

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3580, 20-3827 Caption [use short title]

Motion for: Joint Motion to Stay Appeal Asapansa-Johnson Walker v. Cochran

Set forth below precise, complete statement of relief sought:

The parties jointly seek a stay of this appeal while new leadership at HHS evaluates the issues this case presents. The parties propose to file a joint status report by May 14, 2021.

MOVING PARTY: All parties moving jointly

OPPOSING PARTY:

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Attorneys for both plaintiffs and defendants listed below [name of attorney, with firm, address, phone number and e mail]

OPPOSING ATTORNEY:

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Court Judge/Agency appealed from: Eastern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Has this relief been previously sought in this Court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know JOINT MOTION

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: s/ Joshua Dos Santos

Date: 3-15-2021

Service by: CM/ECF Other [Attach proof of service]

[ORAL ARGUMENT NOT SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TANYA ASAPANSA-JOHNSON WALKER
and CECILIA GENTILI,

Plaintiffs-appellees,

v.

NORRIS COCHRAN, in his official capacity as
Acting Secretary of the United States Department
of Health and Human Services, and UNITED
STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendants-appellants.

Nos. 20-3580,
20-3827

JOINT MOTION TO STAY APPEAL

The parties jointly request that the Court stay this appeal while new leadership at the U.S. Department of Health and Human Services (HHS) evaluates the issues this case presents, especially in light of the President's Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

1. This appeal concerns a preliminary injunction prohibiting HHS from enforcing certain aspects of a final rule that HHS promulgated in 2020. The rule, entitled Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160 (June 19, 2020), implements Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116.

2. The government filed its opening brief on January 19, 2021. Pursuant to this Court's scheduling order, plaintiff-appellees' response brief is due April 19, 2021, and the government's reply is due May 10, 2021.

3. New leadership at HHS will be reassessing the issues that this case presents. It would therefore conserve the resources of the Court and the parties to stay this appeal while HHS undertakes this reassessment. New leadership began arriving at HHS and the U.S. Department of Justice on January 20, 2021, and will need additional time to review the rule in question and the multiple legal issues that are involved in this case; consult with all interested federal agencies and offices; and determine the appropriate course going forward. In addition, the President has issued an executive order on "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," which directs federal agencies to "review all existing ... agency actions" promulgated pursuant to "any ... statute or regulation that prohibits sex discrimination," 86 Fed. Reg. 7,023 (January 25, 2021), such as the rule at issue in this case. Given the recent change of administration and the complexity and importance of the issues presented by the rule and in this case, these extraordinary circumstances support a stay of the appeal. The Court's authority to order such a stay is well-settled. *See, e.g., Landis v. North Am. Co.*, 299 U.S. 248, 253 (1936) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

4. The parties respectfully request that the Court stay this appeal pending the new administration's review of this litigation and the rule being challenged because that review may result in changes that render it unnecessary for the court to resolve the jurisdictional and merits issues presented in this case or, at the very least, narrow those issues significantly. Moreover, neither party nor the public would be prejudiced by a stay. And the preliminary injunction prohibiting enforcement of the portions of the rule underlying this appeal will remain in effect. *See Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020); *Walker v. Azar*, No. 20-CV-2834 (FB) (SMG), 2020 WL 6363970 (E.D.N.Y. Oct. 29, 2020).

5. The parties propose that they file a joint status report no later than May 14, 2021, apprising the Court of the status of the matter and submitting a proposal for further proceedings. Section 2(d) of the aforementioned Executive Order requires agency heads, by April 30, 2021, to develop a plan to carry out actions the agency identifies as appropriate. *See* 86 Fed. Reg. at 7,024. May 14, 2021 would provide the parties two weeks to confer after that date.

CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court stay this appeal. The parties propose that they file a joint status report by no later than

May 14, 2021, apprising the Court of the status of the matter and submitting a proposal for further proceedings.

Respectfully submitted,

FOR DEFENDANTS-APPELLANTS:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 623 words. This motion also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos

JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ Joshua Dos Santos

JOSHUA DOS SANTOS