United States Court of Appeals

for the

Eleventh Circuit

BAYOU LAWN & LANDSCAPE SERVICES, *et al.*,

Plaintiffs/Appellees,

v.

THOMAS E. PEREZ, Secretary of Labor, *et al.*,

Defendants/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO: 3:12-cv-00183-MCR-CJK
(Hon. M. Casey Rodgers and Hon. Charles J. Khan, Jr.)

PETITION FOR PANEL REHEARING (FRAP 40) AND FOR REHEARING EN BANC (FRAP 35)

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rules of Appellate Procedure 26.1 and 28(a), and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, undersigned counsel shows that the following trial judge(s), attorneys, persons, associations of persons, firms, partnerships, and corporations have an interest in the outcome of this appeal:

Hon. M. Casey Rodgers, District Court Judge

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Undersigned counsel is not aware of any parent corporation or publicly held corporation that owns 10% or more of the stock of any party to this litigation.

/s/ Christopher J. Schulte
Christopher J. Schulte
Attorney of Record for
Plaintiffs-Appellees

STATEMENT OF COUNSEL UNDER 11TH CIR R. 35-5(c)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp., 513 U.S. 18 (1994)

Singh v. Carnival Corp., 550 Fed. Appx. 683 (11th Cir., Oct. 29, 2013)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a questions of exception importance, namely whether a party permanently enjoined from certain conduct should be granted vacatur of that injunction by virtue of repeating the prohibited conduct to render their own appeal moot.

/s/ Christopher J. Schulte
Christopher J. Schulte
Attorney of Record for
Plaintiffs-Appellees

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STATEMENT OF ISSUES THAT MERIT EN BANC CONSIDERATION

1. The Panel erred in vacating the district court order on appeal based on Appellants' suggestion that *their own appeal* may have become moot after the district court entered its order because of Appellants' own actions. Although Appellees do not contest that the Panel may remand the case for further proceedings so that the district court may consider in the first instance whether Appellants actions have rendered further litigation in this case moot, Appellees respectfully submit that the Panel erred in *vacating* the district court's judgment before that "reasoned consideration," Panel Op. 4, has occurred and erred in vacating the judgment under the particular circumstances of this case.

2. The Panel's decision to vacate the district court's December 18, 2014 Order is contrary to well-settled Supreme Court precedent regarding whether vacatur is an appropriate equitable remedy where the alleged mootness arises from the conduct of one of the litigants, rather than happenstance. Here, Defendants-Appellants' own conduct is the sole basis cited for the potential mootness of their own appeal, and Supreme Court precedent and equity dictate that they should not be able to profit from their own conduct by filing an appeal, mooting it, and obtaining the full relief they sought (vacatur of the district court's judgment).

3. Accordingly, Plaintiffs-Appellees seek rehearing only to ask that this Court modify its order and judgment by striking the vacatur of the district court's

Order and Judgment. The remand for further consideration of the effects of the 2015 H-2B Rules would continue, but the December 2014 Order and Judgment should remain in place pending further proceedings.

COURSE OF PROCEEDINGS, DISPOSITION OF THE CASE, AND STATEMENT OF FACTS

The Complaint in this lawsuit challenged, *inter alia*, the Department of Labor's 2012 regulations regarding the H-2B visa program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,038 (Feb. 21, 2012) ("2012 H-2B Regulations"). The District Court for the Northern District of Florida (Rodgers, J.) granted a preliminary injunction against the 2012 H-2B Regulations on April 26, 2012, holding that DOL lacked rulemaking authority with respect to the H-2B program. This Court affirmed the preliminary injunction on appeal on April 1, 2013. 713 F.3d 1080, 1083-85 (11th Cir. 2013).

The district court subsequently granted Plaintiffs-Appellees' motion for summary judgment by order dated December 18, 2014, again ruling that DOL lacked rulemaking authority as to the H-2B program, vacating the 2012 H-2B Regulations and permanently enjoining the government from enforcing them. Defendants-Appellants timely appealed from that order.

After Defendants-Appellants filed their brief in this appeal, but before Plaintiffs-Appellees filed their opening brief, the Department of Labor issued ("jointly" with the Department of Homeland Security) an interim final rule,

Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24,042 (Apr. 29, 2015) ("2015 H-2B Regulations"). The two Departments expressly describe the 2015 H-2B Regulations as "virtually identical" to the 2012 H-2B Regulations. 80 Fed. Reg. 24,043.

