June 27, 2019

The Honorable Paul A. Engelmayer
United States District Court for the Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 2201
New York, NY 10007

RE: Plaintiffs' joint opposition to Defendants' motion to continue the deadline to respond to Plaintiffs' motions for preliminary injunction, and for other relief, in *State of New York v. U.S. Dep't of Health & Human Servs.*, 19 Civ. 4676 (PAE) (consolidated with 19 Civ. 5433 (PAE) and 19 Civ. 5435 (PAE)).

Dear Judge Engelmayer,

Plaintiffs in these consolidated cases oppose Defendants' motion to continue the deadline to respond to Plaintiffs' motions for preliminary injunction and to set a summary judgment briefing schedule. Dkt. 79. Defendants' motion represents that "HHS will delay enforcement of the HHS rule challenged in this case" until November 22, 2019. *Id.* at 1. Nonetheless, the effective date of that rule remains July 22, 2019. 84 Fed. Reg. 23,170, 23,170 (May 21, 2019).

Plaintiffs appreciate Defendants' acknowledgment that the equities here weigh decisively against enforcement of the Final Rule on July 22, 2019, and Plaintiffs are sensitive to Defendants' request for additional time to brief their position on the pending motions for preliminary injunction. With regard to that request, Plaintiffs would consent to a stipulated order that preserves the status quo to allow Defendants more time to respond to those motions. But Defendants' proposal—based on a representation through counsel of the agency's intent to delay enforcement of the Final Rule for four months following its effective date—should be rejected because it does not preserve the status quo as would a preliminary injunction, and therefore it does not protect Plaintiffs from irreparable harm upon the Final Rule's effective date. In addition, Defendants' proposed schedule for summary judgment briefing is unworkable and prejudicial, and should be rejected.

Plaintiffs therefore respectfully request that the Court (1) deny without prejudice Defendants' request to continue the deadlines for Plaintiffs' motions for preliminary injunction; (2) deny Defendants' request to set their proposed schedule for cross-motions for summary judgment briefing; and (3) as necessary, schedule a status conference at the Court's earliest convenience to discuss the most efficient way to resolve these challenges.

1. The deadlines for preliminary injunction briefing and argument set by the Court, Dkt. 38, should not be adjourned absent a stipulated order or other measure that fully preserves the status quo. Plaintiffs have briefed in detail the irreparable injury they will face immediately upon the effective date of the Final Rule. *See* 19 Civ. 4676, Dkt. 45, at 9-23; 19 Civ. 5433, Dkt. 20, at 42-50; 19 Civ. 5435, Dkt. 26, at 42-50. The *State of New York* Plaintiffs, for example, explained that they will be harmed through (a) the forced choice of complying with a potentially unlawful regulation or risking the loss of federal health care funds; (b) harms to Plaintiffs' health institutions and their direct delivery of care; and (c) interference with Plaintiffs' administration

of their insurance laws. *See* Dkt. 45, at 9-23. Defendants' delay of enforcement would seemingly address only one of the threats of imminent harm Plaintiffs face—namely, the risk that federal health care funds will be terminated for noncompliance with the Final Rule. But because the Final Rule will be in effect, all of the other injuries that Plaintiffs (including their affiliates, members, institutions, patients, and residents) will face—the likelihood of increased denials of care, interference with the provider-patient relationship, decreased insurance coverage, and other harms—will still accrue.

Defendants' motion and the accompanying representation from counsel provide the Court and Plaintiffs with no details regarding the contours of Defendants' proposed delay of enforcement. For example, between July 22 and November 22, 2019, it is not clear whether HHS's Office for Civil Rights ("OCR") will accept complaints under the Final Rule; whether OCR will commence complaint investigations and merely delay taking action based on such investigations; or whether HHS and OCR will take no action at all with respect to the Final Rule. In a meet-and-confer with Defendants' counsel yesterday (after Plaintiffs were first advised of Defendants' intended approach, *see* Ex. 1 at 1), Plaintiffs requested additional detail regarding what "delayed enforcement" would mean, but Defendants were unable to provide any information. And Defendants' current position is a significant departure from the representation they made to the parties last week: that HHS had decided to publish a new rule delaying the effective date of the Final Rule from July 22 to November 22, 2019. *See* Ex. 1 at 3, 6. Defendants' last-minute change in position—combined with the refusal or inability to describe what a delay of enforcement would entail—strongly suggest a substantive difference between counsel's representation that the agency will "delay enforcement," Dkt. 79, and Defendants' earlier representation that they intended to publish a rule delaying the Final Rule's effective date.

