August 15, 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 letter-motion to compel completion of the Administrative Record 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 write pursuant to Rules 1.A and 3.I of this Court's Individual Rules and Practices to request that the Court order defendants to complete the Administrative Record in this action by no later than Monday, August 19, 2019. Because plaintiffs have attempted to resolve these matters with defendants for several weeks without success, and in light of plaintiffs' imminent briefing deadlines, plaintiffs also request that defendants' time to file any opposition to this letter-motion be shortened to Friday, August 16, at 5 p.m.

Despite an order of this Court directing defendants to produce the administrative record ("A.R.") to plaintiffs by July 22, 2019—and to file a certified list of the contents of the A.R. with the Court by the same date, Dkt. 121—defendants have failed to produce the complete record nearly four full weeks later. Defendants in fact acknowledge that the agency considered materials that were not included in the A.R. they produced on July 22, yet defendants have refused to provide any date by which the record will be completed. As the Court has already recognized, the complete A.R. is a "game changer" for purposes of being able to brief plaintiffs' motions for summary judgment effectively. Dkt. 133 at 41 (Tr. of July 12, 2019 Conference). Defendants' failure to complete the A.R. violates the Court's July 16 Order, Dkt. 121, and prejudices plaintiffs' ability to comply with the short briefing deadlines established by that Order.

1. The Administrative Procedure Act requires review on a complete administrative record. The APA requires this Court to conduct "plenary review of the Secretary's decision, . . . to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also* 5 U.S.C. § 706 (in evaluating agency action, "the court shall review the whole record"). This "whole record" requirement is a necessary element of effective judicial review, because the § 706(2) standard requires the Court to determine, *inter alia*, whether the agency "relied on factors which Congress has not intended it to consider," made a decision that "runs counter to the evidence" before it, or failed to offer a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983); *see also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.").

For this reason, where the agency produces an incomplete administrative record, courts reviewing agency action should order that the record be completed. *See, e.g.*, *Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2574 (2019) (affirming the district court's order compelling the Department of Commerce to complete the administrative record); *In re Nielsen*, No. 17-3345, slip op. at 2-3 (2d Cir. Dec. 27, 2017) (order denying mandamus petition) (Ex. 1); *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (reversing grant of summary judgment where there was "a strong suggestion that the record before the Court was not complete").

2. The administrative record defendants produced is incomplete. The whole record required by the APA "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). Here, the administrative record is facially deficient in numerous respects, as defendants themselves have acknowledged in communications with counsel in this matter or with counsel in the similar challenges pending in the Northern District of California. For example:

- Defendants disclosed to counsel in the Northern District of California cases on August 7 that in promulgating the Final Rule at issue in this litigation, HHS considered "publicly available materials footnoted in the 2008 NPRM and 2008 Final Rule (except for materials containing outdated data, contained in broken links, etc.)." Ex. 2. These materials are not included in the A.R. produced to plaintiffs, and are not listed in the certified index of the A.R. filed with this Court that purports to be the "complete administrative rulemaking record for the 2019 Final Rule." Dkt. 132-2 at 2. Indeed, HHS's certification of the administrative record refers to only the "publicly available materials otherwise referenced in the 2018 Proposed Rule . . . and in the [2019 Final Rule]." *Id.* Moreover, it is evident that defendants expected *plaintiffs* to comb through the 2008 NPRM and 2008 Final Rule, check the footnotes for publicly available materials, determine for themselves whether the links were "broken," and if they were not, guess whether the *agency* would have considered the data "outdated" and therefore did not consider it in finalizing the 2019 Final Rule. After learning from counsel in the California cases that defendants had disclosed this deficiency in the A.R., plaintiffs immediately emailed defendants to request the omitted documents. Ex. 3. Defendants have not responded.

- The Final Rule includes a Regulatory Impact Analysis quantifying the costs and benefits of the rule, which cites census data and information from HHS's grant-tracking system not included in the A.R. and not accessible publicly. *See* 84 Fed. Reg. 23,170, 23,232 & n.182; 23,233 & n.184; 23,234-35 & nn.186-224; 23,236; 23,238; 23,245 (May 21, 2019). Plaintiffs identified these shortcomings to defendants last week, Ex. 4, yet despite responding that defendants would "review these points and get back to you soon," Ex. 5, defendants have neither completed the administrative record to include this information nor responded to subsequent inquiries about these materials. Ex. 3.

- The Final Rule references a number of complaints of discrimination received by the HHS Office for Civil Rights, *e.g.*, 84 Fed. Reg. at 23,178-79, 23,229, yet these complaints do not

appear to be included in the administrative record. Plaintiffs have received no substantive response to their request for these materials.[1] Ex. 3; Ex. 4; Ex. 5.

These deficiencies are material to the claims in this litigation. For instance, plaintiffs have alleged that the Final Rule is arbitrary and capricious because, among other reasons, "the Department conducted and relied on a flawed cost-benefit analysis." 19 Civ. 4676, Dkt. 1 at ¶ 179; *see also* 19 Civ. 5433, Dkt. 1 at ¶ 138 (alleging that the Final Rule is arbitrary and capricious because "the Department failed to . . . conduct an adequate regulatory impact analysis"); 19 Civ. 5435, Dkt. 1 at ¶ 138 (same). Depriving plaintiffs of the ability to consider the data HHS cites in the Final Rule's Regulatory Impact Analysis would undermine the Court's ability to fairly consider this claim. *See Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792.

In addition to these deficiencies in the administrative record, Defendants have failed to address—or, in some instances, even respond to—plaintiffs' concerns regarding other shortcomings in the production of the A.R. that have hindered plaintiffs' ability to determine whether it is incomplete in other respects. Ex. 6. The record was not served on all counsel; required a password that defendants did not provide until late in the day on July 23; included corrupt files and folders that could not be opened, which was not rectified until July 25; and was produced as non-text-searchable image files. *See id.* Moreover, Defendants did not include in the A.R. an index of public comments on the proposed rule, which plaintiffs believe it is the agency's practice to prepare, based on recent APA litigation against HHS in other matters. *See id.* Defendants have not responded for several weeks to this latter concern, despite repeated requests. Ex. 3.

The Court should therefore direct defendants to complete the deficient record in this case immediately. *See Dopico*, 687 F.2d at 654; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 529 (S.D.N.Y. 2019). Plaintiffs do not at this time seek to continue the deadlines established by the Court's July 16 Order, Dkt. 121, but respectfully reserve the right to request additional time to oppose summary judgment and cross-move for summary judgment pending the outcome of this motion.

Dated: August 15, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: */s/ Matthew Colangelo*
Matthew Colangelo
Chief Counsel for Federal Initiatives

[1] Plaintiffs' ability to assess the completeness of the complaint information in the A.R. has been further hindered by defendants' decision to produce the list of complaints it claims to have considered by complaint number, *see* 000537745-000537752, but to produce the underlying complaints themselves with missing or redacted complaint numbers, *see* 000542017-000545608, making it impossible for plaintiffs to determine that the complaints included in the A.R. match the complaints listed on the index. Defendants have provided no substantive response to repeated requests for the underlying complaints with the actual complaint numbers included. Ex. 3; Ex. 4; Ex. 5.

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* *Pro hac vice* motion forthcoming

Attorneys for the *PPFA* Plaintiffs

* *Pro hac vice* motion forthcoming

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* Application for admission forthcoming
**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

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 2

Eisenberg, Sara (CAT)

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Monday, August 12, 2019 1:39 PM
To: Nemetz, Miriam R.; Eisenberg, Sara (CAT); Neli Palma; Karli Eisenberg
Cc: Kopplin, Rebecca M. (CIV)
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Hi Miriam,

Although we do not agree with the characterizations in your e-mail, we believe that Plaintiffs' concerns can be addressed. As previously explained, HHS did not consider any publicly available materials that are not in the administrative record we provided to you or that are not cited in the rulemaking documents in that record. Nevertheless, we are now gathering those publicly available materials—excluding statutes, regulations, citations to case law, executive orders, citations to the congressional record, and citations to un-enacted legislation—processing them, and will add Bates numbers for production. We expect to be able to produce those materials to you soon.

Best,
Ben

--

Benjamin T. Takemoto
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From: Nemetz, Miriam R. <MNemetz@mayerbrown.com>
Sent: Thursday, August 08, 2019 5:24 PM
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Cc: Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Thanks, Ben.

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Thursday, August 08, 2019 5:06 PM
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Cc: Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

****EXTERNAL SENDER****

Hi Miriam,

Thank you for your e-mail. HHS is considering your request. We will get back to you as soon as possible.

Best,
Ben

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Benjamin T. Takemoto
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Cc: Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Ben,

Thank you for these responses.

This message and your email of August 2 have made it clear to us that defendants have not produced or lodged with court the complete administrative record. Specifically, we understand that HHS has certified as included in the administrative record but has excluded from its production and index various materials, including articles and studies, that were cited in the proposed or final rule on the basis that the material is publicly available. You have now informed us for the first time that HHS also considered "publicly available materials footnoted in the 2008 NPRM and 2008 Final Rule (except for materials containing outdated data, contained in broken links, etc.)." These materials were not mentioned in HHS's Certification of the Administrative Record, which purported to describe "all materials considered by HHS in promulgating the 2019 Final Rule." Pursuant to the Court's scheduling order, defendants were required to "lodge[] the administrative record" on July 22, but it has lodged only a partial record. We request that defendants promptly produce to us all materials that HHS considered that have not yet been produced, along with an index.

By omitting these materials from the production and the index, defendants are placing the burden on plaintiffs to assemble a complete administrative record. To accomplish this, plaintiffs would be obliged to determine which materials have been excluded from the record, obtain each item, and organize the materials so that they can be retrieved and reviewed. This would be a time-consuming task that would impede plaintiffs' efforts to review all relevant parts of the administrative record in the limited time available. Even after completing this task, plaintiffs would not be certain that they had obtained the correct material. If plaintiffs wished to rely on this material, they would have to submit it to the Court and establish that the documents—which would not have "AR" bates numbers—were part of the administrative record. It is not only cumbersome but improper to require plaintiffs to piece together the record in this fashion. In addition,

plaintiffs have no way of knowing which of the materials cited in the 2008 NPRM and Final Rule were considered by the agency and which were deemed outdated or were unavailable.

Unless these deficiencies are corrected, the district court will not have the entire administrative record, nor will there be any place in which the complete administrative record is lodged. Over time, it may become more difficult to identify the documents on which HHS relied. As your e-mail acknowledges, Internet links expire and the linked materials can change or disappear. Hence, there is no guarantee that any single party to this case will have a complete administrative record that could be forwarded to an appellate court should that become necessary. This may lead to confusion about whether a document is part of the record or not. All of these hurdles would be avoided if HHS simply produced all of the material on which it relied to the parties and the Court.

Defendants' failure to provide a complete administrative record in a timely fashion is already interfering with plaintiffs' review of the record and preparation for the imminent summary judgment briefing. We request that defendants promptly supplement the production to include the *entire* administrative record.

Thank you.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)
mnemetz@mayerbrown.com

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Wednesday, August 07, 2019 5:12 PM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Neli Palma <Neli.Palma@doj.ca.gov>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

****EXTERNAL SENDER****

Hi Miriam, Karli, Neli, and Sara,

The following is our response to the remainder of your questions and comments regarding the AR:

First, HHS has confirmed that all of the public comments for the Final Rule and 2011 Rule are included in the AR. There will be a discrepancy between the number of pages and the number of comments. That is because, under HHS's counting method for the Final Rule, not every comment occupies its own page. For example, if an organization's public submission includes a narrative comment and an associated spreadsheet listing 100 individuals who sign on to that submission, that public submission is counted as 100 comments, but it may not occupy 100 pages of the AR.

As to Neli's question about supporting documents, HHS has confirmed that all materials that it considered in promulgating the 2019 Rule are either included in the administrative record or are publicly available documents that

are cited in the rulemaking documents included in the administrative record. For example, HHS considered the public comments that were submitted in response to the 2008 and 2009 NPRMs as well as the publicly available materials footnoted in the 2008 NPRM and 2008 Final Rule (except for materials containing outdated data, contained in broken links, etc.). HHS is not obligated to provide materials it did not consider in promulgating the 2019 rule and thus HHS will not supplement the record to include any such materials.

Last, thank you Miriam and Sara, for bringing to our attention the listening session summaries with various privilege markings. HHS has confirmed that it intended to include those documents in the AR. However, should you find other documents marked as privileged, please bring them to our attention.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

From: Takemoto, Benjamin (CIV)
Sent: Friday, August 02, 2019 12:50 PM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Neli Palma <Neli.Palma@doj.ca.gov>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Hi Karli, Miriam, Neli, and Sara,

We are still looking into some of your questions, but I have a response to a couple of your questions for now. The publicly available materials that HHS references consist of materials (e.g., news articles and research studies) cited in the final rule that you can readily access using the citations in the final rule. For instance, the memorandum that Sara raised can be accessed using the link provided in footnote 316 of the final rule, where the citation to the memorandum appears: https://docs.wixstatic.com/ugd/809e70_2f66d15b88a0476e96d3b8e3b3374808.pdf. By contrast, if the document was behind a paywall or otherwise not publicly accessible, HHS included it in the AR. Although you should be able to access everything that HHS considered, feel free to let us know if there is a document cited in the rule that you are having difficulty accessing.

As I said, I will follow up soon regarding your other questions.

Best,
Ben

--

Benjamin T. Takemoto

Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

From: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Sent: Thursday, August 01, 2019 4:42 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>; Neli Palma <Neli.Palma@doj.ca.gov>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Ben,

In addition to the outstanding inquiries referenced below, I want to bring another issue to your attention. In reviewing the record, we have discovered that although most documents cited in the Final Rule appear to have been included in the materials you provided, at least one document was not. Specifically, this document—a memorandum regarding "Key Findings on Conscience Rights Polling" from Kellyanne Conway to "Interested Parties," dated April 8, 2009—was cited in the Final Rule (see 84 Fed. Reg. at 23247 nn. 316-318), but was not among the documents you provided in these cases.

Please (1) supplement the record to include this document and (2) confirm whether any other documents cited in the rule were omitted from the production.

Thank you,
Sara

Sara J. Eisenberg
Chief of Strategic Advocacy
Office of City Attorney Dennis Herrera
(415) 554-4633 Direct
www.sfcityattorney.org
Find us on: Facebook Twitter Instagram

Please note my new phone number.

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Tuesday, July 30, 2019 2:05 PM
To: Neli Palma <Neli.Palma@doj.ca.gov>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Karli, Miriam, Neli, and Sara,

Thank you for these questions. I will look into them and will get back to you soon.

Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

From: Neli Palma <Neli.Palma@doj.ca.gov>
Sent: Tuesday, July 30, 2019 2:49 PM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]
Importance: High

Ben,

I wanted to follow up on the outstanding inquiries concerning the administrative record and also add to the questions. Do you have an estimate on when we can expect responses on the inquiries below?

One follow-up question: We note that just the comment letters from the prior rulemaking are listed as being included, but not the supporting materials, including the supporting documents to the 2008 and 2011 final rules. This seems to be in sharp contrast to HHS's practice in other ongoing APA litigation in which HHS produced not only the comments, but also the supporting materials. For example, in the birth control litigation, State of California v. Azar, Case No. 4:17-cv-5783, the record defendants lodged earlier this year included several categories of supporting material to the prior rulemaking, including studies considered, legislative materials, RIA studies and articles, etc. (see attached index). Could you please provide us with those documents as soon as possible?

Thank you.

Neli

From: Nemetz, Miriam R. <MNemetz@mayerbrown.com>
Sent: Thursday, July 25, 2019 2:05 PM
To: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Neli Palma <Neli.Palma@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: Conscience Rule Cases / AR [MB-AME.FID2341860]

Ben,

Thank you for providing this material so promptly. We also have a question about the record.

The certification of the administrative record states that the record includes both the materials described in the index and "those publicly available materials otherwise referenced" in the proposed and final rules. Would you please describe to us the categories of publicly-available materials that are referenced in the proposed and final rules but which were not included in the material that you indexed and produced? And would you also explain why those materials were not assigned Bates numbers and produced? We are concerned that the incorporation of material in the administrative record by reference may cause confusion and place a heavy burden on plaintiffs to identify and then to obtain the material that was excluded from the indexed AR so that they will have a complete record.

Thanks very much.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)
mnemetz@mayerbrown.com

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Thursday, July 25, 2019 9:51 AM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Neli Palma <Neli.Palma@doj.ca.gov>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: Conscience Rule Cases / AR

****EXTERNAL SENDER****

Hi all,

I'm sorry you're having a hard time opening folder 17. Please let me know if you receive this e-mail, which has folder 17 attached. If it doesn't send (the folder might be over the size limit for e-mail), we'll send you a copy via FedEx.

Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

From: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Sent: Wednesday, July 24, 2019 9:54 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>; Neli Palma <Neli.Palma@doj.ca.gov>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: Re: Conscience Rule Cases / AR

Hi Ben,

San Francisco also receives an error message when we try to open folder #17. Please resend a new version to us as well.

We, too, are still reviewing the record and will advise promptly if there are other issues.

Thank you,
Sara

On Jul 24, 2019, at 6:15 PM, Karli Eisenberg <Karli.Eisenberg@doj.ca.gov> wrote:

> Dear Ben,
>
> We are now in receipt of the administrative record. While we are still reviewing it, we are very concerned because folder #17 will not open. We receive an error message when we try to click on it. Will you please immediately serve us with the contents of folder #17 in a format that we can open?
>
> Additionally, we are concerned that some comment letters may be missing from the production. According to the index, the comments are located at 000000001 -000185296. But, the Rule lists 242,000 comments as of the date the Rule was published. 84 Fed. Reg. at 23180, n. 41. And, as we know, several of those comments span multiple pages. Could you please confirm whether or not all comments are included in the production? If they are, could you please explain this discrepancy? The total number of pages produced also seems to be inconsistent with the number of comments received to prior rulemaking which are purportedly included in the record. See e.g. 76 Fed. Reg. 9968, 9971 (Feb. 23, 2011) (noting that the "Department received more than 300,000 comments addressing its notice of proposed rulemaking proposing to rescind in its entirety the 2008 Final Rule.").
>
> Thank you for your prompt attention to these concerning issues. As I mentioned, we are still reviewing the administrative record and its adequacy, but wanted to bring these initial issues to your attention as quickly as possible in light of the court's briefing schedule.
>
> Best Regards,
>
> Karli

