

No. 17-10135

In the United States Court of Appeals for the Fifth Circuit

FRANCISCAN ALLIANCE, INC., ET AL.,

Plaintiffs-Appellees,

v.

THOMAS E. PRICE, SECRETARY OF THE UNITED STATES

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendants-Appellants.

On Appeal from the U.S District Court for the
Northern District of Texas, Wichita Falls Division

No. 7:16-cv-00108-0

**PLAINTIFFS'-APPELLEES' RESPONSE TO
PUTATIVE INTERVENORS' MOTION TO BIFURCATE
INTERVENTION AND SUSPEND BRIEFING ON THE MERITS,
AND PLAINTIFFS'-APPELLEES' CROSS MOTION
TO SUSPEND BRIEFING**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

- (1) This case is *Franciscan Alliance, Inc., et al., v. Price, et al.*, No. 17-10135 (5th Cir.).
- (2) The following persons and entities, including those described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case:

Putative Intervenors-Appellants:

American Civil Liberties Union of Texas
River City Gender Alliance

Counsel:

Brigitte Amiri, American Civil Liberties Union Foundation
Brian Hauss, American Civil Liberties Union Foundation
Joshua Block, American Civil Liberties Union Foundation
James Esseks, American Civil Liberties Union Foundation
Louise Melling, American Civil Liberties Union Foundation
Daniel Mach, American Civil Liberties Union Foundation
Rebecca Robertson, American Civil Liberties Union of Texas
Kali Cohn, American Civil Liberties Union of Texas
Amy Miller, American Civil Liberties Union of Nebraska

Defendants-Appellees:

Thomas E. Price, in his official capacity as Secretary of the U.S. Department of Health and Human Services
U.S. Department of Health and Human Services

Counsel:

Adam Anderson Grogg, U.S. Department of Justice
Bailey Wilson Heaps, U.S. Department of Justice
Emily Brooke Nestler, U.S. Department of Justice

Plaintiffs-Appellees:

Franciscan Alliance, Inc.
Christian Medical and Dental Associations
Specialty Physicians of Illinois, LLC

Counsel:

Luke W. Goodrich, The Becket Fund for Religious Liberty
Mark L. Rienzi, The Becket Fund for Religious Liberty
Stephanie H. Barclay, The Becket Fund for Religious Liberty

State of Texas
State of Wisconsin
State of Nebraska
Commonwealth of Kentucky, by and through
Governor Matthew G. Bevin
State of Kansas
State of Louisiana
State of Arizona
State of Mississippi, by and through Governor Phil Bryant

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Michael C. Toth
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/s/ Luke W. Goodrich
Luke W. Goodrich

ARGUMENT

The Court should deny putative intervenors' Motion to Bifurcate Intervention and Suspend Briefing on the Merits, No. 17-10135 (Mar. 3, 2017) ("Motion to Bifurcate"). Instead, pursuant to Federal Rule of Appellate Procedure 27(a)(3)(B), and Fifth Circuit Rules 27.4, Plaintiffs-Appellees ("Plaintiffs") hereby cross-move this Court to suspend all briefing in this appeal until Plaintiffs' pending Motion to Dismiss for Lack of Jurisdiction has been decided.

Putative intervenors acknowledge that the sequence in which this Court decides issues is important "to prevent wasting judicial and party resources." Motion to Bifurcate at 2. Plaintiffs agree. But the course suggested by putative intervenors—bifurcated briefing of intervention and then merits—ignores the logically prior and most important question, namely, whether this Court has jurisdiction over the appeal at all. The most efficient course of action is for this Court to resolve the question of jurisdiction first, which will likely render all subsequent briefing moot.

As putative intervenors recognize, "if the Court grants Plaintiffs' motion to dismiss this entire appeal for lack of jurisdiction, that decision would moot any appellate briefing on the merits of the preliminary injunction." Motion to Bifurcate at 1-2. But such a decision would also moot briefing on the merits of the intervention appeal. *See* Motion to Dismiss,

No. 17-10135 (Feb. 15, 2017). That sort of decision is not uncommon. *See, e.g., Superior Energy Servs. LLC v. Bordelon Marine Inc.*, 351 F. App'x 862, 863 (5th Cir. 2009) (granting motion to dismiss for lack of jurisdiction and rendering all further briefing moot). Thus, to prevent “wasting judicial and party resources,” Motion to Bifurcate at 2, this Court should resolve the serious jurisdictional questions in this case before requiring further briefing.

This stay of briefing is sought in the interest of justice, not for delay, and no party will be prejudiced if the stay request is granted. Putative intervenors' own request to delay briefing on the preliminary injunction appeal demonstrates that delay will cause them no prejudice. Lack of prejudice is further confirmed by putative intervenor's recent request for a 30-day extension of time to file their opening brief. Extension Request, No. 17-10135 (Mar. 15, 2017). This extension was requested “in light of the outstanding motion to dismiss their appeal,” which is the same reason Plaintiffs request staying such briefing in this Motion.

CONCLUSION

Putative intervenors' Motion to Bifurcate Intervention and Suspend Briefing on the Merits should be denied, and this Court should instead grant Plaintiffs' motion to stay all briefing until resolution of the Motion to Dismiss.

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Respectfully submitted,

/s/ Luke W. Goodrich

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CERTIFICATE OF CONFERENCE

On April 6, 2017, Plaintiffs' counsel conferred via email with Joshua Block, counsel for Putative Intervenor-Appellants, who stated on April 7 that putative intervenors' position is that briefing on the preliminary injunction should be suspended in accordance with putative intervenors' motion to bifurcate, and putative intervenors oppose the request to suspend briefing on the motion for a stay pending appeal and on the appeal from denial of intervention as of right.

/s/ Luke W. Goodrich _____

Luke W. Goodrich

Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I certify that on April 7, 2017, this motion was (1) served via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov>, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov>. I further certify 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 Kaspersky VirusDesk and is free of viruses.

/s/ Luke W. Goodrich

Luke W. Goodrich
Attorney for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 417 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook) using Microsoft Word 2010.

/s/ Luke W. Goodrich
Luke W. Goodrich
Attorney for Plaintiffs-Appellees

Dated: April 7, 2017