BURNETTE SHUTT MCDANIEL
Moving law forward.

BURNETTE SHUTT & MCDANIEL, PA
912 Lady Street | PO Box 1929 | Columbia, SC 29202
O: 803.850.0912 F: 803:904.7910
burnetteshutt.law

Nekki Shutt – Partner
T: 803.904.7912
F: 803.904.7910
nshutt@burnetteshutt.law
Certified in Employment and Labor Law
by the South Carolina Supreme Court

September 29, 2022

VIA ECF FILING SYSTEM
The Honorable Joseph Dawson III
UNITED STATES DISTRICT JUDGE
401 West Evans Street
Florence, South Carolina 29501

RE: Rogers, et al. v. U.S. Department of Health and Human Services, et al.
USDC C/A No.: 6:19-cv-01567-JD
BSM File No.: 3781.005

Dear Judge Dawson:

We write on behalf of Plaintiffs and Defendants in the above-captioned matter to request that the Court set a briefing schedule for the parties' intended cross motions for summary judgment. Pursuant to the Court's Seventh Amended Scheduling Order (ECF No. 208), dispositive motions were due on March 4, 2022. This deadline was stayed by the Court's March 3, 2022 Order (ECF No. 214).

The parties have attempted via email correspondence and a meet-and-confer call held on September 21, 2022 to reach agreement on a briefing schedule for summary judgment motions, but have been unable to do so. Plaintiffs' and Defendants' respective positions are set forth below.

PLAINTIFFS' POSITION

Plaintiffs propose that the Court enter a simultaneous briefing schedule, such that the parties would submit their opening briefs on the same day, their opposition briefs on the same day and their reply briefs on the same day. This approach ensures that no party has the unfair advantage of viewing the other side's summary judgment arguments before having to commit to their own. Plaintiffs' proposal also accords with this Court's practice in other cases, *see, e.g.*, *Gator Myrtle Beach Partners, Ltd. v. Arch Specialty Ins. Co.*, 19-CV-01525-JD; *Am. Nat'l Prop. & Cas. Co. v. Kennedy*, 20-CV-00745-JD. And, importantly, it is the same approach to scheduling that has long been in effect in this case—without prior objection by Defendants. (*See* Seventh Amended Scheduling Order, ECF No. 208 (setting a single deadline that applied to all parties for the filing of dispositive motions)).

Defendants, by contrast, seek a complicated, staggered briefing schedule, under which Plaintiffs would be required to file their opening summary judgment brief first, and then Federal and State Defendants would each file a combined opposition and opening brief, Plaintiffs would file a combined opposition and reply brief responding to both State and Federal Defendants and State and Federal Defendants would each file a reply. Not only would this proposal give Defendants an unfair tactical advantage, as noted above, but it also would extend motion practice considerably and further delay resolution of this matter. Defendants' approach also introduces unnecessary complication, as each brief would need to play the dual role of supporting one side's motion for summary judgment while opposing the others', even though different arguments and different burdens apply to each.

Defendants' assertion that sequential briefing is more streamlined is specious. For example, Plaintiffs could file a single brief responding to State and Federal Defendants' briefs under either sequential or staggered briefing, thus reducing the number of briefs. More importantly, the amount of effort Defendants have put into arguing for a staggered briefing schedule—one that is inconsistent with the existing schedule—itself demonstrates that Defendants are simply seeking a tactical advantage in forcing Plaintiffs to file their brief before Defendants commit to their own summary judgment arguments. The purported benefits associated with Defendants' proposal flow exclusively to Defendants, at Plaintiffs' expense, and with no tangible benefit for the Court.

