NO. 12-1788

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARY SHEPARD and the ILLINOIS STATE RIFLE ASSOCIATION,

Plaintiffs-Appellants,

v.

LISA M. MADIGAN, in her official capacity as ATTORNEY GENERAL OF ILLINOIS, *et al*.,

*Defendants-Appellee*s.

On Appeal from United States District Court for the Southern District of Illinois
Civil Case No. 11-CV-405-WDS (Honorable William D. Stiehl)

OPPOSITION TO DEFENDANTS' MOTION TO STAY BRIEFING AND HOLD APPEAL IN ABEYANCE and PLAINTIFFS' MOTION TO SCHEDULE ORAL ARGUMENT TOGETHER WITH A RELATED CASE.

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Plaintiffs-Appellants Mary Shepard and the Illinois State Rifle Association ("Plaintiffs") hereby oppose Defendants' motion to stay the briefing schedule and hold this case in abeyance pending resolution of the appeal in *Moore v. Madigan*, No. 12-1269. *See* Dkt. Entry 3. Given that, as Defendants aver, these two cases "present[] identical issues," Defendants' Motion at 1, Plaintiffs oppose Defendants' motion and move this Court instead to calendar this case for oral argument before the same panel that will be hearing the appeal in *Moore v. Madigan.*

1. Plaintiffs Mary Shepard and the Illinois State Rifle Association are entitled to present their own appeal through their own chosen attorneys. That is the default rule in our adversarial system, and there is no reason to depart from it in this case. Defendants have cited no authority, and we are aware of none, that establishes a different rule when two appeals involving similar legal issues are pending before this Court at the same time. Certainly Defendants have adduced no authority indicating that this Court is obliged to hold in abeyance the appeal that is second in time—especially where, as here, that appeal follows the prior appeal by just a few weeks. Defendants characterize the briefing now underway in this case, *Shepard v. Madigan*, as "a second round of briefing in this appeal."

Defendants' Motion at 3. That is plainly incorrect: there has not yet been a *first* round of briefing by Plaintiffs-Appellants in this case. Ms. Shepard is entitled to her own briefing, of her own appeal, by her own chosen counsel, and we are filing our opening merits brief contemporaneously with this submission.

2. Defendants are mistaken in their contention that "consolidating the two cases would restart and delay the process." There will be no delay because the *Shepard* Plaintiffs will be filing their brief in this Court today. Defendants concede that their own brief in *Moore v. Madigan* has not even been filed yet, apparently because they sought an extension of time. Defendants' Motion at 2. Thus, the only delay in the briefing schedule in *Moore* has occurred as a result of the request of the Defendants.

3. Defendants contend that consolidating *Shepard* and *Moore* "would waste the substantial resources the *Moore* parties have already invested in briefing that case." Defendants' Motion at 3. We fail to discern the sense in this. The *Moore* plaintiffs would surely wish to present their own arguments through their own counsel and would brief their appeal whether it were consolidated with another case or not. Therefore, no time or resources have been wasted by the plaintiffs-appellants in *Moore*. And the

State of Illinois would likewise surely brief its opposition to the *Moore* plaintiffs and their particular arguments. Defendants repeatedly aver that the Second Amendment issues in this appeal and in *Moore v. Madigan* are the same. Defendants' Motion at 1, 2, 3. Insofar as this is true, then the time Defendants are spending now in briefing the *Moore* appeal will leave them well prepared to brief their opposition to the *Shepard* appeal. According to Defendants' own analysis, there will be little, if any, incremental burden on them to respond to Ms. Shepard's appeal brief.

4. Although it is true that the substance of the Second Amendment constitutional issues is much the same in both cases, there is a significant procedural difference between *Moore* and *Shepard*: in our prayer for relief in our opening merits brief, we seek a preliminary injunction against the Illinois Gun Carry Ban in the event that this Court determines that a remand is necessary before entry of a permanent injunction. The appellants in *Moore* seek no such relief. An application for preliminary injunctive relief is a basis for *expediting* an appeal, not for holding it in abeyance. *See, e.g.*, 28 U.S.C. § 1657; *Gregorio T. v. Wilson*, 54 F.3d 599, 600 (9th Cir. 1995).

5. Ms. Shepard has a real and immediate need to carry a firearm for self-defense: she was savagely beaten to within an inch of her

life and unable to defend herself because she was unarmed at the time. Ms. Shepard lives in mortal terror that she could not, at her advanced age, survive another such attack. That is why we filed a notice of appeal on her behalf the day after the district court below issued its opinion denying her injunctive relief. And it is also why we will be filing Ms. Shepard's appeal brief this very day—less than two weeks after the district court decision.

6. There are also some significant differences in the arguments presented in these two cases. In the court below, Ms. Shepard argued both that the Illinois Gun Carry Ban is categorically unconstitutional and also that, if subjected to any level of heightened scrutiny, the mass of social science evidence on firearms regulation fails to support Illinois's draconian prohibition on the right to bear arms. *See, e.g.*, Doc. No. 21 at 16-18; Brief of *Amicus Curiae* National Rifle Association of America, Inc., Doc. No. 54 (collecting social science literature on effects of allowing carriage of firearms). That body of scientific literature from the fields of criminology and public health does not figure prominently in the arguments of the plaintiff-appellants in *Moore*.

7. This case and *Moore* are already proceeding on very similar timelines. The United States District Court for the Central District of Illinois issued its decision in *Moore* on February 3, 2012; in this case the

United States District Court for the Southern District of Illinois issued its decision on March 30, 2012. The Plaintiffs-Appellants in *Moore* filed their brief on the merits in this Court on March 3, 2012. The Plaintiffs-Appellants in *Shepard* will be filing their brief on the merits in this Court today, April 11, 2012. The State of Illinois has not yet filed its merits brief in *Moore.*

8. In the interests of judicial efficiency, the two cases should be heard together by the same panel of this Court. No party in either case could be prejudiced by having the same panel consider both cases at the same time.

9. The only authority offered by Defendants, *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), does not suggest, let alone compel, a different course of action here. Holding one of the appeals in abeyance in that case was prudent and sensible because the two appeals in that class action involved the same attorneys, the same lower court, and the same settlement letter that supposedly mooted the claims in both cases. *See id.* at 893-94, 897.

CONCLUSION

Plaintiffs-Appellants Mary Shepard and the Illinois State Rifle Association therefore respectfully request that this case and *Moore* be set for argument before the same panel of this Court and, accordingly, that

Defendants' motion to stay the briefing schedule and hold this case in abeyance be denied.

Dated: April 11, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Charles J. Cooper
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