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
Case No. 18-cv-1091 consolidated with Case No.18-cv-1100
The Honorable Robert Pitman, District Judge

APPELLEE BAHIA AMAWI AND APPELLEES JOHN PLUECKER, OBINNA DENNAR, ZACHARY ABDELHADI, AND GEORGE HALE'S OPPOSED JOINT MOTION TO MODIFY BRIEFING SCHEDULE TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, TO SUPPLEMENT THE RECORD

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JOINT MOTION TO MODIFY BRIEFING SCHEDULE TO STAY APPELLATE PROCEEDINGS OR, IN THE ALTERNATIVE, TO SUPPLEMENT THE RECORD

Plaintiff-Appellee Bahia Amawi and Plaintiffs-Appellees John Pluecker, Obinna Dennar, Zachary Abdelhadi, and George Hale (collectively, "Plaintiffs") respectfully request that the Court modify the briefing schedule to stay appellate proceedings or, in the alternative, supplement the record.

This Court should stay appellate proceedings for two reasons:

First, Plaintiffs have just filed in the District Court a Motion for Declaratory Judgment. Dkt No. 111, attached hereto as Exhibit A. There is also currently pending before the District Court a Motion for Permanent Injunction. District Court Dkt. No. 90. As Plaintiffs represented to the District Court in their Motion for Declaratory Judgment, to the extent the District Court grants relief on either Motion, Plaintiffs will dismiss all of their other claims, which would render the judgment a final judgment for purposes of FRCP 54. Exhibit A at 1.

A final judgment by the District Court will render moot Defendants' interlocutory appeal of a preliminary injunction order. *Forkner v. Fisher*, 678 Fed. Appx. 210, 211 (5th Cir. 2017) ("[T]he entry of final judgment renders moot the order regarding preliminary injunctive relief."); *Pro-Life Cougars v. Univ. of Houston*, 67 Fed. Appx. 251 (5th Cir. 2003) ("Where, however, a decision on the merits is rendered during the appeal of a preliminary injunction, the preliminary

injunction becomes moot, and we lose jurisdiction."). If the District Court grants the motion for a permanent injunction, this appeal would be moot. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter."). Similarly, if the District Court grants the request for declaratory relief, and Plaintiffs withdraw their request for injunctive relief (thereby dissolving the preliminary injunction), this appeal would be moot. *Alpert v. Riley*, 457 Fed. Appx. 429, 430 (5th Cir. 2012) ("We hold that this appeal has been mooted by the district court's dissolution of the preliminary injunction, as we can no longer grant Appellant's requested relief."). Finally, even if the District Court ultimately denies Plaintiffs' motions, this appeal will be moot. *Pickett v. Hubert*, 244 F.3d 136 (5th Cir. 2000) ("This issue is moot as final judgment denying permanent injunctive relief has been rendered.").

Therefore, it does not make sense for the parties to continue the briefing process, and this Court to expend its judicial resources, when this appeal is likely to shortly become moot.

Second, as part of their Motion for Declaratory Judgment, Plaintiffs have introduced substantial evidence that, despite Defendants' claims to the contrary, sole proprietors, including one of the plaintiffs in this case, are still being

confronted with No Boycott of Israel clauses. Defendants' primary argument to this Court is that it should vacate the preliminary injunction because it is moot following amendment to the law at issue. Defendants argue that there is no reasonable expectation that Plaintiffs will be subject to the challenged conduct again. State's Opening Brief at 12-15; School District's Opening Brief 28-30.

Plaintiffs' evidence in the District Court though demonstrates that Defendants' speculative claims have been proven false. In August 2019, more than three months after the State represent to this Court in its Motion to Stay that no plaintiff would ever be confronted with a No Boycott of Israel clause going forward, Plaintiff Obinna Dennar was again forced to forego an opportunity to judge at a debate tournament because the contract contained a No Boycott of Israel clause. Dennar Declaration, Dkt No. 111-1. Mr. Dennar's experience was not an aberration; the inclusion of No Boycott of Israel clauses for contracts with sole proprietors (or the failure to recognize any exemption for sole proprietors) still appears to be prevalent. In fact, even today—more than five months after moving to dismiss this case based on a theory of mootness—the online Legal policies for both defendant school districts still include the No Boycott Certification with no mention of exemptions. Clay Declaration at 2-3, Dkt No. 111-2. Other school districts also continue to enforce the No Boycott clause against sole proprietors. Bentley Declaration, Dkt No. 111-3. Numerous university contracts still include

the language, as do many State contracts. Clay Declaration at 4-10, Dkt No. 111-2.

This evidence that Plaintiffs are still being subject to the very practice they challenge is highly pertinent to this Court's determination of whether Defendants have met their burden to demonstrate that Plaintiffs' challenge is moot. Because the current appeal is limited to the District Court's preliminary injunction order, evidence about events following that order are not part of the record before the Court. However, this evidence is before the District Court and would properly be part of the record on any appeal of a final judgment by that court. Accordingly, this Court should stay proceedings here to allow the District Court to enter a final judgment, which, on appeal, would include this relevant record evidence pertaining to mootness.

If this Court declines to stay these proceedings, it should, in the alternative, permit Plaintiffs to supplement the record with the evidence attached to the Motion for Declaratory Judgment. Exhibit A. As explained above, this evidence bears directly on Defendants' argument that a legislative amendment has mooted Plaintiffs' claims. Plaintiffs should not be forced to defend against a claim of mootness without the ability to refer to evidence that the No Boycott clauses are still in effect against and causing harm to sole proprietors, including one of the plaintiffs in this action.

Defendants will not be harmed by abating the current proceedings as a stay of the preliminary injunction remains in place, and, evidently, state agencies continue to enforce contracts requiring a No Boycott of Israel certification.

This motion is not brought to unnecessarily delay proceedings, but to ensure justice and efficiency in the Court's consideration of the issues in this case.

CONCLUSION AND PRAYER

WHEREFORE, Plaintiffs request that this Court modify the briefing schedule and stay all current briefing on the appeal of the preliminary injunction pending the District Court's determination of Plaintiffs' Motion for Declaratory Judgment. Plaintiffs further request that the Court order the parties to submit a joint status report regarding the proceedings in the District Court sixty days from the date that it enters the requested stay.

In the alternative, if the Court does not enter a stay of all current briefing, Plaintiffs request that they be given leave to supplement the record with the evidence attached to the Motion for Declaratory Judgment.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned certifies that counsel for Plaintiffs-Appellees conferred on November 5, 2019 with counsel for Defendants-Appellants regarding the relief requested in the foregoing motion. Defendants-Appellants represented that they are opposed to the motion and intend to file a response.

s/ *Edgar Saldivar*
Edgar Saldivar

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing motion complies with Fed. R. App. P. 27(d)(2)(A) because it contains 1,097 words. The motion also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, roman style typeface of 14 points or more.

s/ *Edgar Saldivar*
Edgar Saldivar

CERTIFICATE OF SERVICE

On November 6, 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.

s/ *Edgar Saldivar*
Edgar Saldivar