IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHINATOWN SERVICE CENTER., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:21-cv-00331-JEB
	)	
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN SUPPORT OF VOLUNTARY REMAND, OR, IN THE ALTERNATIVE, A STAY OF PROCEEDINGS

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INTRODUCTION

Although they oppose Defendants' request for voluntary remand without vacatur, Plaintiffs do not actually seek to continue this litigation in the coming months. Indeed, all of the alternatives Plaintiffs propose—a voluntary remand *with* vacatur, a "stayed vacatur" of the challenged rule, and a stay of all proceedings pending the issuance of a notice of proposed rulemaking—entail ending or pausing this litigation while the United States Department of Health and Human Services ("HHS" or the "agency") considers a new proposed rule.

HHS seeks a remand to allow for further proceedings before the agency, which is engaged in ongoing rulemaking efforts that are expected to result in a new proposed rule no later than April 2022. In these circumstances, voluntary remand is a vital tool in Administrative Procedure Act ("APA") litigation that "preserves scarce judicial resources[,]" *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (citation omitted), by allowing the agency to "reconsider[] the rule" and exercise its "discretion to modify [its] policies and regulatory approaches" in a manner that "may ultimately resolve some or all of [P]laintiffs' objections to the current rule," *California v. Regan*, Case No. 20-cv-03005-RS, 2021 WL 4221583, at *1 (N.D. Cal. Sept. 16, 2021). Plaintiffs have offered no reason for the Court to do otherwise—in fact, they appear to agree that remand is appropriate.

Plaintiffs' principally argue for a voluntary remand with vacatur, but they have never moved the Court for such a remedy, let alone demonstrated that such relief is proper here. Plaintiffs' contention that any remand here must be accompanied by vacatur of the challenged rule—in a case where the administrative record has yet to be produced, there has not yet been briefing on Plaintiffs' claims, and the agency has not confessed error—is unavailing. HHS has given Plaintiffs "reason to believe that [it] will soon act to address their concerns." *Whitman-Walker Clinic, Inc. v. HHS*, Civ. A. No. 20-1630-JEB, 2021 WL 4033072, at *3 (D.D.C. Sept. 3, 2021). And it "is far from inevitable" that Plaintiffs will obtain the relief they seek by proceeding with this litigation. *Id*. at *2. Because the parties' disputes may well be resolved upon remand and further study, there is no need for the Court to address them at this juncture.

ARGUMENT

I. A REMAND WITH VACATUR IS UNAVAILABLE PRIOR TO PRODUCTION OF THE ADMINISTRATIVE RECORD AND BRIEFING ON PLAINTIFFS' CLAIMS.

Plaintiffs do not oppose remanding the challenged provisions of the Final Rule: Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160 (June 19, 2020) (the "2020 Rule") to HHS for further proceedings. But there is no basis for Plaintiffs' suggestion in their response brief that the Court set aside the challenged provisions of the 2020 Rule in conjunction with such a remand. When courts remand an agency action so that an agency may "reconsider its previous position," they ordinarily do so *without* vacatur where, as here, the agency has not "confess[ed] error." *Util Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (citation omitted); *see, e.g.*, *id.* at 437-38; *California*, 2021 WL 4221583, at *1; *WildEarth Guardians v. Bernhardt*, Civ. A. No. 20-56, 2020 WL 6255291, at *1-2 (D.D.C. Oct. 23, 2020); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 42 (D.D.C. 2013) *aff'd* 601 F. App'x 1 (D.C.Cir. 2015); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 26 (D.D.C. 2008); *see also Carpenters Indus. Council*, 734 F. Supp. 2d at 135-37 (granting remand without vacatur despite voluntary vacatur request and agency confession of error).

Judicial authority to vacate rules must be based on the standard of review set forth in the APA, under which the Court may only "set aside agency action" if it makes one of several enumerated determinations. 5 U.S.C. § 706. And the Court cannot make any of those determinations without first determining that it has jurisdiction to address the claim and then reviewing "the whole record or those parts of it cited by a party[.]" *See id.*; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The D.C. Circuit has explained that the APA includes these mandatory prerequisites because of "[t]he risk" of "circumvent[ion of] the rulemaking process[,] . . . thereby denying interested parties the opportunity to oppose or otherwise comment on significant changes in regulatory policy." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015). "If an agency could engage in rescission by concession" or parties to

agency proceedings could obtain vacatur by resort to equitable balancing alone, "the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter." *See id*.

Plaintiffs acknowledge that "this Court has not reached the merits of the APA claims in this case." Mem. of P. & A. in Supp. of Pls.' Resp. to Defs.' Mot. for Voluntary Remand, or, in the Alternative, a Stay of Proc., ("ECF No. 21") 6, ECF No. 21. And Defendants dispute that the Court has jurisdiction over Plaintiffs' claims or that Plaintiffs will prevail on the merits of those claims. The Court therefore "lacks the authority to grant [Plaintiffs'] request for vacatur without a determination on the merits." *Carpenters Indus. Council*, 734 F. Supp. 2d at 136. Thus, the Court has limited "options at this time[.]" *Am. Forest Res. Council*, 946 F. Supp. 2d at 42. The Court may either (1) immediately "grant [HHS's] motion for voluntary remand without vacatur[,]" (2) "deny [HHS's] motion and proceed" with this litigation immediately; or (3) stay proceedings and hold the remand motion in abeyance. *See id*. So even if Plaintiffs could eventually obtain vacatur, it would not be immediate.

Plaintiffs cite several cases where, *after summary judgment briefing* addressing the alleged deficiencies in an agency's action, courts weighed whether to grant remand with or without vacatur. *See* ECF No. 21 at 7; *Allied-Signal, Inc. v. U.S. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). But in those cases, courts had the benefit of both the agency record and the parties' briefs on the merits of the agency's decision. By contrast, here the agency requests voluntary remand early in APA litigation because it seeks to reconsider the challenged action. *See Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 4-5 (D.D.C. 2009). This Court cannot not vacate the challenged portions of the 2020 Rule when the parties have not even briefed whether those portions are legally deficient, nor have Defendants produced the administrative record on which any such determination must be made. In this situation, the lack of an administrative record or briefing means the Court "has no basis to vacate the agency action" at this point in the litigation. *Wildearth Guardians*, 2020 WL 6255291, at *1.

For the same reasons that vacatur is not available at this stage of the litigation, neither is Plaintiffs' request for a "Stayed Vacatur." ECF No. 21 at 18-20.

II. PLAINTIFFS HAVE NOT ESTABLISHED UNDUE PREJUDICE FROM PROCEEDING BEFORE THE AGENCY ON REMAND.

"In deciding a motion to remand, [courts] consider whether remand would unduly prejudice the non-moving party." *Util. Solid Waste*, 901 F.3d at 436. In moving for voluntary remand, Defendants argued that remand would not unduly prejudice Plaintiffs for several reasons. First, during the rulemaking process on remand, HHS intends to consider and evaluate the issues raised in the various legal challenges to the 2020 Rule, including arguments Plaintiffs make in this case. Defs.' Mot. for Voluntary Remand, or, in the Alternative, a Stay of Proc., ("ECF No. 20") 13, ECF. No 20. Second, Plaintiffs have not shown that this Court will award their requested relief, especially given that the Court previously determined that similar claims are not likely to succeed on the merits. *Id*. Third, remand does not deprive Plaintiffs of avenues for redress if there are specific entities allegedly causing them harm. *Id*. at 13-14. Finally, even if Plaintiffs were eventually successful on the merits, the disruption that would be caused by an interim change in the regulatory environment—that may well be overtaken following the agency's reconsideration of the 2020 Rule—counsels against vacatur. *Id*. at 14.