Karli Eisenberg
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567
*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Monday, July 22, 2019 5:55 PM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Nemetz, Miriam R. <MNemetz@mayerbrown.com>; Neli Palma <Neli.Palma@doj.ca.gov>
Cc: Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: Conscience Rule Cases / AR

Miriam, Neli, and Sara,

As indicated in the attached filing, we have sent each of you via FedEx a copy of the administrative record. The password for the USB drives is [redacted] Please let me know if you have any questions.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

Exhibit 3

From: Salgado, Diana <diana.salgado@ppfa.org>
Sent: Tuesday, August 13, 2019 8:02 PM
To: Humphreys, Bradley (CIV)
Cc: Takemoto, Benjamin (CIV); Kopplin, Rebecca M. (CIV); Alexa Kolbi-Molinas; Colangelo, Matthew; Meyer, Amanda; Deabler, Justin; Adam Grogg; Kristen Miller; Zionts, David; Calia, Kurt; Banker, Michelle; Hana Bajramovic; Lindsey Kaley; Chris Dunn; Erin Beth Harrist; PPFA-HHS
Subject: Re: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Brad:

Following up here, in light of our request for a response by yesterday, do you have an update when we will hear back concerning the issues outlined in my email from Thursday last week?

In addition, from your Aug. 1 email, we understood you to be looking into whether defendants will produce a metadata-containing index of public comments in the administrative record; is there any update there?

Finally, we understand that defendants have informed the plaintiffs in the N.D. Cal. and D. Md. cases that the administrative record includes additional documents that have not been provided, specifically certain publicly-available documents that were referenced in the footnotes to the 2008 NPRM and 2008 Final Rule. Given the schedule in our consolidated cases—and in particular plaintiffs' Sept. 5, 2019 briefing deadline—we are very concerned that still we do not possess the complete record, and we ask that defendants provide us those documents ASAP. At minimum, do you have an estimate of how many pages are yet to be produced and when you will be able to produce them?

Thank you.

Diana O. Salgado
Senior Staff Attorney
Public Policy Litigation & Law
Planned Parenthood Federation of America
212-261-4399

On Thu, Aug 8, 2019 at 9:12 PM Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov> wrote:

> Diana -
>
> Thanks for your email. We'll review these points and get back to you soon.
>
> Best,
> Brad
>
> On Aug 8, 2019, at 8:57 PM, Salgado, Diana <diana.salgado@ppfa.org> wrote:
>
> > Brad:
> >
> > We write to request several categories of documents that we are unable to locate in the administrative record. These include:

1. Complaints with complaint numbers. The list of complaints at 000537745-000537752 is organized by complaint number, but the actual complaints provided (*see* 000542017-000545608) do not appear to include complaint numbers. Indeed, in some cases, it appears the complaint number may have been redacted (*see, e.g.*, 000542221). As a result, we have no way of cross referencing the list that was provided with the actual complaints. We ask that you provide either (a) versions of these complaints that include their associated complaint numbers, or (b) a version of the list at 000537745-000537752 that includes the Bates range for each listed complaint.

2. Complaints between Nov. 2016 - Jan. 2018. The Final Rule states there were "thirty-four complaints that OCR received between November 2016 and January 2018 that allege coercion, violation of conscience, or discrimination." 84 Fed. Reg. at 23,229; *see also* Proposed Rule, 83 Fed. Reg. at 3,887 ("OCR has received thirty-four complaints between November 2016 and mid-January 2018."). However, the Index does not contain a list identifying those 34 complaints with the corresponding Bates ranges, nor is there any other way of identifying where the 34 complaints are in the record. Therefore, we ask that you direct us to the Bates range(s) for these complaints. Alternatively, if the underlying complaints were not actually considered by the agency we ask that you confirm that.

3. OCR Complaint Nos. 14–193604, 15–193782, 15–195665, 16–224756 and 18–292848 (*see* 84 Fed. Reg. at 23,178-79). Although letters relating to these complaints are provided at 000541996-000542000 and 000542001-000542012, the underlying complaints do not appear to be in the record. If these complaints are available in the record, we ask that you direct us to the appropriate Bates ranges. If they are not available in the record as provided to us, but were considered by the agency, we ask that you provide them to us now. Alternatively, if the underlying complaints described in these letters were not actually considered by the agency -- and only the letters themselves were considered -- we ask that you confirm that.

