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

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs*, v. ALEX M. AZAR II, Secretary of Health and Human Services, *et al.*, *Defendants*.	No. 3:16-CV-386
CATHOLIC BENEFITS ASSOCIATION, *et al.*, *Plaintiffs*, v. ALEX M. AZAR II, Secretary of Health and Human Services, *et al.*, *Defendants*.	No. 3:16-CV-432

STATUS REPORT

Pursuant to this Court's August 24, 2017 and December 9, 2019 Orders, Defendants hereby provide the following update on "all rulemaking proceedings initiated as to the challenged rule as well as any contemplated enforcement actions." ECF No. 56. *See also* 45 C.F.R. § 92.

As Defendants previously informed the Court, the Department of Health and Human Services (HHS) issued a Notice of Proposed Rulemaking (NPRM) on June 14, 2019 that proposes to amend the HHS regulations implementing Section 1557 of the Patient Protection and

Affordable Care Act, 42 U.S.C. § 18116, which are challenged in this litigation (hereafter, "current regulations"). *See* Nondiscrimination in Health and Education Programs or Activities, Proposed Rules, 84 Fed. Reg. 27,846 (June 14, 2019).

Among other things, HHS "proposes to repeal the definition of 'on the basis of sex' that had been adopted in [the current regulations]." *Id.* at 27,857. The proposed rule would not include a "definition of 'sex' for purposes of discrimination on the basis of sex in the regulation," *id.*, and instead would merely cross-reference Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) and thus prohibit sex discrimination "as defined by Title IX," *id.* at 27,861.[1] The proposed rule also would make 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." *Id.* at 27,864. The NPRM proposes making those exemptions explicit in the regulations as well, by amending the 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 27,892.

[1] Defendants note that, on April 22, 2019, the Supreme Court granted three petitions for writs of certiorari, raising the question whether Title VII's prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation. *See Bostock v. Clayton Cty.*, 723 Fed. Appx. 964 (11th Cir. 2018), *cert granted*, No. 17-1618 (U.S. Apr. 22, 2019); *Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018), *cert granted*, No. 17-1623 (U.S. Apr. 22, 2019); *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert granted*, No. 18-107 (U.S. Apr. 22, 2019). A decision by the Supreme Court on the definition of "sex" under Title VII will likely have significant ramifications for the definition of "sex" under Title IX. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992). The Supreme Court heard oral argument in these cases on October 8, 2019.

The comment period for the NPRM closed on August 13, 2019. Commenters submitted over 155,000 public comment submissions on the NPRM, which HHS is currently reviewing.

Defendants request an opportunity to continue their ongoing efforts to amend the current regulations. Defendants will continue to abide by this Court's preliminary injunction and will therefore not enforce the current regulations' prohibition against discrimination on the basis of gender identity or termination of pregnancy.

Defendants also note that, since Defendants' last status report, the United States District Court for the Northern District of Texas issued an order vacating the current regulations "insofar as the Rule defines '*On the basis of sex*' to include gender identity and termination of pregnancy," and remanded to Defendants for further consideration. *See Franciscan Alliance, Inc. v. Azar*, No. 16-cv-108-O, Order, ECF No. 182 (N.D. Tex. Nov. 21, 2019) (attached as Exhibit A). That the relevant portions of the current regulations have been vacated—at least pending any possible appeal by the defendants or the intervenors in that case—further weights in favor of maintaining the current stay here.

DATED: January 2, 2020

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

FRANCISCAN ALLIANCE, INC., et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00108-O**
	§	
ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion to Modify Final Judgment (ECF No. 178), filed November 12, 2019; State Plaintiffs' Response (ECF No. 180), filed November 20, 2019; and Private Plaintiffs' Response (ECF No. 181), filed November 20, 2019.

Defendants state that they "do not believe the Court intended to or, in fact, did vacate the Rule in its entirety, based on the Court's clear statement in the accompanying Memorandum Opinion and Order that it was vacating only 'the *unlawful portions* of the Rule,'" but "out of an abundance of caution, and to remove any doubt," they ask the Court to modify its Final Judgment (ECF No. 176), dated October 15, 2019. Defs.' Mot. 1, ECF No. 178 (emphasis in original) (quoting Mem. Op. & Order 23, ECF No. 175). Defendants ask the Court to specify that the Court vacates "the portion of the definition of '*On the basis of sex'* at 45 C.F.R. § 92.4 that refers to 'termination of pregnancy' and 'gender identity.'" Defs.' [Proposed] Order 1, ECF No. 178-1.

Neither State Plaintiffs nor Private Plaintiffs believe that modification of the Final Judgment is necessary given the Court's severability analysis in its Memorandum Opinion and

Order. *See* State Pls.' Resp. 1–2, ECF No. 180; Private Pls.' Resp. 1, ECF No. 181. However, State Plaintiffs and Private Plaintiffs agree that, "[i]f the Court is inclined to modify its judgment," the modification should clarify that the Court "vacates the Rule 'insofar as the Rule defines "on the basis of sex" to include gender identity or termination of pregnancy.'" State Pls.' Resp. 2, ECF No. 180; *see also* Private Pls.' Resp. 1, ECF No. 181 (agreeing that the State Plaintiffs' "proposed language . . . better captures the conclusion of the Court's summary-judgment order"). State Plaintiffs argue that this language avoids any potential confusion regarding the particular words in the Rule. *See* State Pls.' Resp. 2, ECF No. 180.

Having considered the Defendants' motion and Plaintiffs' responses, the **GRANTS in part** the motion and **MODIFIES** the Final Judgment (ECF No. 176), filed October 15, 2019, to confirm that, consistent with the Court's discussion in the accompanying Memorandum Opinion and Order (ECF No. 175), the Court vacates only the portions of the Rule that Plaintiffs challenged in this litigation. Specifically, the Court **VACATES** the Rule insofar as the Rule defines "*On the basis of sex*" to include gender identity and termination of pregnancy, and the Court **REMANDS** for further consideration. The remainder of 45 C.F.R. § 92 remains in effect.

SO ORDERED on this **21st day** of **November, 2019.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE