UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BAGLY, *et al.*,	)	
Plaintiffs,	)	
v.	)	C.A. No. 20-cv-11297-PBS
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR VOLUNTARY REMAND

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INTRODUCTION

"[W]hen an agency seeks to reconsider its action, it should move the court to remand or hold the case in abeyance pending reconsideration by the agency[.]" *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 n.3 (D.C. Cir. 1993) (quoting *Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962)). Accordingly, Defendant United States Department of Human and Human Services ("HHS" or the "agency") hereby moves the Court to remand the challenged provisions of the Final Rule: Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160 (June 19, 2020) (the "2020 Rule"), to HHS and to dismiss this action without prejudice.

HHS has completed an initial review of the 2020 Rule and has commenced a rulemaking proceeding to reconsider the rule and revise or replace it. HHS anticipates issuing a Notice of Proposed Rulemaking no later than April 2022. In light of this ongoing agency reconsideration, the Court should remand the rule to the agency without vacatur. A remand would avoid potentially unnecessary litigation in this Court over aspects of the 2020 Rule that would be reconsidered in the rulemaking proceeding on remand; it would conserve the parties' limited resources, allowing HHS to focus its efforts on the new rulemaking instead of this litigation; and it would best serve the interests of judicial economy. Through HHS's administrative rulemaking process, HHS will address the issues Plaintiffs raise in their Amended Complaint that remain subject to review in this case. Indeed, all members of the public—including Plaintiffs Boston Alliance for Gay, Lesbian, Bisexual and Transgender Youth; Callen-Lorde Community Health Center; Campaign for Southern Equality; Darren Lazor; Equality California; Fenway Health; Indigenous Women Rising; CrescentCare; and the Transgender Emergency Fund for Massachusetts—will, at a minimum, have the opportunity to submit comments on the proposed rule. HHS's new final rule therefore may resolve or moot some or all of the claims that remain subject to review in this litigation. And, if the new rule does not resolve Plaintiffs' concerns, Plaintiffs can challenge the new rule at that time. In any such challenge, the parties and court would benefit from reviewing the agency's new

rule and accompanying new administrative record, rather than continuing to litigate a rule that the agency is in the process of reconsidering.

Moreover, as the *Whitman-Walker* court recently recognized in denying a motion by similarly situated plaintiffs to lift a stay of proceedings, Plaintiffs will not be unduly prejudiced by a remand. *Whitman-Walker Clinic, Inc. v. HHS*, 20-cv-1630 (JEB), 2021 WL 4033072, at *2-3 (D.D.C. Sept. 3, 2021). HHS intends to consider and evaluate issues raised in the various legal challenges to the 2020 Rule during the rulemaking process, including arguments made by Plaintiffs in this case. There is little reason to believe that Plaintiffs are more likely to obtain the relief they seek before this Court—let alone obtain it more quickly—than by proceeding on remand before the agency. In any event, Plaintiffs have other avenues to address their risk of future harms, which are focused on the actions of third parties to this case. Plaintiffs have not demonstrated the type of undue prejudice from a remand that would justify a court's unusual intrusion into the ordinary administrative process of remand. Important principles of judicial and party economy, judicial restraint, and respect for the integrity of the administrative process outweigh any prejudice to Plaintiffs. In short, this Court should grant voluntary remand to the agency and permit the agency the opportunity to reconsider a challenged action with respect to a program it administers.

BACKGROUND

I. THE 2020 RULE AND THIS LITIGATION

On June 12, 2020, the HHS issued a Final Rule modifying regulations implementing Section 1557 of the Affordable Care Act ("ACA") ("Section 1557"). *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,248 (June 19, 2020) ("2020 Rule"). These modifications largely became effective on August 18, 2020. *Id*. at 37,160.

