IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

JOINT STATUS REPORT REGARDING FURTHER STAY OF PROCEEDINGS

Pursuant to this Court's order of May 27, 2021 (ECF. No. 18), the parties submit this joint status report setting forth their positions on further proceedings.

1. **Plaintiffs Oppose a Continued Stay**

A. Plaintiffs Continue to Experience Ongoing Harm

Plaintiffs oppose a continued stay as it would harm them by delaying judicial review of the present case. The 2020 Final Rule continues to adversely impact Plaintiff organizations and the older adults with limited English proficiency (LEP) they assist. This harm is ongoing.

Initially, Plaintiffs supported a stay until July 16, 2021, for the limited purpose of obtaining clarity on the scope and timing of HHS' anticipated rulemaking proceeding. On May 10, 2021, HHS announced that it would reportedly address the gender-related provisions of the 2020 Final Rule implementing Section 1557, which were impacted by *Bostock v. Clayton County, GA*, 140 S. Ct. 1731 (2020). HHS, *"HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity"* (May 10,

2021).[1] Since then, HHS formally announced its intent to issue a Notice of Public Rulemaking (NPRM) no earlier than April 2022 that would "propose changes to the 2020 Final Rule implementing section 1557 of the [ACA], and conforming amendments to related HHS rules." Office of Management and Budget, Unified Regulatory Agenda, "*Nondiscrimination in Health Programs and Activities*" (Spring 2021).[2]

Plaintiffs are opposed to a continued stay for several reasons. First, HHS does not plan to issue a proposed rule until Spring 2022. The scope of this proposal remains vague and undefined, and does not specifically include addressing Plaintiffs' claims. When the parties conferred on July 8, 2021, Defendants would not commit to addressing the language access issues raised by Plaintiffs' suit.

Second, Plaintiffs' ongoing harm will go unabated if this Court permits HHS to engage in prolonged rulemaking without taking any intermediary action to address Plaintiffs' claims. Even if HHS addresses the issues raised by this suit within the scope of the promised proposed rule, any changes to the rule would likely not be implemented for well over a year, perhaps longer. To date, HHS will not commit to issuing an interim final rule to ensure that Plaintiffs are no longer faced with the flood of unaddressed translation service requests brought on by the 2020 rule change.

HHS also will not commit to undertaking any action short of rulemaking that would address Plaintiffs' and others' concerns regarding language access. As such, Plaintiffs and their clients will continue to experience harm if a stay is granted.

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[1] https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html.
[2] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0945-AA17.

The harm experienced by Plaintiffs flows from the inadequacy of notice and translation services across providers and health entities. For example, harm stems from inadequate translation of COVID-19 vaccine information on individual, local government websites, and that harm is significant and ongoing. Plaintiffs' typical clients are older adults with limited English proficiency who rely on their translation and interpretation assistance to timely and meaningfully understand, respond to, and participate in a myriad of health care and insurance communications with various health entities covered by the challenged rule. Complaint (ECF 1) ¶¶ 19-20, 69-71, 77-83. After the elimination of notice and tagline requirements, Plaintiffs experienced an unprecedented surge in demand for healthcare-related language translation services. This has strained their capacity to provide those and other services needed by their clients and to meet their related contractual obligations. Chinatown Service Center Decl. (ECF 1-6) ¶¶ 8-15; St. Barnabas Senior Center Decl. (ECF 1-7) ¶¶ 5-6, 14-16.

B. Judicial Review is Timely and Needed.

Judicial review is appropriate now because HHS has to date only promised to issue a vague and undefined *proposed* rule in April 2022. The risk that the rulemaking process will not satisfactorily address the issues raised by Plaintiffs but will simply stave off judicial review, combined with the likelihood of hardship to Plaintiffs, outweighs the agency's purported interest in delaying review.

Defendants' counsel has both indicated that Defendants may request a "voluntary remand" and suggested that Defendants may raise ripeness issues as grounds for a stay of proceedings. Neither suggestion has merit.

First, the promise of a voluntary remand without vacatur simply leaves the present case in indefinite limbo. It offers no concrete promise that the issues raised in the Complaint will ever be addressed.

