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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. ALEX M. AZAR II, Secretary of the U.S. Dep't of Health and Human Services, *et al.*, Defendants.	Case No.: 4:17-cv-5783-HSG **MEMORANDUM ON SCOPE OF THE RECORD**

INTRODUCTION

The Court has ordered the parties to submit briefs "addressing their positions on whether this proceeding is limited to an assessment of the administrative record." Minute Entry, ECF No. 270,

Jan. 29, 2019. The evidence properly available to the Court in this case depends on the issue being addressed. The Court may not consider evidence outside of the administrative record produced by the Agencies – *i.e.*, extra-record evidence – for the purpose of assessing the merits of Plaintiffs' claims, which challenge two final rules issued collectively by three federal agencies,[1] because these claims arise under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, which limits review to the administrative record. The Ninth Circuit has recognized four narrow exceptions to this rule, but none is applicable here. The Ninth Circuit has *not* recognized any freestanding exception for constitutional claims, and many (though not all) district courts asked to create such an exception have properly rejected calls to do so. The few district court decisions that have created such an exception to the record review rule are unpersuasive, for reasons explained below. All of this said, the Court may rely on extra-record evidence for the purposes of resolving other non-merits questions that may be presented in this case, such as questions about plaintiffs' standing and the appropriate scope of any relief that the Court may award to plaintiffs.

During the telephonic hearing held on January 29, 2019, the Court also asked the parties to make final determinations of whether they intend to engage in discovery. Federal Defendants do not intend to take discovery unless the Court permits another party to do so.

ARGUMENT

I. The APA Governs Plaintiffs' Claims

The APA governs all five claims in plaintiffs' Second Amended Complaint. The first three causes of action explicitly invoke the APA. *See* Second Am. Compl. pp. 61-63. The last two causes of action – plaintiffs' Establishment Clause and Equal Protection challenges to the final rules – do not cite the APA. *Id.* at 63-64. But they too are governed by the APA: The APA provides the private right of action necessary for plaintiffs to assert these claims for equitable relief with respect to final agency action. *Lan Thi Hoang v. Burke*, 2017 WL 4443144, at *2 (C.D. Cal. Oct. 3, 2017) ("[W]here a plaintiff fails to establish a private right of action, courts have dismissed cases for failure

[1] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,592 (Nov. 15, 2018).

to state a claim."); *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 796 (9th Cir. 2013) (noting that the APA "provides a cause of action for persons adversely affected or aggrieved by agency action within the meaning of a relevant statute" (internal quotation marks omitted)). Notably, the APA provides that, if certain prerequisites are met, *see* 5 U.S.C. §§ 702, 704, a "reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). Federal Defendants are aware of no statute other than the APA that would provide plaintiffs with a private right of action to raise these constitutional claims.

Plaintiffs also cannot invoke the doctrine of nonstatutory review of agency action to sue directly under the First Amendment and Fifth Amendment. "The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires." *R.I. Dep't of Envtl. Mgmt. v. United States ("RIDEM")*, 304 F.3d 31, 41 (1st Cir. 2002). But another court in this circuit noted that, in the Ninth Circuit, the doctrine has been limited to labor relations law, and it had "been unable to locate a single Ninth Circuit case that ever seriously considered applying nonstatutory review outside the context of labor relations law." *Cal. Sportfishing Prot. All. v. U.S. Bureau of Reclamation*, 2015 WL 6167521, at *11 (N.D. Cal. Oct. 20, 2015).

Even if the doctrine of nonstatutory review were not limited to the field of labor-relations law in this circuit, it would not be available here. As the First Circuit explained in "[t]he most frequently cited modern articulation of the doctrine," *id.* at 10, two factors must be present to invoke the doctrine: (1) nonstatutory review may occur only if its absence would " 'wholly deprive the party of a meaningful and adequate means of vindicating its . . . rights,' " *RIDEM*, 304 F.3d at 42; and (2) "Congress must not have clearly intended to preclude review of the agency's particular determination," *id.* at 42–43. Plaintiffs cannot satisfy the first element of this test because they have another means of vindicating their constitutional rights: review under the APA. *See Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 59–60 (1st Cir. 2007) (rejecting attempt by Commonwealth of Puerto Rico to invoke doctrine because APA review was available); *see also Bd.*