So, under Defendants' proposed approach, the Final Rule will still take effect on July 22, 2019. Accordingly, on that date, an employee at one of Plaintiffs' institutions could assert her new refusal rights under the Final Rule, and that assertion of rights would arguably be completely lawful under the rule, because it will have taken effect. Whether Defendants are prepared to *enforce* the rule seemingly affects only whether Plaintiffs face financial sanction for noncompliance with the Final Rule's requirements, but does not stem the many other irreparable injuries Plaintiffs will face.

As noted, Plaintiffs are prepared to consent to a stipulated order that *would* fully preserve the status quo. *See* Ex. 1. Defendants could, for example, consent to a temporary restraining order that would enjoin Defendants from enforcing, applying, or taking any action to implement the Final Rule until the pending motions for preliminary injunction are resolved. Defendants in fact agreed to a similar approach in a different case earlier this year. *See* Temporary Restraining Order and Scheduling Order, *DeOtte v. Azar*, No. 4:18-cv-825 (N.D. Tex. Feb. 20, 2019), Dkt. 29 (Ex. 2). In the alternative, Defendants could stipulate to entry of an order from the Court that postpones the effective date of the Final Rule under 5 U.S.C. § 705 pending judicial review. Plaintiffs proposed both of these options to Defendants, but Defendants rejected each approach.

Until a preliminary injunction, stipulated order, or other mechanism that preserves the status quo is effectuated, any adjournment of the current briefing schedule would prejudice Plaintiffs by exposing them to the very harms they are seeking a preliminary injunction to avert.

2. The Court should also reject Defendants' proposed schedule for summary judgment briefing because it does not allow the parties sufficient time to brief, or the Court to consider, the merits of Plaintiffs' challenges in a case of this size and complexity.

Defendants propose that they provide the Administrative Record ("A.R.") by July 22, 2019; that they move for summary judgment 45 days later, by September 5; and that Plaintiffs file their opposition to Defendants' motion for summary judgment and cross-move for summary judgment approximately three weeks after that, by September 27. These deadlines are unworkable and would prejudice Plaintiffs. First, although Defendants repeatedly stated on the parties' meet-and-confer calls that they are unable to provide Plaintiffs with the anticipated size of the A.R., Plaintiffs understand that, at minimum, it will include the more than 200,000 public comments filed during the notice-and-comment period, *see* 84 Fed. Reg. at 23,180, as well as any yet-to-be disclosed studies, reports, or economic analyses the agency considered in preparing the Final Rule. Defendants' proposed schedule allows insufficient time to digest an A.R. of that size, *and* at the same time brief the merits of Plaintiffs' summary judgment motions and opposition to Defendants' motions. All the more so given that, in the normal course, Plaintiffs could assess the A.R. before negotiating a summary judgment briefing schedule.

Second, Defendants' proposed schedule includes virtually no allowance for the possibility that Defendants will produce a deficient A.R. In at least four lawsuits challenging federal agency action in just the past eighteen months, the agency has produced a deficient record that required court-ordered completion. *See In re Nielsen*, No. 17-3345, slip op. at 2-3 (2d Cir. Dec. 27, 2017) (order denying mandamus petition) (Ex. 3); *Washington v. U.S. Dep't of State*, No. 18-cv-1115, 2019 WL 1254876, at *1-4 (W.D. Wash. Mar. 19, 2019); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 529 (S.D.N.Y. 2019); Minute Order, *Saget v. Trump*, No. 18-cv-1599 (WFK) (E.D.N.Y. Aug. 27, 2018) (Ex. 4). That is so even though "an agency's designation of the administrative record is generally afforded a presumption of regularity," and that "[s]upplementation of the record as designated by the agency is, thus, the exception, not the rule." *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012) (Engelmayer, J.). Plaintiffs do not presume that the A.R. Defendants will produce will be incomplete, but the truncated schedule Defendants have proposed—with the Final Rule in effect and the end of HHS's delay of enforcement looming—would prevent any meaningful consideration of the issue by Plaintiffs or the Court.

In contrast to the prejudicial schedule that Defendants have proposed, Plaintiffs proposed a modified briefing schedule that would allow for summary judgment motions practice on a more realistic—yet still expedited—timeline. *See* Ex. 1, at 2. Defendants rejected Plaintiffs' proposal.

3. If the Court is inclined to adjourn the preliminary injunction briefing deadlines or set a summary judgment briefing schedule, Plaintiffs request a status conference beforehand at the Court's earliest convenience to discuss the most efficient way to resolve the merits while protecting Plaintiffs from irreparable injury in the interim.

