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

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-4370-TAD-KDM

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION TO ORDER COMPLETION OF ADMINISTRATIVE RECORD

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INTRODUCTION

Plaintiffs challenge an interim final rule ("Rule") issued by the Administration for Children and Families ("ACF") of the Department of Health and Human Services ("HHS") requiring COVID-19 vaccinations for Head Start staff and mask use in Head Start programs. On March 24, 2022, Defendants produced the certified administrative record in this action. The record comprises over one hundred separate documents, totaling 22,817 pages. *See* ECF Nos. 55–56.

Plaintiffs then moved for "an order compelling Defendants to complete the administrative record." Pls.' Mot. to Order Completion of the Admin. Record, at 1 ("Mot."), ECF No. 68. Without identifying any particular documents, Plaintiffs claim that Defendants failed to include two "categories" of documents: records related to "White House influence and outside influence." *Id.* Despite Plaintiffs' assertions, however, the administrative record as filed is complete. The administrative record already includes all of the materials related to consultations with external experts, and no other non-governmental groups were consulted as part of the rulemaking. To the extent ACF coordinated with other agencies of the government, including the White House, it did so as part of the usual regulatory process. Such communications are subject to the deliberative process privilege and properly excluded from the administrative record. Plaintiffs' motion does not overcome the presumption of regularity in an agency's designation of an administrative record, and the Court should therefore deny the motion.

LEGAL STANDARD

Plaintiffs bring suit pursuant to the Administrative Procedure Act ("APA"), and, as a consequence, adjudication of Plaintiffs' claims is limited to the administrative record. In APA actions, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

Although courts occasionally use different terminology, in general there are two ways in which

a litigant may attempt to add records to the administrative record beyond those designated by the agency: "completing the record" and "supplementing the record." First, "'completing the record' refers to including 'materials which were actually considered by the agency, yet omitted from the administrative record.'" *Bruce v. Azar*, 389 F. Supp. 3d 716, 724 n.5 (N.D. Cal. 2019) (quoting *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1274 (D. Colo. 2010)), *aff'd*, 826 F. App'x 643 (9th Cir. 2020). Second, "'supplementing the record' refers to including 'materials which were not considered by the agency, but which are necessary for the court to conduct a substantial inquiry.'" *Id.* (quoting *Ctr. for Native Ecosystems*, 711 F. Supp. 2d at 1274).

Agencies follow a well-established practice in identifying the records that should be included in the administrative record. The administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers." *Lee Mem'l Hosp. v. Burwell*, 109 F. Supp. 3d 40, 46–47 (D.D.C. 2015). "[A]bsent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record." *Grunewald v. Jarvis*, 924 F. Supp. 2d 355, 357 (D.D.C. 2013) (quoting *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 5 (D.D.C. 2009)); *see also W&T Offshore, Inc. v. Jewell*, No. 14-cv-2449, 2016 WL 5724907, at *2 (W.D. La. Sept. 30, 2016). To rebut the strong presumption of regularity, a plaintiff must (1) "identify reasonable, non-speculative grounds for its belief that the [omitted] documents were considered by the agency"; and (2) "identify the materials . . . with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are 'likely' to exist." *UnitedHealthcase Ins. Co. v. Azar*, 316 F. Supp. 3d 339, 345 (D.D.C. 2018) (citations omitted).

ARGUMENT

I. The Administrative Record Is Complete

Plaintiffs assert that Defendants have not provided the complete administrative record, or that Defendants did not include in the record material that they considered in promulgating the Rule.

Plaintiffs come nowhere close to carrying the "sizable burden" required "to convince the court to forego the customary deference owed to an agency's determination of what constitutes the record." *WildEarth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1254 (D. Colo. 2010).

As an initial matter, Plaintiffs do not even attempt to "identify the materials" that they believe were omitted but should have been included in the administrative record "with sufficient specificity." *UnitedHealthcase Ins. Co.*, 316 F. Supp. 3d at 346. Instead, they argue that the agency excluded two "categories" of documents, Mot. at 1, and that these "areas" reveal unspecified "gaps in the record," Mot. at 2. Plaintiffs are not entitled to an order compelling completion of the record by "[m]erely proffering broad categories of documents and data that are 'likely' to exist." *UnitedHealthcase Ins. Co.*, 316 F. Supp. 3d at 345. The Court should deny the motion on this basis alone.

Plaintiffs have also failed to "identify reasonable, non-speculative grounds for [their] belief that" these categories of documents were improperly excluded from the administrative record, *id.*, much less produced "clear evidence" to that effect, *Grunewald*, 924 F. Supp. 2d at 357. Plaintiffs merely describe the certified administrative record as "suspect," Mot. at 2, but such general, unsupported assertions cannot overcome the "strong presumption of regularity," *Grunewald*, 924 F. Supp. 2d at 357. Plaintiffs have failed to meet their sizable burden to overcome the presumption that the administrative record is complete, and the Court should deny their motion.

A. Ordinary Intragovernmental Coordination Is Protected by the Deliberative Process Privilege.

Plaintiffs are incorrect that the administrative record should include communications between the agency and the White House and other agencies, such as the Office of Information and Regulatory Affairs ("OIRA") and the Office of Management and Budget ("OMB"). Mot. at 2–3. To the extent ACF coordinated with these other governmental entities, those communications were part of the ordinary deliberative process. *See* Decl. of Katherine Troy Rau ("Rau Decl.") ¶ 5; *see also* Mot. at 3 (conceding that such coordination is "routine" for many regulatory actions). Any documentation of

those communications is therefore privileged and not included in the administrative record.

"[D]eliberative, intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record." *W&T Offshore, Inc.*, 2016 WL 5724907, at *2 (alteration in original) (bolding omitted) (quoting *Amfac Resorts LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 13 (D.D.C. 2001)).[1] APA review is focused on the agency *decision*, not the *process* leading to that decision. *See Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008) (APA review is of the "agency's stated justification, not the predecisional process that led up to the final, articulated decision"). Accordingly, "agency officials should be judged by what they decided, not for matters they considered before making up their minds." *National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014). The "principle that judges review administrative action on the basis of the agency's *stated* rationale and findings . . . is well-established." *Deukmejian v. Nuclear Regulatory Com.*, 751 F.2d 1287, 1325 (D.C. Cir. 1984) (emphasis in original). Therefore, documents reflecting the deliberative process that led to the agency's decision are simply not pertinent to the Court's review of the agency decision and should not be included in the administrative record.

This sensible rule, embraced by the overwhelming majority of courts, is premised on two independent rationales. First, it is "not the function of the court to probe the mental processes" of the agency. *Morgan v. United States*, 304 U.S. 1, 18 (1938). That is why an "agency's action must be upheld, if at all, *on the basis articulated by the agency itself*." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (emphasis added). Changes in position or discussions

[1] *See also San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (*en banc*); *Town of Norfolk v. Army Corps of Eng'rs*, 968 F.2d 1438, 1455–58 (1st Cir. 1992); *Madison Cnty. Bldg. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 622 F.2d 393, 395 n.3 (8th Cir. 1980); *Norris & Hirshberg, Inc. v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947); *Kovac v. Wray*, No. 3:18-cv-110, 2022 WL 717260, at *5 & n.30 (N.D. Tex. Mar. 10, 2022); *ASSE Int'l, Inc. v. Kerry*, No. SACV-14-00534-CJCJPRX, 2018 WL 3326687, at *2 (C.D. Cal. Jan. 3, 2018); *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312–13 (S.D.N.Y. 2012); *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 18 (D.D.C. 2009); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008); *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 372–73 (D.D.C. 2007).

prior to that final agency action are not evidence of arbitrary and capricious decision-making, and, accordingly, they are immaterial to this Court's review. *See, e.g.*, *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, No. ELH 16-1015, 2017 WL 3189446, at *8 (D. Md. July 27, 2017) ("[J]udicial review of agency action 'should be based on an agency's stated justification, not the predecisional process that led up to the final, articulated decision.'" (quoting *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002))). Second, excluding deliberative materials from the administrative record "prevent[s] injury to the quality of agency decisions" by encouraging uninhibited and frank discussion of legal and policy matters within the Executive Branch. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). "To require the inclusion in an agency record of documents reflecting internal agency deliberations could hinder candid and creative exchanges regarding proposed decisions and alternatives, which might, because of the chilling effect on open discussion within agencies, lead to an overall decrease in the quality of decisions." *Ad Hoc Metals Coalition*, 227 F. Supp. 2d at 143.[2]

