IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA,
By and through its Attorney General, JEFF LANDRY; ET AL.,

PLAINTIFFS,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; et al.,

DEFENDANTS.

CIVIL ACTION NO. 3:21-CV-04370-TAD-KDM

REPLY BRIEF IN SUPPORT OF MOTION TO ORDER COMPLETION OF THE ADMINISTRATIVE RECORD

Defendants concede that the White House influenced the decision to promulgate the Head Start Mandate. They also concede outside influence on at least some parts of the Administration's vaccine mandates. But no documents reflecting those facts appear in the administrative record. Because both areas are highly relevant to Plaintiff States' claims that Defendants elevated non-statutory political concerns over the Head Start Act's text, the record is incomplete and Defendants must supplement it.

I. The Administrative Record Is Incomplete.

Defendants first oppose Plaintiffs' motion by urging a standard of review that is effectively unmeetable. They insist (at 2-3) that Plaintiff States must identify the exact documents that Defendants excluded from the record. But that turns the concept of administrative record completion motions on its head. The whole purpose of such motions—long allowed in federal court—is to force the federal government to supplement the administrative record with documents it has withheld. This, in turn, ensures full judicial review. *See, e.g.*, *Louisiana v. Biden*, No. 2:21-v-00778, 2021 WL 5370101, at *4 (W.D.

La. Nov. 17, 2021) ("If a court is never willing to scrutinize agency action, the gates become a cement wall, impervious even to legitimate claims of improper influence.").

And caselaw in the Fifth Circuit confirms that Plaintiff States do not need to identify specific documents missing from the record. Rather, Plaintiff States need only point to gaps in the administrative record. *See, e.g.*, *Louisiana Sportsmen All., LLC v. Vilsack*, 2013 WL 12182156, at *2 (W.D. La. Sept. 4, 2013) ("In instances where 'the agency considered evidence omitted from the administrative record', a court may consider 'extra-record' evidence."). Or demonstrate that the record submitted is suspect. *See, e.g.*, *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 34 (N.D. Tex. 1981) (Higginbotham, J.) (extra-record discovery's "primary function is to offer assurance that the administrative record is complete in areas where completeness is suspect"). And the "whole administrative record" includes "all documents and materials directly *or indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Id.* at 33 (emphasis added). Forcing Plaintiff States to identify specific documents would place on them an improper and impossible burden given the information disparity between the federal government and plaintiffs. *Cf. Schaghticoke Tribal Nation v. Norton*, 2007 WL 867987, at *3 (D. Conn. Mar. 19, 2007) (noting "the difficulty the moving party will have in producing evidence of wrongdoing before they have had an opportunity to conduct discovery"); *see also Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997) ("This is especially true given that agency officials are not likely to keep a written record of improper political contacts.").

Plaintiff States have identified precisely the sort of gaps that justify administrative supplementation. To briefly recap:

First, the Head Start Mandate was part of a White House-directed push to achieve full vaccination. Defendants admit as much in their response (at 7): "Defendants do not dispute that the Rule is part of a broader goal of the administration to increase vaccination rates." Yet despite admitting

White House influence, Defendants refuse to supplement the record. Thus, there is an admitted gap in the administrative record because agency officials surely at least "indirectly considered" such White House directives and policy priorities.

Defendants respond with a myopic focus on the interagency process led by the Office of Information and Regulatory Affairs (OIRA). What happened here was no ordinary OIRA review, but instead what Defendants concede was a whole-of-government approach. To the extent Defendants' decision to promulgate the Head Start Mandate was influenced by agencies with statutory mandates or political missions that do not align with the Head Start Act, such evidence is highly relevant to Plaintiff States' statutory claims. And even if such interagency OIRA-coordinated deliberation were somehow shielded from the administrative record, Plaintiff States' request is not limited to the OIRA process. Consultation with other agencies, particularly the Centers for Disease Control and Prevention, is highly relevant and omitted from the record. *See* Doc. 68-1 at 2-3 ("It is simply not believable that the Head Start Mandate was published without any prior consultation, review, and approval from the White House; no interagency review or coordination with other interested agencies such as CMS, OSHA, GSA, and OPM; or no interaction between HHS and the Office of Information and Regulatory Affairs (OIRA) and Office of Management and Budget (OMB).").

