

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**GOVERNOR GREG ABBOTT, in his official
capacity as Governor of the State of
Texas,**

and

**GOVERNOR MIKE DUNLEAVY, in his
official capacity as Governor of the State of
Alaska,**

Plaintiffs,

v.

**JOSEPH R. BIDEN, in his official capacity
as President of the United States, *et al.,*
*Defendants.***

No. 6:22-cv-3-JCB

**PLAINTIFFS' RESPONSE TO DEFENDANTS PROPOSED SCHEDULE
AND MOTION FOR STAY**

The Fifth Circuit's opinion on the preliminary-injunction appeal is likely to furnish guidance that will help both the parties and the Court with their analysis of the law and how it applies to these facts. A stay will likely result in a more efficient resolution of the case and will do so without unnecessarily delay. Texas and Alaska therefore respectfully request that the Court stay proceedings until 30 days after the Fifth Circuit's resolution of the preliminary-injunction appeal.

Should trial-court proceedings continue, the parties are likely to brief, and the Court consider, issues on currently open questions that the Fifth Circuit's opinion may close. More, should trial court proceedings continue, the parties will be duplicating their efforts by briefing issues before two courts, and this Court and the Fifth Circuit will be duplicating

their efforts by considering the same issues simultaneously. This is especially the case under the Defendants' proposed schedule, under which briefing would close on October 14, only two days after the Fifth Circuit's close-of-briefing date of October 12.

Both sides have agreed not to seek extensions of their briefing deadlines before the Fifth Circuit, and Texas has filed an unopposed motion to set argument on the first date available after the close of briefing. *See* Exh. A. The appeal is therefore likely to be submitted to the Fifth Circuit no later than early November with an opinion possible before the end of the year, making it possible that any final judgment from the Court will only weeks later be contradicted by a conflicting ruling from the Fifth Circuit in the very same case. A stay avoids this result and has the added benefit of avoiding multiple rounds of briefing. A decision from the Fifth Circuit during a stay by this Court will not only furnish important legal guidance to the parties, it will furnish strategic guidance about how (and even whether) the parties should proceed, will almost certainly avoid the need for the post-judgment briefing that may be necessary if a Fifth Circuit opinion quickly supervenes a trial-court judgment, and may render a second appeal unnecessary. A stay, that is, could prevent up to three rounds of briefing—and the related time and effort required for a court to consider the issues raised therein.

The savings of a stay to both the Court and the parties are likely to be significant. The benefits of proceeding before this Court while an appeal simultaneously proceeds before the Fifth Circuit do not outweigh them. Texas and Alaska therefore respectfully request that the Court stay these proceedings until 30 days after the Fifth Circuit's resolution of the preliminary-injunction appeal. To the extent the Court chooses not to stay this case, the Plaintiffs are unopposed to the Defendants' proposed schedule.

Date: July 20, 2022.

Respectfully submitted.

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/s/ Leif A. Olson

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Certificate of Service

I certify that on July 20, 2022, this document was filed through the Court’s CM/ECF system, which automatically serves all counsel of record.

/s/ Leif A. Olson

Certificate of Conference

I certify that on July 15, 2022, Defendants’ counsel, Zachary A. Avallone and James Gillingham, informed me that they oppose a stay in favor of the Defendants’ proposed schedule.

/s/ Leif A. Olson

No. 22-40399

**In the United States Court of Appeals
for the Fifth Circuit**

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS,
Plaintiff-Appellant,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE
UNITED STATES; DEPARTMENT OF DEFENSE; LLOYD AUSTIN, SECRE-
TARY, U.S. DEPARTMENT OF DEFENSE; DEPARTMENT OF THE AIR
FORCE; FRANK KENDALL, III, IN HIS OFFICIAL CAPACITY AS SECRE-
TARY OF THE AIR FORCE; DEPARTMENT OF THE ARMY; CHRISTINE
WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

APPELLANT'S UNOPPOSED MOTION TO EXPEDITE

KEN PAXTON
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CERTIFICATE OF INTERESTED PERSONS

No. 22-40399

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS,
Plaintiff-Appellant,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF DEFENSE; LLOYD AUSTIN, SECRETARY, U.S. DEPARTMENT OF DEFENSE; DEPARTMENT OF THE AIR FORCE; FRANK KENDALL, III, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; DEPARTMENT OF THE ARMY; CHRISTINE WORMUTH, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE ARMY,
Defendants-Appellees.