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: */s/ Matthew Colangelo*
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* *Pro hac vice* motion forthcoming

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**Pro hac vice* motion forthcoming

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* Application for admission forthcoming
**Pro hac vice* motion forthcoming

Attorneys for the *NFPRHA* Plaintiffs

Exhibit 1

From: Colangelo, Matthew
Sent: Wednesday, June 26, 2019 4:49 PM
To: Humphreys, Bradley (CIV); Adam Grogg; Takemoto, Benjamin (CIV); Kopplin, Rebecca M. (CIV); Meyer, Amanda; Brigitte Amiri (bamiri@aclu.org); Alexa Kolbi-Molinas (akolbi-molinas@aclu.org); Salgado, Diana (diana.salgado@ppfa.org); Deabler, Justin; Tucker, Brooke
Subject: RE: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Counsel,
Thank you for your time on the parties' meet-and-confer discussion this afternoon. Based on the information you have been able to provide regarding Defendants' nonenforcement proposal, Plaintiffs in these consolidated cases oppose your proposed summary judgment briefing schedule, and oppose your proposal to vacate the current briefing and hearing schedule for Plaintiffs' motions for preliminary injunction. If you receive additional information regarding your client's intended approach in response to the questions we raised when we spoke, we are of course happy to revisit this position.
Thank you,
Matthew

From: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Sent: Wednesday, June 26, 2019 10:24 AM
To: Adam Grogg <agrogg@democracyforward.org>; Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Meyer, Amanda <Amanda.Meyer@ag.ny.gov>; Brigitte Amiri (bamiri@aclu.org) <bamiri@aclu.org>; Alexa Kolbi-Molinas (akolbi-molinas@aclu.org) <akolbi-molinas@aclu.org>; Salgado, Diana (diana.salgado@ppfa.org) <diana.salgado@ppfa.org>; Deabler, Justin <Justin.Deabler@ag.ny.gov>; Tucker, Brooke <Brooke.Tucker@ag.ny.gov>
Subject: RE: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

All –

After further deliberations, HHS no longer intends to delay the effective date of the rule with a notice in the Federal Register. HHS will, however, delay any enforcement of the Rule until November 22, 2019. We intend to file a motion this afternoon asking the Court to enter the following briefing schedule (which is largely similar to our initial proposal, except the order of summary judgment motions is switched):

- July 22, 2019: HHS lodges the administrative record.
- September 5, 2019: Defendants file their motion for summary judgment.
- September 27, 2019: Plaintiff files its opposition to Defendants' motion for summary judgment (and cross-motion for summary judgment, if any).
- October 11, 2019: Defendants file their reply (and opposition, if any).
- October 25, 2019: Plaintiff files its reply in support of its motion for summary judgment, if any.

In the alternative, if the Court rejects that proposal, we will be asking for an extension of the PI opposition deadline until July 31.

Based on your earlier response, I understand that Plaintiffs opposes our request, but I wanted to let you know nonetheless about the modification to our prior representation. We plan to file later this afternoon, and, unless we hear differently from you, we'll indicate that Plaintiffs oppose our motion.

Thanks,
Brad

From: Adam Grogg <agrogg@democracyforward.org>
Sent: Friday, June 21, 2019 11:29 AM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>; Humphreys, Bradley (CIV) <brhumphr@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Meyer, Amanda <Amanda.Meyer@ag.ny.gov>; Brigitte Amiri (bamiri@aclu.org) <bamiri@aclu.org>; Alexa Kolbi-Molinas (akolbi-molinas@aclu.org) <akolbi-molinas@aclu.org>; Salgado, Diana (diana.salgado@ppfa.org) <diana.salgado@ppfa.org>; Deabler, Justin <Justin.Deabler@ag.ny.gov>; Tucker, Brooke <Brooke.Tucker@ag.ny.gov>
Subject: Re: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Ben and Brad,

For all the reasons we have previously explained, including in our email yesterday, we are unable to consent to Defendants' revised proposal.

The most recent schedule you have proposed, which would require that summary judgment motions be fully briefed, argued, and decided by Nov. 22, is simply not workable and would severely prejudice Plaintiffs. The additional three weeks in your latest proposal are not sufficient; indeed, under this new proposal the government would be providing the administrative record one week later than in your previous proposal. In addition, your schedule would leave Plaintiffs only two weeks to simultaneously oppose your motion for summary judgment and file a reply in support of our own motion. We cannot agree to such an arbitrary and prejudicial schedule when preliminary injunctive relief would allow the parties -- and the Court -- a reasonable amount of time to resolve this case on the merits. As we have stated previously, we are particularly unable to agree to the truncated schedule you have proposed when we have not even seen the administrative record, but know that it is over 200,000 pages.