Indeed, if Defendants both intend to move for summary judgment and are really concerned with "efficiencies," then they should have proposed a staggered briefing schedule under which Defendants file their brief first. Defendants' insistence that Plaintiffs should move first because "Plaintiffs brought the case" makes no sense. A motion for summary judgment is neither a complaint, which initiates a case, nor an appeal, which initiates review of an unfavorable ruling. A motion for summary judgment is a dispositive motion, and typically, the party seeking to dispose of the case (*i.e.*, the defendant) files first. And where, as here, both parties are moving for similar but opposite relief, it makes the most sense for both to move at the same time. It is no answer to claim, as Defendants do, that "in APA cases, the summary judgment standard functions slightly differently." Plaintiffs here are pursuing freestanding constitutional claims against both State and Federal Defendants and are not pursuing any claims under the APA. The APA's standard of review does not apply. *See, e.g.*, *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. CIV.A.MJG-95-309, 2006 WL 581260, at *6 (D. Md. Jan. 10, 2006).

Plaintiffs thus respectfully request that the court set a simultaneous briefing schedule, and Plaintiffs propose that opening briefs be due **October 28, 2022**, opposition briefs be due **November 21, 2022** and reply briefs be due on **November 30, 2022**. Should Federal Defendants really lack counsel who could oversee this case during Mr. Takemoto's extended "leave," which seems dubious, then Plaintiffs would agree to Defendants' alternative simultaneous briefing schedule set forth below—even though

such a schedule seems unduly lengthy given Federal Defendants' claim that they "have been prepared to proceed to summary judgment for years."[1]

In the alternative, should the Court decide that staggered briefing is appropriate, Plaintiffs respectfully request that the Court order Defendants to file their opening briefs first, as it is Defendants who say they prefer a sequential briefing schedule.

DEFENDANTS' POSITION

Federal Defendants respectfully request briefing ad seriatim, rather than simultaneous briefing, for the following reasons. State Defendants concur with and join in this request and in the explanation and proposal that follows.

First, under the circumstances of this case, briefing ad seriatim would allow the parties to engage directly with one another's arguments. Each party must address the remaining issues in this case to prevail at summary judgment—the briefing would be clearer and more beneficial to the Court if the parties made their case one after the other, rather than at the same time. For example, a party could raise a counterargument to an issue that the other party concedes in a simultaneously filed brief. Needless time would be spent by the parties writing and responding to that issue, and needless time would be spent by the Court reading and considering it. Furthermore, the space and time spent writing, responding to, and analyzing that issue is space and time that could otherwise be spent engaging in a direct dialogue about the core issues of the case.

Second, briefing ad seriatim is more streamlined than simultaneous briefing for the simple reason that there are fewer briefs for the parties to prepare and for the Court to review. Whereas Plaintiffs' proposed simultaneous schedule would contain eleven briefs (Plaintiffs' MSJ; SC's Opposition to Plaintiffs' MSJ; HHS's Opposition to Plaintiffs' MSJ; Plaintiffs' Reply to SC's Opposition; Plaintiffs' Reply to HHS's Opposition; SC's MSJ; Plaintiffs' Opposition to SC's MSJ; SC's Reply to Plaintiffs' Opposition; HHS's MSJ; Plaintiffs' Opposition to HHS's MSJ; HHS's Reply to Plaintiffs' Opposition), Defendants' proposed serialized schedule would contain six briefs (Plaintiffs' MSJ; SC's Response & Cross-MSJ; HHS's Response & Cross-MSJ; Plaintiffs' Consolidated Reply and Response; SC's Reply; HHS's Reply).

[1] Defendants' claim that Plaintiffs have caused "years of delay" is blatantly false. The discovery period in this case needed to be extended multiple times because of State Defendants' failure to produce documents or deponents in a timely manner. (*See, e.g.*, ECF Nos. 114, 205.) The parties were then unable to find a mutually agreeable date before July 8, 2022 for Plaintiffs to take the final Rule 30(b)(6) deposition of a Department of Social Services representative. Two-and-a-half weeks after that deposition, counsel for State Defendants notified all parties that he planned to move to reset the dispositive-motions deadline. Counsel for Plaintiffs responded the next day with our objections to and thoughts on Defendants' proposed briefing schedule. Counsel for Plaintiffs then never heard back from either State or Federal Defendants until counsel for Plaintiffs sent another follow-up message in September. It is thus Defendants, not Plaintiffs, who have dragged their feet throughout this case, including with respect to finalizing the proposed summary judgment schedule.