Defendants also assert privilege over the conceded White House involvement in the rulemaking process. But if such White House influence or planning was "indirectly considered," as it must have been, it must be included in the administrative record. Any documents and materials directly or indirectly considered by these government agencies, including documents and materials from the White House, are subject to judicial review and are to be filed in the administrative record. *Louisiana*, 2021 WL 5370101, at *5.

Finally, Defendants say that evidence of political influence is irrelevant because the existence of political considerations in agency decisionmaking does not render an action arbitrary and capricious.

Whatever that suggestion's merits for purely discretionary agency decisions—or when the political influence is arguably within the bounds set by statute—political considerations are arbitrary, unlawful, and evidence of pretext when they constitute a nonstatutory factor that affects agency decisionmaking or direct an agency to elevate nonstatutory considerations over statutory ones. A key part of Plaintiff States' argument is that the Mandate is arbitrary and capricious, violates the Head Start Act, and based on pretext because it elevates the President's policy of full vaccination over (and contradicts) the Head Start Act's mandate "to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development[.]" 42 U.S.C. §9831. So on its face, evidence of Presidential involvement is highly relevant to their claims. And Defendants concede that such influence exists. Accordingly, Plaintiff States have met their burden to demonstrate a gap in the administrative record.

Second, Plaintiff States are willing to accept Defendants' concession that they failed to meet their statutory duty to "consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs." 42 U.S.C. §9836a(a)(2)(A). But Defendants do nothing to explain away their failure to include records of the Administration's consultations with unions in the lead up to the Mandate. They admit that they briefed the National Head Start Association and that the CDC, whose recommendations Defendants considered at least indirectly, met with unions. Such consultations would be relevant because it would demonstrate that Defendants had the time to consult with outside groups, but chose to consult with unions rather than the groups specified by statute.

II. The Court Should Order Completion of the Record.

Defendants close (at 9-10) with the general claim that discovery and supplementation of the record are not warranted in general. But Fifth Circuit courts have squarely rejected this reasoning. *See, e.g.*, *Texas Steel Co. v. Donovan*, 93 F.R.D. 619, 621 (N.D. Tex. 1982) ("Plaintiff does not have to show that the agency acted in 'bad faith,' before such discovery will be allowed, plaintiff merely has to produce reasonable evidence so that the Court may determine whether the 'whole' record has been filed."). And requiring such evidence of bad faith is particularly unjustified because "it is improper to 'require [the moving party] to come forward with conclusive evidence of political improprieties at a point when they are seeking to discover the extent of those improprieties.'" *Schaghticoke Tribal Nation*, 2007 WL 867987, at *3; *accord Louisiana*, 2021 WL 5370101, at *4. Because "there is nothing before th[e C]ourt which proves the administrative record filed herein contains all evidence considered by the defendants in reaching [their] decision," this Court should order supplementation of the record. *Louisiana Sportsmen All., LLC*, 2013 WL 12182156, at *2.

Conclusion

For the foregoing reasons, this Court should grant Plaintiff States' motion for an order compelling Defendants to complete the administrative record.

Respectfully Submitted,

/s/ Elizabeth B. Murrill
ELIZABETH B. MURRILL (La #20685)
Solicitor General
J. SCOTT ST. JOHN (La #36682)
Deputy Solicitor General
MORGAN BRUNGARD*
Assistant Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov
brungardm@ag.louisiana.gov
Counsel for the State of Louisiana

STEVE MARSHALL
Alabama Attorney General
/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.**
Solicitor General
Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Counsel for the State of Alabama

TREG R. TAYLOR
Attorney General of Alaska
/s/ Charles E. Brasington
Charles E. Brasington*
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-6612
charles.brasington@alaska.gov
Counsel for the State of Alaska

MARK BRNOVICH
Arizona Attorney General
/s/ Robert J. Makar
Robert J. Makar**
Assistant Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
Tel: (602) 542-4389
Robert.Makar@azag.gov
ACL@azag.gov
Counsel for the State of Arizona

AUSTIN KNUDSEN
Montana Attorney General
/s/ Kristin Hansen
Kristin Hansen**
Lieutenant General
David M.S. Dewhirst*
Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
Counsel for the State of Montana

DOUGLAS J. PETERSON
Nebraska Attorney General
/s/ James A. Campbell
James A. Campbell*
Solicitor General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682
jim.campbell@nebraska.gov
Counsel for the State of Nebraska

