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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

19-cv-4676 (PAE)

6 UNITED STATES DEPARTMENT OF HEALTH  
7 AND HUMAN SERVICES, et al.,

8 Defendants.

Conference

9  
10 New York, N.Y.  
11 July 12, 2019  
12 2:00 p.m.

13 Before:

14 HON. PAUL A. ENGELMAYER

15 District Judge

16 APPEARANCES

17 LETITIA JAMES  
18 Attorney General of  
19 The State of New York  
20 BY: MATTHEW COLANGELO, ESQ.

21 PLANNED PARENTHOOD FEDERATION OF AMERICA  
22 BY: DIANA SALGADO, ESQ.

23 AMERICAN CIVIL LIBERTIES UNION  
24 BY: ALEXA R. KOLBI-MOLINAS, ESQ.

25 ZACHARY W. CARTER  
26 Corporation Counsel for  
27 The City of New York  
28 BY: CYNTHIA WEAVER, ESQ.  
29 Assistant Corporation Counsel

30 U.S. DEPARTMENT OF JUSTICE  
31 BY: BENJAMIN T. TAKEMOTO, ESQ.

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1 THE COURT: Let me begin by taking the roll. Who do I  
2 have for the State of New York?

3 MR. COLANGELO: Good afternoon, your Honor. Matthew  
4 Colangelo from the New York State Attorney General's Office on  
5 behalf of the state and local government plaintiffs.

6 THE COURT: Good afternoon, Mr. Colangelo.

7 MS. SALGADO: Good afternoon, your Honor. Diane  
8 Salgado on behalf of Planned Parenthood Federation of America  
9 and its member affiliates and Planned Parenthood of Northern  
10 New England.

11 THE COURT: Very good. Good afternoon, Ms. Salgado.

12 MS. KOLBI-MOLINAS: Good afternoon, your Honor. Alexa  
13 Kolbi-Molinas on behalf of the National Reproductive Health  
14 Association and Public Health Solutions.

15 THE COURT: Very good. Good afternoon,  
16 Ms Kolbi-Molinas.

17 MS. WEAVER: Good afternoon, your Honor. Cynthia  
18 Weaver, New York City Law Department, City of New York.

19 THE COURT: Very good. Good afternoon, Ms. Weaver.

20 And at the defense table?

21 MR. TAKEMOTO: Yes. Benjamin Takemoto from the  
22 Department of Justice on behalf of the Department of Health and  
23 Human Services.

24 THE COURT: All right, Mr. Takemoto. Good afternoon  
25 to you.

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1 I will note that a substantial number of counsel are  
2 auditing by phone. Mr. Colangelo has sent us all a list of the  
3 auditing participants. It appears to be 15 to 20. I'm not  
4 going to tax everybody's patience by reading the names out  
5 loud, but suffice it to say that all the participants are  
6 counsel for states or localities.

7 All right. Welcome, everyone. First of all, I hope  
8 I'm not inconveniencing everyone. I'm mindful it's a summer  
9 Friday, and I don't think this conference ought take terribly  
10 long. Nevertheless, as I indicated in the order that I issued,  
11 this is an important and a complex case, and some of the  
12 planning issues are not self-evident to me, and I thought that  
13 I would frankly build a better mousetrap for all of us if I  
14 spent some time with all of you working through some of the  
15 practical and logistical issues presented by the alternative  
16 ways of briefing, scheduling and conceiving of the briefing  
17 here.

18 So what I intend to do is just open up the floor  
19 guiding you through certain specific questions I have, and then  
20 if there are other considerations people want to bring to my  
21 attention I'm all ears. But I will tightly choreograph this  
22 anyway at the beginning.

23 And just to emphasize a point that I'm sure need not  
24 be emphasized, this is not an opportunity to argue the merits  
25 or to try to predispose me on the merits. There will be time

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1 enough for that, but I will shut that down pretty quickly. I  
2 am really just trying to be user friendly for all of you and  
3 for the Court.

4 So, with that, I think a good place to start is  
5 teaching me about the relationship between this and the  
6 California case. Specifically I'm happy to hear anything else  
7 anyone wants to say, but I'm trying to understand the extent if  
8 at all to which there are different issues across the cases.

9 Let me just go around the horn. Mr. Colangelo, you  
10 are not a party in that case, correct, but other states and  
11 localities are?

12 MR. COLANGELO: That's correct, your Honor. There are  
13 three cases in the Northern District of California that have  
14 all been consolidated before Judge Alsup. None of the state  
15 and local government plaintiffs in your Honor's court are  
16 parties to any of those three consolidated cases. The State of  
17 California is a plaintiff in one of those cases. The City and  
18 County of San Francisco is the only local government that's a  
19 plaintiff in the second case. And then the third case, your  
20 Honor, was filed on behalf of the County of Santa Clara and a  
21 number of organizations and associations.

22 THE COURT: All right. Thank you. Very helpful.  
23 Those are all states and localities. Are there, in those  
24 cases, other plaintiffs, other than you as the government?

25 MR. COLANGELO: Your Honor, in the City and County of

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1 San Francisco case there is no other plaintiff, just the City  
2 and County of San Francisco. In the California v. Azar case,  
3 again, no other plaintiff. In the County of Santa Clara  
4 case -- and this is case no. 19-cv-2916 in the Northern  
5 District -- there are about a dozen community organizations and  
6 individual healthcare providers that are also listed as  
7 plaintiffs with the County of Santa Clara.

8 THE COURT: All right. I take it there is no overlap,  
9 though, in plaintiffs between the California case and this  
10 case.

11 MR. COLANGELO: That's correct, your Honor.

12 THE COURT: In the nature of things you wouldn't  
13 expect there to be.

14 MR. COLANGELO: That's correct, your Honor.

15 THE COURT: And do you know, it may be premature, but  
16 to the extent that there are people who have indicated an  
17 interest in participating as amicus, does that create an  
18 overlap in participating entities?

19 MR. COLANGELO: Your Honor, there have been amicus  
20 briefs filed by the same entities in both the Northern District  
21 of California case and in your Honor's court.

22 THE COURT: Right.

23 MR. COLANGELO: I don't know that I have an exhaustive  
24 list, but, for example, the Institute for Policy Integrity at  
25 NYU School of Law, that was amicus in both courts.

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1 THE COURT: So your expectation is the amici will  
2 significantly overlap across the cases.

3 MR. COLANGELO: Yes, your Honor.

4 And one other thing to mention, your Honor. You've  
5 asked about the California cases. We should make the Court  
6 aware, if the Court is not already aware, that there are two  
7 additional cases challenging the same final rule in two other  
8 district courts.

