United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5298 **September Term, 2019**

1:19-cv-02369-KBJ

Filed On: December 12, 2019

Make The Road New York, et al.,

Appellees

v.

Chad F. Wolf, Acting Secretary of the Department of Homeland Security, in his official capacity, et al.,

Appellants

BEFORE: Srinivasan, Katsas*, and Rao, Circuit Judges

O R D E R

Upon consideration of the unopposed motion to expedite appeal, it is

ORDERED that the appeal be expedited. See D.C. Circuit Handbook of Practice and Internal Procedures 33-34 (2019). It is

FURTHER ORDERED, on the court's own motion, and in light of the court's obligation to expedite this appeal "to the greatest possible extent," 8 U.S.C. § 1252(e)(3)(D), the following revised briefing schedule will now apply in this case:

Appellants' Brief	December 20, 2019
Appendix	December 20, 2019
Brief(s) of Amicus Curiae Supporting Reversal, or in Support of Neither Party	December 27, 2019
Appellees' Brief	January 17, 2020
Brief(s) of Amicus Curiae Supporting Affirmance	January 24, 2020
Appellants' Reply Brief	January 31, 2020

*A concurring statement by Circuit Judge Katsas is attached to this order.

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The Clerk is directed to schedule this case for argument on the first appropriate date in March.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

KATSAS, *Circuit Judge*, concurring:

The Immigration and Nationality Act permits the Secretary of Homeland Security, in his "sole and unreviewable discretion," to designate for expedited-removal procedures any alien who has not been admitted or paroled into the United States and who has not been continuously present in the United States for two years. 8 U.S.C. § 1225(b)(1)(A)(iii). In the order under review, the Acting Secretary undertook to designate for expedited removal two categories of aliens falling within this express statutory authorization. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019). The district court stopped that initiative dead in its tracks, by universally enjoining the Acting Secretary from enforcing the designation against "anyone to whom it would apply," whether or not a party to the litigation. *Make the Road New York v. McAleenan*, No. 19-cv-2369 (D.D.C. Sept. 27, 2019).

The government's ensuing appeal plainly warrants substantial expedition. Given the "sole and unreviewable discretion" referenced in section 1225(b)(1)(A)(iii), the government would seem to have strong grounds for challenging the district court's conclusion that the designation may be reviewed and set aside through the Administrative Procedure Act. Moreover, the Acting Secretary has described the designation as a "necessary response to the ongoing immigration crisis," which includes an unprecedented backlog of over 900,000 removal cases. 84 Fed. Reg. at 35411. Likewise, in a filing styled as a motion for expedition, the Department of Justice represents that the injunction "profoundly harms the government and the public" by preventing a sensible allocation of the "limited government resources" available for immigration enforcement. Unopposed Motion to Expedite Appeal at 11–12, *Make the Road New York v. McAleenan*, No. 19-5298 (D.C. Cir. Nov. 15, 2019) (quotation marks omitted). Finally, and most importantly, a governing statute requires this Court, in considering whether the Acting Secretary permissibly implemented his authority under section 1225(b), to expedite the appeal "to the greatest possible extent." 8 U.S.C. § 1252(e)(3)(D). Just this week, when faced with another binding directive to decide a different appeal "with appropriate dispatch," *Barr v. Roane*, No. 19A615 (U.S. Dec. 6, 2019), we ordered briefing and oral argument over a span of less than one month. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Dec. 9, 2019). Even in the absence of any specific time limit, we often expedite important, time-sensitive appeals to permit oral argument within two months after docketing. *See*, *e.g.*, *In re Comm. on the Judiciary*, No. 19-5288 (D.C. Cir. Nov. 18, 2019) (2 months); *Trump v. Mazars*, No. 19-5142 (D.C. Cir. May 23, 2019) (1.5 months); *Comm. on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Nov. 27, 2019) (1 month).

Unfortunately, the government's leisurely prosecution of this appeal has made comparable expedition impossible. The district court entered its injunction on September 27, 2019. The government waited almost a month—until October 25—to file its notice of appeal. It then waited three additional weeks—until November 15—to seek what it described as expedition. Yet the motion to expedite proposed a briefing schedule extending over 91 additional days—the same overall time limit imposed by default under Federal Rule of Appellate Procedure 31(a). And by the time this unhurried motion made

its way to a panel of judges, the proposed due date for the government's opening brief was barely two weeks away.

The attached order modestly shortens the time limits for the appellees' brief and for the reply brief. Even with that adjustment, this case will not even be fully briefed until more than three months after the notice of appeal was filed—and more than four months after the injunction was entered. But at this point midstream, any further expedition would place the appellees at an unfair disadvantage with regard to deadlines for the parties' respective principal briefs. The appeal thus will proceed much more slowly than it should have, even though we have attempted to expedite it to the greatest extent that remains possible.