IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC., *et al.* *Plaintiffs*, v. ALEX M. AZAR II, Secretary of Health and Human Services, *et al.*, *Defendants*.	)	Case No. 7:16-cv-00108-O

DEFENDANTS' PARTIAL OPPOSITION TO PRIVATE PLAINTIFFS' MOTION TO SET DEADLINE FOR FILING PETITION FOR FEES AND EXPENSES

Defendants oppose the Private Plaintiffs' request to set a deadline for filing a petition for fees and expenses to the extent they seek them pursuant to 28 U.S.C. § 2412(b), because their request pursuant to that statutory provision is untimely. Rule 54 of the Federal Rules of Civil Procedures is clear that a party requesting fees must seek them within 14 days of entry of final judgment, unless a statute or court order provides otherwise. Here, the Court entered its modified final judgment on November 21, 2019, ECF No. 182, almost two months before the Private Plaintiffs requested a briefing schedule for fees. Notwithstanding the Private Plaintiffs' possible eligibility for fees under 28 U.S.C. § 2412(d)—assuming they satisfy § 2412(d)'s various threshold requirements—the Court should not entertain briefing on the Private Plaintiffs' untimely request for fees under § 2412(b). This distinction matters because, not only are there different time limits under § 2412(b) and § 2412(d), but § 2412(d) also imposes threshold requirements and limitations on fees not found in § 2412(b). *Compare*, *e.g.*, 28 U.S.C. § 2412(d)(1)(A) (precluding fees where the court "finds that the position of the United States was substantially justified"); *id.* § 2412(d)(2)(A) (limiting the hourly rates that can be awarded); *id.* § 2412(d)(2)(B) (limiting the

parties that can seek fees based on net worth and number of employees), *with id.* § 2412(b) (permitting fees "to the extent that any other party would be liable . . . under the terms of any statute which specifically provides for such an award").

BACKGROUND

Plaintiffs brought this action to challenge certain portions of the May 18, 2016 rule titled Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,392 (Rule), specifically the Rule's prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy." *See, e.g.*, ECF No. 62 (describing Plaintiffs' objections to the Rule); *see also* ECF No. 57 (describing the portions of the Rule Plaintiffs challenge). On December 31, 2016, the Court granted Plaintiffs' motion for a preliminary injunction, finding that those two challenged aspects of the Rule were contrary to law. *See id.* at 32-38.

With the preliminary injunction in place, and in light of Defendants' request that the United States Department of Health and Human Services be given the opportunity to reconsider the regulations at issue in this case, the Court stayed the litigation until December 17, 2018. *See* ECF No. 126. After the stay was lifted, on February 4, 2019, Plaintiffs moved for summary judgment. *See* ECF Nos. 132-37. On October 15, 2019, the Court granted Plaintiffs' motions for summary judgment and entered Final Judgment in favor of Plaintiffs. *See* ECF Nos. 175, 176. Upon Defendants' request, the Court modified the language of the Final Judgment on November 21, 2019. *See* ECF No. 182. Under Federal Rule of Civil Procedure 54(d)(2)(B), Plaintiffs had until December 4, 2019 to file a motion for fees, "[u]nless a statute or a court order provides otherwise."

ANALYSIS

In their Motion to Set Deadline for Filing Petition for Fees and Expenses, the Private Plaintiffs put forth two theories for why they may be entitled to fees: First, that they may seek fees under 42 U.S.C. § 1988, as incorporated through § 2412(b) of the Equal Access to Justice Act

(EAJA). *See* Private Pls.' Mot. to Set Deadline for Filing Petition for Fees and Expenses at 4-5, ECF No. 184 (Priv. Pls.' Mot.). And, second, that the Court should award fees under § 2412(d), which sets out a deadline of 30 days of entry of a judgment that is "final and not appealable," as well as various other specific threshold requirements and limitations on fees. *Id.*

Defendants acknowledge that, assuming the Private Plaintiffs can meet the other requirements of that subsection, the Private Plaintiffs could still file a timely petition for fees under § 2412(d). However, it is too late for the Private Plaintiffs to seek fees under § 2412(b). Pursuant to Federal Rule of Civil Procedure 54(d)(2)(B), a motion for attorney's fees and nontaxable expenses "must . . . be filed no later than 14 days after the entry of judgment," "[u]nless a statute or a court order provides otherwise." Fed. R. Civ. P. 54(d)(2)(B). The "failure to file" a motion for attorney's fees and nontaxable expenses "within the allotted period" set forth in Rule 54(d) "serves as a waiver of [a party's] claim for attorneys' fees." *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 766 (5th Cir. 1996).

