

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN ACADEMY OF PEDIATRICS,
et al.,

Plaintiffs,

vs.

ROBERT F. KENNEDY, JR., in his official
capacity as Secretary of the Department of Health
and Human Services; *et al.*,

Defendants.

Case No. 1:25-cv-11916 (BEM)

District Judge: Hon. Brian E. Murphy

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXTEND THE STAY
OF PROCEEDINGS PENDING RESOLUTION OF THE FIRST CIRCUIT APPEAL**

Defendants' Motion to Extend Stay of Proceedings, Dkt. No. 352, should be denied for four separate and independent reasons.

First, ten and a half months ago, on October 30, 2025, the parties first appeared before this Court on Plaintiffs' Motion to Lift Stay and Continue This Case on Schedule During the Federal Government Shutdown. Dkt. No. 122. At that hearing, the Court stated: "I'm going to lift the stay. I can tell you that my policy on cases of national import is not to allow a stay . . . This is clearly a case that's of national importance. It's one that needs to get addressed. . . . [T]his is a case that is significant enough and important enough that it must move forward."¹ This case still is of national import and needs to move forward.

Second, an indefinite extension of the stay of proceedings in this Court prejudices the Plaintiffs and their members. When this Court lifted the stay last October, the government shutdown was in its fourth week, with no end in sight. Now, a stay of proceedings has been in

¹ Tr. of October 30, 2025, Hr'g 16:25–17:9, Dkt. No. 137 (attached hereto as Exhibit A).

place for six weeks, and the government seeks an *indefinite* stay.² In the meantime, prejudice and harm continue to accrue to the Plaintiffs and their members. A significant harm that numerous declarants have attested to in this case is the confusion and uncertainty that Defendants' actions have caused in the clinical setting that has affected Plaintiffs' and their members' operations.³ This Court's March 16 decision that granted stays, not preliminary injunctions, signaled a *temporary* pause of the challenged actions pending a decision on the merits. The longer that the country waits for a decision on the merits in this case, the more opportunity there is for further confusion and uncertainty to be injected into the vaccine ecosystem.⁴ A decision on the merits of the lawfulness

² This is the fourth time that the government has sought a stay of these proceedings. See Defs.' Unopposed Mot. for a Stay of Their Reply Deadline in Light of Lapse of Appropriations, Dkt. No. 121; Defs.' Mot. to Stay Proceedings Pending the Resolution of Any Appeal of the March 16, 2026, Order of Prelim. Relief, Dkt. No. 304; Defs.' Renewed Mot. to Stay Proceedings Pending Appeal and to Postpone R. Disputes, Dkt. No. 325; Defs.' Mot. to Extend the Stay of Proceedings Pending Resolution of the First Circuit Appeal, Dkt. No. 352.

³ See, e.g., Decl. of Susan J. Kressly, MD., FAAP ¶ 15, Dkt. No. 185-27 ("The lack of clarity regarding the reach of the Secretary's Directive has also created confusion and uncertainty regarding what the CDC's COVID-19 recommendations are for children"); Decl. of Shannon Scott-Vernaglia, M.D. ¶ 24, Dkt. No. 185-29 ("HHS Directive like the Directive and the SCDM recommendation cause more confusion about appropriate medical recommendations, and erode the relationship between the pediatric physician and patient family"); Decl. of Mary-Cassie Shaw, MD, FAAP ¶ 6, Dkt. No. 185-33 ("ACIP's recommendation and CDC's adoption of the recommendations provides no guidance to me on how to apply the new recommendations and the lack of guidance to support the change has caused disruption and confusion to me and my practice"); Decl. of Carlene Pavlos ¶ 23, Dkt. No. 185-44 ("my day-to-day work and interactions with members and allies frequently concerns the SCDM COVID-19 recommendation, other more recent vaccine changes made by the CDC, and/or combatting the distrust, confusion, and misinformation circulating as a result of the CDC's and the Secretary's actions and messaging."); Decl. of Georges Benjamin, M.D. ¶ 29, 32, Dkt. No. 185-25 ("APHA clinician members also report now substantially more unreimbursed time correcting misinformation and explaining vaccine safety;" "public health professionals have been forced from proactive disease prevention into reactive crisis response"); Decl. of Andrew Pavia ¶ 25, Dkt. No. 185-36 (downgrading to SCDM has left "me and other IDSA physician members without clear guidance regarding what to discuss with patients or how to counsel them regarding the risks and benefits of the COVID-19 vaccine"); Decl. of Sindhu K. Srinivas, MD, MSCE ¶ 26, Dkt. No. 185-46 ("SMFM members are frontline physicians who will be forced, yet again, to divert substantial time, expertise, and organizational resources away from their high-risk patients to address confusion and erosion of trust generated by illegitimate federal guidance.").