After the 2015 H-2B Regulations were issued, Plaintiffs-Appellees filed their brief in this appeal on June 12, 2015, advising the Court of the April 2015 rulemaking—which Defendants-Appellees previously had not, notwithstanding its relevance to their own appeal—and raising the possibility that Defendants-Appellants had deprived this Court of jurisdiction over their appeal through their actions. Plaintiffs-Appellees' Brief at 1 n.1.

Defendants-Appellants' reply brief argued that the entire case should be dismissed as moot, based on their issuance of the 2015 H-2B Regulations, requesting vacatur of the district court's permanent injunction based on *United States v. Munsingwear*, 340 U.S. 36 (1950). Plaintiffs-Appellees, however, had no opportunity to respond.

On November 5, 2015, the Panel issued a *per curiam* decision addressing the potential impact of Defendants-Appellants' 2015 H-2B Regulations. The final paragraph of the decision contains the operative language at issue in the current Petition:

> Here, we lack the benefit of the district court's reasoned consideration of whether the new regulations actually moot this proceeding or

> whether any exception to the mootness doctrine would allow a federal court to adjudicate some aspect of the case. We vacate the district court's order and remand to allow the district court to decide in the first instance what effect the new rules have had on this case.
>
> VACATED and REMANDED.

Panel Op. at 4.

ARGUMENT AND AUTHORITIES

With respect to the specific issue of vacatur (or any other potential remedy), Plaintiffs-Appellees never had an opportunity to brief the issue of vacatur to this Court and respectfully asks the Court for rehearing on the narrow issue of whether vacatur of the district court's order was required or appropriate.

I. The Panel's Decision on Vacatur is in Conflict with Supreme Court and Eleventh Circuit Case Law.

By vacating the district court's December 18, 2014 Order and Judgment, the Panel's November 5, 2015 Order eliminates judicial precedent that was indisputably not moot when it issued and, effectively, grants Defendants-Appellants all of the relief that they might have obtained had they not issued new regulations but litigated the current appeal to completion and prevailed before this Court.[1] This outcome does not serve the fundamental interests of equity that

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[1] By vacating the December 2014 Order and permanent injunction, the Panel's Order also arguably eviscerates the district court's 2012 preliminary injunction, which this Court upheld in 2013. A preliminary injunction ceases to be effective upon issuance of a permanent injunction. *See, e.g.*, *Cone Corp. v. Hillsborough*

inform the remedy of vacatur. "To allow a party who steps off the statutory path [of seeking relief through appeal] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 27 (1994).

The Panel's decision goes beyond the equitable rule discussed by the Supreme Court in a dictum in *United States v. Munsingwear*, 340 U.S. 36 (1950). In *Munsingwear,* the Court explained that vacatur of the decision on appeal "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented *through happenstance*." *Id.* at 40 (emphasis added). This rule remains viable for those cases where review is "prevented through happenstance," that is, where a case presented for review has "become moot due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 83 (1987). Vacatur must also be granted "where mootness

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County, 908 F.2d 908, 912 n.5 (11th Cir. 1990) (citing *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401, 403 (3d Cir. 1989) ("[O]nce the order granting the permanent injunction was entered, the order granting the preliminary injunction merged with it, and appeal is only proper from the order granting the permanent injunction."); *SEC v. First Financial Group of Texas*, 645 F.2d 429, 433 (5th Cir. Unit A 1981) (same)).

results from the unilateral action of the party *who prevailed* in the lower court." *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 23 (1994) (emphasis added). Neither of those scenarios is present in this case.

A. Vacatur in This Case Is Not the Result of Happenstance Nor The Unilateral Action of the Plaintiffs-Appellees

In this case, the basis for mootness advanced by Defendants-Appellants is the action by those same Defendants-Appellants in issuing another interim final rule that allegedly supersedes the prior final rule that was being litigated on appeal. Thus, even if the district court and this Court were to conclude that *the appeal* is "actually moot," that mootness would not be "due to circumstances unattributable to any of the parties" or "happenstance," nor from the "unilateral action of the party who prevailed in the lower court," *i.e.,* Plaintiffs-Appellees. Rather, Defendants-Appellants have generated the mootness (of their own appeal) through their own conduct, making this situation more akin to a situation where a losing party elects not to appeal, *see, e.g., Karcher,* 484 U.S. at 83 (vacatur not warranted when losing party declined to appeal), or where the losing party settles the case while appealing from the decision below, *see, e.g.*, *Bancorp*, 513 U.S. at 25 (where mootness results from settlement, losing party voluntarily forfeits legal remedy and surrenders claim to equitable remedy of vacatur; the "judgment is not unreviewable, but simply unreviewed by his own choice"). *Cf. Singh v. Carnival Corp.*, 550 Fed. Appx. 683, 686-87 (11th Cir., Oct. 29, 2013) (discussing

Bancorp's modification of *Munsingwear* policy on vacatur). Thus, the policy principles motivating *Munsingwear* are not present here.

