IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY; ET AL, PLAINTIFFS, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; et al., DEFENDANTS.	CIVIL ACTION NO. 3:21-CV-04370-TAD-KDM

Motion to Order Completion of the Administrative Record

For the reasons discussed in the accompanying memorandum of law, Plaintiff States move for an order compelling Defendants to complete the administrative record. Specifically, Plaintiff States identify two categories on which the lodged administrative record is incomplete: White House influence and outside influence. The shortcomings in the lodged administrative record make an order compelling completion necessary to ensure the Court has a full administrative record to review.[1]

Respectfully Submitted,

Dated: April 19, 2022

/s/ Elizabeth B. Murrill

ELIZABETH B. MURRILL (La #20685)
Solicitor General
J. SCOTT ST. JOHN (La #36682)
Deputy Solicitor General
MORGAN BRUNGARD*
Assistant Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766

[1] Plaintiff States and Defendants have attempted to negotiate a resolution to these issues, but were unable to come to an agreement. Defendants oppose the motion.

murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov
brungardm@ag.louisiana.gov

Counsel for the State of Louisiana

STEVE MARSHALL
Alabama Attorney General
/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.*
Solicitor General
Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov

Counsel for the State of Alabama

TREG R. TAYLOR
Attorney General of Alaska
/s/ Charles E. Brasington
Charles E. Brasington
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-6612
charles.brasington@alaska.gov

Counsel for the State of Alaska

MARK BRNOVICH
Arizona Attorney General
/s/ Robert J. Makar
Robert J. Makar*
Assistant Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
Tel: (602) 542-4389
Robert.Makar@azag.gov
ACL@azag.gov

Counsel for the State of Arizona

AUSTIN KNUDSEN
Montana Attorney General
/s/Kristin Hansen
Kristin Hansen*
Lieutenant General
David M.S. Dewhirst*
Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov

Counsel for the State of Montana

DOUGLAS J. PETERSON
Nebraska Attorney General
/s/ James A. Campbell
James A. Campbell
Solicitor General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682
jim.campbell@nebraska.gov

Counsel for the State of Nebraska

WAYNE STENEHJEM
North Dakota Attorney General
*/s/ Matthew Sagsveen*___
Matthew Sagsveen
Solicitor General
Director of Civil Litigation, Natural
Resources, and Indian Affairs Division
North Dakota Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509
masagsve@nd.gov

Counsel for the State of North Dakota

LESLIE RUTLEDGE
Arkansas Attorney General
/s/ Dylan L. Jacobs
Dylan L. Jacobs
Assistant Solicitor General
Office of the Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-2007
Dylan.Jacobs@arkansasag.gov

Counsel for the State of Arkansas

ASHLEY MOODY
Florida Attorney General
/s/ Natalie P. Christmas
Natalie P. Christmas
Assistant Attorney General of Legal Policy
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
natalie.christmas@myfloridalegal.com

Counsel for the State of Florida

CHRISTOPHER M. CARR
Georgia Attorney General
/s/ Stephen J. Petrany
Stephen Petrany
Solicitor General
Ross W. Bergethon
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Counsel for the State of Georgia

THEODORE E. ROKITA
Indiana Attorney General
/s/Thomas M. Fisher
Thomas M. Fisher*
Solicitor General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204

DAVE YOST
Ohio Attorney General
/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General
30 E. Broad St., 17th Floor
Columbus, OH 43215
bflowers@ohioAGO.gov

Counsel for the State of Ohio

JOHN M. O'CONNOR
Oklahoma Attorney General
/s/ Mithun Mansinghani
Mithun Mansinghani*
Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-4392
Mithun.Mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

ALAN WILSON
South Carolina Attorney General
/s/ Thomas T. Hydrick
Thomas T. Hydrick
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4127
thomashydrick@scag.gov

Counsel for the State of South Carolina

JASON R. RAVNSBORG
South Dakota Attorney General
/s/David M. McVey
David M. McVey
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215
david.mcvey@state.sd.us