Many of HHS's changes reflect its decision not to proceed by rulemaking in certain respects. For example, the agency declined to include a definition of "on the basis of sex" by rule "[b]ecause of the likelihood that the Supreme Court will be addressing the issue" of whether sex

discrimination encompasses gender identity discrimination "in the near future." Nondiscrimination in Health and Health Education Programs or Activities, Proposed Rule, 84 Fed. Reg. 27,846, 27,857 & n.75 (June 14, 2019) (citing *Bostock v. Clayton Cnty.*, 723 F. App'x 964 (11th Cir. 2018), *rev'd*, 140 S. Ct. 1731 (2020)). HHS also repealed former 45 C.F.R. § 92.207's explicit examples of discriminatory practices in the provision and administration of health related insurance and replaced them with a general prohibition on discrimination reflecting the statutory text, repealed certain notice and tagline requirements and replaced them with a requirement that all covered entities take reasonable steps to ensure meaningful access to their programs and activities by limited English proficient individuals, and determined not to take a position by rule regarding whether Section 1557 encompasses discrimination on the basis of association or includes a private right of action.

On September 18, 2020, Plaintiffs filed an Amended Complaint challenging each of the 2020 Rule's modifications to HHS's Section 1557 regulations. *See* Am. Compl., ECF No. 18. All of Plaintiffs' claims are brought under the Administrative Procedure Act ("APA"). *See id.* ¶¶ 395-427. Specifically, Plaintiffs claim that each of the changes were either arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A), *id.* ¶¶ 395-414, 424-27, or contrary to constitutional right, power, privilege, or immunity in violation of 5 U.S.C. § 706(2)(B), *id.* ¶¶ 415-23.

On October 14, 2020, HHS moved to dismiss the Amended Complaint. Defs.' Mot. to Dismiss Pls.' Am. Compl., ECF No. 21. HHS argued that Plaintiffs lacked standing, that some claims were not ripe for review, and that certain claims should be dismissed for failure to state a claim. On August 18, 2021, the Court issued a Memorandum and Order deciding HHS's motion to dismiss. Mem. & Order, ECF No. 63. First, the Court concluded that Plaintiffs adequately alleged standing to challenge some aspects of the challenged rule, but not others. *Id.* at 3-4. Second, the Court exercised equitable discretion to dismiss Plaintiffs' challenges to claims that are subject to nationwide preliminary injunctions issued by other courts. *Id.* at 10. The Court also denied HHS's motion to dismiss Plaintiffs' constitutional claim, concluding that Plaintiffs had

plausibly alleged that aspects of the 2020 Rule violate Fifth Amendment equal protection principles. *Id*. at 42-44. Overall, the Court allowed claims challenging the following actions to proceed: (1) HHS's promulgation of the 2020 Rule's Section 1557 conscience provision, 45 C.F.R. § 92.6(b);[1] *see* Mem. & Order at 19-22;[2] (2) HHS's promulgation of 45 C.F.R. § 92.3(c),[3] *see* Mem. & Order at 22-25; and (3) HHS's replacement of an anti-discrimination provision formally codified at 45 C.F.R. § 92.207(b)(4) with a general prohibition on discrimination, *see* Mem. & Order at 25-28.

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[1] 45 C.F.R. § 92.6(b) states:

> Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by [Title IX and other statutory provisions], such application shall not be imposed or required.

The provision replaced a prior version (from 2016), which stated:

> Insofar as the application of any requirement under this part would violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required.

Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,466 (May 18, 2016) (adding 45 C.F.R. § 92.2(b)(2)).

[2] In its Memorandum and Order, the Court—quoting subsections (a) and (b) of 45 C.F.R. § 86.18—incorrectly stated that "[t]he 2020 Rule explicitly incorporated Title IX's abortion exemption ('Danforth Amendment') *into § 1557*." Mem. & Order at 19 (citing 85 Fed. Reg. at 37,243) (emphasis added). But the quoted provisions do not construe Section 1557. HHS's Title IX regulations are located at Part 86 of Title 45 of the Code of Federal Regulations. HHS's Section 1557 regulations are located at Part 92 of Title 45 of the Code of Federal Regulations. The two subsections that the Court quotes are from Title IX regulations and apply to education programs or activities receiving federal financial assistance. 45 C.F.R. § 86.11 (Application). The government does not understand Plaintiffs to challenge the 2020 Rule's modifications to HHS's Title IX regulations. *See* Am. Compl. ¶ 409(c) (addressing a purported "importing [of] a series of blanket exemptions *into Section 1557*") (emphasis added).

