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21 *Attorneys for Plaintiff*

22 **UNITED STATES DISTRICT COURT**
23 **SOUTHERN DISTRICT OF CALIFORNIA**

24 SKYLINE WESLEYAN CHURCH,

25 Plaintiff,

26 v.

27 CALIFORNIA DEPARTMENT OF
28 MANAGED HEALTH CARE;
MICHELLE ROUILLARD, in her official
capacity as Director of the California
Department of Managed Health Care,

Defendants.

Case No.: 3:16-cv-00501-TWR-MSB

**PLAINTIFF’S EX PARTE MOTION
TO SET SUPPLEMENTAL
BRIEFING SCHEDULE**

No Oral Argument Requested

1 Plaintiff Skyline Wesleyan Church (“Skyline”), by and through counsel,
2 respectfully moves this Court for an Order setting a special briefing schedule for
3 supplemental briefs in support of motions for summary judgment. This motion is
4 supported by the attached Memorandum of Points and Authorities and the Declaration of
5 Jeremiah Galus. No oral argument is requested. Skyline moves the Court to include the
6 following provisions in any such schedule:

7 1. Good cause exists to set a briefing schedule for supplemental briefs in
8 support of motions for summary judgment.

9 2. The parties shall comply with the following briefing and hearing schedule
10 for any supplemental briefs in support of motions for summary judgment:

- 11 • Each party shall file a supplemental brief no later than **October 11, 2021**;
- 12 • Each party may file an opposition to the other party’s supplemental brief for
13 summary judgment no later than **October 25, 2021**;
- 14 • No party shall file a reply in support of their supplemental motion for
15 summary judgment; and
- 16 • Any supplemental briefs and oppositions may not exceed 15 pages each;
- 17 • A hearing on the supplemental motions for summary judgment will be heard
18 by the Court on **November 10, 2021** (or another date selected by the Court).

19 3. Any trial related dates shall be scheduled, if necessary, after the Court
20 resolves any dispositive motions.

21
22 Dated: September 7, 2021

Respectfully submitted,

23
24 s/ Jeremiah Galus
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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, service of the foregoing Plaintiff’s Ex Parte Motion to Set Supplemental Briefing Schedule, Plaintiff’s supporting Memorandum of Points and Authorities, and the Declaration of Jeremiah Galus were made by way of the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated September 7, 2021

s/Jeremiah Galus
Jeremiah Galus
Attorney for Plaintiff

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MICHELLE ROUILLARD, in her official
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Defendants.

Case No.: 3:16-cv-00501-TWR-MSB

**PLAINTIFF’S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF EX PARTE MOTION
TO SET SUPPLEMENTAL
BRIEFING SCHEDULE**

1 **INTRODUCTION**

2 In August 2014, Defendants mandated that Skyline’s employee healthcare plan
3 cover elective abortions in violation of the church’s beliefs. They did this even though the
4 law on which the coverage requirement is based allows exemptions for “good cause” or if
5 “in the public interest.” Cal. Health & Safety Code §§ 1367(i), 1343(b), and 1344(a).
6 Thus, for the past seven years, Defendants have been violating Skyline’s constitutional
7 rights. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (the government
8 may not withhold a religious exemption when the challenged law contains a “system of
9 individual exemptions”). But without a final judgment from this Court holding the same,
10 Skyline will continue to suffer irreparable harm. Given that no court dates have been set
11 since this case was remanded from the Ninth Circuit, a supplemental summary judgment
12 briefing schedule is needed for the case to proceed and for Skyline to vindicate its
13 constitutional rights. The motion should be granted.

14 **BACKGROUND**

15 This case has been ongoing since the beginning of 2016. Discovery was completed
16 in 2017, and the parties moved for and briefed summary judgment the same year.
17 However, Judge Bencivengo ruled that Skyline lacked standing and dismissed its lawsuit.
18 The Ninth Circuit reversed in May 2020, holding that Skyline had standing to challenge
19 Defendants’ mandate that the church’s employee healthcare plan cover elective abortions.

