

[ORAL ARGUMENT REQUESTED]

No. 26-1503

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

AMERICAN ACADEMY OF PEDIATRICS, *et al.*
Plaintiffs-Appellees,

v.

ROBERT F. KENNEDY, JR., *et al.*
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts

**DEFENDANTS-APPELLANTS' MOTION TO CALENDAR ORAL
ARGUMENT AT THE EARLIEST AVAILABLE DATE OR, IN THE
ALTERNATIVE, TO SUBMIT THE APPEAL FOR DECISION ON THE
BRIEFS**

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MATTHEW C. ZORN
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Attorney General*

Pursuant to Federal Rules of Appellate Procedure 2, 27, and 34, Defendants-Appellants (“the government”) respectfully request that the Court calendar oral argument at the earliest available date. If the Court finds that argument cannot practicably be heard before its September 2026 session, the government respectfully requests, in the alternative, that the Court deem the appeal submitted for decision on the briefs. See Fed. R. App. P. 34(a), (f).

The parties’ filings suggest submission on the briefs would be unopposed: Plaintiffs-Appellees “view oral argument as unnecessary,” Resp. Br., Statement Regarding Oral Argument, and the government has asked for “argument at the Court’s earliest convenience, or submission on the briefs if argument would delay decision,” Reply Br. 1. Appellees’ position on this motion is set out in the Conferral statement below. This Court has stated that “this matter will be resolved without undue delay.” Order of June 16, 2026.

Finally, should the Court reach its disposition before its opinion is complete, the government respectfully suggests that judgment issue by order with opinion to follow, a course this Court has taken in other time-sensitive appeals of preliminary relief. *See, e.g., Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 10 (1st Cir. 2004).

INTRODUCTION

This is an expedited appeal of a preliminary order restructuring a sitting Cabinet officer's exercise of the appointment function on a federal advisory committee. The question presented is not whether the prior committee should be reseeded. Rather, it is whether the HHS Secretary may now reconstitute his own advisory committee, subject to APA review of the committee's downstream work, or whether the appointment function is instead to be supervised in the first instance by private plaintiffs and state attorneys general through preliminary relief orders under 5 U.S.C. § 705.

That question is fully briefed. The government moved to expedite this appeal on June 12, 2026, and the Court granted expedition on June 16. The government shortened its opening-brief time and filed its reply brief on July 21, six days before it was due. The last of the five amicus briefs supporting Appellees was docketed on July 31. Nothing remains but decision. And, as explained below, recent developments give the timing of that decision consequences beyond this Court's docket.

BACKGROUND

A. The district court has stayed proceedings on a schedule keyed to this Court's decision.

On July 23, 2026, on the government's renewed motion, the district court stayed proceedings until September 3, 2026 pending this appeal. It ordered that the government's opposition to a pending motion to complete the administrative record be due on "the earlier of either three weeks from the day that the stay is lifted or three weeks from the day that the First Circuit issues its opinion," Ex. A (July 23, 2026 Hr'g Tr.) 43:12-16—running, the district court explained, from "when you first get it, not the rescript," *id.* 43:17-18. It added: "Even if we don't have an answer on September 3rd, I might very well lift the stay anyway with the anticipation that the answer would be forthcoming. While August is optimistic, I think sometime in September is probably in the ballpark." *Id.* 40:2-7. Plaintiffs' counsel, for their part, asked for a status conference "within a day or two" of this Court's decision—a request the district court called "more than fair." *Id.* 40:17-22.

The district court entered the stay noting that this Court's decision "could certainly narrow what's left of the case." *Id.* 37:16-18. If the stay lapses without a decision, what resumes is litigation over the administrative

record underlying the very count on appeal – proceedings the government urged, and the district court agreed, should await this Court’s answer to the threshold questions now under advisement.¹

B. A decision from this Court may end or narrow the litigation.

Below, the government also explained what a decision from this Court makes possible. If the order below is reversed, the Secretary can reconstitute the committee – “a different ACIP, not the current ACIP,” Ex. A 29:4–6 – “mindful of everything th[e] [district] [c]ourt has said,” *id.* 14:15–16, and the government anticipates that the agency “would be inclined to move the Court for a voluntary remand on at least some of the claims,” *id.* 29:8–10; *see id.* 14:25–15:3 (“some of the case would be moot. Maybe the entire case would be moot.”). The district court described that prospect as “not something that I’d, frankly, really contemplated before I read it in their paper.” *Id.* 37:10–12. On the government’s stated intentions, a decision from this Court is the first event in a sequence that can bring this litigation to an orderly close.

¹ Below, in opposing a stay, Plaintiffs’ counsel described the administrative record underlying the appealed count as “ongoing because it is a live, organic body that continues to act.” Ex. A 34:4–6.

C. The new vaccine season is arriving, and unresolved litigation fuels legal uncertainties.

On August 5, 2026, the Food and Drug Administration approved a new seasonal influenza vaccine for adults aged 50 and older, with availability expected for the 2026–2027 season.² The coverage architecture Congress built keys to recommendations of the Advisory Committee on Immunization Practices (“ACIP”): private insurers must cover, without cost sharing, immunizations “that have in effect a recommendation from the Advisory Committee on Immunization Practices,” 42 U.S.C. § 300gg-13(a)(2), and Congress assigned the committee the role of establishing and periodically reviewing the pediatric vaccine list under the Vaccines for Children Program, *id.* § 1396s(c)(2)(B)(i). A newly licensed vaccine has no ACIP recommendation, and none can issue through the ordinary statutory process while the committee’s composition remains in litigation limbo.

As amici States emphasize, “nearly 600 statutes and regulations across forty-nine states, territories, and Washington, D.C.” incorporate ACIP

² See *FDA Approves Moderna’s mRNA Flu Vaccine, the First to Use the Technology*, STAT News (Aug. 5, 2026), <https://www.statnews.com/2026/08/05/fda-approves-moderna-mflusiva-first-mrna-flu-vaccine/>.

recommendations by reference into scope-of-practice, school-entry, and insurance-coverage requirements. States Br. 13–14. Each month without a functioning recommendation process propagates legal uncertainty through insurance markets and state health codes – uncertainty that a decision from this Court, whichever way it runs, begins to resolve. Appellees assure this Court that access to flu vaccines this fall is secure regardless of this appeal. Resp. Br. 46–48 & nn.32–34. Whatever the force of those assurances, they are no substitute for the statutory coverage architecture Congress keyed to ACIP recommendations, which resumes ordinary operation only when the committee’s composition is settled.

D. The decision will govern parallel multi-state litigation.

Fourteen States and the Governor of Pennsylvania, appearing here as amici, are plaintiffs in *Arizona v. Kennedy*, No. 3:26-cv-01609 (N.D. Cal.), which, in their words, “challenges three of the same actions that the plaintiffs in this case challenged,” including “the reconstitution of the Advisory Committee on Immunization Practice[s] . . . at issue in this appeal.” States Br. 1. Proceedings in that case, too, are being sequenced around this appeal. *See id.* at 6–7. Thus, two district courts now await this Court’s decision. Prompt disposition serves judicial economy beyond this case.

ARGUMENT

I. The Court should submit the appeal on the briefs if that will prevent undue delay.

In granting expedition, the Court stated that “[o]ral argument, to the extent deemed necessary, will be scheduled as soon as practicable after the completion of briefing, and this matter will be resolved without undue delay.” Order of June 16, 2026. Briefing is complete.

If argument cannot be heard before the Court’s September session, the parties’ submissions permit the Court to take the appeal on the briefs now. Fed. R. App. P. 34(a)(2), (f). Appellees “view oral argument as unnecessary.” Resp. Br., Statement Regarding Oral Argument. While the government believes argument could assist the Court, “the paramount consideration is a decision before the coming flu season.” Reply Br. 1. The government has already agreed that the Court’s argument calendar need not be a constraint on the timing of decision.

Submission on the briefs is a natural fit here for another reason: the dispositive threshold question is one of law, and the submissions converge to a remarkable degree. Every brief before the Court accepts that FACA’s fair-balance requirement can be enforced through APA review of

downstream final agency action. *See* Gov't Br. 2, 19, 34; Reply Br. 4, 28; States Br. 22–23. What remains—whether anything more was reviewable, and whether it was remediable in the manner the district court chose—is fully aired in the briefs.³

Nor would prompt disposition prejudice Appellees. They have represented that “a decision on the appeal appears likely in August,” Pls.’ Opp. to Defs.’ Renewed Mot. to Stay 1, ECF No. 334 (D. Mass. July 21, 2026), that “[a]t most, it seems, a stay of these proceedings would last about a month,” *id.* at 5, and that they wish to appear for a status conference within days of this Court’s decision, Ex. A 40:17–21. Every participant in this litigation has planned for a prompt decision.

³ The submissions have narrowed the dispute considerably. Amici States, for example, distinguish *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11 (1st Cir. 2020), on the ground that no “written directive, as in *Wheeler*,” is present here. States Br. 4. The government agrees that is the difference: *Wheeler* involved a discrete, written, published directive. The briefs dispute only what follows from that difference. That question is legal, cleanly presented, and ready for decision. Amici’s alternative submission is that the reconstitution “is reviewable even if it was an intermediate action.” States Br. 22. Section 704 provides that agency action “not directly reviewable” is “subject to review on the review of the final agency action.” 5 U.S.C. § 704. Whether that clause reaches an order restraining the intermediate action itself is likewise a purely legal question, fully presented.

II. If the Court reaches its disposition before its opinion is complete, judgment may enter with opinion to follow.

Because the district court's deadlines run from "the day that you see the opinion," Ex. A 43:19–21, entry of judgment by brief order, with a fuller explication to follow, would permit the framework the district court has constructed to operate as designed. This Court has proceeded in that fashion in other time-sensitive appeals of preliminary relief. *See Bl(a)ck Tea Soc'y*, 378 F.3d at 10 ("We summarily affirmed the order on July 26, 2004 This opinion limns the basis for our ruling."). The government offers this suggestion respectfully, recognizing that the form and timing of the Court's disposition are matters for the Court alone.

CONFERRAL

Counsel for the government conferred with counsel for Appellees on August 12, 2026. Appellees stated that they intend to respond to this motion and requested the opportunity to do so by August 18, 2026. The government does not oppose that request but respectfully asks, given the September 3 lapse of the district court's stay, that the Court resolve this motion promptly thereafter.

CONCLUSION

The Court should calendar oral argument at the earliest available date or, if argument cannot practicably be heard before its September session, deem the appeal submitted for decision on the briefs. Should the Court reach its disposition before its opinion is complete, the government respectfully suggests that judgment issue by order with opinion to follow.

Respectfully submitted,

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August 13, 2026

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,875 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Book Antiqua 14-point font, a proportionally spaced typeface.

/s/ Matthew C. Zorn

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2026, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Matthew C. Zorn

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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AMERICAN ACADEMY OF PEDIATRICS, ET :
AL., : Civil Action No.
Plaintiff, : 1:25-CV-11916-BEM

v. :

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

- - - - - x

BEFORE THE HONORABLE BRIAN E. MURPHY
UNITED STATES DISTRICT JUDGE
MOTION HEARING

Thursday, July 23, 2026
12:00 p.m.

John J. Moakley United States Courthouse
Courtroom No. 12
One Courthouse Way
Boston, Massachusetts

Linda Horne, CSR, RPR
Official Court Reporter
lindahornel@charter.net

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P R O C E E D I N G S

THE COURT: This Court is now in session. The Honorable Brian E. Murphy presiding. You may be seated. Civil Action Number 1:25-CV-11916, American Academy of Pediatrics versus Kennedy.

Would counsel please identify themselves starting with plaintiffs' counsel?

MR. OH: Good morning, Your Honor. James Oh on behalf of the plaintiffs.

THE COURT: Good morning.

MS. COSTELLO: Good morning, Your Honor. Gianna Costello on behalf of the plaintiffs.

THE COURT: Good morning.

MR. WALTERS: Good morning, Your Honor. William Walters on behalf of the plaintiffs.

THE COURT: Good morning.

MS. MCEVOY: Good morning. Elizabeth McEvoy on behalf of the plaintiffs.

THE COURT: Good morning.

MR. BELFER: Good morning, Your Honor. Isaac Belfer for defendants.

THE COURT: Good morning.

MR. ZORN: Matthew Zorn for the defendants.

THE COURT: Good morning.

MR. OH: Technically speaking, I guess it is

1 afternoon. I do have some clients here from the
2 Massachusetts Public Health Association as well.

3 THE COURT: Okay. Excellent. Thank you for
4 letting us know.

5 The motion for leave to file a reply that was
6 unopposed is allowed. That brings us to the motion to
7 continue. I don't know which of you wants to take the lead
8 on that. You have a presentation prepared.

9 MR. BELFER: So, Your Honor, before we get to the
10 motion to stay, I want to flag one issue. So yesterday
11 plaintiff filed Exhibit No. 342 of a motion for a redacted
12 version of the motion to complete the administrative record,
13 which the Court granted today. That motion stated that
14 counsel for defendants instructed plaintiffs to file this
15 motion and do not oppose this motion. That is not correct.

16 Defendants did not agree to the motion or those
17 redactions. We agreed to the motion to seal, but we did not
18 agree to the motion -- we never actually reviewed or signed
19 off on those redactions.

20 THE COURT: The whole thing is sealed right now.

21 MR. BELFER: We just confirmed with the courtroom
22 deputy before the hearing started. We gathered all the
23 relevant documents removed from the public docket. That has
24 been addressed for now, but we do think we should discuss
25 these issues with the Court.

1 We're happy to do the motion to stay argument first
2 and after that address the confidentiality issues.

3 THE COURT: You started on this, so why don't we
4 finish that, and then we'll move to a motion to stay.

5 So everything is sealed right now. You don't want
6 everything sealed. You want some things -- you just want
7 some redactions made and then the rest open; is that correct?

8 MR. BELFER: Well, under the protective order, the
9 parties have to confer about redactions. The immediate issue
10 with the motion to file redactions is that we didn't have an
11 opportunity to confer, and so we need that opportunity.

12 THE COURT: Okay.

13 MR. BELFER: But there are also multiple protective
14 order violations that warrant, I think, a bit of a
15 discussion.

16 THE COURT: Do you want an opportunity to confer
17 first and see if you can come to an agreement on this? What
18 are you going to ask me to do? Begin with what you're asking
19 me to do, and then I'll see which direction we can go.

20 MR. BELFER: Understood. Essentially, what we're
21 asking for is just a declaration. Well, two things. So
22 although we agree there are documents that were removed from
23 the public docket, they were on the docket for some period of
24 time. We know they have been disseminated publically. There
25 is potential harm that's already been done.

