

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as
Secretary of the U.S. Department of Health
and Human Services, et al.,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR,
JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND
DEFENSE FUND,

Intervenor-Defendant-Appellant.

Nos. 18-15144, 18-15166,
and 18-15255

**MOTION TO LIFT THE STAY OF THE DEADLINE
TO FILE ANY PETITION FOR REHEARING**

The federal defendants respectfully move to lift the stay of the deadline to file a petition for panel rehearing or for rehearing en banc in this case.

1. On January 14, 2019, counsel for the federal defendants filed a motion to stay the deadline for filing any petition for rehearing because of the lapse in appropriations to the Department of Justice, explaining

that, absent an appropriation, Department of Justice attorneys are prohibited from working, even on a voluntary basis, except in very limited circumstances, including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. The Court granted the motion on January 17, 2019.

2. Following the Court’s remand to the district court, the plaintiff States (joined by several additional States) amended their complaint to challenge the final rules that superseded the interim rules at issue in this appeal and sought a preliminary injunction. On January 13, 2019, the district court issued a preliminary injunction of the final rules. *See Order, California v. HHS*, No. 4:17-cv-5783 (N.D. Cal. Jan. 13, 2019). The government filed a notice of appeal on January 23, 2019.¹

3. Upon further review and consultation, counsel for the federal defendants have concluded that authorization exists to litigate the appeal notwithstanding the appropriations lapse. The Office of Legal Counsel has previously advised that “[t]o the extent that any of [the Department of Justice]’s functions are necessary to the effective

¹ Intervenor-defendant the Little Sisters filed a notice of appeal on January 13, 2019 (docketed as case no. 19-15072).

execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the Department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the Department's functions and activities may continue." *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations*, 19 Op. O.L.C. 337, 338 (1995).² Counsel is informed that HHS has current fiscal year appropriations to administer the contraceptive-coverage mandate; and that the efficient, lawful, and fair administration of its program will be harmed unless the government takes expeditious action to secure reversal of the injunction, which threatens substantial injury to HHS's ability to carry out its regulatory responsibilities and obligations. Under these circumstances, counsel for the federal defendants have concluded that they may litigate the appeal of the preliminary injunction of the final rules notwithstanding the appropriations lapse.

² Available at <https://www.justice.gov/file/20141/download>.

4. For much the same reasons, counsel for the federal defendants also now believe that a stay of the deadline for filing any rehearing petition is unnecessary. Accordingly, the government requests that the Court lift the stay of the rehearing deadline.

5. We have consulted with counsel for the plaintiff States, as well as counsel for intervenors, who have informed us that they do not object to the relief sought in this motion.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court lift the stay of the deadline for filing any petition for rehearing.

Respectfully submitted,

/s/ Sharon Swingle
SHARON SWINGLE
Assistant Director, Appellate Staff
Civil Division, Room 7250
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 353-2689
sharon.swingle@usdoj.gov

JANUARY 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this motion complies with the requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 27(d)(2)(A), because it contains 514 words, according to the count of Microsoft Word.

/s/ Sharon Swingle
Sharon Swingle

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2019, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
Sharon Swingle