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 FOR A RULE 16 CONFERENCE

Plaintiffs' motion for a Rule 16 conference should be denied. Pls.' Mot. Set Rule 16 Conf. (Pls.' Mot.), ECF No. 110. This Court previously determined not to set a Rule 16 conference, and instead to set a briefing schedule for Defendants' motions to dismiss the second amended complaint. *See* Tr. of Aug. 6, 2020 Hearing at 19-20. Plaintiffs' motion provides no valid reason for the Court to depart from its earlier decision. Moreover, Federal Defendants' intent to move for partial summary judgment on Plaintiffs' arbitrary and capricious challenge to the Final Rules does not warrant a Rule 16 conference. Plaintiffs speculate that they may need discovery in order to respond to Federal Defendants' forthcoming motion. But any request for discovery is premature, and Plaintiffs have not met Rule 56's standard of "show[ing] by affidavit or declaration" that they "cannot present facts essential to justify [their] opposition" to Federal Defendants' forthcoming

motion. Indeed, Plaintiffs are unlikely to be able to make such a showing, even at the appropriate time, given that arbitrary and capricious claims are typically resolved on the administrative record.

A. Plaintiffs Offer No Reason to Disturb this Court's Prior Decision.

This Court previously determined not to set a pretrial conference while receiving Defendants' motions to dismiss the second amended complaint. Plaintiffs offer no reason to disturb the Court's prior decision. Although Plaintiffs cite generally to Federal Rule of Civil Procedure 16 and to Rule 16-1 of the Local Rules, they identify no provision in either that requires a pretrial conference at *this* juncture or constrains this Court's discretion to determine the best path forward.

Contrary to Plaintiffs' suggestion, Federal Defendants have not "changed course," Pls.' Mot. 2, from their position in the parties' joint status report of July 22, 2020. There, Federal Defendants stated that "a scheduling conference, including . . . for any discovery (which Defendants do not believe is appropriate in any event), would be premature and inefficient prior to the resolution of any dispute between Defendants and Plaintiffs concerning which, if any, of Plaintiffs' claims survive the Supreme Court's decision in *Little Sisters*." Joint Status Report 3, ECF No. 94; *see also id*. ("[T]he appropriate time for a scheduling conference would be after the resolution of any such supplemental briefing [regarding which of Plaintiffs' claims should be dismissed in light of *Little Sisters*].").

Federal Defendants continue to take the same position. Federal Defendants maintain that discovery is not appropriate in this case and, in any event, would be premature and inefficient prior to the Court's resolution of Defendants' motions to dismiss, which are currently being briefed. Plaintiffs appear to suggest that filing a motion for partial summary judgment is inconsistent with Federal Defendants' position, but Plaintiffs never explain why that is so, and there is nothing

inconsistent in Federal Defendants filing for partial summary judgment on claims that can be resolved on the administrative record. And Plaintiffs do not argue that Federal Defendants' partial summary judgment motion will be untimely, given that, barring a contrary court order, "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed. R. Civ. Pro. 56(b).

Once this Court has before it fully briefed motions to dismiss and the forthcoming motion for partial summary judgment, the Court can, naturally, resolve them in the most efficient course. Indeed, Federal Defendants' partial summary judgment motion on the arbitrary and capricious claim may *increase* efficiency by permitting the Court to resolve all of Plaintiffs' claims without the need to address disputes concerning any discovery.

While Plaintiffs hint that the press of business makes it burdensome for them to respond to both motions to dismiss and Federal Defendants' motion for partial summary judgment at the same time, Pls'. Mot. 3, the most practical solution to such a resource issue is a motion for an extension of time, not the creation of additional burdens on the parties and the Court by requesting a Rule 16 conference and prematurely opening disputes about the necessity of discovery. Federal Defendants, of course, remain open to any reasonable request by Plaintiffs for consent to an extension motion.

B. <u>In Any Event, Plaintiffs' Motion Does Not Meet the Standards of Rule 56 and Is Premature.</u>

As noted, Plaintiffs appear to request a Rule 16 conference based on their speculation that they may need discovery to respond to Federal Defendants' forthcoming motion for partial summary judgment. The Federal Rules of Civil Procedure provide a mechanism for such occasions, but Plaintiffs have not properly invoked it here. A party may seek relief under Rule 56(d), when it believes that it "cannot present facts essential to justify its opposition" to a summary

judgment motion. To do so, however, the party must "show[] by affidavit or declaration" that additional facts are "essential" to its opposition. Fed. R. Civ. Pro. 56(d). Plaintiffs have not even attempted to make that showing here.

In any event, it is unlikely that Plaintiffs could make such a showing, given that arbitrary and capricious claims under the APA are generally resolved on the administrative record rather than on some new record created before the reviewing court. *See, e.g., Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 856 (7th Cir.2009) ("In cases like this, where the decision of a federal agency is challenged under the APA, district courts are to review the administrative record to see how the agency reached its decision."); *Coal. to Protect Cowles Bog Area v. Salazar*, No. 2:12-CV-515, 2013 WL 595895, at *1 (N.D. Ind. Feb. 13, 2013) ("As a general rule, under the APA, review of an agency's decision is confined to the administrative record to determine whether, based on the information presented to the administrative agency, the agency's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."). Likely for this reason, Plaintiffs have focused on claims *other* than their arbitrary and capricious claim when adverting to their purported need for discovery.[1] *Cf.* Pls.' Mem. Opp'n Fed. Defs.' Mot. Stay 7 (arguing for discovery on Plaintiffs' claims that the Settlement Agreement is unlawful); *id.* at 10 (suggesting that discovery would be appropriate on Plaintiffs' Establishment Clause claims). Although Federal Defendants do not believe discovery would be appropriate as to any of Plaintiffs' claims, the Court need not address that issue now, as Federal Defendants have moved to dismiss Plaintiffs' other claims on the pleadings. As to the arbitrary and capricious claim that will be the

[1] Nor, contrary to Plaintiffs' implication, Pl.'s Mot. 2, do Federal Defendants "agree" that discovery would assist in the resolution of this case.

subject of Federal Defendants' forthcoming motion for partial summary judgment, it is clear that that claim can and should be resolved on the administrative record.

* * *

Because Plaintiffs have not provided any valid reason for the Court to reverse course on its decision to postpone any Rule 16 conference until after it resolves Defendants' motions to dismiss, and have not met the Rule 56 standard, the Court should deny Plaintiffs' motion.

Dated: October 9, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

/s/ Rebecca M. Kopplin _
REBECCA M. KOPPLIN
Trial Attorney (California Bar No. 313970)
JUSTIN M. SANDBERG
Senior Trial Counsel
MICHAEL GERARDI
CHRISTOPHER R. HEALY
DANIEL RIESS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20001
Telephone: (202) 514-3953
Facsimile: (202) 616-8202
Email: Rebecca.M.Kopplin@usdoj.gov

Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Federal Defendants' Opposition to Plaintiffs' Motion for a Rule 16 Conference was served on counsel for all parties using the Court's CM/ECF system on October 9, 2020.

/s/ Rebecca M. Kopplin
REBECCA M. KOPPLIN
Counsel for Federal Defendants