

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA**

IRISH 4 REPRODUCTIVE HEALTH
et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES
et al.,

Defendants.

Case No. 3:18-cv-0491-PPS-JEM

**FEDERAL DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION TO HOLD IN
ABEYANCE FEDERAL DEFENDANTS’ MOTION FOR PARTIAL SUMMARY
JUDGMENT OR FOR EXTENSION OF TIME TO RESPOND**

Currently before the Court are two sets of motions—Federal Defendants’ and Notre Dame’s motions to dismiss Plaintiffs’ second amended complaint, and Federal Defendants’ motion for partial summary judgment on Plaintiffs’ arbitrary and capricious challenge to the Rules—that are potentially dispositive of this entire case. The motions to dismiss are fully briefed. Plaintiffs previously moved for a Rule 16 conference because they “intend[ed] to seek discovery.” Mot. Set R. 16 Conf., ECF No. 110. The Court denied that motion, noting that “[t]o the extent that Plaintiffs require additional time to respond to Defendants’ motions, Plaintiffs may move for an extension of the deadline, and to the extent that Plaintiffs are unable to present facts to support their opposition to Defendants’ motion for summary judgment, Plaintiffs may move under Rule 56(d) for appropriate relief.” Order, ECF No. 122.

Instead, Plaintiffs now ask the Court to indefinitely stay briefing on the motion for partial summary judgment by either holding it in abeyance, denying the motion without prejudice, or delaying Plaintiffs' deadline to respond to the motion until after the Court resolves the pending motions to dismiss. Pls.' Mot. Abeyance or for Ext. Time (Pls.' Mot.), ECF No. 130. Yet Plaintiffs offer no valid justification for such an indefinite delay.

Notably, Plaintiffs do *not* argue that they need discovery in order to respond to the motion for partial summary judgment, which they concede can be decided on the administrative record.¹ Instead, Plaintiffs argue that they need more time to review the administrative record. But they have already obtained a 30-day extension of their time to oppose the motion for partial summary judgment. Plaintiffs have identified no good reason for a further, indefinite extension of that deadline. Federal Defendants did not move to dismiss the arbitrary and capricious claim on which they have moved for partial summary judgment. Thus, fully briefing the motion for partial summary judgment at this point presents the more efficient route to resolve the entire case, especially given that resolution of the motion for partial summary judgment may simplify resolution of the motions to dismiss. Plaintiffs appear to agree that arguments overlap between the motions, *see* Pls.' Mot. at 5-6, and, accordingly it may aid the Court to consider both motions at once. (And, to the extent that the same issues arise in both motions, it would not be overly burdensome for Plaintiffs to brief them in both contexts.) With both motions briefed, the Court may resolve any overlap in the most efficient course as the Court sees fit—it need not require the parties to re-brief the summary judgment motion before deciding. Plaintiffs' request to

¹ *See* Pls.' Mot. 3 n.1 (“[T]he discovery that Plaintiffs anticipate goes to their constitutional claims and challenge to the Settlement Agreement, while the claim that the Rules are arbitrary and capricious, which is the lone subject of Federal Defendants’ Motion for Partial Summary Judgment, instead requires careful review of the massive administrative record in this APA case[.]”).

indefinitely postpone briefing is also in tension with Plaintiffs' earlier statements about their purported need to expeditiously reach the summary judgment stage in this litigation. *See, e.g.*, Plaintiffs' Position, Joint Status Report at 2, ECF No. 94.