9 THE COURT: Where are they?

10 MR. COLANGELO: There is a lawsuit filed by the State  
11 of Washington, in the Eastern District of Washington. The only  
12 plaintiff in that lawsuit is the State of Washington.

13 THE COURT: And has any schedule been set in that  
14 case?

15 MR. COLANGELO: No schedule has been set that I know  
16 of. My understanding, although Mr. Takemoto should correct me  
17 if he believes it is incorrect, my understanding is that the  
18 district court in that action requested a joint submission or  
19 proposed schedule by today.

20 And then the last action, your Honor, is a lawsuit  
21 styled "Mayor and City Council of Baltimore." The Azar case,  
22 the plaintiff in that case is only the Mayor and Council of  
23 Baltimore. And that's in the District of Maryland.

24 THE COURT: Any schedule set?

25 MR. COLANGELO: Yes, your Honor. A schedule was set

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1 in that action by order dated, I believe, July 3rd. It's a  
2 schedule that -- I'm happy to read the schedule into the  
3 record, your Honor, or just advise the Court that it's a  
4 schedule for summary judgment briefing following production of  
5 an administrative record on July 22nd.

6 THE COURT: So not a preliminary injunction schedule,  
7 a summary judgment schedule?

8 MR. COLANGELO: That's correct, your Honor.

9 THE COURT: Do you know if it tracks the schedule  
10 that's been set in the Northern District of California for  
11 summary judgment briefing?

12 MR. COLANGELO: Give me one moment, your Honor, and  
13 I'll compare.

14 THE COURT: I'm getting a nod from the defense table,  
15 but I'll take the support.

16 MR. COLANGELO: It tracks within a few weeks, give or  
17 take, of the conclusion of briefing. So, your Honor, the  
18 District of Maryland schedule calls for the conclusion of  
19 briefing by September 27th, with no argument date, at least not  
20 that I'm aware of.

21 THE COURT: OK.

22 MR. COLANGELO: And Judge Alsup, in the Northern  
23 District of California, has set a schedule that calls for the  
24 conclusion of briefing by October 10th, also on cross-motions  
25 for summary judgment.

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1 THE COURT: Right.

2 MR. COLANGELO: And Judge Alsup has scheduled a  
3 hearing on those cross-motions for October 30.

4 THE COURT: Thank you. Very helpful.

5 Let me turn, then, to Ms. Salgado. Anything to add  
6 about those other litigations?

7 MS. SALGADO: No, your Honor, not with respect to the  
8 questions that have been asked at this time. There are not  
9 overlapping plaintiffs and certainly not with respect to  
10 Planned Parenthood, Planned Parenthood entities.

11 THE COURT: I guess the natural question would be,  
12 understanding that you're not a party in the case, but as  
13 demonstrated by your participation in this case you have an  
14 interest in it, is it your expectation that your organization  
15 will, or affiliate, will be participating as amicus in any of  
16 those other cases?

17 MS. SALGADO: No, your Honor, not at this time. PPFA  
18 represents here its member affiliates, and our participation  
19 would be --

20 THE COURT: Exclusively here.

21 MS. SALGADO: Yes.

22 THE COURT: All right. We'll come back to -- the next  
23 question that we get into once we deal with this is whether  
24 there are any differences in the issues presented across the  
25 cases. What you've just said may bear on that.

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1 All right. Going around the horn, Ms. Kolbi-Molinas,  
2 anything to add?

3 MS. KOLBI-MOLINAS: No. I don't expect that the  
4 NFPHRA or PHS plaintiffs would be amicus in any of the other  
5 cases.

6 THE COURT: Thank you.

7 Over to you, Mr. Takemoto.

8 MR. TAKEMOTO: The only thing that I would -- well,  
9 there are two things that I would add. Number one is, yes, the  
10 schedule has been set in the District of Maryland case.  
11 Although the briefing schedule ends on September 27th, I would  
12 note that, with regard to the parties' differences on when  
13 defendants' opening summary judgment brief ought to be filed,  
14 like Judge Alsup in the Northern District of California, Judge  
15 Russell has given the defendants four weeks after it lodges the  
16 administrative record.

17 And as to the Eastern District of Washington,  
18 Mr. Colangelo is correct that the parties have been instructed  
19 to file a joint status report today. Because I don't have  
20 access to my phone I don't know whether it's been filed yet,  
21 but the parties intend to file it today.

22 THE COURT: OK. Thank you. Very helpful. But  
23 Mr. Colangelo's recounting of the cases is accurate, as you  
24 understand it, and complete in terms of the number of cases and  
25 the participants in each?

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1 MR. TAKEMOTO: That is accurate, yes.

2 THE COURT: All right. All of those cases, at this  
3 point, are being litigated exclusively as summary judgment  
4 matters, correct, Mr. Takemoto?

5 MR. TAKEMOTO: That's right.

6 THE COURT: All right. May I ask you, I think you're  
7 probably the best person to start with, then, understanding  
8 that you don't know the arguments specifically that particular  
9 plaintiffs may make in particular cases, it looks as if, with  
10 the exception of the County of Santa Clara case, the plaintiffs  
11 in all the other matters are in the nature of states or  
12 localities.

13 MR. TAKEMOTO: That's right.

14 THE COURT: This case obviously combines both states,  
15 localities, and Planned Parenthood and the National Family  
16 Planning and Reproductive Health Association. From your  
17 perspective, without commenting on the merits, is it right to  
18 assume that there will be a broader set of contentions made,  
19 issues raised, given the different institutional affiliations  
20 of the plaintiffs here? I'm just trying to get a sense of what  
21 the footprint is of this case as opposed to the others.

22 MR. TAKEMOTO: Based on the complaints that I have  
23 seen in the numerous cases, I do not believe that there are  
24 significant differences between the cases. All of the  
25 plaintiffs in all of the districts make the same APA claims,

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1 largely the same APA claims. There are differences, just like  
2 there are differences among the parties here, but they are  
3 slight compared to the general interests of the APA claims.

4 THE COURT: I mean I suppose if the case were  
5 conceived of as a preliminary injunction, the different  
6 postures of the plaintiffs might matter more as one considers  
7 issues of balance of hardships and the like.

8 MR. TAKEMOTO: Correct.

9 THE COURT: But if it's conceived of exclusively as an  
10 APA claim, you're saying that essentially you understand all  
11 the legal challenges that have been foreshadowed here to be  
12 captured by the plaintiffs in the other cases?

13 MR. TAKEMOTO: I'm not sure I understand your Honor's  
14 question.

15 THE COURT: So, look, I mean, you have read no doubt  
16 the complaints in the cases that have been consolidated here  
17 and the submissions that were made in support of the  
18 preliminary injunction at the time that that schedule was red  
19 hot.