Plaintiffs offer no explanation as to why the Court should not treat communications between ACF and other agencies, like OIRA and OMB, as privileged. Indeed, they note that OIRA and OMB clearance of regulations is "routine," *see* Mot. at 3, yet they point to no case in which such interagency review was included as part of an administrative record. These sorts of interagency review and clearance are commonplace, and agencies do not include these processes in the administrative record because they are deliberative. *See* Rau Decl. ¶ 5. The D.C. Circuit has held that such communications are not part of an administrative record except when the agency explicitly relies on them to support

[2] Plaintiffs have not requested a privilege log. In any event, Defendants are not required to produce a privilege log of any sort to describe deliberative materials that were excluded from the administrative record. *See Great Am. Ins. Co. v. United States*, No. 12 C 9718, 2013 WL 4506929, at *8 (N.D. Ill. Aug. 23, 2013) ("[T]he law is clear: [since] predecisional and deliberative documents 'are not part of the administrative record to begin with,' . . . they 'do not need to be logged as withheld from the administrative record.'" (quoting *Oceana, Inc. v. Locke*, 634 F. Supp. 2d 49, 52 (D.D.C. 2009))); *see also Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013); *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Hum. Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009).

its actions. In *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), a bedrock case in administrative law, a petitioner argued that an agency's communications with the White House in connection with an informal rulemaking proceeding should have been publicly docketed and made part of the record for judicial review. *See id.* at 404. The D.C. Circuit rejected that argument and held that such communications did not need to be made part of the record. The court reasoned that "[t]he purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact . . . in [an] informal rulemaking setting." *Id.* at 407. The court explained that, in conducting judicial review, a court should examine whether the agency's action had "the requisite factual support in the rulemaking record," not whether the action may have been influenced by "political considerations or the presence of Presidential power." *Id.* at 407–08; *see also New Mexico v. EPA*, 114 F.3d 290, 295–96 (D.C. Cir. 1997) (holding that "communications with persons outside the agency" within the Executive Branch, including the Office of Management and Budget, "are permissible under the Administrative Procedure Act so long as [the agency] can justify its rules entirely by reference to the record before it."). Accordingly, there is no basis for compelling ACF to add documents to the administrative records reflecting communications with OMB or any other agency.

Plaintiffs' request that the Court order Defendants to include in the record White House communications related to the Rule raises additional concerns. In *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), the Supreme Court emphasized that discovery directed to the White House raises "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office" and "[t]he high respect that is owed to the office of the Chief Executive." *Id.* at 385 (alteration in original) (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). The Court specifically rejected the contention that the White House could sufficiently protect itself against intrusive discovery through individual privilege assertions, holding that the White House should not

unnecessarily be placed in the position of having to assert executive privilege. *Id.* at 390. As the Court explained, "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course" and "[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." *Id.* at 389. The burdens that would be placed on the White House here are directly analogous to those deemed improper in *Cheney*.[3]

Finally, the materials that Plaintiffs request are irrelevant to resolution of their APA claims. Plaintiffs argue that the Rule's stated rationales—protecting the health and safety of Head Start personnel and preventing Head Start program closures due to positive COVID-19 cases—are pretextual, and that ACF's real motivation came from a directive from the President as "part of a broader program aimed at increasing vaccination rates." Compl. ¶ 204. But Defendants do not dispute that the Rule is part of a broader goal of the administration to increase vaccination rates. As Defendants have explained, "[a] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *See* Defs.' Br. in Support of their Mot. to Dismiss, or in the Alternative, Mot. for Summary Judgment, at 31, ECF No. 65-1 (quoting *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019)). In other words, the parties' dispute is a legal one, *i.e.* whether an agency rule is arbitrary and capricious under the APA merely because it aligns with the President's priorities. A detailed accounting of the Executive's communications will not assist in deciding that issue.

