

**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.

No. 4:16-CV-731-ALM
LEAD

DEFENDANTS’ OPPOSED MOTION TO STAY PROCEEDINGS PENDING APPEAL

Defendants respectfully move this Court to enter an order staying further proceedings in both cases consolidated under the caption above pending resolution of Defendants’ appeal to the United States Court of Appeals for the Fifth Circuit from this Court’s order granting the State Plaintiffs’ motion for a preliminary injunction.

On November 22, 2016, this Court entered a nationwide injunction against Defendants from “implementing and enforcing the . . . regulations as amended by 81 Fed. Reg. 32,391.” *See* Memorandum and Order, ECF No. 60, at 19. The Court determined that the moving State Plaintiffs satisfied all prerequisites for a preliminary injunction. *See id.* In addressing the merits of the present controversy, the Court held that the regulation challenged here fails under both step one and step two of the analysis set forth in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *See id.* at 10-13. On December 1, 2016, Defendants filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit of that decision. *See* Notice of Appeal, ECF No. 62. On December 8, 2016, the Fifth Circuit granted Defendants’ opposed motion to expedite that appeal, and ordered a briefing schedule that will conclude by the end of January 2017. *See* Order

(attached as Exhibit A). That court further ordered that oral argument would be scheduled for the first available sitting after the close of briefing.

This Court should stay the proceedings in these two cases. Pending before this Court are the Business Plaintiffs' summary judgment motion, and a motion by the State Plaintiffs to join their briefing on the preliminary injunction motion with the Business Plaintiffs' motion. Defendants' time to answer or otherwise respond to the State Plaintiffs' and Business Plaintiffs' Complaints does not run until December 25 and 26, 2016, respectively.

These proceedings should all be stayed pending the Fifth Circuit's decision on appeal. "Although the filing of an interlocutory appeal does not automatically stay proceedings in the district court, the district court has broad discretion to decide whether a stay is appropriate to promote economy of time and effort for itself, for counsel, and for litigants." *Association of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008). Here, the Fifth Circuit's decision will greatly impact any further proceedings in this Court. As this Court has recognized, the issues raised in the Business Plaintiffs' summary judgment motion overlap with those raised in the State Plaintiffs' preliminary injunction motion. *See* Order, ECF No. 33 (noting that the Court will consider the Business Plaintiffs' summary judgment briefs in the preliminary injunction proceedings for issues that "overlap with the Plaintiff States"). Moreover, the Court held that the Rule likely fails at both step one of *Chevron* (as raised by the Plaintiff States' preliminary injunction motion) and step two of *Chevron* (as raised by the Business Plaintiffs' summary judgment motion). Therefore, the merits of both the State Plaintiffs' and the Business Plaintiffs' APA claims¹ will likely be controlled in large part by the Fifth Circuit's decision on appeal.

¹ The State Plaintiffs also raised a Tenth Amendment claim that this Court held was foreclosed by Supreme Court precedent and an alternative non-delegation claim that the Court did not reach. *See* Order, ECF No. 60, at 19.

Concurrent proceedings in this Court and the Fifth Circuit on substantially similar claims would be inefficient and contrary to judicial economy.

Therefore, Defendants respectfully request that this Court enter an order staying all district court proceedings in both consolidated cases pending the Fifth Circuit's decision on Defendants' appeal of this Court's grant of preliminary injunctive relief.

Dated: December 12, 2016

Respectfully Submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

BRIT FEATHERSTON
Acting United States Attorney

JUDRY SUBAR
Assistant Branch Director

/s/ Julie Saltman

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2016, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Julie Saltman

JULIE SALTMAN

CERTIFICATE OF CONFERENCE

I hereby certify that I have complied with the meet and confer requirements in LOCAL RULE CV-7(h). I met and conferred with counsel for the Business Plaintiffs and the State Plaintiffs by telephone. Both sets of plaintiffs indicated that they oppose this motion.

/s/ Julie Saltman

JULIE SALTMAN

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41606

STATE OF NEVADA; STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF WISCONSIN; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; TERRY E. BRANSTAD, Governor of the State of Iowa; PAUL LEPAGE, Governor of the State of Maine; SUSANA MARTINEZ, Governor of the State of New Mexico; PHIL BRYANT, Governor of the State of Mississippi; ATTORNEY GENERAL BILL SCHUETTE, on behalf of the people of Michigan,

Plaintiffs - Appellees

v.

UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, SECRETARY, DEPARTMENT OF LABOR, In his official capacity as United States Secretary of Labor; WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR; MARY ZIEGLER, in her official capacity as Assistant Administrator for Policy of the Wage and Hour Division; DOCTOR DAVID WEIL, in his official capacity as Administrator of the Wage and Hour Division,

Defendants - Appellants

Appeal from the United States District Court for the
Eastern District of Texas, Sherman

O R D E R :

IT IS ORDERED that Appellants' opposed motion to expedite the appeal is GRANTED AS MODIFIED:

- Appellants' opening brief and record excerpts are due on or before December 16, 2016.
- Amicus briefs in support of Appellants are due on or before December 23, 2016.
- Appellees' response brief and record excerpts are due on or before January 17, 2017.
- Amicus briefs in support of Appellees are due on or before January 24, 2017.
- Appellants' reply brief is due on or before January 31, 2017.
- Oral argument will be scheduled by the Clerk of the Court for the first available sitting after the close of briefing.

IT IS FURTHER ORDERED that Appellants' motion for an expedited ruling on the instant motion is GRANTED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

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STATE OF NEVADA, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR,
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Defendants.

No. 4:16-CV-731-ALM
LEAD

**ORDER GRANTING DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING
APPEAL**

For good cause shown, the Court grants Defendants' motion to stay proceedings pending appeal. The Court will stay proceedings in both cases in this consolidated action. While the matter is stayed Defendants do not need to file an answer in response to the complaints filed in these cases, and the Court will hold the pending summary judgment motion in abeyance. Within thirty days of the decision on appeal by the United States Court of Appeals for the Fifth Circuit, the parties will file a status report proposing a schedule to proceed in these cases.