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October 30, 2020

VIA ECF

Honorable Frederic Block
United States District Judge
Honorable Steven M. Gold
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Tanya Asapansa-Johnson Walker, et al. v. Alex M. Azar II, et al., *Civ. No. 20-CV-02834 (FB) (SMG), Opposition to Defendants' Motion to Stay*

Dear Judges Block and Gold:

Plaintiffs are two transgender women of color who have experienced—and continue to experience—extensive discrimination when seeking healthcare. In the face of uncontroverted evidence illustrating this discrimination, and in the midst of a historic global pandemic, Defendants attempted to strip Plaintiffs and others in the LGBTQ community of critical non-discrimination protections in the Affordable Care Act by promulgating the Rule that is the subject of this litigation ("the 2020 Rule"). Because Defendants did so while intentionally ignoring controlling Supreme Court precedent, this Court preliminarily enjoined their conduct.

The instant motion to stay (or, in the alternative, for an extension of time to respond to the Complaint), is without legal basis and, at bottom, an attempt by Defendants to avoid producing the relevant administrative record and to delay Plaintiffs' forthcoming summary judgment motion. Seventy days after the injunction, and a mere four days before their already-extended deadline to respond to the Complaint, Defendants ask this Court to stay the case or again delay their responsive pleading. The arguments advanced in support of the stay are generic and, if applied, would require a stay in *every* case in which a party appeals a preliminary injunction. None address the ongoing harm suffered by Plaintiffs in the context of an escalating pandemic. Stripped bare, Defendants' tactic is plain: avoid filing the administrative record for as long as possible because it will undermine the purported justifications for their action, further expose Defendants' animus towards the LGBTQ community, and enable Plaintiffs to succeed on

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their summary judgment motion. Indeed, Defendants similarly sought to avoid production of the record in the other cases challenging the 2020 Rule brought by other plaintiffs. *See, e.g. New York v. Dep't of Health & Human Servs.*, No. 20-cv-05583, No. 98 (S.D.N.Y. Oct. 14, 2020) (asking for extension of deadline to produce administrative record) (attached as Exhibit A); *Whitman-Walker Clinic, Inc. v. Dep't of Health & Human Servs.*, No. 20-cv-01630, No. 60 (D.D.C. Oct. 20, 2020) (asking the court to interpret their motion to dismiss as waiver of requirement to produce record) (attached as Exhibit B).

For the reasons discussed below, this Court should deny Defendants' request for a stay and, in the alternative, for an extension of their deadline to file their response to the Complaint. Instead, Plaintiffs respectfully request that this Court set a deadline for Defendants' production of the administrative record concurrent with Defendants' responsive pleading. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (explaining that resolution of APA claims turns on review of the whole administrative record); *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (noting the discretion courts have as to when to call for the administrative record including, if necessary, to resolve pre-answer preliminary injunction motions); *Regents of Cal.. v. Dep't of Homeland Security*, No. 17-cv-05211, ECF No. 49 (N.D. Cal. Sept. 21, 2020) (requiring agency to produce administrative record before motion to dismiss and other dispositive briefing) (attached as Exhibit C).

Background. Plaintiffs filed this case on June 26, 2020. ECF No. 1. They challenge the 2020 Rule, an agency action that would, among other things, strip LGBTQ people of protections under the Affordable Care Act's non-discrimination provision. Because the mere existence of the 2020 Rule causes Plaintiffs irreparable harm, they swiftly moved for a preliminary injunction. ECF Nos. 8 & 9. On August 17, 2020, this Court recognized that harm, found the 2020 Rule arbitrary, capricious, and contrary to law, and enjoined it. ECF No. 23. On September 7, 2020, the Court requested supplemental briefing on the scope of the preliminary injunction in response to the Parties' disagreement regarding the scope of the injunction. Nonetheless, Defendants filed a notice of appeal on October 16, 2020, before the Court resolved that dispute.

On October 29, 2020, the Court concluded that the injunction applied to the definitions of "on the basis of sex," "gender identity," and "sex stereotyping," set forth in 45 C.F.R. § 92.4, and to the repeal of 45 C.F.R. § 92.206.[1] ECF No. 23. The preliminary injunction order was based on the 2020 Rule's incompatibility with the Supreme Court's decision in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), and Defendants' failure to consider that decision. Thus, Defendants' appeal—to the extent it is substantively considered—will not address Plaintiffs' other claims in the case (that the 2020 Rule is unconstitutional and in excess of statutory authority), nor Plaintiffs' other arguments that the 2020 Rule is arbitrary and capricious under the Administrative Procedure Act.

[1] Defendants have asked that the Court stay proceedings pending resolution of the dispute over the scope of the injunction. The Court has since decided that issue and so the request is moot.

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Defendants' deadline to file a responsive pleading was originally August 28, 2020. Plaintiffs consented to a 30-day extension, but Defendants sought even more time from the Court. The Court permitted an additional 30 days, making Defendants' responsive pleading due as of the date of this letter, October 30, 2020.[2] Rather than seek a stay or additional extension in August, September, or most of October, Defendants waited until four days before their responsive pleading deadline to inform Plaintiffs about the instant motion. *See* Exhibit D. That same day—before Plaintiffs had a reasonable opportunity to respond to Defendants' request for consent—Defendants filed the instant motion.

Defendants' Efforts to Stay or Delay the Case are Premature. As an initial matter, the stay should be rejected because Defendants' appeal is improper. Defendants appealed the preliminary injunction while there was a "pending dispute as to the proper scope of the Court's preliminary injunction order." ECF No. 33 p. 1. The Court has since decided the issue and entered an order superseding the initial one. As a result, Defendants are asking for a stay pending the appeal of an order that is not the operative one. The Second Circuit is unlikely to consider such an appeal, rendering a stay entirely gratuitous and unnecessary. *See Hajro v. U.S. Citizenship & Imm. Servs.*, 811 F.3d 1086, 1097 (9th Cir. 2016) (stating that the injunction was not "immediately appealable because the scope and language of the injunction were not yet final when the government filed the notice of appeal."); *Webb v. GAF Corp.*, 78 F.3d 53, 56 (2d Cir. 1996) (dismissing appeal of preliminary injunction that was overtaken by subsequent events); *In re Chateaugay Corp.*, 924 F.2d 480, 483 (2d Cir. 1991) (stating that it was "reluctant to decide whether or not to place our imprimatur on an injunction when the scope of that injunction remains unclear.").

The Relevant Factors Counsel Against a Stay. A party is not entitled to a stay pending an appeal of a preliminary injunction. *See* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3921.2 (stating that such an appeal "does not defeat the power of the trial court to proceed further with the case."). Instead, it is a purely discretionary decision driven by a number of considerations. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (explaining that the power to stay is one "inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). Here, the relevant considerations—the interest in proceeding with moving forward as balanced against the prejudice of delay to Plaintiffs, the interests and burden on Defendants,

[2] Defendants' request for a stay or extension is untimely because it does not afford the Court ample time to adjudicate the motion prior to the current deadline for their responsive pleading. As such, to the extent Defendants fail to file that pleading as of the date of this letter, Defendants have defaulted in this action and Plaintiffs reserve all rights to seek all such relief the Court may deem just and proper.

the interests of the courts, the interests of persons not parties to the civil litigation, and the public interest—all favor Plaintiffs.[3]

First, and consistent with their approach throughout this litigation, Defendants ignore the harm to Plaintiffs that would stem from a stay. The preliminary injunction here is critical to stopping irreparable harm to Plaintiffs, but until this litigation ends, Plaintiffs must live with uncertainty about the ultimate fate of Defendants' unlawful 2020 Rule. This limbo yields similar mental anguish and fear that Plaintiffs previously described, and that this Court credited. *See* Gentili Decl. ¶¶ 65, 71–72; Walker Decl. ¶¶ 88–89; ECF No. 23 at 15–16.

