

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

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

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS’ MOTION
TO STAY SUMMARY JUDGMENT DEADLINES**

Federal Defendants have known for years that their grantee United States Conference of Catholic Bishops (“USCCB”) systematically discriminates against Plaintiffs and other same-sex couples in their programs based on its religious beliefs. Plaintiffs filed this lawsuit in February 2018. Discovery has been complete for more than ten months. Just three months ago, the parties jointly requested the current briefing schedule. Now, less than two weeks before dispositive motions were due, Federal Defendants seek an indefinite delay based on unsworn, post-discovery assertions that they intend to alter their relationship with USCCB by some unspecified date. *See* Fed. Defs.’ Mot. to Stay Summ. J. Deadlines (“Mot.”), ECF No. 95.

The Scheduling Order “may be modified only for good cause,” Fed. R. Civ. P. 16(b)(4), which Federal Defendants have not shown. “The good cause standard requires the party seeking relief to show that the deadlines cannot reasonably be met despite its diligence.” *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 226 (D.C. Cir. 2011) (internal quotation marks

and alterations omitted). In addition to establishing diligence, the moving party “must also show that there is a lack of prejudice to the opposing party.” *Lovely-Coley v. District of Columbia*, 255 F. Supp. 3d 1, 7 (D.D.C. 2017). Because Federal Defendants have shown neither diligence nor lack of prejudice to Plaintiffs, their motion should be denied for lack of good cause.

Moreover, Federal Defendants’ proposal on its face would not cure the constitutional violations at issue here, or the harm caused to Plaintiffs, similarly situated individuals who also wish to foster a child under these federal programs, or program youth. Apparently, Federal Defendants intend to contract with and fund a “third-party entity” to identify and segregate same-sex couples from other program foster parent applicants in the Dallas-Fort Worth area and categorically direct them away from USCCB’s subgrantee and toward an alternative program grantee that purportedly would be willing to accept their applications—and to do so *precisely* on account of USCCB’s religious beliefs disfavoring same-sex couples. Yet Federal Defendants’ misconduct is not insulated because the discrimination is being filtered through a third-party grantee. The Constitution has never allowed the Government to do indirectly what it is forbidden to do directly. *See Norwood v. Harrison*, 413 U.S. 455, 463-67 (1973). The scheme (as it has been articulated) would reinforce and further sanction the constitutional violations, discrimination, and harm caused by Federal Defendants’ conduct, not cure or moot them. Foster parents who might serve the best interests of children in the care of USCCB’s subgrantee would remain unavailable to such children. Prospective foster parents who are same-sex couples would remain restricted in their participation in federally funded programs. And Federal Defendants would further stigmatize and denigrate same-sex couples by creating a scheme to segregate them and sanction their exclusion from full and equal opportunities with respect to critical governmental

functions, solely on account of a federally funded service provider's religious beliefs. Federal Defendants' assertions underscore the need to move forward with summary judgment briefing, rather than evince good cause for delay.

1. Federal Defendants have not asserted—much less shown—that the dispositive motions deadlines cannot reasonably be met despite their diligence. Accordingly, they have not shown the requisite diligence to support a finding of good cause. *See Capitol Sprinkler Inspection*, 630 F.3d at 226. Federal Defendants state that the Office of Refugee Resettlement (“ORR”) recently decided to restructure its relationship with USCCB, but they have made no showing that ORR could not have decided to alter its relationship with USCCB earlier. Nor have they shown that ORR's decision prevents Federal Defendants from meeting the Court's deadlines. Instead, Federal Defendants assert that adhering to the Scheduling Order *might* waste resources because some arguments “may” be mooted if Federal Defendants implement the changes described in their motion. Even based on the limited description provided, the described changes would not moot Plaintiffs' claims. USCCB's religious beliefs would continue to dictate that same-sex couples be treated less favorably than other similarly situated foster parent applicants under government programs.¹

¹ Assuming Federal Defendant eventually implement the changes described in their motion, Federal Defendants are free to argue that those changes render issues in the case moot. Indeed, that is the appropriate manner of placing the issue before the Court, not a filing based on extra-record, unsworn assertions that lack any real detail. In that event, Plaintiffs will respond at the appropriate time, with the benefit of better understanding what changes have been implemented and why Federal Defendants believe that certain issues are moot as a result. That course, however, is mere speculation at this point—based solely on a *suggestion* of mootness cloaked in a motion to stay—and seems supported by a strategy that any lawsuit might go away if one can stall long enough.

2. Plaintiffs would plainly be prejudiced by modification of the Scheduling Order, and Federal Defendants have made no showing to the contrary. Federal Defendants seek an indefinite stay, during which summary judgment filings would be delayed until Federal Defendants implement modifications that (they assert without detail or articulation) would “essentially moot[]” some of the parties’ arguments. Mot. at 4. There is no basis presented to engender further indefinite delay. Discovery is complete. The issues presented are ready for adjudication. Modifying the Scheduling Order now would prejudice Plaintiffs by indefinitely delaying the “just” and “speedy” determination of their claims. *See* Fed. R. Civ. P. 1.

3. The Court should restore the deadlines in the Scheduling Order. In the alternative, Plaintiffs request that the Court order Federal Defendants to file a Status Report no later than December 31, 2021, reporting what changes, if any, they have implemented. If Federal Defendants report any changes at all, the Court should then grant leave to allow Plaintiffs 20 days to conduct limited discovery into any changes to Federal Defendants’ relationship with USCCB, including, without limitation, a Rule 30(b)(6) deposition. Motions for summary judgment should then be due 20 days after the close of discovery.

CONCLUSION

For the above reasons, Federal Defendants’ Motion to Stay Summary Judgment Deadlines should be denied with instructions that the parties file their dispositive motions no later than ten days from the Court’s order.

Dated: November 16, 2021

Respectfully submitted,

By: /s/ Kenneth Y. Choe
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Plaintiffs' Response in Opposition to Federal Defendants' Motion to Stay Summary Judgment Deadlines with the Clerk of the Court through the ECF system on November 16, 2021. This system provided a copy to and effected service of this document on all parties.

Dated: November 16, 2021

Respectfully submitted,

By: /s/ Kenneth Y. Choe
Kenneth Y. Choe (pro hac vice)

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<i>Defendants.</i>)	

[PROPOSED] ORDER

Upon consideration of Plaintiffs’ Response in Opposition to Federal Defendants’ Motion to Stay Summary Judgment Deadlines, and good cause having been shown it is hereby **ORDERED** that Federal Defendants’ Motion (ECF No. 95) is **DENIED**.

It is further **ORDERED** that the parties shall file any dispositive motions no later than ten days from the signing of this Order.

Dated: _____

The Honorable Amit P. Mehta
United States District Judge