We are willing, however, to offer the following counter-proposal:

July 22, 2019 – Defendants produce the administrative record

Oct. 1, 2019 – Plaintiffs move for summary judgment

Nov. 1, 2019 – Defendants oppose and cross-move

Dec. 2, 2019 – Plaintiffs file their reply and opposition

Dec. 20, 2019 – Defendants file their reply

Month of Jan. 2020 or at the Court's convenience – argument on cross-motions

Feb. 15, 2020 – Rule's delayed effective date

If the above is not agreeable to Defendants, we will contest Defendants' motion to set the summary judgment briefing schedule you have proposed.

Brad, your email from yesterday stated that if the Court does not adopt Defendants' proposed summary judgment schedule, you will seek, in the alternative, an extension of time to respond to Plaintiffs' preliminary injunction motions until July 31, 2019. At present, however, the rule's effective date is July 22, 2019, and so until the delay that you indicate is forthcoming takes effect, we are not in a position to agree. However, once the rule's effective date is delayed through Nov. 22, 2019, we certainly anticipate that we will be able to agree to an extended schedule for briefing the preliminary injunction motions.

All my best,
Adam

—
Adam Grogg
Senior Counsel, Democracy Forward Foundation
agrogg@democracyforward.org | (202) 701-1790

On Thu, Jun 20, 2019 at 10:01 PM Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov> wrote:

> Matthew,
>
> We reject your counter-proposal, but HHS is willing to delay the effective date of the rule until November 22, 2019. And, in light of the new effective date, we propose the following schedule:
>
> - HHS will provide the administrative record by July 22, 2019.
> - Plaintiffs' motion for summary judgment by September 5, 2019.
> - Defendants' oppositions and cross motions by September 27, 2019.
> - Plaintiffs' reply and opposition by October 11, 2019.
> - Defendants' reply by October 25, 2019.
>
> Regarding your question about authority, HHS will issue the notice pursuant to section 553(b)(3)(B); there is good cause to waive the normal rulemaking requirements in light of the imminent PI briefing schedule and the attendant difficulty in implementing the Rule.

And last, we reject your proposed stipulation to delay implementation of the rule pending judicial review.

Ben

--

Benjamin T. Takemoto

Trial Attorney

U.S. Department of Justice, Civil Division, Federal Programs Branch

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From: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>
Sent: Thursday, June 20, 2019 5:09 PM
To: Humphreys, Bradley (CIV) <brhumphr@CIV.USDOJ.GOV>; Meyer, Amanda <Amanda.Meyer@ag.ny.gov>; Brigitte Amiri (bamiri@aclu.org) <bamiri@aclu.org>; Alexa Kolbi-Molinas (akolbi-molinas@aclu.org) <akolbi-molinas@aclu.org>; Salgado, Diana (diana.salgado@ppfa.org) <diana.salgado@ppfa.org>; Adam Grogg (agrogg@democracyforward.org) <agrogg@democracyforward.org>; Deabler, Justin <Justin.Deabler@ag.ny.gov>; Tucker, Brooke <Brooke.Tucker@ag.ny.gov>; Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Brad,

We take it this moots your colleague Rebecca's request this morning that we provide our alternative proposed schedule, but in the event that assumption is incorrect, following is a proposed schedule that we think is a more reasonable timeline for briefing cross-motions for summary judgment in a case of this size and complexity:

July 15, 2019 - HHS produces the administrative record

Oct. 15, 2019 – Plaintiffs file the Motion for Summary Judgment

Nov. 26, 2019 – Defendants file their Opposition and Cross-motion for Summary Judgment

Jan. 7, 2020 – Plaintiffs file their Reply and Opposition

Jan. 28, 2020 – Defendants file their Reply

Month of February or March at the Court's convenience – argument on cross-motions

Mar. 31, 2020 – Delayed effective date

Given the different messages we have heard from DOJ on this question in the past few hours, we'd appreciate confirmation that you are now saying there is no room to negotiate any proposed schedule other than the one set out in your original message. As we explained this morning, we think an October 31 effective date does not give the parties or the Court sufficient time to brief summary judgment and consider the large administrative record here, which we understand includes, at a minimum, more than 200,000 comments. Plaintiffs' proposal more reasonably allows for that review. In the normal course, we would agree on a reasonable summary judgment schedule *after* reviewing the AR. In light of the uncertainty given that we haven't seen the AR here, we believe this would be a more reasonable schedule—and, in any event, that October 31 is not.

We also asked your colleagues this morning what additional information your client could provide regarding the authority for the delay you intend to announce. Your message below does not answer that question. As we discussed on our call, the Plaintiffs can't assess whether our interests will be adequately protected by an agency delay notice absent a preliminary injunction, including in the event your delay notice is challenged by third parties. Rebecca told us this morning she would convey our request for additional information to your client. Has that request been conveyed, and are you authorized to communicate the basis for the intended delay?

We separately asked your colleagues this morning if your client would instead consider presenting the Court with a joint stipulation to postpone the effective date of the Final Rule under 5 U.S.C. 705 pending judicial review. Are you rejecting that request?

We can better assess and respond to your new questions below if you are able to answer the questions we discussed with your colleagues on the phone earlier today.

Thank you,

Matthew

From: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Sent: Thursday, June 20, 2019 4:13 PM
To: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Meyer, Amanda <Amanda.Meyer@ag.ny.gov>; Brigitte Amiri (bamiri@aclu.org) <bamiri@aclu.org>; Alexa Kolbi-Molinas (akolbi-molinas@aclu.org) <akolbi-molinas@aclu.org>; Salgado, Diana (diana.salgado@ppfa.org) <diana.salgado@ppfa.org>; Adam Grogg (agrogg@democracyforward.org) <agrogg@democracyforward.org>; Deabler, Justin <Justin.Deabler@ag.ny.gov>; Tucker, Brooke <Brooke.Tucker@ag.ny.gov>; Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

All –

Thanks for taking the time to talk through our proposal this afternoon, and I'm sorry I wasn't able to make the call. I understand Plaintiffs are concerned about the timing. The government, however, is not willing to delay the effective date of the Rule beyond October 31. I suspect that means we're at an impasse, but we'd ask that you give us your definitive position on our initial proposal by noon tomorrow.

Regardless of Plaintiffs' position, HHS intends to file a notice in the Federal Register delaying the effective date of the Rule until October 31.

If Plaintiffs do not consent to Defendants' proposal, Defendants intend to file a contested motion requesting that the Court deny Plaintiffs' motion for a preliminary injunction without prejudice in light of the delayed effective date and set briefing for cross motions for summary judgment according to the schedule we proposed in our email from Monday, with the view that this will permit the Court to rule on those motions before the new effective date.

If the Court does not adopt the requested MSJ schedule, Defendants will seek, in the alternative, an extension of time to respond to the preliminary injunction motion until July 31, 2019, at which point Defendants may also move for summary judgment. If Plaintiffs do not consent to the proposed summary judgment briefing schedule, would you please let us know Plaintiffs' position regarding this alternative request for an extension of the preliminary injunction opposition deadline by noon this Friday as well? We would hope that, in light of Defendants' extension of the effective date of the Rule, Plaintiffs would have no objection to our request for an extension of that deadline.

Thank you,

Brad

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD W. DEOTTE et al.,	§	
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:18-cv-00825-O**
	§	
ALEX M. AZAR II et al.,	§	
	§	
Defendants.	§	

TEMPORARY RESTRAINING ORDER AND SCHEDULING ORDER

Before the Court are Plaintiffs' Motion for Preliminary Injunction, (ECF No. 20), and Motion for Class Certification, (ECF No. 21), each filed on February 5, 2019. On February 7, 2019, the Court ordered the parties to confer on a briefing schedule for each motion. *See* Feb. 7, 2019 Order, ECF No. 24. After conferring, the parties have put before the Court a Joint Status Report with a proposed initial briefing schedule, (ECF No. 27), and an Unopposed Motion for Temporary Restraining Order, (ECF No. 28).

The parties' joint proposed briefing schedule is "joint" only insofar as a temporary restraining order is granted. Plaintiff Braidwood seeks a prompt ruling on its request for a preliminary injunction to avoid fines for conduct it claims is within its rights under the Religious Freedom Restoration Act. *See* Joint Status Report 2, ECF No. 27. And because Braidwood's tax returns for the 2018 calendar year are due on March 15, 2018, Braidwood is generally unwilling to agree to a briefing schedule that would push resolution of its request for an injunction past that date. But as the Court has alluded, "the scope of any injunction would inevitably turn on whether and what kind of class is certified." Feb. 7, 2019 Order, ECF No. 24. And for the same reason,

Defendants are generally unwilling to agree to a briefing schedule that would put the injunction cart before the class-certification horse. *See* Joint Status Report 3, ECF No. 25.

