IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS; STATE OF LOUISIANA, *Plaintiffs*, v. The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendants*.	Civ. Action No. 6:21-cv-00016

PLAINTIFFS' MOTION FOR EXTRA-RECORD DISCOVERY

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INTRODUCTION

On September 1, 2021, the Parties filed a Joint Advisory to address the Court's questions raised in the hearing held on August 23, 2021. ECF No. 97. That submission articulated the Parties' divergent views on the propriety of discovery in this case and set out a schedule for party submissions to assist the Court in making a determination on that issue. On September 8, 2021, Defendants filed the administrative record, triggering the agreed timing of this Motion. ECF No. 99.

SUMMARY OF THE ARGUMENT

Plaintiffs move the Court to approve discovery in this case. Defendants claim discovery is improper and assert that this is a case under the Administrative Procedure Act (APA), and the bare administrative record is therefore sufficient for trial on the merits. They rely on the "record rule" that precludes evidence outside the administrative record but (1) that rule does not apply to many of the issues for the Court's consideration at trial; and (2) even where the record rule does apply, it is subject to important exceptions that are applicable here.

ARGUMENT

Parties are entitled to discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The term "relevant" in Rule 26 is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Although "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable," Fed. R. Civ. P. 26(b)(1), as explained below, information subject to discovery on various issues is admissible evidence at trial and not precluded by the record rule. Discovery on these matters is therefore proper despite the general rule that claims under the APA are limited to review of the administrative record.

In an APA action, the Supreme Court has explained that the "whole record" standard for review, 5 U.S.C. § 706, requires the court to conduct a "thorough, probing, in-depth review." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also id.* at 413-14 n.30, 419. In conducting this review, "[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action." *Id*. at 420. And although "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," *id*. (citing *United States v. Morgan*, 313 U.S. 409 (1941)), such inquiry "may be necessary" to determine "if the Secretary's action was justifiable under the applicable standard." *Id*.

Defendants in this very case implicitly recognized this rule when they submitted two declarations—extra-record evidence—in support of their opposition to the preliminary injunction motion. ECF Nos. 42-5, 42-6. They used these declarations to claim the challenged memoranda are exempt from notice-and-comment rulemaking requirements, ECF No. 42 at 33–36 & n. 5; to oppose Plaintiffs' Article III standing, ECF No. 42 at 11; to argue the public interest factors do not support injunctive relief, ECF No. 42 at 41–43; and to argue against the propriety of a positive (or mandatory) injunction to compel agency action unlawfully withheld, ECF No. 42 at 43–45. Yet Defendants claim that Plaintiffs may not obtain discovery on these same issues—in the same case—because this litigation is limited solely to the contents of the administrative record. Defendants' proposed double standard is not the law.

In its order granting Plaintiffs' motion for preliminary injunction, this Court has also previously recognized that extra-record evidence was both relevant in that stage and will be at trial. *See* ECF No. 79 at 23 & n. 16 (citing evidence submitted by Texas on dropped detainers and noting that "at the preliminary injunction phase," it would accept hearsay statement of ICE officials on effect of memoranda on detainers, implying other evidence on this score would be needed at trial);

id. at 41 (relying on Texas's evidence of mobility of aliens among states to evaluate impact of challenged memoranda); *id*. at 60 (relying on other litigation, outside the administrative record, to evaluate whether final agency action was present); *id*. at 148–50 (evaluating Defendants' evidence of harm—including inhibiting their ability to prioritize limited resources and causing confusion among subordinates—for balance of equities and public interest factors for preliminary injunction); *id*. at 155 (evaluating evidence of mobility of aliens in determining geographic scope of injunction); *id*. at 156 n. 61 ("reserv[ing] ruling on this issue [of positive injunction to compel agency action unlawfully withheld] until later in the litigation"). Plaintiffs are entitled to bolster the extra-record evidence they submitted at the preliminary injunction stage with evidence within the possession of Defendants relevant to these issues. Discovery is necessary for the Court to be presented with the relevant evidence it needs at trial.

The Court's order imposing reporting requirements on Defendants regarding how they are implementing their detention requirements, ECF No. 79 at 158–59, is also consistent with this view. *See* ECF No. 90 at 3–4 ("the Court is using the reporting requirements as a case-management tool to monitor compliance and gather information that would be relevant and helpful for the Court in making a final determination at trial"). Plaintiffs are entitled to discovery on the information subject to the reporting requirements for the same reason the Court has determined it to be relevant for trial, among other issues.