1 So our ask is twofold. First, we want to make sure
2 that plaintiffs have contacted anyone who they might have
3 transmitted this stuff to to confirm it's been destroyed.
4 Also --

5 THE COURT: Let's pause on that. Any problem with
6 that, Mr. Oh?

7 MR. OH: None.

8 THE COURT: So ordered.

9 MR. OH: I have -- when we got into a little
10 kerfuffle about this on the previous motion and then we
11 contacted Ms. Beatty about restricting access, I made sure to
12 instruct my clients -- I don't want to get into -- I'm sure I
13 sent the briefs to them, but, like, keep it amongst
14 yourselves and don't disseminate. They've been instructed.

15 THE COURT: They've been instructed now to destroy
16 it?

17 MR. OH: Yes.

18 THE COURT: That's a reasonable request, and the
19 order is granted.

20 MR. BELFER: Just to be clear, we're talking about
21 both the documents that were improperly filed unredacted and
22 the recently redacted documents that that shouldn't have been
23 filed.

24 MR. OH: Your Honor, before you stepped up here, in
25 the interest of trying not to have to spend too much time on

1 this today, I asked Mr. Belfer if we could talk to Ms. Beatty
2 about if you have an issue with any documents that you think
3 were improperly or inadvertently filed not under seal, let's
4 have her restrict access to them now. So that has been done.
5 With respect to any document that Mr. Belfer identified to us
6 this morning. And I apologize if there's been any mistakes
7 on my part. There probably were. But we are moving to
8 correct any issues that they bring to us as quickly as
9 possible and comply with as much as possible the protective
10 order, both in letter and in spirit.

11 THE COURT: Okay. As I hear your complaint, there
12 were some things that shouldn't have been made public.
13 They've now been made public. They've now been private,
14 rather. Anyone who Mr. Oh distributed them to, he has pulled
15 them back.

16 MR. BELFER: Yes. Again, both the documents filed
17 unredacted and the documents that were just filed yesterday
18 in the redacted form that shouldn't have been filed. Both of
19 those categories should not have been filed, and we want to
20 make sure they've been destroyed.

21 THE COURT: You're confirming that that's the case?

22 MR. OH: I will confirm that they've been
23 destroyed. I haven't confirmed that they actually got them.

24 THE COURT: If you can confirm by the end of the
25 day and send an e-mail. That addresses that.

1 Does that address your concerns?

2 MR. BELFER: Yes, Your Honor. Then the second
3 issue is that because of the gravity of this -- just to take
4 a quick step back. When people's names are disclosed, that
5 opens them up to harassment, threatening e-mails. It's a
6 very serious issue to disclose people's names that are
7 confidential and protected by the protective order and the
8 Privacy Act.

9 We think it would be very helpful to get a sworn
10 declaration from the plaintiffs stating three things. First,
11 how those multiple protective order violations happened.
12 Second, who plaintiff sent this information to which would
13 allow the government to assess the risk and figure out who
14 got access and what the possible risks are. Third, confirm
15 the efforts to correct those violations, the corrective
16 action they took. We would request that plaintiffs' counsel
17 prepare a sworn declaration addressing these issues and send
18 it back to the Court.

19 THE COURT: Any objection to that, Mr. Oh?

20 MR. OH: Yes. In that we are talking just about
21 names. There are no CVs, resumes, biographical information
22 put into any of them. And there has been no legal basis
23 identified to me in the Privacy Act that names alone are
24 protected under the Privacy Act. It's documents, as far as I
25 can tell.

1 THE COURT: This concern seems reasonable to me,
2 especially given the environment in which we are all
3 operating.

4 MR. OH: As far as I know, names of individuals who
5 are put forward for the ACIP and PIP can be and have been
6 identified in the record, and the government is not objecting
7 to that.

8 THE COURT: What I understand Mr. Belfer to be
9 asking is a declaration that says we violated the protective
10 order by doing X, Y, and Z, obviously without reiterating the
11 substance of the X, Y, and Z. After we did that, we sent the
12 documents to A, B, and C, and after the hearing today, what
13 we did to address that mistake was contact the people and
14 tell them to destroy the documents. Am I getting what you're
15 looking for?

16 MR. BELFER: That's correct.

17 MR. OH: I think there were two names, as far as I
18 know, of individuals. And this was meet and confer e-mails
19 with Mr. Belfer that were --

20 THE COURT: This seems like something you can do,
21 Mr. Oh.

22 MR. OH: If Your Honor thinks it's reasonable.

23 THE COURT: This sounds like several sentences,
24 several minutes' of effort. I suppose it's an effort to go
25 back and make sure you've contacted the people you sent them

1 to and told them to destroy it. But that's something you
2 were going to do anyway.

3 MR. OH: We'll do that.

4 THE COURT: I'll give you until Monday afternoon.

5 MR. ZORN: Your Honor, I work at the Department.
6 Let me just explain the Department's concerns here.

7 I think it's what you said, Your Honor. I have
8 some e-mail here on sort of inverse situation of sort of the
9 inverse of plaintiffs here seeking information from our
10 Department and the identities of people, and we fight that
11 vigorously because they get e-mails, threatening e-mails from
12 the public.

13 THE COURT: You don't have to make the case that
14 this is a concern. I understand that.

15 MR. ZORN: It's a substantive concern, but it's
16 also a concern of process. The protective order is clear.
17 The reason we're asking for plaintiffs to confer with us
18 before they publish redacted documents is I have attorneys
19 that have a lot of experience with the Privacy Act. We're
20 happy to address Mr. Oh's concern, but Mr. Oh is not free to
21 make the determination himself before conferring with us
22 because there are serious risks in the disclosure of names
23 that are protected by the Privacy Act.

24 THE COURT: You don't need to make that point any
25 more clearly to me. It's well made. I understand it.

1 Mr. Oh, going forward, is there any problem with
2 before you file any future filings that involve any material
3 that's been produced, you are required to meet and confer and
4 make sure you agree on it?

5 MR. OH: Will do, Your Honor.

6 THE COURT: That seems like a prophylactic solution
7 for you?

8 MR. BELFER: Yes. Any document that was produced
9 with a confidentiality designation, there should be a confer
10 before anything is filed publicly.

11 THE COURT: I'm going even broader. Anything
12 that's filed on the docket that was produced by the
13 defendants, before filing it on the docket, confer with the
14 defendants.

15 MR. OH: Will do, Your Honor.

16 MR. BELFER: Thank you.

17 THE COURT: You're welcome. Anything else I can do
18 for those preparatory matters?

19 MR. BELFER: I think that addresses the
20 confidentiality issues. We can go to the motion to stay.

21 THE COURT: Okay. Sounds good.

22 MR. ZORN: Thank you, Your Honor. May it please
23 the Court, Matthew Zorn for the defendants. Your Honor, we
24 ask this Court to stay these proceedings pending the
25 expedited appeal from this Court's March 16th order. And let

1 me start with, I think, the question that runs against me.

2 Why shouldn't this Court simply deny from the bench
3 today? After all, the Court declined to stay this case in
4 May, and it already said what the Court wants. The Court
5 wants this case to get to finality and it wants this case to
6 be over. I echo those sentiments.

7 I realize I'm running a little bit uphill in
8 today's argument, but what I propose to persuade the Court is
9 the course of a government's proposal to resolving this case
10 is the only downhill one.

11 THE COURT: Can I ask a quick question? Your name
12 is on the reply brief, so I assume you're familiar with it.
13 It references an August date for possible resolution. Where
14 is that date coming from?

