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

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

Plaintiffs respectfully move this Court for an order holding Federal Defendants' Motion for Partial Summary Judgment (ECF No. 114) in abeyance or denying the motion without prejudice, or in the alternative, for an extension of the deadline to respond until 60 days following the Court's decision on the pending Motions to Dismiss (ECF Nos. 108 and 109). This is the first request to hold this motion in abeyance and second request for an extension of time for this deadline. (The first requested interim extension was to allow the parties and the Court to resolve the issues presented here.)

The requested relief will promote the just and efficient resolution of this action by: (1) providing Plaintiffs adequate time to review the vast administrative record and then to prepare an effective opposition to Federal Defendants' Motion for Partial Summary Judgment that will be helpful to the Court in its own review of that record when deciding Federal Defendants' motion; (2) allowing this Court's decision on the pending Motions to Dismiss to inform briefing and

resolution of remaining claims; and (3) reducing piecemeal summary-judgment briefing and multiple opinions on the merits that would require substantial investments of judicial and party resources. Plaintiffs have conferred with Defendants, who informed Plaintiffs that they oppose this Motion.

BACKGROUND

On September 21, 2020, Federal Defendants and Defendant University of Notre Dame filed Motions to Dismiss Plaintiffs' Second Amended Complaint (ECF Nos. 108 and 109). In their memorandum (ECF No. 109-1 at 3 n.3), Federal Defendants mentioned for the first time, in a footnote, that they would release the administrative record *and* would concurrently file a Motion for Partial Summary Judgment for a *single* claim, while briefing on the pending Motions to Dismiss was ongoing. Plaintiffs have maintained for months that discovery and the production of the administrative record would assist in the resolution of this case and have been litigating this case for over two years. (ECF No. 94 ("Joint Status Report") at 2).

On October 9, 2020, Federal Defendants filed their Motion for Partial Summary Judgment (ECF No. 114) and manually filed the Administrative Record (ECF No. 115), which includes "approximately 800,000 pages of material, requiring approximately 20 gigabytes of electronic storage." (ECF No. 111 at 1). The files are so voluminous that Plaintiffs' eDiscovery team required over 5 days to process the documents just to render the files reviewable, all while Plaintiffs were preparing their opposition to the pending Motions to Dismiss.

On October 15, 2020, the Court denied Plaintiffs' Motion to Set a Rule 16 Conference, reasoning that it would be premature to set a schedule for discovery at this juncture but suggesting that Plaintiffs could move for an extension of the deadline to respond to the Motion for Partial

Summary Judgment or move under Rule 56(d) for an order deferring consideration of the motion to permit further factfinding (ECF No. 122).[1]

ARGUMENT

A. The requested relief is necessary to permit review of the full administrative record, as the APA requires.

"[J]udicial review under the 'arbitrary' or 'capricious' standard requires the court to examine the existing administrative record to assure that the agency had factual support for its decision." *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 811 (D.C. Cir. 1987) (citation omitted), *vacated on other grounds*, 846 F.2d 1532, 1535 (D.C. Cir. 1988) (per curiam); 5 U.S.C. § 706 (flush language) ("the court *shall* review the whole record or those parts of it cited by a party . . . ." (emphasis added)). Plaintiffs' careful and thorough review of the administrative record is therefore necessary to assist the Court in identifying and making sense of the material in that record so that the Court can ascertain whether the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency[] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

[1] Plaintiffs style this motion not as a Rule 56(d) motion but instead as a request to hold Federal Defendants' Motion for Partial Summary Judgment in abeyance or to extend the deadline for their response because: the 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; and the Court's rulings on the pending Motions to Dismiss may provide substantial guidance on the legal issues to be briefed and decided on summary judgment. Thus, the immediate issue at hand is not that Plaintiffs need discovery to justify their opposition to Federal Defendants' motion for summary judgment on the arbitrary-and-capricious claims under the APA—which is what Rule 56(d) anticipates—but, rather, that postponing briefing on that claim is necessary to permit Plaintiffs to review the vast administrative record just made available, and also to account for the imminent legal guidance on related issues.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* ECF No. 102 ("Second Am. Compl.") ¶ 182.

Federal Defendants decided to wait for *two years* in these proceedings before producing the administrative record in this case, despite their having provided the very same administrative record in three other cases in 2017 and supplemented that record in those cases in 2018 and 2019. *See Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017); *California v. Dep't of Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017); *Commonwealth of Massachusetts v. Dep't of Health & Human Servs.*, No. 17-cv-11930 (D. Mass. 2017).[2] The administrative record in those cases was not provided by the courts' CM/ECF system nor was it made available on PACER, and Plaintiffs here thus did not have access to it.