of Governors of the Fed. Reserve Sys. v. MCorp Financial, Inc., 502 U.S. 32, 43-44 (1991) (holding that an ultra vires challenge may proceed only if the lack of judicial review "would wholly deprive the [injured party] of a meaningful and adequate means of vindicating its statutory rights"); *Wise v. Glickman*, 257 F. Supp. 2d 123, 127 n.1 (D.D.C. 2003) ("Non-statutory review actions may be proper only when a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision." (citation and internal quotation omitted)); *Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) ("The doctrine does not apply in a case such as this one, where the injury the plaintiff alleges may be fully remedied under a statutorily provided cause of action"). Indeed, assuming the Court concludes that plaintiffs have standing, Federal Defendants do not dispute that the APA provides a mechanism by which the Court may review plaintiffs' constitutional claims. Moreover, as the First Circuit indicated in *Commonwealth of Puerto Rico*, "with respect to the second requirement, although Congress has not explicitly prohibited nonstatutory review in a case such as this, the existence of the APA as a means for reviewing the [agency's] actions at least implies that nonstatutory review is inappropriate." *Id.* at 60.

II. None of the Exceptions to Record Review Apply Here

Under the APA, courts are to evaluate claims on the basis of the administrative record compiled by the agency (or, in this case, agencies), subject to narrow exceptions. Section 706 lists the bases on which courts may compel or set aside agency action found to be unlawful, and then provides that, "[i]n making the foregoing determinations [regarding the lawfulness of agency (in)action], the court shall review the whole record . . . ." 5 U.S.C. § 706. And the Supreme Court long ago held that the whole record means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The Supreme Court has reiterated this conclusion in subsequent decisions. In *Camp v. Pitts*, for example, the Court explained that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 U.S. 138, 142 (1973). And in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985), the Court stated that "[t]he 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." Ninth Circuit decisions reflect the same principle. *See, e.g.*, *Jet Inv., Inc. v. Dep't of Army*, 84 F.3d 1137, 1139 (9th Cir. 1996).

The Ninth Circuit "allows for a court to review material outside of the administrative record" in only "four narrow circumstances." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 600 (9th Cir. 2018). Specifically, the Ninth Circuit has recognized exceptions:

> 1) where the extra-record evidence is necessary to determine whether the agency has considered all relevant factors and has explained its decision;
> 2) where the agency has relied on documents not in the record;
> 3) where supplementing the record is necessary to explain technical terms or complex subject matter; or
> 4) where plaintiffs make a showing of agency bad faith.

Id. (quotation marks omitted). As the Ninth Circuit has explained, "The scope of these exceptions permitted by our precedent is constrained, so that the exception does not undermine the general rule. Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise, and decision-making." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Plaintiffs bear the burden of demonstrating that the administrative record is inadequate. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

None of these exceptions applies here. Indeed, Federal Defendants argued in their opposition to Plaintiffs' second preliminary injunction motion that plaintiffs' use of extra-record evidence was improper because none of these exceptions applied, Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (Second), ECF No. 198, Jan. 3, 2019, at 16-17, and plaintiffs did not attempt to rebut that argument, *see S*tates' Reply in Support of Motion for Preliminary Injunction, ECF No. 218, Jan. 8, 2019, at 12 (arguing simply that the administrative record stands for the same principle as their declarations). Plaintiffs did not, for example, argue that extra-record evidence was necessary to determine whether the Agencies considered all of the relevant factors and explained their decision.

Instead, they improperly used extra-record evidence – primarily in the form of declarations created for the purposes of this litigation – to challenge the correctness of the Agencies' evaluation of the relevant factors. *See* PI Mtn., ECF No. 174, Dec. 19, 2018, at 18-20; *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record."). Plaintiffs also did not argue that the Agencies relied on any documents not in the administrative record, or that supplementing the record is necessary to explain technical terms or complex subject matter. As the Federal Defendants pointed out, neither of these exceptions is applicable here. Finally, the Agencies did not act in bad faith, and plaintiffs have not alleged or shown that they have. *See Organic Pastures Dairy Co., LLC v. Sebelius*, 2013 WL 4648548, at *2 (E.D. Cal. Aug. 29, 2013) ("For the bad faith exception to apply, there must be a strong showing of bad faith or improper behavior."). Indeed, when the applicability of these exceptions was put into issue in the preliminary injunction briefing, plaintiffs did not attempt to make any showing of bad faith. Because no exception applies, plaintiffs cannot rely on extra-record evidence to support any of their claims.[2]

Moreover, "even if [an] enumerated exception[ ] did apply, it would be of no matter, because exceptions to the normal rule regarding consideration of extra-record materials only apply to information available at the time, not post-decisional information," *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 600 (9th Cir. 2018), and the declarations submitted by Plaintiffs were created after the final rules were issued. *See id.* at 600 (rejecting use of declaration created after decision).

III. There Is No Freestanding Exception to Record Review for Constitutional Claims

During the oral argument on plaintiffs' preliminary injunction motion, the Court asked

[2] As plaintiffs are not entitled to rely on any extra-record evidence with respect to the merits of their claims, they are necessarily disentitled from taking discovery to supplement the record. *See generally Haiping Su v. Nat'l Aeronautics & Space Admin.*, 2010 WL 11586743, at *3 (N.D. Cal. June 16, 2010); *City of Santa Clarita v. U.S. Dep't of Interior*, 2005 WL 2972987, at *1 (C.D. Cal. Oct. 31, 2005).

whether the record-review rule applies to claims alleging a violation of the Constitution. Tr. at 38, lns. 10-12. It does. Section 706 addresses claims that raise constitutional challenges to final agency actions – such as the rules at issue here – and it provides that such claims shall be evaluated based on a "review [of] the whole record." 5 U.S.C. § 706. A contrary rule – one admitting of a special exception for constitutional claims – would "incentivize every unsuccessful party to agency action to allege . . . constitutional violations to trade in the APA's restrictive procedures" for the Federal Rules of Civil Procedure. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1238 (D.N.M. 2014). What is more, Federal Defendants are aware of no Ninth Circuit decision recognizing an exception to the record review rule for constitutional claims. Many district courts have rejected requests to create any such exception. *See Jiahao Kuang v. U.S. Dep't of Defense*, 2019 WL 293379, at *2-3 (N.D. Cal. Jan. 23, 2019); *Moralez v. Perdue*, 2017 WL 2264855, at *3 (E.D. Cal. May 24, 2017); *Bellion Spirits v. United States*, 335 F. Supp. 3d at 43-44 (D.D.C. 2018); *Chiayu Chang v. United States Citizenship and Immigration Servs.*, 254 F. Supp. 3d 160, 161-163 (D.D.C. 2017); *Jarita Mesa Livestock Grazing Ass'n*, 58 F. Supp. 3d at 1232–33, 1238; *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10–11 (D.R.I. 2004).

Some district courts in this circuit have recognized an exception for constitutional claims, but their reasoning is unpersuasive. For example, *Karnoski v. Trump,* 2018 WL 1880046, at *1 (W.D. Wash. Apr. 19, 2018); *Bolton v. Pritzker,* 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016); and *Grill v. Quinn*, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012) all permitted discovery on constitutional claims, primarily based on the theory that "a direct constitutional challenge is reviewed independent of the APA."[3] *Karnoski*, 2018 WL 1880046, at *1; *Bolton,* 2016 WL 4555467, at *4; and *Grill*, 2012 WL 174873, at *2. But as noted earlier, *see* pp. 3-4 above, a direct constitutional challenge – i.e., nonstatutory review – is not available here because review is available under the APA. The Court in *California v. Ross*, 18-cv-1865-RS, ECF No. 76, also permitted discovery on a

[3] *Karnoski* also questioned whether the APA applied to the claims in that case. 2018 WL 1880046, at *1. Note, the government has filed a mandamus petition in the Ninth Circuit challenging the District Court's July 27, 2018 discovery order in *Karnoski*. *Trump v. United Stated Dist. Ct.*, 18-72159, Docket No. 1 (9th Cir.).

constitutional claim. It tied its holding, however, to a decision by a court in the Southern District of New York addressed to the same agency action, which concluded that "Plaintiffs had made a strong showing of pretext or bad faith on the part of agency-decision makers," *New York v. U.S. Dep't of Commerce*, 2018 WL 5791968, at *1 (S.D.N.Y. Nov. 5, 2018); *see also Jiahao Kuang*, 2019 WL 293379, at *3 (offering this interpretation of the discovery order in *California v. Ross*). While Federal Defendants disagree with the discovery orders in the *California v. Ross* and *New York* cases, *if* a strong showing of pretext or bad faith is made, discovery is appropriate under the well-recognized exception to the administrative record rule set out in Ninth Circuit precedent; there is no need to resort to any supposed exception to the record-review rule for constitutional claims.

All of this said, the Court may rely on extra-record evidence for purposes of resolving other non-merits questions that may be presented in this case, such as questions about plaintiffs' standing and the appropriate scope of any relief that the Court may award to plaintiffs. The APA's record-review limitation does not reach topics beyond the merits of the claims. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 2018 WL 6660080, at *6 (N.D. Cal. Dec. 19, 2018) (rejecting the argument that the APA prohibited the court from considering extra-record evidence for purposes of assessing, in the context of a preliminary injunction motion, the balance of equities and the public interest).

CONCLUSION

For the reasons stated above, with respect to the merits of plaintiffs' claims, the Court should base its review on the administrative record compiled by the Agencies.

Dated: February 12, 2019

Respectfully submitted,

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