Throughout their discussion of the issue of undue prejudice, Plaintiffs lose sight of the relevant inquiry. The question is not whether Plaintiffs have alleged any harm stemming from the 2020 Rule, *see* ECF No. 21 at 14, 16, but rather whether proceeding before the agency would prejudice them in addressing any such harm as compared with proceeding before this Court. *See Am. Forest Resource Council*, 946 F. Supp. 2d at 42-47. In other words, because immediate vacatur of the Rule is not available, *supra* at 1-3, Plaintiffs cannot rely on the alleged benefits of immediate vacatur in suggesting they face undue prejudice from a remand. Properly framed, then, Plaintiffs do not face undue prejudice from proceeding before the agency on remand.

A. Because Denying Voluntary Remand Will Not Provide Plaintiffs Immediate Vacatur, Plaintiffs Will Not Be Unduly Prejudiced from Proceeding Before the Agency on Remand Instead of this Court.

Plaintiffs claim that they "continue to receive more requests for language assistance than before the 2020 Rule became effective." ECF No. 21 at 16. Even assuming that this alleged harm is fairly traceable to the 2020 Rule, Plaintiffs fail to address the most important reason Plaintiffs will not be unduly prejudiced by proceeding before the agency: HHS's reconsideration may well be a more expeditious and efficient means of achieving adjustment of agency policy than proceeding with this litigation.

Plaintiffs point out that "the rulemaking process is a lengthy and complex one" and that "concrete action at some future date is insufficient to stem the ongoing harm to Plaintiffs[.]" ECF No. 21 at 20. But it is far from clear that "[t]he duration of administrative proceedings, without more, can[] suffice to demonstrate" undue prejudice from proceeding before the agency. *See Anversa v. Partners Healthcare Sys.*, 835 F.3d 167, 178 (1st Cir. 2016). Of the "[c]ourts in this district" that have found "prejudice from the delay" of administrative proceedings, "delays in the administrative process [were] of three or more years[,]" *Cost v. Soc. Sec. Admin.*, 770 F. Supp. 2d 45, 50-51 (D.D.C. 2011), not the shorter time period at issue here where Defendants "have given Plaintiffs reason to believe that they will soon act to address [Plaintiffs'] concerns," *Whitman-Walker Clinic*, 2021 WL 4033072, at *3.

And "while Plaintiffs correctly point out that Defendants' rulemaking will not provide them immediate relief, neither would" denying Defendants' remand motion. *See Whitman-Walker Clinic*, 2021 WL 4033072, at *3. Proceeding with this litigation does not offer a more definite timeframe for setting aside the challenged provisions of the 2020 Rule (assuming, arguendo, Plaintiffs succeed on their claims) than reconsideration on remand. In *American Forest Resource Council*, 946 F. Supp. 2d 1, a court granted voluntary remand without vacatur of a critical habitat designation in light of the agency's reconsideration of the decision. The Court rejected the suggestion that remand before briefing on the merits is unduly prejudicial:

> As a practical matter, since briefing on the merits has not yet transpired, it would be many months before a decision on the merits could be rendered by the Court. The critical habitat designation would remain in force during that time regardless of the Court's decision today [to grant voluntary remand], and so the additional amount of time that [plaintiff] will be subject to the rule as a result of voluntary remand is actually less than [the time for the agency to complete reconsideration].

Id. at 47.

Recently, this Court recognized this principle in a related case where similarly situated plaintiffs are challenging the same provisions of the 2020 Rule. This Court acknowledged that "HHS's efforts to reconsider the 2020 Rule are underway" and that by the time the Court addressed Defendants' motion to dismiss, the parties briefed summary-judgment motions, and the Court issued a summary-judgment opinion, the "date at which the Government has indicated it plans to issue an NPRM may well have passed." *Whitman-Walker Clinic*, 2020 WL 4033072, at *3. Here, in addition to the time it would take for the parties to brief and the Court to rule on the merits, Defendants plan to raise threshold issues in a motion to dismiss Plaintiffs' Complaint. So the list of litigation events to take place before Plaintiffs might finally reach a decision on the merits is even longer. "In the interim, a substantial amount of the parties' and the Court's resources would have been expended and potentially for little gain." *Id*. Given the agency's ongoing reconsideration and request for voluntary remand, "'[a]dministrative reconsideration is [likely] a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts'" in this case. *See B.J. Alan Co. v. ICC.*, 897 F.2d 561, 562 n.1 (1990) (quoting *Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). That is particularly true given that one of the alternatives Plaintiffs endorse—a stay of this litigation while the agency considers a new proposed rule, *see* ECF No. 21 at 20—would further delay any final ruling on the merits.

Plaintiffs are wrong to suggest that proceeding before the agency instead of this Court would be futile. ECF No. 21 at 7. "[F]utility . . .[is] limited to situations 'when resort to administrative remedies would be clearly useless.'" *Tesoro Refining and Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (quoting *Commc'ns Workers of Am. v. AT&T Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994)). And here, "there has been no demonstration that the agency will certainly,

or even probably, deny relief." *Randolph-Sheppard Vendors of Am v. Weinberger*, 795 F.2d 90, 106-107 (D.C. Cir. 1986). To the contrary, HHS has "given Plaintiffs reason to believe that they will soon act to address their concerns." *Whitman-Walker Clinic*, 2021 WL 4033072, at *3.

B. This Court's Preliminary Opinion in *Whitman-Walker* is Relevant to the Undue Prejudice Analysis.

Plaintiffs attempt to distinguish their claims from the *Whitman-Walker* plaintiffs' claims. ECF No. 21 at 12-14. But they overlook the many reasons why, just as in *Whitman-Walker*, "their desired outcome—a declaration of the 2020 Rule's unlawfulness—is far from inevitable" if Defendants' remand motion were denied and this litigation were to proceed. *Whitman-Walker Clinic, Inc.*, 2021 WL 4033072, at *2. Even if there are some minor variations between the claims in the two cases, Plaintiffs do not deny that the *Whitman-Walker* plaintiffs claim that the limited English proficient ("LEP") discrimination provisions of the 2020 Rule are (1) contrary to Section 1554 and (2) arbitrary and capricious, which are the same claims that Plaintiffs bring here. So while this Court's preliminary opinion in *Whitman-Walker* "'does not constitute the law of [this] case,'" it "'can be persuasive[.]'" *See Whitman-Walker Clinic*, 2021 WL 4033072, at *2 (quoting *Belbacha v. Bush*, 520 F.3d 452, 458 (D.C. Cir. 2008)). That opinion "is relevant to the Court's" consideration of whether undue prejudice from granting remand exists and, if so, how to balance undue prejudice against the efficiency and agency autonomy interests favoring remand. *See id.*

Moreover, the distinctions Plaintiffs attempt to draw are not material to their chances of success. For example, in discussing their Section 1554 claim, Plaintiffs say that they "filed their complaint several months after the 2020 Rule's effective date, and thus, were able to set forth documented, concrete harms they experienced as a result of the rule change in their complaint, and how those harms erect 'unreasonable barriers,' and 'interferes with communications' in violation of Section 1554." ECF No. 21 at 13. But "[i]t is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made," *Tindal v. McHugh*, 945 F. Supp. 2d 111, 123 (D.D.C. 2013) (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)), not on events occurring

thereafter. Accordingly, if this litigation were to proceed and Plaintiffs were to attempt to rely on information that postdates the agency's decision to adopt the 2020 Rule, such an effort would constitute the "sort of Monday morning quarterbacking" that is improper in an APA case. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 547 (1978). Indeed, if Plaintiffs would like the agency to consider new evidence about the impacts of the 2020 Rule, the proper course is for them to submit that material for HHS's consideration—in the first instance—on remand.

