

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF
MASSACHUSETTS, *et al.*,

Plaintiffs,

v.

ROBERT F. KENNEDY, JR., *et al.*,

Defendants.

No. 1:25-cv-10814-WGY

PROPOSED SCHEDULE FOR FURTHER PROCEEDINGS

Counsel for plaintiffs and defendants have met and conferred on the procedure for resolving the asserted claims and defenses and reaching a final disposition in this matter. The parties agree that this case will proceed to the merits without defendants filing a separate response to the complaint. The parties further agree on a proposed schedule for the first phase of litigation, as set forth below, which they respectfully move the Court to adopt. The parties do not agree on the schedule and procedure for the second phase; they set forth their respective positions below.

I. Joint Proposal for First Phase of Proceedings (To Be Heard on June 16)

1. With respect to the first portion of this case,¹ the Court has ordered defendants to file the administrative record by June 2, 2025, and has set a hearing for June 16, 2025, at 10:00 a.m. *See* ECF Nos. 109, 110.

¹ The clerk's notes for the May 13 case-management conference state that "[t]he first portion of the case will focus on termination of grants." ECF No. 109; *see* ECF No. 110, at 26:12–18. The parties understand this to mean that the first portion of the case will focus on all claims except plaintiffs' unreasonable-delay claims (*i.e.*, Count 7 and that portion of Counts 4–6 that plaintiffs contend concern unreasonable delay). Plaintiffs note their position that the gravamen of the claims to be resolved in the first phase is the legality of the Challenged Directives, a question that is antecedent to any issues concerning terminations carried out under the directives. *See* ECF No. 78, at 23 n. 19; ECF No. 101, at 3 n. 4. Defendants disagree because plaintiffs argued and the Court appeared to agree that grant terminations are reviewable final agency actions in response to defendants' arguments that the "challenged directives" are not themselves reviewable final agency actions.

2. It is defendants' position that all aspects of the first phase of the case are subject to the record review rule. *See Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004). It is plaintiffs' position that certain first-phase claims are not subject to the record-review rule. *See, e.g., United Farm Workers v. Noem*, No. 25-cv-246, 2025 WL 1490131, at *7 (E.D. Cal. May 23, 2025). In the event plaintiffs do not agree to proceed on the record submitted, plaintiffs shall file any motion to supplement or to challenge the completeness of the administrative record by **June 9, 2025, at 6:00 p.m.** Plaintiffs must also submit a list of any exhibits or witnesses they intend to present at the June 16 hearing by **June 9, 2025, at 6:00 p.m.** Defendants shall file any response or objections to the presentation of such exhibits or witnesses by **June 11, 2025, at 6:00 p.m.**, and plaintiffs shall file a response to any such objections by **June 13, 2025, at 10:00 a.m.**

3. The parties shall file simultaneous opening briefs of no more than 35 pages on the merits of first-phase issues by **June 9, 2025, at 6:00 p.m.** Plaintiffs shall also, by the same deadline, file a proposed judgment and proposed permanent injunction as to those issues. The parties shall file simultaneous response briefs of no more than 10 pages by **June 13, 2025, at 10:00 a.m.** limited to arguments raised in the opposing parties' opening brief.

II. Parties' Positions on Second Phase of Proceedings (To Be Heard After June 16)

4. Plaintiffs' position: Plaintiffs intend to serve discovery requests related to their unreasonable-delay claims and, to the extent required by Federal Rule of Civil Procedure 26(d)(1), they seek the Court's leave to do so. Defendants' objection to *any* discovery on these claims is misplaced: it is well-established that "[r]eview under [5 U.S.C. §706(1)] is not limited to the administrative record." *Cherokee Nation v. U.S. Dep't of the Interior*, 531 F. Supp. 3d 87, 97 (D.D.C. 2021) (denying protective order and permitting discovery on claims related to withheld

government action).² Plaintiffs propose a schedule of 21 days for defendants to respond to written-discovery requests and 28 days for depositions to occur (measured from the date of service of the requests or the date of the Court’s order setting a schedule, whichever is later). Plaintiffs respectfully request a hearing on July 1, 2025, or as soon as possible thereafter to consider the merits of plaintiffs’ unreasonable-delay claims. Plaintiffs propose that the parties file concise pre-hearing memoranda identifying the witnesses they intend to call at the hearing, the exhibits they intend to introduce at the hearing, and the issues of fact and law to be decided. Plaintiffs propose that, following the hearing, the Court order any post-hearing briefing as appropriate.