Tom.fisher@atg.in.gov

Counsel for the State of Indiana

JEFFREY S. THOMPSON
Iowa Solicitor General
/s/ Samuel P. Langholz
Samuel P. Langholz*
Assistant Solicitor General
Office of the Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov

Counsel for the State of Iowa

DEREK SCHMIDT
Kansas Attorney General
/s/ Shannon Grammel
Shannon Grammel
Deputy Solicitor General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
Email: shannon.grammel@ag.ks.gov

Counsel for the State of Kansas

DANIEL CAMERON
Attorney General
/s/ Jeremy J. Sylvester
Jeremy J. Sylvester*
Assistant Attorney General
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Jeremy.Sylvester@ky.gv

Counsel for the Commonwealth of Kentucky

LYNN FITCH
Attorney General of Mississippi
/s/Whitney H. Lipscomb
Whitney H. Lipscomb*

Counsel for the State of South Dakota

HERBERT H. SLATERY III
Attorney General and Reporter of Tennessee
/s/ Andree S. Blumstein
Andree S. Blumstein*
Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3492
Andree.Blumstein@ag.tn.gov

Counsel for the State of Tennessee

SEAN D. REYES
Utah Attorney General
/s/ Melissa A. Holyoak
Melissa A. Holyoak
Solicitor General
Utah Attorney General's Office
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
385.271.2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

BRIDGET HILL
Wyoming Attorney General
/s/ Ryan Schelhaas
Ryan Schelhaas*
Chief Deputy Attorney General
Wyoming Attorney General's Office
Attorneys for the State of Wyoming
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov
Counsel for the State of Wyoming

PATRICK MORRISEY
West Virginia Attorney General
/s/ Lindsay S. See
Lindsay S. See
Solicitor General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305

Deputy Attorney General
John V. Coghlan*
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680
Counsel for the State of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri
/s/ D. John Sauer
D. John Sauer
Solicitor General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-8870
Fax: (573) 751-0774
John.Sauer@ago.mo.gov

Counsel for the State of Missouri

**Motion for Pro Hac Vice forthcoming*

Lindsay.s.see@wvago.gov
Counsel for the State of West Virginia

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FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY; ET AL, PLAINTIFFS, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; et al., DEFENDANTS.	CIVIL ACTION NO. 3:21-CV-04370-TAD-KDM

Memorandum in Support of Motion to Order Completion of the Administrative Record

Plaintiff States respectfully move for an order compelling Defendants to complete the administrative record. Specifically, Plaintiff States identify two categories on which the lodged administrative record is incomplete: White House influence and outside influence. The shortcomings in the lodged administrative record make an order compelling completion necessary to ensure the Court has a full administrative record to review.[1]

I. The Administrative Record Is Incomplete.

"If a court is never willing to scrutinize agency action, the gates become a cement wall, impervious even to legitimate claims of improper influence." *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 5370101, at *4 (W.D. La. Nov. 17, 2021). Thus, "[t]he 'whole' or 'complete' administrative record" must "include[] all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's decision." *Id.* (collecting cases). And while extra-record discovery is premature at this point, it will be appropriate if Defendants' response

[1] Plaintiffs have conferred with Defendants' counsel and attempted but were unable to resolve the dispute over the record. Defendants oppose the Motion.

to the Court's record-completion order demonstrates that "'there was such failure to explain administrative action as to frustrate judicial review,' or, if administrative findings were made at the time of the challenged action, upon a 'strong showing of bad faith or improper behavior' on the part of the agency." *La Union Del Pueblo Entero v. FEMA*, 2011 WL 1230099, at *9 (S.D. Tex. Mar. 30, 2011); *accord Louisiana Sportsmen All., LLC v. Vilsack*, 2013 WL 12182156, at *2 (W.D. La. Sept. 4, 2013) ("In instances where 'the agency considered evidence omitted from the administrative record', a court may consider 'extra-record' evidence.").

The administrative record submitted to the Court is suspect at best and contains clear gaps that fail to disclose political pressure on the agency to issue the Head Start Mandate. Two areas in particular reveal gaps in the record lodged: White House influence and outside influence.