20 After remand, in August 2020, this Court asked both parties to file status reports
21 recommending a course of action given the Ninth Circuit’s decision. Skyline recom-
22 mended that the Court set a briefing schedule for the parties to refile or supplement their
23 summary judgment briefing. ECF No. 107. In contrast, Defendants recommended
24 delaying adjudication of Skyline’s claims until the Supreme Court decided *Fulton v. City*
25 *of Philadelphia*, No. 19-123 (U.S.). ECF No. 106. Shortly after the parties filed their
26 status reports, Judge Bencivengo transferred the case to Judge Todd W. Robinson, ECF
27 No. 109, and no action was taken on the parties’ reports.

1 On June 17, 2021, the Supreme Court issued its decision in *Fulton*, 141 S. Ct. 1868
2 (2021), endorsing the same free-exercise argument that Skyline has been making
3 throughout this litigation. *See* ECF No. 110 at 2–3 (discussing *Fulton*’s applicability to
4 this case). And in July 2021, the Ninth Circuit vacated and remanded another case
5 challenging Defendants’ abortion-coverage mandate, *Foothill Church v. Watanabe*, No.
6 19-15658, 2021 WL 3028052 (9th Cir. July 19, 2021). In response to these rulings,
7 Skyline filed a Notice of Ruling in Related Case and Request for Status Conference on
8 July 21, 2021. ECF No. 110. To date, no status conference has been scheduled.

9 With Skyline’s constitutional injury ongoing, Skyline’s counsel also reached out to
10 Defendants’ counsel on August 12, 2021, to see if Defendants would be willing to join a
11 motion stipulating to a proposed supplemental briefing schedule. *See* Galus Decl. ¶ 3. In
12 response, Defendants’ counsel said that Defendants would not agree to a briefing
13 schedule but desired to engage in mediation instead. *Id.* ¶ 4. Because the parties had
14 previously attempted mediation, however, Skyline replied that it was not interested in
15 another round of mediation but would consider any settlement offers. *Id.* ¶ 5.

16 On August 17, 2021, Skyline’s counsel again asked if Defendants would be willing
17 to stipulate to a joint briefing schedule. *Id.* ¶ 6. Defendants’ counsel declined on August
18 20, stating that she hoped to provide “an offer of settlement next week” and that
19 Defendants were “in the midst of proffering settlement terms.” *Id.* ¶ 8.b. Accepting that
20 representation in good faith, Skyline’s counsel asked Defendants to propose alternative
21 dates for a briefing schedule that would account for any anticipated settlement offer and
22 negotiations. *Id.* ¶ 8.c. Defendants again refused—this time suggesting that the parties
23 stipulate to an October case management conference rather than a briefing schedule. *Id.* ¶
24 8.d. & 8.e. Skyline said it would consider that option after receiving Defendants’
25 settlement offer. *Id.* ¶ 8.f.

26 On Friday, August 27, Defendants’ counsel left Skyline’s counsel a message
27 saying that she did not have client approval to send a written settlement proposal but was
28

1 working to obtain that approval. *Id.* ¶ 9. Skyline’s counsel replied that Skyline would
2 await the proposal but would need to move forward with this motion if it did not receive
3 the proposal by September 3. *Id.* ¶ 10. Since then, Defendants have not responded, nor
4 have they sent Skyline the anticipated settlement offer. *Id.* ¶ 11.

5 **EX PARTE MOTION STANDARD**

6 A party may submit an “*ex parte* application” if it complies with Civil Local Rule
7 83.3(g) and “satisf[ies] the applicable legal standard, with a particular focus on the
8 diligence of the movant and any prejudice that may result in the absence of the requested
9 *ex parte* relief.” *See* Hon. Todd W. Robinson, Civil Standing Order Rule III.C.3. Local
10 Civil Rule 83.3(g) in turn provides that an *ex parte* motion may be made if “it appears by
11 affidavit or declaration [] that within a reasonable time before the motion the party
12 informed the opposing party or the opposing party’s attorney when and where the motion
13 would be made.”

14 An *ex parte* motion must also state “why the regular noticed motion procedures
15 must be bypassed,” and must “show that the moving party’s cause will be irreparably
16 prejudiced if the underlying motion is heard according to regular noticed motion
17 procedures and that the moving party is without fault in creating the crisis that requires *ex*
18 *parte* relief, or that the crisis occurred as a result of excusable neglect.” *Raiser v.*
19 *Casserty*, No. 18-CV-1836 JLS (AHG), 2020 WL 8970333, at *1 (S.D. Cal. Feb. 3,
20 2020) (internal quotations and citations omitted).

21 **ARGUMENT**

22 **I. Skyline’s motion is proper under the Local Civil Rules and this Court’s Civil**
23 **Standing Order.**

24 Skyline’s *Ex Parte* Motion to Set Supplemental Briefing Schedule satisfies Local
25 Civil Rule 83.3(g) because it is supported by the attached Declaration of Jeremiah Galus,
26 which avers that Skyline’s counsel has informed Defendants’ counsel of Skyline’s
27 intention to file this motion. Galus Decl. ¶¶ 3–10. In fact, Skyline’s counsel has
28

1 repeatedly requested Defendants' input on a proposed briefing schedule and specifically
2 asked Defendants to stipulate and move the Court for such a schedule. *Id.* Because
3 Defendants know of Skyline's intent to file this motion, Local Civil Rule 83.3(g)(2)(1) is
4 met.

5 Moreover, this Court's Civil Standing Order Rule III.C.3 is satisfied because the
6 applicable legal standard is met (*see infra*), Skyline and its counsel have been diligent in
7 trying to move this case forward to a final resolution, and Skyline will be prejudiced
8 without the requested relief since filing under the normal motion procedures will cause
9 Skyline further irreparable injury.

10 As discussed, Skyline promptly notified this Court of the Supreme Court's ruling
11 in *Fulton* and the Ninth Circuit's ruling in *Foothill Church* and requested a status
12 conference. To obviate the need for such a conference, however, Skyline also approached
13 Defendants about stipulating to a joint supplemental briefing schedule. Defendants have
14 refused. Even so, Skyline has tried to accommodate Defendants by delaying the filing of
15 this motion while Defendants contemplated making a settlement offer. But no settlement
16 offer has been made, nor is there a guarantee that one is forthcoming. Skyline's ongoing
17 constitutional injury prevents it from waiting any longer.

18 **II. The regular noticed motion procedures should be bypassed.**

19 Skyline is being diligent by moving *ex parte*: if forced to move under ordinary
20 motion procedures, resolution of this case will be delayed even more because of the need
21 to obtain a hearing date. A hearing is not needed to set a supplemental briefing schedule.
22 Indeed, this motion is not an adversarial one; it simply asks the Court to set dates by
23 which the parties can file supplemental briefs addressing *Fulton*. There is no reason for
24 Defendants to oppose this motion. Nor is there any need for oral argument.

25 What's more, the burden on Defendants if the Court orders a special briefing
26 schedule is virtually nonexistent. Yet Skyline will continue to be irreparably harmed if
27 this case lingers on with no end in sight. Each day the case continues is another day
28

1 Skyline is forced to cover abortions in violation of its beliefs. Indeed, Defendants have
2 forced Skyline to pay for and facilitate abortions through its healthcare plan *since 2014*.
3 “The loss of First Amendment freedoms, for even minimal periods of time, unquestiona-
4 bly constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because of
5 this ongoing harm, “the regular noticed motion procedures must be bypassed.” *Raiser*,
6 2020 WL 8970333, at *1.

7 **CONCLUSION**

8 Supplemental summary judgment briefing will resolve this case. Both parties have
9 previously filed motions for summary judgment. Discovery is complete and the case is
10 ripe for disposition. And because this case involves constitutional issues, mainly the Free
11 Exercise Clause, Skyline intends to file a supplemental brief addressing the Supreme
12 Court’s recent free-exercise ruling in *Fulton*. Accordingly, Skyline requests this Court
13 grant the relief requested in its Motion to Set Supplemental Briefing Schedule.