I. Plaintiffs' Claimed Need for Additional Time Does Not Justify an Indefinite Stay.

Plaintiffs' primary argument is that they require additional time to review the administrative record, Pls.' Mot. 3-5, but that is not a reason to stay the deadline for Plaintiffs' opposition *indefinitely*. Federal Defendants provided Plaintiffs with the administrative record on October 8, 2020, so as of the filing of this opposition, Plaintiffs have already had the administrative record for more than a month. And, Plaintiffs appear to be well-resourced—their motion is signed by *fifteen* attorneys, and lead counsel are experienced attorneys at one of the biggest firms in New York. Moreover, Federal Defendants already consented to a 30-day extension of Plaintiffs' deadline to respond to the motion for partial summary judgment, providing Plaintiffs with yet more time to review the administrative record. If this existing 30-day extension is not sufficient for Plaintiffs to complete their review of the administrative record and prepare an opposition brief, then the appropriate remedy is a motion for an limited extension of time, not an indefinite stay or a stay tied to resolution of the motions to dismiss.

Plaintiffs' suggestion that Federal Defendants have somehow strategically delayed producing the administrative record, Pls.' Mot. 4-5, is spurious. Given that arbitrary and capricious claims are often decided at summary judgment on the administrative record, it is unsurprising that Federal Defendants produced the administrative record to the parties and the Court at the time they moved for summary judgment on Plaintiffs' arbitrary and capricious claims. This is the first time in this multi-year case that Federal Defendants have heard any objection from Plaintiffs about the timing of their access to the administrative record. Moreover, the administrative record has in fact

been previously available, because (as Plaintiffs are well aware) the administrative record for the Religious Exemption Rule and Moral Exemption Rule was previously produced to the various parties and publicly filed at the clerk's offices in three other ongoing cases challenging the Rules. Pls.' Mot. 4 & n.2. Plaintiffs could have requested the administrative record from the plaintiffs in these other cases or accessed it from the clerk's offices.

Finally, while Plaintiffs cite cases for the proposition that courts should resolve arbitrary and capricious claims on the full administrative record, rather than an incomplete one, Pls.' Mot. 5, Plaintiffs do not even assert that the administrative record here is incomplete, much less explain any purported deficiency.

II. Plaintiffs' Other Arguments Also Do Not Support an Indefinite Stay.

Plaintiffs also argue that staying briefing on the motion for partial summary judgment will promote efficiency. Pls.' Mot. 5-6. But Plaintiffs are wrong. As noted above, the Federal Defendants' pending motion to dismiss will not resolve the case in its entirety; the pending motion for summary judgment will afford the Court the opportunity to do so.

Plaintiffs argue that overlap between the arguments at issue in the pending motions to dismiss and the motion for partial summary judgment on the arbitrary and capricious claims militates in favor of a stay. Pls.' Mot. 6. Of course, to the extent that Plaintiffs have already addressed particular issues in opposing the motions to dismiss, it would not be unduly burdensome for them to do so again in the arbitrary and capricious context. And, because the issues are intertwined, resolution of Plaintiffs' arbitrary and capricious claims through the pending motion for partial summary judgment may simplify resolution of the pending motions to dismiss. Plaintiffs' own arguments suggest that the relevant issues are interrelated. *See* Pls.' MTD Opp'n 26, ECF No. 127 (arguing that Plaintiffs have stated a claim that the Settlement Agreement violates

the prior regulatory regime and noting that “the validity of th[e] [current] Rules remains an open question pending before this Court and two others” and “[i]f the Rules are vacated, as they should be, the Settlement Agreement will be contrary to the law then in effect”).

Finally, contrary to Plaintiffs’ suggestion that staying briefing on the Federal Defendants’ motion for partial summary judgment could result in consolidated summary judgment briefing later if the court denies the motions to dismiss, *proceeding* with briefing on the motion for partial summary judgment could just as easily result in the resolution of all claims at issue in this lawsuit without the need for further briefing. Ultimately, the better course is for the parties to finish briefing Federal Defendants’ pending motion for partial summary judgment, permitting the *Court* to decide the most efficient sequence to resolve the pending motions.

Dated: November 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Federal Defendants' Opposition to Plaintiffs' Motion to Hold in Abeyance Federal Defendants' Motion for Partial Summary Judgment or for Extension of Time to Respond was served on counsel for all parties using the Court's CM/ECF system on November 16, 2020.

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