

No. 21-16118

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, et al.,
Plaintiff-Appellants.

v.

U.S. DEPARTMENT OF HOMELAND SECURITY et al.,
Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:21-cv-00186-SRB

**PLAINTIFF-APPELLANTS' MOTION FOR EXTENSION OF TIME TO
FILE PETITION FOR REHEARING UNDER CIRCUIT RULE 31-2.2(B)**

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Dated: February 25, 2022

MOTION FOR AN EXTENSION OF TIME

Pursuant to Circuit Rule 31-2.2(b), Plaintiff-Appellants the States of Arizona and Montana as well as Arizona Attorney General Mark Brnovich in his official capacity (hereinafter, the “States”), respectfully request a 130-day extension of time to file their petition for rehearing, from March 7 to July 15, 2022, in light of the Supreme Court’s recent grant of DHS’s petition for certiorari in *Biden v. Texas*, No. 21-954. Alternatively, the States respectfully request a 30-day extension of time, to April 6, 2022. Good cause supports this request.

The Fifth Circuit’s decision in *Texas v. Biden*, 20 F.4th 928, 958 (5th Cir. 2021) was central to Plaintiffs’ opposition to DHS’s motion to dismiss based on mootness here, with Plaintiffs specifically arguing that a dismissal here would create a square circuit split with *Texas v. Biden*. See Doc. 48 at 1-2, 6. In *Biden*, the Fifth Circuit held that “when a government repeals the challenged action and replaces it with something substantially similar, the injury remains,” and the case is not moot. 20 F.4th at 958.

Now that the Supreme Court has accepted review in that case, the circuit split that the Plaintiffs States have relied upon may either evaporate, or mature into direct conflict with U.S. Supreme Court precedent. This Court’s resources are best held in reserve until that uncertainty is resolved. Moreover, a short delay to permit consideration of the Supreme Court’s decision in *Biden v. Texas* may obviate any need for the Supreme Court to grant, vacate, and remand in light of that decision. Such a GVR would needlessly waste the resources of both this Court and the parties.

The Supreme Court has expedited briefing in *Biden v. Texas* and agreed to hear oral argument in April, and thus decide the case in this Term. See https://www.supremecourt.gov/orders/courtorders/021822zr_o758.pdf. A decision by July 1, 2022 is thus virtually certain and an extension until July 15 will permit the Plaintiffs States to incorporate that decision into a rehearing petition.

An extension of time is further warranted because of counsel for the States' many other obligations within the current petition window, including oral argument at the U.S. Supreme Court in *Arizona v. San Francisco*, No. 20-1775, multiple briefs and an oral argument in the District of Arizona, and a brief in the Arizona Supreme Court. Therefore, if this Court is unwilling to grant an extension based on the impending decision in *Biden v. Texas*, the Plaintiffs States respectfully request that this Court grant them a 30-day extension, from March 7 to April 6, 2022.

Counsel for the States have exercised diligence and any petition for rehearing will be filed within the time requested. The court reporter is not in default with regard to any designated transcripts.

Counsel for the States have conferred with counsel for Defendant-Appellees, who have declined to take a position on this extension request prior to filing.

CONCLUSION

For the foregoing reasons, the States' motion for a 130-day extension of time, until July 15, 2022, to file a petition for rehearing should be granted. Alternatively, this Court should grant the a 30-day extension of time to file a petition for rehearing.

Respectfully submitted,

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Dated: February 25, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February , 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign

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

The State of Arizona, et al.,

Case No. 21-16118

Plaintiff-Appellants,

v.

U.S. Department of Homeland Security,
et al.,

Defendant-Appellees.

SECOND DECLARATION OF DREW C. ENSIGN

I, Drew C. Ensign, declare as follows:

1. I am an attorney licensed to practice law in Arizona, and am admitted to the bar of this Court. I am an attorney with the Arizona Office of the Attorney General, and represent Plaintiff-Appellants Mark Brnovich in his official capacity as Attorney General and the State of Arizona (hereinafter, the “States”).

2. The States move this Court for a 130 day extension of the deadline to file a petition for rehearing in this matter, to and including July 15, 2022.

3. Under FRAP 40, the States’ petition for rehearing is due March 7, 2022.

4. An extension of time is warranted by counsel for the States’ other extensive commitments during the filing window. During that time, counsel for the

States have or had: a U.S. Supreme Court oral argument in *Arizona v. San Francisco*, No. 20-1775, a reply brief on the merits in the same case, an oral argument in *Arizona v. Mayorkas*, No. 2:21-cv-00617-DWL (D. Ariz.), a brief on injunctive relief in *Brnovich v. Biden*, 2:21-cv-01568-MTL (D. Ariz.), a reply brief in a major election litigation in *Mi Familia Vota v. Hobbs*, No. 2:21-cv-01423-DWL (D. Ariz.), a supplemental brief in the Arizona Supreme Court in *Arizona v. Roberts*, No. CV-21-0077-PR (Ariz.), and a multi-state amicus brief in *Buffington v. McDonough*, No. 21-972 (U.S.).

5. Counsel for the States have exercised diligence in preparing the States' Petition and will file it by the proposed deadline, July 15, 2022.

6. Counsel for Defendant-Appellees decline to take a position on the motion prior to filing.

7. The court reporter is not in default with regard to any designated transcripts.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Drew C. Ensign

Drew C. Ensign

EXECUTED ON February 25, 2022.