20 MR. TAKEMOTO: Yes.

21 THE COURT: So you have a sense of the range of legal  
22 challenges that have been anticipated in this case.

23 MR. TAKEMOTO: Yes.

24 THE COURT: Based on your familiarity with the  
25 litigations in California, Maryland, and Washington, are there

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1 any issues identified in this case that you do not understand  
2 to be being raised in those cases?

3 MR. TAKEMOTO: No.

4 THE COURT: And do you understand there to be any  
5 issues in those cases that are not raised here?

6 MR. TAKEMOTO: Not that I am aware of, no. There may  
7 be like one or two slight, marginal claims that are raised in  
8 one of the cases that aren't raised in the others, but by and  
9 large, no, they're essentially the same.

10 THE COURT: And I'll come back to the plaintiffs here  
11 in a moment, but just the following question. Assuming that  
12 that is right, I do note that we have different states and  
13 localities. Is there any way in which the nature of the issues  
14 to be litigated here differs by state or locality?

15 In other words, the extent to which the interplay  
16 between state regulation and federal rule, is there any way in  
17 which there could be a difference in the way a court would  
18 analyze the issues depending on the state or locality whose  
19 regulatory structure is at issue?

20 MR. TAKEMOTO: It is possible. I believe some of the  
21 plaintiffs have claimed that state law contradicts the final  
22 rule. Beyond that, I'm not aware of any other claims that  
23 would differ in substance among the cases.

24 THE COURT: All right. Thank you.

25 Anything further on California? I'm going to come

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1 back to the plaintiffs on this issue, but anything further? It  
2 sounds like your assessment, anyway, is that for better or for  
3 worse, the cases are essentially substantively coterminous.

4 MR. TAKEMOTO: That's correct. I would also add that  
5 they all seek the same relief as well.

6 THE COURT: Right. OK. Thank you. Helpful.

7 All right. Mr. Colangelo, back to you. Do you have  
8 any different understanding in terms of the issues to be  
9 raised?

10 MR. COLANGELO: Yes, your Honor. I would make two  
11 corrections to my colleagues' representation. There are, as we  
12 understand it, there are two claims to relief distinctly  
13 presented in these consolidated actions that are not presented  
14 in any of the other consolidated actions. In these actions and  
15 nowhere else there's a claim for relief under 5 U.S.C.  
16 706(2)(D) for observance of procedure required by law. Those  
17 claims relate to a logical outgrowth problem with regard to one  
18 of the definitions in the final rule. There is no other  
19 complaint in any of the other five actions that raises a  
20 procedural APA violation.

21 THE COURT: Given that we now have a slightly longer  
22 timetable for all these cases, is there any reason to think  
23 that that deviation will stand, or would you expect in the  
24 natural order of things that plaintiffs in the other cases that  
25 are raising fundamentally APA challenges will now add that now

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1 that they have been alerted?

2 MR. COLANGELO: I don't know the answer to that, your  
3 Honor. Whether they will amend their complaints to add a  
4 procedural violation? I don't know the answer to that.

5 THE COURT: But I think there's no reason, in the  
6 nature of sort of standing or in the institutional interests of  
7 the plaintiffs in the other cases, why they would there would  
8 be any less incentive to raise that.

9 MR. COLANGELO: No, not that I can think of, your  
10 Honor. They're all outside the period for amending as of right  
11 under Rule 15.

12 THE COURT: It's a slightly broader additional APA  
13 challenge here at present.

14 MR. COLANGELO: Yes.

15 THE COURT: OK. What else?

16 MR. COLANGELO: As I understand it, although my  
17 colleagues from the two consolidated cases should correct me if  
18 this is wrong, my understanding is that the plaintiffs in those  
19 cases have alleged a Fifth Amendment void for vagueness claim  
20 for relief that I believe is not presented in the other -- in  
21 any of the other actions.

22 THE COURT: Sorry. This is a claim that your  
23 co-plaintiffs here raise --

24 MR. COLANGELO: Correct.

25 THE COURT: -- that you do not raise, but you

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1 understand that not to be raised by the California plaintiffs,  
2 including the ones in Santa Clara.

3 MR. COLANGELO: Yes, your Honor.

4 THE COURT: OK. Very helpful.

5 Mr. Takemoto, is that wrong?

6 MR. TAKEMOTO: It is generally not incorrect. I will  
7 add that, like I said earlier, there are four slight devia-  
8 tions, but I do not believe that a logical outgrowth claim is a  
9 substantially different claim than any of the other APA claims.

10 THE COURT: What about the void for vagueness? That  
11 is something that is uniquely being raised by some of the non-  
12 governmental plaintiffs, it sounds like.

13 MR. TAKEMOTO: Your Honor, I believe that plaintiff  
14 Planned Parenthood has raised this claim. It appears to me at  
15 least that this is very similar to the claim about following  
16 the definitions that are set forth in the rule and that they  
17 are somehow vague.

18 THE COURT: Who, though, in this litigation is raising  
19 a claim that you regard to be substantively the same as the  
20 void for vagueness claim brought by the nongovernmental  
21 plaintiffs here?

22 MR. TAKEMOTO: All of the plaintiffs in all of the  
23 cases raise claims that the definitions that HHS has adopted in  
24 the final rule are improper, are inconsistent with the statute.

25 THE COURT: Sorry, but that's a statutory question.

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1 The issue that Mr. Colangelo has just raised is really a  
2 constitutional question. Has anyone in the other litigations  
3 raised that?

4 MR. TAKEMOTO: Not at that time, no.

5 THE COURT: So, fair to say, whatever the consequences  
6 of it may be, that at least as of now, presumably because we  
7 have nongovernmental plaintiffs here, there is at least some  
8 slice of this case, some form of a challenge that's unique to  
9 this case for now.

10 MR. TAKEMOTO: That's correct.

11 THE COURT: Thank you. Helpful.

12 OK. Ms. Salgado, your chance to comment on that.  
13 Have I now gotten a fair portrait of the areas of commonality  
14 and difference across the cases?

15 MS. SALGADO: That's right, your Honor. The claims  
16 with respect to -- I guess with a couple caveats. The claim  
17 that Mr. Colangelo and Mr. Takemoto just talked about, that  
18 what we believe is a key portion of the rule was not a logical  
19 outgrowth of the proposed rule, that is a unique claim that  
20 both the Planned Parenthood and National Family Planning  
21 Reproductive Health Association -- if I may, your Honor, I will  
22 refer to that as NFPRHA, the NFPRHA plaintiffs -- have uniquely  
23 pled, and that is different.