The Private Plaintiffs argue that the 14-day deadline in Rule 54(d) does not apply, because EAJA provides a different deadline. Their argument is that—when deciding what deadline to apply to their claim under *§ 2412(b)*—the Court should use the 30-day deadline that appears in *§ 2412(d)(1)(B)*, rather than the generally applicable 14-day deadline in Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure.

Plaintiffs' argument finds no support in EAJA, the text of which Defendants attach as Exhibit 1 for ease of reference. The 30-day deadline in § 2412(d)(1)(B) expressly applies only to applications for fees and expenses "*under this subsection*," referring to paragraph (d). 28 U.S.C. § 2412(d)(1)(B) (emphasis added). Applying the 30-day deadline to fee requests brought under § 2412(b) would be contrary to the plain language and structure of the statute. The Private

Plaintiffs offer no valid reason why the Court should ignore the statutory text to import the deadline in § 2412(d)(1)(B) to give them more time to submit a fee request under § 2412(b), or why the Rule 54(d) deadline should not apply.[1]

The Private Plaintiffs cite dicta from one case, *Townsend v. Commissioner of Social Security*, 415 F.3d 678 (6th Cir. 2006), for the proposition that—contrary to the language and structure of the statute—the 30-day time limit in § 2412(d)(1)(B) also applies to attorneys' fees sought pursuant to § 2412(b). Priv. Pls.' Mot. at 4. In *Townsend*, the Sixth Circuit indicated in a footnote and without any analysis that the 30-day deadline applies to claims for fees brought under both § 2412(d) and § 2412(b). *See Townsend*, 415 F.3d at 581 n.1. Yet, in that case and in the case the Sixth Circuit cited, *United States v. Ranger Electronics Communications, Inc.*, 210 F.3d 637 (6th Cir. 2000), the 30-day deadline in § 2412(d) had already run. *See Townsend*, 415 F.3d at 581; *Ranger Elec. Commc'ns*, 210 F.3d at 632. Thus, the Sixth Circuit had no need to consider whether, like here, a shorter deadline for requesting fees applied under § 2412(b).

In any event, the cited dicta from *Townsend* is contrary to Fifth Circuit precedent. In *Jackson v. U.S. Postal Service*, 799 F.2d 1018 (5th Cir. 1986), the Fifth Circuit addressed the deadline to seek fees under § 2412(b), which, "unlike the Equal Access to Justice Act, 28 U.S.C. § 2412(d)[,] contains no time limit within which requests for attorneys' fees must be made." *Id.* at 1023. The court explained that, "[i]n such situation, we deem it appropriate for the [district] court to apply its local rule, since there is neither statute nor regulation to the contrary." *Id.*

[1] If the Private Plaintiffs were correct that the time limit in § 2412(d)(1)(B) applies to claims for fees under § 2412(b), then the other procedural requirements in § 2412(d) should also apply to § 2412(b), including, among other things, the need to establish that the government's position was not substantially justified, § 2412(d)(3), and the amount of fees awarded shall be based on prevailing market rates, "not to exceed $125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee," § 2412(d)(2)(A).

Notably, in 1986, when the Fifth Circuit decided *Jackson*, Federal Rule of Civil Procedure 54 did not include the 14-day deadline that is currently in Rule 54(d)(2)(B). The 14-day deadline was added to Rule 54 in 1993. *See* Fed. R. Civ. P. 54, Notes of Advisory Committee on Rules—1993 Amendment. Because there is now a clear, generally applicable deadline for moving for fees in Rule 54(d)(2)(B), that deadline should apply with respect to § 2412(b) under the Fifth Circuit's logic in *Jackson*.

Moreover, the Private Plaintiffs argument that the 30-day deadline in § 2412(d) applies to § 2412(b) would, in effect, eliminate the 14-day deadline in Rule 54(d)(2)(B) as to the United States any time a statute authorizes fees.[2] Yet, courts routinely deny requests for fees as untimely under Rule 54(d) after the 14-day deadline has passed. *See, e.g.*, *Lagarde v Metz*, No. 13-cv-805-RLB, 2017 WL 2371817, at *5 (M.D. La. May 31, 2017) (denying request for fees authorized under 42 U.S.C. § 1988 because the request was made after the 14-day deadline); *Zimmerman v. City of Austin, Texas*, No. 1:15-CV-00628-LY, 2019 WL 2712265, at *3-4 (W.D. Tex. June 28, 2019) (same); *S. Tex. Elec. Cooperative v. Dresser-Rand Co.*, No. V-06-cv-28, 2010 WL 1855959, at *4 (S.D. Tex. May 5, 2010) (denying fees sought after the Rule 54(d) deadline had passed).

