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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant,

and,

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant.

Case No. 4:17-cv-05783-HSG

INTERVENOR-DEFENDANT MARCH FOR LIFE'S BRIEF REGARDING THE ADMINISTRATIVE RECORD AND DISCOVERY ISSUES

On January 30, 2019 this Court ordered the parties to "e-file simultaneous briefs . . . addressing their positions on whether this proceeding is limited to an assessment of the administrative record." Dkt. No. 270. This brief outlines the law on APA record review and March for Life's position on that issue as it pertains to proceedings going forward in this case.

The Plaintiff States have challenged the Interim Final Rules ("IFRs") and the Final Rules promulgated by the Departments, which rules provide for both religious and moral exemptions to the operation of the contraceptive mandate, which forms a part of the Affordable Care Act. In so doing the Plaintiff States have pressed claims sounding in the Administrative Procedure Act ("APA"), as well as the Establishment Clause of the First Amendment to the United States Constitution, and the Equal Protection Clause of the Fifth Amendment to the United States Constitution. *See* Dkt. No. 170, Second Am. Compl. More specifically, and most pertinent to answering the Court's question as to the proper record going forward, the Plaintiff States allege that in promulgating the IFRs and the Final Rules, the Departments have "acted arbitrarily and capriciously, have abused their discretion, have acted otherwise not in accordance with law, have taken unconstitutional and unlawful action in violation of the APA, and have acted in excess of statutory jurisdiction and authority." *Id*. at ¶ 247 (bringing a cause of action pursuant to 5 U.S.C. § 706). This claim is the gravamen of the Plaintiff States' case against the Departments.

The Proper Record in an APA Challenge

The APA provides that in adjudicating challenges like the one brought by the Plaintiff States, a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. In discharging these functions the APA further provides that a court "shall review the whole record or those parts of it cited by a party." *Id*. What constitutes the "whole record," or whether the administrative record submitted by the government defendants must or may be completed or supplemented, is not definitively spelled out by the statute. This

leaves case law and historical practice as the best guide,[1] but even those sources leave a picture that is less than pellucid. Perhaps the best that can be said is that absent any exceptions or special circumstances, it is presumptively the case that the record submitted by the pertinent departments or agencies is what the court should review—nothing less and nothing more. But again, this is "less than a hard and fast rule," and more the general state of affairs as to theory and practice. Beck, *Agency Practices* at 1.

The basic standard for record requirements in APA actions was laid out by the Supreme Court in the seminal case, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). There the Court determined that judicial review of an APA challenge was to be "based on the full administrative record that was before the [government decisionmakers] at the time [they] made [their] decision." *Id*. at 420. Later cases have further limned the contours of this paradigm, essentially confirming that the administrative record submitted by an agency is the default record that should be reviewed by a court. In *Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam), the Supreme Court stated that the determination as to whether government action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, as specified in 5 U.S.C. s 706(2)(A)," should proceed from a "judicial review [of] the administrative record already in existence, not some new record made initially in the reviewing court." *Id*. at 142. "Parties may not use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (internal quotation and citation omitted). In the event that "the record before the agency does not support the agency action, if the agency

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[1] *See* Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemakin*g at 2 (May 14, 2013), available at https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf (last visited February 5, 2019) ("The APA provides little guidance on the creation and compilation of the 'whole record' or 'administrative record' as it has come to be known. The Attorney General's Manual, as the authoritative interpretation of the APA, points out that the APA did not define 'administrative record,' at the time of enactment. The administrative record concept has evolved over time through judicial interpretation and agency practice.").

has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see also Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotations and citation omitted) ("If the court determines that the agency did not consider all the relevant factors then it should remand the matter to the agency and not compensate for the agency's dereliction by undertaking its own inquiry into the merits."). "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light Co.*, 470 U.S. at 744.

In sum, then, courts reviewing APA claims must conduct a "thorough, probing, in-depth review" of the administrative record to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 415-16.[2] "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co.*, 470 U.S. at 743–44. Generally there are "no disputed facts that the district court must resolve" in an APA review. *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985) (finding that there were no disputed facts to resolve on summary judgment, and stating that the "court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the

[2] *See also Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (internal quotations and citations omitted)("We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration."); *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325 (D.C. Cir. 1984) ("The principle that judges review administrative action on the basis of the agency's stated rationale and findings, and our correlative reluctance to supplement the record, is well-established.").

administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.").[3]

Exceptions to the General Rule and Practice

"[I]n the absence of clear evidence to the contrary, courts presume that [officials] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotation and citation omitted). This presumption extends to the compilation and filing of the administrative record in APA cases. Indeed, "courts routinely 'presume' the regularity of a record and that is the embarkation point for review." Beck, *Agency Practices* at 66; Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. Kan. L. Rev. 1, 31–32 (2018) (discussing the "longstanding presumption of agency regularity," which in APA practice "translates to a rebuttable presumption that the agency's record is complete"); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) ("Generally, judicial review of an agency decision is limited to the administrative record on which the agency based the challenged decision.").[4]

Plaintiffs may rebut this, but "[t]o overcome the strong presumption of regularity to which an agency is entitled, a plaintiff must put forth concrete evidence that the documents it

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[3] In this sense "[r]eview in the district court . . . is much more like an appellate function because the 'facts' normally tried are generally established in the certified administrative record and largely focused through the motions practice lens of summary judgment." Beck, *Agency Practices* at 57. *See also Carlsson v. U.S. Citizenship & Immigration Servs.*, 2015 WL 1467174, at *4 (C.D. Cal. Mar. 23, 2015) (internal quotations and citations omitted) ("Reviewing a final agency determination under the APA does not require fact finding, and is limited to the administrative record. In such a case, the district court sits as an appellate tribunal and the entire case on review is a question of law.").

[4] *See also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (holding that "the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity"); *Deukmejian*, 751 F.2d at 1324 ("In discharging their obligation to monitor agency action, courts review a record compiled by the agency and containing its rationale and supporting findings, accompanied by record evidence . . ."); *The Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 112 (D.D.C. 2009) ("A court that orders an administrative agency to supplement the record of its decision is a rare bird.").

seeks to add to the record were actually before the decisionmakers." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (internal quotation marks omitted). The Ninth Circuit permits "expansion of the administrative record in four narrowly construed circumstances: (1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency." *Fence Creek Cattle Co.*, 602 F.3d at 1131.

As to the possibility or propriety of discovery in APA actions, in general discovery is inappropriate and not permitted in APA actions. *See, e.g.*, *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 195 (3d Cir. 2006) ("There is a strong presumption against discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process."); *USA Grp. Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996) ("Discovery is rarely proper in the judicial review of administration action."); *Int'l Jr. Coll. of Bus. & Tech., Inc. v. Duncan*, 937 F. Supp. 2d 202, 204-05 (D.P.R. 2012) ("[T]he narrowness of the APA action for judicial review weighs heavily against discovery."); Beck, *Agency Practices* at 73 ("The 'no discovery' concept . . . is . . . embedded in the local rules of some courts where judicial review of administrative records is relatively common; for example, the United States District Court for the District of Columbia exempts action for review on administrative records from the parties' duty to confer on pretrial management and scheduling and initial discovery disclosures. The rules otherwise appear to leave open this possibility, but it remains highly limited by the very nature of the review as the courts have noted.").

Limited exceptions to this general rule have been carved out by courts to address situations in which a plaintiff can show "bad faith" or when the "record is so bare that it prevents effective judicial review." *Id.*; *see, e.g.*, *Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997-98 (D.C. Cir. 1990) (holding that *Overton Park* permitted discovery in APA actions "only in two circumstances," to wit, "the familiar case in which there has been a strong

showing of bad faith or improper behavior," and when "effective judicial review" requires it because "there have been no contemporaneous administrative findings"). Discovery may be appropriate where a court needs to determine "whether an agency submitted the full administrative record." Beck, *Agency Practices* at 74. Additionally, "[a] party might be able to obtain expedited discovery in advance of a preliminary injunction hearing, perhaps to address issues collateral to the record such as irreparable harm and the balance of the equities." Gavoor & Platt, *Administrative Records*, 67 U. Kan. L. Rev. at 56. But "that discovery should not bleed into the merits and become impermissible record supplementation." *Id*. Indeed, "[c]onsideration of . . . [extra-record] evidence to determine the correctness or wisdom of [an] agency's decision is not permitted, even if the court has also examined the administrative record." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

March for Life's Position in Light of Extant Authority

The Ninth Circuit has established that the "whole administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555. It appears from March for Life's review thus far that the record filed with the Court by the Departments, *see* 12/12/2017 Dkt. Entry No. CV. 17-5783 (N.D. Cal.), and transmitted to the parties, is complete. At the very least, the Plaintiff States have raised no objection that it is incomplete. It also appears that none of the exceptions to the general rule that a court should review the administrative record produced, and only the administrative record, obtains here. Absent a motion alleging any such infirmities, it is March for Life's position that neither completion nor supplementation of the record is necessary.

Discovery is also not warranted. Although the Plaintiff States have raised constitutional claims in addition to their predominant APA claims, those claims are legal in nature and should not require discovery. Further, those claims are essentially subsumed within the Plaintiff States' Third Cause of Action, brought pursuant to 5 U.S.C. § 706, which requires this Court to "hold unlawful and set aside agency action" that is, *inter alia*, "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law," or "*contrary to constitutional right*, power, privilege, or immunity."[5] (emphasis added).

Accordingly, the APA claims of the Plaintiff States should be resolved by this Court on the basis of the administrative record compiled by the Departments, which the federal defendants have furnished to the Court and the parties.

Respectfully submitted this 12th day of February, 2019.

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** *Pro hac vice granted*

[5] Although March for Life believes no discovery is necessary and that this matter can proceed to a disposition on the merits through cross-briefing, where a plaintiff maintains a constitutional claim "alongside arbitrary and capricious APA claims," discovery may be permitted in support of such claims. *See, e.g.*, *Carlsson*, 2015 WL 1467174, at *13 (dealing with due process claims brought in addition to APA claims). But even if such discovery is permitted as to this independent constitutional claim, it should be limited. *See Grill v. Quinn*, No. CIV S-10-0757 GEB, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012) (internal quotations and citations omitted) (holding that in such a case a "court is entitled to look beyond the administrative record," but cautioning that "wide-ranging discovery is not blindly authorized at a stage in which an administrative record is being reviewed").