

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION**

<b>STATE OF TEXAS</b> , et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 7:16-cv-54-O
	)	
<b>UNITED STATES OF AMERICA</b> , et al.,	)	
	)	
Defendants.	)	
_____	)	

**NOTICE OF SUPPLEMENTAL AUTHORITY**

On September 23, 2016, the Fifth Circuit issued an order withdrawing the panel’s decision in *Texas v. EEOC*, No. 14-10949, 2016 WL 3524242 (5th Cir. June 27, 2016), vacating the district court’s judgment, and remanding the case to the district court. *See* Order, No. 14-10949 (Sept. 23, 2016) (attached as Exhibit 1). Defendants bring this development to the Court’s attention because the Court’s Preliminary Injunction Order, ECF No. 58, relied substantially on the Fifth Circuit’s now-vacated opinion in *EEOC*.

For example, in rejecting the argument that Plaintiffs lack standing because Defendants “have merely set forth their views about what the law requires,” ECF No. 40 at 12-13, the Court concluded that “[t]his case is analogous” to *EEOC*, which also involved “guidance that was advisory only and imposed no affirmative obligations.” ECF No. 58 at 13. Likewise, the Court found final agency action absent any actual or threatened enforcement action against Plaintiffs because “the Fifth Circuit held in *EEOC* . . . that ‘an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties.’” ECF No. 58 at 17. The

Court's conclusion that *EEOC* was analogous or controlled the outcome here no longer holds up now that the *EEOC* opinion has been withdrawn.

Dated: September 28, 2016

Respectfully submitted,

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Principal Deputy Assistant Attorney General

JENNIFER D. RICKETTS  
Director, Federal Programs Branch

SHEILA M. LIEBER  
Deputy Director, Federal Programs Branch

/s/ Benjamin L. Berwick

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2016, a copy of the foregoing Notice of Supplemental Authority was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Benjamin L. Berwick  
Benjamin L. Berwick

# EXHIBIT 1

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

\_\_\_\_\_  
No. 14-10949  
\_\_\_\_\_

United States Court of Appeals  
Fifth Circuit

**FILED**

September 23, 2016

Lyle W. Cayce  
Clerk

STATE OF TEXAS,

Plaintiff - Appellant

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG,  
in her official capacity as Chair of the Equal Employment Opportunity  
Commission; LORETTA LYNCH, U. S. ATTORNEY GENERAL,

Defendants - Appellees

\_\_\_\_\_  
Appeal from the United States District Court  
for the Northern District of Texas  
\_\_\_\_\_

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 06/27/16, 5<sup>th</sup> Cir., \_\_\_\_\_ F.3d \_\_\_\_\_)

Before JOLLY, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

As we noted in our opinion, *Texas v. EEOC*, No. 14-10949, 2016 WL 3524242, at \*7 (5th Cir. June 27, 2016), shortly before the opinion's issuance the Supreme Court decided *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016), which held in the context of the Clean Water Act that a jurisdictional determination ("JD") is a final agency action that is subject to

No. 14-10949

judicial review under the Administrative Procedure Act, 5 U.S.C. § 704. *Hawkes*, 136 S. Ct. at 1816.

In *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), also cited in our opinion, our court had held that the JD in that case was not a final decision. Belle Co. petitioned for certiorari, which the Supreme Court granted. In the light of its opinion in *Hawkes*, the Court vacated the judgment and remanded *Belle Co.* to our court. 136 S. Ct. 2427 (2016) (mem.). The panel then remanded the case to the district court for further proceedings consistent with the Supreme Court's decision in *Hawkes*. *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs*, No. 13-30262, 2016 WL 4073301, at \*1 (5th Cir. July 29, 2016).

Both *Belle Co.* and the instant case relate closely to the issue that the Supreme Court decided in *Hawkes*. Given this similarity, and given that the district court has not had the opportunity to apply *Hawkes* to the facts of this case, we conclude that the importance of the issue and the interest of uniformity of our precedent require that we, like the *Belle Co.* panel, remand this case for further consideration in the light of *Hawkes*. We recognize that *Hawkes* may or may not affect other issues raised in this appeal, and we leave it to the district court in the first instance to reconsider this case, and its opinion, in its entirety and to address the implications of *Hawkes* for this case.

Accordingly, we WITHDRAW our prior opinion, VACATE the district court's judgment dismissing the complaint, and REMAND this case to the district court for such further proceedings as, in its discretion, are required.

PETITION GRANTED; OPINION WITHDRAWN; JUDGMENT  
VACATED, AND CASE REMANDED.

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

September 23, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing  
or Rehearing En Banc

No. 14-10949 State of Texas v. EEOC, et al  
USDC No. 5:13-CV-255

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Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

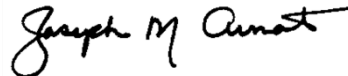
Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in black ink that reads "Joseph M. Armato". The signature is written in a cursive style with a prominent initial "J".

By: \_\_\_\_\_  
Joseph M. Armato, Deputy Clerk

Enclosure(s)

Mr. Scott A. Keller  
Ms. Stephanie Robin Marcus  
Mr. Justin Michael Sandberg  
Mr. Prerak Shah