Further, the advisory committee notes to the 1993 amendments to Rule 54 also strongly suggest that the 14-day deadline applies to claims brought under § 2412(b). When creating a time limit for moving for fees, the advisory committee specifically noted that "[t]he time for making claims is specifically stated in some legislation, such as [EAJA], 28 U.S.C. *§ 2412(d)(1)(B)*[.]"

[2] Because § 2412(b) applies only to the United States, if the Private Plaintiffs were correct, it would also mean, paradoxically, that litigants would often have *more time* when seeking fees against the United States than if they prevailed against a private party, where Rule 54(d)(2)(B) would govern. That result would be inconsistent with § 2412(b)'s purpose, which is to make the United States "liable for [ ] fees and expenses *to the same extent* that any other party would be liable." 28 U.S.C. § 2412(b) (emphasis added).

See Fed. R. Civ. P. 54, Notes of Advisory Committee on Rules—1993 Amendment (emphasis added). If the Private Plaintiffs' theory that the 30-day time limit applies to fee petitions under both § 2412(d)(1)(B) and § 2412(b), the advisory committee could have cited EAJA without specifying a specific subsection, or could have cited both § 2412(d)(1)(B) *and* § 2412(b). It did not. Rather, the advisory committee went out of its way to highlight only § 2412(d)(1)(B) as a statute that would provide a different deadline than the one in Rule 54(d).

For all the reasons above, the Private Plaintiffs are incorrect that they can still file a timely fee petition through § 2412(b). Their fallback argument is that the failure to file a timely petition was the result of "excusable neglect." *See* Priv. Pls.' Mot. at 7-9. The Private Plaintiffs state that their failure to meet the 14-day deadline was based on "the good-faith view that the controlling deadline is provided by 28 U.S.C. § 2412(d)(1)(B)." *Id.* at 8. Putting the Private Plaintiffs' subjective beliefs aside, it is clear from EAJA's text that the 30-day deadline in § 2412(d)(1)(B) applies only to fee awards "*under [that] subsection*," as discussed above. *See* 28 U.S.C. § 2412(d)(1)(B) (emphasis added). The Private Plaintiffs are represented by the Becket Fund for Religious Liberty, which has extensive experience litigating RFRA claims; thus, counsel for Private Plaintiffs should have been aware that the deadline in Rule 54(d)(2)(B) applies when seeking fees against the government under 42 U.S.C. § 1988, as incorporated through § 2412(b). Indeed, in other RFRA cases, the Becket Fund has demonstrated its knowledge of this 14-day deadline. *See, e.g.*, Unopposed Mot. to Extend Deadlines for Bill of Costs and Mot. for Attorney's Fees, ECF No. 84, *Little Sisters of the Poor Home for the Aged, Denver, Co. v. Sebelius*, No. 1:13-cv-2611-WJM-BNB (D. Colo., filed June 11, 2018) (acknowledging that the district court's local rule and Rule 54(d)(2)(B) establish the deadline to file the plaintiffs' motion for attorney's fees) (attached as Exhibit 2); Plaintiffs' Mot. for Extension of Time to File Petition for Fees and

Expenses, ECF No. 137, *E. Tex. Baptist Univ. v. Sebelius*, No, 4:12-cv-3009 (S.D. Tex., filed Feb. 3, 2014) ("Federal Rule of Civil Procedure 54(d) provides that, absent an order from the court, motions for fees and expenses [shall] 'be filed no later than 14 days after the entry of judgment.'") (attached as Exhibit 3).

It is also clear based on the face of the Court's November 21, 2019 order that the Court entered "Final Judgment," ECF No. 182, triggering the Rule 54(d)(2)(B) deadline, even if the Private Plaintiffs subjectively believed the Court had not concluded the case. *See* Priv. Pls. Mot. at 8. "Oversight," "inadvertence," or "mistake" on the "part of counsel" is "not a viable basis for excusable neglect." *Atel Mar. Inv'rs, LP v. Sea Mar Mgmt., L.L.C.*, No. CIV.A. 08-1700, 2014 WL 235441, at *10 (E.D. La. Jan. 22, 2014) (citing *McGinnis v. Shalala*, 2 F.3d 548, 550 (5th Cir. 1993)). The Private Plaintiffs also have not demonstrated that they were prevented from seeking more time before the expiration of the relevant deadline, and Defendants (as well as taxpayers) would be prejudiced by resuscitation of the deadline. Allowing the Private Plaintiffs to resuscitate their claim for discretionary fees available under § 2412(b) after the deadline has passed would harm Defendants and taxpayers (who will ultimately bear the burden of any fees) by exposing them to costs that otherwise would be avoided. *See* pp. 1-2, *supra* (explaining the differences in fees available under § 2412(b) and § 2412(d)).

CONCLUSION

For the foregoing reasons, any briefing on the Private Plaintiffs' petition for fees should be limited to fees available under 28 U.S.C. § 2412(d).

Dated: February 7, 2020

Respectfully Submitted,

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Franciscan Alliance, Inc. v. Azar
Case No. 7:16-cv-108-O (N.D. Tex.)

Exhibit 1

section 765 providing that interest shall be computed from the date of the judgment.

Provisions of section 765 of title 28, U.S.C., 1940 ed., that when the findings of fact and the law applicable thereto have been filed in any case as provided in "section 763" [764] of title 28, U.S.C., 1940 ed., and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same, that, whereupon, the Attorney General shall determine and direct whether an appeal shall be taken or not, and that, when so directed, the district attorney shall cause an appeal to be perfected in accordance with the terms of the statutes and rules of practice governing the same were omitted as unnecessary and covered by section 507 of this title which provides for supervision of United States attorneys by the Attorney General.

Words of section 765 of title 28, U.S.C., 1940 ed., "Until the time when an appropriation is made for the payment of the judgment or decree" were omitted and words "up to, but not exceeding, thirty days after the date of approval of any appropriation act providing for payment of the judgment" were substituted. Substituted words clarify meaning and are in accord with congressional procedure in annual deficiency appropriation acts for payment of judgments against the United States. The substituted words will obviate necessity of repeating such provisions in appropriation acts.

Changes were made in phraseology.

1949 ACT

This section amends section 2411 of title 28, U.S.C., by restoring the provisions of section 177 of the former Judicial Code for the payment of interest on tax refunds.

REFERENCES IN TEXT

Section 6621 of the Internal Revenue Code of 1986, referred to in text, is classified to section 6621 of Title 26, Internal Revenue Code.

AMENDMENTS

1986—Pub. L. 99–514, §1511(c)(18), substituted "the overpayment rate established under section 6621" for "an annual rate established under section 6621".

Pub. L. 99–514, §2, substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1982—Pub. L. 97–164 struck out "(a)" before "In any judgment" and struck out subsec. (b) which provided that, except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest was to be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

1975—Subsec. (a). Pub. L. 93–625 substituted "an annual rate established under section 6621 of the Internal Revenue Code of 1954" for "the rate of 6 per centum per annum".

1949—Act May 24, 1949, restored provisions relating to payment of interest on tax refunds.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–514 applicable for purposes of determining interest for periods after Dec. 31, 1986, see section 1511(d) of Pub. L. 99–514, set out as a note under section 6621 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

§ 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an

itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding

under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

(June 25, 1948, ch. 646, 62 Stat. 973; Pub. L. 89–507, §1, July 18, 1966, 80 Stat. 308; Pub. L. 96–481, title II, §204(a), (c), Oct. 21, 1980, 94 Stat. 2327, 2329; Pub. L. 97–248, title II, §292(c), Sept. 3, 1982, 96 Stat. 574; Pub. L. 99–80, §§2, 6, Aug. 5, 1985, 99 Stat. 184, 186; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 102–572, title III, §301(a), title V, §§502(b), 506(a), title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4511–4513, 4516; Pub. L. 104–66, title I, §1091(b), Dec. 21, 1995, 109 Stat. 722; Pub. L. 104–121, title II, §232, Mar. 29, 1996, 110 Stat. 863; Pub. L. 105–368, title V, §512(b)(1)(B), Nov. 11, 1998, 112 Stat. 3342; Pub. L. 111–350, §5(g)(9), Jan. 4, 2011, 124 Stat. 3848.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§258, 931(a) (Mar. 3, 1911, ch. 231, §152, 36 Stat. 1138; Aug. 2, 1946, ch. 753, §410(a), 60 Stat. 843).

Section consolidates the last sentence of section 931(a) of title 28, U.S.C., 1940 ed., with section 258 of said title 28. For other provisions of said section 931(a), see Distribution Table.

Subsection (a) is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law. This is a corollary to the rule that a sovereign cannot be sued without its consent.