Moving with haste is particularly important given the Court's order on the scope of the preliminary injunction. ECF No. 34. As noted, Plaintiffs raised several counts and arguments that did not form the basis of the injunction; because each speaks to fatal defects in Defendants' rulemaking process, they will ultimately require the court to vacate the rule in full. *See, e.g.*, *New York v. Dep't of Health and Human Servs.*, 414 F. Supp. 3d 475, 577 (S.D.N.Y. 2019) (vacating rule where "the rulemaking exercise . . . was sufficiently shot through with glaring legal defects as to not justify a search for survivors."). These claims remain pending and the appeal will not address them one way or the other. Defendants have made no representations that the effectiveness or enforcement of the full import of the 2020 Rule will be held in abeyance pending any of their efforts to appeal the injunction and delay this case. Simply stated, any stay of this case would result in irreparable harm to Plaintiffs and their ability to pursue their claims.

To argue otherwise, Defendants cite *Washington v. Trump* and *Hawaii v. Trump*. ECF No. 33 at 2. Neither of those cases—in which States challenged the Administration's executive orders barring travel from specific countries—included individual plaintiffs challenging a rule whose mere existence caused harm. The same is true for *Boardman v. Pacific Seafood Grp.*, 2015 WL 13744253, *1 (D. Or. Aug. 6, 2015), which involved commercial fisherman challenging a merger of seafood processors. In contrast, a stay here would unnecessarily infringe on Plaintiffs' right to swiftly and completely bring each of their claims to resolution in order to avoid the harm caused by lingering litigation. *See SEC v. Jones*, 2005 WL 2837462, *2 (S.D.N.Y. Oct. 28, 2005) (highlighting the import of a timely resolution in litigation); *Citibank N.A. v. Hakim*, 1993 WL 481335 at *2 (S.D.N.Y. Nov. 18, 1993) (noting that delay will cause "substantial prejudice" because it will deny the plaintiff "its right to speedy discovery and resolution of this dispute."); *see also Cali. v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (stating that a stay is generally disfavored given "the limited scope of [appellate] review of the law applied by the district court and because the fully developed factual record may be materially different from

[3] Rather than applying the *Landis* test, some courts have utilized the standard for a stay of an injunction pending appeal to decide whether to stay proceedings pending appeal. *See Starke v. Squaretrade, Inc.*, 2017 WL 11504834, at *1 (E.D.N.Y. Dec. 15, 2017). This alternative test asks whether the moving party is likely to succeed on the merits, whether it would be irreparably injured absent a stay, whether the balance of interests favors a stay, and whether a stay is in the public interest. *Id.* Here, the Court has already determined that Plaintiffs, not Defendants, are likely to succeed on the merits. ECF No. 23. And, Defendants cannot establish *any* harm from moving forward with the case, let alone irreparable harm. If the Court applies this test, a stay is still inappropriate.

that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits.") (internal citation omitted)).

Second, Defendants cannot articulate any prejudice from moving forward during their appeal. The trajectory of this Administrative Procedure Act case is straightforward: Defendants will respond to the Complaint and produce the administrative record, and then the parties will cross-move for summary judgment.[4] Defendants will be simultaneously doing so in the parallel litigation. While Defendants rely on *Bahl v. New York Coll. Of Osteopathic Med. Of New York Inst. of Tech*, to claim prejudice, that court considered an entirely different question of whether a defendant should have to litigate a case in light of pending litigation in another district court. 2018 WL 4861390 at *3 (E.D.N.Y. Sept. 28, 2018). It did not address the question presented here. In contrast, courts routinely reject stay requests like the one here—including an appeal of a preliminary injunction by these very Defendants regarding a different rule that was enjoined, *Washington v. Azar*, 2019 WL 791662 (E.D. Wash. June 14, 2019)—because a party is not prejudiced when they *choose* to simultaneously appeal an injunction. *See, e.g.*, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 679–80 (S.D.N.Y. 2019) (granting nationwide injunction after denying defendants' prior attempts to stay trial).

Third, Defendants' proposal is inefficient. They have indicated that the administrative record comprises over two million pages of documents. *See New York v. Dep't of Health & Human Servs.*, No. 20-cv-05583, ECF No. 98 at p.1 (S.D.N.Y. Oct. 14, 2020) (asking to delay production of the record because it is estimated to be approximately 2 million pages). If true, Plaintiffs will need substantial time to review that record before summary judgment. There is no reason to wait as the parties can prepare this case for a swift resolution while the appeal is pending. *See hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 1006 (9th Cir. 2019) (Wallace, J., concurring) (stating that "[w]e have repeatedly admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction," since the "case could have well proceeded to a disposition on the merits without the delay in processing the interlocutory appeal.").[5]

That the case "bear[s] on Article III standing," does not mean that Defendants' proposal is efficient. Defendants repeatedly say that it is most efficient to wait until the Second Circuit

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[4] This clear path assumes that Defendants lodge a complete administrative record. *See Saget v. Trump*, 375 F. Supp. 3d 280, 340 –42 (E.D.N.Y. 2019) (describing circumstances in which completion or supplementation of the administrative record is necessary).

[5] Defendants cite to a number of cases suggesting that a stay is in the interest of judicial economy. Those cases are not comparable to the facts here because they either: (1) arise in the context of a denied motion to arbitrate, *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638 (S.D.N.Y. 2012), (2) arise in the context of a stay pending parallel district court litigation, *Bahl*, 2018 WL 4861390; *Marine Travelift, Inc., v. K. Graefe & Sons Corp.*, 2016 WL 8711453 (S.D.N.Y. June 3, 2016); *Nuccio v. Duve*, 2015 WL 1189617 (N.D.N.Y. Mar. 16, 2015), or (3) arise in the context of an already-pending appellate case addressing a dispositive legal question, *McCracken v. Verisma Sys.*, 2018 WL 4233703 (W.D.N.Y. Sept. 6, 2018).

rules on their standing arguments. But, as courts have explained, "the question of standing does not fit within the collateral order doctrine," that is, the doctrine that typically allows for interlocutory appeals before final judgment, and ordinarily does not justify "an immediate interlocutory appeal on this issue." *Summit Med. Assoc., P.C. v. Pryor*, 180 F.3d 1326, 1334–35 (11th Cir. 1999); *see also Levine v. AtriCure, Inc.*, 594 F. Supp. 2d 471, 477 (S.D.N.Y. 2009) (denying certification for appeal on standing question because they did not "justify a departure from the basic policy of postponing appellate review until after entry of a final judgment."); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1154 (9th Cir. 2000) (stating that the court would not "have the power to hear a premature appeal" on standing questions). Said differently, courts do not halt litigation mid-stream because a case presents a question on standing. Defendants should not be able to sidestep this doctrine simply because the Court decided the standing issue while enjoining their unlawful behavior, rather than through a motion to dismiss.

Nor are the standing questions in this case particularly difficult as to warrant waiting for the Second Circuit's review. Defendants state that "given that different courts have assessed standing to challenge this rule in different ways, the benefit of Second Circuit guidance on this issue is all the more important." *See* ECF No. 33 at 3 (citing *Washington v. HHS*, 2020 WL 5095467 (W.D. Wash. Aug. 28, 2020) and *Whitman-Walker Clinic, Inc v. HHS*, 2020 WL 5232076 (D.D.C. Sept. 2, 2020)). Yet the plaintiffs in those cases are not individuals. The plaintiff in the *Washington* case is the State of Washington. The *Whitman Walker* case, which remains pending, involves questions of associational and organizational standing. This is the only case challenging the 2020 Rule in any court brought by individual plaintiffs who have been, and will be, subject to imminent harm. As this Court already concluded, the standing question is not close.