4. Spreadsheets of TAGGS and Census data relied upon by HHS (*see, e.g.,* 84 Fed. Reg. at 23,232 & n.182; 23,233 & n.184; 23,234-35 & nn.186-224; 23,236; 23,238; 23,245). While portions of these data sets were provided in the record, there appear to be omissions. For example, the Final Rule states that "[a]ward data in HHS TAGGS for FY 2017 indicated that some State universities receive less than 100 awards per fiscal year and others receive nearly 2,000 awards." 84 Fed. Reg. at 23,245. The data set provided at 000537758-000537801, however, aggregates the award amount for each entity, making it impossible to determine how many awards each receives.

Though the Final Rule includes citations to websites where this data is publicly available, Plaintiffs are unable to ascertain with certainty the subsets of data HHS downloaded to make its calculations. Moreover, the data sets that were provided in the record are in PDF format, and HHS is under an obligation to produce these documents in the same format in which HHS stores them. For this reason, we request that HHS provide all TAGGS and Census data upon which it relied in spreadsheet format.

5. Number of locations owned by Department obtained from U.S. General Services Administration on October 30, 2018 (on file with HHS OCR) (*see* 84 Fed. Reg. at 23,243-44 & n.294). This document, which the Final Rule states is "on file with HHS OCR," does not appear to be included in the record. We ask that you provide us with this document.

Thank you for your prompt attention to this matter. We ask that you provide us with a response no later than Monday, August 12.

Diana O. Salgado

Senior Staff Attorney
Public Policy Litigation & Law
Planned Parenthood Federation of America
212-261-4399

This e-mail is for the sole use of the intended recipient(s) and contains information which is confidential and/or legally privileged. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or taking of any action in reliance on the contents of this e-mail information is strictly prohibited. If you have received this e-mail in error, please immediately notify the sender by reply e-mail and destroy all copies of the original message.

Exhibit 4

From: Salgado, Diana <diana.salgado@ppfa.org>
Sent: Thursday, August 8, 2019 8:56 PM
To: bradley.humphreys@usdoj.gov; btakemot@civ.usdoj.gov; rkopplin@civ.usdoj.gov
Cc: Alexa Kolbi-Molinas; Colangelo, Matthew; Meyer, Amanda; Deabler, Justin; Adam Grogg; Kristen Miller; Zionts, David; Calia, Kurt; Banker, Michelle; Hana Bajramovic; Lindsey Kaley; Chris Dunn; Erin Beth Harrist; PPFA-HHS
Subject: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Brad:

We write to request several categories of documents that we are unable to locate in the administrative record. These include:

1. Complaints with complaint numbers. The list of complaints at 000537745-000537752 is organized by complaint number, but the actual complaints provided (*see* 000542017-000545608) do not appear to include complaint numbers. Indeed, in some cases, it appears the complaint number may have been redacted (*see, e.g.*, 000542221). As a result, we have no way of cross referencing the list that was provided with the actual complaints. We ask that you provide either (a) versions of these complaints that include their associated complaint numbers, or (b) a version of the list at 000537745-000537752 that includes the Bates range for each listed complaint.

2. Complaints between Nov. 2016 - Jan. 2018. The Final Rule states there were "thirty-four complaints that OCR received between November 2016 and January 2018 that allege coercion, violation of conscience, or discrimination." 84 Fed. Reg. at 23,229; *see also* Proposed Rule, 83 Fed. Reg. at 3,887 ("OCR has received thirty-four complaints between November 2016 and mid-January 2018."). However, the Index does not contain a list identifying those 34 complaints with the corresponding Bates ranges, nor is there any other way of identifying where the 34 complaints are in the record. Therefore, we ask that you direct us to the Bates range(s) for these complaints. Alternatively, if the underlying complaints were not actually considered by the agency we ask that you confirm that.

3. OCR Complaint Nos. 14–193604, 15–193782, 15–195665, 16–224756 and 18–292848 (*see* 84 Fed. Reg. at 23,178-79). Although letters relating to these complaints are provided at 000541996-000542000 and 000542001-000542012, the underlying complaints do not appear to be in the record. If these complaints are available in the record, we ask that you direct us to the appropriate Bates ranges. If they are not available in the record as provided to us, but were considered by the agency, we ask that you provide them to us now. Alternatively, if the underlying complaints described in these letters were not actually considered by the agency -- and only the letters themselves were considered -- we ask that you confirm that.

4. Spreadsheets of TAGGS and Census data relied upon by HHS (*see, e.g.,* 84 Fed. Reg. at 23,232 & n.182; 23,233 & n.184; 23,234-35 & nn.186-224; 23,236; 23,238; 23,245). While portions of these data sets were provided in the record, there appear to be omissions. For example, the Final Rule states that "[a]ward data in HHS TAGGS for FY 2017 indicated that some State universities receive less than 100 awards per fiscal year and others receive nearly 2,000 awards." 84 Fed. Reg. at 23,245. The data set provided at 000537758-000537801, however, aggregates the award amount for each entity, making it impossible to determine how many awards each receives.

