

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al.

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as  
Secretary of the United States Department of  
the Interior, et al.,

Defendants,

THE CHEROKEE NATION, et al.

Intervenor-Defendants.

Civil Action No: 4:17-cv-868-O

**FEDERAL DEFENDANTS' OPPOSED MOTION FOR EXPEDITED  
CONSIDERATION AND MOTION TO STAY PROCEEDINGS ON SUMMARY  
JUDGMENT PENDING RESOLUTION OF DEFENDANTS' MOTION TO DISMISS**

Plaintiffs plan to file a combined Response to Federal Defendants' Motion to Dismiss and Brief in Support of Summary Judgment. Federal Defendants hereby respectfully move this Court for expedited consideration of this Motion and for an order staying proceedings on Plaintiffs' forthcoming motion for summary judgment pending resolution of the issues presented by Defendants' Motion to Dismiss the Second Amended Complaint. ECF Nos. 56 and 57. Federal Defendants request this stay because the jurisdictional issues, which Defendants contend warrant dismissal of the entire case, should be resolved before this Court considers the merits, which present far-reaching constitutional challenges. The doctrine of constitutional avoidance requires that this Court first determine whether these claims are properly before it. Further, a stay is warranted for reasons of judicial economy and conservation of the parties' resources. Plaintiffs will not be prejudiced by postponing merits-based arguments until after the Motion to

Dismiss has been decided. Defendants, on the other hand, will be prejudiced if they are required to brief constitutional arguments not properly before the Court.

### ARGUMENT

The Court should stay proceedings on any motion for summary judgment until the Court addresses the jurisdictional issues raised by the Defendants. This Court is authorized to stay proceedings as appropriate. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 411 (1995) (“[W]e have long recognized that courts have inherent power to stay proceedings.”).

First, Plaintiffs’ Second Amended Complaint raises numerous allegations of constitutional violations against the Indian Child Welfare Act, a forty-year federal statute, its implementing regulations, and two federal agencies, based on the following constitutional provisions and principles:

- Commerce Clause of Article I of the U.S. Constitution
- Article I based on non-delegation principles
- Fifth Amendment Equal Protection
- Fifth Amendment Due Process
- Tenth Amendment Domestic Relations
- Tenth Amendment Anti-Commandeering

ECF No. 35 at 63-83. “A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”

*Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). The doctrine of

constitutional avoidance is a “cardinal principle” and “has for so long been applied” by the Court “that it is beyond debate.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citations omitted). As indicated above, Plaintiffs assert broad and far-reaching constitutional arguments regarding a statute that has been in place for 40 years. In their 86 page Second Amended Complaint, Plaintiffs utilize the kitchen sink approach and raise six independent constitutional arguments. Defendants have called into question the Court’s jurisdiction to hear those arguments. Before this Court addresses those issues, it should be assured that they are properly before the Court. The requested stay would allow the Court to avoid unnecessarily expending resources on this litigation. It would also allow the Court to avoid needlessly permitting briefing, much less deciding, the constitutional questions posed here. And even if the Court’s ruling on Defendants’ Motion to Dismiss does not dismiss this case entirely, the number and scope of constitutional issues that proceed to the merits could be narrowed during the process. Given the well-established canon of constitutional avoidance, *United States v. Nat’l Treasury Emp. Union*, 513 U.S. 454, 478 (1995) (noting that the Court has a policy of “avoiding [the] unnecessary adjudication of constitutional issues”), that alone warrants a stay.

A stay pending a motion to dismiss on jurisdictional grounds is also appropriate because jurisdiction is a “threshold matter” that courts must resolve before proceeding to the merits. *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998)). “The requirement that jurisdiction be established as a threshold matter . . . is ‘inflexible and without exception.’” *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) (quoting *Steel Co.*, 523 U.S. at 94-95); see also *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004) (“We have . . . urged counsel and district courts to treat

subject matter jurisdiction as a threshold issue for resolution . . . .” (quoting *United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 170-71 (2d Cir. 2003)). Before this Court addresses Plaintiffs’ claims, it should consider whether it even has jurisdiction over those claims. Plaintiffs’ assertion that the legal questions raised “are intertwined with the merits,” ECF No. 62 at 3, falls flat because the Court is not required to consider the viability or validity of the merits of Plaintiffs’ claims to make a determination as to jurisdictional arguments raised in Defendants’ Motion to Dismiss, which involves principles of standing, abstention, ripeness, Rule 19, and waiver. ECF No. 57. Plaintiffs’ attempts to prematurely advance this case to the merits, and further create confusion through the filing of one brief that both responds to Defendants’ Motion to Dismiss and advances Plaintiffs’ arguments for summary judgment, should be rejected.

