UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN, *Plaintiffs*, v. WARREN K. PAXTON, in his official capacity as the Attorney General of Texas, *et al.*, *Defendants*.	§ § § § § § § § § §	Case No. 5:21-cv-1223-XR

ATTORNEY GENERAL PAXTON'S REPLY IN SUPPORT OF MOTION TO DISMISS OR ABSTAIN

The Court should grant the Attorney General's motion to dismiss or abstain. *See* ECF 24. Plaintiffs argue that the Attorney General's motion "must be denied" "[u]nder the law of the case doctrine," ECF 61 at 3–4, but that is wrong for two reasons.

First, the law-of-the-case doctrine does not apply to a district court's interlocutory decisions. "[I]n civil cases a district court is not precluded by the law-of-the-case doctrine from reconsidering previous rulings on interlocutory orders. . . ." *United States v. Palmer*, 122 F.3d 215, 220 (5th Cir. 1997). Other courts agree that a district court's interlocutory order does not limit its ability to reach contrary conclusions later. *See, e.g.*, *Keepseagle v. Perdue*, 856 F.3d 1039, 1048 (D.C. Cir. 2017); *Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014) (en banc); *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008). That makes sense because "a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case." *Dietz v. Bouldin*, 579 U.S. 40, 46 (2016). Indeed, the federal rules authorize this Court to revise its interlocutory orders "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

Plaintiffs' only citation regarding law of the case, *FDIC v. McFarland*, is not to the contrary. *See* ECF 61 at 3 (citing 243 F.3d 876, 884 (5th Cir. 2001)). *McFarland* did not consider mere interlocutory orders. It considered the potentially binding effect of previous decisions "[w]here a final judgment is entered, the case appealed, and the case remanded." 243 F.3d at 884. In any event, *McFarland*'s holding—that a certain issue was *not* law of the case, *see id.* at 885—does not help Plaintiffs here.

Second, even if the law-of-the-case doctrine otherwise applied, it would not prevent dismissal here. Plaintiffs argue that the denial of a motion to dismiss follows "*a fortiori*" from the grant of a motion for preliminary injunction, ECF 61 at 4, but those motions present different questions. A motion to dismiss focuses on the allegations in the complaint, *see, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), while a preliminary-injunction motion focuses on evidence in the record, *see, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

In granting a preliminary injunction, the Court did not consider the sufficiency of Plaintiffs' allegations. *See, e.g.*, ECF 53 at 28 (outlining the standard for a preliminary injunction). The Attorney General's motion to dismiss, though, raised a "facial attack" on jurisdiction, *see* ECF 24 at 3, which asks "whether the complaint is sufficient to allege . . . jurisdiction," *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). As a result, the law-of-the-case doctrine cannot apply. *See Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. Unit A 1981) ("[U]nlike common law res judicata, the law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided on the prior appeal.").

Plaintiffs misleadingly characterize the preliminary-injunction standard as "more stringent" than the motion-to-dismiss standard. ECF 61 at 3. True, the preliminary-injunction standard is more stringent in the sense that it requires various evidentiary showings, but that does not mean that evidence sufficient to support a preliminary injunction can defeat a motion to dismiss. When a plaintiff's allegations do not suffice, it cannot cure those "deficiencies" with "declarations" or other

evidence. *In re Apple iPhone Antitrust Litig.*, No. 4:11-cv-6714, 2013 WL 4425720, at *7 (N.D. Cal. Aug. 15, 2013). The Court should dismiss and consider preliminary-injunction evidence "only with respect to whether leave to amend should be granted." *Id.*

The Court should grant the Attorney General's motion to dismiss because Plaintiffs' only response—law of the case—is incorrect. The Court should not consider any other arguments against dismissal. Plaintiffs forfeited all such arguments because they "did not raise them in" their "response to the motion to dismiss." *Stearman v. C.I.R.*, 436 F.3d 533, 537 (5th Cir. 2006); *see also Burke v. Ocwen Loan Servicing, L.L.C.*, 855 F. App'x 180, 183 (5th Cir. 2021) (per curiam) (holding an argument forfeited because it was not included in a response to a motion to dismiss); *Mohamed for A.M. v. Irving Indep. Sch. Dist.*, 252 F. Supp. 3d 602, 619 n.9 (N.D. Tex. 2017) (dismissing a claim because the plaintiff did not address it in his response brief).

To the extent the Court relies on its order granting a preliminary injunction, the Attorney General respectfully maintains that the order is erroneous for the reasons explained in his motion to dismiss, *see* ECF 24, his response to the motion for a preliminary injunction, *see* ECF 48, and his appellate filings, *see Longoria v. Paxton*, No. 22-50110 (5th Cir.).

Date: March 2, 2022

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on March 2, 2022, and that all counsel of record were served by CM/ECF.

/s/ William T. Thompson
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