⁴ Amanda Geduld, *A Seasoned Pediatrician on What the Latest Vaccine Victory Means for Kids*, THE74 (April 7, 2026), <https://www.the74million.org/article/a-seasoned-pediatrician-on-what-the-latest-vaccine-victory-means-for-kids/>. (Question: "I would imagine that the majority of parents across the country are not keeping super close tabs on this lawsuit or tuning into ACIP meetings, but they are reading the headlines, and they're seeing these rulings go back and forth and practices being implemented and then rolled back. I'm wondering what impact that back-and-forth messaging is having on parents. Is that leading to confusion?" Answer: "Oh, I know that it is leading to massive confusion.") <https://perma.cc/A2X7-AMLL>.

of Defendants’ actions with respect to vaccines, one way or another, will provide some clarity as to how Plaintiffs and their members should interact with their patients on a daily basis.

Third, Defendants have failed to argue, let alone demonstrate with evidence, that they will suffer any hardship if the stay is not extended. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) (explaining that docket-control stays require judgment that weighs competing interests and that a stay proponent must make a clear showing of hardship if there is a fair possibility of damage to another party); *Marquis v. Fed. Deposit Ins. Corp.*, 965 F.2d 1148, 1155 (1st Cir. 1992) (cautioning that stays “cannot be cavalierly dispensed” and must be supported by good cause, reasonable in duration, and based on a balancing of competing equities); *Clinton v. Jones*, 520 U.S. 681, 707–08 (1997) (recognizing a district court’s discretion to manage proceedings and holding that a stay was premature where the record did not establish the need for postponement).

Finally, it is clear that Defendants seek to extend the stay of proceedings before this Court to delay for as long as possible responding to Plaintiffs’ Motion to Complete the Administrative Records.⁵ After all, Defendants filed the Renewed Motion to Stay Proceedings Pending Appeal and *To Postpone Record Disputes*⁶ in the midst of meet and confer meetings over the completeness of the administrative records.⁷ Moreover, Defendants overstate the impact the First Circuit’s decision could have on the Motion to Complete the Administrative Records. In the instant motion, the government argues that the “First Circuit’s ruling could significantly streamline this case.” However, in their opening First Circuit brief, the government defined the scope of its appeal to be very narrow: “This appeal presents a single error and its consequences. The district court

⁵ Mem. in Supp. of Pls.’ Mot. to Complete the Administrative Rs., Dkt. No. 330.

⁶ Defs.’ Renewed Mot. to Stay Proceedings Pending Appeal and to Postpone R. Disputes, Dkt. No. 325 (emphasis added).

⁷ Status Report at 4, Dkt. No. 322 (“Plaintiffs propose that the parties file another status report on Friday, July 10, that will set forth a briefing schedule on any motion regarding the ARs.”).

adjudicated a non-final action – the ACIP appointments – that the APA does not reach.”⁸ It admitted that “Plaintiffs’ concrete injuries trace to the downstream CDC-adopted recommendations, **which are independently actionable under Counts I, III, and IV.**”⁹ Since the government admits that Counts I (the childhood schedule), III (the HepB, Covid, and thimerosal votes), and IV (the May 2025 Covid Directive) are independently actionable, and the Court’s decision on Counts I, III, and IV have not been appealed, there is no reason not to move forward now on adjudicating the completeness of those administrative records.

There also is good reason to move forward on the administrative record on the ACIP reconstitution claim. Regardless of how the First Circuit rules, that record on how the ACIP was reconstituted last year is set in stone. There were, however, no documents produced in this AR on what criteria were relied upon to vet and choose candidates.¹⁰ The stay should not be extended so that Defendants file a response forthwith to the Motion to Complete the Administrative Records that presumably would state whether any documentation of selection criteria for the ACIP candidates chosen last year exist.¹¹

First Circuit law is clear that this Court is free to proceed toward permanent relief while a preliminary-injunction appeal is pending. *Contour Design, Inc. v. Chance Mold Steel Co.*, 649 F.3d 31, 34 (1st Cir. 2011). That is exactly what this Court should do now in this case of national importance. Defendants’ Motion to Extend the Stay should be denied.

⁸ Br. for Federal Defs.-Appellants at 22, *Am. Acad. of Pediatrics v. Kennedy*, No. 26-1503 (1st Cir. June 18, 2026).

⁹ *Id.* pp. 22-23 (emphasis added).

¹⁰ See Mem. in Supp. of Pls.’ Mot. to Complete the Administrative Rs. 12, Dkt. No. 330 (“The selection criteria, if any, are unidentified, . . .”).

¹¹ *Id.* n. 7.

Dated: September 10, 2026

Respectfully submitted,

By: /s/ James J. Oh

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed and served through the ECF system upon the following counsel of record for Defendants on this 10th day of September 2026:

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EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3 AMERICAN ACADEMY OF PEDIATRICS,
4 *et al.*,

Plaintiffs,

5 Civil Action
6 No. 1:25-cv-11916-WGY

v.

October 30, 2025
10:04 a.m.

7 ROBERT F. KENNEDY, JR., in his
8 official capacity as Secretary
9 of the Department of Health
and Human Services, *et al.*,
Defendants.

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13 TRANSCRIPT OF MOTION HEARING
14 BEFORE THE HONORABLE BRIAN E. MURPHY
UNITED STATES DISTRICT COURT
15 JOHN J. MOAKLEY U.S. COURTHOUSE
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Brian E. Murphy, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on October 30, 2025.)

