

No. 18-2861

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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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.

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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

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**FIFTH JOINT MOTION FOR ORDER  
FURTHER EXTENDING THE BRIEFING SCHEDULE**

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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 April 26, 2019. (The current deadline for this brief is March 27, 2019.)

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

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

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

Dated this 20th day of March, 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 March 20, 2019, I electronically filed the foregoing *Fifth 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 20th day of March, 2019.

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

No. 18-2861

---

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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CODY FLACK and SARA A. MAKENZIE,

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WISCONSIN DEPARTMENT OF HEALTH  
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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 FIFTH JOINT MOTION FOR ORDER  
FURTHER EXTENDING THE BRIEFING SCHEDULE**

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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 March 27, 2019. Accordingly, Plaintiffs-Appellees' response brief will be due on April 26, 2019 and Defendants-Appellants' reply brief (if any) will be due on May 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 April 19, 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 April 26, 2019, Plaintiffs-Appellees’ response brief would be due May 27, 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 June 17, 2019.

12. If, by April 19, 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 April 19, 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 20th day of March, 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 March 20, 2019, I electronically filed the foregoing *Declaration of Steven C. Kilpatrick In Support Of Fifth 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 20th day of March, 2019.

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