Many enactments of Congress relating to fees and costs contain specific exceptions as to the liability of the United States. (See, for example, section 548 of title 28, U.S.C., 1940 ed.) A uniform rule, embodied in this section, will make such specific exceptions unnecessary.

Subsection (b) incorporates section 258 of title 28, U.S.C., 1940 ed.

Subsection (c) incorporates the costs provisions of section 931(a) of title 28, U.S.C., 1940 ed.

Words "and for summoning the same," after "witnesses," were omitted from subsection (b) as covered by "those actually incurred for witnesses."

Changes were made in phraseology.

REFERENCES IN TEXT

Section 7430 of the Internal Revenue Code of 1986, referred to in subsec. (e), is classified to section 7430 of Title 26, Internal Revenue Code.

AMENDMENTS

2011—Subsec. (d)(2)(E). Pub. L. 111–350, §5(g)(9)(A), substituted "chapter 71 of title 41" for "the Contract Disputes Act of 1978".

Subsec. (d)(3). Pub. L. 111–350, §5(g)(9)(B), substituted "chapter 71 of title 41" for "the Contract Disputes Act of 1978".

1998—Subsec. (d)(2)(F). Pub. L. 105–368 substituted "Court of Appeals for Veterans Claims" for "Court of Veterans Appeals".

1996—Subsec. (d)(1)(D). Pub. L. 104–121, §232(a), added subpar. (D).

Subsec. (d)(2)(A)(ii). Pub. L. 104–121, §232(b)(1), substituted "$125" for "$75".

Subsec. (d)(2)(B). Pub. L. 104–121, §232(b)(2), inserted before semicolon at end "or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5".

Subsec. (d)(2)(I). Pub. L. 104–121, §232(b)(3)–(5), added subpar. (I).

1995—Subsec. (d)(5). Pub. L. 104–66 struck out par. (5) which read as follows: "The Attorney General shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards."

1992—Subsec. (a). Pub. L. 102–572, §301(a), designated existing provisions as par. (1) and added par. (2).

Subsec. (d)(2)(F). Pub. L. 102–572, §902(b)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Pub. L. 102–573, §506(a), inserted before semicolon at end "and the United States Court of Veterans Appeals".

Subsec. (d)(5). Pub. L. 102–572, §502(b), substituted "The Attorney General shall report annually to the Congress on" for "The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title,".

1986—Subsecs. (d)(2)(B), (e). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1985—Subsecs. (a), (b). Pub. L. 99–80, §2(a)(1), substituted "or any agency or any official of the United States" for "or any agency and any official of the United States".

Subsec. (d). Pub. L. 99–80, §6, repealed amendment made by Pub. L. 96–481, §204(c), and provided that subsec. (d) was effective on or after Aug. 5, 1985, as if it had not been repealed by section 204(c). See 1980 Amendment note and Revival of Previously Repealed Provisions note below.

Subsec. (d)(1)(A). Pub. L. 99–80, §2(a)(2), inserted ", including proceedings for judicial review of agency actions," after "in tort)".

Subsec. (d)(1)(B). Pub. L. 99–80, §2(b), inserted provisions directing that whether or not the position of the United States was substantially justified must be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action was based) which is made in the civil action for which fees and other expenses are sought.

Subsec. (d)(2)(B). Pub. L. 99–80, §2(c)(1), substituted "$2,000,000" for "$1,000,000" in cl. (i), and substituted "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;" for "(ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organiza-

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Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 1:13-cv-02611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation,
LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated, along with
CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation, and
CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
THOMAS E. PEREZ, Secretary of the United States of Department of Labor,
UNITED STATES DEPARTMENT OF LABOR,
JACOB J. LEW, Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

UNOPPOSED MOTION TO EXTEND DEADLINES
FOR BILL OF COSTS AND MOTION FOR ATTORNEY'S FEES

Pursuant to D.C.COLO.LCivR 6.1 and 7.1, and in light of ongoing fruitful negotiations between the parties regarding costs and attorney's fees, Plaintiffs respectfully request that the Court grant a 21-day extension for the Plaintiffs to file their Bill of Costs and motion for attorney's fees. Defendants consent to this motion. There is good cause to grant the motion:

1. On May 29, 2018, this Court granted Plaintiffs' motion for a permanent injunction and ordered that Plaintiffs would have their costs upon compliance with D.C.COLO.LCivR 54.1. *See* Dkt. 82 (order); Dkt. 83 (final judgment).

