

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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FATMA MAROUF AND BRYN ESPLIN,)	
a married couple,)	
)	
)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 1:18-cv-378 (APM)
)	
XAVIER BECERRA, in his official capacity as)	
Secretary of the U.S. Department of Health and)	
Human Services, <i>et al.</i> ,)	
)	
)	
<i>Defendants.</i>)	
)	
_____)	

JOINT STATUS REPORT

Plaintiffs Fatma Marouf and Bryn Esplin, together with Defendants United States Department of Health and Human Services (“HHS”), Administration for Children and Families (“ACF”), Office of Refugee Resettlement (“ORR”), Xavier Becerra, in his official capacity as Secretary of HHS, JooYeun Chang, in her official capacity as Acting Assistant Secretary for ACF, and Cindy Huang, in her official capacity as the Director of ORR, and United States Conference of Catholic Bishops (together the “Parties”), file this joint status report. The Parties state as follows:

1. On November 23, 2021, the Court granted Federal Defendants’ Motion to Stay Summary Judgment Deadlines, ECF No. 95, and ordered the Parties to file by January 7, 2022, a joint status report with a proposed schedule for further proceedings in this matter. *See* Minute Order (Nov. 23, 2021).

2. The Parties do not agree on a schedule for further proceedings, and state their respective positions below:

Plaintiffs' Position

For the reasons stated in Plaintiffs' Response in Opposition to Federal Defendants' Motion to Stay Summary Judgment Deadlines (ECF 97), Plaintiffs continue to oppose a stay and request that the Court reinstate the briefing schedule. Even if Federal Defendants implement the changes as described, this will not remedy the constitutional violations or render moot Plaintiffs' requested relief. *See* ECF 97 at 2–3.

Additionally, continuation of the stay is not warranted under the reasoning of the Court's November 23, 2021 minute order. The Court stayed summary judgment briefing “[i]n view of Federal Defendants’ representation that changes to the relationship between Federal Defendants and USCCB are ‘imminent’” and would be completed “by the end of the year.” Minute Order (Nov. 23, 2021). That has not occurred, as made clear by Federal Defendants’ statements below and in the attached declaration by ORR Deputy Director, Ken Tota. Now, the proposed changes are “expected” to be implemented by April 1, 2022. As stated in Plaintiffs’ Response in Opposition to Federal Defendants’ Motion to Stay Summary Judgment Deadlines, speculation about proposed changes that have not been implemented does not support good cause for an indefinite stay of proceedings. *See* ECF 97 at 3. Continued uncertainty and indefinite delay prejudices Plaintiffs by delaying the “just” and “speedy” determination of their claims. *See* Fed. R. Civ. P. 1.

For these reasons, Plaintiffs request that the Court enter a scheduling order reinstating the summary judgment motion deadlines. Specifically, motions should be filed 30 days after the date of the order, responses due 30 days after the motions deadline, and replies due 21 days after the responses deadline.

In the event that the Court maintains the stay as requested by Federal Defendants, Plaintiffs agree to the schedule stated below for a 30-day discovery period following implementation of the proposed Program modifications by April 1, 2022. However, if the changes are yet again not implemented by April 1, 2022, the Court should enter a scheduling order reinstating the summary judgment motion deadlines. Specifically, motions should be filed 30 days after the date of the order, responses due 30 days after the motions deadline, and replies due 21 days after the responses deadline.

Federal Defendants' Position

The Court previously stayed summary-judgment briefing because “[t]he court and the parties will be better served by a record that reflects the present state of USCCB’s role in providing long-term foster care placement in the Unaccompanied Children and Unaccompanied Refugee Minor programs,” and because proceeding before then “risks the expenditure of the parties’ and court’s resources on issues that may become moot or modified by new developments.” Minute Order (Nov. 23, 2021).

That reasoning still applies today. Although it has taken slightly longer than anticipated to implement the consortium model—*see* Reply 3 (“Federal Defendants’ motion is premised on the understanding that the anticipated consortium will be established by the end of this year.”), ECF No. 98—that implementation is proceeding apace. The attached declaration confirms that all participants in the consortium have submitted the necessary paperwork, and that HHS is presently analyzing that paperwork. Ex. 1 (Tota Decl.) ¶ 13. USCRI has received a Cash and Medical Assistance (“CMA”) award for FY2022 activities, *id.* ¶ 10, which means that USCRI is already receiving ORR funding to plan and develop the consortium’s activities, *id.* ¶ 11. Accordingly, there will be no additional delay (to await funding) once the paperwork is completed. HHS expects that

USCRI will be performing its intake function on the ground in Texas in this fiscal quarter, *i.e.*, no later than March 31, 2022. *Id.* ¶ 16. USCRI may also begin performing those functions remotely, from its headquarters in Virginia, even before the Texas offices open. *Id.* ¶ 15. Accordingly, Federal Defendants propose that summary-judgment briefing continue to be postponed until after that time.

Plaintiffs urge that summary-judgment briefing begin *now*, before the consortium model is updated. But the “continued uncertainty” cited by Plaintiffs is overstated. As Mr. Tota’s declaration makes clear, the process is well underway and expected to be completed in short order. There is no reason to proceed with briefing issues that will likely become moot before that briefing is even complete.

Nor do Plaintiffs face prejudice warranting denial of another brief postponement. The consortium, once implemented, will streamline the case and eliminate the need to contest a model that no longer exists, while allowing briefing of a model that is fully operationalized. And the consortium will ensure that Plaintiffs are not turned away by any URM replacement designee in the Dallas-Fort Worth area, if they still desire to foster a child in that program.¹ That should be the priority, not litigating questions that will likely become moot before they are even fully briefed.

Should the Court agree to postpone briefing until after the consortium is in place, the Parties agree on the following schedule:

- Federal Defendants will supplement their discovery responses by **April 1, 2022**. Thereafter, the Parties will meet and confer on the parameters for a 30-day period

¹ Plaintiffs have been able to foster a child through the URM program for more than a year, since the Lutheran Immigration and Refugee Service (“LIRS”), which has no objection to working with same-sex foster parents, was named as an additional replacement designee in Texas. Plaintiffs’ counsel were first informed of this development through supplemental interrogatory responses served on July 13, 2020. LIRS’s designation was then confirmed through ORR deposition testimony given on September 28, 2020. Finally, counsel for USCCB and Federal Defendants explained this directly to Plaintiffs at their depositions on November 6, 2020.

of limited discovery into any URM program modifications disclosed through those supplemental discovery responses.

- Assuming that the Parties can agree on parameters without involving the Court, such limited discovery will be conducted from **April 15, 2022 to May 15, 2022**.
- Motions for summary judgment will be due on **June 15, 2022**.
- Oppositions to summary judgment will be due on **July 15, 2022**.
- Replies in support of summary judgment will be due on **August 5, 2022**.

In the unlikely event that the consortium is not implemented by March 31, 2022, Federal Defendants do not agree with Plaintiffs that summary-judgment briefing should commence automatically. The more prudent course would be to assess, at that time, *why* the consortium has not been implemented and when it is expected, if it still is. In that scenario, Federal Defendants propose that the Parties file by **April 8, 2022**, another joint status report with proposals for further proceedings.

USCCB's Position

USCCB agrees with the Federal Defendants' position.

Dated: January 7, 2022

Respectfully submitted,

/s/ David T. Raimer

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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Plaintiffs,)	
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XAVIER BECERRA, in his official)	
capacity as Secretary of the United States)	
Department of Health and Human)	
Services, <i>et al.</i> ,)	
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Defendants.)	
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_____)	

DECLARATION OF KENNETH TOTA

I, Kenneth Tota, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am employed in the position of Deputy Director within the Office of Refugee Resettlement (“ORR”), a component of the Administration for Children and Families (“ACF”) within the U.S. Department of Health and Human Services (“HHS”).

2. I have held the position of Deputy Director since 2008. In this capacity, my job duties include serving as the primary oversight of the ORR Refugee Program and Unaccompanied Refugee Minors (URM) program, putting forth initiatives and mandates from the ORR Director, providing funding to States and a network of non-profit organizations for services to refugees and other eligible populations. In my role of Deputy Director, I report directly to the ORR Director. I also served as Acting ORR Director in 2006, 2015, 2017, and 2021.

3. Prior to assuming my current position, I held the position of Chief of Operations of

ORR. In that position, I reported to the ORR Director and interacted with various senior staff providing operational support of and direction to programs. Before becoming Chief of Operations of ORR, I served as a Senior Program Specialist at the Immigration and Naturalization Service from 1998-2003 where I provided oversight to the Unaccompanied Children's Program and the program transfer from the U.S. Department of Justice to the U.S. Department of Health and Human Services.

4. While at HHS, I have worked to enhance funding and services for refugees by focusing on the most vulnerable populations, technical assistance and expanding intensive case management. I also worked to create an ORR division to focus on refugee health-related issues and developing partnerships in support of services for refugees.

5. I have a Bachelor's Degree in Political Science and a Master of Public Administration from American University in Washington, D.C.

6. From approximately 1988 to 1998, prior to my federal career, I was the Cuban/Haitian Program Coordinator for the United States Conference of Catholic Bishops ("USCCB") in Washington, D.C., and Miami, FL.

7. My testimony in this declaration is based upon my personal knowledge, information acquired by me in the course of performing my official duties and my review of HHS records, systems, and information maintained by ORR in the regular course of my employment.

8. On September 28, 2021, ORR confirmed and approved USCRI's role to administer the consortium model.

9. On November 16, 2021, USCRI submitted their Fiscal Year 2022 ("FY22") ORR-1 Cash and Medical Assistance (CMA) Program Estimates.

10. ORR issued CMA awards in the first quarter of FY22 to USCRI; a small portion of this funding could be allocated for the planning and development of the consortium model.

11. Based on the award, USCRI is already receiving ORR funding to plan and develop the consortium activities envisioned by the documents received from the consortium members (USCRI, USCCB, and LIRS) between October 29, 2021 and January 4, 2022.

12. This enables USCRI to begin the initial intake function of the consortium following ORR's review of the key documents and USCRI's successful implementation of the intake function.

13. The consortium members submitted documents in phases over the course of several months. While the documents have all been submitted as of January 4, 2022, ORR continues to review all documents and provide feedback to ensure that implementation can continue apace and the process runs as smoothly as possible.

14. Additionally, ORR continues to review USCRI's ORR-1 and ask follow-up questions to ensure that proposed costs are justified, and the implementation of the consortium will be adequate to meet the URM Program's needs.

15. ORR expects USCRI to start implementing the initial intake function from its headquarters in Virginia while they are securing office space and hiring staff locally in the Dallas/Fort Worth area.

16. ORR anticipates having the intake functions in place on the ground in Texas during the second quarter of FY22 (i.e., January 1 – March 31, 2022).

I declare under penalty of perjury that the foregoing is true and correct. Executed on
January 7, 2022.



Kenneth Tota
Deputy Director
Office of Refugee Resettlement
Administration for Children and Families
Department of Health and Human Services