

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, Secretary of U.S.
Department of Health and Human Services; et al.,

Defendants-Appellants.

No. 20-15398

COUNTY OF SANTA CLARA; et al.,

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.

No. 20-15399

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

No. 20-16045

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

No. 20-35044

MOTION FOR EXTENSION OF TIME

Pursuant to Federal Rule of Appellate Procedure 26(b) and Ninth Circuit Rule 31-2.2(b), Plaintiffs-Appellees County of Santa Clara, *et al.* (the Plaintiffs-Appellees in No. 20-15399) hereby move to extend the time to file their answering brief, which is due on July 15, 2020, by 90 days to October 13, 2020. As described in the attached Declaration of Miriam Nemetz, this motion is based on a showing of diligence and substantial need. Counsel for Defendants-Appellants have indicated that they do not consent to this motion.

Respectfully Submitted,

Dated: July 8, 2020

By: /s/ Miriam R. Nemetz

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No. 20-35044

**DECLARATION OF MIRIAM NEMETZ IN SUPPORT OF MOTION
FOR EXTENSION OF TIME**

I, Miriam R. Nemetz, hereby declare as follows:

1. I am a partner at the law firm of Mayer Brown LLP and a member in good standing of the Bar of the District of Columbia and of this Court. I am one of the counsel of record for Plaintiffs-Appellees in *County of Santa Clara, et al. v. United States Dep't of Health and Human Servs., et al.*, No. 20-15399 (“the *Santa Clara* Plaintiffs”). I have personal knowledge of the facts set forth in this declaration.

2. The Plaintiffs-Appellees in these four appeals all challenged a final rule promulgated by the U.S. Department of Health and Human Services, which addresses religious and moral objections in healthcare. Two district courts, one in the Northern District of California and the other in the Eastern District of Washington, granted summary judgment to the Plaintiffs and vacated the rule. Appellants Alex M. Azar and the U.S. Department of Health and Human Services

(“Appellants”) have appealed in all four cases. The cases have been consolidated for purposes of briefing and oral argument scheduling.

3. Appellants filed their consolidated 17,371-word brief on June 15, 2020, together with a motion seeking an expansion of the type-volume limitations.

4. Plaintiffs-Appellees in the consolidated appeals anticipated that they would seek a 30-day streamlined extension of the deadline to file their briefs and would subsequently file Notices stating that an additional 60-day extension was necessary in light of the Covid-19 pandemic.

5. On June 19, 2020, the City and County of San Francisco filed a streamlined request for a 30-day extension. The Clerk of the Court denied the motion, stating that the extension was unnecessary because the briefing schedule was stayed.

6. As of July 1, 2020, this Court ceased its practice of granting 60-day extensions of time automatically upon the filing of a Notice and began requiring that extensions be sought by motion under the Court’s usual rules.

7. On July 7, 2020, the Court granted the Defendants-Appellants’ motion to expand the type-volume limitations, ordered that Defendants-Appellants’ brief be filed, and stated that the Appellees’ briefs are due on July 15, 2020 (eight days after the order). The Court also granted the pending motion to consolidate the appeal in No. 20-16405 with the other three appeals.

8. Under Circuit Rule 31-2.2(b), a motion for extension of time is due on July 8, 2020.

9. A 90-day extension of the current July 15 deadline is necessary to allow the *Santa Clara* Appellees sufficient time to prepare their brief.

10. The facts and the legal issues in this case are complex. The challenged final rule extends over 103 pages and was based on a large administrative record. The *Santa Clara* Plaintiffs raised several independent legal arguments that the Rule is invalid, and Appellants have raised numerous arguments in their 72-page brief. Appellants' brief addresses the decisions of both the district court in the Northern District of California and the district court in the Eastern District of Washington. The latter decision incorporated much of the analysis of the 147-page decision of the district court in the Southern District of New York, which also vacated the rule.

11. The *Santa Clara* Appellees include the County of Santa Clara, private healthcare providers, and organizations that provide services to the LGBT community. The County of Santa Clara is represented by Mayer Brown and by government attorneys employed by the County. The other Plaintiffs are represented by Mayer Brown, the Center for Reproductive Rights, Lambda Legal, and Americans United for Separation of Church and State. Counsel have divided responsibility for working on the brief, and all counsel will comment on, review, and approve the draft brief before it is finalized. The process of collaboration and review

will require additional time, particularly because some party approvals of the final product require multiple levels of review.

12. To minimize duplication and ensure that all issues are covered, counsel for the *Santa Clara* Plaintiffs must also confer and coordinate with counsel for the State of California, the State of Washington, and the City and County of San Francisco regarding their briefs.