WAYNE STENEHJEM
North Dakota Attorney General
/s/ Matthew Sagsveen
Matthew Sagsveen*
Solicitor General
Director of Civil Litigation, Natural
Resources, and Indian Affairs Division
North Dakota Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509
masagsve@nd.gov
Counsel for the State of North Dakota

LESLIE RUTLEDGE
Arkansas Attorney General
/s/ Dylan L. Jacobs
Dylan L. Jacobs*
Assistant Solicitor General
Office of the Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-2007
Dylan.Jacobs@arkansasag.gov
Counsel for the State of Arkansas

ASHLEY MOODY
Florida Attorney General
/s/ Natalie P. Christmas
Natalie P. Christmas*
Assistant Attorney General of Legal Policy
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
natalie.christmas@myfloridalegal.com
Counsel for the State of Florida

CHRISTOPHER M. CARR
Georgia Attorney General
/s/ Stephen J. Petrany
Stephen Petrany*
Solicitor General
Ross W. Bergethon**
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Counsel for the State of Georgia

THEODORE E. ROKITA
Indiana Attorney General
/s/Thomas M. Fisher
Thomas M. Fisher**
Solicitor General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.fisher@atg.in.gov
Counsel for the State of Indiana

DAVE YOST
Ohio Attorney General
/s/ Benjamin M. Flowers
Benjamin M. Flowers*
Solicitor General
30 E. Broad St., 17th Floor
Columbus, OH 43215
bflowers@ohioAGO.gov
Counsel for the State of Ohio

JOHN M. O'CONNOR
Oklahoma Attorney General
/s/ Mithun Mansinghani
Mithun Mansinghani**
Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-4392
Mithun.Mansinghani@oag.ok.gov
Counsel for the State of Oklahoma

ALAN WILSON
South Carolina Attorney General
/s/ Thomas T. Hydrick
Thomas T. Hydrick*
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4127
thomashydrick@scag.gov
Counsel for the State of South Carolina

JASON R. RAVNSBORG
South Dakota Attorney General
/s/David M. McVey
David M. McVey*
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215
david.mcvey@state.sd.us
Counsel for the State of South Dakota

JEFFREY S. THOMPSON
Iowa Solicitor General
/s/ Samuel P. Langholz
Samuel P. Langholz**
Assistant Solicitor General
Office of the Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov
Counsel for the State of Iowa

DEREK SCHMIDT
Kansas Attorney General
/s/ Shannon Grammel
Shannon Grammel*
Deputy Solicitor General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
Email: shannon.grammel@ag.ks.gov
Counsel for the State of Kansas

DANIEL CAMERON
Attorney General
/s/ Jeremy J. Sylvester
Jeremy J. Sylvester**
Assistant Attorney General
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Jeremy.Sylvester@ky.gv
Counsel for the Commonwealth of Kentucky

HERBERT H. SLATERY III
Attorney General and Reporter of Tennessee
/s/ Andree S. Blumstein
Andree S. Blumstein**
Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3492
Andree.Blumstein@ag.tn.gov
Counsel for the State of Tennessee

SEAN D. REYES
Utah Attorney General
/s/ Melissa A. Holyoak
Melissa A. Holyoak*
Solicitor General
Utah Attorney General's Office
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
385.271.2484
melissaholyoak@agutah.gov
Counsel for the State of Utah

BRIDGET HILL
Wyoming Attorney General
/s/ Ryan Schelhaas
Ryan Schelhaas**
Chief Deputy Attorney General
Wyoming Attorney General's Office
Attorneys for the State of Wyoming
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov
Counsel for the State of Wyoming

PATRICK MORRISEY
West Virginia Attorney General
/s/ Lindsay S. See
Lindsay S. See*
Solicitor General
State Capitol, Bldg. 1, Room E-26
Charleston, WV 25305
Lindsay.s.see@wvago.gov
Counsel for the State of West Virginia

LYNN FITCH
Attorney General of Mississippi
/s/Whitney H. Lipscomb
Whitney H. Lipscomb**
Deputy Attorney General
John V. Coghlan**
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680
Counsel for the State of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri
/s/ D. John Sauer
D. John Sauer*
Solicitor General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-8870
Fax: (573) 751-0774
John.Sauer@ago.mo.gov
Counsel for the State of Missouri

* *Pro hac vice* application granted
** *Pro hac vice* application forthcoming

Dated: May 11, 2022