[3] 45 C.F.R. § 92.3(c) construes "health program or activity," 42 U.S.C. § 18116, to exclude "an entity principally or otherwise engaged in the business of providing health insurance . . . by virtue of such provision[.]"

II. THE BIDEN ADMINISTRATION'S SECTION 1557 RECONSIDERATION AND FORTHCOMING NOTICE OF PROPOSED RULEMAKING ("NPRM")

After the parties completed briefing on Defendants' motion to dismiss, on January 20, 2021, Joseph R. Biden, Jr. took office as President of the United States. That same day, the President issued Executive Order 13,988: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. 86 Fed. Reg. 7,023, 7,023 (Jan. 25, 2021) ("EO 13,988"). In section 1, EO 13,988 explained that "[u]nder *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended . . . along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." *Id.* Section 1 further explained that "[i]t is the policy of [the Biden] Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation." *Id.* Section 2 of EO 13,988 required "[t]he head of each agency" to "consider whether to . . . promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of th[e] order." *Id.* at 7,023-24.

On January 20, 2021, President Biden also issued Executive Order 13,985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. 86 Fed. Reg. 7,009, 7,009 (Jan. 25, 2021) ("EO 13,985"). In section 1, EO 13,985 explained that it is "the policy of [the Biden] Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality." *Id.* Section 1 further provided that "each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups." *Id.*

On and after January 20, 2021, new leadership also began arriving at HHS. Recognizing that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations," *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)), new HHS leadership began to reconsider the challenged rule on its own initiative. As explained in the attached declaration, HHS has now initiated a rulemaking proceeding to revise its regulations implementing Section 1557—a decision that is reflected in the Spring Unified Agenda of Federal Regulatory and Deregulatory Actions—and anticipates issuing a Notice of Proposed Rulemaking ("NPRM") no later than April 2022. Declaration of Robinsue Frohboese ("Frohboese Decl.") ¶¶ 7-13.

ARGUMENT

I. THE COURT SHOULD REMAND WITHOUT VACATUR THE PROVISIONS OF THE 2020 RULE SUBJECT TO REVIEW IN THIS CASE BECAUSE HHS IS RECONSIDERING THE CHALLENGED RULE AND WILL SOON ISSUE AN NPRM

Motions for voluntary remand are "commonly granted even when they are opposed." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013), *aff'd,* 601 F. App'x 1 (D.C. Cir. 2015) (granting voluntary remand without vacatur). Here, HHS moves for a voluntary remand (without vacatur) because it has substantial and legitimate concerns with the 2020 Rule and is reconsidering the rule. Remand would allow HHS to consider the issues raised in Plaintiffs' Amended Complaint in the context of its ongoing reconsideration of the rule, including Plaintiffs' assertions about the harmful effects of the rule and alleged deficiencies in the agency's justification for the rule. This motion should be granted in light of HHS's inherent authority to reconsider its own decisions, to ensure the integrity of the administrative process, and to conserve the Court's and the parties' resources.

A. Motions for Voluntary Remand are Generally Granted

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *State Farm*, 463 U.S. at 42, including the authority to correct or modify a prior rule by selecting a new policy in the range of those that lie "within the bounds of reasonable interpretation," *see City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). Further, an agency's regulations implementing a statute it administers are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted). "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. . . . [I]t is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Nat'l Ass'n of Home Builders*, 682 F.3d at 1043 (citation omitted).

Voluntary remand is proper where an agency requests "a remand (without confessing error) in order to reconsider its previous position." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)). In other words, remand should be granted "so long as 'the agency intends to take further action with respect to the original agency decision on review.'" *Id*. (quoting *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017)); *see Edward W. Sparrow Hosp. Ass'n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) (noting that motions for voluntary remand are "usually granted"). This practice is rooted in judicial deference to an agency's inherent authority to reconsider its own decisions, judicial respect for the integrity of the administrative process, and an interest in conserving the resources of courts and parties. *See, e.g.*, *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416–18 (6th Cir. 2004); *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73–74 (D.D.C. 2015).

"Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *see also Util. Solid Waste*, 901 F.3d at 436; *Limnia, Inc.*, 857 F.3d at 386–88 (refusing remand where agency had no intention to revisit challenged decision). In contrast, "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF USA*, 254 F.3d at 1029; *see also Bayshore Cmty. Hosp. v. Azar*, 325 F. Supp. 3d 18, 23 (D.D.C. 2018) (determining that "[s]ubstantial and legitimate concerns warrant a remand"); *Code v. McHugh*, 139 F. Supp. 3d 465, 469 (D.D.C. 2015) (concluding that "Defendant's concern . . . is 'substantial and legitimate' and certainly not 'frivolous or in bad faith'" and issuing remand) (citation omitted); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 25 (D.D.C. 2008) (concluding that an agency "has a substantial and legitimate interest in reconsidering its permit decision on remand based on a more complete factual record").

B. HHS's Substantial and Legitimate Concerns with the Provisions of the 2020 Rule Subject to Review Make Voluntary Remand Appropriate in this Case

An agency may seek remand because it wishes to consider further the governing statute, the procedures it followed in reaching its decision, or the decision's relationship to other agency policies and interests, in light of its authority to reconsider the wisdom of its policies on a continuing basis. *SKF USA*, 254 F.3d at 1028-30. HHS seeks remand for those reasons. Moreover, HHS is reconsidering the 2020 Rule based on substantial and legitimate reasons—its need to consider whether the 2020 Rule's provisions, including the provisions challenged by Plaintiffs here, are consistent with the current Administration's policies and reading of the statute—and has determined that additional consideration should be given to certain aspects of the rule through notice and comment rulemaking. *See* Frohboese Decl. ¶¶ 7-13. For example, HHS has a substantial interest in considering whether the 2020 Rule's construction of the scope of entities covered by Section 1557 unreasonably "perpetuate[s] systemic barriers to opportunities and benefits for . . . underserved groups[,]" including those served by the Plaintiffs in this case. *See id*. HHS must also determine whether the 2020 Rule's scope of covered entities and silence

with respect to categorical coverage exclusions is consistent with the Administration's policy as articulated in EO 13,988 that "people should be able to access healthcare . . . without being subjected to sex discrimination," including discrimination against individuals because of their sexual orientation or gender identity. *See id*. Voluntary remand is appropriate in light of these "substantial and legitimate concerns" with the 2020 Rule and HHS's rulemaking process to revise or replace the rule, anticipated to result in a notice of proposed rulemaking no later than April 2022. *SKF USA*, 254 F.3d at 1029 ("[I]f the agency's concern [with the challenged action] is substantial and legitimate, a remand is usually appropriate."); *see* Frohboese Decl. ¶ 7.

Remand would give HHS the opportunity to fully explore and address these issues, as well as the concerns of Plaintiffs and other stakeholders, through the administrative rulemaking process. Remand would also allow HHS to develop a new administrative record, which would benefit the Court and the parties if the new rule were subsequently challenged. *See Anversa v. Partners Healthcare Sys., Inc.*, 835 F.3d 167, 177-78 (1st Cir. 2016) (quoting *Frazier v. Fairhavn Sch. Comm.*, 276 F.3d 52, 61 (1st Cir. 2002)) ("'[F]acilitat[ing] the compilation of a fully developed record,' . . . 'is an invaluable resource for a state or federal court required to adjudicate a subsequent civil action covering the same terrain.'"). The new rulemaking proceeding would also allow a new agency decisionmaker to address these issues. "[T]his kind of reevaluation is well within an agency's discretion," *Nat'l Ass'n of Home Builders*, 682 F.3d at 1038 (citing *Fox Television*, 556 U.S. at 514-15), and the Court should allow it. *See Util. Solid Waste*, 901 F.3d at 436.