2. Based on that local rule and Federal Rule of Civil Procedure 54(d)(2)(B), the deadline to file the Bill of Costs and Plaintiffs' motion for attorney's fees is currently June 12, 2018.
3. This motion is therefore filed before the original filing deadline, in compliance with this Court's practice standards. WJM Revised Practice Standards II(D)(2).
4. Further, this case featured complex civil rights litigation that lasted almost five years and required two trips to the U.S. Supreme Court, with extensive briefing before this Court, the Tenth Circuit, and the U.S. Supreme Court along the way. Dkt. 80 at 3-8 (history of case).
5. After this Court entered final judgment, Plaintiffs filed a notice with the Tenth Circuit informing it of this Court's resolution of the case and that the pending appeal is now moot. Status Report, *Little Sisters of the Poor v. Burwell*, No. 13-1540 (10th Cir. May 31, 2018). The Tenth Circuit has ordered Defendants to file a status report by June 14, 2018. *See* Order, *Little Sisters of the Poor v. Burwell*, No. 13-1540 (10th Cir. June 4, 2018).
6. Plaintiffs and Defendants have been diligently pursuing agreement on fees and costs since this Court entered final judgment.
7. Plaintiffs believe that the parties will be able to reach an agreement within the next 21 days.
8. A 21-day extension would be reasonable. *See, e.g.*, D.C.COLO.LCivR 6.1(a) (allowing the parties to stipulate in writing to one extension of not more than 21 days in other contexts).
9. The parties have not previously sought extensions of these deadlines. *Id.* at 6.1(b) (factoring in past extensions). The only extension of any kind sought by either party in this case was Defendants' motion on November 15, 2013, which this Court granted that same day. *See* Dkts. 35 & 36.

Plaintiffs therefore respectfully request that this Court grant a 21-day extension of Plaintiffs' deadlines to file a Bill of Costs and a motion for attorney's fees.

Respectfully submitted,

/s/ Mark Rienzi
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CERTIFICATE OF SERVICE

I hereby certify on June 11, 2018, the foregoing motion was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ *Mark Rienzi*
Mark Rienzi

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Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EAST TEXAS BAPTIST UNIVERSITY, and
HOUSTON BAPTIST UNIVERSITY,

Plaintiffs,

and

WESTMINSTER THEOLOGICAL SEMINARY,

Plaintiff-Intervenor,

v.

KATHLEEN SEBELIUS, *et al.*

Defendants.

Civil No. 12-cv-3009

Plaintiffs' Motion for Extension of Time to File Petition for Fees and Expenses

The Court granted summary judgment and a permanent injunction in Plaintiffs' favor on December 27, 2013. Dkt. 133, 134. On January 22, 2014 the Court entered onto the docket certification of that order as a partial final judgment in favor of Plaintiffs. Dkt. 136. The time for Defendants to appeal has not yet run.

Federal Rule of Civil Procedure 54(d) provides that, absent an order from the court, motions for fees and expenses "be filed no later than 14 days after the entry of judgment." Since the certification was entered on January 22, 2014, Plaintiffs East Texas Baptist University and Houston Baptist University would normally file a motion for fees and expenses by February 5, 2014.

However, given the unique procedural posture of this case, the likelihood of appeal, and pending related litigation elsewhere, *see*, *e.g.*, *Sebelius* v. *Hobby Lobby*, No. 13-354 (Supreme Court oral argument scheduled March 25, 2014); *Little Sisters of the Poor* v. *Sebelius*, No. 13A691 (application to Supreme Court for injunction pending appeal granted Jan. 24, 2014), Plaintiffs hereby move the Court to extend the time for filing a fee petition (under 42 U.S.C. § 1988 or other applicable law) until after resolution of the appeal in this case, if any. Waiting to decide the fee petition issue will preserve judicial and party resources while avoiding potentially duplicative litigation. Depending on how the appeal, if any, is resolved, the Court may want to wait until final judgment is issued on all claims before setting a schedule for submitting and briefing the fee petition.

Defendants were unable to state a position immediately on this motion, as undersigned counsel contacted counsel for Defendants in the afternoon. Counsel for Defendants anticipates stating Defendants' position by tomorrow morning. Given the impending deadline two days from now, Plaintiffs thought it advisable to file this motion today and update the Court with Defendants' position once Defendants have formulated it.

Respectfully submitted,

/s/*Eric C. Rassbach*
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Counsel for Plaintiffs East Texas Baptist University and Houston Baptist University

Dated: February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, the foregoing motion was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ *Eric C. Rassbach*
Eric C. Rassbach