15 MR. ZORN: The August date comes from plaintiffs.
16 Candidly, Your Honor, I doubt that is going to be the case.

17 THE COURT: This is a guess about the First
18 Circuit?

19 MR. ZORN: The First Circuit scheduled argument for
20 next week. I believe they don't sit in August. My hope is
21 that it's the first week of September. But we would
22 sincerely like the appeal to be resolved as quickly as
23 possible. I personally spent the weekend writing the reply
24 brief so we could get it on file as early as possible.

25 THE COURT: Why do you think you'll get oral

1 argument? Do you have an insight to the fact you are likely
2 or not likely to get oral argument?

3 MR. ZORN: Actually, as we state in our statement
4 for oral argument, I would be happy for the case to be
5 decided on the briefs.

6 THE COURT: Okay. It's just a matter of practice?

7 MR. ZORN: I think oral argument would assist the
8 First Circuit. I think there are some interesting issues of
9 first compression that relate to separation of powers, but
10 the First Circuit will decide whether to schedule argument or
11 not. If they decided on the briefs, then it has made that
12 decision.

13 THE COURT: Okay. Thank you.

14 MR. ZORN: A brief stay is the fastest path, I
15 think, to what the Court wants here. And so this isn't
16 really an ordinary stay motion. It raises issues, I think,
17 that go beyond this case. Article 3 courts resolve cases and
18 controversies. They don't create them. If the case
19 continues while the First Circuit is deciding related
20 questions of law, there are going to be controversies that
21 are created in this case that could have been needlessly
22 avoided.

23 I might add one other point, Your Honor, which is
24 administrative records are in service of APA claims. Not the
25 other way around.

1 We don't go around finding APA claims to create
2 administrative records to ask for us. Again, Your Honor, the
3 motion that we filed can be summarized in a sentence, which
4 is one of the two parties here before you wants to bring this
5 case to a close. The Government has asked the Court of
6 Appeals to expedite. We cut into our own briefing time on
7 that appeal. The plaintiffs took all of their time on
8 theirs. And they opposed expedition, and now they're asking
9 for six categories of documents of all documents related to.
10 So I think you have a vision into sort of what this case
11 looks like right now. And I'm here to bring you a vision of
12 how this case ends.

13 The Court of Appeals settles this question of law,
14 which has profound implications beyond this case. The
15 Secretary reconstitutes the committee, and mindful of
16 everything this Court has said, by the way. We understand
17 and in our appellate brief, you can read, the fair balance
18 provision is fully enforceable from downstream agency action.
19 The agency has no reason to believe that if there were an
20 agency action with an unbalanced committee, that this Court
21 wouldn't reach the same conclusion simply based on the
22 downstream agency action.

23 Mindful of what this Court has said, and then the
24 ACIP goes back to work. There is a high likelihood that we
25 would ask this Court for a voluntary remand on some of the

1 issues that were identified in this Court's ruling, and some
2 of the case would be moot. Maybe the entire case would be
3 moot. Again, this Court found that some of their claims
4 weren't likely to succeed for lack of final agency action.
5 The vision that I am presenting the Court today is a brief
6 stay that allows us to resolve these issues.

7 And one word about how I came to the lectern here
8 today. I'm here on detail. The Department detailed me over
9 to the Department of Justice. I'm a senior political
10 official at HHS. I'm a deputy general counsel. I was not
11 brought in to litigate cases like this. But it is the
12 Secretary's sincere desire to reconvene the ACIP.
13 Unfortunately, this lawsuit is preventing that from
14 happening.

15 So why isn't May the answer here? First, we have
16 the First Circuit expedited the appeal. This Court was
17 presented a very different situation, and we didn't present
18 Your Honor what the basis for the appeal was, so Your Honor
19 had no idea what that was. But this is very concrete.

20 Second, by plaintiffs' own admission, the stay here
21 is a matter of weeks, maybe a couple of months. Your Honor
22 also can put the case on stay, and if nothing happens, can
23 lift the stay at its discretion. So at the bottom, this is
24 about sequence. We are not trying to delay anything. So the
25 two questions I want to put to this Court, because I'm going

1 to continually revisit them, is why is the parties -- why is
2 plaintiffs -- why are they saying two different things to two
3 different courts?

4 In October, plaintiffs came to this Court and
5 talked about the urgency of the flu season and why this case
6 needed to move forward. And weeks ago in the First Circuit,
7 they told the First Circuit, There's nothing to worry about
8 with the flu season. How could something be urgent in
9 October and all of a sudden the same flu season is
10 approaching, and it's no longer urgent?

11 Second, why does this case look the way it does and
12 why is it developing in this way? I hope to answer that
13 question, because it's going to be a theme of my
14 presentation. I don't mean it as an accusation. I mean it
15 more as a diagnosis, because I think no matter how the Court
16 rules on this motion today, I think walking through this is
17 going be instructive on the Court on how it can rule on legal
18 issues.

19 So my hope is that by diagnosing the case, Your
20 Honor can help it bring this case to an orderly close, which
21 is what the Department wants. So I want to start with
22 something that plaintiffs put on the record, because I think
23 plaintiff told you how this case began.

24 The firing of the ACIP was what prompted counsel to
25 do something about this. If Your Honor can recall, the

1 original claims in this case had final agency action
2 problems. This case started as a cause, an advocacy case, in
3 search of a final agency action to find -- to keep the case
4 alive.

5 And what we've also heard outside this courtroom is
6 that they're here to challenge the Secretary in a broad sense
7 and bring a steady stream of actions. It's all in the
8 transcript. But counsel here has stated they anticipate
9 bringing more and more and more agency actions into this
10 case. And that's actually borne out by the first, the
11 second, the third, the fourth complaint. So there's nothing
12 dishonorable about litigating a cause.

13 If you were to look up my background, Your Honor, I
14 litigated a cause for five years in private practice. But
15 the APA doesn't adjudicate causes. It adjudicates final
16 agency actions. What happens when you start litigating
17 causes and you work your way backward to final agency actions
18 is you start putting square pegs in round holes. Our appeal,
19 and, again, Your Honor has read it. We're trying to get this
20 Court's order reversed. I think the diagnosis there is that
21 claim that is on appeal was a square peg put in a round hold.
22 That's the long and the short of that argument.

23 So the problem is that this is still happening. So
24 the document that was recently filed, the motion to complete
25 the administrative record, has a new final agency action.

1 Apparently, now the final agency action is in
2 February of 2025. Why? Because plaintiffs want to
3 characterize everything after that as post decisional to get
4 production of those records. It's an incoherent argument
5 because post decisional records aren't part of an
6 administrative record, but you can see how positions are
7 shifting, because they have a cause that they're trying to
8 serve, and they don't have causes of action.

9 So if you'll note how this suit began, it starts to
10 make sense. So here is what the Court has ahead of it.
11 Again, my colleague here will litigate the motion to complete
12 the record, but it's entirely relevant for this motion to
13 stay to understand what the Court has ahead of it.

14 It's six extremely broad requests, all documents
15 related to, which is not the standard for an administrative
16 record. And it has to do with a sitting cabinet secretary.
17 Now we're in separation of powers territory. I'll get to the
18 case law in the presentation. Respectfully, Your Honor,
19 these document requests wouldn't even pass Rule 26
20 proportionality muster. So plaintiffs vision of --

21 THE COURT: If this is the argument you want to
22 make, isn't this an argument to be made on the motion to
23 expand the record?

24 MR. ZORN: No, because the problem, again, Your
25 Honor, just cutting to it and why I'm introducing this here

1 is, frankly, I don't even know what the record is right now.
2 Even in the appeal, they can't tell me what the final agency
3 action is with respect to the ACIP claims. And a record
4 relates to the final agency action.

