

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ANTHONY HINRICHS, REV. HENRY)
GERNER, LYNETTE HEROLD,)
FRANCIS WHITE QUIGLEY,)

Plaintiffs,)

v.)

No. 1:05-CV-00813 DFH/TAB

BRIAN BOSMA, in his official capacity)
as Speaker of the House of Representatives)
of the Indiana General Assembly,)

Defendant.)

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT’S MOTION TO STAY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 62(b), Defendant Brian Bosma, in his official capacity as Speaker of the House of Representatives of the Indiana General Assembly, moves this Court to stay the enforcement of its Final Declaratory Judgment and Permanent Injunction entered on November 30, 2005 until the disposition of the Defendant’s Motion to Alter or Amend Judgment.

I. Rule 62(b) Standard

Rule 62(b) allows a court to stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion made pursuant to Rule 59. Fed. R. Civ. P. 62(b). This Rule allows the entry of the judgment immediately after the trial while still providing protection to the moving party pending the outcome of their post-trial motion. The decision whether to grant a stay under Rule 62(b) is left to the discretion of the

district court. And while the Speaker is unaware of any Seventh Circuit cases setting forth a more specific standard, some courts have applied to Rule 62(b) motions the same equitable standard that generally applies to stay requests, including an examination of the applicant's likelihood of success on the merits, the risk of substantial injury to either party (and the balance of harms), and the public interest. *See Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 106 F. Supp. 2d 696, 708 (D.N.J. 2000) (citing *Standard Havens Products v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990)).

II. An order staying the judgment is proper under Rule 62(b).

Defendant Brian Bosma has contemporaneously filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e). In this motion, Defendant asserts that the injunction entered by the Court manifests clear legal error in the following respects—(1) the injunction exceeds the Court's jurisdiction in cases of taxpayer standing, (2) the injunction is not limited to the relief requested by Plaintiffs, and (3) the injunction is vague and gives the Speaker of the House no clear standard for application. The Speaker respectfully requests that the Court modify the injunction accordingly.

The Speaker respectfully requests that the Court stay its injunction until it rules on the Speaker's Rule 59(e) motion because the Court's ruling in that regard may either substantially reduce the scope of the injunction or at least clarify the effort required of the Speaker for good-faith compliance with the Court's order. The equities balance in favor of a stay for the following reasons:

1. The Rule 59(e) motion is likely to succeed

As explained in more detail in the Speaker's memorandum in support of his Rule 59(e) motion, that motion is very likely to be successful because the Court's injunction

goes well beyond proving relief to the plaintiffs as taxpayers. Rather than simply enjoining the Speaker from spending tax money on prayers that the Court deems to be unconstitutional, the Court has enjoined anything but “non-sectarian” prayers in all official proceedings of the House. If Plaintiff Hinrichs had standing as a lobbyist who was forced to come into unwelcome contact with sectarian prayers, this type of relief might at least have been within the Court’s jurisdiction. However, Hinrichs has dropped his claim of standing as a lobbyist, so the most that the Court may do is redress the alleged injuries of the plaintiffs as taxpayers.

The leading taxpayer standing cases, including those cited by this Court in its Findings of Fact and Conclusions of Law, all suggest that spending restraints are the appropriate relief in taxpayer standing cases. Indeed, the Speaker is aware of no taxpayer standing cases where a court has granted any other type of relief. Consequently, the Speaker is likely to succeed on this issue.

In the alternative, the Speaker is also likely to succeed with his request for the Court to pare its injunction to cover only the relief requested by the plaintiffs and litigated by the parties: an injunction concerning the prayer that opens each meeting day of the House pursuant to Rule 10.2. Cases from this and other circuits state that courts should not enjoin activity beyond the scope of the relief necessary to remedy the plaintiffs’ alleged injuries. Here, the Court’s injunction professes to cover all official proceedings of the House, but the plaintiffs have protested only the House’s opening prayers given pursuant to Rule 10.2. The Speaker’s chances of success on this issue are great as well.

Finally, given the facial vagueness of some dimensions of the Court’s injunction, the Speaker is likely to persuade the Court to clarify what is required of him under the injunction. Rule 65 requires that injunctions be reasonably specific so that those enjoined have fair warning of the demands placed on them. As it stands, the Court’s injunction says that the Speaker “is permanently enjoined from permitting sectarian prayers.” Other than requiring the Speaker to give particular advice to those offering prayers, however, this injunction does not clearly set forth how far the Speaker must go to prevent “sectarian” prayers from occurring during “official proceedings” or whether any particular remedies are required in circumstances where, despite the Speaker’s best efforts, a cleric or a House member either openly defies the Court’s instructions or inadvertently uses language ultimately deemed to be “sectarian.” At a minimum the Speaker is likely to win relief in this regard.

