

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

THE RELIGIOUS SISTERS OF MERCY,
et al.,

Plaintiffs,

v.

ALEX M. AZAR, Secretary of the United
States Department of Health and Human
Service, *et al.*,

Defendants.

No. 3:16-cv-386

CATHOLIC BENEFITS ASSOCIATION,
et al.

Plaintiffs,

v.

ALEX M AZAR, Secretary of the United
States Department of Health and Human
Service, *et al.*,

Defendants.

No. 3:16-cv-432

MOTION TO EXTEND DEADLINES

Defendants respectfully move to extend until December 23, 2020 the deadlines to respond to the motion for partial summary judgment, or in the alternative, preliminary injunction (ECF No. 96), filed by Plaintiffs in *Religious Sisters of Mercy, et al. v. Azar, et al.*, No. 3:16-cv-386, and to respond to the partial motion for summary judgment and for permanent injunctive and declaratory relief (ECF No. 98), filed by Plaintiffs in *Catholic Benefits Association, et al. v. Azar, et al.*, No. 3:16-cv-432. Plaintiffs oppose this motion.

These consolidated proceedings remained stayed for over three years while the Department of Health and Human Services (“HHS”) engaged in a rulemaking to amend 2016 HHS regulations implementing Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (the “2016 Regulations”), which Plaintiffs challenge in this litigation. This Court stayed enforcement of the relevant portions of those regulations as to the Plaintiffs in this case, *see* ECF No. 23, 36, and a court in the United States District Court for the Northern District of Texas vacated the 2016 Regulations “insofar as the Rule defines ‘*On the basis of sex*’ to include gender identity and termination of pregnancy,” *see Franciscan Alliance, Inc. v. Azar*, No. 16-cv-108-O, ECF Nos. 175, 182 (N.D. Tex.) (“*Franciscan Alliance*”).

HHS completed its rulemaking on June 19, 2020. Among other things, the Final Rule “repeals the 2016 Rule’s definition of ‘on the basis of sex.’” *Id.* at 37,178. The Final Rule declines to replace the definition with a new regulatory definition, and instead merely cross-references Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.). *Id.* The Final Rule also makes clear that HHS’s enforcement of Section 1557 (to the extent it incorporates Title IX), must be constrained by the statutory contours of Title IX, which include explicit abortion and religious exemptions. *See, e.g., id.* at 37,218. Accordingly, the Final Rule amends the relevant regulations to provide that, “[i]nsofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by [a number of listed statutes, including Title IX] . . . or any related, successor, or similar Federal laws or regulations, such application shall not be imposed or required.” *Id.* at 37,245 (to be codified at 45 C.F.R. § 92.6(b)). The Final Rule became effective on August 18, 2020, *id.* at 37,160; however, portions of the Final Rule have been preliminarily enjoined by courts in the Eastern District of New York and the District of Columbia. *See Walker v. Azar*, --- F. Supp. 3d ---, 2020

WL 4749859 (E.D.N.Y. Aug. 17, 2020); *Whitman-Walker Clinic v. Azar*, --- F. Supp. 3d ---, 2020 WL 5232076 (D.D.C. Sept. 2, 2020).

Months after HHS completed the rulemaking process, on November 6, 2020, Plaintiffs moved, with Defendants' consent, to lift the stay of these proceedings. ECF No. 92. In their motion, Plaintiffs asked the Court to set a November 23, 2020 deadline for them to amend their complaints, and Plaintiffs agreed that Defendants response to the amended complaints should not be due until 30 days later, on December 23, 2020. The Court granted Plaintiffs' motion on November 9, 2020, giving Plaintiffs until November 23, 2020 to amend and setting a deadline of December 23, 2020 for Defendants to respond.

Plaintiffs filed their amended complaints on November 23, and additionally moved for partial summary judgment and for injunctive relief. *See* ECF No. 96; ECF No. 98. Pursuant to Local Civil Rule 7.1(A)(1), Defendants' oppositions to those motions are currently due by December 14, 2020. Defendants respectfully ask for an extension of the deadline to respond to those motions until December 23, 2020, to correspond with Defendants' deadline to respond to Plaintiffs' amended complaints, at which time Defendants intend to move to dismiss under Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Defendants make this request because it would be highly inefficient for Defendants to draft, and for the Court to consider, separate briefs that would necessarily address many of the same jurisdictional and merits arguments. Indeed, the "first and fundamental" question for any court is that of jurisdiction: "[t]he requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception," and therefore "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (internal quotation marks

omitted). Defendants' forthcoming motion to dismiss, due on December 23, 2020, will raise, *inter alia*, the threshold issue of whether Plaintiffs have standing to bring suit, including whether Plaintiffs have suffered any injury. The Court will necessarily need to consider those arguments before ruling on the merits. Thus, Defendants respectfully submit that the Court should grant a modest extension of time to respond to Plaintiffs' motions for summary judgment and injunctive relief, to align with the deadline for Defendants' motion to dismiss, so that Defendants can file a combined motion to dismiss and opposition to Plaintiffs' motions for summary judgment and injunctive relief.

Plaintiffs will not be prejudiced by the requested extension. As noted above, this case was stayed for over three years, and the portions of the 2016 Rule that Plaintiffs challenged were enjoined as to Plaintiffs in this case, vacated in *Franciscan Alliance*, and replaced by the 2020 Rule. Moreover, Plaintiffs themselves agreed as late as October 5, 2020 that the cases should remain stayed, and they agreed on November 6 that Defendants' response to their amended complaints should not be due until December 23. Their litigation of this case belies any suggestion that they will be harmed by the requested 9-day extension of time for Defendants to respond to their pending motions. Moreover, while Plaintiffs have asked for an injunction by January 20, 2020, they largely ignore that the 2016 Rule has been replaced by the Final Rule and, to the extent other courts have preliminarily enjoined portions of the Final Rule, this Court has already stayed enforcement of the 2016 Rule as to Plaintiffs, and that the stay of enforcement remains in effect. *See* ECF No. 36. There is simply no basis to conclude that Plaintiffs will "face crippling penalties" "[b]eginning on January 20," ECF No. 96-1 at 37, or any other reason that Plaintiffs could be harmed by the requested extension.

For the foregoing reasons, Defendants respectfully ask that the Court extend the current deadline for Defendants to respond to Plaintiffs' pending motions for summary judgment and for injunctive relief until December 23, 2020. In the alternative, if the Court is inclined to deny the instant motion, Defendants ask for an extension of the deadline until two business days after any denial of this motion.

Respectfully submitted this 10th day of December, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2020, the foregoing was served on all parties via ECF.

/s/ Bradley P. Humphreys

Bradley P. Humphreys

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[PROPOSED] ORDER

Upon consideration of Defendants' motion to extend until December 23, 2020 the deadlines to respond to the motion for partial summary judgment, or in the alternative, preliminary injunction (ECF No. 96), filed by Plaintiffs in *Religious Sisters of Mercy, et al. v. Azar, et al.*, No. 3:16-cv-386, and to respond to the partial motion for summary judgment and for permanent injunctive and declaratory relief (ECF No. 98), filed by Plaintiffs in *Catholic Benefits Association,*

et al. v. Azar, et al., No. 3:16-cv-432; any response by Plaintiffs; the entire record herein; and for good cause shown, it is hereby ORDERED.

Defendants' motion is GRANTED.

SO ORDERED.

Peter D. Welte, Chief Judge
United States District Court