THE CLERK: This Honorable Court is now in session. Judge Brian Murphy presiding. You may be seated.

Civil Action No. 25-11916, American Academy of Pediatrics, et al., v. Kennedy, et al.

If counsel can please identify yourselves, starting with plaintiffs' counsel.

MR. OH: Good morning, Your Honor. James Oh on behalf of all the plaintiffs. And with me at counsel table are Rob Wanerman and Richard Hughes also from my law firm, Epstein Becker Green. And then we also have representatives from our clients, Dr. Brenda Pring. She is the president of the Massachusetts Chapter of the American Academy of Pediatrics; Dr. Vandana Madhavan who is a member of the Infectious Disease Society of America and also a member of the Massachusetts Chapter of the American Academy of Pediatrics; and Carlene Pavlos who is the Executive Director of the Massachusetts Public Health Alliance.

THE COURT: All right. Good morning to you all and welcome.

1 MR. OH: Thank you.

2 MR. BELFER: Good morning, Your Honor. Isaac Belfer
3 for the Department of Justice for the government.

4 MR. FITZGERALD: Good morning, Your Honor. Michael
5 Fitzgerald for the defendants.

6 THE COURT: Good morning.

7 So the -- the first thing we have is the issuance of
8 the motion to stay.

9 I -- as you know, I took this case over midstream
10 here, so I wasn't -- I wasn't familiar with it until I got your
11 most recent motion to end the stay.

12 So why don't I -- why don't I give you the floor first
13 in terms of -- I believe you agreed to the initial stay, or at
14 least it was filed as an assented-to stay, and why you have a
15 different position today.

16 MR. OH: Thank you.

17 First of all, thank you for scheduling the hearing so
18 quickly. Appreciate you bringing in your staff during the
19 shutdown on this.

20 And we initially agreed not to object to the stay.
21 The day before Isaac contacted me, Judge Young had sua sponte
22 canceled the motion to dismiss hearing on October 8th, and then
23 we all obviously knew that the shutdown was impending.

24 The next day, Isaac E-mailed me to say we'll be filing
25 this motion for a stay. Judge Young at that point in time had

1 canceled the hearing with no date set for a new hearing on the
2 motion to dismiss. And so as a professional courtesy to my
3 opposing counsel and hopefully to show a little decency to --
4 and understanding of the situation, at that point in time we
5 agreed not to object to the stay.

6 Things have been changing very much since October 1st,
7 and there has been, contrary to the opposition that was filed
8 at 3:00 yesterday, a significant change in circumstances, and,
9 that is, on October 6th, the CDC changed its immunization
10 schedule with respect to the COVID-19 vaccine.

11 And, Your Honor --

12 THE COURT: October 6th?

13 MR. OH: October 6th.

14 THE COURT: Okay.

15 MR. OH: If Your Honor -- I have a copy right now of
16 the announcement that was made on October 6th. May I approach
17 and hand you a copy of that?

18 THE COURT: Of course.

19 MR. OH: Thank you.

20 So this, Your Honor, was an announcement posted by the
21 HHS Press Office online. If you look on the bottom left-hand
22 corner, "For Immediate Release, October 6, 2025" and the next
23 page "CDC Immunization Schedule Adopts Individual-Based
24 Decision-Making for COVID-19 and Standalone Vaccination For
25 Chickenpox in Toddlers." The date is October 6th after the

1 stay had been entered.

2 And if you look at the last paragraph on the first
3 page, Deputy Secretary O'Neill says that purportedly, "Informed
4 consent is back." I added the "purportedly." "CDC's 2022
5 blanket recommendation for perpetual COVID-19 boosters deterred
6 health care providers from talking about the risks and benefits
7 of vaccination for the individual patient or parent. That
8 changes today."

9 That change is a significant paradigm shift with
10 regard to how doctors handle the Covid vaccine when they're in
11 their clinical settings on a day-to-day basis.

12 And our position, contrary to the government's, is
13 that "shared clinical decision-making" is the term of art being
14 used here. Shared clinical decision-making is not a
15 recommendation. Shared clinical decision-making is now this
16 requirement, apparently, from the CDC that was adopted without
17 explanation that we think is required under the Administrative
18 Procedure Act, and it is a paradigm that basically says, come
19 in and talk about the vaccine, you may or may not need to
20 get it, as opposed to a routine recommendation, which is, this
21 is -- it's time for your annual flu shot.

22 And with regard to this particular change, there have
23 been four other times when shared clinical decision-making has
24 been adopted by the CDC for very specific age groups and --

25 THE COURT: For the Covid vaccine or for other

1 vaccines?

