

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

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