The existence of these other cases challenging the 2020 Rule also does not justify Defendants' request. The cases are not "parallel" for purposes of a stay given the differences in the parties and the distinct interest that each is vindicating. *Cf. Admin. Comm. v. Gauf*, 188 F.3d 767 (7th Cir. 1999) (noting that differences in plaintiffs render case not parallel). Moreover, even if Plaintiffs were not the only individuals challenging this rule (as noted, they are), stays are not justified simply because there are multiple cases in different courts involving common issues of fact or law. *See, e.g., Stockman v. Trump*, No. EDCV 17-1799, 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017) (litigating administration's transgender military ban); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017) (same); *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017) (same); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 216–17 (D.D.C. 2017) (same); *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 755 (D. Md. 2019) (litigating efforts to insert a citizenship question on census); *State v. Ross*, 358 F. Supp. 3d 965, 1050–51 (N.D. Cal. 2019) (same).

Finally, the impact on other individuals, and the public interest, weigh against a stay. We are in the midst of a once-in-a-generation global pandemic and vacating the 2020 Rule through swift adjudication of this case helps ensure that LGTBQ individuals have access to

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discrimination-free care. As Plaintiffs previously detailed, there is extensive evidence of the systemic discrimination that has limited LGBTQ peoples' access to affordable health care. ECF No. 1 ¶¶ 133–41. Vacating the 2020 Rule in full, and bringing finality to this issue, serves the "fundamental purpose of the ACA" to "ensure that health services are available broadly on a nondiscriminatory basis to individuals throughout the country." 81 Fed. Reg. at 31,379.

No Extension is Appropriate. The Court should also deny Defendants' alternative request for a further extension of Defendants' responsive pleading deadline. Defendants have had *over four months* to prepare a response to Plaintiffs' Complaint. Instead of doing so, they asked Plaintiffs for one extension, unhappy with that, they asked the Court for an additional extension, waited until the last minute to appeal the preliminary injunction, and then sat on this pending motion until the week their responsive pleading was due. Defendants cite paternity leaves, "briefs relating to other business," and "the press of other business" as justifications for the delay. But the Court has already provided Defendants with four months within which to serve and file any responsive pleading. Perhaps a reset on some context is appropriate here: Defendants bring with them all of the resources and power of the United States Department of Justice. Plaintiffs are two individual transgender women—having suffered exceptional marginalization, severe discrimination, and serious health care complications—whose lives hang in the balance during a global pandemic.

As such, Defendants' request to stay the case or, in the alternative, extend their time to Answer should be denied in its entirety. Instead, Plaintiffs respectfully request that this Court set a deadline for Defendants' production of the administrative record concurrent with Defendants' responsive pleading.

Very truly yours,

s/ Edward J. Jacobs
Edward J. Jacobs
Partner
cc (via ECF):

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EXHIBIT A

U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20530

By ECF

October 14, 2020

The Honorable Alvin K. Hellerstein
United States District Judge
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *State of New York, et al. v. U.S. Dep't of Health and Human Servs.*, No. 20-cv-05583 (AKH)

Dear Judge Hellerstein:

Defendants write to request a 21-day extension of the current deadline to produce the administrative record in this case. The current deadline for filing the administrative record is October 16, 2020, set by this Court's Order of September 22, 2020. Defendants have been working diligently to compile and finalize the administrative record, but the task is enormous and Defendants therefore requests additional time.

Specifically, Defendants request that the existing deadlines set in this Court's September 22 Order be extended by 21 days as follows:

- Defendants produce the administrative record on or before November 6, 2020. The current deadline is October 16, 2020.
- Plaintiffs shall have until November 16, 2020 to comment or otherwise object as to the adequacy, accuracy, or comprehensiveness of the administrative record. The current deadline is October 26, 2020.
- Defendants further propose that the status conference currently set for October 29, 2020, at 11:00 a.m. be re-scheduled to November 19, 2020, at 11 a.m., or at any other time convenient for the Court.

Defendants respectfully submit that there is good cause for the extension. The administrative record is enormous—currently estimated at two million pages, possibly more—and some of the individuals involved in preparing, collecting, and reviewing materials have been actively involved in time-sensitive matters regarding the COVID-19 crisis that have consumed much of their attention. Defendants' counsel contacted Plaintiffs' counsel earlier today to seek their position on the requested extension. Plaintiffs advised that they would not be able to take a position by close of business but stated that they expected to advise the Court of their position by tomorrow.

This is Defendants' first request for an extension of these deadlines.

Respectfully submitted,

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/s/ Stephen Ehrlich
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Counsel for Defendant

CC: All Counsel of Record (by ECF)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WHITMAN-WALKER CLINIC, INC., *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Case No. 1:20-cv-01630-JEB

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF THE ADMINISTRATIVE RECORD AND TO HOLD IN ABEYANCE OR DISMISS DEFENDANTS' MOTION TO DISMISS

Defendants U.S. Department of Health and Human Services ("HHS" or the "agency"), and several of its officials (collectively, "Defendants"), have moved to dismiss this action, identifying threshold jurisdictional grounds for dismissal under Rule 12(b)(1), as well as various purely legal grounds to dismiss under Rule 12(b)(6). Understandably reluctant to address the numerous deficiencies apparent on the face of their pleading, Plaintiffs have now filed their own Motion (the "Motion to Compel") asking the Court to halt further briefing on the motion to dismiss and not to consider the arguments raised therein. Instead, they urge the Court to skip ahead to summary judgment proceedings based on an administrative record that has not yet even been compiled and finalized for production. Specifically, they ask the Court to: (1) compel Defendants to "produce" the administrative record pertaining to the agency rule challenged in this case, (2) hold Defendants' Motion to Dismiss in "abeyance," and (3) order "consolidated" briefing on motions to dismiss and for summary judgment based on the administrative record. This extraordinary request is justified, they say, because Defendants failed to file a certified list of the contents of the administrative record, purportedly in violation of Local Civil Rule 7(n).

Plaintiffs' motion is meritless and should be denied. Contrary to Plaintiffs' suggestion, the local rule does not require the filing of a certified list where, as here, Defendants file a motion to dismiss that does not rely on the administrative record. Courts in this District have repeatedly recognized as much, declining to require compliance with the rule in such circumstances. The Court should also reject Plaintiffs' unsupported assertion that the administrative record is "necessary to resolve the motion to dismiss." The motion to dismiss includes numerous threshold jurisdictional and prudential grounds for dismissal that undisputedly do not require review of the administrative record. To the extent Defendants also seek dismissal of certain claims under Rule 12(b)(6), those arguments are likewise properly decided on the motion to dismiss. And even if Plaintiffs were correct that some of Defendants' arguments require review of the administrative record, the proper course would be for the Court to "resolve" those arguments by simply declining to dismiss specific claims on those grounds. Plaintiffs improperly ask the Court to go further, bypass review under Rule 12(b) altogether, and proceed directly to full-blown summary judgment proceedings on the administrative record. This request should be rejected, as it has no sound basis in law or logic, and would violate well-settled jurisdictional constraints on the scope of this Court's judicial review. Indeed, this Court already ruled in Defendants' favor on most of the arguments addressed in their motion to dismiss when it resolved Plaintiffs' motion for preliminary injunction.

