

1 JOSEPH H. HUNT
Assistant Attorney General
2 JAMES M. BURNHAM
Deputy Assistant Attorney General
3 CHRISTOPHER A. BATES
Senior Counsel to the Assistant Attorney General
4 MICHELLE R. BENNETT
Assistant Branch Director
5 BRADLEY P. HUMPHREYS
REBECCA M. KOPPLIN
6 BENJAMIN T. TAKEMOTO
Trial Attorneys
7 U.S. Department of Justice, Civil Division, Federal Programs Branch
1100 L Street, NW
8 Washington, DC 20005
9 *Counsel for Defendants*
10

11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF WASHINGTON**
AT SPOKANE

13 STATE OF WASHINGTON,

14 Plaintiff,

15 v.

16
17 ALEX M. AZAR II, *in his official*
capacity as Secretary of the United
18 *States Department of Health and*
Human Services; and UNITED
19 STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
20

21 Defendants.
22

No. 2:19-cv-0183-SAB

DEFENDANTS' RESPONSE TO
PLAINTIFF'S NOTICE OF
SUPPLEMENTAL AUTHORITY

1 Defendants respectfully submit this brief opposition to Plaintiff's
2 eleventh-hour Notice of Supplemental Authority and Proceedings in a Related
3 Case, ECF No. 68. Specifically, Defendants object to the Court considering
4 attachment B of Plaintiff's notice, an uncertified, 160-page rough transcript of a
5 motions hearing in *New York v. HHS*, Civ. No. 1:19-cv-4676 (S.D.N.Y. Oct. 18,
6 2019), a case that involves another challenge to the Rule at issue in this case. *See*
7 Attachment B, ECF No. 68-2. There are two bases for Defendants' objection to
8 consideration of the rough transcript (which even Plaintiff does not appear to
9 claim is "authority").

10 First, the Court's review of this case is limited to the administrative
11 record, and Plaintiff has identified no basis to expand that review to include the
12 rough transcript. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100
13 F.3d 1443, 1450–51 (9th Cir. 1996) (holding that judicial review of agency
14 decisions is limited to the administrative record except in certain narrow
15 circumstances). Accordingly, on record-review principles alone, the Court
16 should disregard the rough transcript.

1 Furthermore, the transcript is irrelevant to this case. *See* Fed. R. Evid.
 2 401; *cf. Baker v. Racansky*, 887 F.2d 183, 185 n.1 (9th Cir. 1989) (concluding
 3 that transcripts of interview that postdated decision were irrelevant to the claims
 4 at issue). The transcript contains only the arguments of counsel made in the
 5 context of a different set of legal theories and plaintiffs. *See New York v. HHS*,
 6 Civ. No. 1:19-cv-4676 (S.D.N.Y. filed May 21, 2019). This Court will hear the
 7 arguments of counsel on the claims in *this* case at the hearing scheduled for
 8 tomorrow.

9 For these reasons, this Court should not consider Attachment B of
 10 Plaintiff's notice of supplemental authority in its review of this case.

11
 12 Dated: November 6, 2019

Respectfully submitted,

13 JOSEPH H. HUNT
 Assistant Attorney General

14 JOSEPH H. HARRINGTON
 15 United States Attorney

16 JAMES M. BURNHAM
 17 Deputy Assistant Attorney General

18 CHRISTOPHER A. BATES
 19 Senior Counsel to the Assistant Attorney
 General

20 MICHELLE R. BENNETT
 21 Assistant Branch Director

/s/ Bradley P. Humphreys

BRADLEY P. HUMPHREYS

REBECCA KOPPLIN

BENJAMIN T. TAKEMOTO

Trial Attorneys

United States Department of Justice

Civil Division

1100 L Street, NW

Washington, DC 20005

Tel: (202) 305 0878

Fax: (202) 616-8460

E-mail: Bradley.Humphreys@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS
Trial Attorney
United States Department of Justice