to cure its constitutional deficiencies, or they leave those deficiencies in place. The first outcome would be a concession that—just like almost every other federal district court in the country current recognizes, *see,*

e.g., ECF 30-5 (compiling other districts' local rules)—Rule 83.04's presumptions of prejudice and burden-shifting are unnecessary to assure fair trials. That would all but concede that the current rule is not narrowly tailored and has been impermissibly restricting Mr. Horwitz's speech for years. On the other hand, if the rules revision results in no substantive change to the aspects of Rule 83.04 that Mr. Horwitz is challenging, the stay will have proved entirely unnecessary. Either way, a stay will only ensure further injury to Mr. Horwitz's First Amendment rights.

CONCLUSION

There is no legitimate basis to stay proceedings. The Judicial Defendants' motion, filed just one day after another motion urging this Court to delay consideration of Mr. Horwitz's pending motions for injunctive relief, is just another attempt to avoid a judicial determination that Rule 83.04 violates the First Amendment. When Mr. Horwitz filed his lawsuit, he detailed his extensive efforts over 27 months to get the Middle District to rule on his First Amendment challenge to Rule 83.04. Now, the Judicial Defendants want to delay consideration of Mr. Horwitz's claims for yet another few months. Each day that Mr. Horwitz's claims remain pending is another day that Rule 83.04 is violating his First Amendment rights. A stay of proceedings would only further delay justice.

Dated: January 2, 2025.

Respectfully,

/s/ Jared McClain

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CERTIFICATE OF SERVICE

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