No. 18-40246

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS,
Plaintiffs-Appellees,
CHIPOTLE MEXICAN GRILL, INCORPORATED; CHIPOTLE SERVICES, L.L.C.,
Petitioners-Appellees,
v.
UNITED STATES DEPARTMENT OF LABOR,
Defendant,
CARMEN ALVAREZ, and her Counsel,
Respondent-Appellant.

On Appeal from the United States District Court for the Eastern District of Texas, No. 4:16-CV-731

BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE NATIONAL RETAIL FEDERATION, AND THE TEXAS ASSOCIATION OF BUSINESS IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the National Association of Wholesale-Distributors, the National Federation of Independent Business, the National Retail Federation, and the Texas Association of Business each certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

CERTIFICATE OF INTERESTED PERSONS

State of Nevada, et al. v. United States Department of Labor, No. 18-40246

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF AMICI CURIAE[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by participating as a litigant or amicus curiae in cases involving issues of concern to American businesses, such as this one.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from Amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The National Association of Wholesaler-Distributors ("NAW") is a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 40,000 companies operating at more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler distributors are small to medium size, closely held businesses. The wholesale distribution industry generates $5.6 trillion in annual sales volume and provides stable and good-paying jobs to more than 5.9 million workers.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice

for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government.

The Texas Association of Business ("TAB") is the leading employer organization in Texas. It is the state's chamber of commerce. Representing companies from large multi-national corporations to small businesses in nearly every community of Texas, TAB works to improve the Texas business climate and to help make the state's economy the strongest in the world. For more than 85 years, TAB has fought for issues that impact business to ensure that employers' opinions are heard.

The Chamber, NAM, NRW, NFIB, NRF, and TAB (collectively, "Amici") participated as both plaintiffs-appellees and amici curiae in the litigation challenging

the 2016 Overtime Rule. If that rule were to take effect, it would impose significant monetary costs and regulatory burdens on employers. Amici were co-plaintiffs alongside the States of Nevada and Texas (and many others) in the District Court. *See generally* ROA.1-49. The States moved for a preliminary injunction, and Amici supported that motion. ROA.105; ROA.265. Amici moved for summary judgment, ROA.270, and the States supported that motion, ROA.3857. The District Court first granted a preliminary injunction, blocking the Overtime Rule from taking effect shortly before the effective date stated in the Department of Labor's final rule. ROA.3825-3844. After the Department appealed, ROA.3846, while this case was on appeal and Amici were participating as amici curiae in support of the preliminary injunction obtained by the States, the District Court entered a final judgment, vacating the Overtime Rule in its entirety. ROA.4356-4373; ROA.4374. The Department appealed the final judgment, and this Court has held that appeal in abeyance. *See* Order, *Nevada v. U.S. Dep't of Labor*, No. 17-41130 (5th Cir. Nov. 6, 2017).

Accordingly, Amici have a significant interest in the preliminary injunction that provided the basis for the contempt order at issue in this appeal. Although Amici take no position on the contempt order, Amici and their members have a strong interest in ensuring that the parties are not permitted to attack the validity of the

injunction or otherwise seek a merits ruling on the Overtime Rule in the course of these collateral proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

This limited, collateral appeal from a contempt order provides no occasion for this Court to consider the merits of the underlying injunction that enjoined the Department of Labor's implementation and enforcement of the Overtime Rule. To the extent Appellant Carmen Alvarez and her counsel ("Appellants") ask this Court to look behind the contempt order to evaluate whether that injunction was valid, those arguments are squarely foreclosed by Supreme Court precedent. *See Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 439-40 (1976). Attacking the validity of the injunction is especially inappropriate in these circumstances, as the United States has asked this Court to hold its appeal of the final injunction in abeyance while it reconsiders the rule, and this Court granted that request. *See* Order, *Nevada v. U.S. Dep't of Labor*, No. 17-41130 (5th Cir. Nov. 6, 2017). Appellants' *ultra vires* request for this Court to consider the merits of the injunction in this collateral proceeding in which the United States is not even a party would thus be particularly unfair and inappropriate.

Although the Court need not and should not address the underlying injunction at all, to the extent Appellants suggest that the Overtime Rule went into effect notwithstanding the district court's injunction, that suggestion is plainly wrong. The

district court expressly enjoined the Department of Labor from implementing the rule. *See* ROA.3843 ("enjoin[ing] the Final Rule"). That much is clear from the text of the order, and it follows directly from the Administrative Procedure Act ("APA"), 5 U.S.C. §705, which permits a court to take all necessary steps "to postpone the effective date of an agency action" pending judicial review. A rule that has not been implemented and whose effective date has been postponed simply is not in "effect." Appellants' suggestion otherwise runs counter to black-letter administrative law, a wealth of judicial authority across the country interpreting the district court's injunction, and common sense. Whatever this Court decides about the merits of the contempt order that gives rise to this appeal, it should reject Appellants' invitation to opine on the validity of the underlying injunction, and it certainly should not accept Appellants' remarkable contention that the Overtime Rule has taken effect notwithstanding that injunction.