Though the Final Rule includes citations to websites where this data is publicly available, Plaintiffs are unable to ascertain with certainty the subsets of data HHS downloaded to make its calculations. Moreover, the data sets that were provided in the record are in PDF format, and HHS is under an obligation to produce these documents in the same format in which HHS stores them. For this reason, we request that HHS provide all TAGGS and Census data upon which it relied in spreadsheet format.

5. Number of locations owned by Department obtained from U.S. General Services Administration on October 30, 2018 (on file with HHS OCR) (*see* 84 Fed. Reg. at 23,243-44 & n.294). This document, which the Final Rule states is "on file with HHS OCR," does not appear to be included in the record. We ask that you provide us with this document.

Thank you for your prompt attention to this matter. We ask that you provide us with a response no later than Monday, August 12.

Diana O. Salgado

Senior Staff Attorney
Public Policy Litigation & Law
Planned Parenthood Federation of America
212-261-4399

Exhibit 5

From: Humphreys, Bradley (CIV) <Bradley.Humphreys@usdoj.gov>
Sent: Thursday, August 8, 2019 9:12 PM
To: Salgado, Diana
Cc: Takemoto, Benjamin (CIV); Kopplin, Rebecca M. (CIV); Alexa Kolbi-Molinas; Colangelo, Matthew; Meyer, Amanda; Deabler, Justin; Adam Grogg; Kristen Miller; Zionts, David; Calia, Kurt; Banker, Michelle; Hana Bajramovic; Lindsey Kaley; Chris Dunn; Erin Beth Harrist; PPFA-HHS
Subject: Re: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Diana -

Thanks for your email. We'll review these points and get back to you soon.

Best,
Brad

On Aug 8, 2019, at 8:57 PM, Salgado, Diana <diana.salgado@ppfa.org> wrote:

> Brad:
>
> We write to request several categories of documents that we are unable to locate in the administrative record. These include:
>
> **1. Complaints with complaint numbers.** The list of complaints at 000537745-000537752 is organized by complaint number, but the actual complaints provided (*see* 000542017-000545608) do not appear to include complaint numbers. Indeed, in some cases, it appears the complaint number may have been redacted (*see, e.g.*, 000542221). As a result, we have no way of cross referencing the list that was provided with the actual complaints. We ask that you provide either (a) versions of these complaints that include their associated complaint numbers, or (b) a version of the list at 000537745-000537752 that includes the Bates range for each listed complaint.
>
> **2. Complaints between Nov. 2016 - Jan. 2018.** The Final Rule states there were "thirty-four complaints that OCR received between November 2016 and January 2018 that allege coercion, violation of conscience, or discrimination." 84 Fed. Reg. at 23,229; *see also* Proposed Rule, 83 Fed. Reg. at 3,887 ("OCR has received thirty-four complaints between November 2016 and mid-January 2018."). However, the Index does not contain a list identifying those 34 complaints with the corresponding Bates ranges, nor is there any other way of identifying where the 34 complaints are in the record. Therefore, we ask that you direct us to the Bates range(s) for these complaints. Alternatively, if the underlying complaints were not actually considered by the agency we ask that you confirm that.
>
> **3. OCR Complaint Nos. 14–193604, 15–193782, 15–195665, 16–224756 and 18–292848 (*see* 84 Fed. Reg. at 23,178-79).** Although letters relating to these complaints are provided at 000541996-000542000 and 000542001-000542012, the underlying complaints do not appear to be in the record. If these complaints are available in the record, we ask that you direct us to the appropriate Bates ranges. If they are not available in the record as provided to us, but were considered by the agency, we ask that you provide them to us now. Alternatively, if the underlying complaints described in these letters were not actually considered by the agency -- and only the letters themselves were considered -- we ask that you confirm that.
>
> **4. Spreadsheets of TAGGS and Census data relied upon by HHS (*see, e.g.,* 84 Fed. Reg. at 23,232 & n.182; 23,233 & n.184; 23,234-35 & nn.186-224; 23,236; 23,238; 23,245).** While portions of these

data sets were provided in the record, there appear to be omissions. For example, the Final Rule states that "[a]ward data in HHS TAGGS for FY 2017 indicated that some State universities receive less than 100 awards per fiscal year and others receive nearly 2,000 awards." 84 Fed. Reg. at 23,245. The data set provided at 000537758-000537801, however, aggregates the award amount for each entity, making it impossible to determine how many awards each receives.