Beyond the Court's decision in *Whitman-Walker*, Plaintiffs face substantial threshold issues that must be resolved before the merits can be addressed. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004) ("[T]he availability of a private cause of action directly against [covered entities] that discriminate in violation of [Section 1557] constitutes an adequate remedy that bars [their] case" entirely.); *Washington Legal Found. v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993) (quoting *Coker v. Sullivan*, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990)) (The APA "bar[s] suits where a plaintiff's *injury* may be remedied in another action, even if that remedy would have no effect upon the challenged agency action."); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 (1993); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-46 (1976).

Finally, Defendants demonstrated in their initial brief that an additional obstacle to vacatur exists even if this litigation were to proceed on a parallel track with the agency's reconsideration of the 2020 Rule and if Plaintiffs succeeded on their claims. Namely, there is a substantial likelihood that leaving the current Rule in place would ultimately be prudent because of the potentially disruptive consequences of an interim change on regulated parties (assuming that this litigation terminated before the agency issued the new final rule). ECF No. 20 at 14. Plaintiffs' primary response is to note that, in a different case, challenging a different rule, the Government decided not to maintain an *appeal* of a district court's final order and judgment—issued after full briefing on the merits. ECF No. 21 at 9-10. But the Government's decision in that separate matter has no bearing on whether it would, in fact, be disruptive to switch in short succession from the

2020 Rule, to the 2016 Rule, and then to any new rule HHS may promulgate.

C. Alternative Avenues Exist for Plaintiffs to Mitigate Any Alleged Injuries.

The only identifiable organizational harm Plaintiffs describe in their brief is the injury identified in the Complaint: they allegedly are receiving "requests for language assistance" at levels greater "than before the 2020 Rule became effective" because covered entities are allegedly not taking "reasonable steps to ensure meaningful access to [health] programs or activities by [LEP] individuals," 45 C.F.R. § 92.101(a). *See* ECF No. 21 at 16. As explained in Defendants' opening brief, Plaintiffs have alternative remedies for redressing these alleged harms, mitigating any finding of prejudice from proceeding before the agency on remand. *See* ECF No. 20 at 13-14. And although Plaintiffs claim such alternatives are "unfeasible and inefficient," ECF No. 21 at 18, they have failed to file a complaint with HHS about the allegedly injurious conduct of *even one* covered entity—not even the one specifically described in their Complaint.[1]

III. THE REMAINING CONSIDERATIONS IN THE VOLUNTARY REMAND ANALYSIS FAVOR REMANDING THE LEP PROVISIONS OF THE 2020 RULE TO HHS.

"[W]hether remand would unduly prejudice the non-moving party" is merely a "consider[ation]" when "deciding a motion to remand" in light of an agency's intention "to take further action with respect to the original agency decision on review." *Util. Solid Waste*, 901 F.3d at 436 (citation omitted). So even if the Court determines that Plaintiffs face undue prejudice from a remand, the degree and nature of Plaintiffs' prejudice must be balanced against Defendants' substantial "interests in the efficiency [and] administrative autonomy" advanced by remand for reconsideration of the challenged rule. *See Vt. Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 159 (D.C. Cir. 2012). Here, the interests furthered by a remand outweigh any possible prejudice to Plaintiffs.

[1] Moreover, Plaintiffs provide no support for their contention that redressing or substantially mitigating their alleged injury through enforcement of the 2020 Rule would require complaints against "each and every" covered entity, ECF No. 21 at 18, when a single complaint may help clarify the regulatory standard governing the conduct of similarly situated covered entities.

Plaintiffs do not dispute that the concerns driving HHS's thorough reexamination of the 2020 Rule are "substantial and legitimate." *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). They do not contend that HHS's remand "request is frivolous or in bad faith." *Id*. Nor do they dispute that remand would conserve judicial and party resources. And they do not dispute that granting remand preserves the integrity of the administrative process or that it serves important jurisprudential interests. Accordingly, the Court should remand the LEP Provisions of the 2020 Rule to HHS without vacatur.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion for voluntary remand without vacatur.

Dated: October 8, 2021

Respectfully submitted,

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