To alleviate this impasse, the parties have agreed to a combination of an unopposed motion for a temporary restraining order and a briefing schedule that will allow resolution of the class issue before the Court and the parties turn to the preliminary injunction. *See generally* Joint Status Report, ECF No. 27. Defendants therefore do not oppose Plaintiffs' Motion for Temporary Restraining Order, (ECF No. 28), which is to apply only to Plaintiff Braidwood and only until such time as the Court rules on the motion for a preliminary injunction.

Having considered the parties' status reports, motion, and briefing, the Court finds that the motion, (ECF No. 28), should be and is hereby **GRANTED**.

It is therefore **ORDERED** that:

Defendants Alex M. Azar II, Steven T. Mnuchin, and R. Alexander Acosta, and their officers, agents, servants, employees, attorneys, designees, and subordinates, as well as any person acting in concert or participation with them, are **ENJOINED** from enforcing the Contraceptive Mandate, codified at 42 U.S.C. § 300gg-13(a)(4), 45 C.F.R. § 147.130(a)(1)(iv), 29 C.F.R. § 2590.715–2713(a)(1)(iv), and 26 C.F.R. § 54.9815–2713(a)(1)(iv), **only** against any group health plan, and any health insurance coverage provided in connection with a group health plan, that is **sponsored by Braidwood Management Inc.**, and they are **ENJOINED** from enforcing 26 U.S.C. § 4980D against **Braidwood Management Inc.** for its failure to provide contraceptive coverage in its self-insured health plan from December 1, 2018, **until** the date on which this Court rules on Plaintiffs' motion for a preliminary injunction.

This order, which is **limited to Plaintiff Braidwood Management Inc.**, shall be incorporated into the final judgment or consent decree issued in this case.

Additionally, it is **ORDERED** that Defendants file a response to Plaintiffs' Motion for Class Certification, (ECF No. 21), on or before **March 8, 2019**, that Plaintiffs file a reply thereto on or before **March 15, 2019**, and that the parties meet and confer on a briefing schedule for the Motion for Preliminary Injunction, (ECF No. 20), with **seven days** of the Court's entry of an order on the Motion for Class Certification.

SO ORDERED on this **20th day** of **February, 2019**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

Exhibit 3

E.D.N.Y.-Bklyn
16-cv-4756
17-cv-5228
Garaufis, J.
Orenstein, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand seventeen.

Present:

Barrington D. Parker,
Gerard E. Lynch,
Christopher F. Droney,
Circuit Judges.

In re Kirstjen M. Nielsen, Secretary of Homeland Security,

17-3345

Petitioner.*

Petitioner Kirstjen M. Nielsen, the Secretary of the Department of Homeland Security, seeks a writ of mandamus to stay discovery orders entered by the District Court that required the Government (1) to supplement the administrative record it filed with the District Court and (2) to file a privilege log, in litigation challenging the decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program.

Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED, and the stay of the District Court's discovery orders is LIFTED. Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). To be entitled to mandamus relief, a petitioner must show (1) that it has "no other adequate means to obtain the relief [it] desires," (2) that "the writ is appropriate under the circumstances," and (3) that the "right to issuance of the writ is clear and undisputable." *In re Roman Catholic Diocese of Albany, Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (quoting *Cheney*, 542 U.S. at 380–81). We have "expressed reluctance to issue writs of mandamus to overturn discovery rulings," and will do so only "when a discovery question is of extraordinary significance or there is an extreme need for reversal of the district court's mandate before the case goes to judgment." *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (internal quotation marks omitted). "Because the writ of mandamus is such an extraordinary remedy, our analysis of whether the petitioning party has a

* In accordance with Fed. R. App. P. 43(c)(2), the Clerk of Court is directed to amend the caption as set forth above.

clear and indisputable right to the writ is necessarily more deferential to the district court than our review on direct appeal," *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108–09 (2d Cir. 2013) (internal quotation marks omitted), and the writ will not issue absent a showing of "a judicial usurpation of power or a clear abuse of discretion," *In re City of New York*, 607 F.3d at 943 (emphasis omitted) (internal quotation marks omitted).

