No. 19-50384

In the United States Court of Appeals for the Fifth Circuit

BAHIA AMAWI,
Plaintiff-Appellee,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
Defendants-Appellants.

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI; GEORGE HALE,
Plaintiffs-Appellees,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM; TRUSTEES OF THE KLEIN INDEPENDENT SCHOOL DISTRICT; TRUSTEES OF THE LEWISVILLE INDEPENDENT SCHOOL DISTRICT; BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

STATE APPELLANTS' RESPONSE TO APPELLEES' JOINT MOTION TO MODIFY BRIEFING SCHEDULE TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, TO SUPPLEMENT THE RECORD

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Response to Joint Motion to Modify Briefing Schedule to Stay Appellate Proceedings or, In the Alternative, to Supplement the Record

Days before their principal brief is due, and months after this appeal was filed, Plaintiffs have asked this Court to stay all appellate proceedings in the name of judicial economy. Plaintiffs' request is late, prejudicial, and counterproductive. A stay will not promote the efficient disposition of the case; it will only prolong it. The legal issues raised by the State Defendants are ripe for resolution and can most expeditiously be addressed in the present appeal. Plaintiffs' alternative attempt to shoehorn irrelevant and previously undisclosed evidence into the record is improper and confuses the relevant issues. There is no need to stay these proceedings and no reason to supplement the record. The Plaintiffs' motion should be denied.

The State Defendants' appeal of the district court's preliminary injunction raises two threshold issues: (1) whether H.B. 793, which unambiguously removes sole proprietors from the "companies" subject to Chapter 2270 of the Texas Government Code, moots Plaintiffs' claims; and (2) if this case is not moot, whether Chapter 2270 is constitutional. *See* Br. for State Appellants at 2. The answers to those questions will ultimately resolve this entire litigation. Any appeal of a permanent injunction or declaratory judgment would raise the same legal issues and involve the same material facts. This Court has jurisdiction, and it will soon have all the necessary briefing, to resolve those issues now. *See Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) ("'Where it

appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.'" (citation omitted)).

But just as this Court is poised to resolve those issues and dispose of this case, Plaintiffs seek a stay of appellate proceedings until the district court has ruled on either their motion for permanent injunction or their recently filed motion for declaratory judgment. A stay would serve no purpose, least of all judicial economy. This Court has already stayed the district court's preliminary injunction, indicating that State Appellants have made a "strong showing that [they are] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 426 (2009). Entry of a permanent injunction or declaratory judgment will not change the State Defendants' likelihood of success or any of the remaining *Nken* factors. Because the relevant factors would still weigh in favor of a stay, further orders by the district court are not likely to have any practical effect.

Nor would a stay change the issues before this Court. Any final affirmative relief in the district court would implicate the same legal issues that the State Defendants have already raised: whether Plaintiffs' claims are moot, and whether Chapter 2270 is constitutional. As a matter of economy, it makes no sense for the parties to engage in district court motion practice when the dispositive issues in the case are already ripe for adjudication in this Court. The Court should reject the Plaintiffs' attempt to delay these proceedings.

Plaintiffs alternatively ask this Court to allow new evidence into the record. That request should also be rejected. The Plaintiffs' new evidence purports to show that (a) school districts and universities continue to properly include Chapter 2270's verification provision in contracts subject to the statute,[1] and (b) some entities appear to misunderstand the changes to Chapter 2270 encapsulated in H.B. 793. That evidence is immaterial because it does not affect the Plaintiffs' claims in this case.

The Plaintiffs' new evidence has nothing to do with the State Defendants (or any defendants). In their motion for declaratory judgment in the district court, Plaintiffs introduced evidence that, notwithstanding the amendments to Chapter 2270, some isolated governmental entities may have continued to require sole proprietors to sign Chapter 2270's no-boycott verification. First, they contend that Plaintiff Obinna Dennar was allegedly asked to sign a no-boycott verification by Lamar Consolidated Independent School District, which is not a party to this case. Second, they contend that Jason Bentley, who is not a party to this case, was allegedly asked to sign a no-boycott verification by Katy Independent School District, also not a party to the case. Even if non-parties have misapplied Chapter 2270, that does not support the Plaintiffs' claims against the State Defendants.

[1] Plaintiffs' "new" evidence in this regard includes policy manuals from school districts and universities that contain language reflecting that state contractors who are subject to Chapter 2270—*i.e.*, companies of 10 or more employees—must sign Chapter 2270's no-boycott verification. Plaintiffs provide no evidence that any of these school districts or universities, with the exceptions discussed below, require sole proprietors to sign a no-boycott verification.

Nor is the Plaintiffs' new evidence relevant to their facial challenge to Chapter 2270. The district court's preliminary injunction facially enjoined the State Defendants from including a no-boycott verification in any state contract. *See* ROA.1263 n.22 ("[T]he Court will not construe Plaintiffs' claims as bringing as-applied challenges."); ROA.1297. This appeal is about the plain language of the statute, and the Court needs no new evidence to ascertain what the current iteration of Chapter 2270 requires. H.B. 793 could not be more straightforward: it explicitly provides that the term "company" "does not include a sole proprietorship." ROA.1352; ROA.1358. Plaintiffs have previously acknowledged this fact, effectively conceding that their claims are moot. It is not "speculative," as Plaintiffs wrongly contend, for the State Defendants to contend that sole proprietors will not be required to sign a no-boycott verification *because of* Chapter 2270. That is simply what Chapter 2270 currently provides. If any governmental entity requires a sole proprietor to sign a no-boycott verification post-H.B. 793, that action would not be traceable to State Defendants or to Chapter 2270. Any allegations to that effect therefore have no bearing on this lawsuit.[2]

Finally, putting aside the irrelevance of this new evidence, Plaintiffs sprung these documents on the State Defendants for the first time in their motion for declaratory judgment.[3] The State Defendants have not had the opportunity to test

[2] The record properly before the Court reflects just the opposite of Plaintiffs' allegations: for example, Plaintiff George Hale entered into a new contract with Texas A&M University-Commerce after H.B. 793 passed that omits the no-boycott verification. ROA.1378.

[3] The State Defendants acknowledged in the hearing on the motion for preliminary injunction that there were no material facts in dispute regarding that motion. ROA.1476-77. But the issues

the validity of these new allegations through depositions, interrogatories, or other discovery tools. It would be prejudicial to allow Plaintiffs to bring these documents into the record without first complying with their discovery obligations under Federal Rule of Civil Procedure 26.

Plaintiffs now raise were not before the district court at the time of the hearing, and the State Defendants do not concede, and in fact contest, the relevance, admissibility, and authenticity of this late-filed evidence.

Conclusion and Prayer

The Court should deny the Plaintiffs' motion to stay and alternative motion to supplement the record.

Respectfully submitted.

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Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,184 words, excluding the parts exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Service

On November 15, 2019, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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