B. All External Consultations Are Already Included in the Administrative Record.

Plaintiffs are also incorrect that the administrative record is incomplete because it does not

[3] *Lousiana v. Biden*, No. 2:21-cv-00778, 2021 WL 5370101 (W.D. La. Nov. 17, 2021), relied on by Plaintiffs, is distinguishable. That decision, which involved judicial review of an Executive Order, did not address the deliberative process privilege or any other type of privilege. *See id.* at *5.

include discussions between the agency and external experts and interested parties. Mot. at 3. The agency did not omit any such non-privileged document from the record.

First, Plaintiffs claim that Defendants did not include documents of consultation with "outside entities and experts" as required by 42 U.S.C. § 9836(a)(2)(A). The agency included a transcript from its consultation with Dr. Sean O'Leary, an external expert in child health and pediatrics. *See* Administrative Record ("AR") 2,055–64. As Defendants have explained, all other consultations under § 9836(a)(2)(A) either were deferred for good cause until after publication of the interim Rule or have been satisfied through internal consultations. *See* Defs.' Br. in Support of their Mot. to Dismiss, or in the Alternative, Mot. for Summary Judgment, at 23, *Brick v. Biden*, No. 2:21-cv-04386-TAD-KK (W.D. La. Apr. 29, 2022), ECF No. 32-3; Rau Decl. ¶ 4. Deferred consultations are excluded from the administrative record because, of course, they have not occurred yet or had not occurred at the time the Rule was promulgated, and internal consultations among ACF or Office of Head Start staff are properly excluded under the deliberative process privilege. *See supra* section I.A.

Second, Plaintiffs claim that "the Administration consulted with unions in the development of CDC school masking policies." Mot. at 3. But this argument concerns an entirely different agency—CDC—and not ACF, the agency that promulgated the Rule. Plaintiffs do not contend that ACF consulted with unions before issuing the Rule challenged in this case. *See* Rau Decl. ¶¶ 2–3. In fact, ACF did not consult with or seek input from any outside groups before issuance of the interim Rule. *See id.* ¶ 2. ACF offered a courtesy briefing to the National Head Start Association, state and regional Head Start associations, and state collaboration offices on September 9, 2022, which is standard operating procedure for any rollout of a new Head Start performance standard. *See id.*. That briefing was one-sided and did not elicit feedback from the briefed parties, *see id.*, and was thus not included in the administrative record, *see Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 297 (D.N.M. 2015) (recognizing that plaintiffs may not add materials to the administrative

record "solely on the ground that the [agency] authored them").

The fact that the CDC may have consulted with unions in issuing its school masking guidance is irrelevant. CDC is not a defendant in this case, and Plaintiffs in this action challenge the Rule, not CDC's guidance. The preamble to the Rule states that the agency "consulted with . . . the recommendations of the CDC." Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs, 86 Fed. Reg. 68,052, 68,054 (Nov. 30, 2021). But that only means that ACF decision-makers considered those recommendations. ACF included in the administrative record the content of those CDC recommendations it considered. *See* AR 444–56. ACF personnel did not consult with any unions in issuing the Rule. *See* Rau Decl. ¶ 2. And there is no authority for the proposition that one agency needs to include all of the materials considered by a *different* agency in issuing a separate rule or recommendation merely because first agency considers or cites to that second agency's rule or recommendation. If agencies were under such an obligation, it would create a massive expansion of administrative records that would be unmanageable for judicial review. As such, ACF was under no obligation to include in the administrative record in this case any consultations conducted between the CDC and unions in the development of the CDC's guidance.

