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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; KEVIN MCALEENAN, 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

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO COMPEL COMPLETION OF ADMINISTRATIVE RECORD AND PRIVILEGE LOG

ORAL ARGUMENT REQUESTED

Plaintiffs respectfully reassert that Defendants have not lodged with this Court a full version of the administrative record, as has twice now been ordered by the Court. ECF 97; ECF 125, at 2–3. The administrative record that Defendants lodged is deficient in several respects, and Plaintiffs have identified reasonable, non-speculative grounds to support that conclusion. *See Audubon Soc'y of Portland v. Zinke*, 2017 WL 6376464, at *4 (D. Or. Dec. 12, 2017) (stating that standard for ordering completion of the administrative record). Because Defendants have not met their burden to produce the record in full, the Court should grant Plaintiffs' Motion to Compel and order Defendants to complete the record and produce of a privilege log setting forth all claims of privilege, including the deliberative process privilege.

ARGUMENT

I. Defendants' implementation of the Proclamation constitutes final agency action.

Despite the fact that this Court has twice ordered Defendants to produce a complete administrative record, Defendants again claim that "there is no 'final agency action' in this case that would permit APA review," ECF 127, at 1, and for that faulty reason continue to limit the administrative record provided to date to "documents the State Department considered, either directly or indirectly, 'relating to the amendments to the Foreign Affairs Manual and the State Department's "methodology" and other definitions implementing the Proclamation.'" ECF 124, at 2 (so describing the "full" administrative record). But the Court already has rejected that argument, holding that "the State Department's decisionmaking with respect to implementing the Proclamation is direct and immediate and has a direct effect on day-to-day business," as evidenced in part by, among other agency actions, the cable sent to consular officers, the amendments made to the Foreign Affairs Manual, the notice published in *The Federal Register* on October 30, 2019 (focused on how "to implement [the Proclamation] when it goes into effect on November 3, 2019"), and the e-mail notifying immigration attorneys about the Proclamation

and its effects on their clients. ECF 83, at 8 (listing those actions as illustrative of the multiple agency actions Defendants have taken to implement the Proclamation, and which are relevant to the analysis for purposes of APA review). The Court has also ruled that production of the *complete* administrative record is necessary to determine fully and conclusively whether and to what extent final agency action occurred.[1] ECF 83, at 9 ("Without production of the administrative record, it will be difficult conclusively to determine whether the agency action was final."). The Court should reject Defendants' continued efforts to sidestep the Court's orders by limiting the record available for review in this case. As Plaintiffs have explained several times, the Proclamation is not self-executing, and, as this Court has recognized, Defendants have taken several actions to implement the Proclamation, all of which are subject to APA review.[2]

II. Plaintiffs have identified reasonable, non-speculative grounds to conclude that Defendants' current administrative record is incomplete.

Despite Defendants' claims to the contrary, ECF 127 at 5–6, Plaintiffs have presented sufficient evidence that the administrative record produced to date is incomplete. As articulated

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[1] Defendants cite to *In re United States*, 138 S. Ct. 443, 445 (2017), for the proposition 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." ECF 127, at 5. Defendants mischaracterize the Supreme Court's decision, which explicitly was limited to "the specific facts of [the case at hand]," involving threshold issues *not* addressing the existence of final agency action. *In re United States*, 138 S. Ct. at 445. The proposition cannot support Defendants' position here.

[2] Indeed, those actions are consistent with State Department practice, pursuant to which the agency implements policies that pertain to the issuance of immigrant visas. *See* 8 U.S.C. § 1104(a) ("The Secretary of State shall be charged with the administration and the enforcement of the provisions of [the INA] relating to . . . the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas . . . ."); U.S. Dep't of State, About Us—Bureau of Consular Affairs (accessed Mar. 13, 2020), *available at* https://www.state.gov/about-us-bureau-of-consular-affairs ("The Bureau of Consular Affairs formulates and implements policy relating to immigration . . . . Consular Affairs (CA) is the public face of the Department of State for millions of people around the world.").

in Plaintiffs' Motion to Compel, ECF 119, Plaintiffs have identified "reasonable, non-speculative grounds" to believe that additional documents were considered by the State Department but were omitted from the administrative record that Defendants lodged. *See Audubon Soc'y of Portland*, 2017 WL 6376464, at *4. Plaintiffs have also satisfied their burden to describe the omitted materials "with sufficient specificity." *See id.*

A. Comments in response to the emergency notice of information collection

Defendants have improperly withheld public comments the agency received in response to their notice of request for emergency review by the Office of Management and Budget, which was published in *The Federal Register* on October 30, 2019. Indeed, the current administrative record makes clear—although Defendants openly ignore—that the comments were considered by the State Department in "authoriz[ing] consular officers to ask certain immigrant visa applicants about their intended insurance coverage in the United States," and were "necessary to implement Presidential Proclamation 9945." AR 131. Defendants' contrary assertion that "[t]he State Department did not, and need not, consider these comments in implementing the Proclamation," ECF 124, at 4, remains untenable and should be rejected.[3]

Defendants alternative explanation—that they omitted the comments because the comments are not related to the amendments to the Foreign Affairs Manual, the State Department's "methodology," or "other definitions implementing the Proclamation," ECF 124, at 3—must also be rejected for reasons the Court already has identified, ECF 125, at 2–3. The

[3] Public comments are a quintessential component of any complete administrative record. *See, e.g.*, *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1257 (E.D. Cal. 1997). If Defendants are correct that these public comments were never considered by the State Department, notwithstanding the record evidence to the contrary, Defendants effectively have conceded a violation of the APA. *See* 5 U.S.C. § 553(c); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

"complete" administrative record should not and cannot be limited to the topics identified in the Court's earlier administrative record opinion at the preliminary injunction stage.

