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

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs,* v. THOMAS E. PRICE, M.D., 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. THOMAS E. PRICE, M.D., Secretary of the United States Department of Health and Human Service, *et al.*, *Defendants.*	No. 3:16-cv-432

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION
FOR VOLUNTARY REMAND AND STAY

HHS asks the Court to "stay this litigation" and "remand the Rule to HHS" so it can engage in further rulemaking proceedings. ECF No. 45 at 6. Plaintiffs have no objection to a stay, given HHS's stated desire to reconsider the Rule and the fact that the Rule is subject to a nationwide injunction in *Franciscan Alliance v. Burwell*, No. 7:16-cv-108, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016). But HHS's additional request for a "voluntary remand" is misguided. HHS has inherent authority to reconsider its Rule regardless of whether there is a remand or not. A voluntary remand

is also inconsistent with HHS's request that this Court retain jurisdiction and keep its stay of enforcement in place. Instead, the appropriate course is for the Court to hold this case in abeyance, keeping the stay of enforcement in place and requiring HHS to submit periodic status reports on its rulemaking process.

BACKGROUND

The Plaintiffs in Case No. 3:16-cv-386 are a Catholic order of religious sisters (the Religious Sisters of Mercy), two health care clinics operated by the Religious Sisters of Mercy (Sacred Heart Mercy Health Care Center in Alma, Michigan, and Jackson, Minnesota); a Catholic health system in North Dakota sponsored by the Sisters of Mary of the Presentation (SMP Health System); a Catholic University in North Dakota (University of Mary); and the State of North Dakota.

Plaintiffs challenge an HHS Rule that requires them to perform and pay for controversial and potentially harmful gender transition procedures—even when doing so would violate their religious beliefs and medical judgment. Complaint, ECF No. 1. The Rule also pressures them to perform and pay for abortions. The Rule imposes these mandates by adopting a sweeping new definition of the word "sex" to include "gender identity" and "termination of pregnancy," and by threatening Plaintiffs with massive financial penalties if they refuse to comply. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

On November 17, 2016, Plaintiffs filed a motion for a preliminary injunction, arguing that the new Rule violates the Administrative Procedure and the Religious Freedom Restoration Act by misinterpreting the term "sex," by refusing to incorporate statutorily mandated exemptions for religious organizations and for abortion, and by pressuring Plaintiffs to violate their religious beliefs. ECF No. 6. On December 30, this Court issued an order prohibiting HHS from enforcing

the Rule against Plaintiffs. ECF No. 23 (sealed); *see also* ECF No. 36 (clarifying the stay of enforcement). On December 31, in separate but related litigation, a federal district court in Texas issued a nationwide injunction prohibiting HHS from enforcing the challenged portions of the Rule. *Franciscan Alliance*, 2016 WL 7638311.

On January 23, 2017, this Court consolidated this case with Case No. 3:16-cv-432, which includes a challenge to the same Rule. ECF No. 37.

On May 26, 2017, HHS filed a motion asking this Court to stay both cases and voluntarily "remand" the Rule to HHS so that HHS can "reevaluate the regulation and address the issues raised in this litigation and in *Franciscan Alliance*." ECF No. 45 at 2. As part of its request, HHS acknowledged that the Court's order prohibiting HHS from enforcing the Rule should "continue in force." *Id.*

ARGUMENT

A. The case should be held in abeyance.

Federal agencies are always free to reconsider and revise their regulations, so long as the new regulation is permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). When an agency chooses to reconsider a rule, courts have discretion to hold challenges to the rule in abeyance pending completion of reconsideration proceedings. This practice is commonplace. *See, e.g.*, *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) ("the consolidated cases were held in abeyance pending reconsideration"); *New York v. EPA*, No. 02-1387, 2003 WL 22326398, at *1 (D.C. Cir. Sept. 30, 2003) (case "held in abeyance pending completion of respondent's administrative reconsideration process"); *see also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) ("[W]e can hold the case in

abeyance pending resolution of the proposed rulemaking, subject to regular reports from [the agency] on its status.") (collecting cases).

