UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, et al., Plaintiffs, v. U.S. DEPARTMENT OF LABOR, et al., Defendants.	CIVIL ACTION NO. 18-cv-1747 (JDB)

PLAINTIFFS' MOTION FOR THE COURT TO ENTER PLAINTIFFS' PROPOSED BRIEFING SCHEDULE

For the reasons set forth in the attached Memorandum of Points and Authorities, Plaintiffs hereby move for the Court to enter Plaintiffs' proposed briefing schedule. Plaintiffs respectfully request that the Court grant Plaintiffs' proposed briefing schedule to resolve this matter as expeditiously as possible. In support of this Motion, Plaintiffs submit the accompanying Memorandum of Points and Authorities and Proposed Order.

Dated: September 7, 2018

Respectfully submitted,

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Memorandum of Points and Authorities in Opposition to Defendants' Motion to Stay Summary Judgment Proceedings or to Enter Defendants' Proposed Briefing Schedule and in Support of Plaintiffs' Cross-Motion to Enter Plaintiffs' Proposed Briefing Schedule

After Plaintiffs moved for summary judgment and the parties conferred in good faith but were unable to reach agreement on a briefing schedule, Defendants moved to stay briefing on Plaintiffs' motion and, in the alternative, enter their own proposed briefing schedule. *See* Defs. Motion to Stay Defs.' Response to Plaintiffs' Motion for Summary Judgment, or, in the alternative, to Enter Defs.' Proposed Briefing Schedule, ECF No. 35 ("Defs. Stay Memo").

Contrary to Defendants' assertions, summary judgment motions are especially appropriate and routine in challenges to agency action under the Administrative Procedure Act (APA). Plaintiffs have a strong interest in a prompt resolution of their summary judgment motion because the final rule at issue already enables a rollout of unlawful association health plans (AHPs), and Plaintiffs' proposed schedule would better achieve a prompt resolution on a timeline that is feasible for Defendants. Indeed, in a similar case challenging a major rule promulgated under the same statute, Defendants agreed to a similar schedule. Defendants' proposals extend briefing until an indeterminate date in the future, multiply briefing cycles, or unnecessarily delay briefing until January of next year at the earliest.

Plaintiffs thus oppose Defendants' motion and move the Court to enter Plaintiffs' proposed schedule, which is an accelerated version of Defendants' alternative schedule that more appropriately balances all parties' interests. Plaintiffs propose that: (1) Defendants file their combined motion to dismiss (or cross-motion for summary judgment) and opposition to Plaintiffs' motion for summary judgment on October 1, 2018, with the certified contents of the administrative record; (2) Plaintiffs file their consolidated reply in support of their summary judgment motion and opposition to Defendants' motion on October 29, 2018; and (3) Defendants file their reply in support of their motion on November 27, 2018.

BACKGROUND

On June 21, 2018, the Department of Labor (DOL) issued the final rule at issue in this case. 83 Fed. Reg. 28,912 (to be codified at 29 C.F.R. pt. 2510) ("Final Rule"). Plaintiffs filed their complaint in this action on July 26, 2018 and moved for summary judgment on August 23, 2018. *See* Complaint for Declaratory and Injunctive Relief, ECF No. 1 ("Compl."); Plaintiffs' Motion for Summary Judgment, ECF No. 31.

As detailed in Plaintiffs' earlier filings, the Final Rule seeks to permit loosely-affiliated small employers and individuals to participate in health plans that skirt core consumer protections mandated by the Affordable Care Act (ACA). Under the ACA, these critical consumer protections for the individual and small group health insurance markets. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, ECF No. 31-17 ("Pls. Mem. Supp. Summ. J.").

The Final Rule is in effect now. DOL designed the Final Rule to initiate a "prompt expansion of AHP availability," 83 Fed. Reg. at 28,953, with that expansion calculated to have

begun on September 1, the Rule's first applicability date, *id.* On that date, the Final Rule allowed fully insured AHPs—meaning AHPs that offer coverage free from the ACA's various federal requirements for individual and small group coverage, but that are insured by an insurance company—to operate under the Rule's terms. *Id.* at 28,954. On January 1, 2019, existing self-insured AHPs will be able to "expand availability to additional industries within a geographic location and/or to working owners without employees." *Id.* The third applicability date under the final rule is April 1, 2019, when "new self-insured AHPs' operations" can begin. *Id.*

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANTS' MOTION AND GRANT PLAINTIFFS' CROSS-MOTION BECAUSE PLAINTIFFS' PROPOSED SCHEDULE REASONABLY ACCOMMODATES ALL PARTIES' INTERESTS.

A. Plaintiffs Filed a Timely and Appropriate Motion to Achieve a Prompt Resolution of this Matter.

Plaintiffs' motion for summary judgment is timely, appropriate, and reflects routine practice. A summary judgment motion can be filed "at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). Indeed, Rule 56 was amended in 2009 to allow such a motion: "The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action." Fed. R. Civ. P. 56 Advisory Committee Notes (2009 Amendment). APA challenges to agency actions are routinely resolved on cross-motions for summary judgment or on contemporaneous briefing on motions for summary judgment and motions to dismiss, including in this district.[1] As this Court has noted, "[s]ummary judgment is

[1] *See Mahon v. U.S. Dep't of Agric.*, 485 F.3d 1247, 1253 (11th Cir. 2007); *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018) (Bates, J.) (resolving Government's motion to dismiss and plaintiffs' motion for summary judgment); *AARP v. Equal Employment Opportunity Comm'n*, 267 F. Supp. 3d 14 (D.D.C. 2017) (Bates, J.) (resolving cross-motions); *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 171 (D.D.C. 2017) (Howell, C.J.) (resolving cross-motions); *Kort v. Burwell*, 209 F. Supp. 3d 98, 101 (D.D.C. 2016) (Mehta, J.) (resolving

especially appropriate in cases such as this where the Court is called on to review a decision of an administrative agency." *Keystone Ship. Co. v. U.S.*, 801 F. Supp. 771, 776 (D.D.C. 1992) (citing 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2733 at 366–67 (2d ed. 1983)); *Sec. Indus. Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 399 (D.D.C. 2014) ("When an agency action is challenged, the entire case on review is a question of law, and only a question of law.") (internal citation and bracketing omitted). Indeed, "early summary judgment motion practice is routine in APA cases." *Clean Air Carolina v. U.S. Dep't of Transportation*, No. 17 Civ. 5779 (AT), 2017 WL 5157469, at *1 (S.D.N.Y. Sept. 14, 2017). Defendants cite several cases for the proposition that Plaintiffs' motion is premature, *see* Defs. Stay Memo. at 7–8, but none is on point, and many are not cases brought under the APA.[2]

Plaintiffs have a strong interest in prompt resolution in this matter. The Final Rule is designed to unleash harms to insurance markets during a time period that started on September 1—the Rule's first applicability date. Those harms will only grow after the Final Rule's second

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cross-motions); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 78–79 (D.D.C. 2007) (Bates, J.) (resolving cross-motions).

[2] In *Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n*, the parties' dispute already had been fully briefed on jurisdiction and the merits in the Court of International Trade (which the United States asserted had exclusive jurisdiction) before the plaintiffs filed an identical action in this Court. 804 F. Supp. 2d 1, 2, 3, 7 (D.D.C. 2011) (Bates, J.). This Court ultimately deferred to the Court of International Trade's jurisdiction, dismissing the action in this Court without prejudice. *Id.* at 7. *Cierco v. Lew*, 190 F. Supp. 3d 16 (D.D.C. 2016), involved *notices* of proposed agency action that had never been finalized. The Government in that case filed a motion to dismiss seeking a jurisdictional and merits dismissal (arguing among other things that there was no final agency action), and then later argued the case was moot after even the proposed actions were withdrawn. *Baginski v. Lynch*, 229 F. Supp. 3d 48 (D.D.C. 2017), was not an APA case. The Court there considered motions to dismiss on the merits under Rule 12(b)(6) and deferred the plaintiff's summary-judgment motion because the Government asserted resolution of the plaintiff's constitutional claims "may require further factual development," *id.* at 57. In contrast to those cases, this case is a straightforward challenge to a final rule under the APA of the sort routinely resolved on summary judgment.

and third applicability dates (January 1, 2019 and April 1, 2019). Many States relied on the ACA's individual and small market protections as intended by Congress, and have not enacted similar protections in their own statutes. *See* Pls. Mem. Supp. Summ. J. at 12–13 (citing declarations and pertinent statutes). That means that when these applicability dates occur, their insurance markets become immediately and increasingly vulnerable to disruption.