Accordingly, Defendants respectfully submit that the Court should deny Plaintiffs' Motion to Compel, and order Plaintiffs to respond to Defendants' motion to dismiss.

BACKGROUND

Plaintiffs in this case raise myriad challenges under the Administrative Procedure Act, 5 U.S.C. 706 ("APA"), to numerous provisions of a rule promulgated by the agency (the "2020 Rule"). The 2020 Rule implements Section 1557 of the Affordable Care Act, the statute's antidiscrimination provision, codified at 42 U.S.C. § 18116. Plaintiffs' various challenges to the 2020 Rule were predicated both on the provisions of the 2020 Rule itself and on the agency's statements in the preamble to the rule, as published in the Federal Register. *See generally* Compl., ECF No. 1 (June 22, 2020).

On July 9, 2020, relying only on their pleading and the Federal Register to support the merits of their claims, Plaintiffs sought a preliminary injunction. *See* ECF No. 29. On September 9, 2020, likewise relying only on Plaintiffs' pleading and matters of public record for its merits determinations, this Court issued an order granting in part and denying in part the preliminary injunction. *See* ECF Nos. 55, 56. Specifically, the Court preliminarily enjoined two aspects of the rule, but otherwise denied Plaintiffs' preliminary injunction motion. *See Whitman-Walker Clinic, Inc. v. HHS*, No. 20-1630 (JEB), 2020 WL 5232076, at *18 (D.D.C. Sept. 2, 2020). The Court explained, *inter alia*, that Plaintiffs had failed to show they had standing to challenge certain provisions. *See id.* at *18-20.

On September 29, 2020, Defendants moved to dismiss. Defs' Mem. in Support of Defs.' Mot. to Dismiss Pls.' Compl. ("Defs. Mot."), ECF No. 57-1 (Sept. 29, 2020). Defendants raised several threshold objections to Plaintiffs' suit. *See id.* at 5-15. First, Defendants pointed out that the Court lacks jurisdiction over many of Plaintiffs' claims because Plaintiffs lack standing to assert them. *See id.* at 5-10. Defendants also explained that a number of Plaintiffs' claims are not ripe, a prerequisite for judicial review, and sought dismissal of one claim on mootness grounds. *See id*. at 10-15. Defendants also raised various grounds for dismissal under Rule 12(b)(6) because a number of Plaintiffs' challenges fail to state a claim upon which relief can be granted. Specifically, Defendants sought dismissal of Plaintiffs' APA claims, *see id*. at 15-26, and also moved to dismiss Plaintiffs' four constitutional claims. *See id*. at 26-31. Defendants' Motion to Dismiss does not cite or rely on the administrative record. It seeks dismissal based on the allegations in the complaint, and in some instances based on statements in the Federal Register, which are subject to judicial notice on a motion to dismiss.

Rather than responding to Defendants' motion to dismiss, Plaintiffs filed their own motion, which they captioned, "Motion to Compel Defendants to Produce the Administrative Record, to Hold in Abeyance Defendants' Partial Motion to Dismiss, and to set a Consolidated Schedule for Filing and Briefing Motions to Dismiss and/or Motions for Summary Judgment." ("Pl. Mot. to Compel") ECF No. 58 (Oct. 6, 2020). Plaintiffs' motion asserts that Defendants violated Local

Civil Rule 7(n) by failing to file a certified list of contents of the administrative record. On this basis, Plaintiffs argue that the Court should compel Defendants to produce the administrative record to Plaintiffs, hold the motion to dismiss in abeyance, and order a "consolidated briefing schedule for motions to dismiss and/or motions for summary judgment with appropriate citations to the record." Pl. Mot. to Compel at 14.

ARGUMENT

The Court should reject Plaintiffs' wholly improper request to move forward with summary judgment briefing before considering the arguments raised in Defendants' motion to dismiss. Defendants' motion does not rely on the administrative record; instead, it identifies threshold jurisdictional and prudential limitations on the Court's power to review specific claims, as well as various pleading deficiencies in other claims. Plaintiffs ask the Court to ignore those threshold issues and to instead proceed directly to summary judgment briefing on an administrative record that has yet to be compiled. In attempting to justify this remarkable request, Plaintiffs argue that: (1) Defendants purportedly failed to comply with a local rule requiring them to file a certified list of contents of the administrative record; (2) the Court cannot properly "resolve" the motion to dismiss without the administrative record; and (3) "judicial economy" favors requiring immediate production of the administrative record and a consolidated briefing schedule including summary judgment briefing on the basis of that record. Plaintiffs are wrong on all counts.

I. Plaintiffs' Arguments Under Local Civil Rule 7(n)(1) Are Meritless

Plaintiffs argue that the Court should bypass review under Rules 12(b)(1) and 12(b)(6) because, in their view, Defendant violated Local Rule 7(n). That rule provides that:

> In cases involving judicial review of administrative agency actions, unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first. Thereafter, counsel shall provide the Court with an appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of or in opposition to any dispositive motion. Counsel shall not burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion

> or opposition. Unless so requested by the Court, the entire administrative record shall not be filed with the Court.

LCvR 7(n)(1). Here, Defendants' motion to dismiss does not cite or otherwise rely on the administrative record, which has not yet even been compiled and certified. Even so, Plaintiffs argue that the local rule required Defendants to file a certified list of contents of the administrative record simultaneously with their motion, and to produce the complete record to Plaintiffs. Plaintiffs' arguments on this point are all meritless.

First, Plaintiffs' assertion that Defendants have violated Rule 7(n) rests on an erroneous interpretation of the rule. Fixating on the term "dispositive motion," Plaintiffs argue that defendants are obliged to file a list and produce the record even where, as here, the defendant files a motion to dismiss that does not rely on the record. *See* Pl. Mot. to Compel at 8-9 (asserting that a "motion to dismiss . . . unquestionably is a dispositive motion," and arguing that the rule applies "regardless of whether the agency relied on the record in its motion"). That interpretation is plainly wrong. It would lead to absurd results, like requiring production of the administrative record when the defendant seeks dismissal under Federal Rule of Civil Procedure 4(m) because plaintiff never served a summons and complaint, or when the defendant seeks dismissal on statute of limitations grounds because plaintiff challenges agency action that occurred decades ago. Indeed, Plaintiffs' interpretation would render Rule 12 largely meaningless in APA cases, effectively preventing the agency from seeking dismissal solely on the basis of the complaint. *See* Fed. R. Civ. P. 12. Unsurprisingly, Plaintiffs cite no case adopting this reading of Local Civil Rule 7(n). Plaintiffs themselves seem to acknowledge later in their brief that their interpretation would lead to results that make no sense. *See* Pl. Mot. to Compel at 10 (acknowledging that "in some circumstances," a motion to dismiss "may raise purely legal issues that can be resolved without reference to the administrative record").

It is clear from the text and logic of the rule that the administrative record obligations are triggered only by a dispositive motion that *relies* on the contents of the agency's administrative record. *See* LCvR 7(n)(1) (directing counsel to "provide the Court with an appendix containing

copies of those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of or in opposition to any dispositive motion"). The point of the rule is not to ensure that motions to dismiss are always based on an administrative record. It is to ensure that the Court is not unnecessarily burdened with the filing of an administrative record in cases where a dispositive motion relies on such a record. *See, e.g.*, *Carroll v. DOL*, 235 F. Supp. 3d 79, 81 n.1 (D.D.C. 2017) (explaining that LCvR 7(n) is intended to assist the Court in cases involving a voluminous record and that failure to file a certified list under the rule is "immaterial" to resolution of motion to dismiss where motion turned on complaint and documents attached thereto). To that end, Local Civil Rule 7(n)(1) specifically instructs counsel not to "burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion or opposition." LCvR 7(n)(1). And the comment to Local Civil Rule 7(n)(1) expressly states that the "rule is intended to assist the Court in cases involving a voluminous record . . . by providing the Court with copies of *relevant portions of the record relied upon in any dispositive motion*."[1] *Id*. cmt. 1 (emphasis added).