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

/s/ Ryan S. Baasch

RYAN S. BAASCH

Counsel of Record for Plaintiff-Appellant Governor Greg Abbott

UNOPPOSED MOTION TO EXPEDITE THE APPEAL

Plaintiff-Appellant Governor Greg Abbott hereby respectfully moves to expedite this appeal on the terms set forth below. Counsel for Plaintiff-Appellant has conferred with counsel for Defendants-Appellees, and they do not oppose this motion.

This case presents an issue of substantial importance to the State of Texas and Governor Greg Abbott. As Governor of Texas, Greg Abbott is the commander-in-chief of the Texas militia. Defendants-Appellees, however, have imposed a COVID-19 vaccination requirement on all members of the Texas National Guard—a component of the Texas militia. Their constitutional authority to impose that requirement on a State militia—particularly while the militia has not been federalized—is a question at the heart of this appeal.

Defendants-Appellees' vaccination requirement took effect on December 31, 2021 for the Air National Guard, and June 30, 2022 for the Army National Guard. Plaintiff-Appellant moved for a preliminary injunction against the vaccination requirement because, among other things, it was causing Guardsmen to leave the Texas National Guard. In addition, many Guardsmen remain in the Texas National Guard even though they have not complied with the vaccination requirement, and their status as Guardsmen is subject to significant uncertainty moving forward. If Texas were to lose all of its unvaccinated Guardsmen it would have catastrophic consequences for the State.

On June 24, 2022, the district court denied the motion for preliminary injunction. Plaintiff-Appellant believes expedition is warranted on the terms set forth below in order to quickly address the potentially catastrophic consequences that the

vaccination requirement may have on the Texas National Guard and on the important State operations that the Texas National Guard conducts. Plaintiff-Appellant is not disrupting the normal appellate process with a motion for emergency relief because this case presents rarely litigated, complex constitutional issues about the scope of federal control of a State militia, and those issues are better suited for consideration after full merits briefing. In addition, Defendants-Appellees' methods for enforcing their vaccination requirement have, *at this time*, partially limited the more catastrophic consequences that would flow from different modes of enforcement. The specific modes of potential enforcement will be the subject of merits briefing. Plaintiff-Appellant reserves his right, however, to seek additional relief either in this Court or the district court if Defendants-Appellees change their enforcement methods.

For the foregoing reasons, Plaintiff-Appellant respectfully requests that the Court expedite resolution of this appeal. *See* 5TH CIR. R. 27.5. Plaintiff-Appellant also respectfully requests that the Court calendar this case for oral argument on the first available date after the close of merits briefing. *See* 5TH CIR. R. 34.5. The current schedule calls for briefing to conclude on **October 12, 2022**. The parties have agreed not to seek any extensions of the briefing schedule but are not requesting abbreviation of that schedule.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JUDD E. STONE II
Solicitor General

BRENT WEBSTER
First Assistant Attorney General

/s/ Ryan S. Baasch
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CERTIFICATE OF SERVICE

On July 19, 2022, 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; and (2) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Ryan S. Baasch
RYAN S. BAASCH

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because it contains 462 words, excluding parts exempted by Rule 32(f). This motion complies with Fed. R. App. 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).

/s/ Ryan S. Baasch
RYAN S. BAASCH

UNITED STATES DISTRICT COURT
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Defendants.

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ORDER STAYING CASE

On the Plaintiffs' motion, this case is stayed until 30 days after the Fifth Circuit issues its mandate in Case No. 22-40399. On that date, the parties will file a status report proposing a schedule for final resolution.

Signed on _____, 2022, at Tyler, Texas.

J. Campbell Barker
United States District Judge