5 So we're arguing over something that the First
6 Circuit is actually deciding. So to your point, Your Honor,
7 that might be an argument. It might be a rhetorical argument
8 of this is even broader than Rule 26. But the point I'm
9 trying to make, Your Honor, is making I don't know even how
10 we're supposed to brief our opposition to this motion because
11 we don't know what the final agency actions are. We don't
12 know the metes and the bounds of this case. I'll get to this
13 later in the presentation, but the Cheney case clearly says
14 when there are threshold issues in cases that address
15 separation of powers issues and they are looking for
16 documents from the Secretary, that separation of powers is a
17 principle that applies to all aspects of the proceeding. I
18 would ask the Court to apply that on this motion for a very
19 brief stay.

20 So this is the motion that they filed, and I don't
21 need to belabor the point, but this is a motion that has 20
22 pages of factual narrative, 57 footnotes, and barely any
23 argument. Two of the four pages is on the standard of
24 review. Again, this isn't a FOIA case. This isn't an
25 oversight hearing. This is a motion to complete the

1 administrative record.

2 I would submit to Your Honor, when they say in
3 their motion that the American people deserve to know about
4 this, that may be true. That also doesn't mean that this
5 case should proceed on that basis. This is an APA case. The
6 administrative record serves the cause of action. They don't
7 get to make causes of action to build an administrative
8 record. That is what they want to do.

9 That is why, again, to start answering the
10 questions that I posed to Your Honor, why would you take two
11 different positions in different courts regarding the flu
12 season? Because the answer isn't really about public health.
13 The answer is they're trying to press the district case
14 forward and put the brakes on the appellate because the
15 appellate court case could narrow the scope of disclosure in
16 this case, which is precisely why we're moving for a stay and
17 what the Cheney case teaches.

18 There is no doubt -- I don't believe that there's
19 any doubt and there's hardly any dispute that the appeal
20 could meaningfully narrow the scope of what this Court has to
21 decide in many respects. Again, the vision that I'm
22 presenting to Your Honor isn't just a narrowing of decisions.

23 I think that there's a way that after the First
24 Circuit rules, this entire case goes away. But even setting
25 that aside, reversal on Count 2 may end. It depends on the

1 terms. It may be that the remedy was the issue and not the
2 analysis. It could simply be we understand, what does fair
3 balance mean? I think Your Honor probably was asking the
4 same question. There's not a lot of case law on that.

5 It would be instructive to have the First Circuit
6 explain what does fair balance mean. That obviously shapes
7 the course of the record. Even affirmants would help us
8 insofar as we would have to brief this issue once and not
9 twice.

10 THE COURT: We're certainly going to have an answer
11 before summary judgment. There's no doubt about that, right?
12 You're not going to do summary judgment twice?

13 MR. ZORN: It depends. I mean, I would anticipate
14 that we would have an answer before summary judgment, but I
15 don't know for sure.

16 THE COURT: The question is really should we fight
17 about the administrative record now or later. It's not so
18 much about summary judgment. If summary judgment was due
19 August 15, your point would ring differently, right? But
20 it's not. We have a hearing in mid August that's on just
21 this motion to expand the administrative record. So there's
22 no chance of doing summary judgment twice here.

23 MR. ZORN: Fair. Although, again, I think we're
24 preparing for summary judgment too. There is not just the
25 briefing date, but there's lead-up to the briefing. I

1 understand your point, Your Honor. I would concede that.
2 It's very unlikely that this appellate decision is decided
3 before the due date for summary judgment motions.

4 THE COURT: Is there a way to narrow what could be
5 done in the meantime to exclude Count 2?

6 MR. ZORN: Your Honor, the counts are somewhat
7 intertwined. There's actually thorny, I would say,
8 Constitutional issues with statutory interpretation and
9 appointments clause issues even that the Court didn't really
10 reach, but plaintiffs have been advocating certain
11 interpretations of statutes. I think that the way the First
12 Circuit reads the statutes is relevant to a couple of the
13 claims.

14 I actually do think, Your Honor, that if you're
15 looking for a middle path on this, there are ways that
16 certain claims can move forward, and we can work through those
17 claims while keeping Count 2 and maybe one of the other
18 related claims on a stay until the First Circuit --

19 THE COURT: Talk to me about how you would do that.

20 MR. ZORN: The way I see it is Count 2 relates to
21 the ASA claim. That is the Constitution. That also happens
22 to be the claim that I would argue the demands that
23 plaintiffs are making, which, again, we disagree with on the
24 merits for a variety of reasons. But that actually
25 implicates separation of powers probably the greatest, which

1 is the appointment's sort of power, which is an executive
2 prerogative.

3 So certainly Count 2. I think the other count is
4 the one that relates to the January 5th directive. I think
5 it's tied into it. The issues are tied together. But,
6 certainly, if the Court is looking for the narrowest stay to
7 address the separations of powers concerns, it's Count 2 for
8 sure.

9 THE COURT: Okay.

10 MR. ZORN: So their opposition concedes the
11 premises of our motion, Your Honor. I think Keating and the
12 like in August. That's not my position. That's just what's
13 in their motion. If they're saying that the Court shouldn't
14 enter into a brief pause because it would be brief, that's
15 not sort of a coherent argument. About a month. Again,
16 their arguments. Again, the real point here is there is no
17 harm. There is no harm. There is no harm to the public.
18 There's no prejudice. If we pick up again and we litigate
19 again, the record is going to be the same after a stay as it
20 would be before. The documents aren't going anywhere. So I
21 don't need to belabor the point but here Your Honor has the
22 different claims that they're making to different courts.
23 It's a shifting position here of we cannot predict who is
24 going to get sick and who is going to die, but those things
25 are going to happen.

1 And then they turn around and argued here that our
2 urgency, which based on their -- sort of the same argument
3 they were making was contrived and manufactured. I can tell
4 you as an employee of the Department, the Department is not a
5 monolith, and there are people who are concerned about the
6 inability of ACIP to meet to make recommendations for the flu
7 season.

8 Again, they're now telling the First Circuit that
9 Americans will have access to the flu shots this fall even if
10 the appeal is still pending. I'll leave it to them to
11 explain, kind of, how they can reconcile these
12 representations to different floors of the same building.
13 But I find it a little bit concerning.

14 The reason I mention that is returning to our
15 questions about what is the case really about, at least from
16 the plaintiffs' side and why is their vision of this case not
17 one that brings it to where Your Honor wants, which is a
18 conclusion. The emergency, did it pass? No. That is not --
19 let's cross off all the innocent explanations for why they
20 would change positions. The emergency didn't pass. It's the
21 same one this time around as it was. Is our appeal trivial?
22 Your Honor has the brief in front of him. I don't think it's
23 trivial. And did the expedition harm them? At the Court of
24 Appeals , no. They didn't -- we cut into our own deadlines.
25 We didn't cut into theirs.

1 I don't know how you can reconcile what they filed
2 at the First Circuit with what they're telling this Court,
3 unless you come to what I think is the explanation, which is
4 it's not -- none of this is about the calendar. This is
5 about a cause. This is about producing an administrative
6 record. This is about publishing an administrative record.
7 That's what we saw with the UCF330. This is about
8 essentially convening an ad hoc oversight panel in an Article
9 3 Court.

10 So the main argument that I want to sort of take
11 apart here is why -- you know, if the Department is here, if
12 they're going to detail a lawyer over here and argue to Your
13 Honor underscoring the urgency, why can't we just reconvene
14 the ACIP? Your order does allow that.

15 The answer, again, is plaintiffs. Plaintiffs have
16 told the public that if the Secretary makes any new
17 appointments, they're going to bring a claim right back to
18 Your Honor, and we are going to be right back here. So if
19 Your Honor is asking also the question, I think outstanding
20 of, why did we wait so long to appeal? Your Honor, walk
21 yourself through the thought process of my department.

22 We want the ACIP to reconvene, but we have a
23 plaintiff that says anything we do -- if we take one step to
24 the left, one step to the right, we're just going to be back
25 in front of Your Honor. First of all, I'm not even sure

1 anyone would want to be on the ACIP, because, again,
2 plaintiffs are seeking discovery, broad disclosure of
3 everything having to do with the ACIP. But on top of that,
4 we need to settle this principle of law. We need to
5 understand the metes and bounds of the claim. We don't think
6 this claim is actionable about the appointments. We need to
7 get this claim resolved. It's not clear what the path is to
8 getting the ACIP reconvened right now.

9 The determination that we came to after careful
10 deliberation is this is the only way. So, yes, I would like
11 this Court's order reversed. Again, we're trying to get the
12 reverse to reconvene the ACIP in light of the representations
13 that plaintiffs have made, saying that if we take one step to
14 the left, we're back in court. If we take a step to the
15 right, we're back in court too. This is the only way we can
16 do it.

17 So there is an authority that addresses a pattern
18 like this. It's the Cheney case. It's actually remarkably
19 similar on some of the facts. There were six requests at
20 issue in that case. They were discovery requests. They
21 weren't, sort of, completion of the administration --
22 administrative record request, but I think that's a
23 distinction without a difference.

24 And the Supreme Court said that they were asking
25 for everything under the sky. If you look at the request in

1 that case, it's actually narrower than the requests that
2 plaintiffs are seeking in this case.

3 I think the principle of law that I think should
4 dispose of the motion in our favor is special considerations
5 control when the executive's interest in maintaining its
6 autonomy, which is appointments here, and safeguarding its
7 communications and confidentiality are implicated.

8 THE COURT: Your argument really seems to belong at
9 the hearing on the motion to expand the administrative record
10 rather than here.

11 MR. ZORN: Frankly, we have to respond to that.
12 Like I said, Your Honor, we are having difficulty even doing
13 that because we don't even agree on -- we don't even know
14 what the record is. Especially with Count 2, we don't
15 understand what is the final agency action here. Look, they
16 pleaded this claim in November and December and January and
17 February. There were appointments that were happening all
18 along the way. At which point did the panel -- was there a
19 consummation of a decision? I genuinely don't understand.
20 So there's a lot of bad faith accusations, but I, frankly,
21 don't understand what the record is on this because I don't
22 understand what the final agency action is. If Your Honor is
23 saying why don't you brief a response, I don't know how to
24 produce an intelligible response to that.

25 THE COURT: The argument about whether or not there

1 is prejudice for a delay is well made. The argument as to
2 the merits seems more difficult for me to take up now. That
3 seems like -- if you really have these arguments about what
4 they're seeking in terms of discovery, that -- I'm hearing
5 both arguments from you, right, that their requests as to
6 expanding the administrative record are reasonable, and
7 you're prepared to argue those points, and you have here. In
8 which case, why don't we go forward in August.

9 MR. ZORN: We are not prepared to argue that. I
10 want to be clear about my argument. What the Cheney case
11 says is separation of powers implicates every aspect of the
12 proceeding. The simplest way to do that is at least a
13 partial stay, at least on Count 2. That is the easiest,
14 fastest way to do that.

15 If Your Honor is inclined to want to make progress
16 in the case, we can still make progress on the other counts,
17 if the Court wants to split the middle. But the appointments
18 power is a pretty core Article 2 power. And a stay here is a
19 brief pause, which I think is the simplest way to carry out
20 that directive, that when separation of powers is at play,
21 courts need to respect that consideration.

22 So the three things that they can't dispute, Your
23 Honor, that there could be judicial efficiency. I think the
24 other point, Your Honor, that I want to underscore is you
25 say, why not put it on hold? Again, I'm giving Your Honor a

1 vision of how this case can end.

2 If the First Circuit comes back and says the
3 Secretary can make appointments -- that, respectfully, the
4 District Court got this wrong, the stays are lifted, and we
5 can reconstitute, as in a different ACIP, not the current
6 ACIP, but we can reconstitute the ACIP, the agency, I
7 believe -- and we would have to deliberate with the
8 Department -- I'm wearing two hats now -- I believe would be
9 inclined to move the Court for a voluntary remand on at least
10 some of the claims.

11 So if we move forward, if we escalate this case and
12 we start going into motions on -- that becomes less likely.
13 There is no prejudice. The agency actions remain stayed.
14 There is zero prejudice. The agency actions are stayed. We
15 didn't challenge the agency actions, the actual actions of
16 the votes. They're all stayed.

17 This is about the sequence that the Court is
18 undertaking with the case. It's not about the merits, and we
19 can always go argue the merits. I present the Court sort of
20 a choice. The First Circuit decides on an expedited basis,
21 we reconstitute the ACIP and we possibly ask the Court for a
22 voluntary remand, and ACIP goes back to work. Or we can
23 engage in motion practice, very hotly contested motion
24 practice, over a motion to complete the administrative
25 records.

1 We're going to have to deal with -- if we keep
2 going in this direction, we're going to have to deal with
3 privilege logs, in-camera review. This is consuming an
4 enormous amount of resources from my department as well as
5 the Department of Justice. I guess I'm in both departments
6 since I'm on a detail.

7 I spent a lot of time with this case, as have my
8 attorneys at the Department. This could all be unnecessary.
9 That is the bottom line. This could all be unnecessary.
10 There's a clear path to resolution. This is what Your Honor
11 said and this is my concluding slide. I am doing everyone a
12 service the quicker I can move this towards finality.
13 Granting this motion is the quickest way to get to finality.

14 If the First Circuit -- no matter how the First
15 Circuit rules, it's either going to narrow the case or, my
16 submission to Your Honor, is it could very well dispose of it
17 because the agency may present Your Honor a motion that would
18 take care of all or nearly all of the remaining claims.

19 THE COURT: How long are you looking for the stay
20 to be?

21 MR. ZORN: I'm sorry?

22 THE COURT: How long would you suggest the stay be?
23 It doesn't seem like you -- and I don't think I have any
24 confidence in August as a date.

25 MR. ZORN: I agree, Your Honor. We're happy to

1 give the Court status reports. Again, I am on this case. I
2 work at the Department. If you have any questions, I am here
3 to expedite getting answers to Your Honor straight from the
4 Department, and we are happy to file status reports every
5 month, every two weeks. And Your Honor can make a decision
6 to lift the stay if he doesn't feel like it's moving along.

7 THE COURT: All right. Thank you, Mr. Zorn.

8 MR. ZORN: Thank you.

9 MR. OH: For once, I didn't bring a PowerPoint,
10 Your Honor, so I'm just going to speak off-the-cuff here.

11 THE COURT: Let me start with giving you my
12 preliminary thoughts, which is Mr. Zorn made some arguments
13 as to the merits of the motion to expand the administrative
14 record, which I find somewhat -- well, they're just not for
15 today. I'm not saying I have any thoughts about their merits
16 or not, but I don't know that they factor in terribly much in
17 terms of a decision on a stay. However, it does seem like a
18 stay of six weeks -- I don't see a lot of prejudice there.
19 So tell me what the harm would be.

20 MR. OH: The harm is, contrary to what Mr. Zorn
21 argued, is continued delay of this case, and I think it's
22 important to remember that they appealed one claim to the
23 First Circuit. And that was Count 2. And this motion really
24 then is a motion to stay the proceedings in light of that
25 appeal only of Count 2.

1 And I'm sure the court reporter has got it more
2 accurately than I did, but I do believe that Mr. Zorn said if
3 Your Honor is inclined just to stay at least Count 2, we can
4 still make progress and proceed on the other counts.

5 So there has been this conflation of all of them
6 together when they have only appealed Count 2. And for
7 orderly resolution and expeditious resolution of this case,
8 we do have issues that we have teed up in this motion to
9 complete the administrative record. It is not a motion for
10 extra record discovery. It is not a motion to -- that's why
11 the Cheney case doesn't apply at this moment. It may apply
12 two steps down the road. That is when, if we file a motion
13 for extra record discovery, because in Cheney, the District
14 Court actually entered a discovery plan allowing the
15 plaintiffs to serve document requests and interrogatories.
16 That hasn't been done here. And the document request,
17 according to the Court of Appeals, did ask for everything
18 under the sky. We will be guided by Cheney, if we ever get
19 to that point in not asking for everything under the sky.
20 What the -- we'll get into this potentially in August.

21 Mr. Zorn says he does not know what is in the
22 administrative record on this count that has been appealed or
23 the others. Nor do we. We do think it is incomplete, and so
24 we have asked them to -- in light of information that has
25 come up both in the record that they produced and other

1 e-mails that were made publicly available, to go back and
2 look in good faith as to whether or not you might have missed
3 a few categories of documents that should have been produced
4 initially. Okay? So --

5 THE COURT: What do you say about the idea of
6 staying in so much of the case as concerns Count 2? How
7 practical is that?

8 MR. OH: I don't actually think it is that
9 practical. Let me -- so I think we should play this out. So
10 they have asked the First Circuit to reverse your order
11 staying the appointments. What does that mean? Then that
12 means that we revert back to March 15th, I guess the day
13 before you entered your order. That means that that ACIP can
14 reconvene and they can meet and they can do what they will,
15 influenced or not by the Secretary. Okay? But that doesn't
16 mean that they shouldn't go back or we should not, in this
17 case and in this courtroom, continue to develop the record if
18 there is a record to be developed.

19 So they've argued in their motion here, and I'm not
20 sure if they did this up at the First Circuit, that we have
21 said that the record continues to grow. I went back and
22 looked at the transcript of the motions to dismiss hearing.
23 And I know I said at that hearing in December that the record
24 on the May directive, the thimerosal vote in June, the
25 September COVID vote, the December HEP B vote, and the

1 January schedule, I said those records are what they are as
2 of that point.

3 ACIP continued to meet. When you look at the
4 transcript there, that is what I was referring to, that that
5 record may be ongoing because it is a live, organic body that
6 continues to act.

7 So I don't think that there is any practical reason
8 to stay -- excuse me -- continuing to move forward on
9 developing the records on all counts and then the practical
10 effect of your March 16th order, Your Honor, is to fix the
11 administrative record, at least up to that point in time, the
12 two elements of the FACA claim, fair balance and undue
13 influence.

14 And noticeably absent from today's presentation, in
15 their motion, the reply brief, or in their motion to renew
16 the stay or in the First Circuit is any discussion on undue
17 influence.

18 If you recall, your decision specifically and
19 explicitly says that I'm not going to address undue influence
20 at this time, quite frankly, because you couldn't -- and we
21 couldn't because while we had our suspicions, there wasn't
22 any documentation, but now there is.

23 There are two e-mails that have come to light. One
24 in May from the deputy chief of staff to other people within
25 HHS that says to another individual in the immediate office

1 of the Secretary, Bobby wants these four items on the agenda
2 for the next ACIP meeting. Probably unprecedented action by
3 any Secretary of Health and Human Services with the ACIP. An
4 e-mail one month later from another individual to others
5 within HHS that I've been hearing from the Secretary's office
6 that they want a vote at the next ACIP meeting on thimerosal
7 to make it shared clinical decision-making. That is, in our
8 opinion, evidence, if not smoking gun evidence, of undue
9 influence being exerted by the Secretary on the ACIP, telling
10 them how to vote.

11 Now, the inappropriate or undue influence part of
12 this Count 2 of FACA is something that they have stayed away
13 from. They haven't addressed at all in the briefing here or
14 at the First Circuit. And that certainly is something that
15 up to March 16th, your order, that record is fixed. And they
16 could produce a more complete record with regard to that
17 claim.

18 THE COURT: What is the prejudice of the six-week
19 delay?

20 MR. OH: On that particular --

21 THE COURT: Of the whole thing. If I granted a
22 stay for six weeks, that would bring you to the middle part
23 of September. What is the prejudice on that?

24 MR. OH: It certainly would help us to take a
25 little vacation in August, Your Honor, but, like I said --

1 THE COURT: I'm not considering granting an
2 unlimited stay, nor do I hear him asking for one. A six-week
3 stay doesn't seem -- I don't know that the First Circuit will
4 act in six weeks. If they did, I do think that whatever
5 direction we got from the First Circuit would be --

6 MR. OH: On Count 2, Your Honor, but not with
7 regard to the other five agency actions we have challenged.
8 And so in terms of continuing to move the case forward, there
9 is prejudice to our clients about what is going to happen
10 with those particular claims.

11 As we have briefed and as we have said, the actions
12 that we have challenged in this case have led to and continue
13 to foster confusion among healthcare providers with their
14 clients.

15 THE COURT: My temporary order is in place. It
16 will remain in place.

17 THE OH: It is a temporary order. People know it
18 is a temporary order and that there will be an adjudication
19 on the merits, and this is not a final decision by the trial
20 court.

21 THE COURT: I get all of that. I do. I'm not
22 seeing a lot of negative ramifications of a short stay.

23 MR. OH: I think harm is not the actual
24 dispositive --

25 THE COURT: It's certainly a question of

1 efficiency. What the First Circuit says will --

2 MR. OH: It's good cause.

3 THE COURT: There is a significant question in
4 front of the First Circuit. While, of course, I agree with
5 my own decision, the First Circuit may or may not agree with
6 it.

7 I do -- Mr. Zorn's point that it could change the
8 case dramatically and his statement that this could
9 potentially moot the case because the Department could decide
10 to -- it could decide to ask for a voluntary remand, not
11 something that I'd, frankly, really contemplated before I
12 read it in their paper.

13 MR. OH: Your Honor, I think mooting the case is
14 also an overstatement. They cannot moot the entire case when
15 they've only appealed --

16 THE COURT: You're right. It probably doesn't moot
17 the entire case, but it could certainly narrow what's left of
18 the case.

19 MR. OH: It would narrow Count 2. Even if they
20 reverse your stay, like I said, and they say that it was
21 improvidently granted, we still need to proceed to a trial on
22 the merits of that claim. We still need to. And in terms of
23 the orderly functioning of this case and moving along in the
24 interest of justice and judicial economy, making the parties
25 work, actually, while the First Circuit is dark for August.

1 I don't know if Your Honor's courtroom is dark.

2 THE COURT: It's not.

3 MR. OH: I have a hearing scheduled for August.

4 THE COURT: Let me --

5 MR. OH: I do want to also say one thing about
6 separation of powers. That issue, I don't recall it being
7 raised in proceedings here, Your Honor, up to the point that
8 you issued your March 16th stay order. And I don't recall it
9 being -- it was vaguely referenced in their opening brief to
10 the First Circuit. But in terms of those types of issues
11 actually affecting this particular motion at this particular
12 time, I would say it's either waived, number one, or, number
13 two, it certainly hasn't been properly briefed or put forward
14 before the Court. Third, it is an issue that if it's
15 premature to address when we have our motion to complete the
16 record on file, and if they claim that separation of powers
17 issues are implicated in this case with regard to depleting
18 -- expanding the administrative record, then that issue
19 should be fully flushed out.

20 THE COURT: Let me ask Mr. Zorn. It may be more
21 appropriately targeted at Mr. Belfer, since I think it's
22 going to fall on him. If I granted a stay and said, when I
23 lift the stay, you have two weeks to file your response, is
24 that something you're going to be able to accomplish?
25 Mr. Zorn, I don't mean to take the mic from you, but I think

1 you said Mr. Belfer would be doing more on that.

2 MR. BELFER: Yes. So --

3 THE COURT: If I grant a six-week stay and said six
4 weeks from now I intend to lift the stay and you'll have two
5 weeks to respond to the motion to expand the administrative
6 record.

7 MR. BELFER: Yes, I think the original schedule, I
8 think, gave us about four weeks. Is that --

9 THE COURT: Your opposition right now is due 8/14.
10 I issued that on -- I gave you a month. I issued that on
11 7/13. I've given you a month under the current schedule. If
12 I were to continue this for six weeks, that would take us to
13 -- I'm asking as a practical matter, Mr. Zorn. I didn't mean
14 to take the microphone from you. I got the impression that
15 Mr. Belfer would be doing the --

16 MR. BELFER: Our brief would be due about three
17 weeks from today. Maybe if the Court could say, once the
18 stay is lifted, you have three weeks, that would give us an
19 equal amount of time. Yeah. I think if the Court said,
20 issue a stay and then once the stay is lifted, you have three
21 weeks to file your response to the motion to complete the
22 record, I think that would be fair.

23 THE COURT: That is what I'm inclined to do is
24 grant the stay for six weeks, which would go to September
25 3rd. That would make your brief due on September 24th. That

1 delays the case slightly, Mr. Oh, I know.

2 I think it's a minimal delay, and I do think it may
3 inform the process a bit. Even if we don't have an answer on
4 September 3rd, I might very well lift the stay anyway with
5 the anticipation that the answer would be forthcoming. While
6 August is optimistic, I think sometime in September is
7 probably in the ballpark.

8 MR. OH: Your Honor, if I may?

9 THE COURT: Sure.

10 MR. OH: The First Circuit granted them 11 days to
11 file their reply brief to our response, which made their
12 reply due on Monday. They filed their reply brief yesterday
13 or the day before. Yesterday, I think. I thought maybe they
14 did that because they were thinking that maybe the First
15 Circuit might issue a decision or at least schedule oral
16 argument as quick as next week before they go dark in August.

17 And so if a decision from the First Circuit comes
18 down, let's say, next week, then I would request that we have
19 a status conference, let's say, within a day or two of that
20 decision, if it comes down before that, to see if the stay
21 should be lifted at that point in time.

22 THE COURT: I think that is more than fair. Mr.
23 Belfer, I'm going to turn back to you, mostly because I don't
24 know what your -- many people go on vacation in August. And
25 what I would be inclined to say to address Mr. Oh's concern

1 is your brief is due three weeks -- three weeks from either
2 the day that I lift the stay or the day that the appeals
3 court issues a decision.

4 MR. BELFER: That sounds fair, Your Honor.

5 MR. ZORN: Your Honor, if you'd indulge me for just
6 a moment?

7 THE COURT: Sure.

8 MR. ZORN: I just want to correct the record on a
9 point. This is a public hearing, and I just want to address
10 something Mr. Oh stated. It's not a position we have stated
11 now in multiple briefs. Mr. Oh talked about, Well, the ACIP
12 could just revert to the old composition and just move
13 forward. That's not the position that we're taking before
14 the First Circuit, because what we are saying is, okay, under
15 the Wheeler case, you can review a downstream action of an
16 unbalanced committee.

17 So we kind of do that at our own peril based on our
18 own argument saying, well, courts can't review appointments
19 as final agency action. And I essentially heard kind of
20 remarkably counsel concede here in open court that it wasn't
21 a final agency action, because he's saying it's a live
22 record. If it's a live record, it's not a final agency
23 action. Let's be clear about that. There is no such thing
24 as a consummated decision that has a live record that keeps
25 materially accruing. So there's that.

1 But the reason this matters, and I think this is
2 instructive, is when we're talking on the record, I wasn't
3 very precise with Your Honor, but I want to be very precise
4 so you understand what I'm saying.

5 The fair balance, even if it's reviewable at the
6 downstream action, has a very different record than if it's
7 the action itself. If you're looking at the fair balance of
8 the committee under APA review of a final agency action,
9 you're looking at a facial inquiry of is the committee
10 balanced? Right. That doesn't require the record that they
11 are demanding.

12 By the way, we've produced a complete record that
13 they're demanding, regardless. I'm not suggesting that we
14 aren't producing the record. I'm just saying that the legal
15 issue here and the broader import of this case beyond this
16 specific case is if plaintiffs can come into court on a FACA
17 claim, claiming that it's not fair and balanced and then get
18 all of these administrative record on the appointments
19 process, that is the Cheney concern. That is the Cheney
20 concern, and I read the Cheney case very differently.

21 THE COURT: Mr. Zorn, we're not getting to that
22 today. You're on the wrong day.

23 MR. OH: May I just also say that --

24 THE COURT: Very briefly, because you're on the
25 wrong day too, Mr. Oh. Wrong place. Wrong time. We're here

1 on a motion to stay.

2 MR. OH: I understand that, but just to address
3 what he just said. I don't want this transcript to come back
4 and bite me by him.

5 THE COURT: Feel free to add your provisos.

6 MR. OH: Thank you. By him saying I have conceded
7 something about final agency action and because the
8 administrative record continues to grow we're conceding
9 that's not final agency action, that is not --

10 THE COURT: Understood. No one has conceded
11 anything today. It's a motion for a stay, which is being
12 granted insofar as the matter is stayed until September 3rd,
13 with the opposition to the plaintiffs' motion to expand the
14 administrative record due, the earlier of either three weeks
15 from the day that the stay is lifted or three weeks from the
16 day that the First Circuit issues its opinion. And to be
17 clear, I mean the first -- when you first get it, not the
18 rescript. I don't understand when -- I don't understand
19 exactly when the rescript comes out. When you see the
20 opinion, the day that you see the opinion, it's three weeks
21 from that day. Maybe someone can explain to me when the
22 rescript comes, but that's not what I'm talking about. As
23 soon as you know, that's when I expect you to start working
24 on it.

25 With that, anything else I can do for the

1 plaintiffs?

2 MR. OH: No, Your Honor. Thank you.

3 THE COURT: For the defendants?

4 MR. BELFER: No, Your Honor.

5 THE COURT: Thank you, all. Have a nice day.

6 (Recess, 1:03 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Linda Horne, Certified Shorthand Reporter and Registered Professional Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 28th day of July, 2026.

/s/ Linda Horne

LINDA HORNE, CSR, RPR
Official Court Reporter