

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

HUMANA INC., and AMERICANS FOR  
BENEFICIARY CHOICE,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES; CENTERS FOR  
MEDICARE & MEDICAID SERVICES;  
ROBERT F. KENNEDY JR., in his official  
capacity as Secretary of Health and Human  
Services; and MEHMET CENGIZ OZ, in  
his official capacity as Administrator of the  
Centers for Medicare & Medicaid Services,

Defendants.

Civil Action No. 4:25-cv-00779-O

**DEFENDANTS' RESPONSE  
TO PLAINTIFFS' MOTION FOR EXPEDITED BRIEFING**

Defendants, the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, Robert F. Kennedy Jr., in his official capacity as Secretary of Health and Human Services, and Mehmet Cengiz Oz, in his official capacity as Administrator of the Centers for Medicare & Medicaid Services, file this response to Plaintiffs' Motion for Expedited Briefing and to Vacate Order Requiring Scheduling Conference ("Plaintiffs' Motion for Expedited Briefing"), ECF No. 18.

## I. Introduction

Plaintiffs' own litigation strategy in this matter is largely responsible for the urgency behind their proposed expedited briefing schedule. Defendants nonetheless share Plaintiffs' interest in a prompt adjudication of this matter, and Defendants agree with Plaintiffs that an expedited briefing schedule is appropriate in this case. However, the expedited briefing schedule that Plaintiffs propose is flawed and unworkable in two respects. This Court should reject Plaintiffs' effort to impose an untenable briefing schedule and instead, consistent with the spirit of its prior scheduling order, ECF No. 15, order the parties to meet and confer on an appropriate schedule for dispositive briefing.

## II. Argument & Authorities

### A. Plaintiffs' proposed briefing schedule is flawed and unworkable in two respects.

*First*, because this case seeks to challenge agency action under the Administrative Procedure Act (APA), the first procedural step is for the government to file a certified administrative record. The certified administrative record serves as the basis for the parties' summary-judgment briefing and the district court's review of the agency actions at issue. *See* 5 U.S.C. § 706 (directing courts to evaluate agency action upon "the whole record or those parts of it cited by a party"). Plaintiffs acknowledge as much in their brief:

"Disputes arising under the APA are commonly resolved on summary judgment, where district courts sit as an appellate tribunal to decide legal questions *on the basis of the administrative record.*" *National Association for Gun Rights, Inc. v. Garland*, 741 F. Supp. 3d 568, 596 (N.D. Tex. 2024) (citing *Amin v. Mayorkas*, 24 F.4th 383, 391 (5th Cir. 2022)).

(Pls.' Mot. for Expedited Briefing 4 (emphasis added).) So the first, necessary deadline in a briefing schedule for an APA case is the deadline for filing the administrative record. That was true in the briefing schedule the parties proposed in *Humana I*. (See *Joint Mot. to Establish a Briefing Schedule*, Case No. 24-cv-01004-O (N.D. Tex. Nov. 11, 2024, ECF No. 17.)

In the instant case, however, Plaintiffs' proposed briefing schedule contains no provision for the filing of the administrative record or for the filing of objections to the administrative record.<sup>1</sup> Defendants have reason to anticipate that Plaintiffs will make objections to the administrative record, given that they did so in *Humana I*. (See *Pls.' Br. in Supp. of Their Expedited Mot. to Complete the Administrative Record*, Case No. 24-cv-01004-O (N.D. Tex. Nov. 29, 2024, ECF No. 23-1). The undersigned defense counsel, during exchanges with Plaintiffs' counsel, agreed to expedite the filing of the administrative record and file it no later than Monday, August 4, 2025. (In a typical APA case, defendants would have at a minimum *sixty* days to compile, certify, and file the administrative record.) Plaintiffs' counsel chose, instead, to file a unilateral motion for an expedited briefing schedule with no provision for filing the certified administrative