Federal Defendants finally provided that record in this case only during Plaintiffs' briefing on the motions to dismiss, filing it contemporaneously with a motion for partial summary judgment that is *expressly based on that very record*. This timing was particularly problematic given the size of the record, coupled with the fact that any response to the motion for partial summary judgment necessarily requires Plaintiffs first to conduct a detailed, careful review in order to provide an opposition that will assist the Court as it conducts its own required "thorough, probing, in-depth review" of the administrative record. *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 979 F. Supp. 771, 776 (N.D. Ind. 1996) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402,

[2] In *Pennsylvania v. Trump*, the administrative record was provided in several parts between November 20 and November 22, 2017, again on December 11 of that year, and supplemented on March 12, 2018, and January 7, 2019. No. 17-4530 (E.D. Pa.), ECF Nos. 23 & 47. In *California v. Dep't of Health & Human Servs.*, the administrative record was originally filed on November 30 and December 12, 2017, and was supplemented on March 7, 2018, and January 8, 2019. No. 17-cv-5783 (C.D. Cal.), ECF No. 53 & docket entry dated Dec. 12, 2017. In *Commonwealth of Massachusetts v. Dep't of Health & Human Servs.,* the administrative record was provided on December 11, 2017, and supplemented on March 5, 2018, and July 9, 2019. No. 17-cv-11930 (D. Mass), ECF Nos. 38, 86 & 108.

415 (1971)). Indeed, so voluminous and unwieldy is the record as produced by Federal Defendants that Plaintiffs have not thus far even had adequate opportunity to ascertain whether it is complete.

Courts "routinely," and quite properly, "exercise their discretion to decline to reach the ultimate question of whether the agency's decisionmaking process was arbitrary or capricious in the absence of the full administrative record," in order to avoid the "dangers associated with proceeding with judicial review on the basis of a partial and truncated record without the consent of the parties." *Banner Health v. Sebelius*, 797 F. Supp. 2d 97, 112, 113 (D.D.C. 2011) (internal quotations and citations omitted). This Court should likewise decline to require Plaintiffs to respond to Federal Defendants' Motion for Partial Summary Judgment without allowing adequate opportunity to review the extensive record in full. Holding the motion in abeyance, denying the motion without prejudice, or, at minimum, providing Plaintiffs' requested extension of time to respond will provide the requisite opportunity for review and for any potential motions practice over the sufficiency of the record, thus enabling the Court as efficiently as possible to consider and resolve Federal Defendants' request for partial summary judgment.

B. Plaintiffs' requested relief will further promote judicial economy by avoiding duplicative litigation of issues that the Court will resolve or clarify in deciding the Motions to Dismiss.

Allowing all parties the benefit of the Court's decision on the pending Motions to Dismiss before further briefing on summary judgment will conserve the resources of the parties and the Court, and will promote efficiency. Though the pending Motions to Dismiss do not seek dismissal of Plaintiffs' claim that the Rules are arbitrary and capricious, the Court's decisions on related questions presented by the Motions to Dismiss will likely inform resolution of Federal Defendants' Motion for Partial Summary Judgment on that claim. For example, Plaintiffs argued in opposition to the Motions to Dismiss that the Rules are unconstitutional because they do not alleviate a substantial government-imposed burden on religion and because they impermissibly harm third

parties. ECF No. 127 ("Pls.' Mem. in Opp."), at 16–20. Plaintiffs also argue that these same infirmities, among others, render the Rules arbitrary and capricious. *See* Second Am. Compl. ¶ 182(b), (c), (d). Yet in their Motion for Partial Summary Judgment, Federal Defendants raise, and again dispute, these points. Mot. Partial Summ. J., at 1, 9–14. Likewise, Plaintiffs argued in opposition to the Motions to Dismiss that RFRA cannot authorize or require the Rules. Pls.' Mem. In Opp., at 20–21. But Federal Defendants again contend in their Motion for Partial Summary Judgment that RFRA justifies the Rules. *E.g.*, Mot. Partial Summ. J., at 8, 15. Rather than preparing and submitting further briefing on these and other overlapping questions as though the Court has not considered them, it would preserve the resources of the parties and the Court to wait for the Court to issue its decision on the pending Motions to Dismiss and then to allow that ruling to guide and streamline further litigation on these issues.

Finally, waiting to brief Federal Defendants' Motion for Partial Summary Judgment until after the Motions to Dismiss have been resolved would afford the possibility of consolidating resolution of surviving claims into one summary-judgment proceeding. Because Federal Defendants have moved for summary judgment on only a single issue—whether the challenged regulations are arbitrary and capricious—that motion by definition cannot result in a final judgment of Plaintiffs' constitutional claims, nor can it resolve the separate challenges to the Settlement Agreement. Thus, all other claims that remain live following resolution of the Motions to Dismiss will still need to be litigated.

Accordingly, the requested extension would allow the Court at an appropriate point to consider ameliorating the squandering of judicial and party resources, by potentially consolidating what otherwise will be multiple, piecemeal rounds of judicial review.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an order holding Federal Defendants' Motion for Partial Summary Judgment in abeyance or denying the motion without prejudice, or in the alternative granting an extension of time to respond until 60 days after the Court issues its decision on the pending Motions to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 2, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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