Second, the case is ripe for review. To be sure, an impending new rulemaking proceeding that would address the issues raised in an appeal of an existing agency rule may warrant a stay of proceedings to conserve judicial resources. *See, e.g., Am. Petroleum Inst. v. E.P.A.,* 683 F.3d 382, 388 (D.C. Cir. 2012) (agency action not ripe for review where proposed rule marked a "complete reversal of course" on its rule); *see also Belmont Abbey Coll. v. Sebelius,* 878 F. Supp. 2d 25, 36 (D.C. 2012) (no hardship to party challenging rule where agency's Advance Notice of Public Rulemaking addressed the "exact concerns" complained of by plaintiff and *before* the existing rule's harm occurred).[3] But this is not such a case. On the contrary, HHS has announced only an *intention* to issue a proposed rule, the proposed rule would reportedly not be issued for nearly a year, and it is of undefined scope.

The harms flowing from the burdens imposed on Plaintiffs, moreover, are ongoing and outweigh Defendants' institutional interests in deferring review. The hardship to Plaintiffs is unmitigated by any commitment on HHS' part to make the necessary rule changes they requested or other subregulatory relief in the interim. *Cf. Belmont Abbey Coll.,* 878 F. Supp. 2d at 36 (no finding of hardship in light of agency's "promises and actions" in publishing plan to amend rule to address plaintiff's "exact concerns"). Holding this case in abeyance would simply prolong the hardship of these organizations and the individuals they serve.

[3] "They have published their plan to amend the rule to address the exact concerns Plaintiff raises in this action and have stated clearly and repeatedly in the Federal Register that they intend to finalize the changes before the enforcement safe harbor ends." *Id*.

Finally, where, as here, the questions presented by the Complaint are "purely legal," they are "presumptively reviewable." *National Ass'n of Home v. US Army Corps*, 417 F. 3d 1272, 1282 (D.C. Cir. 2005). This is simply not a case where the issues are not "fully crystallized or adopted in final form." *Ticor Title Ins. Co. v. FTC*, 814 F. 2d 731, 735 (D.C. Cir. 1987). Delaying review, as Defendants suggest, would not "crystallize" any issues for the Court, particularly where there is not a promise that some future rule would even address, much less narrow the issues for review.

C. Proposed Expedited Briefing

Plaintiffs propose expediting resolution of this action and conserving judicial resources by applying D.C. Circuit procedures applicable to direct appeals to that court under the Administrative Procedure Act (APA). Those procedures would consolidate the parties' jurisdictional and dispositive motions into a single briefing that could address standing and ripeness — should Defendants choose to raise them — as well as the merits. More specifically, under D.C. Circuit procedures, the agency record (or an index of its contents) is ordinarily transferred to the court 40 days after a petition for review is filed, the petitioner is required to address its standing in its opening brief — which also addresses the merits. *See* Circuit R. 28. This Court has broad discretion to address procedures for resolving APA cases before it since, after all it "sits as an appellate tribunal" when a final agency action is challenged under the APA. *PPG Indus., Inc. v. United States,* 52 F.3d 363, 365 (D.C. Cir. 1995).

There are sound reasons to apply this approach. First, the agency loses no rights to challenge Plaintiffs' standing or to raise ripeness. It can raise these issues in its brief as has happened in thousands of direct appeals of agency decisions to the circuit courts. Second, because this is an APA case, except in limited circumstances not present here, there is no

discovery. *Marshall County Health Care Authority v. Shalala*, 988 F. 2d 1221, 1226-27 (D.C. Cir. 1993). Third there is no burden on Defendants to produce the record. It has already been produced in another proceeding challenging the very same agency rule. *State of New York v. U.S. Dep't of Health & Human Servs.*, Civil Action No. 1:20-cv-5583 (S.D.N.Y filed July 20, 2020). Besides, the record, while extensive, is not complicated. It consists essentially of the proposed agency rule, the comments thereon and the agency's final rule. Fourth, and most importantly, it will conserve the Court's resources while expediting final resolution of the case. If the Court finds our case ripe and meritorious, relief would be months, rather than years away.[4]

Plaintiffs do not plan to seek discovery, as they view the case as presenting purely legal questions and the relevant record as consisting only of the proposed rule, the comments on the proposed rule, and the final rule. Appellate rules would require Defendants to file the record with the clerk within 40 days (Circuit R. 17) – a nominal burden given that the record has already been compiled in another case challenging the same rule.

