

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

ALEX M. AZAR II and U.S. DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

No. 20-35044

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, Secretary of U.S.
Department of Health and Human Services;
ROGER T. SEVERINO, Director, Office for
Civil Rights, Department of Health and Human
Services; U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Defendants-Appellants.

No. 20-15398

COUNTY OF SANTA CLARA; TRUST
WOMEN SEATTLE; LOS ANGELES LGBT
CENTER; WHITMAN-WALKER CLINIC,
INC., DBA Whitman-Walker Health;
BRADBURY-SULLIVAN LGBT
COMMUNITY CENTER; CENTER ON
HALSTED; HARTFORD GYN CENTER;
MAZZONI CENTER; MEDICAL STUDENTS
FOR CHOICE; AGLP: THE ASSOCIATION

No. 20-15399

OF LGBTQ+ PSYCHIATRISTS; AMERICAN ASSOCIATION OF PHYSICIANS FOR HUMAN RIGHTS, DBA GLMA: Health Professionals Advancing LGBTQ Equality; COLLEEN MCNICHOLAS; ROBERT BOLAN; WARD CARPENTER; SARAH HENN; RANDY PUMPHREY,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services,

Defendants-Appellants.

UNOPOSED MOTION TO CONSOLIDATE APPEALS WITH RESPECT TO COORDINATED BRIEFING SCHEDULES, PANEL ASSIGNMENT, AND THE SCHEDULING OF ARGUMENT

Defendants-appellants¹ respectfully move to consolidate the above-captioned appeals for briefing schedules, panel assignment, and argument schedules.

1. On May 21, 2019, the U.S. Department of Health and Human Services published a final rule entitled Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170. The State of Washington filed suit to challenge the rule in the U.S. District Court for the Eastern District of Washington, and the State of California, the City and County of San Francisco, and the County of

¹ Defendants in the Washington and Santa Clara cases are Alex M. Azar II and the U.S. Department of Health and Human Services (HHS). Defendants in the San Francisco case are Mr. Azar, Roger Severino, and HHS.

Santa Clara along with 15 organizational and individual co-plaintiffs filed three separate actions challenging the rule in the U.S. District Court for the Northern District of California. The California cases were deemed related and assigned to the same judge.

2. On November 21, 2019, a judge of the U.S. District Court for the Eastern District of Washington issued an order granting the State of Washington's motion for summary judgment, denying defendants' motion to dismiss or for summary judgment, vacating the rule, and entering final judgment. *Washington v. Azar*, No. 2:19-CV-00183-SAB, 2019 WL 6219541 (E.D. Wash. Nov. 19, 2019). Defendants filed a notice of appeal on January 17, 2020, and the case has been docketed in this Court as No. 20-35044. Defendants' opening brief is currently due on April 27, 2020.

3. On November 19, 2020, a judge of the U.S. District Court for the Northern District of California issued a single order that was entered in the dockets of the three related cases pending in the district. *City and County of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019). The order granted the plaintiffs' motions for summary judgment, denied defendants' motions to dismiss or for summary judgment, and vacated the rule. The district court entered separate final judgments in the San Francisco and Santa Clara cases on January 8, 2020, and defendants filed notices of

appeal in those two cases on March 6, 2020.² The cases have been docketed in this Court as Nos. 20-15398 and 20-15399, and defendants' opening briefs are currently due on June 15, 2020.

4. Defendants-appellants respectfully request that the three appeals be consolidated for purposes of coordinated briefing schedules, panel assignment, and oral arguments. Consolidation would promote judicial economy, as all three appeals concern the validity of the same final rule promulgated by the U.S. Department of Health and Human Services, and the plaintiffs in all three appeals asserted similar claims. *See* Fed. R. App. P. 3(b)(2) (“When . . . parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.”). If the appeals are consolidated, defendants-appellants expect to file one opening brief and one reply brief applicable to all three pending appeals, which would conserve the resources of both this Court and the Executive Branch.

5. Plaintiffs-appellees in all three appeals do not oppose consolidation for purposes of the briefing schedule, panel assignment, and the scheduling of oral argument. Plaintiffs believe this consolidation is appropriate given that many issues in the three cases overlap, the administrative record is identical across all cases, and assignment to different panels would create the risk of conflicting decisions on issues

² The third case, in which the plaintiff has outstanding claims, remains pending before the district court. *See State of California v. Azar*, No. 3:19-cv-02769-WHA (N.D. Cal.).

of nationwide import. Plaintiffs note, however, that the claims for relief asserted by plaintiffs diverged and the Washington and California district court opinions granted summary judgment on different grounds. Moreover, the cases do not have identical records in the district court.

6. The parties have agreed to the following consolidated briefing schedule, which matches the schedule this Court previously set in *City & County of San Francisco v. Azar*, No. 20-15398, and *County of Santa Clara v. U.S. Department of Health & Human Services*, No. 20-15399:

Mon., June 15, 2020

Appellants' opening brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Wed., July 15, 2020

Appellees shall file their answering briefs and excerpts of record in their respective cases pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Within 21 days of service of the appellees' briefs

Appellants' optional reply brief shall be filed and served pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

The parties' consent to the briefing schedule previously established by the Court in the San Francisco and Santa Clara cases is without prejudice to their right to request any deadline extensions available under the Court's procedures and rules.

CONCLUSION

Defendants-appellants respectfully request that the Court consolidate the above-captioned appeals for establishing a coordinated briefing schedule, as well as for panel assignment, and the scheduling of argument.

Respectfully submitted,

s/ Sarah Carroll

MICHAEL S. RAAB
LOWELL V. STURGILL, JR.
SARAH CARROLL
LEIF OVERVOLD

Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7511
Washington, D.C. 20530
sarah.w.carroll@usdoj.gov

APRIL 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A). This document contains 1010 words.

s/ Sarah Carroll

SARAH CARROLL

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Sarah Carroll

SARAH CARROLL