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<sup>1</sup> To the extent that Plaintiffs argue that they can obviate the need for a certified administrative record in this matter by filing the administrative record from the previous matter (*Humana I*) and adding a few exhibits, they have cited no caselaw for this proposition. As will become apparent once Defendants file the certified administrative record in this matter, Plaintiffs' uncertified quasi-record is both over- and under-inclusive and does not provide the Court a sufficient basis for ruling on cross-motions for summary judgment. For example, it includes none of the materials each side presented to the Reconsideration Official and Hearing Officer during the agency review process. Defendants anticipate arguing that Plaintiffs are attempting to rely in this litigation on claims never presented to the agency; a complete administrative record is fundamental to such arguments.

record. Because Plaintiffs' proposed expedited briefing schedule is flawed from the get-go, the Court should not adopt it.

*Second*, the briefing timelines that Plaintiffs seek to impose on Defendants are unrealistically short. Specifically, Plaintiffs propose that Defendants be given only two weeks to prepare their combined opposition and cross motion for summary judgment, and only one week to prepare a summary-judgment reply. (Pls.' Mot. for Expedited Briefing 4.) Those deadlines are unattainable for at least three reasons. First, ensuring that Defendants' summary-judgment briefing represents the facts and the law with absolute accuracy requires multiple levels of review, including review by subject-matter experts at the Centers for Medicare & Medicaid Services. The briefing must also be reviewed internally at the United States Attorney's Office for the Northern District of Texas. Two weeks does not provide adequate time for both the drafting of the brief and the necessary review process. Second, preparing Defendants' summary-judgment briefing will not be a "cut and paste" exercise from its earlier briefs in *Humana I* because Plaintiffs' summary-judgment brief in this case contains new arguments.<sup>2</sup> Finally, the Civil Division of the United States Attorney's Office for the Northern District of Texas is experiencing severe staffing shortages, resulting in heavy caseloads for the remaining attorneys. During the same time frame that Plaintiffs propose all summary-judgment briefing be completed in

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<sup>2</sup> In its summary-judgment brief in this case, Humana's repeated references to (and arguments against) Defendants' reply brief in *Humana I* show that Humana is presenting new arguments not addressed in its prior briefing. *See, e.g.*, Mem. in Supp. of Mot. for Summ. J 21-22, ECF No. 17 (referring to arguments made "in [defendants'] last brief addressing this topic"); *id.* at 24 (describing, with citation to defendants' reply brief in *Humana I*, what "CMS previously argued"); *id.* at 25 (describing an argument made "in [defendants'] reply from the last suit").

this case, the undersigned defense counsel has eight other significant pleadings due, a summary-judgment hearing, written discovery responses due, and a plaintiff's deposition to take. Given those three realities, it is unrealistic to expect Defendants to prepare a cross motion for summary judgment in only two weeks, or a reply brief in only one week.

**B. Plaintiffs' own litigation strategy is largely responsible for the urgency behind their untenable proposal.**

Even in the absence of the above factors, this Court should reject Humana's unilateral request for an expedited briefing schedule because Humana's own litigation strategy in this matter is largely responsible for the urgency behind their untenable proposal. Humana could have filed its Complaint as soon as April 23, 2025, when the Administrator of the Centers for Medicare & Medicaid Services advised the parties that he had declined to review the CMS Hearing Officer decision at issue here. *See Mot. for Leave to File Notice of Suppl. Authority and Suggestion of Mootness to Exhaustion Defense*, Case No. 24-cv-01004-O (N.D. Tex. Apr. 24, 2025, ECF No. 48, at 5). Defendants contemporaneously alerted Humana to this option: "If Humana wants to avoid a ruling on Defendants' motion to dismiss, it may withdraw its complaint and file a timely challenge to the agency's final decision." (*Resp. to Pls.' Notice of Suppl. Authority and Suggestion of Mootness*, Case No. 24-cv-01004-O (N.D. Tex. Apr. 17, 2025, ECF No. 47, at 6). Humana opted against that course, insisting that jurisdictional deficiencies present at the time it filed its complaint could be mooted by subsequent events. (*Mot. for Leave to File Notice of Suppl. Authority and Suggestion of Mootness to Exhaustion Defense*, Case No. 24-cv-01004-O (N.D. Tex. Apr. 24, 2025, ECF No. 48, at 2). This Court disagreed with Plaintiffs and dismissed their complaint without prejudice. *Order*,

Case No. 24-cv-01004-O (N.D. Tex. July 18, 2025, ECF No. 56) (granting Defendants’ motion to dismiss). The three-month delay between the conclusion of the agency administrative review process and Humana’s filing of its new complaint is thus the result of Humana’s decision to oppose Defendants’ Motion to Dismiss, even though Defendants sought dismissal without prejudice and repeatedly explained that Humana could file a challenge to a properly exhausted claim at the conclusion of the administrative review process in late April.<sup>3</sup>

Humana has consistently professed its desire for urgency, but its litigation decisions have not reflected its words. Over the course of this litigation, it has insisted on a revision to the Administrative Record (then abandoned the claims underlying its demand), filed an Amended Complaint to add a count (which it has since abandoned), and filed thinly disguised sur-replies in violation of the Local Rules. Having opted for a litigation strategy that has needlessly prolonged resolution of the underlying merits, Humana cannot now demand special treatment.<sup>4</sup> *See S. Constructors Grp. v. Dynaletric Co.*, 2 F.3d 606, 611 (5th Cir. 1993) (explaining that, when a party’s “harms are self-inflicted, the result of [a party’s] own litigation strategy” a court “cannot bend or break

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<sup>3</sup> On a similar note, Humana included in its original motion for summary judgment a count (alleged unlawful subdelegation) based entirely on a Fifth Circuit case in which the Supreme Court had already granted certiorari, without so notifying the Court. *See FCC v. Consumers’ Rsch.*, 145 S. Ct. 587 (Nov. 22, 2024) (granting petition for writ of certiorari); *Mem. in Supp. of Mot. for Summ. J.*, Case No. 24-cv-01004-O (N.D. Tex. Jan. 21, 2025, ECF No. 35, at 28-31, 36) (citing Fifth Circuit decision in *Consumers’ Research*). Following the Supreme Court’s decision, Humana has abandoned its unlawful subdelegation claim by not including it in the *Humana II* Complaint—another option Humana would have had as soon as April 23, 2025.

<sup>4</sup> To the extent that Humana would prefer rapid merits briefing, the Federal Rules of Civil Procedure allow it to seek preliminary injunctive relief. *See* Fed. R. Civ. P. 65(a). That Humana has not done so here suggests that it is aware that it does not satisfy the requirements for preliminary injunctive relief.

the rules—and set harmful precedent—simply to achieve what one party perceives to be a ‘just result’ in one case”).

**C. Defendants propose an alternative.**

As an alternative to Plaintiffs’ flawed briefing schedule, Defendants propose the following:

1. Consistent with the spirit of the Court’s July 25, 2025 Order requiring a scheduling conference, counsel for both parties be ordered to re-confer on a proposed expedited briefing schedule within two business days after this Court’s decision on Plaintiffs’ Motion for Expedited Briefing.
2. The parties be ordered to submit, within three business days after this Court’s decision on Plaintiffs’ Motion for Expedited Briefing, a joint proposal for an expedited briefing schedule. If the parties are unable to agree on an expedited briefing schedule, the joint proposal must contain each party’s proposed briefing schedule.

Meanwhile, Defendants agree to file the certified administrative record no later than Monday, August 4, 2025.

**III. Conclusion**

Defendants will work with Plaintiffs to create an expedited, but realistic, briefing schedule for this case. But Defendants should not be prejudiced in its ability to fully defend the claims and allegations in this case because of Plaintiffs’ dilatory actions in *Humana I*.

Respectfully submitted,

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ACTING UNITED STATES ATTORNEY

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Certificate of Service

On July 31, 2025, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Andrea Hyatt

Andrea Hyatt  
Assistant United States Attorney