Moreover, permitting Plaintiffs' concerns to be addressed in the context of HHS's new rulemaking process also promotes important jurisprudential interests. "In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference' in an ongoing decision-making process." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87 (D.C. Cir. 2012) (quoting *Abbott Lab'ys. v. Gardner*, 387 U.S. 136, 148 (1967)); *see also Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989) ("Were the Court to intervene at this stage," despite a

pending rulemaking process, "we would deny the agency an opportunity to correct its own mistakes if any and to apply its expertise.") (quotation and alterations omitted); *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 38-39 (D.D.C. 2012) (concluding rulemaking challenge not ripe for review where "the Court has before it a challenge to final regulations that Defendants have promised to amend"). Allowing the administrative process to run its course here will let HHS "crystalliz[e] its policy before that policy is subjected to judicial review," *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) (citation omitted), and avoid "inefficient" and perhaps "unnecessary" "piecemeal review," *Pub. Citizen Health Rsch. Grp. v. Comm'r, FDA*, 740 F.2d 21, 30 (D.C. Cir. 1984) (citation omitted). It also "acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers[.]" *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516 (2002).

What is more, granting remand here promotes weighty institutional interests. "[T]he integrity of the administrative process must be [as] equally respected" as the integrity of the judicial process. *United States v. Morgan*, 313 U.S. 409, 422 (1941). Agencies and reviewing courts "are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *Id*. Remand "recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs Congress has charged them to administer." *McCarthy*, 503 U.S. at 145. In this case, "if the merits of [Plaintiffs'] claims are decided, open questions—for example," selecting a reasonable scope of covered entities if the Court concludes that the agency arbitrarily or capriciously construed the scope of entities covered by Section 1557 in the 2020 Rule —may "remain regardless of whether the" 2020 Rule's construction is vacated. *See Am. Forest Res. Council*, 946 F. Supp. 2d at 46-47. "Granting [HHS's] motion will allow the agency to revise the [2020 Rule] based on its reconsidered construction of [Section 1557], which the Court need not weigh in on in the first instance." *Id*. at 47.

C. Granting Remand Conserves Judicial Resources

Granting remand here also promotes judicial economy and conserves the parties' and the Court's resources. Courts "have recognized that '[a]dministrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts.'" *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). Allowing HHS to proceed with a new rulemaking allows it to address concerns with the 2020 Rule through the administrative process. HHS might resolve the parties' concerns through that process, potentially rendering unnecessary future litigation that could strain the Court and the parties' resources.

In addition, continuing to litigate this case will consume HHS's and Plaintiffs' resources, and those resources could be better spent on the rulemaking process. Because all of the issues that remain subject to review in this case are being re-evaluated in the new rulemaking, remand of these challenged provisions will allow HHS to focus its resources on the new rulemaking, with input from Plaintiffs and other interested stakeholders. *See* Frohboese Decl. Decl. ¶¶ 7-14. In particular, ongoing litigation could interfere with HHS's rulemaking, as HHS would have to prioritize pending litigation deadlines. *See Am. Forest Res. Council*, 946 F. Supp. 2d at 43 ("[F]orcing [agency] to litigate the merits would needlessly waste not only the agency's resources but also time that could instead be spent correcting the rule's deficiencies."); Frohboese Decl. ¶ 14. Indeed, "[i]f a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

HHS's rulemaking may fully address and resolve Plaintiffs' concerns or, at least, narrow the issues if Plaintiffs decide to challenge the new rule arising out of the rulemaking. Even if remand does not finally resolve all of Plaintiffs' claims (which it may), subsequent judicial review will turn on a new and different record that will necessarily alter the nature of this Court's review. Therefore, continuing to litigate the same issues that HHS may resolve though a new rulemaking

"would be inefficient," *FBME Bank*, 142 F. Supp. 3d at 74, while a remand would "preserve resources," *Whitman-Walker Clinic,* 2021 WL 4033072, at *4.