13. Lead plaintiff the County of Santa Clara is the healthcare provider of last resort and operates the sole public health department for millions of County residents. Due to significant diversion of attorney resources within the Office of the County Counsel to the COVID-19 pandemic response, government counsel for Plaintiff the County of Santa Clara require additional time to coordinate drafting, review, and finalization of the brief. In particular, James Williams and Greta Hansen, counsel for Plaintiff the County of Santa Clara, are responsible for directing the County's Emergency Operations Center and leading the legal team that is advising the County of Santa Clara Health Officer on the local response to the public health emergency caused by the COVID-19 pandemic.

14. All counsel are working remotely as a result of the pandemic. The circumstances have been disruptive to work schedules, and it will be more difficult to incorporate comments and to produce the final brief and record excerpts when the lawyers and support staff involved are working on laptops at home using remote

access platforms rather than in their fully equipped offices. Several counsel with responsibility for preparing the brief also are juggling unusual childcare, family, and other personal obligations as a result of the pandemic. Susan Greenberg, Counsel for Plaintiff the County of Santa Clara, is a primary caregiver for her elderly mother-in-law, including taking her to regular radiation treatments for cancer. Due to the COVID-19 pandemic, Ms. Greenberg must stay in her vehicle during the appointments, unable to work for significant periods of time. Mary Hanna-Weir, counsel for Plaintiff the County of Santa Clara, is coordinating the relocation of and health care for her mother who lives across the country in North Carolina and is entering the final stages of Parkinson's Disease. Due to the COVID-19 pandemic, she is unable to travel to assist with the move, making the coordination more complex. Laura Trice, Susan Greenberg, and Mary Hanna-Weir, counsel for Plaintiff the County of Santa Clara, are primary caregivers for young children whose usual childcare arrangements have been disrupted by the COVID-19 pandemic, resulting in the need to take additional unexpected leave to address unplanned gaps in caring for those children.

15. Counsel for the *Santa Clara* Plaintiffs also have substantial competing professional obligations, including the following.

16. Lead coordinating counsel Nicole Saharsky has the following briefs due on the following dates:

U.S. Supreme Court brief in opposition due in *Baker v. Planned Parenthood South Atlantic*, S. Ct. No. 19-1186 (due 7/29/2020)

Seventh Circuit party brief in *U.S. Venture, Inc. v. United States*, 7th Cir. No. 20-1861 (due 8/5/2020)

Ninth Circuit amicus brief in *Moser v. Health Insurance Innovations, Inc.*, 9th Cir. 19-56224 (due on 8/7/2020)

17. Mary Hanna-Weir, government counsel for Plaintiff the County of Santa Clara, serves as the primary advice attorney for the Registrar of Voters for the County of Santa Clara, which is preparing for the unprecedented challenge of administering a Presidential election, and the hundreds of state and local contests, in the midst of a global pandemic. The nominations period for the election begins July 13th, the time period in which there typically are numerous, urgent, election-related litigation matters seeking changes to text on the ballot or in the county voter information guide will be on or about August 7th through September 7th, and voting begins October 5th.

18. Susan Greenberg, government counsel for Plaintiff the County of Santa Clara, has briefs due on July 13th and August 10th and a hearing on September 3rd for a litigation challenging policies of the Valley Health Plan, the County's health maintenance organization, for which she is the primary counsel.

19. Attorney Genevieve Scott has a reply in support of Plaintiffs' fee application due on July 27, 2020 in *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-705, (M.D. Tenn.), and has an oral argument on Plaintiffs' motion for summary judgment on July 27, 2020, in *Hodes & Nauser, MDs, P.A. v. Schmidt*, No. 2015CV000490 (Kan. Dist. Ct.).

20. Several counsel for the *Santa Clara* Plaintiffs also have longstanding plans to take vacation over the summer. Nicole Saharsky plans to take vacation from July 27 to 30 and from August 29 to September 7. I plan to take vacation from August 8 to 15. In addition, during the last week of July, because of the pandemic, I will drive from Washington, D.C. to Madison, Wisconsin and back in order to assist my daughter in relocating to begin her new job. Kenneth Upton will be vacationing out of the country from September 19 through September 28.

21. The *Santa Clara* Plaintiffs understand that the Appellees in the other consolidated appeals plan to seek a 90-day extension of time. It would be efficient for all Appellees to have the same deadline for their briefs.

22. Counsel for the *Santa Clara* Plaintiffs are diligently working on the answering brief and, if the Court grants this motion for an extension of time, Appellees will file their answering brief by October 13, 2020.

23. On July 7, 2020, I emailed counsel for Appellants to determine whether Appellants objected to this request for an extension. Counsel for Appellants responded that they do not consent to the requested extension.

24. The court reporter is not in default with respect to any of the designated transcripts.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED this 8th day of July, 2020 in Washington, D.C.

/s/ Miriam R. Nemetz
Miriam R. Nemetz