First, it is clear that the Head Start Mandate was part of a White House-directed policy push this Fall that included several other mandates. The President's September 9, 2021 "Path Out of the Pandemic" plan promised vaccination mandates from Head Start, the Occupational Health and Safety Administration (OSHA), the Centers for Medicare and Medicaid Services (CMS), the General Services Administration (GSA), and the Office of Personnel Management (OPM). Demonstrating the politically driven nature of the Head Start Mandate, Defendants include in the administrative record two White House reports, including the Path Out of the Pandemic plan. AR 00601, 00628.

Despite the obvious White House influence, the record lodged by Defendants utterly lacks any communications, emails, meeting agendas, white papers, directives, memos, or any other materials from the White House other than the publicly available documents noted above. It is simply not believable that the Head Start Mandate was published without any prior consultation, review, and approval from the White House; no interagency review or coordination with other interested agencies such as CMS, OSHA, GSA, and OPM; or no interaction between HHS and the Office of Information and Regulatory Affairs (OIRA) and Office of Management and Budget (OMB). Such consultations

are routine for significant regulatory actions. Yet Defendants ask the Court to accept that they did not occur on a centerpiece of the Administration's COVID strategy.

Second, the lodged record contains significant gaps regarding HHS's consultation with outside entities and experts. Such consultation is required by statute. *See* 42 U.S.C. § 9836a(a)(2)(A) ("In developing any modifications" to the Head Start standards the Secretary must "consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs."). But the record does not contain meeting notes, expert reports, testimony, or email exchanges.

What's more, it is clear that the Administration consulted with unions in the development of CDC school masking policies. *See, e.g.*, Joe Schoffstall, *Teachers unions influenced last-minute CDC school guidance, received copies before public release, emails show*, Fox News (Oct. 20, 2021), https://fxn.ws/3O7ZUDQ. The Final Rule preamble states that HHS did consult the recommendations of the CDC. 86 Fed. Reg. at 68,054. If that is so, the outside input CDC relied upon from the teachers unions should also be included in the record. And if HHS followed CDC's path and consulted teachers unions directly, it must disclose these communications. Finally, such ex parte consultations would undermine Defendants' claim that they did not have time to conduct a full public notice-and-comment period.

These two sets of omissions are material because Plaintiff States claim that the rationale provided in the Final Rule is not the actual reason for the Head Start Mandate. Indeed, the Fifth Circuit has already found that another mandate stemming from the Path Out of the Pandemic Plan was based on pretextual reasons. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 614 (5th Cir. 2021). And it is particularly important for the Court to have these items before it when conducting judicial

review. *Cf. Louisiana v. Biden*, 2021 WL 5370101, at *5 ("It is important in this case for this Court to review those items in order to determine . . . whether the postponement or cancellation of these Lease Sales are pretextual."). The omissions are directly relevant to many of the "interesting issues which will warrant more discussion later" that the Court flagged in its preliminary injunction ruling. *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 16571, at *14 (W.D. La. 2022); *see also, e.g.*, *id.* ("If many Head Start programs will close, is the Head Start Mandate defeating the purpose of the Head Start Program?").

"Meaningful judicial review" of these claims requires Defendants "to disclose the basis of [their] action" and "does not permit an agency to obscure the actual bases for its conduct." *Louisiana v. Biden*, 2021 WL 5370101, at *4 (citing *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019)). And even though there is ample evidence of bad faith and pretext, Plaintiff States' showing of a clear gap in White House materials in the record is sufficient to show incompleteness. *See Texas Steel Co. v. Donovan*, 93 F.R.D. 619, 621 (N.D. Tex. 1982) ("Plaintiff does not have to show that the agency acted in 'bad faith,' before such discovery will be allowed, plaintiff merely has to produce reasonable evidence so that the Court may determine whether the 'whole' record has been filed.").[2] Because Defendants were required to offer "genuine justifications, including 'unwritten