B. Comments and redactions relating to the public charge interim final rule

Plaintiffs also have pointed to reasonable, non-speculative grounds that Defendants improperly omitted from the record public comments received in response to the public charge rule and questionnaire, and improperly redacted public-charge-related information from certain materials included administrative record. Defendants concede, as they must, that the State Department considered both the public charge rule and the questionnaire, *see* AR 38–63, in implementing the Proclamation. ECF 124, at 4. Consistent with that concession, the administrative record that Defendants lodged contains documents instructing consular officers that their decisions under the Proclamation and the public charge rule overlap in several ways, AR 118, and that the public charge questionnaire "will . . . be useful to posts in adjudicating both Public Charge and the Proclamation," AR 120.

To be able to make those statements, the State Department must have considered—even if indirectly—public charge materials in the Proclamation's implementation. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 51, 555 (9th Cir. 1989) (The "whole record" includes "all documents and materials directly *or indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." (internal quotation marks omitted) (emphasis added)). The public charge comments therefore cannot be excluded from the record, and the Court should order Defendants to supplement the record accordingly and lift the public-charge-related redactions. *See City of Laguna Niguel v. Fed. Emergency Mgmt. Agency*, 2009 WL10687971, at *6 (C.D. Cal. Nov. 20, 2009) ("It is difficult to justify redacting a portion of a document as being

non-responsive . . . while the other portion was indeed considered and has been provided. At the very least, . . . these portions would be a part of the record based on indirect consideration . . . .").

C. Documents relating to decisions about implementation of the Proclamation

With respect to the third category of information that Plaintiffs identify as improperly excluded from the record—documents supporting certain agency decisions relating to the implementation of the Proclamation—Defendants claim that those decisions source solely to the terms of the Proclamation itself. But that is clearly not the case, and the Court should not accept Defendants' efforts to manipulate the terms of the Proclamation to fill clear gaps in its deficient and underinclusive administrative record.

Defendants' decision, for instance, that the Proclamation allows admitted individuals to switch to a non-"approved" health insurance plan once they enter the United States does not at all source or "referenc[e] the terms of the Proclamation," ECF 124, at 6, as Defendants claim. Indeed, the Proclamation's terms not only lack support for that decision, they potentially *contradict it*, creating express penalties for individuals who "circumvent the application of th[e] proclamation through fraud [or] willful misrepresentation of a material fact." AR 5. The current administrative record provides no support for the agencies' decision or how that decision squares with the terms of the Proclamation.

Nor does the current administrative record explain the agencies' decisions to instruct consular posts not to consider whether an "approved" plan covers preexisting medical condition(s), AR 115, and to allow a state-subsidized "family member's plan" to qualify under the Proclamation even though the same plan would not independently qualify as "approved" individual coverage under the Proclamation, AR 94. Neither of these interpretations is clear from the text of the Proclamation. *Cf.* ECF 124, at 6. Both, however, are decisions the agencies

made in implementing the Proclamation, and documents supporting those decisions must therefore be included in the administrative record.

D. Redactions of individual names

Defendants offer no explanation to support their decision to redact the identities of State Department officials who implemented the Proclamation. They improperly place the burden on Plaintiffs to do so, which the Court should reject. Identities of agency officials involved the Proclamation's implementation are discoverable and may shed light on whether the agency satisfied the substantive and procedural requirements of the APA. Defendants cannot arbitrarily decline to provide them.

E. Specific documents and information referred to in the record

Finally, Defendants ignore entirely Plaintiffs' specific requests for information that obviously has been excluded from the administrative record. With respect to these requests—including, for example, Secretary Pompeo's approval of the amendments to the Foreign Affairs Manual, documents referred to in the public charge rule and used by the agency to determine ability to pay for reasonably foreseeable medical costs, documents supporting the Notice of Information Collection calculation, and direct advice the agency gave consular officers during a webinar about how to implement the Proclamation—Plaintiffs have satisfied their burden to identify reasonable, non-speculative grounds to believe that the administrative record currently is incomplete. *See Audubon Soc'y of Portland*, 2017 WL 6376464, at *4. Plaintiffs have also satisfied their burden to do so with specificity. *Id.* All of these documents provide important context for how Defendants intend to implement the Proclamation, including how they intend to make important determinations about an individual's reasonably foreseeable medical costs and the individual's ability to pay those costs.

Defendants cannot simply ignore Plaintiffs' requests, as they seek to do here, nor can they rely on the Court's earlier opinion on the administrative record to limit the documents they are obligated to produce. *See* ECF 124, at 7–8 (citing that limited standard). The Court should order Defendants to supplement the record to include the specific documents that Plaintiffs request.

CONCLUSION

A complete record is essential for the Court to undertake the "substantial inquiry" and "thorough, probing, in-depth review" required by the APA, including to determine whether and to what extent Defendants have engaged in "final agency action" subject to APA review. *Overton Park*, 401 U.S. at 415; *see also Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 976–77 (E.D. Cal. 2012) (full administrative record necessary to determine whether final agency action occurred). Plaintiffs respectfully request that the Court order Defendants to supplement the administrative record as set forth above and in Plaintiffs' Motion, and to produce a privilege log with entries for documents withheld under any claim of privilege.

DATED this 13th day of March, 2020.

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