Here, Defendants' pending motion to dismiss does not rely on the administrative record, and thus does not trigger obligations to produce such a record or to file a certified list of its contents under Local Civil Rule 7(n). Indeed, as Plaintiffs belatedly concede, Pl. Mot. to Compel at 14-15, many of the grounds for dismissal raised in the motion to dismiss address threshold issues such as

[1] Plaintiffs do not argue that Defendants' Motion relies on the administrative record. Instead, they assert that the rule applies "regardless of whether the agency relied on the record in its motion." Pl. Mot. to Compel at 8 (citing the requirement that the joint appendix must contain "copies of those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of *or in opposition to any dispositive motion*") (emphasis in Plaintiffs' brief). But the italicized language simply makes clear what the joint appendix should include. It should contain portions of the record that are relied on to support either party's position. It does not suggest, as Plaintiffs argue, that a defendant *must* produce the record to a plaintiff even when it files a motion to dismiss that does not rely on the record or, indeed, challenges whether an action is properly brought under the APA such that a record would be required in the first place. Such a requirement would make no sense. Plaintiffs' interpretation is in any event undermined by their own concession that some motions to dismiss do not require reference to the administrative record at all. *See* Pl. Mot. to Compel at 10.

standing and ripeness, which undisputedly do not require review of the administrative record. *See Zemeka v. Holder*, 963 F. Supp. 2d 22, 24 (D.D.C. 2013) (Boasberg, J.) (explaining that APA claims may be dismissed before summary judgment where there are "jurisdictional bars such as standing, finality, or ripeness"). Defendants' motion to dismiss also identifies purely legal grounds for dismissal under Rule 12(b)(6), based on the allegations in the Complaint and, in some instances, on statements in the Federal Register, of which the Court may take judicial notice in deciding whether the complaint states a claim for which relief may be granted. In any event, Defendants do not rely on the administrative record, so the rule does not apply and any failure to provide the list is "immaterial." *See Carroll*, 235 F. Supp. 3d at 81 n.1 (declining to apply LCvR 7(n) and finding that documents attached to the complaint are "sufficient for determining whether the complaint states a claim upon which relief can be granted"); *Jimenez Verastegui v. Wolf*, --- F. Supp. 3d ---, ---, 2020 WL 3297230, at *2 n.3 (D.D.C. June 18, 2020) (declining to consider plaintiffs' argument that defendant failed to file certified list under Local Rule 7(n)(1) because "that list is irrelevant to the Court's determination that it lacks subject-matter jurisdiction."), appeal filed No. 20-5215 (D.C. Cir. Jul. 22, 2020).

Second, even if this Court were to adopt Plaintiffs' erroneous reading of the local rule, it would not follow that the Court should grant Plaintiffs' request to bypass review under Rule 12(b) and proceed directly to summary judgment review on the full administrative record. Nothing in the text or purpose of the rule supports that result, and courts have properly rejected analogous arguments in the past. *See Carroll*, 235 F. Supp. 3d at 81 n.1 (rejecting plaintiff's argument that failure to submit a certified list is grounds to strike the motion to dismiss, and explaining that such a result is unwarranted and unsupported by authority). Indeed, as discussed below, even if the Court were inclined to agree with Plaintiffs that some arguments raised in the motion to dismiss require review of the administrative record, the logical response is for the Court to simply decline to dismiss particular claims on that basis.

In any event, if the Court were inclined to adopt Plaintiffs' erroneous interpretation, Defendants respectfully ask, in the alternative, that the Court construe Defendants' motion to

dismiss as incorporating a request to waive compliance with Local Civil Rule 7(n)(1). *See, e.g.*, *Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 123 n. 12 (D.D.C. 2017) (construing defendants' motion to dismiss as incorporating a motion to waive compliance with Local Civil Rule 7(n) and granting "the motion because the administrative record is not necessary for its decision here."). Courts routinely grant such requests where, as here, grounds for dismissal identified in the defendant's motion do not rely on the administrative record. *See, e.g.*, *Connecticut v. Dep't of the Interior*, 344 F. Supp. 3d 279, 294 (D.D.C. 2018) (following the "practice of other courts in this jurisdiction" and waiving compliance with the requirements of LCvR 7(n) because consideration of the administrative record was unnecessary to decide the motion to dismiss) (citing cases); *PETA v. U.S. Fish & Wildlife Serv.*, 59 F. Supp. 3d 91, 94 n.2 (D.D.C. 2014) (noting that court had granted request for relief from LCvR 7(n) where agency sought dismissal of APA claim for failure to state a claim).

II. Contrary to Plaintiffs' Assertion, the Administrative Record Is Not Necessary to Resolve Defendants' Motion to Dismiss.

Plaintiffs do not suggest that the motion to dismiss relies on the administrative record, but they argue that the full administrative record is "necessary to resolve" the motion to dismiss, because Defendants' motion to dismiss "directly implicates the administrative record." *See* Pl. Mot. to Compel at 10, 13. This argument likewise fails for a number of reasons. It certainly does not support Plaintiffs' baseless suggestion that the Court should decline to even consider Defendants' motion to dismiss and proceed directly to summary judgment.

At the outset, Defendants' motion to dismiss raises threshold jurisdictional issues, including standing, ripeness and mootness, that undisputedly do not implicate any need to review an administrative record. *See* Def. Mot. at 5-15. In their briefing, Plaintiffs largely ignore Defendants' standing and mootness arguments, and only briefly suggest that the Court cannot resolve Defendants' *ripeness* arguments without first reviewing the complete administrative record on summary judgment. Pl. Mot. to Compel at 3, 10. This argument is incorrect. Ripeness, like standing, imposes threshold limitations on the Court's authority to review a claim at all, and it is

entirely appropriate to address such issues on a motion to dismiss. *See Zemeka*, 963 F. Supp. 2d at 24 ("Instead of waiting for summary judgment, . . . defendants may have solid grounds for moving to dismiss complaints in cases brought under the APA. For example, there may be jurisdictional bars such as standing, finality, or ripeness.").

Indeed, not only is it appropriate to do so, it is incumbent on the Court to address such threshold issues before proceeding further in a case. "The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1988) (internal quotation omitted). Standing, in particular, is a "necessary predicate to *any* exercise of jurisdiction," and without it, courts have "no business" deciding a matter or "expounding the law in the course of doing so." *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (citations omitted; emphasis added). Plaintiffs ask the Court to flout these jurisdictional limitations, and to compel production of an administrative record that, in their view, is "necessary to resolve" the merits of Plaintiffs' APA challenges. But until the Court has assured itself that Plaintiffs have standing, and that it otherwise has jurisdiction to consider Plaintiffs' claims, the Court has "no business" deciding the merits, "or expounding the law in the course of doing so." *Id*. Moreover, Plaintiffs must demonstrate standing at each "successive stage" of the litigation, including on a motion to dismiss. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). The Court should not relieve them of this burden, especially because the Court already determined that Plaintiffs lack standing to raise certain claims in ruling on the preliminary injunction motion.

