

No. 18-2861

**In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT**

CODY FLACK AND SARA A. MAKENZIE,
PLAINTIFFS-APPELLEES,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES AND LINDA SEEMEYER, IN HER OFFICIAL
CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH SERVICES,
DEFENDANTS-APPELLANTS

On Appeal From The United States District Court
For The Western District Of Wisconsin, Case No. 3:18-cv-309,
The Honorable William M. Conley, Presiding

**THIRD JOINT MOTION FOR ORDER FURTHER
EXTENDING THE BRIEFING SCHEDULE**

Defendants-Appellants Wisconsin Department of Health Services and Linda Seemeyer, and Plaintiffs-Appellees Cody Flack and Sara A. Makenzie, hereby jointly move this Court under Circuit Rule 26 for an order further extending the briefing schedule as follows:

Defendants-Appellants shall file their opening brief on February 25, 2019. (The current deadline for this brief is January 25, 2019.)

Under the default schedule set forth in Federal Rule of Appellate Procedure 31(a), Plaintiffs-Appellees' response brief would be due on March 27, 2019, although the Parties agree that Plaintiffs-Appellees may seek an extension of time to file their response brief. (The current deadline for this brief is February 25, 2019.)

Under the default schedule, Defendants-Appellants' reply brief (if any) would be due on April 17, 2019, or twenty-one days after service of Plaintiffs-Appellees' brief if the response brief deadline is extended. (The current deadline for this brief is March 18, 2019.)

This motion is supported by the accompanying Declaration of Luke N. Berg.

Dated: January 18, 2019

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

/s/ Luke N. Berg

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Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: January 18, 2019

/s/ Luke N. Berg

LUKE N. BERG

Assistant Attorney General

No. 18-2861

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On Appeal From The United States District Court
For The Western District Of Wisconsin, Case No. 3:18-cv-309,
The Honorable William M. Conley, Presiding

**DECLARATION OF LUKE N. BERG IN SUPPORT OF THIRD
JOINT MOTION FOR ORDER FURTHER EXTENDING
THE BRIEFING SCHEDULE**

1. I am an Assistant Attorney General for the Wisconsin Department of Justice, and counsel of record for Defendants-Appellants Wisconsin Department of Health Services and Linda Seemeyer, in the above-captioned matter.

2. Under the current briefing schedule, Defendants-Appellants' opening brief is due January 25, 2019. Accordingly, Plaintiffs-Appellees' response brief will be due on February 25, 2019 and Defendants-Appellants' reply brief (if any) will be due on March 18, 2019.

3. This motion is being made more than seven days before the Defendants-Appellants' Brief is due, as required by Circuit Rule 26.

4. Plaintiffs-Appellees filed suit in the United States District Court for the Western District of Wisconsin challenging Wis. Admin. Code §§ DHS 107.03(23) and

(24), which exclude from Medicaid coverage “[t]ranssexual surgery” and “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics.” R. 1. Plaintiffs-Appellees also filed a motion for a preliminary injunction. R. 18.

5. On July 24, 2018, the district court granted a preliminary injunction as-applied to Plaintiffs-Appellees, and ordered the parties to file supplemental briefs about whether the district court should expand the preliminary injunction statewide. R. 70.

6. On August 24, 2018, Defendants-Appellants filed this appeal of the district court’s as-applied preliminary injunction. R.75.

7. Plaintiffs-Appellees subsequently amended their complaint as a class action and moved for class certification. R. 85, 89.

8. On October 25, 2018, Plaintiffs-Appellees filed a new motion to modify the existing preliminary injunction to “fully enjoin” Defendants-Appellants “from enforcing 107.03(23)–(24)[] . . . against any Wisconsin Medicaid beneficiary during the pendency of this lawsuit.” R. 107.

9. Briefing regarding expanding the preliminary injunction was completed on December 10, 2018, and the parties are currently awaiting the district court’s order.

10. In the event that the district court grants Plaintiffs-Appellees’ motion to expand the existing preliminary injunction, Defendants-Appellants intend to file an immediate appeal and then move to consolidate that appeal with this one.

11. Defendants-Appellants and Plaintiffs-Appellees agree that a 31-day extension of the briefing schedule in this appeal is warranted to prevent the submission of two rounds of duplicative briefing, with the possibility of the first round of briefs being rendered moot by the entry of an expanded injunction. If granted, Defendants-Appellants opening brief would be due February 25, 2019, Plaintiffs-Appellees' response brief would be due March 27, 2019, and Defendants-Appellants' reply brief (if any) would be due April 17, 2019.

12. If, by February 18, 2019, the district court has issued an order declining to expand the preliminary injunction, the parties will proceed with this appeal on this briefing schedule. If the district court issues an order expanding the preliminary injunction before February 18, Defendants-Appellants will file an appeal, move to consolidate the appeals, and either proceed with this briefing schedule or file a motion for a new briefing schedule. If the district court does not render a decision before February 18, Defendants-Appellants and Plaintiffs-Appellees will confer and may seek an additional extension of the briefing schedule in this appeal.

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

Executed: January 18, 2019

/s/ Luke N. Berg

LUKE N. BERG

Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: January 18, 2019

/s/ Luke N. Berg

LUKE N. BERG

Assistant Attorney General