The Government argues that it cannot be ordered (1) to supplement its administrative record or (2) to produce a privilege log for materials withheld from the record. With respect to the Government's first argument, the Government's position appears to be that in evaluating agency action, a court may only consider materials that the Government unilaterally decides to present to the court, rather than the record upon which the agency made its decision. To the contrary, judicial review of administrative action is to be based upon "the full administrative record that was before the Secretary at the time [s]he made [her] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "The [Administrative Procedure Act ("APA")] specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) Allowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the "thorough, probing, in-depth review" of the agency action with which it is tasked. *Overton Park*, 401 U.S. at 415.[1]

We have previously held that whether the complete record is before the reviewing court "may itself present a disputed issue of fact when there has been no formal administrative proceeding." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). This is particularly true in a case like the one before us "where there is a strong suggestion that the record before the Court was not complete." *Id.* In such a situation, a court must "permit[] plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court." *Id.*

Plaintiffs in the District Court have identified specific materials that appear to be missing from the record. For example, in her memorandum terminating DACA, then-Acting Secretary Elaine C. Duke indicated that "[United States Citizenship and Immigration Services] has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the [original DACA] memorandum, but still had his or her application denied based solely upon discretion." Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, Dep't of Homeland Security (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca. Presumably, then-Acting Secretary Duke based this factual assertion upon evidence, yet that evidence is not in the record filed in the District Court. Additionally, in parallel litigation challenging the repeal of DACA in

[1] In arguing for a different rule, the Government cites language from *Florida Power* indicating that the "task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." 470 U.S. at 743–44 (citation omitted). However, the Government takes this language out of context. The *Florida Power* Court used this language in explaining that, ordinarily, additional factfinding in the District Court is inappropriate; the Court did not suggest that the Government may prevent a reviewing court from considering evidence that the agency considered by not filing that evidence as part of the administrative record in the reviewing court. *Id.* at 743–45.

the Northern District of California in which the Government filed the same administrative record, the District Court—following *in camera* review of documents considered during the repeal of DACA but not included in the record filed with the court—concluded that 48 of those documents were not subject to privilege. *See* Statement of District Court in Response to Application for a Stay at 3, *In re United States*, 583 U.S. ___, 2017 WL 6505860 (Dec. 20, 2017) (No. 17-801); *see also Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, Nos. C 17-05211, C 17-05235, C 17-05329, C 17-05380, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017). Also, as the Supreme Court pointed out, nearly 200 pages of the 256 page record submitted to the District Court consist of published opinions from various federal courts. *In re United States*, 2017 WL 6505860, at *1. It is difficult to imagine that a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages, even accepting that litigation risk was the reason for repeal. Accordingly, "there is a strong suggestion that the record before the [District Court] was not complete," entitling the plaintiffs to discovery regarding the completeness of the record. *Dopico*, 687 F.2d at 654.

The Government also argues that it should not be required to produce a privilege log of documents that it withheld from the record on the basis of privilege because disclosure would "'probe the mental processes' of the agency." Full Pet. For Mandamus 22 (quoting *United States v. Morgan*, 304 U.S 1, 18 (1938)). First, while it is true that "review of deliberative memoranda reflecting an agency's mental process . . . is usually frowned upon, in the absence of formal administrative findings"—*e.g.*, in the case of "[a] nonadjudicatory, nonrulemaking agency decision"—"they may be considered by the court to determine the reasons for the decision-maker's choice." *Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (citations omitted). Thus, the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded. Second, without a privilege log, the District Court would be unable to evaluate the Government's assertions of privilege. *See Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (finding no abuse of discretion in District Court refusal to compel disclosure *after* it reviewed documents *in camera* and concluded they were protected by deliberative privilege).[2]

We are unpersuaded by the Government's argument that compliance with the orders would be overly burdensome due to the scope of the documents that it must review to comply with the District Court's order and the protracted timeline allowed for compliance. Administrative records, particularly those involving an agency action as significant as the repeal of DACA, are often quite voluminous. *See, e.g.*, *Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th

[2] We express no opinion at this juncture as to whether discovery is appropriate in connection with plaintiffs' non-APA claims. We note, however, that even if the Government were correct that a deliberative privilege prevents discovery with respect to the APA claims, the Government could not rely on such privilege to avoid all discovery with respect to plaintiffs' constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding that in the context of a suit against the Central Intelligence Agency, "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."); *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the [deliberative process] privilege as a shield.").

