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

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| IRISH 4 REPRODUCTIVE HEALTH *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al*.,<br><br>*Defendants*. | Case No. 3:18-cv-0491-PPS-MGG<br><br>Judge Philip P. Simon |

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

In urging this Court to "resolve the entire case" before Plaintiffs have reviewed the administrative record and before the parties have received the benefit of the Court's reasoning on the pending Motions to Dismiss (ECF Nos. 108, 109), Federal Defendants presume to know what the Court's decision will be and ignore the differences between a motion to dismiss and a motion for summary judgment. *See* ECF No. 133 at 2 ("Federal Defs. Opp."). Unlike Defendants' pending Motions to Dismiss, Federal Defendants' Motion for Partial Summary Judgment (ECF No. 114) relies heavily on the administrative record that they produced for the first time on October 9, 2020 (ECF No. 115) and raises numerous issues that will be informed—but importantly, not resolved—by the Court's decision on the Motions to Dismiss. Judicial and party resources are best spent reviewing the voluminous administrative record and incorporating the Court's decision

on the Motions to Dismiss before responding to any motions for summary judgment. Plaintiffs' requested relief serves these ends.

**A. Federal Defendants downplay the size of the administrative record and their own choice of timing in producing it.**

Federal Defendants attempt to shift onto Plaintiffs the blame for Federal Defendants' own decision not to produce the "approximately 800,000 pages of material" (ECF No. 111 at 1) until the day they filed their Motion for Partial Summary Judgment. Far from acknowledging that they could have produced the administrative record earlier, Federal Defendants assert that Plaintiffs should have obtained the administrative records in *Pennsylvania v. Trump*, *California v. Department of Health & Human Services*, and *Commonwealth of Massachusetts v. Department of Health & Human Services*. Fed. Defs. Opp. at 3, 4. Those administrative records were filed at different times and in piecemeal fashion in those other cases; and they were not electronically filed, just as the administrative record here was not, so they are not available through PACER.[1] Federal Defendants nonetheless suggest that Plaintiffs here should have (i) engaged in the self-help remedy of asking the plaintiffs in those other cases in other jurisdictions to provide the administrative records that the government produced to them, (ii) assumed that the records in those other cases are identical to what the government was required to certify and provide as the

[1] 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. Oct. 23, 2020), ECF Nos. 18, 23, 47, 74, 114 & 126. 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. *California v. Dep't of Health & Human Servs*., No. 17-cv-5783 (N.D. Cal. Nov. 4, 2020), ECF Nos. 53, docket entry dated Dec. 12, 2017, 148 & docket entry dated Jan. 8, 2019. 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. *Commonwealth of Massachusetts v. Dep't of Health & Human Servs.*, No. 17-cv-11930 (D. Mass Oct. 15, 2020), ECF Nos. 38, 86 & 108.

administrative record here, and (iii) have done all of that before now, in anticipation of a premature summary-judgment motion.

First of all, for Plaintiffs to have done any of that would have been inconsistent with the procedural posture of this case. When the administrative records in *those* cases were filed with the respective clerks' offices,[2] there were, *in this case*, pending motions to dismiss (*see*, *e.g.*, ECF Nos. 36, 58), or else this case was stayed—at Federal Defendants' own request.

But there is also a simpler and more fundamental defect in Federal Defendants' argument: It is their affirmative legal duty to compile the administrative record in an APA case, certify it as complete, and then place that "complete administrative record . . . before a reviewing court." *Natural Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975). It is not Plaintiffs' duty to do the government's work for it.

It is thus no surprise that Federal Defendants cite no case law for the proposition that Plaintiffs should have prematurely sought and reviewed administrative records not filed in this case. For the opposite is true. *See Silva v. Lynn*, 482 F.2d 1282, 1283-84 (1st Cir. 1973) ("the law requires production of the entire administrative record").

Nor is there any merit to Federal Defendants' suggestion (Fed. Defs. Opp. at 2) that Plaintiffs have had adequate time to review the administrative record here. The record is vast, exceeding 800,000 pages. So large is the administrative record that even if all the attorneys for Plaintiffs in this case had capacity to split up and review their shares at the pace of 50 pages per hour, it would still take approximately 1,067 hours *per attorney* to review. And mere review of

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[2] The most recent supplemental production of the administrative record in *Pennsylvania v. Trump* was on January 7, 2019, EFC Nos. 114 & 126; in *California v. Dep't of Health & Human Servs.*, on January 8, 2019, docket entry dated same, and in *Commonwealth of Massachusetts v. Dep't of Health & Human Servs*., on July 9, 2019, EFC No. 108.

the administrative record does not account for the time required to carefully and thoughtfully analyze the documents and draft a brief that would assist the Court as it conducts its own "thorough, probing, in-depth review" of that record, as required under the APA. *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, 415 (1971)). Thus, Federal Defendants' argument that Plaintiffs "do not even assert that the administrative record here is incomplete, much less explain any purported deficiency" (Fed. Defs. Opp. at 4) falls flat. As explained in our motion, Plaintiffs have not had sufficient time to fully review the administrative record even just to assess whether it appears to be complete. That is part of why Plaintiffs seek abeyance, dismissal without prejudice, or an extension with respect to the summary-judgment motion.

Additionally, Federal Defendants incorrectly assume (and attribute to Plaintiffs the assumption) that no discovery is necessary to resolve the Motion for Partial Summary Judgment. Opp. at 2. But that motion raises several arguments as to standing. Those issues cannot be resolved based on the administrative record because they implicate disputed factual questions about Notre Dame's grounds for limiting Plaintiffs' access to contraceptive coverage. That is yet another reason why it would be premature, unfair to Plaintiffs, and unhelpful to the Court to require Plaintiffs to brief their opposition to the motion now.

**B. The Court's decision on the pending motions to dismiss should inform summary judgment briefing and will promote judicial economy.**

While Plaintiffs need more time to review the administrative record, Federal Defendants incorrectly characterize this request as an "indefinite" stay. Fed. Defs. Opp. at 3. Plaintiffs do not request an indefinite stay; rather, we believe that an abeyance, denial without prejudice, or an extension tied to a decision on the Motions to Dismiss is appropriate *while the Motions to Dismiss are pending*, because the Court's decision on those pending motions should inform all parties'

briefing on motion(s) for summary-judgment, facilitate consolidation of any additional summary-judgment briefing, and avoid the duplication of effort that Federal Defendants seem otherwise to wish to impose on Plaintiffs and the Court. Federal Defendants also appear to agree with Plaintiffs that some of the issues implicated in the Motions to Dismiss "overlap" with the Motion for Partial Summary Judgment (Fed. Defs. Opp. at 2), yet they assume that their Motion to Dismiss will be fully granted and thus, together with their Motion for Partial Summary Judgment, resolve all claims (*id.* at 5). The most efficient and logical course of action, however, is not to presume to know the Court's ruling before it is issued, but instead to allow the parties to review that decision once it is rendered and then take it into account in preparing further briefing.

**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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