B. Defendant-Appellant Has Not Met Its Burden of Showing That It is Entitled to the Extraordinary Equitable Remedy of Vacatur

It is Defendants-Appellants' burden, "as the part[ies] seeking relief from the status quo of the [district court's] judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." *Bancorp*, 513 U.S. at 26. In *Bancorp*, the Supreme Court held that the appellant's decision to settle the case amounted to a "voluntary forfeiture of review" constituting a "failure of equity that makes the burden decisive." *Id.*

Here, Defendants-Appellants alone are responsible for the mootness that they now assert. It is their issuance of a "virtually identical" rule promulgated by two departments after the district court (and, previously, this Court) explicitly instructed the DOL that it lacked statutory authority to do so that has created the current circumstances. Defendants-Appellants did not (and cannot) meet their burden of showing an "equitable entitlement to the extraordinary remedy of vacatur." *Id.*

Moreover, Defendants-Appellants would suffer no prejudice from the district court's December 2014 Order remaining in force. They have, by their own admission, already issued a "virtually identical" rule as the 2012 H-2B Regulations

permanently enjoined in that Order. The value of the December 2014 Order is the precedent that the Department of Labor on its own lacked H-2B rulemaking authority in 2012, but also that it continues to lack such authority until such time as Congress may endow it with such in the future.

C. The Public Interest is Not Served by a Premature Order of Vacatur in this Case

As a rule, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Bancorp*, 513 U.S. at 26-27 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). This Court has previously held that DOL's issuance of the program rules in question in this case was "*ultra vires.*" 713 F.3d 1080, 1083-85 (11th Cir. 2013). In its opening brief before this Court, DOL continued to assert that it has unilateral rulemaking authority under the H-2B program; and as a result of vacatur in this case, it is now free again to attempt to exercise such authority until the district court below and ultimately, this Court, decides the issue of mootness.

Because the question of whether the Department of Labor and the Department of Homeland Security may jointly issue legislative rules with respect to the H-2B visa program is a live case or controversy before the district court, *see Bayou Lawn & Landscape Servs. v. Johnson*, No. 3:15-cv-00249-MCR-EMT

(summary judgment motions pending on authority of Department of Labor to issue April 2015 H-2B Regulation), the public interest is best served by preserving rather than vacating existing judicial precedent on this issue. The issue decided by the district court was whether the DOL possesses rulemaking authority with respect to the H-2B program, with the court below concluding that the Department did not possess such authority. The 2015 H-2B Regulations that the Department now suggests have made this appeal moot were "jointly" issued by the Departments of Labor and Homeland Security. *See* 80 Fed. Reg. 24,042 (Apr. 29, 2015). The challenged feature of the 2012 H-2B Regulations was the Department of Labor's role in issuing them, a feature that persists in the new Regulations.[2]

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[2] For these reasons, Plaintiffs-Appellees do not concede that the case is actually moot. *Crosby v. Hosp. Auth. Of Valdosta and Lowndes County*, 93 F.3d 1515, 1534 (11th Cir. 1996) ("[A] superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law.") (internal quotations omitted). "It is well settled that when a defendant chooses to end a challenged practice, this choice does not always deprive a federal court of its power to decide the legality of the practice." *Doe v. Wooten,* 747 F.3d 1317, 1322 (11th Cir. 2014), *citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *see Atheists of Florida, Inc. v. City of Lakeland*, 713 F.3d 577, 594 (11th Cir. 2013) (similar), *quoting Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). This Court has long recognized the principle that "the initial 'heavy' burden remains with the government actor to show 'that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Doe*, 747 F.3d at 1322, *quoting Harrell v. Fla. Bar*, 608 F.3d 1241, 1268 (11th Cir. 2010); *see Atheists of Florida, Inc.*, 713 F.3d at 594 (similar, *quoting Already*, 133 S. Ct. at 727, *quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

Accordingly, because the vacatur remedy in the Panel's November 5 Order conflicts with Supreme Court and Eleventh Circuit precedent, Plaintiffs-Appellees respectfully request that this Court grant rehearing, strike the vacatur of the district court's December 18, 2014 Order, and amend its order to remand for further proceedings.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully ask this Court to grant their Petition for Panel Rehearing or Rehearing En Banc with respect to the vacatur of the district court's December 18, 2014 Order.