The Fifth Circuit has emphasized the broad discretion of district courts to stay proceedings pending resolution of motions that raise jurisdictional issues. See *Brown v. DFS Servs.*, 434 Fed. Appx. 347, 354 (5th Cir. 2011) (“It is properly within the province for the district court to stay proceedings pending resolution of dispositive motions, as the court has wide latitude to order proceedings in the interest of justice and judicial economy.”); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (“A trial court has broad discretion and inherent power to stay proceedings until preliminary questions that may dispose of the case are determined.”).

The Fifth Circuit and this Court recognize, as do other circuit courts, that permitting a case to proceed to briefing on summary judgment when there is a question as to the court’s jurisdiction would do “nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public’s perception of the federal judicial system.” *Chudasama v. Mazda Motor Co.*, 123 F.3d 1353, 1368 (11th Cir. 1997); see also *Alaska Cargo Transport*,

*Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993); *Gilbert v. Ferry*, 401 F.3d 411, 415-16 (6th Cir. 2005); *Lafluer v. Teen Help*, 342 F.3d 1145, 1153 (10th Cir. 2003). Federal district courts in this Circuit, including this Court, accordingly frequently stay or otherwise limit the scope of proceedings to limited jurisdictional discovery until the outcome of a motion to dismiss. *See, e.g., Little v. Tex. Attorney Gen.*, Civ. Action No. 3:14–CV–3089–D, 2014 WL 5039461, at \*3 (N.D. Tex. Oct. 9, 2014) (stay while motion to dismiss pending); *Agee v. City of McKinney*, Case No. 4:12–CV–550, 2014 WL 1232644, at \*10 (E.D. Tex. Mar. 22, 2014) (“Defendants filed a Motion to Stay the remaining proceedings in this case in light of Defendants’ dispositive motion,... [t]he Court granted this request.”),

Further, granting the requested stay poses no hardship to Plaintiffs, despite their contention that they will oppose the stay because Plaintiffs are suffering harms. ECF Doc. 62 at 4. At the very heart of Defendants’ Motion to Dismiss is the question of whether Plaintiffs are actually suffering an injury as to the provisions of ICWA they seek to upend, and those issues need to be resolved before advancing to the merits. In addition, Plaintiffs’ outcries of urgency are belied by the fact that Plaintiffs waited six months after the filing of their initial complaint to express a sense of urgency. Plaintiffs’ initial complaint was filed October 25, 2017, and rather than moving the case along, Plaintiffs asked for an extension to file a First Amended Complaint, to which Defendants complied. ECF Doc. 14. And after Defendants moved to dismiss the First Amended Complaint on February 13, 2018, Plaintiffs sought to amend their complaint for a second time rather than respond to the arguments raised in the motion. ECF Doc. 33.

Defendants assented to their request, and the parties negotiated a briefing schedule for a renewed motion to dismiss the Second Amended Complaint, which did not contemplate or even suggest Plaintiffs would file a motion for summary judgment at the same time as opposing Defendants’

Motion to Dismiss. *Id.* Given the current trajectory of the case, which has largely been driven by Plaintiffs' litigation tactics, a modest stay on the motion for summary judgment would pose no additional hardship because the stay would be temporary and would end once the Court makes a ruling on Plaintiffs' standing to bring their claims and the other jurisdictional issues raised in the Motion to Dismiss.

Imposing a temporary stay in the instant case conserves judicial and party resources and poses no burden to Plaintiffs. When a court grants a stay, it must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 255; *see Dellinger v. Mitchell*, 442 F.2d 782, 786 & n.7 (D.C. Cir. 1971) ("A court has inherent power to stay proceedings in control of its docket . . . after balancing the competing interest."). The Defendants believe this case can be resolved without considering the merits of the Plaintiffs' claims. Thus, granting the stay will permit the Court to avoid any motions practice surrounding the briefing of Plaintiffs' motion for summary judgment. Additionally, granting the stay will conserve all parties' resources by requiring the parties to brief the summary judgment motion only if and to what extent this Court determines that Plaintiffs can appropriately advance to the merits and move for summary judgment.

Dated: April 26, 2018

Respectfully submitted,

JEFFREY H. WOOD  
ACTING ASSISTANT ATTORNEY  
GENERAL

/s/ JoAnn Kintz  
JoAnn Kintz  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 2018, a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' and Intervenor-Defendants' counsel, using the ECF system of the court.

/s/ JoAnn Kintz

JoAnn Kintz

Trial Attorney

U.S. Department of Justice

**CERTIFICATE OF CONFERENCE**

I, JoAnn Kintz, hereby certify that I communicated with counsel for Plaintiffs and the Intervenor-Defendants regarding this motion by electronic mail on April 25, 2018. Intervenor-Defendants indicated that they support the motion. Matthew McGill, on behalf of Plaintiffs, indicated their opposition to a motion to stay proceedings on summary judgment through electronic mail on April 26, 2018.

/s/ JoAnn Kintz  
JoAnn Kintz