Plaintiffs are also wrong to argue that the Court cannot resolve Defendants' motion to the extent it seeks dismissal of APA challenges for failure to state a claim. Pl. Mot. to Compel 10-14. Plaintiffs make no real effort to support this argument. They assert that "Defendants' motion to dismiss directly implicates the administrative record," because "Plaintiffs and the Court need the administrative record" to "assess the reasonableness of the agency's explanation for *why* it" acted. *See id*. at 10-11. But this argument is made in response to Defendants' *ripeness* arguments, which

as discussed above are properly resolved on a motion to dismiss and do not require review of the administrative record. *Id.* at 11. Beyond that, Plaintiffs briefly mention only two other "example[s]" of arguments that, in their view, require the administrative record to resolve. *See id.* at 11 (citing arguments seeking dismissal of challenges to removal of prohibition on categorical coverage exclusions, and to the elimination of the notice requirements and access to language protections). Contrary to Plaintiffs' suggestion, however, Defendants' arguments do not "ask the Court to find, as a matter of law, that HHS did not act arbitrarily and capriciously." *Id.* Rather, Defendants argue that allegations in the complaint fail to state a claim for relief with respect to the elimination of specific provisions in the 2020 Rule. Plaintiffs do not explain why these arguments "cannot be resolved" on a motion to dismiss.

To be sure, courts may decline to dismiss claims challenging agency action under Rule 12(b)(6), particularly where the claims, as alleged, require review of the evidentiary issues addressed by the agency and reflected in the administrative record. *See, e.g.*, *Zemeka*, 963 F. Supp. 2d at 24-26. But here, Plaintiffs' arbitrary and capricious challenges were predicated on allegations made in the complaint and on the agency's statements in the Federal Register, and Defendants moved to dismiss those claims on "purely legal" grounds based on the same allegations and statements. *See* Pl. Mot. to Compel, at 10 (conceding that court can decide purely legal grounds for dismissal without the administrative record). In any case, Defendants have moved to dismiss various other claims under Rule 12(b)(6) as well, including Plaintiffs' claims that certain aspects of the rule are inconsistent with statutory provisions in the ACA, as well as Plaintiffs' four constitutional claims. Plaintiffs do not even mention those arguments, much less explain why they require review of the administrative record. These arguments are entirely justified on a motion to dismiss under Rule 12(b)(6). *See, e.g., Marshall Cnty. Health Care Auth., et al., v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993) (affirming dismissal under Rule 12(b)(6) and explaining that "as matters of public record, statements in the Federal Register can be examined on 12(b)(6) review"); *Wash. All. of Tech. Workers v. U.S. Dept. Homeland Sec.*, 892 F.3d 332, 346-47 (D.C. Cir. 2018) (affirming dismissal under Rule 12(b)(6) of various claims challenging agency rule

under APA, including a claim challenging the rule as arbitrary and capricious); *Am. Bank. Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266-67 (D.C. Cir. 2001) (agreeing with the District Court that challenge to regulations as inconsistent with statute "can be resolved with nothing more than the statute and its legislative history").

More fundamentally, however, the proper vehicle for any argument to the contrary is a brief in *opposition* to Defendants' motion to dismiss, not a "Motion to Compel" that seeks to avoid Plaintiffs' obligation to respond at all. If Plaintiffs believe that particular grounds for dismissal raised in Defendants' motion to dismiss are unsound, then Plaintiffs should set forth their position on those issues in a response brief and ask the Court to deny Defendants' request to dismiss specific claims on that basis. Once briefing on the motion to dismiss is complete, the Court can make a determination as to its own jurisdiction to decide the various claims at issue and, if it even has occasion to reach the grounds for dismissal under Rule 12(b)(6), it may decide those issues as well. *See Brown v. Jewell*, 134 F. Supp. 3d 170, 176 (D.D.C. 2015) (explaining that a district court has an "'independent obligation to determine whether subject matter jurisdiction exists . . . before ruling on the merits'"). To the extent the Court determines it has jurisdiction over some set of claims under the APA that are ripe for review, then the Court can decide whether each such claim should be dismissed under Rule 12(b)(6), as Defendants have argued, or whether the Court should deny the motion to dismiss the claim and proceed to review that claim at summary judgment on the basis of the administrative record. Indeed, that is precisely what this Court did in *Zemeka*, the case cited by Plaintiffs. *See Zemeka*, 963 F. Supp. 2d at 24-26 (denying motion to dismiss only after reviewing the parties' respective briefs, as well as the records submitted by both parties).

Plaintiffs are thus wrong to assert that the Court "cannot resolve" the motion to dismiss without the administrative record. Even if the Court were to agree with Plaintiffs that the administrative record is needed to fully address certain arguments, the proper course is to "resolve" those arguments by simply declining to dismiss specific claims on those grounds. Plaintiffs here ask the Court to go further. They ask the Court not to even *consider* Defendants' motion to dismiss, and to accept on faith Plaintiffs' perfunctory assurances that the various arguments raised therein

do not justify dismissal under Rule 12(b)(6). But the only way for the Court to properly decide that question is to consider Defendants' arguments for itself, as well as Plaintiffs' counter-arguments. Plaintiffs would prefer to skip over the motion to dismiss briefing process entirely, and get immediate access to the administrative record so as to try to support their claims on summary judgment. But that is not the process contemplated by the Federal Rules of Civil Procedure, and Plaintiffs have cited no good reason to deviate from the normal process here.

III. Judicial Economy Strongly Supports Deciding the Motion to Dismiss Prior to Briefing on Summary Judgment

Finally, Plaintiffs are also wrong to argue that "judicial economy" favors a consolidated briefing schedule in which the motion to dismiss is briefed and decided together with cross motions for summary judgment on the administrative record. Pl. Mot. to Compel at 3, 14. To the contrary, judicial economy strongly supports resolving Defendants' already-filed motion to dismiss before moving on to litigate summary judgment, as is the normal practice when defendants have filed such a threshold motion.

The benefits to judicial economy of this approach are self-evident. As already explained, Defendants' motion to dismiss raises numerous threshold jurisdictional defects that are apparent on the face of the complaint, some of which have already been acknowledged by this Court in ruling on the preliminary injunction motion. And as also discussed, the Court is obliged to address those concerns before opining on whether Plaintiffs' APA claims will necessitate review of the administrative record, and certainly before entertaining any such merits arguments on summary judgment. Judicial economy also supports addressing Defendants' arguments under Rule 12(b)(6) prior to briefing summary judgment. To the extent the Court can narrow the scope of this litigation through dismissal under Rule 12(b), as the Court's preliminary injunction opinion suggests is likely, that would allow for more efficient and focused proceedings on summary judgment. Such concerns are especially compelling in a case like this one, where (i) Plaintiffs have asserted a litany of challenges to numerous aspects of the 2020 Rule, including multiple constitutional challenges, (ii) the Court has already identified jurisdictional and merits concerns with many of Plaintiffs'

claims, and (iii) the administrative record is not yet compiled and is estimated to be over two million pages in length.

