No. 21-40618

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF LOUISIANA,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HER OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division

OPPOSITION TO MOTION FOR ABEYANCE AND TO STAY BRIEFING

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Certificate of Interested Persons

No. 21-40618

State of Texas; State of Louisiana,
Plaintiffs-Appellees,

v.

United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, In his official capacity; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, In his official capacity; United States Immigration and Customs Enforcement; Tracy Renaud, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; United States Citizenship and Immigration Services,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ Benjamin D. Wilson
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This is the third in a series of immigration cases where the United States has recently sought an abeyance with merits briefing in this Court looming. *See Texas et al. v. Biden et al.*, No. 21-10806 (5th Cir. 2021); *Texas et al. v. United States et al.*, No. 21-40680 (5th Cir. 2021). This Court has already denied abeyances in two of these cases in recent days, and it should likewise deny Appellants' request for an abeyance here.

This case concerns two memoranda promulgated by Appellants on January 20 and February 18, 2021, Stay Mot. Add. 162-65; 168-74, purporting to provide immigration officials discretion whether to detain certain classes of aliens even though that putative discretion conflicts with Congress's express statutory commands. *See* 8 U.S.C. § 1226(c), *id.* at § 1231(a)(2). After Texas and Louisiana challenged portions of those memoranda in the Southern District of Texas, the district court entered a preliminary injunction preventing their enforcement as part of a 160-page opinion that concluded the relevant portions of the memoranda were contrary to law, arbitrary and capricious, and procedurally invalid because they did not go through notice-and-comment procedures. *Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *63 (S.D. Tex. Aug. 19, 2021).

The next day, August 20, Appellants filed a notice of appeal to this Court and moved the district court for a stay of its preliminary injunction. ECF 81, 82. The

district court ultimately granted a seven-day stay to allow Appellants to seek relief in this Court.[1] ECF 90.

Appellants then sought emergency relief from this Court. In doing so, Appellants necessarily certified that there was "an emergency sufficient to justify disruption of the normal appellate process." *See* Fifth Circuit Rule 27.3. After full briefing and oral argument on Appellants' emergency stay motion was conducted over the course of sixteen days, this Court stayed in-part the district court's preliminary injunction. *Texas v. United States*, -- F.4th --, 2021 WL 4188102 at *7 (5th Cir. Sept. 15, 2021).

While litigating this case in the district court and this Court, Appellants were at the same time serially failing to issue a new immigration enforcement memorandum as promised. When it issued the "Interim Guidance: Civil Immigration Enforcement and Removal Priorities" memorandum on February 18, 2021, Immigration and Customs Enforcement (a part of DHS) stated that Secretary Mayorkas "anticipate[d] issuing" "new guidelines" "in less than 90 days." Add. 168. That did not occur.

After missing its initial deadline, the United States represented to an Arizona district court that it "currently expect[s] that the Secretary will issue new immigration priorities in the beginning of July." *Arizona v. Dep't of Homeland Sec.*, No. 2:21-

[1] In their district court stay papers, Appellants sought relief from the district court by 2:00 p.m. on August 23rd, ECF 82 at 1, even though the district court had already scheduled a status conference that same day at 3:15 p.m. ECF 80. Appellants' demand for relief by that time required counsel for the States to oppose their stay request in less than 48 hours and caused the district court to reschedule its status conference to 9:00 a.m. on the 23rd.

cv-00186-SRB (D. Ariz. June 7, 2021), ECF 85 at 2. Once that deadline too had passed, it represented to the district court in this case that "the Secretary will issue new immigration enforcement priorities by the end of August or the beginning of September." ECF 63. Nonetheless, no new memorandum was forthcoming until September 30. *See* Secretary Mayorkas Announces New Immigration Enforcement Priorities (September 30, 2021), https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities (last accessed October 18, 2021).

Having previously insisted that this case proceed at the fastest possible pace on an emergency basis, Appellants have now changed course and asked this Court to hold this appeal in abeyance indefinitely. That request is premised on the September 30 Memorandum issued by the Secretary of Homeland Security that states it will take effect November 29, 2021. Mot. at 3. Appellants contend that "it is likely that this case will become moot before the Court would reach a decision on the merits." *Id.* This Court should deny that motion for at least two reasons.

First, Appellants should not be allowed to insist matters proceed on an expedited, emergency basis—burdening both the litigants and the courts—only to then insist proceedings stop abruptly based solely on the completion of long-overdue action wholly within their own control. This conduct belies Appellants' newfound concern for the resources of the parties and the Court. Mot. at 3. Appellants' litigation conduct has repeated required the States and the federal courts to expend significant resources. For example, the States have been obliged to respond to a stay motion in the district court in less than 48 hours, respond to a stay motion in this Court in less

than a week, and participate in oral argument on only days' notice because Appellants insisted that emergency relief was required.

Second, as Appellants concede, Mot. at 3, this case is not currently moot because the Secretary's September 30 Memorandum is not effective on its own terms until November 29, 2021. There is no dispute that the January 20 and February 18 Memoranda are currently operative.

And this case may well not be moot even after November 29. Last Wednesday, the district court held a status conference in this case. At that status conference, the States explained that they intend to file an amended complaint in this matter by Friday October 22, 2021. The States further informed the district court and Appellants that they intend to ask the district court to delay the effective date of the September 30 Memorandum. *See* 5 U.S.C. 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action. . . ."). Should the district court delay the effective date of the September 30 Memorandum, this case would not be moot on November 29 because the January 20 and February 18 Memoranda (rather than the September 30 Memorandum) would presumably remain in effect. The issues presented by this appeal would therefore still require a decision from this Court, making an abeyance inappropriate.

CONCLUSION

The Court should deny Appellants' request for an abeyance.

Respectfully submitted,

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Certificate of Service

On October 18, 2021, this brief 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/ Benjamin D. Wilson
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,048 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) 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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