2 MR. OH: For four different vaccines.

3 THE COURT: Okay. And what are those?

4 MR. OH: I can tell you.

5 THE COURT: Not that that's -- not that it -- just --

6 I don't know that it's relevant to the stay, but I was --

7 MR. OH: Okay. Well, then, what I --

8 THE COURT: -- curious, if you have it there.

9 MR. OH: They're HPV, Meningococcal B, Hepatitis B,
10 and Pneumococcal Conjugate. If you ask me what those diseases
11 are, I would have to defer to my --

12 THE COURT: It was more --

13 MR. OH: -- experts.

14 THE COURT: -- curiosity on my part to understand.

15 MR. OH: Yeah. And I don't want to get too far into
16 the weeds.

17 THE COURT: Right.

18 MR. OH: But the decision here to change -- to share
19 clinical decision-making previously under an ACIP that the
20 health care community trusted was one where there were working
21 groups of the ACIP that examined the issue. Then it was
22 presented at an open meeting of the ACIP, which then
23 constituted -- consisted of subject matter experts, people with
24 very unquestionable credentials who had been selected without
25 consideration of political affiliation. And they at that point

1 in time in a very open and transparent process then adopted
2 shared clinical decision-making.

3 First time shared clinical decision-making was adopted
4 was in 2019. And since then, there has been kind of
5 uncertainty amongst the health care community as to what
6 "shared clinical decision-making" actually means.

7 And so this shift on October 6th is a marked change in
8 circumstance that is now continuing to cause disruption, chaos,
9 confusion in the health care system, and it is something that
10 needs to be addressed at this point in time due to we are in
11 the middle of the respiratory virus season and doctors around
12 the country need some clarity as to what this decision
13 unilaterally announced by the CDC guidance -- so the last four
14 times when shared clinical decision-making was adopted, the CDC
15 has issued guidance explaining why are we doing shared clinical
16 decision-making and here are the factors you should discuss
17 with your patients.

18 None of that was done. And we think all of that is
19 contrary to what the Administrative Procedure Act requires.
20 Give us a reasonable explanation as to why you've made this
21 change. That hasn't happened. And so this -- this issue needs
22 to be adjudicated now.

23 That is why -- that's -- and then on October 17th, the
24 Administrative Office of the U.S. Courts issued a memo saying,
25 unfortunately, you know, we're running out of funding. Come

1 October 20th, we're really going to bare-bone staffing, but
2 that memo also gave you the discretion to decide what cases
3 would stay active on the docket.

4 And at that point in time, it also looked like the
5 shutdown would be lasting ad infinitum. Who knows when it
6 would end?

7 And the plaintiffs here, my clients, put a little
8 pressure on their counsel to say, we've got to keep this case
9 moving. We need guidance from the court. And so that's why
10 we're here today, Your Honor.

11 THE COURT: Okay. Thank you. I don't know which of
12 you would -- is taking the laboring oar.

13 MR. BELFER: Thank you, Your Honor.

14 So a few points. So plaintiffs noted the announcement
15 from the Administrative Office of the U.S. Courts. That's
16 irrelevant. That was not about the standard for lifting a
17 stay.

18 The standard for lifting a stay is whether there's
19 been a change in circumstances since the stay was entered that
20 warrants lifting the stay, and plaintiffs have not shown that
21 here. Their motion didn't even try to show that, and here for
22 the first time they're saying, well, there was a change in
23 circumstances on October 6th.

24 But I think it's important to pay attention to what
25 exactly the change was. So there are two patient populations

1 at issue here, pediatric patients and pregnant patients.

2 For pediatric patients, there was no change. Both
3 before and now, the recommendation is shared clinical
4 decision-making, essentially talk to your health care provider
5 about whether the vaccine is right for you. So no change for
6 pediatric patients.

7 For pregnant patients, at the time the second amended
8 complaint was filed, the entry for pregnant women said "no
9 guidance, not applicable for the COVID-19 vaccine." So there
10 was simply no guidance on that issue. The change that happened
11 on October 6th is now instead of saying "no guidance, not
12 applicable," it says, "we recommend shared clinical
13 decision-making." That's not a requirement as plaintiffs'
14 said. Instead, it's a recommendation to consult with your
15 health care provider about whether to get the vaccine.

16 And so I think what plaintiffs are trying to do is
17 they're trying to contrast a routine recommendation with shared
18 clinical decision-making, but that is not the right comparison.

19 Instead, the right comparison is what was the -- what
20 was said for pregnant women at the time the second amended
21 complaint was filed and when the stay was entered, which was
22 "no guidance, not applicable," compare that to the current
23 recommendation of shared clinical decision-making. And so that
24 change from "no guidance" to "shared clinical decision-making,"
25 that does not give the Court any reason to lift the stay.

1 That's just saying we now recommend you talk to your doctor
2 about whether the vaccine is right for you. There's no sense
3 in which that hurts the plaintiffs. If anything, I would think
4 it would help the plaintiffs in saying you should talk to your
5 doctor about this.

6 A few other points. You know, plaintiffs note a
7 number of harms that they say flow from, you know, the -- the
8 shared clinical decision-making approach. Those were all harms
9 that they noted in their previous briefing and in their
10 complaint.

11 And as we explained in our motion, on the -- the
12 arguments they make, the harms they note, are all things that
13 existed before the stay was entered. That's nothing new.

14 And no -- plaintiffs' counsel also said that here,
15 purportedly in contrast to past instances, the government has
16 given no guidance for what you should consider in shared
17 clinical decision-making, but that's not true.

