UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: March 02, 2018

Mr. Robert Mark Glover
Mr. Bruce S. Kramer
Ms. Jennie Vee Silk
Mr. Buckner Potts Wellford

Re: Case No. 17-5868, *Elaine Blanchard, et al v. City of Memphis, Tennessee*
Originating Case No. : 2:17-cv-02120

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jennifer Earl
Case Manager
Direct Dial No. 513-564-7066

cc: Mr. Thomas M. Gould

Enclosure

Mandate to issue

No. 17-5868

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELAINE BLANCHARD, et al.,

Plaintiffs-Appellants

and

ACLU OF TENNESSEE,

Intervenor Plaintiff,

v.

CITY OF MEMPHIS, TENNESSEE,

Defendant-Appellee.

FILED
Mar 02, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Before: ROGERS, SUTTON, and BUSH, Circuit Judges.

Plaintiffs Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins appealed the district court's dismissal of their complaint for lack of standing to pursue an action to enforce a consent decree to which they were not parties. The clerk ordered the parties to show cause why the appeal should not be dismissed as being taken from a non-final, non-appealable order. Plaintiffs responded, acknowledging that absent an order certifying the appeal under Federal Rule of Civil Procedure 54(b), their appeal was brought from a non-final, non-appealable order. We dismissed the appeal. Plaintiffs petition for rehearing and move to amend their response to the show cause order, arguing for the first time that we have jurisdiction over their appeal under 28 U.S.C. § 1292(a)(1). Defendant, the City of Memphis, cannot respond to the

petition for rehearing absent a request from the court. Fed. R. App. P. 40(a)(3). But, for the same reasons it would oppose rehearing, it opposes permitting an amended response to the show cause order. Plaintiffs replied, one day following the seven-day period for filing a reply. As a result, the City moves to strike the reply as untimely. Plaintiffs reply and move to extend the time to reply. For equitable reasons, we conclude that Plaintiffs' time to reply should be extended.

Panel rehearing is not warranted if we did not misapprehend or overlook any point of law or fact. *See* Fed. R. App. P. 40(a)(2). The City is correct that we will generally not consider issues raised for the first time in a petition for rehearing. *See Costo v. United States*, 922 F.2d 302, 302−03 (6th Cir. 1990). But the issue of subject matter jurisdiction may be raised "at any time, with or without the issue being raised by a party to the action." *Cmty. Health Plan of Ohio v. Mosser*, 347 F.3d 619, 622 (6th Cir. 2003), *overruled on other grounds by Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515 (6th Cir. 2006). Because Plaintiffs raise a jurisdictional argument that we did not previously consider, we grant rehearing.

Interlocutory appeals from orders expressly refusing injunctive relief are immediately appealable. 28 U.S.C. § 1292(a)(1). Interlocutory appeals from orders that have the practical effect of denying an injunction are also appealable, but only if the denial: has a "serious, perhaps irreparable, consequence"; and it cannot be effectively challenged absent an immediate appeal. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). The basis of the district court's denial—that Plaintiffs lack standing—means that they cannot obtain any injunctive relief; thus, it has the practical effect of a denial. *Shanks v. City of Dallas, Tex.*, 752 F.2d 1092, 1096 (5th Cir. 1985).

Plaintiffs, however, must also demonstrate that, without an immediate appeal, they will face serious or irreparable consequence. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84−89 (1981). Litigants cannot show irreparable consequence when they: (1) sought permanent rather than preliminary injunctive relief in the motion on review; (2) failed to allege that they would be

irreparably harmed if the motion were decided against their favor; and (3) could obtain permanent injunctive relief following trial. *Id.* at 84−86. Plaintiffs sought only permanent injunctive relief in their complaint, and they never moved for preliminary injunctive relief. As a result, even if the district court had denied the City's motion to dismiss, Plaintiffs still would not have received injunctive relief. *See Shanks*, 752 F.2d at 1096 ("If an order would have the same serious consequences irrespective of whether it is reviewed immediately or upon final judgment, the requirement of irreparable harm has not been met for purposes of § 1292(a)(1).") Plaintiffs also failed to allege, at any point before the district court, that irreparable harm would result without immediate injunctive relief. Finally, waiting for a final judgment would not impede their efforts to obtain permanent injunctive relief.

The motion for extension of time to file a reply is **GRANTED**, and the motion to strike the reply is **DENIED**. The petition for rehearing and the motion for leave to file an amended response to the show cause order are **GRANTED**. The appeal is **DISMISSED** for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk