No. 19-10011

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS, ET AL.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants,

STATE OF CALIFORNIA, ET AL.,
Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO EXPEDITE APPEAL

The Court should deny Intervenors' motion to expedite and allow this appeal of enormous national consequence involving the lawfulness of the Affordable Care Act *in toto* to be briefed in the ordinary course. The district court expressly stayed the operative order granting partial final judgment. The status quo will remain in place throughout the course of appellate proceedings. There thus is no "good cause" for expedited treatment. *See* 5th Cir. R. 27.5.

Because they cannot show "good cause"—indeed, they never even cite Rule 27.5—Intervenors instead propose an unbalanced briefing schedule that would re-

quire Appellees to respond to at least two, and possibly three, merits briefs (and potentially numerous amicus briefs) with no opportunity to seek an extension, no matter what circumstances may arise. Under Intervenors' proposed schedule, they would have effectively three months to prepare their opening brief—yet deny Appellees the same timeframe. The Court should not permit Intervenors to prejudice Appellees with such an asymmetrical briefing schedule. Especially in this appeal of significant national importance and exceptional complexity, this Court should demand the best—not the quickest—briefing.

In any event, even if Intervenors could show good cause, the proposed schedule is unworkable. Lead counsel to Appellees is responsible for numerous active appellate matters, several of which are likely to involve deadlines during the window Intervenors would have the Court set. Moreover, lead counsel to Appellees has a longstanding family vacation planned for July that would prejudice his ability to prepare for—and perhaps even participate in—the proposed July argument date.

For all these reasons, Intervenors' motion should be denied, and this matter should be briefed in the ordinary course.

ARGUMENT

1. Intervenors' motion is not really a motion to expedite. Had Intervenors wanted to expedite this appeal, they could have moved to expedite a month ago when they filed their notice of appeal. D.E. 224, *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex.) (filed Jan. 3, 2019).[1] If granted, this would have accelerated the time

[1] All docket entry references are to *Texas v. United States*, No. 4:18-cv-00167 (N.D. Tex.).

both for the record on appeal to come in and for briefing. But they did not do so. They waited. And this delay made it so that under this Court's rules (and assuming the record is filed on its due date of February 14, 2019) their briefs will be due on March 26, 2019. This is over three months after the district court issued its order granting partial summary judgment, D.E. 211 (Dec. 14, 2018 Order), and very nearly three months after the district court entered partial judgment under Fed. R. Civ. P. 54(b), D.E. 221 (Dec. 30, 2018 judgment). Yet even that is supposedly insufficient time for Intervenors to file their opening brief, as their "expedited" schedule proposes they have even *more time*. Mot. 4 (requesting that the appellants' opening briefs be due March 29, 2019).

2. At the same time Intervenors propose to give the appellants three months to file their opening briefs, they ask this Court to limit Appellees to 33 days with no opportunity for an extension. Ossifying the briefing schedule in this way will severely prejudice Appellees. Appellees will have to respond to not one, not two, but possibly three[2] separate, full-length briefs—potentially totaling 39,000 words—from sophisticated appellants potentially advancing different arguments, theories, and resolutions. *See* Mot. 5 n.3 (stating that Intervenors and federal defendants will advance different arguments). Moreover, they will have to review and assess whether and how to respond to the numerous amicus briefs that are likely to be filed on the appellants' behalf. This will be a difficult task in this exceptionally complex appeal even if

[2] The three briefs would be from Intervenors, the federal government, and the United States House of Representatives, if this Court permits the latter to intervene on appeal. *See* U.S. House of Representatives Motion to Intervene, *Texas v. United States*, No. 19-10011 (5th Cir. Jan. 7, 2019).

Appellees are able to devote a significant portion of their time to this matter—which, given the inherent uncertainties in lawyers' schedules, cannot be fully known at this time.

3. There is no basis to heavily tilt the playing field in the appellants' favor. The declaratory judgment from which they appeal is expressly *stayed* throughout this appeal. D.E. 220. Any "good cause" for expediting is therefore premised solely on Intervenors' one-sided, non-record declarations of stakeholder uncertainty. This is hardly sufficient to "expedite" this appeal and deny Appellees the opportunity, if needed, to seek a briefing extension in the ordinary course.

4. Indeed, the proposed lopsided briefing schedule not only prejudices Appellees, it disserves this Court. No one would dispute that this is among the most consequential appeals pending in the United States right now. Barring an exceedingly compelling reason to expedite, this Court should demand the *best* briefing, not the *hastiest*. That means allowing briefing to proceed in the ordinary course.

5. In the end, Intervenors' actions in this appeal speak louder than their declarations. In the ordinary course, Appellees' briefing deadline would be keyed off the date the appellants file their briefs. *See* Fed. R. App. P. 31(a); 5th Cir. R. 31.3. So if Intervenors thought it imperative that Appellees file their brief by May 1, 2019, they could file their opening brief as soon as the record on appeal arrives—or even by March 1, 2019—to trigger the 30-day clock for Appellees to respond. But Intervenors will not shorten their *own* time to file a brief *at all*. *See* Mot. 5 (rejecting outright the federal government's proposal to make appellants' opening briefs due March 15,

2019).[3] That they demand effectively three months to file their opening brief while seeking to lock Appellees into a 33-day briefing period with no opportunity to move for an extension shows that their assertion of good cause to expedite is unfounded.

6. Finally, even if expedited treatment were warranted, the schedule Intervenors propose is unworkable for two reasons. First, lead counsel to Appellees is responsible for numerous active appeals requiring significant attention. It is all but certain that lead counsel to Appellees will face significant briefing and argument obligations during Intervenors' proposed briefing window, which would prevent counsel from devoting the time to this appeal that it demands. In particular, the Supreme Court of Texas has not yet publicly announced its April argument calendar. Second, the undersigned lead counsel to Appellees has a longstanding family vacation planned for July 2019 that would prejudice his preparation for—and possibly his ability to participate in—a July oral argument.

[3] Notably, there is more time between the date Intervenors filed this motion (February 1, 2019) and March 15, 2019, than the 33-day period in which they demand Appellees file their response.

Conclusion

For the foregoing reasons, the Court should deny Intervenors' motion to expedite, and should allow briefing to proceed in the ordinary course.

Respectfully submitted.

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Certificate of Service

On February 11, 2019, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
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Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,147 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B); and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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