18 The current immunization schedule from CDC has a note
19 section where it describes the shared clinical decision-making.
20 And what it says is, you know, whether someone should be
21 vaccinated depends on their -- you should consider their risk
22 factors, that there are certain factors that put you at higher
23 risk for Covid and there's certain factors that mean you are at
24 lower risk for Covid.

25 So the government has provided -- the government has

1 provided some guidance on how to exercise the shared clinical
2 decision-making, but, of course, ultimately it's up to the
3 doctors or, you know, the nurses or the pharmacists. The
4 health care providers have discretion whether to recommend or
5 administer the Covid vaccine. They -- they've had that
6 discretion before the stay was entered. They still have that
7 discretion.

8 And so the fact is, you know, the vaccine is
9 available. Health care providers have discretion whether to
10 recommend or administer it. The government is actually
11 encouraging people to consult with health care providers about
12 whether to get the vaccine. So there's simply no urgency in
13 reinstating this case, and there was no changed circumstances
14 that would lead the Court to lift the stay.

15 THE COURT: Thank you.

16 MR. OH: May I respond?

17 THE COURT: One more thing you want to say?

18 MR. OH: Thank you.

19 First of all, I would like to correct the record.
20 Shared clinical decision-making may have first entered the
21 picture in 2015, not '19.

22 And secondly, there's no dispute that on October 6th
23 this change was made to the shared -- to the CDC's immunization
24 schedule. That is certainly not something that we knew about
25 on October 1st, and it is certainly something that we obviously

1 disagree with what the impact of that is. And those are merits
2 questions that we should be getting into as soon as possible.

3 The question is one of procedure here. Yes, Your
4 Honor, I guess a little bit of the Midwestern nice came out in
5 me, and when my opposing counsel asked, we're facing a shutdown
6 and implying that I can't work and implying that I'm not going
7 to be paid during this time, okay, for a little bit of while, a
8 little bit of time, we'll agree to a stay. But when this
9 change happened and as conditions continued to get worse during
10 the respiratory virus season -- and we cannot predict who is
11 going to get sick and who is going to die, but those things are
12 going to happen.

13 And so health and safety are very -- have always been
14 urgent in this case. And we tried to get this case going as
15 quickly as possible so that we could, hopefully, get to a
16 decision on the merits either before or at the start of the
17 respiratory virus season.

18 But, as you know, Judge Young's courtroom is dark in
19 August. And we did have a motion to dismiss filed, which the
20 government has every right to do. We were going to engage in
21 briefing and have a hearing in October, and it suddenly got
22 canceled without explanation and -- okay.

23 So we didn't want to upset the judge who had just
24 canceled the hearing. And my opposing counsel here would be
25 potentially having to work without pay for a little while, so

1 we showed a little bit of grace and understanding. So my bad
2 if we agreed to cooperate with the government. Lesson learned,
3 I guess.

4 But now we're here and now is the time when we are
5 facing, quite frankly, a whole series of actions which the
6 government now -- another development, the government now
7 contends that our second amended complaint is moot.

8 Mr. Belfer and I talked on Tuesday over the phone,
9 and he brought up that the government thinks that because the
10 May 19th Secretarial Directive that RFK, Jr. announced on X on
11 May 27th, where he said he was going to be removing entirely
12 the recommendation that pregnant women and children get the
13 COVID-19 vaccine, that sent shock waves throughout the entire
14 health care system. It was something that came out of the blue
15 and without consultation with the ACIP.

16 And I don't know if you followed the saga at all of
17 Susan Monarez and Demetre Daskalakis and Deb Houry who --
18 Susan Monarez was fired as director of the CDC. And as she
19 testified in front of Congress, she said she had been asked by
20 RFK, or basically instructed by RFK, to, sight unseen, before
21 the ACIP makes any recommendations or decisions, I want you to
22 approve those. And she said I cannot do that, and so she got
23 fired. And the same day, three other high-ranking officials
24 from the CDC ended up resigning. They all issued public
25 statements.

1 Mr. -- Dr. Daskalakis, in his resignation letter
2 posted that night, said that he had asked the politicals in
3 HHS for what evidence did you rely on to change the COVID-19
4 recommendations, and none were forthcoming. And so that kind
5 of really raises the question of -- when the administrative
6 record actually ends up getting produced in this case, you
7 would think it would be kind of thin.

8 But, anyway, there have been those developments. And
9 then this other change comes on October 6th that changes
10 this what had been a routine recommendation into shared
11 clinical decision-making, the impact of which needs to be
12 litigated.

13 We don't need to get into what does it really mean
14 today, but that change is now going to be the subject of an
15 amended complaint, to forego the Court unnecessarily having to
16 take up a renewed motion to dismiss, which Mr. Belfer said he
17 would be filing if we didn't amend the complaint to say that
18 our second amended complaint is moot. And we actually
19 discussed on Tuesday a potential briefing schedule which would
20 allow, hopefully, for a motion to dismiss hearing to be held
21 before Christmas.

22 And so I think for the sake of public health, for the
23 sake of, quite frankly, the health and safety of everyone in
24 this country -- and I'm not overstating -- we need to
25 address -- yes. We need to file an amended complaint that

1 explains why, in our view, shared clinical decision-making,
2 that decision adopted on October 6th, was arbitrary and
3 capricious and not in accordance with law. We can get that on
4 file within a week to ten days.

5 Mr. Belfer had -- and I had a discussion -- which he
6 said he would have to check with his clients. I thought we had
7 tentatively agreed to a briefing schedule, but then I got a
8 message yesterday from Mr. Belfer that we can't agree to a
9 briefing schedule until the stay is lifted and appropriations
10 are scheduled.

11 And I'm sorry to you and your staff that we're asking
12 to continue this case during the shutdown when some of you are
13 not going to be paid, but there are bigger, larger questions
14 that involve the health and safety and the functioning of the
15 health care system in this country that with the -- no end to
16 the shutdown in sight needs to be addressed now.

17 THE COURT: Thank you.

18 Thank you both for your argument.

19 And, Mr. Belfer, do you -- I enjoyed your brief. It
20 was quite compelling in terms of what the standard on lifting
21 of the stay is. I am going to lift the stay. I can tell you
22 that my policy on cases of national import is not to allow a
23 stay. So I don't -- I don't know if I was -- if this was mine
24 in the first instance if the stay would have been issued.

25 But I'm going to lift the stay for a couple of

1 reasons. I don't -- I don't know sitting here what the
2 significance of this October 6th change is. I hear your point.
3 I hear his point. I don't know the answer to that. But it
4 does seem like a change in circumstance that warrants a lifting
5 of the stay.

6 Further, the sheer duration of the shutdown is reason
7 enough to lift the stay in this case. This is clearly a case
8 that's of national importance. It's one that needs to get
9 addressed.

10 I do want to say that I'm sorry you're not getting
11 paid. I'm sorry that most of the people in this room are not
12 getting paid and that you're having to work on a case that is a
13 lot of work and probably a fair bit of stress without receiving
14 a paycheck. That's not fair to you, and I apologize that I'm
15 compounding those problems. But I think I have to do that
16 because this is a case that is significant enough and important
17 enough that it must move forward.

18 A little bit about where I -- I -- the items that we
19 have before us. So there is the motion to dismiss. I didn't
20 know that you were planning on amending, but I do now, so maybe
21 that would moot the motion to dismiss, which was -- I think you
22 had two weeks to file a reply. It was basically done, and you
23 were going to have an argument on it. But maybe that's not in
24 play anymore.

25 Judge Young had done -- he had -- he had taken his

1 usual approach, that is very much not my usual approach, which
2 is to convert this directly to a trial.

3 In my mind, I -- I don't know that a trial here is
4 warranted. Right? These are APA claims that can be decided on
5 summary judgment based on the administrative record, an
6 administrative record that -- has it been -- you were very --
7 when I was trying to tease out the change in timing, you were
8 very close to producing the administrative record.

9 Do you have it or is this --

10 MR. BELFER: No, Your Honor. So Judge Young said he
11 would set a deadline at the motion to dismiss hearing.

12 THE COURT: Right. But he had initially -- he had
13 set one earlier when the original trial date was, I think,
14 October 14th or -- wait a minute. You don't have it. Do you
15 know how much work it is? Do you know how far you've gone down
16 the road of preparing it?

17 MR. BELFER: I think some work has been done, but
18 there is more work to do. I don't know exactly how much more.

19 THE COURT: Okay. And so what -- this is what I'm
20 going to propose. I'm going to step off the bench, because I
21 would like -- I would like you to consult with each other.

22 I will do -- if you agree that you want a trial,
23 meaning you want the review of the APA claims to go beyond the
24 administrative record itself, I will give that to you and I
25 will do it very quickly.

1 I -- I do think this is an important issue. I think
2 it is an issue that is -- can be resolved relatively quickly.
3 I mean, you -- you all have not appeared in front of me very
4 much, but my policy has been to try to turn around decisions
5 within two weeks of any dispositive hearing, be that a motion
6 to dismiss or summary judgment.

7 But I don't know where you all stand. And so what
8 I -- what I would like to do is say I'm willing to defer to
9 your far more intimate knowledge of this case and -- in terms
10 of your own briefing schedules and what -- what you're looking
11 for.

12 If you want to have a trial in a month, I will give
13 you a trial in a month. If you want to have summary judgment
14 in a month, I'll give you summary judgment in a month.

15 I don't -- I don't know what's reasonable in terms of
16 how long it takes you to produce the administrative record.
17 And so I want to give you a chance -- I want to be -- I want to
18 give you deadlines that are reasonable and conceivable, and I
19 think the best way to do that is to give you all an opportunity
20 to speak amongst yourselves to try to come up with what those
21 deadlines should be.

22 And so if -- if you want this to proceed directly to
23 trial and we can do the motion to dismiss along the way, that's
24 fine. If you want -- I had a similar case recently where we
25 essentially went quickly to summary judgment, which was on the

1 administrative record.

2 In that case, the administrative record was -- was not
3 terribly voluminous. It was some 18 to 20 pages. If that's
4 going to be the case here, then maybe that's an easy approach
5 to take.