D. Remand Would Not Unduly Prejudice Plaintiffs

Remand also would not unduly prejudice Plaintiffs. "In deciding a motion to remand, [courts] consider whether remand would unduly prejudice the non-moving party." *Util. Solid Waste*, 901 F.3d at 436 (citing *FBME Bank Ltd.*, 142 F. Supp. 3d at 73). Plaintiffs will not suffer undue prejudice or harm from delay for several reasons: (1) HHS is considering the issues Plaintiffs raise in its reconsideration of the 2020 Rule, and there is no reason to believe that they are more likely to obtain the relief they seek more quickly in this litigation than by proceeding before the agency; (2) vacatur would likely be unwarranted in any event because the new rule may not be the same as the 2016 rule; vacatur as an interim change would be unduly disruptive to regulated parties; (3) especially given the nature of Plaintiffs' harm—an increased risk of future injury—remand does not deprive Plaintiffs of numerous avenues for seeking relief directly against a participant in the health system should a circumstance arise that expedites Plaintiffs' concerns.

First, Plaintiffs cannot show undue prejudice from delay because HHS may revise or replace the 2020 Rule in a way that resolves Plaintiffs' claims. For example, Plaintiffs claim that the 2020 Rule's provisions are arbitrary and capricious because the agency unwisely weighed the costs and benefits of the 2020 Rule. Am. Compl ¶ 411. But HHS is already undertaking a reweighing of the costs and benefits. Indeed, its reconsideration of the 2020 Rule is based on its substantial and legitimate interest in ensuing that any regulation in this area, including the 2020 Rule's provisions, advances the Administration's policy as articulated in EO 13,988 that "people should be able to access healthcare . . . without being subjected to sex discrimination," including discrimination against individuals because of their sexual orientation or gender identity. Frohboese Decl. ¶¶ 7-9, 11-13. Addressing "essentially the same issues in two separate forums is not in . . . the parties' best interests." *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 397 F. Supp. 3d 34, 40 (D.D.C. 2019) (quoting *Naegele v. Albers*, 355 F. Supp. 2d 129, 141 (D.D.C. 2005)).

To be sure, HHS cannot provide total clarity as to exactly how agency reconsideration will affect Plaintiffs' claims. But that is not surprising given HHS's obligation under the APA to take and consider comment on a proposed rule before finalizing it. In any event, Plaintiffs cannot show the type of futility—they cannot "demonstrat[e] that the agency will certainly, or even probably, deny relief"—necessary to establish *undue* prejudice from remand. *See Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 106-07 (D.C. Cir. 1986). "A pessimistic prediction or a hunch that further administrative proceedings will prove unproductive is not enough[.]" *See Portela-Gonzalez v. Sec'y of the Navy*, 109 F.3d 74, 78 (1st Cir. 1997). HHS is committed to thoroughly reexamining the 2020 Rule and to ensure that it is consistent with the Biden Administration's policies. *See supra* at 5-6, Frohboese Decl. ¶¶ 8-9, 12-13. Articulated in EO 13,988 and EO 13,985, these policies require HHS to prevent and combat discrimination on the basis of gender identity and to pursue a comprehensive approach to advancing equity for all, *see supra* at 5-6, Frohboese Decl. ¶¶ 8-9, 12-13. So HHS has "given Plaintiffs [good] reason to believe that [the agency] will soon act to address their concerns." *Whitman-Walker Clinic*, 2021 WL 4033072, at *3. And the upcoming rulemaking, in turn, may well resolve, or at least substantially narrow, Plaintiffs' claims. Speculation to the contrary is no basis for "permitting this action to go forward in parallel to the administrative proceedings," *Anversa*, 835 F.3d at 179, which would be inconsistent with the principle that "if the agency's concern is substantial and legitimate, a remand is usually appropriate," *SKF USA*, 254 F.3d at 1029. "If this were the case, then opposed motions for voluntary remand without vacatur would almost never be granted. Yet such motions are commonly granted even when they are opposed." *Am. Forest Res. Council*, 946 F. Supp. 2d at 44.