ARGUMENT

I. This Court Should Not Rule On The Merits Of The Overtime Rule Litigation.

This appeal concerns only the validity of the order holding Appellants in contempt, not the validity of the district court's underlying injunction enjoining the Department of Labor from implementing the Overtime Rule. To the extent Appellants seek to attack the validity of the underlying injunction, binding Supreme Court precedent forecloses those efforts. It is the "long-standing" and "well-settled"

rule that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed." *Maggio*, 333 U.S. at 69; *Spangler*, 427 U.S. at 439-40. Allowing a contempt proceeding to "become a retrial of the original controversy" "would be a disservice to the law." *Maggio*, 333 U.S. at 69. Thus, the one thing a party "cannot do" on "appeal of [a] contempt order," *United States v. Does*, 21 F.3d 1108 (5th Cir. 1994) (per curiam), is press arguments "as to whether the [underlying] order should have issued in the first place," *Maggio*, 333 U.S. at 69; *see also TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 885-90 (Fed. Cir. 2011) (applying Fifth Circuit law).

Indeed, a party may not re-litigate the merits of an injunction for which it has been held in contempt even in the face of "eminently reasonable and proper objections" to the underlying order, *see Spangler*, 427 U.S. at 439-40, and even if a court later concludes that the injunction was in error, *see Martin's Herend Imps., Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1307 (5th Cir. 1997) (noting that "the contempt order should not be reversed simply because we now hold, above, that the injunction the court issued was too broad," as the parties are "obliged to obey the injunction pending reconsideration by the district court or appellate review"). The parties must take the injunction as a given until it is "modified or reversed by a court having the authority to do so." *Spangler*, 427 U.S. at 439. Here, Appellants have failed to even address any modification request to the proper court.

The only court that may modify the injunction is the "issuing court," or, "failing there," an appellate court reviewing *that* ruling. *Id.* at 440. Appellants have not sought modification of the injunction in the district court, and this Court—in this limited appeal—is not the proper forum for doing so.

The long-standing rule that a party may not attack the underlying order giving rise to a contempt proceeding should carry special force in these circumstances, where the government has held its own appeal of the final judgment invalidating the rule in abeyance and is not a party to this proceeding. The Department of Labor appealed the final injunction to this Court, but asked this Court "to hold th[e] appeal in abeyance pending the outcome of a new rulemaking" in which the Department "intend[s] to revisit" the Overtime Rule. Mot. to Hold Appeal in Abeyance at 1-2, *Nevada v. U.S. Dep't of Labor*, No. 17-41130 (5th Cir. Nov. 3, 2017).[2] This Court granted the Department's motion "to stay th[e] case pending the outcome of the new rulemaking." Order, *Nevada v. U.S. Dep't of Labor*, No. 17-41130 (5th Cir. Nov. 6, 2017). As the most recent status report reflects, the Department is in the midst of "analyzing the legal and policy issues presented by the [rule] and has initiated the rulemaking process." Status Report, *Nevada v. U.S. Dep't of Labor*, No. 17-41130

[2] After the district court entered a final order enjoining the rule, this Court granted the Department's motion to dismiss as moot the appeal of the preliminary injunction. ROA.4380.

(5th Cir. May 7, 2018). This Court should not weigh in on any issue that might interfere with the Department's regulatory efforts, especially in this limited, collateral proceeding where the Department is not involved. Whatever this Court decides concerning the validity of the contempt order, this Court should reject Appellants' *ultra vires* efforts to assail the validity of the injunction.

II. The Court's Injunction Prohibited The Overtime Rule From Taking Effect.

This Court should not address the validity of the underlying injunction at all, but to the extent Appellants suggest that the district court's injunction did not "stop[] the Overtime Rule from taking legal effect," Opening Br. 38, that position cannot withstand any scrutiny. In recognition of the Overtime Rule's impending effective date, the district court entered a preliminary injunction on November 22, 2016, to preserve the status quo and "delay[]" the implementation of the new rule. ROA.3841-3842. The court then granted the States' request to "enjoin the new overtime rule from becoming effective," ROA.165, and expressly prohibited the Department of Labor—the agency charged with implementing its own rule, *see* 29 U.S.C. §213(a)(1)—from "implementing and enforcing" it, ROA.3843. In short, when the district court preliminarily enjoined the rule, it did exactly that: It "enjoin[ed] the Final Rule." ROA.3843.

Once the district court enjoined implementation of the rule, the rule no longer had an effective date. And "without an effective date," the rule became a "nullity."

Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 762 (3d Cir. 1982). Appellants' Alice-in-Wonderland suggestion that "it was not even clear" that the injunction "stopped the Overtime Rule from taking legal effect" cannot be squared with this reality. Opening Br. 38. It thus comes as no surprise that Appellants point to absolutely *zero* authority for the notion that a regulatory rule takes effect notwithstanding an injunction prohibiting the agency that promulgated the rule from implementing it before it ever became effective.