6 But you all know this case better than I do. And so
7 what I want to do is I'm going to step off the bench and
8 give -- give you an opportunity to speak amongst yourselves and
9 see if you can come up with a reasonable approach to this,
10 doing any of those things, and then I'll come back on. Maybe
11 I'll give you -- do you want -- do you want 15 minutes?
12 Half-hour? What do you want? I don't know if you have to make
13 any phone calls to --

14 MR. OH: I would say 10 to 15 minutes should be fine,
15 I think, but --

16 THE COURT: Okay.

17 MR. BELFER: Yeah. Fifteen minutes. Sure. Thank
18 you.

19 THE COURT: Okay. I'll come back out at 11:45. And
20 hopefully you guys -- you can come up with a joint proposal, in
21 which case I'm nearly certain to adopt it. To the extent that
22 you can't, be prepared to say what you're asking for, and then
23 I'll make a decision.

24 MR. OH: Thank you, Your Honor.

25 MR. BELFER: Thank you.

1 THE CLERK: All rise.

2 (Recess.)

3 THE CLERK: You may be seated.

4 THE COURT: So how have we done?

5 MR. OH: We have made progress, Your Honor. I
6 apologize it took a little bit longer than expected.

7 THE COURT: Not a problem at all.

8 MR. OH: So on a briefing schedule, after we file an
9 amended complaint -- we're three-quarters of the way there.

10 THE COURT: Okay.

11 MR. OH: We'll try to get an amended complaint filed
12 by next Wednesday.

13 THE COURT: Okay. There's no objection to the filing
14 of an amended complaint?

15 MR. BELFER: We take no position on that.

16 THE COURT: Okay. So the amended complaint by next
17 Wednesday. That's the --

18 MR. OH: The 5th.

19 THE COURT: The 5th. Okay.

20 MR. OH: Government wants two weeks to file a motion
21 to dismiss by the 19th.

22 THE COURT: Okay.

23 MR. OH: Opposition due December 3rd, two weeks.

24 THE COURT: Okay.

25 MR. OH: And under the D. Mass local rules, reply

1 briefs are not allowed as a matter of right. I know that they
2 want one. We don't agree to --

3 THE COURT: I always allow a reply brief. So you can
4 have a week to file a reply brief.

5 MR. OH: Okay.

6 MR. BELFER: Could we ask -- the opposition would be
7 December 3rd. Could we ask for the next Friday, December 12th,
8 for a reply?

9 THE COURT: Have you guys already agreed on an
10 argument date?

11 MR. OH: And then argument whenever the Court can
12 schedule it after their reply.

13 THE COURT: Sure. December 12th for a reply. That
14 puts us into -- puts us into the week of the 15th for argument.

15 (Bench conference.)

16 THE COURT: Could you do argument at 10:00 on the
17 17th? Does that work for you all?

18 MR. BELFER: Yes, Your Honor.

19 MR. OH: Yes, Your Honor. 10 a.m., the 17th.

20 And then there's, I guess, disagreement on how to
21 proceed after that if Your Honor denies the motion to dismiss,
22 whether or not there will be cross-motions for summary
23 judgment. A lot of this depends on when we get the
24 administrative record.

25 And I'd actually like, if you can so do this,

1 Your Honor, in an order that they be compiling the record now
2 and that we get the administrative record within a very short
3 time period after the hearing, if necessary.

4 MR. BELFER: So I think we are -- our proposal would
5 be that the Court set a schedule for further proceedings after
6 it decides the motion to dismiss, because, at that point, the
7 Court will know what, if anything, is left of the case.

8 So we propose when the Court resolves the motion to
9 dismiss, at that point the Court can set a schedule for -- for
10 any necessary further proceedings. And then the parties can --
11 can repropose something at that point, too.

12 THE COURT: And so I'm probably fine with doing that.

13 I would like -- if -- if the administrative record is
14 easily prepared, if it consists of, you know, 50 pages or
15 something, then I would like that to be put together and
16 provided to plaintiffs' counsel before -- before the
17 December 12th date or before the December 17th date so that
18 the -- the problem with December 17th, even if I -- my two
19 weeks is a little tighter since I have one of those weeks off.
20 And so you probably won't get a decision from me until the
21 first week of -- first or second week of January. If you're
22 then looking at the administrative record for the first time,
23 we've now added probably two months to the whole undertaking.

24 So if it's possible for you to assemble the
25 administrative record and provide it to plaintiffs' counsel by

1 December 1st, we might save ourselves a little bit of time
2 there.

3 However, I don't know how much work that is for you,
4 so this is what I would like to you to do. I'm going to order
5 that you provide a status report to the Court by a week from
6 today saying how much work that is. Right? If you find that
7 this is a trivial amount of work, then please do it and make
8 the status report and say I'll do it by December 1st.

9 If you tell me that the administrative record is going
10 to be 200 hours of labor and 10,000 pages, I will probably say,
11 you know, maybe we should wait until the motion to dismiss is
12 decided. Does that make sense?