The District of Columbia, a Plaintiff here, is such a jurisdiction. "An actuarial analysis submitted to DOL during the comment period estimates that the District of Columbia's small group market will shrink by as much as 90 percent, and the individual market will lose 25 percent of its participants." Compl. ¶ 104. The Final Rule does not deny those extreme effects in the District of Columbia. 83 Fed. Reg. at 28,945 n.97. Once individuals and businesses sign up for these plans, which DOL expects to happen in large numbers, 83 Fed. Reg. at 28,948, the consequences and market disruption will be difficult to unravel in an orderly fashion. The Final Rule's expansion of AHPs likewise impairs Plaintiffs' sovereign and other interests, as set forth in the Complaint (¶¶ 100–07) and declarations filed by Plaintiffs.

B. Plaintiffs' Proposed Schedule Better Balances Concerns of Judicial Economy and Prompt Resolution With a Proposed Schedule That Is Feasible for Defendants.

Judicial economy strongly favors prompt resolution of this matter in the consolidated round of briefing Plaintiffs have proposed. APA cases are routinely resolved on cross-motions for summary judgment, as noted above, and the questions presented by Plaintiffs' motion for summary judgment are legal. *See, e.g., Univ. Med. Ctr. of Southern Nevada v. Shalala*, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999) (noting that whether agency action is arbitrary and capricious is a legal question that can be resolved on a motion for summary judgment).

Moreover, Plaintiffs' proposed schedule is both reasonable and feasible. Under Plaintiffs' proposed schedule, Defendants would oppose Plaintiffs' motion and file their own motion to

dismiss or cross-motion for summary judgment on October 1, with briefing completed by November 27—giving the Court ample time to consider the merits before the Final Rule's second applicability date, which is designed to enable a potential dramatic expansion of self-insured AHPs. Defendants would have the benefit of the full record in any opposition or cross-motion. Nothing in Plaintiffs' proposal bars Defendants from raising threshold issues. Such issues can be resolved in one round of briefing, not two, preventing unreasonable delay.[3]

Defendants cannot reasonably argue that adhering to Plaintiffs' reasonable proposal is infeasible. In recent challenges to a nationally-significant ERISA rule called the Fiduciary Rule that involved a voluminous record, DOL proceeded in such a fashion. *See* Joint Motion to Establish a Schedule for Summary Judgment Proceedings, ECF No. 44, *Chamber of Commerce of the United States of America, et al. v. Thomas E. Perez*, No. 16-cv-01476 (N.D. Tex. June 24, 2016). There, DOL agreed to produce an initial joint appendix of record material for use in cross-motions for summary judgment on the same time frame Plaintiffs request here—and for opening briefs twice as long as the memorandum Plaintiffs filed here. *See id.* at 2–5. That rulemaking involved a much more voluminous record than this rulemaking is likely to involve. *Compare Chamber of Commerce of the United States of America v. Hugler*, 231 F. Supp. 3d 152, 165 & n.34 (N.D. Tex. 2017) ("The DOL provided a ninety-day comment period on the three proposed

[3] Defendants highlight standing as a threshold issue, but Plaintiff States plainly have standing. The Final Rule says that States will bear an increased regulatory burden to combat fraud and abuse and otherwise regulate AHPs, and states: "The Department and State authorities both need time to build and implement adequate supervision and possible infrastructure to prevent fraud and abuse." 83 Fed. Reg. at 28,953–54. That injury alone is sufficient to establish Plaintiff States' standing. *See, e.g.*, *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093–94 (D.C. Cir. 2015). The Final Rule's vast expansion of AHPs under ERISA and accompanying preemption (particularly as to *non-insurance* laws, *see* Proposed Rule, 83 Fed. Reg. at 617) likewise harms the States as sovereigns. *See, e.g., Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 442–45 (D.C. Cir. 1989).

rules, during which it held a four-day public hearing in August 2015, and received over three thousand comment letters."), *rev'd on other grounds*, 885 F.3d 360 (5th Cir. 2018), *with* 83 Fed. Reg. at 28,914 (noting that DOL received more than 900 comments on the AHP rule). Indeed, in a challenge to the Fiduciary Rule filed in this district only one day after the Texas case was filed, Judge Moss converted the plaintiffs' motion for a preliminary injunction filed with the complaint into a motion for summary judgment and ordered the Government to file its response and possible cross-motion by July 8—only three months after the final rule was promulgated. The Government cross-moved for summary judgment on that date. *See* Docket, *Nat'l Ass'n for Fixed Annuities v. Perez*, No. 16-cv-1035-RDM (D.D.C. 2016).

Nor is it apparent why the record for this rulemaking cannot be compiled and indexed by October 1. In a notice and comment rulemaking, the administrative record is likely to consist of "the Notice of Proposed Rulemaking (NOPR), any studies or reports incorporated by reference in the NOPR, the comments received in response to the NOPR, and the final rule incorporating the statement of the basis and purpose of the rule." 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.6 at 1047 (5th ed. 2010 & Supp. 2018); *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 26 (D.D.C. 2009) ("The whole record of an informal rule-making case is comprised of comments received, hearings held, if any, and the basis and purpose statement.") (quoting *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975)). Indeed, the comments and petitions filed in connection with the Rule have been posted and numbered on the Department's website. There is no apparent reason Defendants cannot produce a certified index of the record by October 1.

In contrast to Plaintiffs' straightforward and feasible proposal to achieve prompt resolution of this important matter while simultaneously providing Defendants with adequate

time to respond, Defendants' proposals impair Plaintiffs' interest in a prompt resolution and the Court's interest in judicial economy. Defendants' proposal to stay summary judgment briefing introduces multiple rounds of briefing and indeterminate delay unnecessarily while a rule DOL expects to affect millions of people and large portions of the economy goes into effect.[4] Moreover, although Defendants assert that the record will not be relevant to their motion to dismiss, that contention flouts Local Rule 7(n)(1)'s requirement that Defendants "file a certified list of the contents of the administrative record. . . simultaneously with the filing of a dispositive motion." Moreover, Defendants' representation to that effect could not bind the Court, whose review of subject matter jurisdiction may consider matters outside the pleadings, such as the administrative record or affidavits filed by Plaintiffs. *AARP v. U.S. Equal Emp't Opportunity Comm'n*, 267 F. Supp. 3d 14, 19 (D.D.C. 2017) (Bates, J.); *Alliance for Democracy v. Fed. Election Comm'n*, 362 F. Supp. 2d 138, 142 (D.D.C. 2005). That confirms it makes little sense to divorce motion-to-dismiss briefing from summary-judgment briefing here.

Although Defendants' second proposal sensibly provides for a single round of briefing, it unnecessarily extends that round of briefing until the middle of January next year—well past the January 1 expansion of self-insured AHPs under the Final Rule's second applicability date. Defendants claim that this proposal addresses "Plaintiff States' desire to obtain a merits ruling prior to April 1, 2019, the applicability date for new self-insured AHPs formed under the Final Rule," Defs. Stay Memo. at 10, but Defendants fail to mention the Final Rule's other two applicability dates—both of which will have passed *before* briefing is completed under their

[4] 83 Fed. Reg. at 28,948 (millions of people); *id.* at 28,958 (economic impact); *id.* at 28,949 (noting that the Final Rule will increase premiums in the individual market for at least six million people); *id.* (noting that the Final Rule may cause some to go without insurance); *id.* at 28,950 (noting that Final Rule will make "more individuals from high-risk demographics" uninsured).

approach. Plaintiffs' proposed schedule better balances Plaintiffs' interest in a prompt resolution while affording the Defendants ample time to compile the record.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion and instead order the briefing schedule Plaintiffs have proposed.

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CERTIFICATE OF SERVICE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, et al., Plaintiffs, v. U.S. DEPARTMENT OF LABOR et al., Defendants.	CIVIL ACTION NO. 18-cv-1747 (JDB)

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion to Enter Plaintiffs' Proposed Briefing Schedule, the opposition and reply thereto, it is hereby ORDERED that:

Defendants' Motion to Stay Defendants' Response to Plaintiffs' Motion for Summary Judgment is DENIED; it is FURTHER ORDERED that

Defendants' Motion to Enter Defendants' Proposed Briefing Schedule is DENIED; it is FURTHER ORDERED that

Plaintiffs' Motion to Enter Plaintiffs' Proposed Briefing Schedule is GRANTED. Pursuant to this Court's ORDER, Defendants will file their combined motion to dismiss, or, in the alternative, cross-motion for summary judgment, and opposition to Plaintiffs' motion for summary judgment and the certified list of administrative record contents on October 1, 2018; Plaintiffs will file their consolidated reply in support of their motion for summary judgment and opposition to Defendants' motion to dismiss, or, in the alternative, cross-motion for summary judgment on October 29, 2018; and Defendants will file their reply in support of their motion to dismiss, or, in the alternative, cross-motion for summary judgment on November 27, 2018.

SO ORDERED.

Date: _____

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JOHN D. BATES
UNITED STATES DISTRICT JUDGE