IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-50377

PLANNED PARENTHOOD ASSOCIATION OF HIDALGO COUNTY TEXAS, INCORPORATED;
PLANNED PARENTHOOD ASSOCIATION OF LUBBOCK, INCORPORATED;
PLANNED PARENTHOOD OF CAMERON AND WILLACY COUNTIES;
FAMILY PLANNING ASSOCIATES OF SAN ANTONIO;
PLANNED PARENTHOOD OF CENTRAL TEXAS;
PLANNED PARENTHOOD OF GULF COAST, INCORPORATED;
PLANNED PARENTHOOD OF NORTH TEXAS, INCORPORATED;
PLANNED PARENTHOOD OF WEST TEXAS, INCORPORATED;
PLANNED PARENTHOOD OF AUSTIN FAMILY PLANNING, INCORPORATED,

Plaintiffs-Appellees,

versus

THOMAS M. SUEHS, Executive Commissioner, Texas Health and Human Services Commission, in His Official Capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

No. 12-50377

O R D E R

Before DAVIS, SMITH, and PRADO, Circuit Judges.

PER CURIAM:

Shortly before noon on April 30, 2012, the district court entered the injunction that is appealed, explaining itself in a 23-page order. The State immediately filed a notice of appeal, then prepared a 23-page motion for stay pending appeal that was filed in this court at about 10:30 p.m. In its motion, the State represented that "the administrative provisions at issue are scheduled to go into effect (and Texas will be irreparably injured if they do not) at midnight tonight [April 30]."

A few minutes before midnight, the motion was submitted to a judge of this court who, pursuant to FED. R. APP. P. 8(a)(2)(D),[1] temporarily granted the motion for stay based on the stated emergency and in order to provide for an orderly review by the full motions panel after any subsequent filings by the parties. The court, through its Clerk, directed the plaintiffs to file a response to the motion by 5:00 p.m. May 1. Plaintiffs submitted a 20-page response by the deadline.

Significantly, in their response the plaintiffs substantially relied—as did the district court in its explanatory order—on the important precedent from this

[1] Rule 8(a)(2)(D) reads,

> A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

court of *Planned Parenthood of Hou. & Se. Tex. v. Sanchez*, 403 F.3d 324 (5th Cir. 2005). Also importantly, on May 2 the plaintiffs filed, with leave of court, a "supplemental opposition" in which they pointed to an affidavit from a state official. Language in that affidavit reasonably calls into question the State's declaration of an emergency need for a stay, because it states that any injunction will have the effect of requiring the State to cease operating the program at issue "upon termination of federal funding." Evidence in the record indicates that such funding is continuing until November 2012.

This supplemental filing undermines the State's assertion of irreparable harm if the injunction is not stayed pending appeal. Regarding the balance of the merits, we cannot conclude, on the present state of the record, that the State has shown a great likelihood, approaching a near certainty, that the district court abused its discretion in entering the injunction.[2]

Our conclusion rests in part on the State's continuing reluctance to address the obviously relevant opinion in *Sanchez*. Despite the plaintiffs' and the district court's having relied extensively on that authority, which binds this panel to the extent it is applicable, the State never mentioned it (as far as we can tell from the record) in the district court and did not refer to it in any way in its motion for stay pending appeal. Nor has the State sought leave to supplement its submission with a response to *Sanchez* or the plaintiffs' focus on the affidavit referred to above.

Accordingly, a stay pending appeal is no longer appropriate under the current record and in light of the early stage of these proceedings. We notice

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[2] *See Allied Marketing Grp., Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 809 (5th Cir. 1989); *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963).

that an appeal of the injunction remains pending, and the only submission to this motions panel is the motion to stay the injunction pending a decision by a merits panel on the State's appeal of the injunction. We also notice that the district court, in its thorough order, carefully advised that it had reached no final decision of the plaintiffs' suit to prohibit enforcement of the administrative rule in question.

The stay entered on April 30 is VACATED. The motion for stay pending appeal is DENIED. To facilitate the early resolution of the injunction appeal, that appeal is hereby *sua sponte* EXPEDITED, and the Clerk is directed to place it on the next available regular oral argument docket for decision by a merits panel and to issue an expedited briefing schedule. The merits panel will decide any motions that may be submitted to it in the course of its consideration of the appeal of the injunction.

Nothing in this order is to be construed as a ruling on any issue of law or fact that is presented in this appeal or as a suggestion on how the district court or the merits panel should decide any question.

IT IS SO ORDERED.