Moreover, "[t]he duration of administrative proceedings, without more, cannot suffice to demonstrate" undue prejudice from proceeding before the agency. *See Anversa*, 835 F.3d at 178. Given that the Notice of Proposed Rulemaking will be issued no later than April 2022, *see* Frohboese Decl. ¶ 7, "[t]he features of the ongoing process are every bit as consistent with a conclusion that the [rulemaking] is proceeding apace through a complex area of [policy] as with an inference of indefiniteness." *Anversa*, 835 F.3d at 179; *see also Mexichem Specialty Resins,*

Inc. v. EPA, 787 F.3d 544, 555 (D.C. Cir. 2015) (concluding that a "reconsideration proceeding [that] will take about four years, a duration commensurate with that of [agency's] prior efforts" at promulgating past similar rules did not "establish unreasonable delay in completing reconsideration"). There is no basis to conclude that the agency's reconsideration will be unreasonably prolonged or delayed in such a manner that remand would pose the type of undue prejudice on Plaintiffs required to deny remand.

In any event, proceeding with litigation does not offer a more definite timeframe. In *American Forest Resource Council*, 946 F. Supp. 2d 1 (D.D.C. 2013), a court granted voluntary remand without vacatur of a critical habitat designation in light of the agency's reconsideration of that decision. The Court frankly rebuked the notion that remand before briefing on the merits is unduly prejudicial:

> As a practical matter, since briefing on the merits has not yet transpired, it would be many months before a decision on the merits could be rendered by the Court. The critical habitat designation would remain in force during that time regardless of the Court's decision today [to grant voluntary remand], and so the additional amount of time that [plaintiff] will be subject to the rule as a result of voluntary remand is actually less than [the time for the agency to complete reconsideration].

Id. at 47. Less than two weeks ago, the *Whitman-Walker* court recognized this principle in a case where similarly situated plaintiffs are challenging the same provisions of the 2020 Rule. The Court acknowledged that "HHS's efforts to reconsider the 2020 Rule are underway" and by the time summary-judgment briefing is complete and the court issues an opinion the "date at which the Government has indicated it plans to issue an NPRM may well have passed." 2020 WL 4033072, at *3.

Like in *American Forest Research Council* and *Whitman-Walker*, briefing on the merits has not yet transpired here. *See id*. But those courts' reasoning applies with even greater force in this case given Plaintiffs' view that they "are entitled to discovery[,]" instead of proceeding on review of the administrative record. Local Rule 16.1(d) Statement, ECF No. 35 at 7. The government disagrees that Plaintiffs can make the showing necessary for discovery in this case, and resolution of that dispute would itself take time. If Plaintiffs are able to make the necessary

showing, discovery too will take substantial time. Given the agency's ongoing reconsideration and request for voluntary remand, "'[a]dministrative reconsideration is" likely a "more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts'" in this case. *See B.J. Alan Co.*, 897 F.2d at 562 n.1 (quoting *Pennsylvania*, 590 F.2d 1194).

Second, the remand itself is a substantial part—and sometimes the only part—of the relief typically provided when a litigant is successful on an APA claim. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation."); *see also INS v. Orlando Ventura*, 537 U.S. 13, 16 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (It "is simply not the law" that a court must vacate an agency action in violation of the APA). So remand would "be granted whether [HHS's] motion is granted now or [if Plaintiffs] prevail[ ] on the merits later." *Am. Forest Res. Council*, 946 F. Supp. 2d at 46.

Moreover, proceeding on parallel tracks of judicial review and agency reconsideration could be disruptive to regulated parties. If Plaintiffs were to prevail and obtain vacatur of the provisions of the 2020 Rule that remain subject to review in this case—such as the construction of the term "health programs or activities"—the prior version of the rule (from 2016) would be revived only for so long as it takes the agency to issue its new rule (assuming it had not already done so before any litigation concluded). Requiring regulated parties to transition from the 2020 Rule, to the 2016 Rule, and then to the agency's new rule would likely be disruptive. And the Court should avoid "the disruptive consequences of an interim change that may itself be changed." *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990); *see also Am. Forest Res. Council*, 946 F. Supp. 2d at 47 ("[R]eal possibility that

the rule's deficiencies can be addressed on remand . . . increases the likelihood that a [temporary] interim vacatur will be unduly disruptive.").

