JOSEPH H. HUNT
Assistant Attorney General, Civil Division
BILLY J. WILLIAMS
United States Attorney
AUGUST E. FLENTJE
Special Counsel, Civil Division
WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section
COURTNEY E. MORAN
Trial Attorney
BRIAN C. WARD
Senior Litigation Counsel
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 616-9121
brian.c.ward@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JOHN DOE #1; JUAN RAMON MORALES; JANE DOE #2; JANE DOE #3; IRIS ANGELINA CASTRO; BLAKE DOE; BRENDA VILLARRUEL; GABINO SORIANO CASTELLANOS; and LATINO NETWORK,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of the Department of Homeland Security; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of the Department of Health and Human Services; U.S. DEPARTMENT OF STATE; MICHAEL POMPEO, in his official capacity as Secretary of State; and UNITED STATES OF AMERICA,

Defendants.

CASE NO. 3:19-cv-01743-SI

DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION TO COMPEL COMPLETION OF ADMINISTRATIVE RECORD AND PRIVILEGE LOG

INTRODUCTION

Defendants respectfully respond to the Court's February 11, 2020, Order providing Defendants until February 28, 2020, to supplement the administrative record and privilege log as necessary to ensure that the full administrative record is lodged and to file a supplemental response to Plaintiffs' motion to compel. ECF No. 125.

As explained below, Defendants have already lodged a complete administrative record (indeed, Defendants' submission is over-inclusive) that will allow the Court to "determine whether the agency action was final" and to address Plaintiffs' claims. ECF No. 83 at 9. Simply put, Defendants are aware of no additional documents that should be included in the record. Plaintiffs' Motion to Compel Completion of Administrative Record and Privilege Log, ECF No. 119, identifies a limited set of documents that Plaintiffs believe should be added to the record, but none of those documents are properly part of the record for the reasons Defendants have explained in their Response to Plaintiffs' Motion to Compel, ECF No. 124.

ARGUMENT

There is no "final agency action" in this case that would permit APA review. *See* 5 U.S.C. § 704; *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 890-93 (1990). When a party brings a challenge to a final agency action or decision under the APA, review of the agency's decision is limited to the record that was before the agency decision-makers "pertaining to the merits of its *decision*." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (emphasis added); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("review is to be based on the full administrative record *that was before the Secretary at the time he made his decision*" (emphasis added)); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) ("judicial review of agency action is limited to review of *the record on which the administrative decision was based*" (emphasis added)). Thus, an

administrative record relates to a particular final agency action or decision, and the decision being challenged defines the scope of the relevant administrative record, which includes all documents the agency decision-maker considered directly or indirectly in reaching that particular decision. Plaintiffs have never identified such a decision in this case, because none exists.

The President issued the "Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System" on October 4, 2019. 84 Fed. Reg. 53,991. The Proclamation, as a Presidential action, is not an agency action that is reviewable under the APA, and so there is no administrative record for the Proclamation itself. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) ("We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards."). The Court has already correctly observed that,"[b]ecause the President is not an agency, a court does not have authority under [the APA] to review actions such as the Proclamation." ECF No. 83 at 2; *see also id*. at 10 ("The Court also notes that the primary argument raised by Plaintiffs is the direct challenge to the Proclamation, which does not involve the requested administrative record.").

The Proclamation had an effective date of November 3, 2019. 84 Fed. Reg. 53,994. On November 2, 2019, however, this Court issued a Temporary Restraining Order, ECF No. 33, and Defendants complied with that Order by not putting the Proclamation into effect. During the short window between when the Proclamation was issued on October 4, 2019, and this Court's order on November 2 enjoining the government "from taking any action to implement or enforce Presidential Proclamation No. 9945," *id.* at 18, the State Department did not take any action that could be considered final agency action under the APA. As Defendants have previously explained, the government's position is that final agency action would occur in a case like this

only when the State Department issues a decision denying (or granting) a visa pursuant to the Proclamation, and such a decision is not reviewable under the APA (or otherwise) under the doctrine of consular nonreviewability. *See* ECF No. 84 at 26-29; *Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir. 2018). But even putting that argument to the side, in the short period between the Proclamation and this Court's TRO, the State Department did not issue any rule or take any other regulatory action that created or imposed any legal requirements, which is required before a court can find a final agency action. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61-62 (2004) (setting out APA's definition of agency action). As Defendants have explained, the State Department's interpretive guidance in the Foreign Affairs Manual is not final agency action for purposes of APA review. ECF No. 124 at 2 n.1; *Whitewater Draw Nat. Res. Conservation Dist. v. Nielsen*, No. 3:16-CV-02583, 2018 WL 4700494, at *4 (S.D. Cal. Sept. 30, 2018) (guidance in agency manual is not final agency action). Rather, the State Department simply took steps to notify consular officers of the requirements created by the Proclamation and to prepare consular officers to gather the information that they are required by the Proclamation to obtain to make the necessary determinations. This is therefore not the kind of case that could generate a large administrative record. Instead, the relevant universe of documents is limited and consists principally of the State Department's communications and informal actions while preparing to implement the Proclamation.