Indeed, for precisely these reasons, courts routinely find that briefing on summary judgment is premature until the Court can resolve issues raised in a pending or anticipated motion to dismiss where, as here, Defendants have raised threshold jurisdictional concerns. *See, e.g.*, *West Virginia ex rel. Morrisey v. HHS*, No. 14-1287 (RBW), 2014 WL 12803229, at *1–2 (D.D.C. Nov. 3, 2014) (stating that "in the interest of judicial economy, Courts will stay summary judgment briefing pending the resolution of a motion to dismiss"); *Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 59 (D.D.C. 2013) ("Not needing more lawyers to spend more time on more briefs on more subjects in order to decide the motion to dismiss, the Court granted the motion to stay...."); *Furniture Brands Int'l Inc. v. U.S. Int'l Trade Comm'n*, No., 11-202 (JDB), 2011 WL 10959877, at *1 (D.D.C. Apr. 8, 2011) (noting that "suspending briefing of the summary judgment motion will allow the Court to manage the orderly disposition of this case").[2] As one court explained:

> Because the Court must necessarily resolve the motions to dismiss before considering plaintiff's summary judgment motion, suspending briefing of the summary judgment motion pending the Court's resolution of the motions to dismiss will not prejudice plaintiff; staying further briefing of the plaintiff's summary judgment motion will allow the parties to avoid the unnecessary expense, the undue burden, and the expenditure of time to brief a motion that the Court may not decide.

Furniture Brands, 2011 WL 10959877, at *1.

Plaintiffs' Motion to Compel asks this Court to take precisely the opposite approach as that espoused in *Furniture Brands*. Plaintiffs ask the Court to halt further briefing on a motion to

[2] *See also, e.g.*, *Baginski v. Lynch*, 229 F. Supp. 3d 48, 57 (D.D.C. 2017) (noting that it had "deferred" consideration of plaintiff's motion for summary judgment "until it was able to assess the government's motion to dismiss"); *Montgomery v. IRS*, No. 17-cv-918 (D.D.C. Nov. 6, 2017) (staying summary judgment briefing until after resolution of threshold issues); *Cierco v. Lew*, 190 F. Supp. 3d 16, 21 (D.D.C. 2016) (same); *Daniels v. United States*, 947 F. Supp. 2d 11, 15 (D.D.C. 2013) (noting that court stayed summary judgment briefing pending its ruling on motion to dismiss); *Angulo v. Gray*, 907 F. Supp. 2d 107, 109 (D.D.C. 2012) (same); *Magritz v. Ozaukee Cnty.*, 894 F. Supp. 2d 34, 37 (D.D.C. 2012) (same); *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747, 749 n.2 (D.D.C. 1986) (holding in abeyance plaintiff's motion for summary judgment "pending resolution of threshold questions of jurisdiction and justiciability").

dismiss that has already been filed, and to skip ahead to full briefing on summary judgment and a full administrative record. This request makes no sense, is contrary to the Court's obligation to decide jurisdiction and other threshold issues before expounding on merits questions, and is wasteful and judicially inefficient.[3] Most of Plaintiffs' arguments to the contrary rest on the false premise, discussed above, that the administrative record is "necessary to resolve" the motion to dismiss. Pl. Mot. to Compel at 14. It is not. To the extent Plaintiffs' claims survive Defendants' Motion to Dismiss, either because they require examination of the administrative record or for any other reason, they can be decided on summary judgment in the ordinary course. Plaintiffs' attempt to avoid having to respond to Defendants' motion to dismiss should be rejected.

[3] Misleadingly, Plaintiffs quote language from the agency's brief in another case challenging the 2020 Rule to inaccurately suggest that Defendants supported a result similar to the one Plaintiffs seek here. But Plaintiffs neglect to inform the Court that the relief sought by the agency in that case was the same as that sought here: "In this case, the existence of serious jurisdictional questions and the interests of efficiency and judicial economy make it appropriate for the Court to resolve Defendants' forthcoming motion to dismiss before the litigation proceeds to summary judgment." *See* Pl. Mot. to Compel, Ex. 5 at 3, ECF No. 58-6. Plaintiffs also neglect to inform the Court that the quoted language suggested consolidated briefing only as an *alternative* to litigating the Plaintiffs' prematurely-filed motion for summary judgment in that case *before* defendants' anticipated motion to dismiss.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion to Compel, and to deny Plaintiffs' premature request to set a consolidated briefing schedule for motions for summary judgment. Defendants respectfully request that the Court order Plaintiffs to respond to the Defendants' pending motion to dismiss.[4]

Dated: October 20, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Liam C. Holland
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Attorneys for Defendants

[4] Defendants do not oppose Plaintiffs' request that their response to Defendants' partial motion to dismiss be due 45 days from the date the Court decides Plaintiffs' Motion to Compel, but respectfully request that Defendants be allowed 30 days to reply to any such response.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO, *in her official capacity as President of the University of California*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE, *in her official capacity as Acting Secretary of the Department of Homeland Security*,

Defendants.
_____/

No. C 17-05211 WHA
No. C 17-05235 WHA
No. C 17-05329 WHA
No. C 17-05380 WHA

CASE MANAGEMENT ORDER FOR ALL DACA ACTIONS IN THIS DISTRICT

After a case management conference at which counsel in all four cases spoke and with the benefit of some agreements, the Court now sets the following case management schedule for all DACA cases in this district:

1. The four above-numbered civil actions in this district all challenge the rescission of the DACA program by the United States Department of Homeland Security. All of these related cases will be coordinated (and possibly later consolidated for trial) as follows.

2. The four sets of plaintiffs are referred to collectively herein as "all plaintiffs," and various defendants in the four cases are referred to collectively herein as "all defendants."

3. All parties shall serve their initial disclosures under FRCP 26, and all defendants shall file and serve the administrative record by **NOON ON OCTOBER 6, 2017**. After a party makes its FRCP 26 disclosure, it may take discovery. All plaintiffs shall be permitted to serve up to a combined total of **TWENTY INTERROGATORIES** and **TWENTY DOCUMENT REQUESTS**, all narrowly directed, plus a reasonable number of depositions. All defendants may serve an equal number of interrogatories and document requests plus a reasonable number of depositions. The time to respond to all discovery requests is cut in half. All discovery disputes are hereby **REFERRED** to **MAGISTRATE JUDGE SALLIE KIM** to be heard and determined on an expedited schedule.

4. A tutorial on DACA, the history of "deferred action," the history of APA rulemaking for deferred action programs and for analogous contexts, and immigration procedure generally is set for **OCTOBER 3, 2017, AT 8:00 A.M.** One or more counsel for each side shall present. Please avoid argument and adhere to updating the judge on the historical and administrative context.

5. Motions for summary judgment, provisional relief, or to dismiss are due by **NOON ON NOVEMBER 1, 2017**. All plaintiffs shall file one joint brief on their statutory claims, and another on their constitutional claims, each brief limited to **25 PAGES**. A plaintiff may, if truly essential, add a very short supplemental brief on any point unique to that plaintiff. All defendants may file a joint brief in support of their own motion of up to **50 PAGES** but the Court would prefer that the briefing be divided between two memoranda, one devoted to statutory claims and one devoted to constitutional claims, both adding to fifty or fewer pages. Any amicus brief must be filed on the same date as the

brief it supports, each limited to **15 PAGES**. Amici may not submit evidentiary material, so their briefs should include everything within their 15 pages.

6. Summary judgment and provisional relief motions must be supported by proper declarations under oath. Simply attaching exhibits to briefs will not do. Foundation must be laid under oath. Motions to dismiss, however, need only be directed to the complaints, but if extraneous matter is referenced, then it too must be supported by declaration.

7. Oppositions are due by **NOON ON NOVEMBER 22, 2017**. The oppositions shall be organized to mirror the organization of the openings. No brief shall exceed the length of the relevant opening brief. All plaintiffs shall file a single joint opposition, and all defendants shall file a single joint opposition, each party being permitted to file a short individual supplement to the extent truly needed for issues unique to that party.