5. Defendants’ position: Plaintiffs’ phase-two claims challenging alleged agency delay or inaction under APA § 706(1) are reviewed on the administrative record, just as are claims challenging the legality of agency action under § 706(2). *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 570 (N.D. Tex. 1997); 5 U.S.C. § 706(2) (permitting review of “agency action”), § 551 (defining “agency action” as the failure of an agency to act).³ Moreover, defendants believe that the parties should be able to agree to facts or a record that either resolves the second-phase issues completely, or that allows the Court to decide these claims on an expedited basis. Plaintiffs have refused defendants’ proposal to set a deadline to seek agreement on facts on an expedited basis and, instead, seek impermissible discovery. Accordingly, unless the parties reach agreement, defendants propose that phase two must proceed as a record-review case, and propose the below expedited schedule to follow the phase-one hearing scheduled for June 16. This schedule

² See also, e.g., *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (holding that “an action arising under 5 U.S.C. § 706(1) . . . is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record”); *W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93, 101 (D.D.C. 2013) (same); *Florida v. FDA*, No. 8:22-cv-1981, 2023 WL 2561380, at *2 (M.D. Fla. Mar. 17, 2023), *objections overruled*, 2023 WL 3004553 (Apr. 19, 2023) (collecting cases).

³ Plaintiffs’ proposal to submit written discovery and to conduct depositions—before defendants even lodge an administrative record—is backwards and improper. In the event the Court is considering plaintiffs’ approach, defendants would respectfully request the opportunity to fully brief this issue.

should include an opportunity to move to dismiss plaintiffs' phase-two claims, including for reasons included in defendants' opposition to plaintiffs' motion for a preliminary injunction and on which the court has not yet ruled.

- Within **7 days** of the conclusion of the phase one hearing scheduled for June 16, 2025, defendants may move to dismiss plaintiffs' claims related to alleged unreasonable delay. Within **10 days** of defendants' motion to dismiss, plaintiffs may file an opposition. No reply is permitted.
- Within **30 days** from any ruling denying defendants' motion to dismiss phase two of plaintiffs' case, defendants must lodge the administrative record.
- Within **14 days** from the lodging of the administrative record, Plaintiffs may file a motion to complete or supplement the record **or** may move for summary judgment. Within **14 days** of the motion filed by plaintiffs, defendants may file an opposition. No reply is permitted.
- If plaintiffs move to complete or supplement the record, the parties must confer and submit a proposed schedule for further proceedings.

May 29, 2025

ANDREA JOY CAMPBELL
Attorney General of Massachusetts

/s/ Gerard J. Cedrone
Katherine B. Dirks (BBO No. 673674)
Chief State Trial Counsel
Gerard J. Cedrone (BBO No. 699674)
Deputy State Solicitor
Allyson Slater (BBO No. 704545)
Director, Reproductive Justice Unit
Rachel M. Brown (BBO No. 667369)
Vanessa A. Arslanian (BBO No. 688099)
Chris Pappavaselio (BBO No. 713519)
Assistant Attorneys General
One Ashburton Place, 20th Floor
Boston, MA 02108
(617) 963-2282
gerard.cedrone@mass.gov

*Counsel for the
Commonwealth of Massachusetts*

ROB BONTA
Attorney General of California

/s/ Emilio Varanini
Neli Palma
Senior Assistant Attorney General
Emilio Varanini*
Kathleen Boergers*
Supervising Deputy Attorneys General
Nimrod Pitsker Elias*
Daniel D. Ambar*
Ketakee R. Kane*
Sophia TonNu*
Hilary Chan*
Deputy Attorneys General
455 Golden Gate Avenue
San Francisco, CA 94102
(415) 510-3541
emilio.varanini@doj.ca.gov

Counsel for the State of California

Respectfully submitted.

YAAKOV M. ROTH
Acting Assistant Attorney General

LEAH B. FOLEY
United States Attorney

KIRK T. MANHARDT
Director

MICHAEL QUINN
Senior Litigation Counsel

/s/ Thomas Ports
THOMAS PORTS (Va. Bar No. 84321)
Trial Attorney
U.S. Department of Justice
Civil Division
Corporate/Financial Section
P.O. Box 875
Ben Franklin Stations
Washington D.C. 20044-0875
Tel: (202) 307-1105
Email: thomas.ports@usdoj.gov

ANUJ K. KHETARPAL
Assistant United States Attorney
United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
Tel: (617) 823-6325
Email: anuj.khetarpal@usdoj.gov