On November 15, 2019, this Court, recognizing the limited time the government would have to put together a record before the preliminary injunction hearing, ordered the government to produce a partial administrative record. ECF No. 83. On November 20, 2019, after exercising best efforts to assemble a record that contains information related to the interrupted implementation of the Proclamation, the government produced a record. Because there is no final agency action in this case to define the scope of the relevant administrative record, the

government broadly included documents related to the State Department's implementation of the Proclamation. And because the State Department's communications and guidance were largely based on the Proclamation itself and there was a very limited universe of documents related to implementation, the government was able to assemble almost all of the relevant documents that would make up the full administrative record even on that short timeline.

On January 10, 2020, Defendants lodged the full administrative record. ECF No. 118. As noted in Defendants' Response to the Motion to Compel, this was a "complete administrative record containing all documents the State Department considered, either directly or indirectly," in preparing to implement the Proclamation, including documents related to any definitions or methodology, and related to the amendments to the FAM. ECF No. 124 at 2. Plaintiffs complain that the full administrative record contains only eight additional pages that were not in the initial record. Mot., ECF No. 119 at 2. But that is simply because the universe of documents that are related to implementation of the Proclamation before the TRO is quite limited, and because the government initially undertook substantial effort to identify and collect any documents connected to the Proclamation so that its initial submission would be as complete as possible.

Because Plaintiffs have not identified any final agency action that is subject to APA review—which would necessarily narrow the administrative record to documents the agency decision-makers considered in reaching the identified decision or taking the identified action—the government has erred on the side of compiling a record that is over-inclusive. For example, the government has included in the record webinars for consular officers on the implementation of the Proclamation. *See, e.g.*, ECF No. 118, AR70. As set out in these webinars, the determinations required by the Proclamation will be made by consular officers around the world in individual decisions on visa applications based on information provided by a particular visa applicant. *See, e.g.*, ECF No. 118, AR114 (noting decision should consider information in

applicant's medical exam and particular evidence submitted by applicant); AR115 (noting consular officers will need to evaluate applicants verbal statements at the visa interview and consider an applicant's "specific circumstances"); AR115 (noting that assessment of reasonably foreseeable medical costs will require consular officers to use their judgment, request advice as necessary, and that determinations will depend on circumstances of applicant's "specific case"). There is no basis to argue that this informal guidance about what might happen in some hypothetical future visa decision under a Proclamation that was enjoined before taking effect is part of the record of any *final* agency action. *See, e.g.*, *DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) ("courts have defined a nonfinal agency order as one, for instance, that does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action" (internal quotations omitted)). Nonetheless, in an abundance of caution, the government has included even documents of this nature to comply with the Court's order to lodge a full administrative record for the State Department's implementation of the Proclamation.

Not only have Plaintiffs not identified a final agency action, they have not identified any additional documents that should be considered part of any administrative record. In their motion, Plaintiffs cite some documents that they claim should be included, but for the reasons set out in Defendants' Response, there is no merit to any of their claims. *See generally*, ECF No. 124. Among other problems, Plaintiffs have not presented clear evidence that the record is incomplete, as is necessary to rebut the presumption of completeness that attaches to the record the government submitted. *Id.* at 2, 10. Moreover, the Supreme Court has recently held that it is improper for courts to require the government to supplement an administrative record before resolving "threshold arguments" about whether Plaintiffs can raise an APA claim at all. *Id.* at 3; *In re United States*, 138 S. Ct. 443, 445 (2017). Because there is no reviewable final agency

action here, and thus no viable APA claim, the Court should deny Plaintiffs' motion, or at least delay consideration of the motion until Plaintiffs can show that they have raised an APA claim that can survive a motion to dismiss.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Compel Completion of Administrative Record and Privilege Log.

Dated: February 28, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General, Civil Division

BILLY J. WILLIAMS
United States Attorney

AUGUST E. FLENTJE
Special Counsel, Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation,
District Court Section

COURTNEY E. MORAN
Trial Attorney

/s/ Brian C. Ward
BRIAN C. WARD
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 616-9121
brian.c.ward@usdoj.gov

Attorneys for Defendants