13 MR. BELFER: Yes, it does.

14 I think just one more point. I think our view is that
15 the Court doesn't have the jurisdiction, and so there's no
16 basis to require us to produce the administrative record.

17 THE COURT: Right.

18 MR. BELFER: So that's --

19 THE COURT: I understand. I have not reviewed the
20 motion to dismiss in as much depth as I will when it gets filed
21 again. I understand that.

22 If I grant the motion to dismiss, the whole case is
23 over, which is why I'm not going to tell you to spend hundreds
24 of hours of effort putting together an administrative record.
25 But if it is really several minutes and, you know, a few dozen

1 pages, then we can probably expend that effort even on the risk
2 that it is expended for nothing because a motion to dismiss is
3 allowed.

4 MR. BELFER: We're happy to do a status report within
5 a week.

6 THE COURT: Okay. Does that address your concerns?

7 MR. OH: Partially, Your Honor.

8 I also want to go on record as saying we think the
9 administrative record should include text messages between the
10 Secretary and whoever else was involved in its decision,
11 whatever -- whatever passes the eyeballs of the decision-maker
12 that goes into the decision should be part of the
13 administrative record.

14 And my understanding through just -- I guess it would
15 be hearsay -- is that RFK has done a lot of texting about
16 certain things, and so we would want to make sure that text
17 messages, E-mail messages are included in the administrative
18 record that, of course, are relevant to the decisions we are
19 challenging.

20 THE COURT: So once the administrative record is
21 produced -- well, two things. The first point is, the
22 administrative record, if we're proceeding via summary judgment
23 is the -- all that they can rely on to say that this is -- this
24 is compliant with the APA.

25 So I don't -- well, it will be up to you about whether

1 or not you want to challenge what is in the administrative
2 record and -- and force them to add to it. You certainly can.
3 And you're entitled to discovery. You can take discovery that
4 goes beyond the administrative record if that comes up. But I
5 think that this is maybe getting the cart before the horse.

6 MR. OH: Yeah. It's premature, but I am also putting
7 Mr. Belfer on notice that we expect to see those in the record.

8 So then, with regard to proceedings after the motion
9 to dismiss hearing, if the case continues, I understand that
10 routinely in -- APA cases are often decided on cross-motions
11 for summary judgment. I've never looked at this case as one
12 being that's routine, that is, one that is like the usual APA
13 case. There isn't much usual going on, I think, and it might
14 be beneficial to the -- to the Judge for us to be able to
15 explicate certain things in open court. It might be beneficial
16 to the Judge to hear from live witnesses for explanation of
17 some of the other kind of technical, scientific, medical issues
18 that -- when we get into the merits. So I would like to
19 reserve the ability to speak with you after the motion to
20 dismiss is decided as to what would be the next proceeding.
21 So --

22 THE COURT: Sure.

23 MR. OH: -- perhaps we could schedule a status
24 conference for the day after you issue -- whenever -- after you
25 issue your decision.

1 THE COURT: Why don't we schedule a status conference
2 for the end of the first week of January.

3 MR. OH: Okay.

4 THE COURT: I'm going to say the second week of
5 January. Just the --

6 THE CLERK: The last week of January?

7 THE COURT: No. Could we schedule it the week of the
8 12th?

9 (Bench conference.)

10 THE COURT: The 12th, January 12th, at 2:30.

11 MR. BELFER: Sure.

12 MR. OH: Thank you, Your Honor.

13 MR. BELFER: And then, one more thing, I wanted to see
14 the amended complaint to know the scope of the record.

15 THE COURT: Yep.

16 MR. BELFER: So I would say maybe our status report
17 regarding the record could be due one week after the amended
18 complaint is filed.

19 THE COURT: That seems reasonable.

20 MR. OH: That's fine, Your Honor.

21 THE COURT: Okay. Yeah. So the status report will be
22 due November 12th.

23 MR. BELFER: Thank you.

24 THE CLERK: Instead of the 6th?

25 THE COURT: Instead of the 6th. Yes.

1 And have I made what I'm looking for in that status
2 report clear?

3 MR. BELFER: Sorry?

4 THE COURT: Just to be clear, what I'm looking for in
5 the status report is I want the administrative record produced
6 in the meantime unless you tell me this is really a lot of
7 work, in which case I won't require you to do it.

8 But if -- if the administrative record is relatively
9 easily prepared, meaning a couple hours work, then I just want
10 it produced by December 1st.

11 MR. BELFER: So we'll describe how much work is
12 necessary to produce the administrative record.

13 THE COURT: Perfect. Great. Thank you very much.

14 Is there anything else I can do from the government's
15 perspective?

16 MR. BELFER: No. That's all. Thank you.

17 THE COURT: Okay. And from the plaintiffs'
18 perspective?

19 MR. OH: No, no. Other than thank you, again,
20 Your Honor, for scheduling this hearing.

21 THE COURT: Of course. Thank you both. I appreciate
22 your time.

23 THE CLERK: All rise.

24 (Adjourned at 12:12 p.m.)
25

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CERTIFICATION

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Jessica L. Bisailon
Jessica L. Bisailon, RPR, CRI,
Official Court Reporter

October 31, 2025
Date