24 I'll also just respond to the point about the void for  
25 vagueness. As you noted, your Honor, that's not the same as

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1 the argument that certain terms were promulgated outside of the  
2 statute.

3 THE COURT: Right.

4 MS. SALGADO: I guess I would just also respond to  
5 what I believe your Honor was getting to earlier, is that we,  
6 speaking for Planned Parenthood and NFPRHA, as reproductive  
7 healthcare providers, as the largest family planning provider  
8 around the country -- Planned Parenthood is the largest  
9 abortion provider in the country -- the rule on its face  
10 clearly applies to reproductive health services. It allows for  
11 refusal of those services. And so while the plaintiffs in the  
12 other cases, in California, in Baltimore, in Washington -- you  
13 know, those are largely governmental plaintiffs but for the  
14 Santa Clara -- none of those plaintiffs involve primary  
15 reproductive healthcare providers, certainly not as large as we  
16 represent.

17 THE COURT: Again, I'm trying to figure out what -- I  
18 appreciate that. I'm trying to figure out what the implica-  
19 tions are for the decision before me. Were this -- and we'll  
20 get to this a little later -- a PI decision, various aspects of  
21 the PI test involve the impact on plaintiffs, for example, of  
22 preliminary relief or the absence thereof. If this is an  
23 ultimate merits summary judgment issue, the question then is a  
24 little bit different in terms of what the claims to be finally  
25 litigated are. And I'm trying to take the measure of that.

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1 MS. SALGADO: That's true, your Honor. I think the  
2 difference in the plaintiff's matter is to standing, certainly.  
3 We still don't know yet, defendants have not indicated whether  
4 they are going to contest standing. They have indicated in  
5 their proposed schedule that they may file a motion to dismiss.  
6 We don't know what that's based on.

7 I would also add that I think with respect to the  
8 rule, the impact on the plaintiffs and the harm -- I would  
9 presume that that is still an issue that would be involved in  
10 the summary judgment briefing, and so from that perspective I  
11 think that who the plaintiffs are in the case --

12 THE COURT: But the summary judgment briefing, to the  
13 extent it's a common issue, presumably plaintiff or not, those  
14 interests get brought to bear.

15 MS. SALGADO: That's correct.

16 THE COURT: I'm really just trying to spot what the  
17 different issues to be litigated are and whether the footprint  
18 here is different from the one in California.

19 MS. SALGADO: Oh, right, your Honor. I'm sorry. I  
20 just meant that there may be different interests.

21 THE COURT: OK.

22 Is Kolbi-Molinas, anything to add?

23 MS. KOLBI-MOLINAS: Nothing to add, your Honor.

24 THE COURT: All right. Anyone have anything else in  
25 terms of just points of difference between this and the

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1 California other cases?

2 MR. COLANGELO: Your Honor, the only additional point  
3 I would add is that although it is correct that all the  
4 plaintiffs uniformly seek to vacate and set aside the final  
5 rule, because of the geographic scope of the plaintiffs in  
6 these consolidated cases as compared to the much narrower  
7 geographic scope of the plaintiffs in the other cases,  
8 certainly our position would be that relief in this Court is  
9 the only way to protect the plaintiffs' interests in these  
10 actions.

11 THE COURT: Understood. I was not proposing to go  
12 away, in fact. I'm more just trying to coordinate right.

13 Let me then ask another question. Assume for  
14 argument's sake, just for the moment, that we're looking just  
15 at a summary judgment proceeding, although I'm actively  
16 considering whether a blended proceeding makes sense. But for  
17 the moment just stick with just summary judgment. What are the  
18 implications of a different schedule from California? How  
19 important is it that the schedules that are set here and in  
20 California, let us say, be roughly contiguous? Mr. Takemoto,  
21 you're the most affected party here by far about that.

22 MR. TAKEMOTO: Yes. I would say, your Honor, that,  
23 should the Court enter plaintiffs' proposed schedule, it would  
24 be a considerable burden on defendants.

25 THE COURT: But is that just as a -- because you are

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1 less enamored of that schedule, or is it because of tension  
2 between it and the California schedule?

3 MR. TAKEMOTO: No, I don't believe there's any tension  
4 between -- there wouldn't be any tension between that and the  
5 California schedule.

6 THE COURT: In other words, if you're defending --  
7 look, this case raises one set of claims. California raises a  
8 large set of claims, set of issues, that is nevertheless  
9 something of a subset, based on what I've just heard. I guess  
10 the question is, if the briefing schedule in this case were to  
11 contemplate either your brief going before or after your  
12 California brief, I take it essentially the points that you  
13 would be making on common issues would be substantially the  
14 same points and the issue is just who goes first. There's not  
15 some enormous administrative problem for the Justice Department  
16 if I set different dates for your summary judgment submissions  
17 in the case, as if you'll have to do somewhat different briefs  
18 given that the issues have not a perfect match.

19 MR. TAKEMOTO: I almost entirely agree with your Honor  
20 except for the date for the administrative record, which I do  
21 not believe that the parties contest, but were the Court to  
22 enter a different date for that, that would create a  
23 complication.

24 THE COURT: OK. And I think the date for the  
25 administrative record everywhere is July 22?

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1 MR. TAKEMOTO: That's correct.

2 THE COURT: So essentially what you're saying to me --  
3 I'm putting words in your mouth; you tell me if they're  
4 wrong -- is, except for the date of the administrative record,  
5 where it is administratively important to you that I sync the  
6 date here with that in the other litigation, some deviation  
7 among the dates for your filing is not that big a deal here.

8 MR. TAKEMOTO: Other than the burden to defend them,  
9 no.

10 THE COURT: Right. But I'm being sensitive to that.

11 MR. TAKEMOTO: Yes.

12 THE COURT: I'm trying to smoke out if there's a  
13 significant consideration I ought to give to the burden of, you  
14 know, having briefs due on a Friday in one case and the next  
15 Friday in another case or something like that. That's not  
16 something that matters significantly to you.

17 MR. TAKEMOTO: No.

18 THE COURT: All right. Thank you. I appreciate that.

19 Now, the front table here, you're not party to any  
20 other case. Can you conceive of any reason why, just in terms  
21 of spawning disorder or confusion or something like that, I  
22 should be adhering to something like the California schedule?  
23 Are there any negative consequences to my building a mousetrap  
24 here that I conclude is most efficient for this purpose?

25 MR. COLANGELO: Your Honor, I think our sense is that

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1 the California schedule is probably unduly generous of the  
2 defendant's time.

3 THE COURT: Look, I appreciate your importuning me.  
4 I'm asking sort of really more a process issue of whether just  
5 the fact of different schedules is something that, from your  
6 point of view, is a problem.

7 MR. COLANGELO: No, your Honor.

8 THE COURT: All right. Let me turn then now to an  
9 issue of considerable significance to me, which is whether, as  
10 everyone has anticipated might be a possibility, the issues to  
11 be joined here should include both summary judgment and a PI.  
12 And just to start the conversation, I'll go around the horn and  
13 get everyone's views. On the one hand I appreciate it's more  
14 work for everybody. On the flip side -- and I don't have a  
15 sense yet -- this will no doubt come up in the conversation --  
16 of how involved the process is going to be of mastering the  
17 administrative record here. But years of practice and years on  
18 the bench teach me that it's not always easy to know how much  
19 work is going to be entailed in a case that includes review of  
20 an administrative record. It can take the D.C. Circuit a year  
21 just going through stuff like that. And there is a part of me  
22 that thinks there may be wisdom in arming this Court with the  
23 arguments relevant to a PI so that if, as a matter of sheer  
24 volume, I'm not confident I can resolve this with the level of  
25 care and accuracy that I aspire to as a final ruling, having

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1 briefs on a PI at least affords an alternative way of tackling  
2 the problem if the deadline creeps up on me in a way that  
3 doesn't make it possible to get this confidently right as a  
4 final call.

5 So that was the thought process, to be very realistic  
6 with you all.

7 So let me go around the horn and get people's judgment  
8 about what your views are about the idea of briefing a PI  
9 alongside summary judgment.

10 MR. COLANGELO: Thank you, your Honor. As you saw  
11 from the joint letter the parties submitted, we proposed  
12 proceeding in the alternative, largely in the interest of  
13 economy. That said, we do want to be extremely mindful of the  
14 Court's interest in being able to get through the record and  
15 issue a thoughtful decision and have adequate time to consider  
16 all the issues that are presented. And in that regard we would  
17 not be opposed to briefing both simultaneously. I think that  
18 your Honor is suggesting that preliminary injunction briefing  
19 could be completed and essentially treated as a backstop in the  
20 event that, once the administrative record is certified and the  
21 briefing is completed, if it then becomes obvious that it's not  
22 realistic by November 22nd, the Court could take up the  
23 preliminary injunction motions, having fully been briefed.

24 THE COURT: Basically yes. In other words, right now  
25 the preliminary injunction motions have been filed. So we have

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1 the first of the three steps in the trilogy filed. On the idea  
2 that I'm floating here, the defense opposition to the  
3 preliminary injunction motion will be filed whatever date I set  
4 alongside its opening brief in support of summary judgment.  
5 And the plaintiffs' reply here would be filed coincident with  
6 your opposition to the defense motion for summary judgment.  
7 That would be the idea. That way the briefing of a preliminary  
8 injunction is done on a somewhat earlier plane in time, but it  
9 gives the Court a different process approach here if,  
10 ultimately, I conclude that the interests of getting this  
11 completely right the first time are at war with the schedule,  
12 given, for example, the possible scope of the record. That's  
13 all I'm floating.

14 MR. COLANGELO: We have no objection to that, your  
15 Honor.

16 THE COURT: All right. Other plaintiffs?

17 MS. SALGADO: Your Honor, we have no objection, in  
18 principle. I think we of course have an interest in what that  
19 schedule might look like, of course, with respect to which  
20 schedule your Honor would go with, because under defendants'  
21 proposed summary judgment schedule, there are only three weeks  
22 between, so we were adding a third week.

23 THE COURT: I appreciate that. I'm raising a third  
24 question, which is the idea of conjoining a PI briefing, or  
25 completing the PI briefing, if you will, with the summary

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1 judgment briefing so as to give the Court the flexibility,  
2 depending on what the problem looks like once this is briefed,  
3 to proceed in either way depending on what makes sense both in  
4 terms of economy and in terms of making sure that any final  
5 decision is one that I've had enough time to stew over.

6 MS. SALGADO: Of course, your Honor. We fully  
7 understand that. That's part of the reason why we have been so  
8 hesitant from the beginning to agree to an expedited summary  
9 judgment schedule without having seen the administrative  
10 record. So we completely agree.

11 THE COURT: The front table has not seen any part of  
12 the administrative record.

13 MS. SALGADO: That's correct, your Honor. Unless, I  
14 guess I should say, your Honor, of course the comments that  
15 Planned Parenthood submitted and NFPRHA submitted, those  
16 comments, which are we anticipate are part of the  
17 administrative record, we have seen.

18 THE COURT: OK. And Mr. Kolbi-Molinas?

19 MS. KOLBI-MOLINAS: I don't think that we have  
20 anything to add, your Honor. I think we're not opposed to  
21 doing them contemporaneously, so long as there is, of course,  
22 enough time.

23 THE COURT: Let me ask you, since you've clearly  
24 thought about this, the possibility anyway of overlapping  
25 briefing, how much does it add, from the plaintiffs' perspec-

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1 tive, if preliminary injunction concepts, if you will, are  
2 added to the briefing mix? I mean, you've got aspects of the  
3 preliminary injunction tests that aren't picked up by summary  
4 judgment briefing. It may well be that those are the easiest  
5 parts to brief, the hardest stuff here is the legal merits, and  
6 that you're going to be dealing with under any issue.

7 MS. KOLBI-MOLINAS: Right. That I'll let Ms. Salgado  
8 speak to. But I think, right, for us, without having seen any  
9 of defendants' arguments yet or even an answer, right, so we  
10 don't really know what what's in their opposition to our PI and  
11 we don't know what's in their affirmative motion for summary  
12 judgment, so I would imagine there would be some new and  
13 additional arguments we might have to contend with that are  
14 raised specifically by the PI that may not have been by the  
15 summary judgment. But -- if that's what you were asking.

16 MS. SALGADO: The other way.

17 MS. KOLBI-MOLINAS: That's right. The other way.

18 THE COURT: Look, either way, I think we can all agree  
19 that there are going to be complex issues relating to the  
20 merits, whether formulated as summary judgment or formulated as  
21 likelihood of success on the merits. What's different is the  
22 other dimensions of the PI test: irreparable harm, balance of  
23 equities, public interest, and the like. Going out on a limb  
24 here, but I'm assuming the heart of the matter is the  
25 likelihood of success on the merits, and then while you will

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1 surely have things to say about the other PI elements, those  
2 are less likely to be the flash point of controversy than the  
3 merits. I mean, I think, I hope I've got that right. But that  
4 must be so. No?

5 MS. KOLBI-MOLINAS: Possibly, your Honor. I could  
6 imagine irreparable harm -- again, without having seen anything  
7 that defendants plan to argue, I would imagine they may raise  
8 some significant arguments against our allegations of  
9 irreparable harm. But I'll let Ms. Salgado --

10 THE COURT: OK. I am informed by my law clerk, we may  
11 be having a glitch with the teleconference system.

12 Notwithstanding that, I think we'll plow ahead here and we'll  
13 faithfully report to the remote participant what is happened in  
14 their absence.

15 All right. Mr. Takemoto, what's your perspective on  
16 joining a PI to the summary judgment briefing?

17 MR. TAKEMOTO: Your Honor, I agree with you that the  
18 question really is mostly answered by your Honor's decision on  
19 whether there needs to be a backstop or not. I don't think  
20 that I have too much to add on that.

21 I would say, if it helps, your Honor, the  
22 administrative record is not yet complete and the Department of  
23 Health and Human Services is working very diligently to  
24 complete it by July 22nd. It is mostly public comment. And  
25 so, to the extent that helps your Honor make a decision --

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1 THE COURT: That is helpful. May I ask you, have you  
2 gotten your eyes on any part of the administrative record yet?

3 MR. TAKEMOTO: A few pages, but no. I mean, by and  
4 large I have not.

5 THE COURT: Do you have any sense of its scale?

6 MR. TAKEMOTO: I do not, other than to say that it is  
7 large.

8 THE COURT: Well, I assumed as much. But, I mean, can  
9 you put any flesh on that bone?

10 MR. TAKEMOTO: Well, there were over 242,000 comments  
11 that were submitted.

12 THE COURT: 242,000 comments or pages?

13 MR. TAKEMOTO: Comments, in response. So that should  
14 give an indication, somewhat of an indication of the size.

15 THE COURT: Technically you get them under an order,  
16 don't you?

17 MR. TAKEMOTO: Exactly. That's a department decision,  
18 on the comments.

19 THE COURT: Given that, I can see why those dominate  
20 the administrative record. What else does the administrative  
21 record contain?

22 MR. TAKEMOTO: I'm not at liberty to say what else it  
23 contains at this point because it is not yet complete.

24 THE COURT: So with 242,000 comments, do you have any  
25 sense of how long these comments are? How many millions of

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1 pages the comments are likely to collectively take up?

2 MR. TAKEMOTO: I do not have a page number, your  
3 Honor.

4 THE COURT: All right. Given what you've just told me  
5 about the scale of that component of the administrative record,  
6 doesn't that suggest that even a hardworking chambers may need  
7 to take a lot of time to get through that to make a final  
8 ruling? I mean, the thought here is just, doesn't that suggest  
9 that there is wisdom in the backstop of litigating this too as  
10 a PI so that, depending on how the issues present to a court, I  
11 can make a judgment that isn't final but is intended to assess  
12 the virtue or not under the governing standard of preliminary  
13 relief?

14 MR. TAKEMOTO: Your Honor, I don't know if the  
15 comments will form a substantial part of any of the arguments  
16 in the briefing. I know that at least one of the plaintiffs  
17 has raised the claim in their complaint that HHS did not  
18 adequately respond to certain comments, and then of course the  
19 logical outgrowth argument that we previously discussed.

20 THE COURT: Right.

21 MR. TAKEMOTO: Beyond that I don't know if many of the  
22 other claims will require any attention to the comments, such  
23 as, for example, the statutory authority claim or the  
24 constitutional claim.

25 THE COURT: In the nature of things with a rule like

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1 this, what else would one ordinarily expect to see in an  
2 administrative record besides the public comments?

3 MR. TAKEMOTO: Your Honor, the supporting documents  
4 that were cited in the rule, I would expect, would be part of  
5 the administrative record. Beyond that I really can't say what  
6 would ordinarily be in an administrative record.

7 THE COURT: OK.

8 MR. COLANGELO: Your Honor, if I may, there is Second  
9 Circuit law that, in notice and comment rulemaking, the  
10 administrative record typically consists of the proposal, the  
11 comments that were submitted in response to the proposal, the  
12 economic analyses or any other analyses that the agency  
13 prepared in developing the proposal, and, in developing the  
14 final rule, any reports or other secondary materials or studies  
15 that the agency considered in preparing the final rule, and  
16 then any other materials that were before the decision maker,  
17 directly or indirectly, or were referenced in the rule. Here,  
18 for example, because the final rule relies on the assertion  
19 that complaints of discrimination have been increasing over  
20 time, one would expect that the administrative record would be  
21 incomplete if it didn't include the evidence of the complaints  
22 of discrimination because the decision maker was clearly  
23 considering them.

24 One other point I would make in response to my  
25 colleague's description of the Court's need to review the

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1 record in order to assess the APA claims. As the Court is  
2 aware, the APA assessment is whether, based on the whole  
3 record, certainly under the arbitrary and capricious standard,  
4 the decision maker's ultimate conclusion was supported or not  
5 supported. So it goes without saying that the Court can't make  
6 an assessment of whether the decision was supported or  
7 unsupported without understanding what's in the whole record.

8 THE COURT: Did you have something further?

9 MR. TAKEMOTO: Yes, your Honor. In the final rule,  
10 many of the arguments that plaintiffs have made, the responses  
11 are contained in the final rule. And I think that your Honor  
12 could look at those responses in the final rule and see that  
13 many of them do not rely on comments necessarily. And so I  
14 don't know if it's the case that they're --

15 THE COURT: It's very hard to know the answers to any  
16 of these questions without seeing the record.

17 MR. TAKEMOTO: Exactly.

18 THE COURT: When will you first get a better  
19 understanding of what the administrative record looks like?

20 MR. TAKEMOTO: I do not know the answer to that  
21 question.

22 THE COURT: May I ask you -- this is not meant to be  
23 personal -- but are you lead counsel in this case or the other  
24 cases as well? Is there coordination?

25 MR. TAKEMOTO: Yes.

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1 THE COURT: How is that working within DOJ?

2 MR. TAKEMOTO: There are three trial attorneys:  
3 Rebecca Kopplin, Bradley Humphreys, and I. We are all jointly  
4 lead counsel in all four of these cases.

5 THE COURT: And to what degree do you all, as lead  
6 counsel in this case, have a sense of what the administrative  
7 record looks like beyond the 242,000 comments?

8 MR. TAKEMOTO: We are working with the department to  
9 review the administrative record. You know, it is entirely in  
10 their purview to know what's directly or indirectly considered  
11 by the decision makers. But that's the extent of our  
12 involvement.

13 THE COURT: Look, I'm going to take this under  
14 advisement. Let me just ask, does anyone else have any further  
15 comment about the wisdom or not of joining the PI briefing with  
16 summary judgment briefing?