That the rule did not take effect follows inexorably not only from the plain text of the district court's order, but from the authority granted to the court under §705 of the APA, which Amici expressly invoked in their briefing before the district court. ROA.280. The court entered the injunction pursuant to the APA, which provides that a court may "issue all necessary and appropriate process to postpone the effective date of an agency action." 5 U.S.C. §705. That is exactly what happened here. The district court's injunction was a "necessary and appropriate process to postpone the effective date of [the] agency action." *Id.* The district court did so preliminarily, and then in a final order, so that it could "preserve [the] status [and] rights" of the parties "pending conclusion of the review proceedings." *Id.*

That the district court "did not even cite §705," Opening Br. 39, makes no difference, as everything about its order, issued pursuant to the APA, clearly had that effect. The litigation in the district court proceeded under the APA: This was

litigation brought to challenge final agency action governed by the APA, and the substantive and procedural claims of both the States and the business association plaintiffs were brought under the APA. *See* ROA.1 (listing cause of action as "Administrative Procedure Act"); ROA.77; *see also* Civil Docket No. 4:16-cv-732 (listing cause of action as "Administrative Procedure Act"); Complaint at 31, *Plano Chamber of Commerce v. Perez*, No. 4:16-cv-732 (E.D. Tex. Sept. 20, 2016), ECF No. 1. The authorities cited by Appellants to attempt to get around this obvious result—*Texas v. EPA*, 829 F.3d 405, 414 (5th Cir. 2016), and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151, 155-56 (1967)—are inapposite, as those cases involved challenges to a rule brought under a different statutory scheme (the Clean Air Act rather than the APA), and to a rule that had already taken effect (*Texas*) or included a provision stating that the rule would automatically become effective upon publication (*Abbott Labs*). Neither undermines the commonsense conclusion that the district court's injunction prevented the Overtime Rule from taking effect.

Indeed, court after court has recognized that the district court's injunction stopped the rule from taking effect. The Sixth Circuit explained that the district court "enjoined the DOL from implementing or enforcing" the new rule, *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191, 196 n.4 (6th Cir. 2017); the Second Circuit observed that the rule "is presently enjoined nationwide," *Fernandez v. Zoni Language Ctrs., Inc.*, 858 F.3d 45, 49 n.5 (2d Cir. 2017); and the Middle District of

Florida noted that the rule had been "held invalid" and its "implementation [had been] stayed," *Sims v. UNATION, LLC*, 292 F. Supp. 3d 1286, 1294 n.2 (M.D. Fla. 2018). *See also, e.g.*, *Hines v. Key Energy Servs., LLC*, No. 5-15-CV-00911-FB-ESC, 2017 WL 2312931, at *3 n.6 (W.D. Tex. May 26, 2017); *Long v. Endocrine Soc'y*, 263 F. Supp. 3d 275, 290 (D.D.C. 2017); *Young Chul Kim v. Capital Dental Tech. Lab., Inc.*, 279 F. Supp. 3d 765, 776 n.10 (N.D. Ill. 2017); *Patton v. Ford Motor Co.*, No. 14-CV-0308-RJA-HBS, 2017 WL 2177621, at *3 (W.D.N.Y. May 18, 2017). And in none of the district courts has the Department of Labor ever acted—under either the Obama administration or the Trump administration—as if the rule took effect.

Moreover, in recognition of the obvious fact that the rule never took effect, courts all across the country have adjudicated disputes about overtime since the court's entry of the injunction by applying the *previous* rule. *See, e.g.*, *Buford v. Superior Energy Servs., LLC*, No. 4:17-CV-00323-KGB, 2018 WL 2465469, at *9 (E.D. Ark. June 1, 2018); *Miller v. Travis Cty.*, No. 1:16-CV-1196-RP, 2018 WL 1004860, at *4 (W.D. Tex. Feb. 21, 2018); *Brashier v. Quincy Prop., LLC*, No. 3:17-CV-3022, 2018 WL 1934069, at *2 n.2 (C.D. Ill. Apr. 24, 2018); *Morgan v. Guardian Angel Home Care, Inc.*, No. 14 C 10284, 2018 WL 1565585, at *2 n.3 (N.D. Ill. Mar. 30, 2018); *Parrish v. Roosevelt Cty. Bd. of Cty. Comm'rs*, No. CIV 15-0703 JB/GJF, 2017 WL 6759103, at *14-18 nn.29-31 (D.N.M. Dec. 31, 2017).

Those courts all recognized the clear consequence of the court's injunction—that the rule did not take effect—and concluding otherwise would make no sense as a practical matter. The Department intended the rule to apply nationwide, as it set a single effective date for the rule. Carving up the effective date so that the rule would be in effect in some jurisdictions, but not in others, would impose massive burdens on the business plaintiffs in this litigation, who collectively represent millions of employers who operate or have facilities all across the country. Thus, while Amici take no position on whether Appellants should be held in contempt of the injunction, Appellants' argument that the rule actually took effect notwithstanding the injunction is meritless, and this Court should disregard it.

CONCLUSION

For the reasons set forth above, this Court should decline appellants' invitation to opine on the merits of the district court's injunction or the effective date of the 2016 Overtime Rule.

Respectfully submitted,

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July 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 3,091 words as determined by the word counting feature of Microsoft Word 2016.

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) the hard copies submitted to the clerk are exact copies of the ECF submission;

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s/Paul D. Clement
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