For these reasons, courts often require briefing ad seriatim when the parties are simultaneously seeking relief on the same issues. *See, e.g.*, Fed. R. App. P. 28(a)-(c). This is also the typical practice in Administrative Procedure Act litigation. Consistent with this practice and for its and the parties' benefit, this Court should order briefing ad seriatim.

On the question of order, Plaintiffs brought the case and are responsible for prosecuting it, so they would be the most logical party to move first, as is typically the case in litigation challenging government action, and just as appellants file the opening brief in the Court of Appeals. Although motions for summary judgment typically test a party's case before trial, that is not their function for challenges to agency action. Rather, "in APA cases, the summary judgment standard functions slightly differently, because the reviewing court generally . . . reviews the agency's decision as an appellate court addressing issues of law." *Ashtari v. Pompeo*, 496 F. Supp. 3d 462, 467 (D.D.C. 2020). Motions for summary judgment therefore become the sole vehicle for resolving the case. As such, it is unusual and nonsensical for the government to move first because it is up to the plaintiff to make their case why the government action is unlawful. It is therefore not "an unfair tactical advantage" for Defendants to move second: just as Plaintiffs must forecast their claims by filing a complaint before Defendants file an answer, Plaintiffs should have to explain why they are entitled to relief on their claims before Defendants can respond.[2]

Plaintiffs also assert that a simultaneous briefing schedule accounts for different arguments and different burdens of proof. But they identify no material differences in arguments or burdens that would support the aforementioned inefficiencies of simultaneous briefs. And, with respect to some issues, such as Plaintiffs' standing, there are no differences in burdens at all (i.e., Plaintiffs must point to evidence establishing their standing regardless of who moves for summary judgment).

Finally, Plaintiffs' suggestion that simultaneous briefing will allow the case to be resolved more quickly is not true. Although simultaneous briefing could theoretically be completed slightly faster, it would also include five additional (and disjointed) briefs for the Court to review. Furthermore, the undersigned counsel for Federal Defendants, who is the lead lawyer and is responsible for drafting the briefs, will be on leave from November 17 to December 26 and has significant responsibilities in other matters before then, including extensive travel in October for depositions as well as other briefs. [3] Were the

[2] Although all of Plaintiffs' claims against Federal Defendants must be channeled through the APA, *see* 5 U.S.C. § 706 (setting forth the scope of judicial review, including for constitutional claims), Federal Defendants acknowledge that Plaintiffs have non-APA claims against State Defendants. However, those claims would benefit from Defendants' proposed serialized schedule for the same reasons.

[3] Defendants previously honored Plaintiffs' request to postpone the briefing schedule by approximately six weeks because a number of their counsel were on leave in August. In light of that, Federal Defendants believe that honoring the pre-planned leave of counsel for Federal Defendants for a similar length of time is reasonable.

Court to issue a simultaneous briefing schedule, such a schedule would actually take longer to complete if it accounts for these scheduling conflicts (briefing ad seriatim would allow Plaintiffs to draft and file their opposition and reply briefs while counsel for Federal Defendants is on leave).

In any event, after years of delay on their part, Plaintiffs cannot now complain that an ad seriatim briefing schedule would "considerably" extend motion practice and "further delay resolution of this matter." Federal Defendants have been prepared to proceed to summary judgment for years. The only reason this case has not proceeded to summary judgment has been because of Plaintiffs' delay. Much of this delay was associated with Plaintiffs' requests to extend discovery deadlines. *See* Pls.' Mot. Stay 2 n.2, ECF No. 211 (summarizing extension motions). But even after discovery closed on February 18, 2022, ECF No. 208, Plaintiffs once again delayed proceeding to summary judgment, seeking to stay the dispositive motion deadline while they sought to reopen discovery. ECF No. 211. The parties met and conferred on the question of reopening discovery following a March 15, 2022 status conference. ECF No. 221. More months passed, and, following a June 30, 2022 status conference, the Court invited Plaintiffs to file a motion to amend the scheduling order. Plaintiffs did not file such a motion, and they have not done anything to advance the case since then. Indeed, it was only after the Court requested a status update from the parties on September 15, 2022, that Plaintiffs sought a briefing schedule. Plaintiffs cannot evince a lack of urgency for years and, only after prompting from the Court, demand that the case be resolved at once and at the expense of Defendants' schedule. Under the circumstances, the benefits of an ad seriatim schedule far outweigh the inefficiencies of Plaintiffs' proposed briefing schedule.