II. Discovery and Supplementation of the Record Are Not Warranted

Plaintiffs have moved only for an order to complete the administrative record. Therefore, the Court has no occasion to decide whether Plaintiffs should be allowed to supplement the record or whether discovery is warranted. However, to the extent the Court considers those issues, neither supplementation nor discovery should be granted here. Discovery in an APA matter is rare and generally requires a "strong showing of bad faith or improper behavior." *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011) (quoting *Baptist Mem'l Hosp.–Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009)). Supplementation of the administrative record with extra-record evidence is likewise only permitted in certain narrow circumstances not present here. *See Medina Cnty.*

Envtl. Action Ass'n v. Surface Trasnp. Bd., 602 F.3d 687, 706 (5th Cir. 2010). Here, the agency had legitimate reasons for excluding the categories of documents that Plaintiffs argue should be part of the administrative record. *See supra* Part I. There was therefore no "bad faith" on behalf of the agency.

III. Any Order Compelling Production of Additional Documents Should Be Stayed Pending Resolution of Defendants' Motion to Dismiss

Although Defendants strongly dispute Plaintiffs' entitlement to expansion of the administrative record, if the Court disagrees, at the very least, it should defer any order compelling production of additional documents until the Court resolves Defendants' motion to dismiss. "[I]t is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Loumiet v. United States*, 225 F. Supp. 3d 79, 82 (D.D.C. 2016); *see also See Kolley v. Adult Protective Servs.*, 725 F.3d 581, 587 (6th Cir. 2013); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). Here, Defendants filed a motion to dismiss, or in the alternative, motion for summary judgment. The administrative record is relevant only to the motion for summary judgment. The Court should therefore rule on the legal issues presented in the motion to dismiss first. *See In re United States*, 138 S. Ct. 443, 445 (2017) (finding that the U.S. District Court for the Northern District of California should have stayed implementation of its order to expand the administrative record and first resolved the government's threshold arguments).

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion should be denied.

Dated: May 4, 2022

Respectfully submitted,

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STATE OF LOUISIANA, *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, Defendants.	Civil Action No. 3:21-CV-04370-TAD-KDM

DECLARATION OF KATHERINE TROY RAU

I, Katherine Troy Rau, make the following declaration in lieu of an affidavit, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this declaration will be filed with the United States District Court for the Western District of Louisiana and that it is the legal equivalent of a statement under oath.

1. I am a Senior Program Specialist in the Policy, Oversight, and Planning Division of the Office of Head Start (OHS), which is a component of the Administration for Children and Families (ACF) within the U.S. Department of Health and Human Services (HHS). In that capacity, I was responsible for overseeing the drafting of the Interim Final Rule with Comment Period regarding the Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs (IFC) and for the compiling of the administrative record for the IFC. I make this affidavit based on personal knowledge and on information I have obtained in the course of my official duties.

2. ACF and OHS did not consult with outside groups in promulgating the IFC. When the policy was announced on September 9, 2021, ACF provided a courtesy briefing to the National Head Start Association (including the Migrant and Seasonal Head Start Association and the National Indian Head Start Directors Association), state and regional Head Start associations, and state collaboration offices. During these briefings, ACF did not solicit comment or consultation. Such briefings are standard in announcing policy. These entities received similar briefings after publication of the IFC on November 30, 2021.

3. In promulgating the IFC, ACF and OHS considered the published Center for Disease Control (CDC) guidance as cited in the rule. ACF and OHS did not consider any non-privileged materials related to the published CDC guidance that are not already included in the administrative record.

4. Experts consulted in the promulgation of the IFC were internal to OHS, ACF, HHS, and OHS's National Center advisers. As the leading federal agency for public health and child health as well as the agency in charge of the largest federal early childhood grant programs, HHS maintains extensive expertise in areas relevant to the IFC. ACF and OHS staff have experience as Head Start directors, teachers, social workers, and staff. ACF consulted with Dr. Sean O'Leary, an expert in child health and pediatric infectious disease, who is a consultant for OHS's National Center. A transcript of that consultation is included in the administrative record.

5. In promulgating the IFC, ACF, and OHS engaged in the routine interagency review process and followed as appropriate all relevant Executive Orders regarding interagency and Office of Management and Budget review including EO 12866 and

EO 13563. ACF and OHS do not include these processes in the administrative record because they are deliberative.

I affirm that the foregoing is true and correct to the best of my knowledge and belief.

Dated: May 3, 2022

/s/Katherine Troy Rau
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