[2] Even if a bad faith showing were required at this stage, which it is not, Plaintiff States have met this burden by pointing to serious gaps in the decisionmaking process that required White House consultation, review, and signoff but are absent from the record. *See Schaghticoke Tribal Nation v. Norton*, 2007 WL 867987, at *3 (D. Conn. Mar. 19, 2007) (because of "the difficulty the moving party will have in producing evidence of wrongdoing before they have had an opportunity to conduct discovery," "it is improper to 'require [the moving party] to come forward with conclusive evidence of political improprieties at a point when they are seeking to discover the extent of those improprieties'"); *see also Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997) ("This is especially true given that agency officials are not likely to keep a written record of improper political contacts." *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997). The gaps identified by Plaintiff States easily meet their burden of "supply[ing] sufficient evidence of improper political influence on agency decisionmaking as to raise suspicions that defy easy explanations." *Schaghticoke Tribal Nation v. Norton*, 2007 WL 867987, at *3.

justifications,'" and have failed to do so in the lodged record, the record is incomplete and must be supplemented. *Id.*; *see also id. See Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981) (Higginbotham, J.) ("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.").

II. The Court Should Order Completion of the Record.

An order compelling Defendants to complete the record is the correct response to Defendants' lodging of an incomplete record. If Defendants fail to supply a complete record in response to the Court's order, then limited extra-record discovery may be appropriate. *See, e.g.*, *Williams v. Roche*, 2002 WL 31819158, at *3 (E.D. La. Dec. 12, 2002) ("Plaintiff may be permitted some limited discovery to explore whether the agency considered other evidence, either directly or indirectly, in reaching its decision and to determine whether the administrative record is actually complete."); *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 34 (N.D. Tex. 1981) (Higginbotham, J.) (extra record discovery's "primary function is to offer assurance that the administrative record is complete in areas where completeness is suspect"). Indeed, in the past, this Court has issued such a completion order in response to very similar gaps in lodged administrative records. *See Louisiana v. Biden*, 2021 WL 5370101, at *5 ("Any documents and materials directly or indirectly considered by these government agencies, including documents and materials from the White House, are subject to judicial review and are to be filed in the AR."); *see also id.* ("It is important in this case for this Court to review those items in order to determine whether there was improper influence, whether there was collusion, and/or whether the postponement or cancellation of these Lease Sales are pretextual."). Accordingly, the Court should compel Defendants to complete the record. *Cf. Louisiana Sportsmen All., LLC*, 2013 WL 12182156, at *2 ("[T]here is nothing before this court which proves the administrative record filed herein contains all evidence considered by the defendants in reaching its decision.").

Plaintiff States request that the Court order record completion in the following two areas:

1. Meetings, communications, correspondence, phone calls, documents, input, approvals, or any other evidence of involvement of the White House, OSHA, CMS, GSA, OPM, OIRA, or OMB in HHS's promulgation of the Head Start Mandate.

2. Meetings, communications, documents, input, approvals, or any other evidence of involvement of the National Head Start Association, the National School Boards Association, the American Federation of Teachers, the National Education Association, or other stakeholder groups in HHS's promulgation of the Head Start Mandate.

Conclusion

For the foregoing reasons, this Court should grant Plaintiff States' motion for an order compelling Defendants to complete the administrative record.

Respectfully Submitted,

Dated: April 19, 2022

Respectfully Submitted,

/s/ Elizabeth B. Murrill

ELIZABETH B. MURRILL (La #20685)
Solicitor General
J. SCOTT ST. JOHN (La #36682)
Deputy Solicitor General
MORGAN BRUNGARD*
Assistant Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, Louisiana 70804
Tel: (225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov
brungardm@ag.louisiana.gov
Counsel for the State of Louisiana

STEVE MARSHALL
Alabama Attorney General
/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.*
Solicitor General

AUSTIN KNUDSEN
Montana Attorney General
/s/ Kristin Hansen
Kristin Hansen*

Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Counsel for the State of Alabama

TREG R. TAYLOR
Attorney General of Alaska
/s/ Charles E. Brasington
Charles E. Brasington
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-6612
charles.brasington@alaska.gov
Counsel for the State of Alaska