17 MR. COLANGELO: Nothing from the government  
18 plaintiffs, your Honor.

19 MR. TAKEMOTO: Nothing.

20 THE COURT: All right. Mr. Takemoto, do you have an  
21 instinct at this point whether it's right that the bulk of the  
22 briefing here is likely to be directed to the merits as opposed  
23 to, if there is a PI dimension to this, the other PI factors?

24 MR. TAKEMOTO: Your Honor, I honestly do not want to  
25 commit to anything one way or the other, but I would generally

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1 agree with your Honor that the gist of the briefing should be  
2 on the merits.

3 THE COURT: Let me turn to the issue of amicus briefs.  
4 The schedules for the most part anticipate amicus briefs ruling  
5 in a week after the party that they support. I've seen that  
6 done that way. Also I've seen amicus briefs due the same time  
7 as the party brief. It looks as if everybody here seems to be  
8 of the view of that the better way to do this is to have the  
9 amicus briefs coming in a week later. Now that we have more  
10 time in the schedule than we originally had for the telescoped  
11 PI briefing, perhaps that makes the most sense. But just to go  
12 around the horn, anyone have an objection to my proceeding in  
13 that way? It gives you a little less time in preparing a  
14 response to the other side. To take into account the amicus  
15 brief you lose a week. But if that's what everyone thinks  
16 makes the most sense, I'm likely to defer to it.

17 MR. COLANGELO: No objection for the government  
18 plaintiffs, your Honor.

19 MS. SALGADO: No objection for PPFA.

20 MS. KOLBI-MOLINAS: No objection for NFPRHA.

21 MR. TAKEMOTO: No objection.

22 THE COURT: And one of the issues that's raised  
23 involves a common brief among the plaintiffs here. Let me  
24 begin first of all with Planned Parenthood and NFPRHA. Is that  
25 the right --

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1 MS. KOLBI-MOLINAS: Yes, your Honor, NFPRHA.

2 THE COURT: Putting aside for the moment the  
3 government plaintiffs, you two filed a lawsuit together. Can I  
4 at least assume that you two, your two organizations will have  
5 a common brief?

6 MS. SALGADO: Yes, your Honor. We filed a separate  
7 complaint, but yes, for here we would file an updated brief.

8 THE COURT: All right. So the question here is, the  
9 idea with the overlap with the government, I appreciate that  
10 there are different issues of different consequence to you.  
11 Nonetheless, you would have a common interest in invalidating  
12 the rule, to be super blunt. You also have somewhat different  
13 formulations of the PI factors for obvious reasons. To what  
14 degree have there been discussions among you about issues on  
15 which your formulations are likely to be so similar that you  
16 can really coordinate and submit a common brief? Have you had  
17 that discussion?

18 MR. COLANGELO: Your Honor, we have not talked in any  
19 detail about specific issues where we could coordinate and  
20 submit similar briefs. We have talked generally about a shared  
21 interest in minimizing duplication and overlap.

22 I should note that in the joint letter that the  
23 parties submitted, we asked that your Honor reserve judgment on  
24 the questions of briefs. We did want to modify that position  
25 slightly and advise your Honor that we believe it is best for

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1 the PPFA and NFPRHA plaintiffs to file separately from the  
2 governmental plaintiffs. And that's in addition to the  
3 question of separate issues, there are fairly significant  
4 coordination and logistical hurdles, especially when one  
5 considers that the government plaintiffs here, nearly two dozen  
6 state and local governments --

7 THE COURT: You are the ring master here, but I've  
8 played this role in a prior life of coordinating multiple  
9 signatories to a brief. It's not easy. So your point is just  
10 from a practical perspective you'd like to have separate  
11 briefs.

12 MR. COLANGELO: Yes, your Honor, with an eye toward  
13 minimizing to the greatest extent possible the duplicative  
14 arguments. It's in nobody's interest to give your Honor more  
15 than --

16 THE COURT: No. Look, one way, of course, to think  
17 about this is to come up with an aggregate page limit that you  
18 are each to be given together, presumptively each given half of  
19 it; you're welcome to swap it amongst yourselves, but at that  
20 point you are losing air time if you're saying the same thing.  
21 Might that be a way of incenting everyone to do the right thing  
22 here?

23 MS. SALGADO: Your Honor, I think you mentioned -- is  
24 this with respect to the summary judgment briefing, or I guess  
25 it would be the reply and the preliminary injunction?

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1 THE COURT: Look, I suppose I was tacitly assuming  
2 that if we joined the PI briefing to the summary judgment, you  
3 would still be giving me one document rather than multiple  
4 documents that largely say similar things, at least on the  
5 merits? So I'm assuming that, even if I go that way, there is  
6 still one submission. I just need to give you more space  
7 because you have more concepts, more elements, to address.

8 MS. SALGADO: Could we make it work? Of course, your  
9 Honor. There are in total 26 different plaintiffs here, and  
10 so, as you've mentioned, the coordination is quite difficult.  
11 But there are different claims, as we were discussing earlier.  
12 Not all plaintiffs brought all the same claims. And there are  
13 certainly different interests and, if we're talking about on  
14 preliminary injunction briefing, different harms. And so  
15 that's the reason, the underlying reason, for --

16 THE COURT: I clearly get that. I'm quite reluctant  
17 to ask you to file a common brief, given what I know; behind  
18 the scenes havoc will be created. The question is more, does  
19 it make sense to give you a common set of pages, presumptively  
20 have these for each of you, and that way at least you're  
21 incented not to duplicate because it means you are in some  
22 sense wasting space? Is that a coherent way to go?

23 MS. SALGADO: We can make that work, your Honor.

24 THE COURT: Government, let me ask you this question.  
25 Why do you care? In other words, why, with respect -- you're

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1 the U.S. government. I would give you the same pages as the  
2 other side got. Why does it matter to you whether or not they  
3 file the same brief?

4 MR. TAKEMOTO: I would say, your Honor, that if the  
5 plaintiffs were to file separate briefs and received similar  
6 page limits as the government and coordinated with one another,  
7 then it might be prejudicial to the government because they  
8 would receive considerably, essentially more pages than the  
9 government.

10 THE COURT: No, in other words, I'm assuming that --  
11 I'm making up numbers here -- but if each of them got 50 pages,  
12 you would get either 100 or something awfully close to it,  
13 recognizing that there's going to be some overlap, statement of  
14 fact, perhaps, but recognizing that they are covering and  
15 incented to cover, to a good degree, different terrain and  
16 certainly not -- first of all, everyone who has practiced in  
17 front of me knows that I'm not very much a disciplinarian about  
18 page limits. When I have good lawyers I'd rather they say what  
19 they need to say and I'd rather not discipline them  
20 arbitrarily. I'd rather hear what you have to say. So just as  
21 a matter of reality in this courtroom, you're going to get the  
22 space you need to say what you need to say. I'm trying to  
23 figure out why the government has an interest in choreographing  
24 the number of briefs that come at them from the plaintiffs.