Though the Final Rule includes citations to websites where this data is publicly available, Plaintiffs are unable to ascertain with certainty the subsets of data HHS downloaded to make its calculations. Moreover, the data sets that were provided in the record are in PDF format, and HHS is under an obligation to produce these documents in the same format in which HHS stores them. For this reason, we request that HHS provide all TAGGS and Census data upon which it relied in spreadsheet format.

5. Number of locations owned by Department obtained from U.S. General Services Administration on October 30, 2018 (on file with HHS OCR) (*see* 84 Fed. Reg. at 23,243-44 & n.294). This document, which the Final Rule states is "on file with HHS OCR," does not appear to be included in the record. We ask that you provide us with this document.

Thank you for your prompt attention to this matter. We ask that you provide us with a response no later than Monday, August 12.

Diana O. Salgado

Senior Staff Attorney
Public Policy Litigation & Law
Planned Parenthood Federation of America
212-261-4399

Exhibit 6

From: Calia, Kurt <kcalia@cov.com>
Sent: Wednesday, July 31, 2019 12:36 AM
To: Benjamin.Takemoto@usdoj.gov
Cc: Colangelo, Matthew; agrogg@democracyforward.org; Rebecca.M.Kopplin@usdoj.gov; Meyer, Amanda; bamiri@aclu.org; akolbi-molinas@aclu.org; diana.salgado@ppfa.org; Deabler, Justin; Tucker, Brooke; PPFA-HHS; Bajramovic, Hana; Banker, Michelle
Subject: New York, et al. v. U.S. Department of Health & Human Services, et al., 19-cv-4676

Ben:

We write to raise several issues with Defendants' production of the administrative record. The administrative record was produced to Plaintiffs in a manner that has already created substantial challenges in conducting its review, and we reserve the right to bring these to the Court's attention and seek appropriate relief. The problems include:

1. Although the Court ordered that Defendants produce the administrative record in this case by July 22, 2019 and although Defendants stated that it had sent the administrative record "to counsel for Plaintiffs via overnight courier" (Dkt. 132 at 2), Plaintiffs did not receive the record until late afternoon on July 23, 2019 by Federal Express. Defendants thus failed to comply with the Court's order.

2. Defendants sent only one encrypted thumb drive with the administrative record stored on it to each set of plaintiffs—sending one only to the NY Attorney General's Office, one to the ACLU, and one to Covington & Burling LLP. As such, they failed to serve a copy on all counsel of record in this action. But moreover, given the size of the files, it took more than 12 hours for us to replicate the content of the thumb drives and share with all counsel of record—a task that should not have fallen to us had Defendants served all counsel of record.

3. Further, Defendants neglected to provide a password to the encrypted drives until Plaintiffs asked for one. Defendants provided that password late in the day on July 23—again, meaning that Defendants did not produce the administrative record by the Court-ordered July 22 date.

4. Worse, when Plaintiffs finally gained access to the drives, the over 500,000 pages of the record were produced as non-text searchable image files, meaning that Plaintiffs will have to either review these documents page-by-page, or process those images to create searchable files. While we do not know if Defendants' own copy of the administrative record is searchable, the record is sufficiently lengthy and cumbersome so as to seem likely.

5. Based on the index that Defendants provided, some of the record files—including, notably, some of the complaints of discrimination that Plaintiffs specifically referenced their interest in reviewing at the July 12, 2019 hearing (Hr'g. Tr. at 30)—were corrupt and unable to be opened. We raised this issue under separate cover, but this too demonstrates that Defendants failed to produce the complete administrative record on the Court-ordered date.

6. Additionally, we understand that in challenges to HHS's final rule with respect to Title X, Defendants produced an index in Excel containing metadata for the public comments that HHS received. The metadata included, among other things, the date a comment posted, the email address of the commenter, the first and last name of the commenter, the organizational name affiliated with the commenter, a tracking number, and a postal zip code. We ask you to inform us whether HHS has a similar index for the public comments contained in the administrative record here and, if so, request that you produce it immediately.

It simply cannot be said that Defendants complied with the Court's order to produce the administrative record by July 22, 2019. Moreover, the manner in which it has been produced has impeded any reasonable ability to review it to date, and so Plaintiffs cannot even confirm whether there are any additional problems with the record (or whether it is even complete), much less review the substance. We are troubled that the state of the record was not something communicated to us in advance; indeed, during the July 12 hearing, Defendants professed to know virtually nothing about the state of the record. Given the manner in which it was produced only 10 days later, it seems hard to imagine that these problems were not foreseen.

In any event, we ask that you tell us no later than the close of business Thursday, August 1 if Defendants (1) are in possession of a searchable version of the administrative record, and/or (2) whether Defendants will produce a metadata-containing index of public comments in the administrative record. If so, we expect it to be produced immediately.

Sincerely,
Kurt Calia

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