Cir. 2016) (noting that the administrative record "is more than a million pages long"); *Chem. Mfrs. Ass'n v. U.S. EPA*, 870 F.2d 177, 184 (5th Cir. 1989) (noting that the administrative record was 600,000 pages). Moreover, in order to accommodate the Government's concerns, the District Court three times modified the magistrate judge's discovery order, the first time by extending the deadline, the second time by limiting the order's scope to documents before the Department of Justice and the Department of Homeland Security, and the third time by limiting it to documents considered by then-Acting Secretary Duke or Attorney General Jefferson B. Sessions or their "first-tier subordinates—i.e., anyone who advised them on the decision to terminate the DACA program." *Batalla Vidal v. Duke***,** Nos. 16 CV 4756, 17 CV 5228, 2017 WL 4737280, at *5 (E.D.N.Y. Oct. 19, 2017). At oral argument, the Government conceded that the number of documents covered by the order, as modified, is approximately 20,000, a far smaller number than the Government's papers led this Court to believe. We are satisfied that under the circumstances, compliance with the District Court's order would not be an undue burden on the Government.

We have been particularly attentive to the Supreme Court's recent opinion granting certiorari and remanding to the District Court in parallel litigation in the Northern District of California. *See In re United States*, 2017 WL 6505860. Contrary to the Government's argument, however, we conclude that that decision does not strengthen the Government's position in the matter before this Court, because the posture of this case in the District Court here, and the orders issued by the District Court in this matter, are significantly distinguishable from those in the California case. Further, the Supreme Court did not decide the merits of the discovery dispute, instead remanding to the District Court to first resolve the Government's threshold arguments "that the Acting Secretary's determination to rescind DACA is unreviewable because it is 'committed to agency discretion,' 5 U.S.C. § 701(a)(2), and that the Immigration and Nationality Act deprives the District Court of jurisdiction." *Id.* at *2. In the case before this court, the District Court has already considered and rejected these threshold arguments. *Batalla Vidal v. Duke*, No. 16 CV 4756, 2017 WL 5201116, at *9, 13 (E.D.N.Y. Nov. 9, 2017). Of course, as the Supreme Court pointed out, the Government has the right to ask the District Court to certify its ruling for interlocutory appeal under 28 U.S.C. § 1292(b), and has announced its intention to do so. While we decline to reserve decision on this petition while the Government pursues an interlocutory appeal, it may be prudent for the District Court to stay discovery pending the resolution of such proceedings. *See In re United States*, 2017 WL 6505860, at *2.

We acknowledge that the Supreme Court noted that "[t]he Government makes serious arguments that at least some portions of the District Court's order are overly broad." *Id*. However, in the case pending in the Northern District of California, the District Court's discovery order applied to documents considered by persons "anywhere in the government," *id.*, which appears to include White House documents, creating possible separation of powers issues not at issue in this case, *see Cheney*, 542 U.S. at 382 ("[S]eparation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President.") The California order also appears to cover a far larger universe of documents than the contested orders before this Court. In contrast, here, the District Court's order covers only documents considered by then-Acting Secretary Duke and Attorney General Sessions, as well as their first-tier subordinates. The order thus does not encompass White House documents, and, as noted above,

the number of officials whose files would be reviewed, and the number of documents that would be involved in that review, would be dramatically fewer than in the case before the Supreme Court.

The Supreme Court also indicated that "the District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue." *In re United States*, 2017 WL 6505860, at *2. The District Court here has required only a privilege log, and has not ordered the production of any documents over which the Government asserts privilege. The order thus plainly contemplates an orderly resolution of any claims of privilege, and we are confident that the District Court will provide the Government with an opportunity to be heard on any claims of privilege it may assert.

We have considered Petitioner's additional arguments and find no basis for the extraordinary remedy of mandamus relief. Accordingly, the petition is DENIED, and the stay of the District Court's discovery orders is LIFTED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Exhibit 4

CIVIL MINUTE ENTRY

BEFORE:	Magistrate Judge Steven L. Tiscione
DATE:	August 21, 2018
TIME:	11:00 A.M.
DOCKET NUMBER(S):	CV-18-1599 (WFK)
NAME OF CASE(S):	**SAGET ET AL. V. TRUMP ET AL.**
FOR PLAINTIFF(S):	Pipoly
FOR DEFENDANT(S):	Marutollo
NEXT CONFERENCE(S):	**See rulings below**
FTR/COURT REPORTER:	11:10 - 11:47

RULINGS FROM MOTION HEARING:

For the reasons discussed on the record, Plaintiffs' Motion to Supplement the Administrative Record and for Extra-Record Discovery [31] is granted in part and denied in part. Defendants are ordered to supplement the administrative record to include "all documents and materials that the agency directly or indirectly considered," including all materials that are already being produced in discovery in parallel cases. Plaintiffs' Motion for Extra-Record Discovery is denied at this time, with leave to renew following a determination on pending Defendants' Motion to Dismiss.