Here, a stay is appropriate because, as HHS has explained, it intends "to reconsider the challenged aspects of the Rule"; its reconsideration may "cure" the "legal errors" in the Rule; and the Rule would remain subject to a "preliminary injunction . . . during the impending regulatory proceedings." ECF No. 45 at 5-6. Beyond that, the court in *Franciscan Alliance* is considering whether to grant summary judgment and vacate the challenged portion of the Rule. Motion for Summary Judgment, No. 7:16-cv-108, ECF No. 82 (N.D. Tex. Mar. 14, 2017). In these circumstances, all parties agree that a stay of this case is appropriate.

B. HHS's request for a voluntary remand is misguided.

However, HHS has asked for more than just a stay; it has also asked for a "voluntary remand." A voluntary remand is typically granted when an "intervening event may affect the validity of the agency action" or when the agency wishes "to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028-29 (Fed. Cir. 2001). "The more complex question, however, involves a voluntary remand request associated with a change in agency policy or interpretation." *Id.* at 1029. If the agency does not confess legal error, the reviewing court "has considerable discretion," and the agency must come forward with "substantial and legitimate" concerns justifying a remand. *Id.* A "voluntary remand" also differs from a stay because it typically deprives a court of jurisdiction over the case. Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, at 33 (May 4, 2017) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963384) (cited in *Limnia, Inc. v. United States Dep't of Energy*, No. 16-5279, 2017 WL 2192943, at *6 (D.C. Cir. May 19, 2017)).

Here, HHS offers no argument for why a remand, over and above a stay, is necessary. It does not dispute that it has authority to reconsider its Rule even in the absence of a remand. *See, e.g.*, *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Salazar*, No. CIV.A. 11-284 RWR, 2012 WL 3757655, at *1 (D.D.C. Aug. 29, 2012) (remand is not "necessary to enable the federal defendants to review and reconsider the determination"). Thus, HHS can still "cure" the "legal errors" in the Rule without a remand. ECF No. 45 at 5.

HHS has not confessed legal error or identified any intervening events that affect the validity of its action. Nor does it cite any Eighth Circuit authority in support of its request for a remand. In fact, HHS asks the Court to keep its temporary stay of enforcement in place, ECF No. 45 at 6—and thus keep jurisdiction over the case—which is more consistent with a stay than a remand. Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, at 33 (May 4, 2017) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963384).

A stay, as opposed to a remand, is also consistent with what other courts have done in similar situations. *See Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008); *New York v. EPA*, No. 02-1387, 2003 WL 22326398, at *1 (D.C. Cir. Sept. 30, 2003); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012). And it is consistent with what the federal government *itself* has requested in recent cases. *See, e.g.*, Motion To Hold Cases in Abeyance at 2, 9 n.4, *W. Va. Coal Ass'n v. EPA*, No. 15-1422 (D.C. Cir. Mar. 28, 2017) (asking the court "to hold these cases in abeyance" so that the agency can "conduct[] its review of the Clean Power Plan" and "any resulting forthcoming rulemaking," and stating that the agency "is willing to provide status reports at regular intervals during the abeyance period").

Finally, a stay, as opposed to a remand, would prevent prejudice to the Plaintiffs that would result if HHS obtained a remand but never moved forward on its stated intention to reconsider the

Rule. To that end, in granting a stay, the court should order HHS to file status reports on the rulemaking process every 90 days. *See, e.g.*, *id.* (offering to provide status reports); *Am. Petroleum Inst.*, 683 F.3d at 390 (ordering status reports).

CONCLUSION

The Court should stay this litigation, keep the stay of enforcement in place, and order HHS to file status reports every 90 days.

Respectfully submitted this 9th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, the foregoing motion was served on all parties via ECF.

/s/ Luke W. Goodrich
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