

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 FOR THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WISCONSIN, CASE NO. 3:18-CV-309,
THE HONORABLE WILLIAM M. CONLEY, PRESIDING

**FOURTH 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 March 27, 2019. (The current deadline for this brief is February 25, 2019.)

Under the default schedule set forth in Federal Rule of Appellate Procedure 31(a), Plaintiffs-Appellees' response brief would be due on April 26, 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 March 27, 2019.)

Under the default schedule, Defendants-Appellants' reply brief (if any) would be due on May 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 April 17, 2019.)

This motion is supported by the accompanying Declaration of Steven C. Kilpatrick.

Dated this 15th day of February, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

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CERTIFICATE OF SERVICE

I certify that on February 15, 2019, I electronically filed the foregoing *Fourth Joint Motion for Order Further Extending the Briefing Schedule* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 15th day of February, 2019.

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General

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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 STEVEN C. KILPATRICK
IN SUPPORT OF FOURTH 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 February 25, 2019. Accordingly, Plaintiffs-Appellees' response brief will be due on March 27, 2019 and Defendants-Appellants' reply brief (if any) will be due on April 17, 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. Because the district court has not yet rendered a decision on Plaintiffs’ motion, Defendants-Appellants and Plaintiffs-Appellees have conferred and agreed to seek an additional 30-day extension of the briefing schedule in this appeal to prevent the possibility of the first round of briefs being rendered moot by the entry of a modified injunction.

11. If, by March 20, the district court has issued an order declining to modify the preliminary injunction, Defendants-Appellants and Plaintiffs-Appellees agree to proceed with this briefing schedule in this appeal: Defendants-Appellants opening brief would be due March 27, 2019, Plaintiffs-Appellees’ response brief would be due April 26, 2019 (although the Parties agree that Plaintiffs-Appellees may seek an extension of time to file their response brief), and Defendants-Appellants’ reply brief (if any) would be due May 17, 2019.

12. If, by March 20, the district court does not render a decision, Defendants-Appellants and Plaintiffs-Appellees will confer and may seek an additional extension of the briefing schedule in this appeal.

13. If, by March 20, the district court issues an order modifying the injunction, Defendants-Appellants and Plaintiffs-Appellees will confer and attempt to agree on a briefing schedule in consideration of the outcome of the district court's order.

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

Executed this 15th day of February, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Defendants-Appellants

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CERTIFICATE OF SERVICE

I certify that on February 15, 2019, I electronically filed the foregoing *Declaration of Steven C. Kilpatrick In Support Of Fourth Joint Motion For Order Further Extending The Briefing Schedule* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 15th day of February, 2019.

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General