25 MR. TAKEMOTO: That's the primary concern, your Honor.

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1 I will say that I recognize that 100 pages was your  
2 hypothetical; I think that may be too generous, you know, 150  
3 for each of them, but, yes, I think your Honor is correct that  
4 in general that's our primary concern.

5 THE COURT: I'm using that as -- I'm not sure it was  
6 unreasonable at all. But I was offering that just for  
7 discussion purposes.

8 All right. Counsel, I think you've answered,  
9 extremely ably, all the questions I have. You've given me a  
10 lot to think about. Before I adjourn, is there anything else  
11 that's been triggered either by the order I issued, identifying  
12 topics to come up, or the subjects that have come up today,  
13 that you would like to put on the table?

14 MR. COLANGELO: Your Honor, the only point that I  
15 would mention is that if the Court does determine to proceed  
16 with consolidated briefing on both preliminary injunction and  
17 summary judgment on the same schedule, we do think that bears  
18 in favor of providing the plaintiffs with more than the three  
19 weeks that the Justice Department had proposed to file our  
20 replies, oppositions, and cross-motions. We have proposed six  
21 weeks, and we think that a reasonable schedule obviously would  
22 be much closer to the proposal that we have put forward than  
23 the Justice Department's. But the only point I wanted to make  
24 is that if the briefs that the plaintiffs are filing is a reply  
25 in support of preliminary injunction and opposition to summary

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1 judgment and opposition to a motion to dismiss, and in  
2 cross-motion to summary judgment, we think that bears in favor  
3 of more time to prepare those documents.

4 THE COURT: Right. One moment. The schedule you're  
5 proposing is the one that spans pages 1 and 2 of the letter.  
6 Correct?

7 MR. COLANGELO: Yes, your Honor.

8 THE COURT: And I understood that to be what you were  
9 proposing on the premise that summary judgment alone was being  
10 litigated. I guess the question is, is your proposal  
11 substantially the same if a preliminary injunction was also  
12 part of what was being briefed?

13 MR. COLANGELO: Yes, your Honor.

14 THE COURT: The difference of course being, though,  
15 that the briefing on that would essentially run its course,  
16 would it not, with the September 12th day, right? Because  
17 that's -- we've in effect started the preliminary injunction  
18 briefing. You've already filed. And so we only have two  
19 briefs to go.

20 MR. COLANGELO: Well, the plaintiffs' briefing would  
21 run its course on the October 10th date.

22 THE COURT: In support of your reply on summary  
23 judgment.

24 MR. COLANGELO: Correct.

25 THE COURT: But on the -- and I appreciate that the

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1 merits issues would continue to be germane.

2 MR. COLANGELO: Right.

3 THE COURT: But strictly speaking on the PI part of  
4 things, you would be done on September 12th, recognizing that  
5 the merits issues span all types of motions, and of course I'd  
6 be interested in the later chapters as to that.

7 MR. COLANGELO: That's right, your Honor.

8 THE COURT: OK. Thank you. No, that's helpful.

9 Anything else from the front table before my final  
10 word, before we adjourn?

11 MR. COLANGELO: Nothing for the governmental  
12 plaintiffs, your Honor.

13 MS. SALGADO: No, your Honor.

14 THE COURT: Nothing else?

15 MS. KOLBI-MOLINAS: Nothing, your Honor.

16 THE COURT: Defense.

17 MR. TAKEMOTO: Two things, your Honor. One is, I  
18 forgot to mention that, on the page-limit question, just so  
19 your Honor is aware, in the Northern District of California,  
20 Judge Alsup has ordered 40 pages for defendants' opening brief,  
21 40 pages for plaintiffs' cross brief, then the following two  
22 briefs are 20 pages each. In the District of Maryland, Judge  
23 Russell did not issue a page limit, but the local rule  
24 indicates that the brief pages go 35, 35, 20, 20.

25 THE COURT: So, may I answer your question?

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1 MR. TAKEMOTO: Sure.

2 THE COURT: Why aren't all those page limits, given  
3 the consequence of what we have here, simply too stingy? I  
4 mean, I may be being very direct, but I can get through what  
5 you submit to me, but I'd rather people have more space. Why,  
6 given the scale of what's at stake, and the 242,000 comments  
7 and the administrative record and whatnot, even if this is just  
8 summary judgment, why wouldn't the Court want more than that?

9 MR. TAKEMOTO: Your Honor, I believe that the  
10 memoranda in support of the motions for preliminary injunction  
11 were not substantially different than those page limits on the  
12 likelihood of success.

13 THE COURT: That's before we have an administrative  
14 record.

15 MR. TAKEMOTO: That's correct.

16 THE COURT: That's a game changer. Isn't it?

17 I mean, that's a lot to add to the prior briefs.

18 MR. TAKEMOTO: It does add material to the briefs,  
19 yes.

20 THE COURT: All right. Anything further?

21 MR. TAKEMOTO: I had one other thing. Sorry, your  
22 Honor. But I just wanted to flag that defendants have  
23 requested to extend the response in the complaint deadline to  
24 be coextensive with theirs.

25 THE COURT: And that's consented to.

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1 MR. TAKEMOTO: It's not opposed?

2 THE COURT: Not opposed. I think that certainly makes  
3 sense.

4 Anything else from you?

5 MR. TAKEMOTO: No.

6 THE COURT: All I can say, at this point, you've given  
7 me a lot to think about and I will think about it. I will have  
8 a schedule and an answer out by Monday. That said, this much I  
9 know for sure, which is, an administrative record due date of  
10 July 22nd that everyone else has set I certainly will set here  
11 too. Therefore everyone can bank on that. Number one.

12 Number two, without holding you to it, I'm likely to  
13 order that there be briefing both of preliminary judgment  
14 issues as well as summary judgment. So as you're beginning to  
15 think about the way briefs like that look, I think it's more  
16 likely than not I will do that, substantially for the reasons  
17 that I gave. I think it gives me more flexibility,  
18 understanding that the rule won't take effect until November  
19 the 22nd, but it gives me more flexibility in a situation where  
20 I simply do not, and can't and won't have for some time, a  
21 really textured understanding of the extent of the record or of  
22 the difficulty of the issues at hand.

23 All right. Thank you. This has been enormously  
24 helpful. We stand adjourned. Have a good weekend.

25 (Adjourned)