8. There will be no page limit on declarations and exhibits, but please be reasonable. All exhibits for a side should be included in that side's joint and tabbed appendix of exhibits (the tabs should protrude for ease of reference). The "individual" exhibits should be included in the joint appendix as well. The exhibits should be numbered. The appendix, however, should not include any item already in the administrative record. Please highlight in yellow any cited passage. Declarations laying foundation for admissibility may simply refer to the exhibits by tab number.

9. Reply briefs are due by **NOON ON DECEMBER 8, 2017**. The replies shall be organized to mirror the organization of the openings (and the oppositions). The briefs shall not exceed half of the pages used in the opposition briefs to which they respond (not to exceed **30 PAGES** in

any event). There shall be no reply declarations except for very good cause, the Court being of the view that it is unfair for a movant to deprive the other side of its chance to respond to evidentiary material. If a brief quotes from any deposition or other exhibit, then the brief should quote the entire passage, not just the helpful part. Please do the same for quotations from case law.

10. A hearing on all motions is set for **DECEMBER 20, 2017, AT 8:00 A.M.**

11. If necessary, a **BENCH TRIAL** will be held on **FEBRUARY 5, 2018, AT 7:30 A.M.**, with a **FINAL PRETRIAL CONFERENCE** to be held on **JANUARY 24, 2018, AT 2:00 P.M.**

For now, all filings should be made in any civil action to which they pertain *and*, for the sake of coordination, in the low-numbered action (No. C 17-05211 WHA). Counsel shall confer and recommend any better way of organizing the filing system for these cases, including, for example, the possibility of filing everything in the low-numbered action and thereby deeming it to be filed in all actions. Counsel may also stipulate to tweaks in the wording of this order (but not to its substance or timeline). Any such fully-stipulated modifications must be submitted by **SEPTEMBER 29, AT NOON**, failing which this order shall control.

IT IS SO ORDERED.

Dated: September 22, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

EXHIBIT D

From: Jacobs, Edward J.
Sent: Tuesday, October 27, 2020 2:44 PM
To: 'Holland, Liam C. (CIV)' <Liam.C.Holland@usdoj.gov>
Cc: jason.starr@hrc.org; Rovenger, Joshua D. <jrovenger@bakerlaw.com>; Zunno-Freaney, Kathryn <kzunno@bakerlaw.com>; Quicker, Katrina <kquicker@bakerlaw.com>; Sabella, Michael A. <msabella@bakerlaw.com>; Harbin, Ryan E. <rharbin@bakerlaw.com>; Ehrlich, Stephen (CIV) <Stephen.Ehrlich@usdoj.gov>
Subject: RE: Motion for stay -- Asapansa-Johnson Walker et al v. Alex M Azar II et al 20-CV-02834 (EDNY)

Hi Liam,

Going forward, we would appreciate it if you would provide more than a few hours of notice before you file a motion with the Court, and the professional courtesy of waiting for a response to your position before doing so. You first contacted us yesterday morning, I promptly requested your basis for seeking the relief requested, and then you filed your motion that same night without allowing us to respond within a reasonable time frame. We will be opposing your motion and will send our response directly to the Court shortly.

I see in the news today what has become of Mr. Lane. Can you kindly let me know who is on paternity leave and overall who will now be handling the case so we know who to contact and include going forward?

Many thanks,

Ted

From: Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov>
Sent: Monday, October 26, 2020 6:17 PM
To: Jacobs, Edward J. <ejacobs@bakerlaw.com>
Cc: jason.starr@hrc.org; Rovenger, Joshua D. <jrovenger@bakerlaw.com>; Zunno-Freaney, Kathryn <kzunno@bakerlaw.com>; Quicker, Katrina <kquicker@bakerlaw.com>; Sabella, Michael A. <msabella@bakerlaw.com>; Harbin, Ryan E. <rharbin@bakerlaw.com>; Ehrlich, Stephen (CIV)

<Stephen.Ehrlich@usdoj.gov>
Subject: RE: Motion for stay -- Asapansa-Johnson Walker et al v. Alex M Azar II et al 20-CV-02834 (EDNY)

Good Evening Ted,

A stay is appropriate because all factors courts typically consider in favor of stay of proceedings counsel in favor of a stay. A stay will not prejudice your clients as the court has already granted your request for a preliminary injunction. The stay would not affect the preliminary injunction at all. By contrast, requiring defendants to defend the action and the court to address the action without awaiting the Second Circuit's views on jurisdictional and merits issues raised in this case would be wasteful and potentially pointless. Grounds for a stay are particularly compelling where, as here, the issue on appeal bears on Article III standing, and the district court's jurisdiction to proceed at all.

Defendants also believe that it is reasonable to wait for a ruling on the stay motion before responding to the Complaint because a favorable ruling on the stay motion will mean that responding to the Complaint is not necessary at this time and, if the Second Circuit determines the district court is without jurisdiction over plaintiffs' claims, may never be necessary. What is more, two of the attorneys originally assigned to this matter have recently left the office to go on paternity leave and a detail, respectfully. Personally, I have several briefs relating to other business in which plaintiffs would be prejudiced by a delay due on Friday. My colleagues who have been reassigned to this matter are also substantially burdened by the press of other business at the present moment.

I'm not sure when COB is for you, but I hope that the timing of my response does not prejudice your ability to respond at a reasonable hour this evening.

Thanks again for your consideration.

Sincerely,
Liam

From: Jacobs, Edward J. <ejacobs@bakerlaw.com>
Sent: Monday, October 26, 2020 5:50 PM
To: Holland, Liam C. (CIV) <lholland@CIV.USDOJ.GOV>
Cc: jason.starr@hrc.org; Rovenger, Joshua D. <jrovenger@bakerlaw.com>; Zunno-Freaney, Kathryn <kzunno@bakerlaw.com>; Quicker, Katrina <kquicker@bakerlaw.com>; Sabella, Michael A. <msabella@bakerlaw.com>; Harbin, Ryan E. <rharbin@bakerlaw.com>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>
Subject: Re: Motion for stay -- Asapansa-Johnson Walker et al v. Alex M Azar II et al 20-CV-02834 (EDNY)

Hi Liam,

Can you articulate why Defendants believe a stay would be appropriate? If so we will consider it, but

absent that we do not believe a stay would serve either Plaintiffs or the Court. Rather, we believe that the appeal of the injunction is premature and certainly not in the interests of our clients who—as the Court agreed—face imminent harm should Defendants proceed with the rule at issue.

We further oppose additional extensions on the deadline for Defendants to respond to the Complaint for the same reasons articulated above. The government has had four months now to respond, including an additional 30 days on Plaintiffs' consent and an additional 30 days beyond that granted by the Court, in addition to the 60 days already afforded by the Federal Rules.

Please let us know the reasons why the government seeks this relief by COB today. Otherwise, we are not sure how the government expects us to meaningfully consider it.

Regards,
Ted

On Oct 26, 2020, at 11:08, Holland, Liam C. (CIV) <Liam.C.Holland@usdoj.gov> wrote:

[External Email: Use caution when clicking on links or opening attachments.]

Dear Counsel,

We plan to seek a stay of proceedings pending the outcome of the appeal, or barring that, until the Court resolves the scope of the preliminary injunction. In the alternative, should the Court deny a stay altogether, we are asking the Court to extend the deadline to respond to the Complaint until twenty-one days from the date of any such denial.

Could you kindly advise whether you consent to the above relief? If you oppose our alternative request for an extension, could you please kindly advise your reasons so we can include them as required in our letter request?

Finally, given the current deadline, we plan to get this on file today and accordingly would appreciate a response by CoB today.

Many thanks,
Liam

Liam Holland
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Civil Division | Federal Programs Branch
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