

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-491-PPS-MGG

Judge Philip P. Simon

**REPLY IN SUPPORT OF PLAINTIFFS'
MOTION TO SET A RULE 16 CONFERENCE**

Plaintiffs seek nothing more than the Court's guidance on the most efficient path forward in this case. Notwithstanding Notre Dame's opposition, Dkt No. 117, and contrary to Federal Defendants' suggestions that Plaintiffs are attempting to "disturb the Court's prior decision," Dkt No. 113 at 2, or file a premature motion under Federal Rule of Civil Procedure 56(d), *id.* at 3,¹ Plaintiffs merely requested a conference to set a schedule for discovery, review of the administrative record, and the filing of cross-motions for summary judgment.

Federal Defendants could have filed the administrative record at any point over the past two years. Instead, they chose to do so in the midst of briefing a second motion to dismiss that Federal Defendants themselves insisted was necessary. And rather than consenting to a conference that would allow this Court to set an efficient schedule for review of the record, discovery on claims that survive the motions to dismiss, and cross-motions for summary judgment, Federal

¹ In fact, Plaintiffs expressly reserved the right to file a motion under Rule 56(d) in their Motion to Set a Rule 16 Conference. Dkt. No. 110 at 3 n.1.

Defendants filed a motion for partial summary judgment on Count III of the Second Amended Complaint concurrently with filing the record, Dkt. No. 114, leaving Plaintiffs virtually no time to review the record and respond. Federal Defendants argue that Plaintiffs can file either a motion for an extension of time to answer their motion for partial summary judgment, Dkt. No. 113 at 3, or a Rule 56(d) motion, *id.* at 3-5, if they require more time to respond. Neither option solves the problem. Under Federal Defendants' approach, the parties would be forced to engage in motions practice over a prematurely filed partial motion for summary judgment that addresses only one of several claims, *and* the claims that survive the pending motions to dismiss would require a *second* round of partial summary judgment briefing. This sort of extended, piecemeal motions practice is hardly an efficient use of this Court's or the parties' resources, and it is precisely what Plaintiffs seek to avoid.

Moreover, reviewing the administrative record and responding to the Federal Defendants' motion for partial summary judgment while drafting an opposition to the motions to dismiss, Dkt. Nos. 108 and 109, is more burdensome than what Federal Defendants dismiss as the mere "press of business." Dkt. No. 113 at 3. As Federal Defendants told the Court prior to filing the administrative record, it "comprises approximately 800,000 pages of material, requiring approximately 20 gigabytes of electronic storage," and is so large that electronically filing it would have required "dividing the administrative record into approximately *one thousand* individual files and uploading each file." Dkt. No. 111 (emphasis in original).²

The Court should recognize the Federal Defendants' gamesmanship for what it is, and hold a conference for setting a schedule that efficiently manages this litigation, including the timeline

² Plaintiffs received an electronic copy of the administrative record on October 9, 2020. As of October 14, 2020, their e-discovery team was still processing the data to render it reviewable due to the size of its files.

for reviewing the administrative record and ensuring that it is complete, obtaining discovery related to the Establishment Clause and Settlement Agreement challenges if those survive dismissal,³ and cross-moving for summary judgment in a way that best conserves the resources of the Court and all parties.

Dated: October 14, 2020

Respectfully submitted,

/s/ Anne S. Aufhauser

Janice Mac Avoy (admitted *pro hac vice*)
Anne S. Aufhauser (admitted *pro hac vice*)
R. David Gallo (admitted *pro hac vice*)
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
One New York Plaza
New York, NY 10004
Telephone: (212) 859-8000
janice.macavoy@friedfrank.com
anne.aufhauser@friedfrank.com
david.gallo@friedfrank.com

Jeffrey A. Macey
Macey Swanson LLP
445 N. Pennsylvania Street, Suite 401
Indianapolis, IN 46204
Telephone: (317) 637-2345
jmacey@MaceyLaw.com

Counsel for all Plaintiffs

³ Plaintiffs do not at this time expect to seek discovery outside the administrative record in support of their claim that the Rules are arbitrary and capricious. Contrary to Federal Defendants' suggestion otherwise, Plaintiffs do not seek the Rule 16 conference for this purpose. Dkt. No. 113 at 3–4. Rather, Plaintiffs seek this Court's guidance in setting a schedule to manage this litigation in an efficient, timely, and reasonable manner.

Richard B. Katskee (admitted *pro hac vice*)
*Americans United for Separation of
Church and State*
1310 L Street, NW, Suite 200
Washington, DC 20005
Telephone: (202) 466-3234
katskee@au.org

Fatima Goss Graves (admitted *pro hac vice*)
Gretchen Borchelt (admitted *pro hac vice*)
Sunu Chandy (admitted *pro hac vice*)
Michelle Banker (admitted *pro hac vice*)
Lauren Gorodetsky (admitted *pro hac vice*)
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
Telephone: (202) 588-5180
fgraves@nwlc.org
gborchelt@nwlc.org
schandy@nwlc.org
mbanker@nwlc.org
lgorodetsky@nwlc.org

*Counsel for Plaintiffs Irish 4 Reproductive Health
and Jane Doe 1*

Emily Nestler (admitted *pro hac vice*)
Jessica Sklarsky (admitted *pro hac vice*)
Caroline Sacerdote (admitted *pro hac vice*)
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3600
enestler@reprorights.org
jsklarsky@reprorights.org
csacerdote@reprorights.org

*Counsel for Plaintiffs Natasha Reifenberg, Jane
Doe 2, and Jane Doe 3*