To this end, Plaintiffs respectfully ask this Court to instruct the parties to file jointly, within one week, a proposed schedule for submission of the index of record below, Plaintiffs' motion for summary judgment, Defendants' responsive brief (in lieu of an answer to the complaint), and Plaintiffs' reply brief. Plaintiffs would agree to waive Defendants' answer and

[4] Defendants may argue that requiring it to brief the merits before a ruling on ripeness is unnecessarily burdensome. But the government simultaneously briefs standing, ripeness, and the merits hundreds of times a year, and the "burden" of doing so exists only in those cases where the agency mounts a successful challenge to timing (ripeness) or standing, and this burden is outweighed by the benefits of timely resolution of APA challenges. Moreover, unlike the situation in direct APA appeals to the circuit courts, the government has the benefit of reviewing a full blown complaint and not a bare bones petition for review that triggers the briefing schedule in the circuit courts.

to accept its response to Plaintiffs' motion for summary judgment in lieu of answer. Plaintiffs propose the following briefing schedule:

- Defendants certifies record to Court: 40 days from order or sooner
- Plaintiffs file motion for summary judgment: 45 days after record is certified
- Defendants files response, including any objections on jurisdiction or ripeness: 45 days after Plaintiffs' motion for summary judgment
- Plaintiffs file reply brief: 21 days after Defendants' response

Finally, if the Court decides to grant a stay, Plaintiffs would respectfully ask that the stay be limited in duration and subject to regular reports from Defendants' regarding the rulemaking process, including status of changes to the language access provisions. *See, e.g., Am. Petroleum Inst.,* 683 F.3d at 389.

2. Defendants' Position

On May 26, 2021, for differing reasons, the parties jointly moved to stay this proceeding until July 16, 2021. *See* ECF No. 18. The following day, the Court stayed the case until July 16 and ordered the parties to "submit a joint status report on that date." Minute Order (May 27, 2021). The Court did not indicate that the status report should include the parties' substantive briefing on the merits of continuing a stay, should the parties have significant disagreements on that matter.

This joint status report is not the proper vehicle for submitting what is essentially a memorandum of law in opposition to a further stay of proceedings. Defendants believe that Plaintiffs' position statement on further proceedings—seven pages of argument in opposition to a motion for a stay that is not currently pending before the Court—is, at minimum, in tension with the Local Rules and the Court's May 26, 2021 Order. Moreover, Plaintiffs did not provide Defendants with these seven pages of argument until July 15—just one day before the status report was due. Accordingly, Defendants respectfully request that the Court forgo consideration of Plaintiffs' arguments above regarding the propriety of a stay without giving Defendants a full and fair opportunity to respond.

Defendants believe this case is a proper candidate for voluntary remand or, in the alternative, a stay of proceedings, given Defendants' stated commitment to reconsider the challenged rule and engage in a new rulemaking to ensure that the Section 1557 regulations are consistent with the Biden Administration's commitment to equity and to expanding access to coverage and care for underserved communities. HHS is moving diligently and anticipates issuing a Notice of Proposed Rulemaking in early 2022. Accordingly, Defendants respectfully request that they be permitted to prepare and file a motion for a voluntary remand or, in the alternative, a stay of proceedings. In Defendants' view, the proper forum for Plaintiffs' legal argument above would be in opposition to such a motion from Defendants.

Defendants propose the schedule below for briefing their anticipated motion for a voluntary remand or, in the alternative, a stay of proceedings. Plaintiffs have indicated that, in the event the Court rejects Plaintiffs' proposal for further proceedings above, Plaintiffs do not object to Defendants' proposed briefing schedule below:

Event	Due Date
Defendants' motion for a voluntary remand, or, in the alternative, a stay of proceedings	August 18, 2021
Plaintiffs' opposition	Thirty days after Defendants file their motion for a voluntary remand, or, in the alternative, a stay of proceedings
Defendants' reply	Thirty days after Plaintiffs file their opposition

Should the Court disagree with Defendants' preferred approach, Defendants nonetheless respectfully disagree with Plaintiffs' proposed approach to further proceedings. In this case, the Administrative Record, like administrative records supporting many complex rulemaking proceedings, is a considerable size. As this Court has already recognized in a related case, Defendants have an important interest in avoiding being unnecessarily burdened with the production of the administrative record before the Court has had a chance to resolve jurisdictional and other threshold arguments raised in a motion to dismiss. Order, *Whitman-Walker Clinic Inc. v. U.S. Dep't of Health and Human Servs.*, No. 20-1630 (JEB), ECF No. 65 (D.D.C. Nov. 3, 2020);

see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1988) (quoting *Ex prte McCardle*, 7 Wall. 507, 514 (1868)) ("Without jurisdiction the court cannot proceed at all in any cause."). Thus, Defendants urge the Court to follow the ordinary course and permit Defendants to produce the Administrative Record and the parties to brief summary judgment only after the Court discerns its "statutory or constitutional *power* to adjudicate the case" in the context of a motion to dismiss. *See Steel Co.*, 523 U.S at 89.

In any event, Defendants respectfully request that the Court adopt Defendants' proposed schedule for further proceedings, and defer addressing additional scheduling issues until after it resolves Defendants' anticipated motion for voluntary remand or, in the alternative, a stay of proceedings. As this Court has recognized, in rare cases—like this one—where non-jurisdictional threshold issues like motions for a voluntary remand or stays pending the completion of parallel proceedings are at issue, courts should "avoid a jurisdictional analysis" and first "render a decision on [the] non-jurisdictional ground," especially where the jurisdictional concerns may be complex. *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 38 (D.D.C. 2019). Proceeding in this matter may minimize unnecessary briefing and administrative-record related burdens and therefore best serve judicial and party economy.

DATED: July 16, 2021

Respectfully submitted,

JUSTICE IN AGING

DENNY CHAN*
(CA Bar No. 290016)
dchan@justiceinaging.org
JUSTICE IN AGING
3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
Phone: (213) 375-3559
Fax: (213) 550-0501

REGAN BAILEY
(D.C. Bar No. 465677)
rbailey@justiceinaging.org
CAROL WONG

STINSON LLP

By: */s/HARVEY L. REITER*
HARVEY L. REITER
(D.C. Bar No. 232942)
harvey.reiter@stinson.com
MICHAEL TUCCI
michael.tucci@stinson.com
(SBN DC 430470)
M. ROY GOLDBERG
(D.C. Bar No. 416953)
roy.goldberg@stinson.com
STINSON LLP
1775 Pennsylvania Ave NW, Suite 800
Washington, DC 20006

(D.C. Bar No. 1035086)
cwong@justiceinaging.org
JUSTICE IN AGING
1444 Eye Street NW Suite 1100
Washington, D.C. 20005
Phone: (202) 289-6976

ALICE BERS*
(CT Bar No. 442203)
abers@medicareadvocacy.org
WEY-WEY KWOK*
(NY Bar No. 4004974)
wkwok@medicareadvocacy.org
CENTER FOR MEDICARE ADVOCACY
P.O. Box 350
Willimantic, CT 06226
Phone: (860) 456-7790
Fax: (860) 456-2614

(202) 785-9100

ANTHONY J. JARBOE*
(MO Bar No. 68746)
tony.jarboe@stinson
STINSON LLP
7700 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105
Phone: (314) 863-0800
Fax: (314) 863-9388

*Admitted *pro hac vice*

Attorneys for Plaintiffs

BRIAN M. BOYNTON
Acting Assistant Attorney General

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Liam C. Holland
LIAM C. HOLLAND
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530
Tel.: (202) 514-4964
Fax: (202) 616-8470
Email: Liam.C.Holland@usdoj.gov

Attorneys for Defendants