14
15 Dated: September 7, 2021

Respectfully submitted,

16 s/ Jeremiah Galus

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**Admitted pro hac vice*

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MICHELLE ROUILLARD, in her official
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Defendants.

Case No.: 3:16-cv-00501-TWR-MSB

**DECLARATION OF JEREMIAH
GALUS IN SUPPORT OF
PLAINTIFF’S EX PARTE MOTION
TO SET SUPPLEMENTAL
BRIEFING SCHEDULE**

1 I, Jeremiah Galus, hereby declare and state as follows:

- 2 1. I am over eighteen years of age and make this declaration on personal
3 knowledge.
- 4 2. I am one of the attorneys representing Plaintiff Skyline Wesleyan Church
5 (“Skyline”) in the above-captioned matter. I have personal knowledge of the
6 facts set forth herein, and I am competent to testify thereto.
- 7 3. On August 12, 2021, I emailed Defendants’ counsel, Karli Eisenberg,
8 notifying her that Skyline intended to file a supplemental brief in support of
9 its motion for summary judgment. In that same email I inquired whether
10 Defendants would be interested in stipulating to, and jointly moving the
11 Court for, a proposed briefing schedule to facilitate the filing of the
12 supplemental briefs.
- 13 4. Attorney Eisenberg called me the following day, August 13, and proposed
14 that the parties attend mediation before any substantive supplemental
15 briefing be done in the case.
- 16 5. After consulting with Skyline, I notified Attorney Eisenberg on August 17,
17 2021, that Skyline did not wish to engage in another round of mediation.
18 The parties had previously participated in an unsuccessful mediation while
19 the case was on appeal to the Ninth Circuit.
- 20 6. Nonetheless, I notified Attorney Eisenberg that Skyline would be open to
21 any settlement offer(s) from Defendants. In that same communication, I
22 proposed dates to Attorney Eisenberg for a supplemental briefing schedule
23 and advised her that she could suggest alternative dates.
- 24 7. I did not hear from Attorney Eisenberg on August 18 or 19.
- 25 8. The following communications took place via email on August 20, 2021:
 - 26 a. I sent Attorney Eisenberg a follow-up email on August 20, 2021,
27 advising her that Skyline planned to file a motion to set a
28 supplemental briefing schedule by the end of business on that day

1 (August 20) and asked her if Defendants would join the motion or
2 planned to oppose it.

3 b. Attorney Eisenberg responded that Defendants continued to think
4 mediation appropriate and that she hoped to provide “an offer of
5 settlement next week” (being the week of August 23-27), and that
6 Defendants were “in the midst of proffering settlement terms.”

7 c. In response, I asked Attorney Eisenberg whether Defendants could
8 propose alternative briefing dates to accommodate the anticipated
9 settlement offer, and that the parties could “build in some extra time
10 to allow for settlement negotiations.” But I reiterated to Attorney
11 Eisenberg that having no briefing schedule at all was not acceptable
12 to Skyline, in the event settlement negotiations failed.

13 d. Defendants again declined to agree to a joint motion for briefing
14 schedule or to propose alternative dates for a briefing schedule.

15 e. Rather, Attorney Eisenberg suggested a stipulated case management
16 conference scheduled for some time in October, to be had only if the
17 case had not yet settled.

18 f. I responded that Skyline would let Defendants know of that
19 possibility after receiving their settlement offer the following week
20 (being the week of August 23-27).

21 9. On Friday, August 27, Attorney Eisenberg left me a voicemail and e-mail
22 message saying that she did not have client approval to send a written
23 settlement proposal but was working to obtain that approval.

24 10. I replied that Skyline would await the proposal but would need to file a
25 motion to set a supplemental briefing schedule if Skyline did not receive the
26 proposal by September 3.

27 11. To date, Defendants have not responded, nor have they sent Skyline the
28 anticipated settlement proposal.

1 I declare that the foregoing is true and correct under penalty of perjury under the
2 laws of the United States of America. Executed on September 7, 2021, in Scottsdale,
3 Arizona.

4 s/ Jeremiah Galus
5 Jeremiah Galus
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