2. The potential harm to the plaintiffs is minimal

The only cognizable injury suffered by the plaintiffs in this case is that their taxpayer dollars have been spent on conduct the Court has determined to be unconstitutional. Beyond that, of course, they are offended by prayers in the House that are not “non-sectarian.” However, the traditions of the House that have led to the Court’s injunction have been in place for decades at least, and no one could plausibly claim that the House has become a theocracy as a result. This is not even a case where the personal conduct of the plaintiffs is being limited by any unenjoined activity of the Speaker. The point is that, while Establishment Clause values are certainly important, the plaintiffs actually stand to suffer no material harm if the Court’s order is stayed pending resolution of this motion.

3. The potential harm to the Speaker substantially outweighs the potential harm to the plaintiffs

The next opportunity for a prayer subject to this Court's injunction is January 4, 2006, when the House is scheduled to come back into session. Pursuant to local rule 7.1, the Plaintiffs will have fifteen days (until December 29, 2005) to respond to the Speaker's Rule 59(e) motion, and the Speaker expects to file a reply memorandum.

Thus, it is unlikely the Court will rule on the Rule 59(e) motion before January 4, 2006.

If so, the Speaker may be greatly injured by having to enforce the injunction as-is. As things stand, in order to avoid allegations of non-compliance, the Speaker may be forced to undertake extraordinary efforts to prevent any prayers except "non-sectarian" prayers during all official House proceedings, even to the point of preventing members of the Indiana House from engaging in lawfully protected conduct, including their rights to use sectarian prayer as a means of debate on the floor of the House. This not only infringes on the rights of those members, but also threatens the proper functioning of a co-sovereign's lawmaking body. Such restraint on the individual conduct of the people's elected representatives and on the very operation of republican governance is very serious harm, and it dramatically outweighs any minimal harm the plaintiffs could possibly suffer during the pendency of the Rule 59(e) motion.

4. The Public interest favors a stay

For largely the same reasons, the public interest favors a stay of the Court's injunction. There is no gainsaying the importance of proper enforcement of the Establishment Clause, but the operations of a co-sovereign's lawmaking branch is also of paramount constitutional dimension. After all, under the Constitution the United States guarantees each state a "Republican Form of Government." U.S. Const. Art. IV, § 4, cl.

1. There is an exceedingly great public interest, therefore, in permitting the legislative branch of state government to function free from a vague or overbroad injunction, even where predicated on a perceived Establishment Clause violation, where the Court may reconsider or clarify the injunction.

* * * *

The circumstances of this Case constitute the paradigmatic “exceptional circumstances” sufficient to stay a judgment. The Court’s injunction affects not only the Speaker, but also every House member and every person who sets foot on the floor of the Indiana House. It interferes with a longstanding House tradition of permitting uncensored prayer by a variety of clerics without regard for their religious beliefs.

Without further guidance by the Court it leaves unanswered many questions regarding the intended scope of the injunction which will divert time and attention from the legislative function of the Indiana House. Particularly in light of the minimal nature of any potential harm a stay could cause the Plaintiffs, these circumstances should be enough to stay the judgment pending appeal, let alone for the much shorter life of a Rule 59(e) motion.

While a motion to stay the judgment pending appeal is premature at this point, the Court should at least stay the judgment until it has a chance to consider the Speaker’s arguments for reconsideration fully and completely.

III. Conclusion

For the reasons set forth above, and pursuant to Federal Rule of Civil Procedure 62(b), this Court should stay its Final Declaratory Judgment and Permanent Injunction issued on November 20, 2005, pending disposition of the Rule 59(e) motion filed by Defendant Brian Bosma, Speaker of the Indiana House of Representatives.

Respectfully submitted,

STEVE CARTER
Attorney General

By: /s/ Thomas M. Fisher .
Thomas M. Fisher
Solicitor General

Counsel for Defendant Brian Bosma

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2005, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

Kenneth J. Falk
Ken.falk@iclu.org

 /s/ Thomas M. Fisher .
Thomas M. Fisher
Solicitor General

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204
Telephone: (317) 232-6255
Fax: (317) 232-7979
tfisher@atg.state.in.us
SC/272043