MARK BRNOVICH
Arizona Attorney General
/s/ Robert J. Makar
Robert J. Makar*
Assistant Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
Tel: (602) 542-4389
Robert.Makar@azag.gov
ACL@azag.gov
Counsel for the State of Arizona

LESLIE RUTLEDGE
Arkansas Attorney General
/s/ Dylan L. Jacobs
Dylan L. Jacobs
Assistant Solicitor General
Office of the Arkansas Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-2007
Dylan.Jacobs@arkansasag.gov
Counsel for the State of Arkansas

ASHLEY MOODY
Florida Attorney General

Lieutenant General
David M.S. Dewhirst*
Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
Counsel for the State of Montana

DOUGLAS J. PETERSON
Nebraska Attorney General
/s/ James A. Campbell
James A. Campbell
Solicitor General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682
jim.campbell@nebraska.gov
Counsel for the State of Nebraska

WAYNE STENEHJEM
North Dakota Attorney General
/s/ Matthew Sagsveen
Matthew Sagsveen
Solicitor General
Director of Civil Litigation, Natural Resources, and Indian Affairs Division
North Dakota Office of Attorney General
500 N. 9th Street
Bismarck, ND 58501-4509
masagsve@nd.gov
Counsel for the State of North Dakota

DAVE YOST
Ohio Attorney General
/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General
30 E. Broad St., 17th Floor
Columbus, OH 43215
bflowers@ohioAGO.gov

Counsel for the State of Ohio

/s/ Natalie P. Christmas
Natalie P. Christmas
Assistant Attorney General of Legal Policy
Office of the Attorney General
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
natalie.christmas@myfloridalegal.com
Counsel for the State of Florida

CHRISTOPHER M. CARR
Georgia Attorney General
/s/ Stephen J. Petrany
Stephen Petrany
Solicitor General
Ross W. Bergethon
Deputy Solicitor General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Counsel for the State of Georgia

THEODORE E. ROKITA
Indiana Attorney General
/s/Thomas M. Fisher
Thomas M. Fisher*
Solicitor General
Indiana Government Center South
302 W. Washington St., 5th Floor
Indianapolis, IN 46204
Tom.fisher@atg.in.gov
Counsel for the State of Indiana

JEFFREY S. THOMPSON
Iowa Solicitor General
/s/ Samuel P. Langholz
Samuel P. Langholz*
Assistant Solicitor General
Office of the Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
jeffrey.thompson@ag.iowa.gov
sam.langholz@ag.iowa.gov
Counsel for the State of Iowa

DEREK SCHMIDT

JOHN M. O'CONNOR
Oklahoma Attorney General
/s/ Mithun Mansinghani
Mithun Mansinghani*
Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-4392
Mithun.Mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

ALAN WILSON
South Carolina Attorney General
/s/ Thomas T. Hydrick
Thomas T. Hydrick
Assistant Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4127
thomashydrick@scag.gov

Counsel for the State of South Carolina

JASON R. RAVNSBORG
South Dakota Attorney General
/s/David M. McVey
David M. McVey
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Phone: (605) 773-3215
david.mcvey@state.sd.us

Counsel for the State of South Dakota

HERBERT H. SLATERY III
Attorney General and Reporter of Tennessee
/s/Andree S. Blumstein
Andree S. Blumstein*
Solicitor General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3492
Andree.Blumstein@ag.tn.gov

Kansas Attorney General
/s/ Shannon Grammel
Shannon Grammel
Deputy Solicitor General
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
Email: shannon.grammel@ag.ks.gov
Counsel for the State of Kansas

DANIEL CAMERON
Attorney General
/s/ Jeremy J. Sylvester
Jeremy J. Sylvester*
Assistant Attorney General
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Jeremy.Sylvester@ky.gv
Counsel for the Commonwealth of Kentucky

LYNN FITCH
Attorney General of Mississippi
/s/Whitney H. Lipscomb
Whitney H. Lipscomb*
Deputy Attorney General
John V. Coghlan*
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
550 High Street
Jackson, MS 39201
Tel: (601) 359-3680
Counsel for the State of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri
/s/ D. John Sauer
D. John Sauer
Solicitor General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-8870
Fax: (573) 751-0774

