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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

STATE OF WASHINGTON,

Plaintiff,

v.

*ALEX M. AZAR II, in his official
capacity as Secretary of the United
States Department of Health and
Human Services; and UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,*

Defendants.

No. 2:19-cv-0183-SAB

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S NOTICE OF
SUPPLEMENTAL AUTHORITY**

1 Defendants respectfully submit this brief opposition to Plaintiff's
2 eleventh-hour Notice of Supplemental Authority and Proceedings in a Related
3 Case, ECF No. 68. Specifically, Defendants object to the Court considering
4 attachment B of Plaintiff's notice, an uncertified, 160-page rough transcript of a
5 motions hearing in *New York v. HHS*, Civ. No. 1:19-cv-4676 (S.D.N.Y. Oct. 18,
6 2019), a case that involves another challenge to the Rule at issue in this case. *See*
7 Attachment B, ECF No. 68-2. There are two bases for Defendants' objection to
8 consideration of the rough transcript (which even Plaintiff does not appear to
9 claim is "authority").

10 First, the Court's review of this case is limited to the administrative
11 record, and Plaintiff has identified no basis to expand that review to include the
12 rough transcript. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100
13 F.3d 1443, 1450–51 (9th Cir. 1996) (holding that judicial review of agency
14 decisions is limited to the administrative record except in certain narrow
15 circumstances). Accordingly, on record-review principles alone, the Court
16 should disregard the rough transcript.

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1 Furthermore, the transcript is irrelevant to this case. *See* Fed. R. Evid.
2 401; *cf. Baker v. Racansky*, 887 F.2d 183, 185 n.1 (9th Cir. 1989) (concluding
3 that transcripts of interview that postdated decision were irrelevant to the claims
4 at issue). The transcript contains only the arguments of counsel made in the
5 context of a different set of legal theories and plaintiffs. *See New York v. HHS*,
6 Civ. No. 1:19-cv-4676 (S.D.N.Y. filed May 21, 2019). This Court will hear the
7 arguments of counsel on the claims in *this* case at the hearing scheduled for
8 tomorrow.

9 For these reasons, this Court should not consider Attachment B of
10 Plaintiff's notice of supplemental authority in its review of this case.

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Dated: November 6, 2019

Respectfully submitted,

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/s/ Bradley P. Humphreys
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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS
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