Third, Plaintiffs did not move for preliminary injunctive relief, signaling that, although they seek a global remedy to avoid a risk of a future injury, this is not a case requiring urgent judicial intervention. To be sure, this Court found that some Plaintiffs demonstrated a substantial risk that they may face harm at some point in the future sufficient to meet Article III standing requirements. Mem. & Order at 21-22, 25, 27-28. But meeting the requirements for Article III standing does not suffice to show undue prejudice from voluntary remand. If a circumstance arises that expedites Plaintiffs' concerns, remanding this action would not preclude them from seeking recourse to address it. "There is every reason to think [a] district court could timely resolve a case" if any Plaintiff is about to face imminent harm by a participant in the health system that they believe to be covered by Section 1557. *See McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 73 (1st Cir. 2003). Indeed, numerous others who have endured actual or imminent harm from alleged violations of Section 1557 have been able to successfully seek relief in district court. *See*, *e.g.*, *Fain v. Crouch*, 3:20-cv-0740, 2021 WL 2657274, at *1-5 (S.D. W. Va. June 28, 2021); *C.P. by and through Pritchard v. Blue Cross Blue Shield of Ill.*, --- F. Supp. 3d ---, ---, 3:20-cv-06145-RJB, 2021 WL 1758896, at *4-5 (W.D. Wash. May 4, 2021); *T.S. by and through T.M.S. v. Heart of ConDon, LLC*, 1:20-cv-1699-TWP-MG, 2021 WL 981337, at *9 (S.D. Ind. Mar. 16, 2021), *appeal filed*, No. 21-2495 (7th Cir. Aug. 16, 2021).

Finally, one court has already determined that similarly-situated plaintiffs are not likely to succeed on the merits of one of Plaintiffs' claims—a challenge to the 2020 Rule's replacement of the provision formally codified at 45 C.F.R. § 92.207(b)(4) with a general prohibition on discrimination. *See Whitman-Walker Clinic v. HHS*, 485 F. Supp. 3d 1, 46-49 (D.D.C. 2020). This is an additional factor weighing against undue prejudice from remand. "Without . . . a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration" advanced by a remand. *Cf. Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

For all these reasons—especially the speed at which the agency is moving forward with the rulemaking and the fact that the agency will address the issues that remain subject to review in this case promptly on remand—the Court should remand the rule to HHS without vacatur and dismiss this action without prejudice.

II. IN THE ALTERNATIVE, THE COURT SHOULD STAY PROCEEDINGS UNTIL APRIL 2022 AND HOLD THIS MOTION IN ABEYANCE

If the Court is disinclined to grant voluntary remand at this time, the Court should, at minimum, stay proceedings pending HHS's anticipated issuance of the NPRM. HHS anticipates issuing the NPRM no later than April 2022. Frohboese Decl. ¶ 7. By that time, Plaintiffs will have additional certainty about whether a remand is likely to address their concerns with the 2020 Rule. And to the extent the NPRM reflects a new proposed "change in agency policy or interpretation" stemming from ongoing reconsideration, "a remand to the agency [will be] required[.]" *SKF USA*, 254 F.3d at 1029-30.

CONCLUSION

HHS has identified concerns with the 2020 Rule provisions subject to review in this case, many of which are similar to those raised by Plaintiffs in their Amended Complaint. HHS intends to evaluate and address those concerns in its ongoing rulemaking proceeding. *See* Frohboese Decl. ¶¶ 7-13. Where, as here, HHS has committed to reconsidering the challenged action, the proper course is to remand the rule to HHS so it can address Plaintiffs' concerns through the administrative process. HHS respectfully asks the Court to remand the 2020 Rule, without vacatur, and to dismiss this case without prejudice, rather than to have the parties litigate a rule that may be replaced. In the alternative, the Court should stay the case pending HHS's issuance of a Notice of Proposed Rulemaking, which HHS anticipates issuing no later than April 2022.

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Respectfully submitted,

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