U.S. Department of Justice

Environment and Natural Resources Division

Deputy Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

November 29, 2018

Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Herbert Building
600 South Maestri Place
New Orleans, Louisiana 70130

Re: No. 18-11479, *Brackeen v. Cherokee Nation*
Opposed Motion to Expedite by Appellees

Dear Mr. Cayce:

I represent the United States of America and other federal defendants (the government) in the district court case from which the above-captioned appeal arises.

The government has become aware of the subject Opposed Motion to Expedite by Appellees. That motion seeks relief not only against appellants in the above-captioned appeal but also against the government. Specifically, the motion seeks to set a shortened briefing schedule in an appeal that the government has not yet noticed, through a filing in a different appeal to which the government is not a party, and in which your Office has informed us that the government may consequently file no formal opposition defending the rights of the United States. Given that bizarre procedural posture, the government is unable to directly file an opposition through this Court's CM/ECF system. Nevertheless, we submit this letter because we have serious objections to the appellees' motion that should be brought to the attention of the judge or judges that will decide the motion.

This appeal arises out of the October 5, 2018 judgment of the U.S. District Court for the Northern District of Texas against the United States and various federal agencies and officers, striking down on multiple constitutional grounds a decades-old Act of Congress and various federal regulations. Several Indian tribes that intervened in the district court in support of the government filed the above-captioned appeal on November 19. On November 27, appellees filed the subject motion to expedite briefing of the above-captioned appeal by seeking to forbid the intervenor tribes from requesting any extension of the present December 31 deadline for filing their opening brief and by setting firm deadlines for answering and reply briefs. Motion at 3. Despite the fact that the government is not a party to the appeal and has not yet filed any notice of appeal of its own, appellees' motion also seeks to impose the same deadlines — including the December 31 deadline for filing an opening brief — in any appeal that the government may subsequently notice from the same judgment. After learning of this request, the government communicated with your Office as to whether the government could file an opposition to the

motion. On November 27, we were informed by your Office that as a "non-party" to the intervenor tribes' appeal, we could not file an opposition — notwithstanding that appellees' motion seeks binding relief against the government.

The government strongly objects to appellees' attempt to preemptively lock it into a shortened briefing schedule. Any decision by the government to appeal an adverse decision of a district court must be made by the Solicitor General, after due consultation with the affected federal agencies. 28 U.S.C. §§ 509, 510; 28 C.F.R. § 0.20. The Federal Rules of Appellate Procedure afford the government 60 days from the date of final judgment to file a notice an appeal. Fed. R. App. P. 4(a)(1)(B). The Solicitor General has not yet rendered a final decision regarding whether to notice an appeal in this case, which involves the validity under the Constitution of an Act of Congress. The district court's decision could have serious and wide-ranging consequences, which the Solicitor General must consider in making this decision. Under the cited rule, the period for noticing an appeal runs until December 3.

Under appellees' proposed schedule, if the government takes the full period to which it is entitled to consider whether to pursue an appeal, we will have only 28 days from filing a notice of appeal in the district court until we must file an opening brief in this Court. The Appellate Rules and the Rules of the Fifth Circuit, by contrast, give an appellant 40 days from the day the record is filed in this Court to prepare an opening brief. Fed. R. App. P. 31(a)(1); 5th Cir. R. 31; *see also* Order, Doc. No. 00514730862 (Nov. 20, 2018) (giving intervenor tribes 40 days from the day their appeal was docketed in this Court to file their opening brief). Given this reality, appellees' insinuation that "[t]here will be no prejudice . . . by expediting this case" according to their proposed schedule — because it would not expedite the deadline for filing an opening brief, Motion at 3 —is simply not true as regards the government.

Moreover, appellees' attempt to preemptively shorten the government's timeframe for filing an opening brief is particularly inappropriate given the complexity and significance of this case. The district court struck down a 40-year-old federal statute in its entirety on four different constitutional grounds. *See* Dist. Ct. ECF No. 166. And even before reaching the merits of the constitutional arguments, the district court had to address a host of threshold jurisdictional issues, including whether any of the 10 plaintiffs had standing to assert some or all of the seven claims raised in plaintiffs' second amended complaint. *See* Dist. Ct. ECF Nos. 33-1, 155. Neither the parties nor this Court would be served by artificially constricting the schedule for briefing the very serious issues presented by this case. To the contrary, given that "declar[ing] an Act of Congress unconstitutional . . . is the gravest and most delicate" of judicial tasks, this Court should only pass on a federal statute's validity after the benefit of full presentation of the arguments, unencumbered by truncated deadlines. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Therefore, expedition is plainly not warranted in any appeal from the district court's judgment, and to constrict the schedule before the government has even decided whether to pursue an appeal would be particularly prejudicial.

For the foregoing reasons, the Court should reject appellees' attempt to set an expedited schedule in any appeal that the government may pursue. We respectfully request that you provide this letter to the judge or judges that will decide appellees' motion. The government has sent electronic copies of this letter to counsel for the parties, via e-mail, to make them aware of our objections to the motion.

Thank you for your consideration.

Sincerely,

Eric Grant
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Counsel for United States of America

cc: All counsel of record in No. 18-11479