Attorneys for Defendants

ANTHONY G. BROWN
Attorney General of Maryland

/s/ James C. Luh
Michael Drezner*
James C. Luh*
Senior Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6959
mdrezner@oag.state.md.us

Counsel for the State of Maryland

NICHOLAS W. BROWN
Attorney General of Washington

/s/ Andrew Hughes
Andrew Hughes*
Tyler Roberts*
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744
andrew.hughes@atg.wa.gov

Counsel for the State of Washington

KRISTIN K. MAYES
Attorney General of Arizona

/s/ Joshua G. Nomkin
Joshua G. Nomkin*
Assistant Attorney General
2005 N. Central Avenue
Phoenix, AZ 85004
(602) 542-3333
joshua.nomkin@azag.gov

Counsel for the State of Arizona

PHILIP J. WEISER
Attorney General of Colorado

/s/ Lauren Peach

Shannon Stevenson*

Solicitor General

Lauren Peach*

First Assistant Attorney General

1300 Broadway, 10th Floor

Denver, CO 80203

(720) 508-6000

lauren.peach@coag.gov

Counsel for the State of Colorado

KATHLEEN JENNINGS
Attorney General of Delaware

/s/ Vanessa L. Kassab

Ian R. Liston**

Director of Impact Litigation

Vanessa L. Kassab*

Deputy Attorney General

820 N. French Street

Wilmington, DE 19801

(302) 683-8899

vanessa.kassab@delaware.gov

Counsel for the State of Delaware

ANNE E. LOPEZ
Attorney General of Hawai'i

/s/ Kaliko 'onālani D. Fernandes

David D. Day*

Special Assistant to the Attorney General

Kaliko 'onālani D. Fernandes*

Solicitor General

425 Queen Street

Honolulu, HI 96813

(808) 586-1360

kaliko.d.fernandes@hawaii.gov

Counsel for the State of Hawai'i

KEITH ELLISON

Attorney General of Minnesota

/s/ Pete Farrell

Peter J. Farrell*

Deputy Solicitor General

445 Minnesota Street, Suite 600

St. Paul, Minnesota, 55101

(651) 757-1424

peter.farrell@ag.state.mn.us

Counsel for the State of Minnesota

AARON D. FORD

Attorney General of Nevada

/s/ Heidi Parry Stern

Heidi Parry Stern*

Solicitor General

1 State of Nevada Way, Suite 100

Las Vegas, NV 89119

hstern@ag.nv.gov

Counsel for the State of Nevada

MATTHEW J. PLATKIN

Attorney General of New Jersey

/s/ Nancy Trasande

Nancy Trasande*

Bryce Hurst*

Deputy Attorneys General

124 Halsey Street, 5th Floor

Newark, NJ 07101

(609) 954-2368

nancy.trasande@law.njoag.gov

Counsel for the State of New Jersey

RAÚL TORREZ

Attorney General of New Mexico

/s/ Astrid Carrete

Astrid Carrete*

Assistant Attorney General

408 Galisteo Street
Santa Fe, NM 87501
(505) 270-4332
acarrete@nmdoj.gov

Counsel for the State of New Mexico

LETITIA JAMES

Attorney General of New York

/s/ Rabia Muqaddam

Rabia Muqaddam*

Special Counsel for Federal Initiatives

Molly Thomas-Jensen*

Special Counsel

28 Liberty Street
New York, NY 10005
(929) 638-0447
rabia.muqaddam@ag.ny.gov

Counsel for the State of New York

DAN RAYFIELD

Attorney General of Oregon

/s/ Christina L. Beatty-Walters

Christina L. Beatty-Walters*

Senior Assistant Attorney General

100 SW Market Street
Portland, OR 97201
(971) 673-1880
tina.beattywalters@doj.oregon.gov

Counsel for the State of Oregon

PETER F. NERONHA

Attorney General of Rhode Island

/s/ Jordan Broadbent

Jordan Broadbent*

Special Assistant Attorney General

150 South Main Street

Providence, RI 02903

(401) 274-4400, Ext. 2060

jbroadbent@riag.ri.gov

Counsel for the State of Rhode Island

JOSHUA L. KAUL

Attorney General of Wisconsin

/s/ Lynn K. Lodahl

Lynn K. Lodahl*

Assistant Attorney General

17 West Main Street

Post Office Box 7857

Madison, WI 53707

(608) 264-6219

lodahlk@doj.state.wi.us

Counsel for the State of Wisconsin

* admitted *pro hac vice*

** *pro hac vice* application forthcoming