UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Victor Leal, et al., Plaintiffs, v. **Alex M. Azar II**, et al., Defendants.	Case No. 2:20-cv-00185-Z

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b)

The issues surrounding *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and the scope of its res judicata holding amply warrant an appeal to the Fifth Circuit—and an eventual certiorari petition to the Supreme Court—and there no just reason for delaying this appeal until the entry of final judgment. In determining whether there is "no just reason for delay" under Rule 54(b), a Court must consider: (1) "judicial administrative interests as well as the equities involved"; (2) whether the issue to be appealed is "separable from the others remaining to be adjudicated"; and (3) must ensure that "no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980). The defendants' arguments do not provide any "just reason" to delay the appeal of the *Hellerstedt* and res judicata issues.

I. Judicial Administrative Interests And The Equities Involved Support Partial Entry Of Judgment

The Supreme Court's ruling in *Hellerstedt* departed from the normal rules of claim preclusion, and it refused to apply the "common nucleus of operative facts" test in deciding whether a subsequent lawsuit should be barred by res judicata. The

Court's opinion in this case recognizes as much,[1] and the defendants do not deny this. Instead, *Hellerstedt* held that the "common nucleus of operative facts" test does not apply when "important human values" are at stake. *See Hellerstedt*, 136 S. Ct. at 2305 ("[W]here 'important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'" (quoting Restatement (Second) of Judgments § 24, Comment *f* (1980)); *id.* at 2306 ("The claims in both *Abbott* and the present case involve 'important human values.'" (quoting Restatement (Second) of Judgments § 24, Comment *f*)). This Court interpreted the *Hellerstedt* opinion as creating an abortion-specific regime with regard to res judicata, which gives litigants who challenge abortion regulations special dispensations from the rules and doctrines that apply to everyone else. *See* Memorandum Opinion and Order (ECF No. 21) at 18–20.

If this Court's interpretation of *Hellerstedt* is correct—and it is certainly plausible given the Court's past behavior in abortion cases—then the ruling in *Hellerstedt* is abject lawlessness, and the res judicata issue in this case should be appealed and brought to the Supreme Court as quickly as possible so that the new membership can reconsider and (one would hope) overrule that decision, or at the very least establish a new regime of claim preclusion that applies equally to all litigants. The judicial oath compels the federal judiciary to administer justice "without respect to persons." 28 U.S.C. § 453. And a regime that exempts litigants who challenge abortion statutes from the "common nucleus of operative fact" test—while still requiring other litigants to observe the traditional rules of res judicata—is about as a clear a contradiction of the judicial oath as one can imagine. There is no justification for prolonging a regime of this sort by denying an immediate appeal, either with regard to "judicial

1. *See* Memorandum Opinion and Order (ECF No. 21) at 17–20.

administrative interests" or "the equities involved." The judicial administration of laws and doctrines is supposed to be done with regard to persons and without regard to the subject matter of the litigation; that is why justice is depicted wearing a blindfold, and that is why judges are bound by oath to administer justice "without respect to persons." 28 U.S.C. § 453. Nor is there any "equity" in delaying an appeal that seeks to overrule the *Hellerstedt* regime. The ruling in *Hellerstedt* is the very embodiment of *inequity*, as it purports to establish a one-off regime for claim preclusion that applies only in abortion cases—or in cases that meet whatever the justices consider to be "important human values."

The defendants insist that we identify "some danger of hardship or injustice through delay which would be alleviated by immediate appeal." Defs.' Br. (ECF No. 27) at 3 (quoting *PYCA Indus., Inc. v. Harrison Cty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996)). One "injustice" from delay is the continued existence of the *Hellerstedt* regime, which cannot be defended by any neutral principle and is ripe for reconsideration given recent changes of membership on the Supreme Court. Another "injustice" is Mr. Leal and Mr. Von Dohlen's inability to launch a facial challenge to 42 U.S.C. § 300gg-13(a)(4) when they had no notice of the previous litigation in *DeOtte v. Azar*, and their continued inability to purchase acceptable health insurance on account of this unconstitutional statute. The defendants claim that Mr. Leal and Mr. Von Dohlen cannot be harmed by a delayed appeal because they are already protected by the *DeOtte* injunction,[2] but we have specifically alleged that the *DeOtte* injunction is inadequate to protect Mr. Leal and Mr. Von Dohlen because they remain unable to purchase contraceptive-free health insurance on the market, and the continued existence of the Contraceptive Mandate will continue to restrict the range of acceptable health insurance for religious objectors to purchase.

2. Defs.' Br. (ECF No. 27) at 3–4.

See Complaint (ECF No. 1) at ¶ 34. The defendants insist claim that Ms. Armstrong can continue seeking the relief that the plaintiffs want, but there is no guarantee that Ms. Armstrong (or other litigants) will be able to prove that they have Article III standing by a preponderance of the evidence, and the government continues to contest Ms. Armstrong's standing to seek declaratory and injunctive relief under 42 U.S.C. § 300gg-13(a)(4).

Finally, the defendants give short shrift to the administrative benefits of a separate and independent appeal of the res judicata issue. The Supreme Court prefers to grant certiorari when an issue is presented in a clean vehicle, without being bogged down by antecedent questions or collateral issues. A certiorari petition that seeks the reconsideration of *Hellerstedt* in the context of an appeal from final judgment in this case is unlikely to present a suitable vehicle, given the many other issues that will simultaneously be presented at that time. Far better to allow an immediate appeal that is limited to res judicata issue, and that promises to present a suitable vehicle for the Supreme Court to reconsider its previous ruling.

II. The Claims That This Court Has Dismissed Are Separable From The Claims Remaining To Be Adjudicated

The defendants suggest that other issues may seep into the plaintiffs' appeal if the Court enters partial final judgment, but this extremely unlikely to occur. The defendants, for example, claim that the Fifth Circuit might need to resolve Mr. Leal and Mr. Von Dohlen's Article III standing, but their standing is undeniable based on the allegations of the complaint, which *must* be accepted as true at this stage of the litigation. *See* Complaint (ECF No. 1) at ¶ 34 (explaining how the continued existence of the Contraceptive Mandate limits Mr. Leal and Mr. Von Dohlen's ability to purchase acceptable health insurance, notwithstanding the DeOtte injunction). The defendants also contend that the Fifth Circuit might decide to affirm this Court's entry of judgment against Mr. Leal and Mr. Von Dohlen on other grounds, but there is no risk of

that unless the defendants *choose* to raise those issues on appeal as an alternate grounds for affirmance, and the defendants have made no representation to this Court that they intend to do this.

III. There Is No Risk That Any Appellate Court Would Have To Decide The Same Issues More Than Once If The Court Enters Judgment Under Rule 54(b)

The defendants (as far as we can tell) do not contest the plaintiffs' claim that there is no risk that an appellate court would need to weigh in on the res judicata issues more than once is partial final judgment were to be entered.

CONCLUSION

The motion for entry of partial final judgment should be granted.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I certify that I have conferred with Christopher Lynch, counsel for the federal defendants, who opposes this motion, as well as Matthew Bohuslav, counsel for the state defendants, who is unopposed to this motion.

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CERTIFICATE OF SERVICE

I certify that on March 15, 2021, I served this document through CM/ECF upon:

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