Counsel for the State of Tennessee

SEAN D. REYES
Utah Attorney General
/s/ Melissa A. Holyoak
Melissa A. Holyoak
Solicitor General
Utah Attorney General's Office
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
385.271.2484
melissaholyoak@agutah.gov

Counsel for the State of Utah

BRIDGET HILL
Wyoming Attorney General
/s/ Ryan Schelhaas
Ryan Schelhaas*
Chief Deputy Attorney General
Wyoming Attorney General's Office
Attorneys for the State of Wyoming
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-5786
ryan.schelhaas@wyo.gov
Counsel for the State of Wyoming

PATRICK MORRISEY
West Virginia Attorney General
/s/ Lindsay S. See
Lindsay S. See
Solicitor General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
Lindsay.s.see@wvago.gov
Counsel for the State of West Virginia

John.Sauer@ago.mo.gov
Counsel for the State of Missouri

**Motion for Pro Hac Vice forthcoming*

EXHIBIT 1

From: Clendenen, Michael P. (CIV)
To: Murrill, Elizabeth
Cc: St. John, Joseph; Barbalich, Lauren; Edelman, Christopher (CIV); McMahon , Madeline M. (CIV); Edwards, Jerry (USALAW); Sarah Harbison; Jeffrey Schwab; Daniel Suhr
Subject: RE: Louisiana v. Becerra, 3:21-cv-04370 (W.D. La.)
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Good evening,

Defendants oppose both motions.

Respectfully,

Michael P. Clendenen
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Room 12028
Washington, DC 20005
(P): 202-305-0693
(C): 202-532-5747
michael.p.clendenen@usdoj.gov

From: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>
Sent: Monday, April 18, 2022 4:40 PM
To: Clendenen, Michael P. (CIV) <Michael.P.Clendenen@usdoj.gov>
Cc: St. John, Joseph <StJohnJ@ag.louisiana.gov>; Barbalich, Lauren <BarbalichL@ag.louisiana.gov>; Edelman, Christopher (CIV) <Christopher.Edelman@usdoj.gov>; McMahon , Madeline M. (CIV) <Madeline.M.McMahon@usdoj.gov>; Edwards, Jerry (USALAW) <JEdwards1@usa.doj.gov>; Sarah Harbison <sarah@pelicaninstitute.org>; Jeffrey Schwab <jschwab@libertyjusticecenter.org>; Daniel Suhr <dsuhr@libertyjusticecenter.org>
Subject: [EXTERNAL] RE: Louisiana v. Becerra, 3:21-cv-04370 (W.D. La.)

Plaintiff States in the above captioned case intend to file two motions tomorrow.

The first is a motion to compel completion of the record. The lodged administrative record contains significant gaps in two areas. First, the record is devoid of communications with the White House despite obvious Presidential and interagency involvement in the promulgation of the final rule. Second, the record lacks communications between the agency and outside groups such as the National Head Start Association and American Federation of Teachers.

The second is a motion to stay the briefing schedule on Defendants' motion to

dismiss/motion for summary judgment pending resolution of Plaintiff States' motion to complete the record. Plaintiff States' response would be due 14 days after resolution of the record completion motion.

Please let us know the federal government's position on these two motions by noon E.T. tomorrow.
Thanks,
Liz Murrill

Elizabeth B. Murrill
Solicitor General
Office of Attorney General Jeff Landry
Direct: (225) 326-6766 Cell: (225) 456-7544
murrille@ag.louisiana.gov
www.AGJeffLandry.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY; ET AL, PLAINTIFFS, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; et al., DEFENDANTS.	CIVIL ACTION NO. 3:21-CV-04370-TAD-KDM

[PROPOSED] ORDER

The Court has considered Plaintiff States' Motion to Compel Completion of the Administrative Record. Having determined that the administrative record is **INCOMPLETE**,

IT IS ORDERED the Government Defendants shall complete the AR, as directed in the accompanying ruling, within 30 days of this Order.

Signed this ___ day of ___________, 2022

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TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE