

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

STATE OF NEVADA, et al,

PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF  
LABOR, et al.,

DEFENDANTS.

Civil Action No. 16-cv-731, 732-ALM  
CONSOLIDATED CASES

**BUSINESS PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR STAY**

The Business Plaintiffs respectfully request that the Court deny Defendants' Motion to Stay proceedings in this case. As the Defendants concede, the Business Plaintiffs' motion for summary judgment is already fully briefed and ready for the Court to decide without any further briefing or hearing. Far from justifying a stay of proceedings in this Court, the interests of judicial economy and efficiency strongly militate in favor of the Court proceeding expeditiously to rule on Plaintiffs' Motion for Summary Judgment, as is the common practice in this Circuit after issuance of a preliminary injunction.<sup>1</sup> This Court's issuance of a final judgment vacating the unlawful Rule would permit the Fifth Circuit to review the legality of the Rule in a single

---

<sup>1</sup> Defendants cite no case authority for the novel proposition that a district court should stay its ruling on a motion for summary judgment pending an appeal from a preliminary injunction in the same or related matter. As further discussed below, the well established practice in this Circuit is to the contrary. *See, e.g., NFIB v. Perez*, Case No. 16-cv-00066, Dkt. No. 135 (N.D. TX Nov. 16, 2016) (granting summary judgment against DOL after filing of preliminary injunction appeal); *Chase Home Finance LLC v. Hall*, 325 Fed. Appx. 392, at \*1 (5th Cir. 2009) (per curiam); *SEC v. First Financial Group of Texas*, 645 F.2d 429, 433 (5th Cir. 1981).

proceeding after a final judgment, rather than adopting the cumbersome piecemeal approach advocated by Defendants. *See SEC v. First Financial Group of Texas*, 645 F.2d at 433 (5th Cir. 1981).

A final judgment by this Court issued in response to Plaintiffs' fully briefed motion for summary judgment will simplify the issues to be heard on appeal, bring to a conclusion this Court's involvement in the case, and allow the Fifth Circuit to focus its attention exclusively on the important statutory questions that are at the core of this case. There certainly would be no prejudice to the Defendants: As the Fifth Circuit held in *Louisiana World Exposition, Inc. v. Logue*, 746 F.2d 1033, 1038 (1984), the party against whom a final judgment is issued "will be able to obtain as broad a review on the merits of the order granting [permanent relief] as they could have obtained on appeal from the granting the preliminary injunction."

By contrast, freezing proceedings in this Court pending the conclusion of the Defendants' present interlocutory appeal would prolong the litigation. First, it is not certain that the Fifth Circuit will rule on the merits of the statutory issues in Defendants' appeal from the preliminary injunction—and thus no guarantee of any further guidance for this Court. Defendants have previously argued to this Court, and to date have not waived on appeal, that the Plaintiff States' showing of irreparable harm and the public interest were insufficient to sustain the preliminary injunction. Although Business Plaintiffs believe the preliminary injunction was entirely proper, Defendants' arguments, if accepted by the Court of Appeals, could leave unresolved the statutory merits questions raised by Defendants on appeal. Only an appeal from a final judgment can ensure appellate review of those statutory issues.

Second, at present the Business Plaintiffs are not parties to the preliminary injunction appeal pending in the Fifth Circuit. The Defendants' appeal is restricted to Case No. 16-cv-731.

Thus, the Business Plaintiffs are not able to participate as parties in the Fifth Circuit, as they are in this Court. Granting Plaintiffs' Motion for Summary Judgment, after denying Defendants' Stay Motion, will allow the two related cases to be consolidated for purposes of appeal, which again serves the ultimate interests of judicial economy and efficiency.

As noted above, Defendants point to no precedent in this Court or within the Fifth Circuit holding that a district court that has granted a motion for preliminary injunction should withhold ruling on a pending, fully briefed motion for summary judgment in the same or related matter in order to await the outcome of an appeal from the preliminary injunction.<sup>2</sup> To the contrary, the practice in this Circuit is generally for a district court to proceed to final judgment after issuing a preliminary injunction, notwithstanding a pending appeal of the preliminary injunction. *See, e.g., Chase Home Finance LLC v. Hall*, 325 Fed. Appx. 392, at \*1 (5th Cir. 2009) (per curiam) ("An appeal from the grant of a preliminary injunction generally becomes moot when the trial court enters a permanent injunction because the order for the preliminary injunction merges into the permanent injunction."). *See also Securities and Exchange Commission*, 645 F.2d at 433 (citing numerous cases); *Louisiana World Exposition, Inc. v. Logue*, 746 F.2d 1033, 1038 (5th Cir. 1984); *F.T.C. v. Assail, Inc.*, 98 Fed. Appx. 316-17 (5th Cir. 2004); *Pro-Life Cougars v. University of Houston*, 2003 U.S. App. LEXIS 10513, 67 Fed. Appx. 251, at \*3 (5th Cir. 2003) (per curiam).

---

<sup>2</sup> Defendants cite only one inapposite legal authority for their proposed stay: a California district court decision that did not deal with either an appeal from a preliminary injunction or a pending motion for summary judgment. *See Association of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp.2d 1081, 1094 (E.D. Cal. 2008). That case dealt solely with a decision by a district court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292, the very purpose of which is to allow an appeals court to address the merits of a certified issue prior to the district court granting final judgment. It is telling that Defendants have not cited a single Fifth Circuit precedent in support of their novel motion to stay, and they have cited no case at all involving a motion to stay a fully briefed motion for summary judgment pending the outcome of a preliminary injunction appeal.

A clear, recent example of this practice occurred in *NFIB v. Perez*, Case No. 16-cv-00066, Dkt. No. 135 (N.D. TX Nov. 16, 2016), where Judge Cummings issued a final summary judgment vacating the Defendant Department of Labor’s “persuader” rule, after the same court had previously issued a nationwide preliminary injunction. Most pertinent to Defendants’ present motion, the Defendant there appealed from the district court’s preliminary injunction and the appeal was pending and almost fully briefed when the district court issued its final judgment on the merits. Thus, the law is clear that this Court may and should grant summary judgment now, without any need for any further delay, thus permitting an immediate and efficient single appeal from a final judgment.

#### CONCLUSION

For the reasons set forth above, Defendants’ Motion for Stay should be denied and the Court should proceed to rule on Plaintiffs’ pending Motion for Summary Judgment.

Dated: December 15, 2016

Respectfully submitted,

/s/ Robert F. Friedman

Robert F. Friedman

Texas Bar No. 24007207

**LITTLER MENDELSON, PC**

2001 Ross Avenue, Suite 1500

Dallas, Texas 75201-2931

Tel: (214) 880-8100

Fax: (214) 880-0181

[rfriedman@littler.com](mailto:rfriedman@littler.com)

/s/ Maurice Baskin

Maurice Baskin, DC Bar No. 248898\*  
Tammy McCutchen, DC Bar No.591725\*

**LITTLER MENDELSON, PC**

815 Connecticut Ave., NW

Washington, DC 20036

Tel: (202) 772-2526

[mbaskin@littler.com](mailto:mbaskin@littler.com)

[tmccutchen@littler.com](mailto:tmccutchen@littler.com)

*\*pro hac vice movants*

**ATTORNEYS FOR THE PLAINTIFFS**

Of Counsel:

Steven P. Lehotsky

Warren Postman

**U.S. CHAMBER LITIGATION CENTER**

1615 H Street, NW

Washington, DC 20062

Tel: (202) 463-4337

[slehotsky@uschamber.com](mailto:slehotsky@uschamber.com)

[wpostman@uschamber.com](mailto:wpostman@uschamber.com)

*Attorneys for Plaintiff Chamber of Commerce  
of the United States of America*

Linda E. Kelly

Patrick N. Forrest

Leland P. Frost

**MANUFACTURERS' CENTER FOR LEGAL ACTION**

733 10th Street, NW, Suite 700

Washington, DC 20001

(202) 637-3000

*Attorneys for Plaintiff the National  
Association of Manufacturers*

Karen R. Harned

Elizabeth Milito

**NFIB SMALL BUSINESS LEGAL CENTER**

1201 F Street, NW, Suite 200

Washington, DC 20004

(202) 314-2048

*Attorneys for Plaintiff National Federation  
of Independent Business*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2016, a copy of the foregoing Opposition to Defendants' Motion to Stay was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/Robert F. Friedman  
Robert F. Friedman

Firmwide:144438154.3 090080.1002