Dated: December 18, 2015

Respectfully submitted,

By: */s/ Christopher J. Schulte*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the page limitation set forth in Rule 35(b)(2) of the Federal Rules of Appellate Procedure. This brief uses Times New Roman 14-point typeface and contains 10 pages, excluding the parts that do not count towards the page limit under 11th Cir. R. 32-4.

s/ Christopher J. Schulte
Christopher J. Schulte

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, 15 copies of the Petition for Rehearing/Rehearing En Banc were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

Amy Nerenberg, Acting Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
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On this same date, a copy of the Petition for Rehearing/ Rehearing En Banc was served on the following by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to received electronic Notices of Electronic Filing:

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Filing and service were performed by direction of counsel

EXHIBIT A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10623
Non-Argument Calendar

D.C. Docket No. 3:12-cv-00183-MCR-CJK

BAYOU LAWN & LANDSCAPE SERVICES,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
NATIONAL HISPANIC LANDSCAPE ALLIANCE,
SILVICULTURAL MANAGEMENT ASSOCIATES INC.,
PROFESSIONAL LANDCARE NETWORK, et al.,

Plaintiffs - Appellees,

versus

SECRETARY, U.S. DEPARTMENT OF LABOR,
PORTIA WU,
In her official capacity as United States
Assistant Secretary of Labor,

Defendants - Appellants.

Appeal from the United States District Court
for the Northern District of Florida

(November 5, 2015)

Before MARCUS, WILLIAM PRYOR, and MARTIN, Circuit Judges.

PER CURIAM:

In February 2012, the United States Department of Labor (DOL) issued a regulation related to the administration of the H-2B visa program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,038 (Feb. 21, 2012). The H-2B program allows foreign nationals to enter the United States for temporary non-agricultural work. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). DOL's 2012 regulation altered how and when employers could hire and pay workers through the program. In April 2012, Plaintiffs-Appellees filed a lawsuit challenging DOL's authority to issue this regulation. In December 2014, the district court granted summary judgment against the government, holding that the United States Department of Homeland Security (DHS) had rulemaking authority in relation to the H-2B program and DOL did not. In so holding, the district court vacated the rule and permanently enjoined the government from enforcing it. The government filed this appeal.

The facts underlying the district court ruling have since changed. In April 2015, DOL and DHS jointly issued a new set of rules governing the H-2B program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24,042 (Apr. 29, 2015); Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24,146-01

(Apr. 29, 2015). These regulations, issued between the date on which the government filed its initial brief and the date the Plaintiffs-Appellees filed their response, superseded the 2012 rule challenged in this lawsuit. Plaintiffs-Appellees acknowledge that the new regulations may have mooted their lawsuit. They nonetheless suggest that these new regulations are also an invalid exercise of rulemaking authority, while at the same time recognizing that this question is not now before us. The government filed a reply brief arguing the case should be dismissed as moot.

The new rules issued by DOL and DHS require us to address issues that the parties did not and could not have raised in the district court. "By well settled convention, appellate courts generally will not consider an issue or theory that was not raised in the district court." F.D.I.C. v. Verex Assur., Inc., 3 F.3d 391, 395 (11th Cir. 1993). However, this convention normally applies to claims that could have been raised in earlier proceedings but were waived, whereas the mootness issue here could not have been presented in the district court. And unlike the waiver rule, "mootness is jurisdictional." Sierra Club v. E.P.A., 315 F.3d 1295, 1299 (11th Cir. 2002). That being the case, we are certainly vested with the power to decide a case has become moot during the pendency of the appeal and dismiss it on that basis. Indeed, once we conclude a case is moot, we not only have power to dismiss but an obligation to do so. See id.

Here, we lack the benefit of the district court's reasoned consideration of whether the new regulations actually moot this proceeding or whether any exception to the mootness doctrine would allow a federal court to adjudicate some aspect of the case. We vacate the district court's order and remand to allow the district court to decide in the first instance what effect the new rules have had on this case.

VACATED and REMANDED.