IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

W. L. (BILL) ARMSTRONG, JEFFREY S. MAY, WILLIAM L. (WIL) ARMSTRONG III, JOHN A. MAY, DOROTHY A. SHANAHAN, and CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services, et al.,

Defendants- Appellees.

No. 13-1218

Response to Defendants-Appellees' Motion to Hold Appeal In Abeyance Pending This Court's Decision In *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294 (10th Cir.) (en banc)

Plaintiffs-Appellants, through counsel, respectfully oppose the Defendants-Appellees' Motion to Hold Appeal In Abeyance Pending This Court's Decision In *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294 (10th Cir.) (en banc) for the following reasons:

1. Other than arguing the "merits" of the government's case in this case, to wit: *Armstrong, et al. v. Sebelius, et al.,* No. 13-1218, and briefly citing to the fact that this Court, en banc, heard oral argument in *Hobby Lobby Stores, Inc., et al. v. Sebelius, et al.,* No. 12-6294 (10th Cir.) on May 23, 2013, the government cites no authority for its request to delay the appeal of *Armstrong.*

2. Indeed, the government's motion fails to include: (a) that the Court's en banc panel on May 23, 2013, consisted of eight (8) members of the United States Court of Appeals for the Tenth Circuit, which gives rise to the possibility of three (3) different outcomes; (b) guidance as to when an opinion by the Court may issue in *Hobby Lobby* so as to justify a delay that deprives the Armstrong Plaintiffs-Appellants of their "day in court"; or (c) that, as is clear from this Court's March 29, 2013 en banc order, attached hereto, which granted Hobby Lobby's petition for an expedited en banc hearing, this Court was fully aware of another arguably "similar" case, to wit: *Newland, et al. v. Sebelius, et al., No. 12-1380*, and did not act to stay the appeal of *Newland.*

3. The opening brief of Plaintiffs-Appellants in *Armstrong* is currently due on or by July 16, 2013. Counsel for Plaintiffs-Appellants are currently drafting this brief so it may be timely filed.

4. The government has presented no good reason to delay *Armstrong*. To do so would work an injustice on the Armstrong Plaintiffs-Appellants and deprive them of their day in Court.

5. Counsel for the government, Alicia Klein, has requested that counsel for Plaintiffs-Appellants inform the Court that she (Ms. Klein) will be on vacation through Saturday, June 23, 2013, and thus unable to file a reply to this response, if requested by this Court, until the week of June 24, 2013.

Wherefore, Plaintiffs-Appellants respectfully oppose the Defendants-Appellees' Motion to Hold Appeal In Abeyance Pending This Court's Decision In *Hobby Lobby Stores, Inc. v. Sebelius,* No. 12-6294 (10th Cir.) (en banc) and request that this Court deny the same.

Dated this 19th day of June, 2013.

Attorneys for Plaintiffs-Appellees

s/ Michael J. Norton

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CERTIFICATIONS

I hereby certify that:

1. On June 19, 2013, I caused the foregoing response to be served through this Court's CM/ECF system;
2. All required privacy redactions have been made;
3. Any required paper copies are exact versions of the document submitted electronically; and
4. This electronic document was scanned for viruses with the most recent version of a commercial virus scanning program and found to be virus free.

s/ Michael J. Norton

FILED
United States Court of Appeals
Tenth Circuit

March 29, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., et al.,

Plaintiffs – Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,

Defendants – Appellees.

EMERITUS PROFESSOR OF LAW CHARLES E. RICE, et al.,

Amici Curiae.

No. 12-6294

ORDER

Before **BRISCOE**, Chief Judge, **KELLY**, **LUCERO**, **HARTZ**, **O'BRIEN**, **TYMKOVICH**, **GORSUCH**, **MATHESON**, and **BACHARACH**, Circuit Judges.*

This matter is before the court on several requests. First, we have the appellants' petition for initial en banc hearing. *See* Fed. R. App. P. 35(a). We also have a response in

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* The Honorable Jerome A. Holmes is recused in this appeal and did not participate in consideration of the request for initial en banc review or the other motions addressed in this order. The Honorable Robert E. Bacharach took the oath of office on March 1, 2013 and did not vote on the initial en banc petition. Judge Bacharach will, however, participate in the court's en banc consideration of the case. *See* 28 U.S.C. § 46(c).

opposition. Second, we have appellants' unopposed motion to expedite oral argument. Finally, we have a motion filed by the government parties asking the court to set this matter and number 12-1380, *Newland, et al. v. Sebelius, et al.*, before the same panel for hearing and disposition. We also have a response and reply related to that request.

Upon consideration, a poll was called and a majority of the available active judges in regular service have voted to grant initial en banc hearing. As such, appellants' petition is granted. In addition, we grant the pending request to expedite oral argument, and will set that argument hearing expeditiously. The parties will be advised promptly of the hearing date. Oral argument acknowledgment forms will be forwarded via a separate communication. Finally, in light of our decision to hear this matter en banc, and considering our decision to expedite, the request to set this appeal and the *Newland* matter before the same panel is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk