

No. 16-5202

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff – Appellee,

v.

SYLVIA M. BURWELL, in her official capacity as Secretary of Health and
Human Services; JACOB J. LEW, in his official capacity as Secretary of the
Treasury,
Defendants – Appellants.

On Appeal from a Final Order of the U.S. District Court for the District of
Columbia (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer, U.S. District Judge)

**APPELLEE’S MOTION TO HOLD BRIEFING IN ABEYANCE OR, IN
THE ALTERNATIVE, TO EXTEND THE BRIEFING SCHEDULE**

Appellee U.S. House of Representatives respectfully moves for entry of an
order temporarily holding in abeyance all briefing in this appeal, and directing the
parties to file by February 21, 2017, a joint status report indicating (a) whether the
parties are considering settlement or voluntary dismissal of the appeal and, if not,
(b) proposing a schedule for the remainder of the briefing in this matter.

Appellee’s representatives and the President-Elect’s transition team currently are
discussing potential options for resolution of this matter, to take effect after the
President-Elect’s inauguration on January 20, 2017. A temporary stay of the

briefing schedule will provide the President-Elect and his future Administration time to consider whether to continue prosecuting or to otherwise resolve this appeal. Appellants do not consent to this motion.

The Court's authority "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1888-89 (2016) (noting court's "inherent power. . . to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases.") (citations omitted). Appellee's request is not unusual. Parties frequently request such abeyances in pending matters due to elections that produce changes in Presidential Administrations and corresponding changes in Administration policies. *See, e.g., California et al. v. Env'tl. Prot. Agency*, No. 08-1178 (D.C. Cir.) (staying briefing for several months to permit President Obama to reconsider determinations promulgated by EPA under President Bush); *Env'tl. Prot. Agency v. New Jersey*, Pet. Cert., No. 08-512 (S. Ct.) (several extensions granted by the Supreme Court; petition for writ of certiorari voluntarily dismissed approximately two weeks after President Obama's election); *New Jersey v. Env'tl. Prot. Agency*, No. 08-1065 (D.C. Cir.) (case held in abeyance for seven years, beginning shortly after President Obama's inauguration, to permit Administration to review

regulations promulgated under President Bush); *Mississippi v. Env'tl. Prot. Agency*, 744 F.3d 1334, 1341 (D.C. Cir. 2013), Clerk's Order No. 08-1200 (D.C. Cir. Mar. 19, 2009) (granting abeyance motion after President Obama's election to permit agency to review and reconsider Bush Administration rule); Richard J. Lazarus, *The Transition and Two Court Cases*, 26 *The Environmental Forum* 12, at 14 (Feb. 2009).¹

The relief sought by Appellee will not cause undue delay. The appeal is not proceeding on an expedited basis, and the parties are still in the briefing process. Appellants filed their opening brief on October 24, 2016, Appellee's responsive brief is currently due on December 23, 2016, and Appellant's reply brief is due on January 19, 2017. *See* Clerk's Order (Nov. 2, 2016).

The relatively short stay requested by Appellee would provide the incoming President and his appointed officials time to decide whether withdrawal or settlement of the appeal is warranted. In light of public statements by the President-Elect and his campaign,² there is at least a significant possibility of a

¹ Available at <https://www.law.harvard.edu/faculty/rlazarus/docs/columns/ELIDraftColumnProofJanFeb09Corrected.pdf>

² *See, e.g., Healthcare Reform to Make America Great Again*, available at <https://www.donaldjtrump.com/positions/healthcare-reform/> (proposing to replace the Affordable Care Act with "a series of reforms ready for implementation that follow free market principles"); Theodore Schleifer, Tami Luhby and Sophie Tatum, CNN, "Trump appears open to compromise on Obamacare," available at <http://www.cnn.com/2016/11/11/politics/donald-trump-obamacare->

meaningful change in policy in the new Administration that could either obviate the need for resolution of this appeal or affect the nature and scope of the issues presented for review.

Appellants will not be prejudiced by the requested abeyance period. The status quo will be maintained during the abeyance period, because the district court stayed its ruling, permitting Appellants to continue paying insurers the funds at issue on a monthly basis. *See* J.A. 63-100, 101.

Finally, in light of the President-Elect's public position, and the potential for resolution of this matter, the requested abeyance will serve to prevent the unnecessary and inefficient expenditure of valuable public resources in all three branches of the federal government that could otherwise result from unnecessary and premature briefing and judicial consideration of this appeal. Given the significant likelihood of a change in Administration position, considerations of judicial economy and the avoidance of unnecessary burdens on litigants justify a delay in the briefing schedule.

Indeed, in closely analogous circumstances the Executive Branch has already acknowledged the propriety of the type of relief sought by Appellee here. In the ongoing legal challenge to the Administration's program of deferred action

[interview/index.html](#) (“Either Obamacare will be amended, or repealed and replaced[.]”).

for certain undocumented aliens, which is on remand from the Supreme Court's 4-4 affirmance of the district court's preliminary injunction, the Department of Justice recently joined in a joint motion to stay further proceedings in order to give the incoming Administration an opportunity to consider its next steps: "Given the change in Administration, the parties jointly submit that a brief stay of any further litigation in this Court before beginning any further proceedings would serve judicial efficiency and economy so that the parties have a better understanding of how they might choose to move forward." Joint Mot. to Stay Merits Proceedings at 1, ECF 430, *Texas et al. v. United States*, No. 1:14-cv-254 (S.D. Tex. filed Nov. 18, 2016). Precisely the same approach is appropriate here as well.

In the alternative, Appellee respectfully requests a 45-day extension of time in which to file its responsive brief, up to and including February 6, 2017. In view of the considerations referenced above and the other pressing duties of the House Office of General Counsel (which presently has a staff of only five attorneys), particularly in this post-election period, good cause exists to extend the briefing schedule. No cognizable prejudice would result to Appellants from such an extension.

CONCLUSION

For the foregoing reasons, the Court should hold in abeyance all briefing in this appeal, and direct the parties to file by February 21, 2017, a joint status report

indicating (a) whether the parties are considering settlement or voluntary dismissal of the appeal, and, if not, (b) proposing a schedule for the remainder of the briefing in this matter. In the alternative, the Court should grant Appellee's request for a 45-day extension of the briefing schedule.

Respectfully submitted,

/s/Thomas G. Hungar

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November 21, 2016

CERTIFICATE OF SERVICE

I certify that on November 21, 2016, I filed the foregoing Appellee's Motion to Hold Briefing in Abeyance or, in the Alternative, to Extend the Briefing Schedule via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/Eleni M. Roumel _____

Eleni M. Roumel