

1 BRIAN M. BOYNTON  
 Acting Assistant Attorney General  
 2  
 3 ERIC BECKENHAUER  
 Assistant Branch Director  
 4 Civil Division  
 5 STEVEN A. MYERS (NY Bar # 4823043)  
 Senior Trial Counsel  
 6 United States Department of Justice  
 Civil Division, Federal Programs Branch  
 7 1100 L St. NW  
 8 Washington, DC 20005  
 Tel: (202) 305-8648  
 9 Fax: (202) 616-8470  
 E-mail: steven.a.myers@usdoj.gov

Samara Spence\* (DC Bar No. 1031191)  
 Jeffrey B. Dubner\* (DC Bar No. 1013399)  
 Sean A. Lev\* (DC Bar. No. 449936)  
 Democracy Forward Foundation  
 P.O. Box 34553  
 Washington, DC 20043  
 sspence@democracyforward.org  
 jdubner@democracyforward.org  
 slew@democracyforward.org  
 (202) 701-1785  
 (202) 448-9090

*Counsel for Plaintiffs*

*Additional counsel listed on signature block*

*\* Admitted pro hac vice*

*Attorneys for Defendants*

12  
 13 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 14 **SAN JOSE DIVISION**

15 COUNTY OF SANTA CLARA, *et al.*,

16 Plaintiffs,

17 v.

18 U.S. DEPARTMENT OF HEALTH AND  
 19 HUMAN SERVICES, *et al.*,

20 Defendants.

) Case No. 5:21-cv-01655-BLF

) **JOINT STATUS REPORT AND STIPULATED**  
 ) **REQUEST FOR ORDER CONTINUING STAY**

21  
 22 Pursuant to the Court’s Order of July 30, 2021, *see* ECF No. 35, the parties respectfully submit  
 23 the following joint status report addressing further proceedings, together with a stipulated request for an  
 24 order continuing the stay of this action through February 1, 2022.

25 1. This is an Administrative Procedure Act (“APA”) case in which Plaintiffs challenge a final  
 26 rule promulgated by the U.S. Department of Health and Human Services (“HHS”) entitled *Securing*  
 27 *Updated and Necessary Statutory Evaluations Timely*, 86 Fed. Reg. 5694 (Jan. 19, 2021) (the “SUNSET  
 28

1 Rule”). The SUNSET Rule provides, in essential part, that nearly all regulations issued by HHS in Titles  
2 21, 42, and 45 of the Code of Federal Regulations shall expire at the end of (1) five calendar years after  
3 the year that the SUNSET Rule first becomes effective, (2) ten calendar years after the year of the  
4 regulation’s promulgation, or (3) ten calendar years after the last year in which HHS assessed and, if  
5 required, reviewed the regulation, whichever is latest.

6 2. Plaintiffs filed their complaint challenging the SUNSET Rule on March 9, 2021. *See* ECF  
7 No. 1. Plaintiffs alleged that the SUNSET Rule is *ultra vires*, *see id.* ¶¶ 123-30; arbitrary and capricious,  
8 *see id.* ¶¶ 131-33; in violation of the APA’s notice-and-comment requirements, *see id.* ¶¶ 134-39; and in  
9 violation of HHS’s Tribal Consultation Policy, *see id.* ¶¶ 140-44. Plaintiffs further alleged that the  
10 SUNSET Rule threatens imminent and irreparable harm to them and the general public, including by  
11 creating regulatory confusion and uncertainty that will impede their ongoing operations, budgeting, and  
12 planning activities. *See, e.g., id.* ¶¶ 100-02; *see generally id.* ¶¶ 95-122.

13 3. As promulgated, the SUNSET Rule was scheduled to become effective on March 22, 2021.  
14 *See* 86 Fed. Reg. at 5694. Shortly before the SUNSET Rule became effective, HHS postponed its effective  
15 date for one year, to March 22, 2022, pursuant to 5 U.S.C. § 705. *See* 86 Fed. Reg. 15404 (2021). While  
16 HHS did not concede liability, HHS stated that it “believes that the Court could find merit in some of  
17 Plaintiffs’ claims.” *Id.* at 15,405. In particular, HHS stated that, in contrast to its prior findings, it “now  
18 believes it is likely some regulations would expire without any additional process” and that this outcome  
19 raises legal questions about whether “regulations promulgated through notice and comment rulemaking  
20 can be terminated through an umbrella rule without individual consideration of the expiring regulations,  
21 including any reliance interests.” *Id.* at 15,406. HHS further stated that it “may have significantly  
22 underestimated the burden” of the rule and that the rule’s magnitude and timing “may have impeded the  
23 full and deliberate consideration of all the potential issues related to the SUNSET rule.” *Id.*

24 4. On October 28, 2021, HHS issued a Notice of Proposed Rulemaking proposing to withdraw  
25 or repeal the SUNSET Rule. *See* Dep’t of Health & Human Servs., Securing Updated and Necessary  
26 Statutory Evaluations Timely; Proposal to Withdraw or Repeal, 86 Fed. Reg. 59,906 (Oct. 29, 2021).  
27 HHS stated that it “reexamined the SUNSET final rule in light of the allegations in” this case, among other  
28

1 things. *Id.* at 59,908. If the withdrawal rule were to issue as proposed, Plaintiffs' claims in this case may  
2 become moot. HHS is also reviewing the Rule in light of Plaintiffs' claims raised in this litigation, and  
3 seeks additional time to evaluate the claims and its position before taking further steps in this litigation.

4 5. The parties therefore jointly request that the Court continue the stay of this action through  
5 February 1, 2022, and direct the parties to file a joint status report proposing a schedule for further  
6 proceedings by that date.

7 Date: November 1, 2021

Respectfully submitted,

8 BRIAN M. BOYNTON  
Acting Assistant Attorney General

9 ERIC BECKENHAUER  
10 Assistant Branch Director  
Civil Division

11 /s/ Steven A. Myers  
12 STEVEN A. MYERS (NY Bar # 4823043)  
Senior Trial Counsel  
13 United States Department of Justice  
Civil Division, Federal Programs Branch  
14 1100 L St. NW  
Washington, DC 20005  
15 Tel: (202) 305-8648  
Fax: (202) 616-8470  
16 E-mail: steven.a.myers@usdoj.gov

17 *Attorneys for Defendants*

18 /s/ Samara Spence  
19 Samara Spence\* (DC Bar No. 1031191)  
20 Jeffrey B. Dubner\* (DC Bar No. 1013399)  
Sean A. Lev\* (DC Bar. No. 449936)  
21 Democracy Forward Foundation  
P.O. Box 34553  
22 Washington, DC 20043  
sspence@democracyforward.org  
23 jdubner@democracyforward.org  
24 slev@democracyforward.org  
Telephone: (202) 448-9090

25 *Counsel for All Plaintiffs*

26 James R. Williams (CA Bar No. 271253)  
27 County Counsel  
Greta S. Hansen (CA Bar No. 251471)  
28

1 Douglas M. Press (CA Bar No. 168740)Office of  
2 the County Counsel  
3 County of Santa Clara  
4 70 West Hedding Street, East Wing, 9th Fl.  
5 San José, CA 95110-1770  
6 lorraine.van\_kirk@cco.sccgov.org  
7 Telephone: (408) 299-5900

*Counsel for the County of Santa Clara*

8 Lisa S. Mankofsky\* (DC Bar No. 411931)  
9 Matthew Simon\* (DC Bar No. 144727)  
10 Center for Science in the Public Interest  
11 1220 L Street, NW, Ste. 300  
12 Washington, DC 20005  
13 lmankofsky@cspinet.org  
14 msimon@cspinet.org  
15 Telephone: (202) 777-8381

*Counsel for Center for Science in the Public  
Interest*

16 Adeline S. Rolnick\*  
17 Natural Resources Defense Council  
18 1152 15th Street NW, Ste. 300  
19 Washington, DC 20005  
20 arolnick@nrdc.org  
21 Telephone: (202) 513-6240

*Counsel for Natural Resources Defense Council*

*\* Admitted pro hac vice*

22 **LOCAL RULE 5-1(i) ATTESTATION**

23 I attest that I have obtained Samara Spence's concurrence in the filing of this document.

24 /s/ Steven A. Myers  
25 Steven A. Myers

**[PROPOSED] ORDER**

PURSUANT TO STIPULATION, IT IS SO ORDERED. The case shall remain STAYED through February 1, 2022, by which date the parties shall submit a joint status report proposing a schedule for further proceedings.

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. BETH LABSON FREEMAN  
UNITED STATES DISTRICT JUDGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28