Accordingly, Defendants propose the following briefing schedule ad seriatim:

1. Plaintiffs' Motion for Summary Judgment (35 pages): October 17, 2022

2. State Defendants' Consolidated Response and Cross-Motion for Summary Judgment (35 pages): November 17, 2022

3. Federal Defendants' Consolidated Response and Cross-Motion for Summary Judgment (35 pages): November 17, 2022

4. Plaintiffs' Consolidated Reply and Response (35 pages): December 27, 2022[4]

5. State Defendants' Reply (15 pages): January 17, 2023

6. Federal Defendants' Reply (15 pages): January 17, 2023

Alternatively, if the Court prefers simultaneous briefing, Defendants propose the following schedule to account for the undersigned pre-planned leave:

[4] Defendants are amenable to expanding this page limit if Plaintiffs deem it necessary.

1. Plaintiffs' Motion for Summary Judgment (35 pages): November 17, 2022

2. State Defendants' Motion for Summary Judgment (35 pages): November 17, 2022

3. Federal Defendants' Motion for Summary Judgment (35 pages): November 17, 2022

4. Plaintiffs' Response to State Defendants' Motion for Summary Judgment (25 pages): January 17, 2023

5. Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (25 pages): January 17, 2023

6. State Defendants' Response to Plaintiffs' Motion for Summary Judgment (25 pages): January 17, 2023

7. Federal Defendants' Response to Plaintiffs' Motion for Summary Judgment (25 pages): January 17, 2023

8. Plaintiffs' Reply to State Defendants' Response to Plaintiffs' Motion for Summary Judgment (15 pages): February 7, 2023

9. Plaintiffs' Reply to Federal Defendants' Response to Plaintiffs' Motion for Summary Judgment (15 pages): February 7, 2023

10. State Defendants' Reply to Plaintiffs' Response to State Defendants' Motion for Summary Judgment (15 pages): February 7, 2023

11. Federal Defendants' Reply to Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (15 pages): February 7, 2023

s/ Nekki Shutt
South Carolina Equality Coalition, Inc.
Nekki Shutt (Federal Bar No. 6530)
BURNETTE SHUTT & MCDANIEL, PA
912 Lady Street, 2nd floor
P.O. Box 1929 Columbia, SC 29202
(803) 904.7912
nshutt@burnetteshutt.law

Peter T. Barbur (admitted *pro hac vice*)
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue

New York, NY 10019
(212) 474-1000
pbarbur@cravath.com

Leslie Cooper (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor New York, NY 10004
(212) 549-2633
lcooper@aclu.org

Daniel Mach (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
(202) 675-2330
dmach@aclu.org

M. Currey Cook (admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
ccook@lambdalegal.org

Karen L. Loewy (admitted *pro hac vice*)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street NW, 8th Floor
Washington, DC 20006-2304
(202) 804-6245
kloewy@lambdalegal.org

ATTORNEYS FOR PLAINTIFFS

s/ Miles E. Coleman
Miles E. Coleman (Fed Bar ID 11594)
NELSON MULLINS RILEY & SCARBOROUGH, LLP
2 W. Washington Street, 4th Floor
Greenville, South Carolina 29201

T: 864-373-2352
Miles.coleman@nelsonmullins.com

ATTORNEY FOR STATE DEFENDANTS

s/ Benjamin Takemoto
Benjamin Takemoto, Esq. (admitted *pro hac vice*)
Trial Attorney
Federal Programs Branch
US Department of Justice, Civil Division
1100 L Street, NW
Washington, DC 20005
T: 202-353-0543
Benjamin.Takemoto@usdoj.gov

ATTORNEY FOR FEDERAL DEFENDANTS