I. The Record Rule Does Not Limit the Evidence Available to Resolve Many Questions

At its core, the record rule is about arbitrary-and-capricious review. "In applying [the arbitrary-and-capricious] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The purpose of the Administrative Record rule during judicial review of the merits of an agency action is to prevent the Court from substituting its judgment for

that of the agency." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. 1:02-cv-199, 2004 WL 3426421, at *5 (D.N.M. Aug. 31, 2004). Thus, the record rule does not govern issues like standing or other jurisdictional issues, the non-merits factors for injunctive relief, or non-arbitrary-and-capricious claims. *See Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) (Kennedy, J.) ("even when judicial review is confined to the record of the agency, as in reviewing informal agency actions, there may be circumstances to justify expanding the record or permitting discovery").

A. The Record Rule Does Not Apply to Jurisdictional Issues

The record rule does not apply to non-merits issues like subject matter jurisdiction, including standing and whether there is final agency action required for claims under the APA.[1] Evidence about such issues does not implicate the record rule because courts consider it "not in order to supplement the administrative record on the merits, but rather to determine [their own] jurisdiction." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 528 (9th Cir. 1997); *see also Sierra Club v. Yeutter*, 911 F.2d 1405, 1421 (10th Cir. 1990). In fact, courts routinely rely on extra-record evidence to support jurisdiction in APA cases. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–54 (2010) (relying on declarations to find that plaintiffs had Article III standing in an APA case); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (same).

Courts also permit plaintiffs discovery to obtain such evidence relevant to the question of whether there is a final agency action under the APA. *See, e.g., Glenwood Springs Citizens' All. v. United States DOI*, Civil Action No. 20-cv-00658-CMA, 2021 WL 916002, at *1–2 (D. Colo. Mar. 10, 2021) (ordering limited discovery in an APA case regarding the "factual question as to

[1] *See Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) ("if there is no final agency action, a federal court lacks subject matter jurisdiction").

whether Defendants engaged in any action that would be subject to review under the APA"); *Doe 1 v. Nielsen*, No. 18-cv-02349-BLF(VKD), 2018 WL 4266870, at *1–3 (N.D. Cal. Sept. 7, 2018) (permitting limited jurisdictional discovery in an APA case where "discovery of the nature of the agency action issue is necessary in order for the parties and the Court to determine the scope of the administrative record to be produced"); *Grand Canyon Tr. v. Williams*, No. CV13-8045, 2013 WL 12176992, at *1 (D. Ariz. Sept. 9, 2013) (permitting written discovery for plaintiffs to develop facts to demonstrate final agency action).

Any other rule would make it impossible to challenge unlawful agency action. An administrative record certified by a federal agency will not often include evidence of standing or whether a final agency action has occurred. *See Nw. Envtl. Def. Ctr.*, 117 F.3d at 1527–28 ("Article III's standing requirement does not apply to agency proceedings," so there is "no reason to include facts sufficient to establish standing as a part of the administrative record. Only when a plaintiff "later seeks judicial review, [does] the constitutional requirement that it have standing kick[] in."). As litigation proceeds, plaintiffs must "supplement the record to the extent necessary to explain and substantiate [their] entitlement to judicial review." *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002). Plaintiffs are entitled to seek jurisdictional discovery in this case for the same reasons.

B. The Record Rule Does Not Apply to Remedial Questions

The record rule also does not limit the evidence this Court can consider when determining the propriety and scope of injunctive relief at trial. "[I]n cases where relief is at issue, especially at the preliminary injunction stage," courts may consider extra-record evidence. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).[2] When the Northern District announced the same rule, *see*

[2] At the trial on the merits, the Court will consider whether a permanent injunction should issue, and the considerations are the same as for issuing a preliminary injunction "with the exception that the plaintiff must show a likelihood of

Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), the Fifth Circuit concluded that "the district court correctly stated the law." *Davis Mountains Trans-Pecos Heritage Ass'n v. FAA*, 116 F. App'x 3, 16 (5th Cir. 2004) (citing 249 F. Supp. 2d at 775–76 and reversing on other grounds); *accord Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-66-C, 2016 WL 3766121, at *23 (N.D. Tex. June 27, 2016) (Cummings, J.).

The APA thus permits courts to assess "the balance of the equities and the public interest" for injunctive relief using extra-record evidence. *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1106–08 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020), *aff'd sub nom. East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021). There would be no other way to do it, as "injunctive relief is generally not raised in the administrative proceedings below and, consequently, there usually will be no administrative record developed on these issues." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) (quotation omitted). "Thus, it will often be necessary for a court to take new evidence to fully evaluate claims of irreparable harm and claims that the issuance of the injunction is in the public interest." *Id.* (quotation omitted).

C. The Record Rule Does Not Apply to Most of Plaintiffs' Claims

"The record rule's purpose is to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review." *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021) (cleaned up). That purpose does not apply to Plaintiffs' other claims, which do not depend on the arbitrary-and-capricious standard.

None of Plaintiffs' claims, other than their arbitrary-and-capricious claim, turn on the "judgment . . . of the agency," so "[t]he purpose of the Administrative Record rule" is not

success on the merits rather than actual success" at the preliminary stage. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987).

implicated. *N.M. Cattle Growers Ass'n*, 2004 WL 3426421, at *5. In those claims, Plaintiffs are not arguing that an administrative "finding is not sustainable on the administrative record made." *Camp*, 411 U.S. at 143. Instead, Plaintiffs argue that the memoranda issued by Defendants violate federal statutory provisions, ECF No. 1 at 21–24 (Counts I & II), the Constitution, *id*. at 27 (Count VI), and a binding agreement, *id*. at 26–27 (Count V), questions Defendants did not consider in the administrative record.

A court reviewing the constitutionality of agency action, for example, must make "an independent assessment of a citizen's claim of constitutional right." *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). Because "[a] direct constitutional challenge is reviewed independent of the APA," a "court is entitled to look beyond the administrative record in regard to this claim." *Grill v. Quinn*, No. 2:10-cv-757, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012). The "Supreme Court has held that a plaintiff who is entitled to judicial review of its constitutional claims under the APA is entitled to discovery in connection with those claims." *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 328 (D. P.R. 1999) (citing *Webster v. Doe*, 486 U.S. 592, 604 (1988)); *see also Jordan v. Wiley*, No. 1:07-cv-498, 2008 WL 4861923, at *2 (D. Colo. Nov. 10, 2008) (allowing a plaintiff to pursue discovery on constitutional claims while adjudication of APA claims was pending); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (permitting plaintiffs to rely on extra-record written testimony because "[w]hen reviewing constitutional challenges to agency decisionmaking, courts make an independent assessment of the facts and the law").

Plaintiffs can assert each of their claims, with the exception of their arbitrary-and-capricious claim, ECF No. 1 at 24–25 (Count III), and the notice-and-comment claim, *id*. at 26 (Count IV), without the APA. *See* ECF No. 18 at 26 (explaining that Plaintiffs have a claim "at

equity" outside the APA); ECF No. 51 at 12–13 (same); ECF No. 1-3, Ex. C § 8 (providing that violations of the agreement between DHS and Texas "may be adjudicated in a United States District Court located in Texas"); 33 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 8304 (2d ed.) (describing "nonstatutory review of agency action" that does not depend on the APA).

In a recent immigration case where Texas made similar claims against the Biden Administration's rescission of the Migrant Protection Protocols (MPP) program, Judge Kacsmaryk denied a DOJ motion to strike Texas's evidence on the ground of the record rule, on the basis that such claims that can be raised outside the APA—through a cause of action "at equity"—and are therefore not limited by the record rule. *Texas v. Biden*, No. 2:21-cv-067-Z (N.D. Tex.), ECF No. 76 at 6–10 (attached as Ex. A). The same reasoning applies to such claims here.

Courts likewise have held that the record rule does not apply to claims seeking to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), claims Plaintiffs also raise here. *See* ECF No. 1 at 21–23 (Count I); *see also* ECF No. 79 at 156 n. 61 (granting preliminary injunction but "reserv[ing] ruling on this issue [of positive injunction to compel agency action unlawfully withheld] until later in the litigation"). This is because "when a court considers a claim that an agency has failed to act," there is "no final agency action that closes the administrative record or explains the agency's [in]action[]." *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002). "Said another way, if an agency fails to act, there is no 'administrative record' for a federal court to review." *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012). And "if the agency never takes action," the "benefits of agency expertise and creation of a record"—considerations which underpin the record rule—"will not be realized." *Telecomms. Research &*

Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984). Discovery is therefore proper on this ground as well.

II. The Record Rule Is Far Narrower than Defendants Contend, Even When Evaluating Agency Decisionmaking

Even where the record rule applies, it "is not without exceptions." *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021). The exceptions are applied in light of "[t]he record rule's purpose": "to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review—not to preclude effective judicial review entirely." *Id.* (cleaned up). Thus, "in certain circumstances a court may permit supplementation of the record or the introduction of extra-record evidence to enable effective judicial review." *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Engineers*, No. 3:13-cv-126, 2015 WL 1883522, at *1 (S.D. Tex. Apr. 20, 2015) (Costa, J.).

The Fifth Circuit has identified three circumstances in which consideration of extra-record evidence is appropriate:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision,
>
> (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or
>
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010) (alteration omitted). But this list is not exhaustive and "did not explicitly purport to overrule prior decisions concerning exceptions." *Gulf Coast*, 2015 WL 1883522, at *3. Courts have also recognized a more detailed list of "eight exceptions":

> (1) when agency action is not adequately explained in the record before the court;

> (2) when the agency failed to consider factors which are relevant to its final decision;
>
> (3) when an agency considered evidence which it failed to include in the record;
>
> (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
>
> (5) in cases where evidence arising after the agency action shows whether the decision was correct or not;
>
> (6) in cases where agencies are sued for a failure to take action;
>
> (7) in cases arising under NEPA; and
>
> (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Id. at *2 (footnote omitted); *accord Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, *23 (N.D. Tex. June 27, 2016) (Cummings, J.).

Most importantly here, courts allow extra-record evidence when it is necessary to determine whether the agency "considered all the relevant factors." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). "[A]n adequate record can sometimes only be determined 'by looking outside the [administrative record] to see what the agency may have ignored.'" *Davis Mountains*, 249 F. Supp. 2d at 776 (quoting *Cty. of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977)); *see also Davis Mountains*, 116 F. App'x at 15–16 (finding district court abused its discretion by excluding extra-record evidence "necessary to determine" whether agency "took a hard look" at a factor).

"[I]t will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). Consideration of extra-record evidence

is also permitted "when supplementing the record is necessary to explain technical terms or complex subject matter." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quotations omitted).

Thus, courts may supplement the administrative record with "affidavits, depositions, or other proof of an explanatory nature" if necessary to "explain the record and [] determine the adequacy of the procedures followed and the facts considered" by the agency. *Arkla Expl. Co. v. Tex. Oil & Gas Corp*., 734 F.2d 347, 357 (8th Cir. 1984); *see also, e.g., Sierra Club v. Marsh*, 976 F.2d 763, 772 (1st Cir. 1992); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1428 (6th Cir. 1991). In other words, such evidence is admissible "to educate the court and to illuminate the administrative record, not to substitute the court's judgment for the [agency's]." *Arkla Expl. Co*., 734 F.2d at 357; *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). Such extra-record evidence is particularly appropriate in cases not involving formal adjudications or rulemakings—such as here—where Plaintiffs lacked an "opportunity to submit such evidence" into the administrative record. *Oceana, Inc. v. Pritzker*, 126 F. Supp. 3d 110, 113–14 (D.D.C. 2015).

This approach makes sense. The administrative record lists "the nonprivileged documents considered by ICE in issuing the February 18, 2021 Interim Guidance." ECF No. 99-1 (certification). One of the key issues for trial is whether Defendants ignored critical factors in the challenged memoranda. *See* ECF No. 79 at 105–27 (examining this claim in granting preliminary injunction). That such information is not in the administrative record is not only no surprise but evidence that the memoranda are arbitrary and capricious. Precluding discovery on this issue would "preclude effective judicial review entirely" by keeping hidden evidence of the information they ignored precisely because they ignored it. *Euzebio*, 989 F.3d at 1322 (cleaned up).

Evidence is also relevant "to enable effective judicial review . . . when agency action is not adequately explained in the record before the court and [because this] case is so complex that a court needs more evidence to enable it to understand the issues clearly." *Gulf Coast*, 2015 WL 1883522, at *2. For example, as the Court has previously noted, a key issue in determining whether the challenged memoranda were subject to the requirements of notice-and-comment rulemaking is whether the memoranda's convoluted top-down permission structure for routine enforcement makes them legislative rules rather than excepted policy statements. ECF No. 79 at 135. Thus, the Court can consider extra-record evidence concerning Defendants' detention practices, even though they omitted this information from the administrative record.

This use of extra-record evidence has been permitted in APA cases, including cases involving immigration issues. Courts reviewing the lawfulness of both DAPA and DACA have considered evidence outside the administrative record. *See Texas v. United States*, 86 F. Supp. 3d 591, 666–670 (S.D. Tex. 2015) (considering evidence of the exercise of discretion actually applied to evaluate whether DAPA violated the APA); *Texas v. United States*, 809 F.3d 134, 171–76 (5th Cir. 2015) (same). This Court has done the same. *See Texas v. United States*, 328 F. Supp. 3d 662, 732–34 (S.D. Tex. 2018) (considering evidence of the exercise of discretion to evaluate whether DACA violated the APA); indeed, it has done so in a recent challenge to a different provision of one of the memoranda challenged here. *Texas v. United States*, No. 6:21-cv-3, 2021 WL 2096669, at *12–19, 42–45, 47–50 (S.D. Tex. Feb. 23, 2021) (Tipton, J.) (relying on extra-record evidence to grant a preliminary injunction). The record rule does not prohibit the same process here.

CONCLUSION

Plaintiffs respectfully request that the Court allow discovery in this case.

Date: September 15, 2021

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that the total of words in this motion, exclusive of the matters designated for omission, is 3997, as counted by Microsoft Word.

/s/Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF CONFERENCE

I certify that on September 14, 2021, I conferred with counsel for Defendants, who represented that Defendants are opposed to this motion.

/s/Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on September 15, 2021, which automatically serves all counsel of record who are registered to receive notices in this case.

/s/Patrick K. Sweeten
PATRICK K. SWEETEN

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

THE STATE OF TEXAS, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	2:21-CV-067-Z
	§	
JOSEPH R. BIDEN, JR. *et al.*,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' Motion to Strike Plaintiff's Extra Record Material (ECF No. 62). After considering the Response, Reply, and the applicable law, the Court **DENIES** the Motion. Plaintiffs' related Motion to Introduce Extra-Record Evidence (ECF No. 73) is **GRANTED.**

BACKGROUND

This case is scheduled for a consolidated hearing and bench trial under Rule 65 on Thursday, July 22, 2021. The parties are familiar with the facts, so a cursory overview will suffice.

The States of Texas and Missouri brought this suit challenging the federal government's decision to first suspend, then terminate the Migrant Protection Protocols ("MPP"). Plaintiff States argue the termination of MPP violates the Administrative Procedure Act ("APA"), the Immigration and Nationality Act ("INA"), the Constitution, and a binding agreement ("Agreement") made between Defendants and Texas.

Plaintiff States filed this case on April 13, 2021, challenging the federal government's temporary suspension of enrollment of aliens in MPP while the new presidential administration reviewed the program. ECF No 1-1. On May 14, Plaintiff States moved for a preliminary

injunction. But on June 1, the federal government completed its review of MPP and decided to permanently end the program. *See* ECF No. 46. The Court held that this action mooted Plaintiff States' motion and directed Plaintiff States to refile its motion — this time challenging the federal government's June 1 memo. ECF No. 52.

On June 8, Plaintiff States filed their renewed Motion for Preliminary Injunction with an appendix in support. ECF Nos. 53, 54. On June 22, Defendants filed the Administrative Record, ECF No. 61. Then, on June 25, Defendants filed their Response. ECF No. 63. On the same day, Defendants also filed the instant Motion to Strike Plaintiff's Appendix in Support. ECF No. 63. Defendants' Motion to Strike argues that Plaintiff's attached appendix violates the record rule.

On June 29, the Court ordered expedited briefing on the Motion to Strike. ECF No. 69. On July 9, Plaintiff States filed a Response to the Motion to Strike, ECF No. 72, and filed their own motion to introduce extra-record evidence. ECF No. 73. On July 16, Defendants filed their Reply, ECF No. 74, and a Response to Plaintiffs' Motion. ECF No. 75. Fully briefed, the Motion to Strike is now ripe for determination.

LEGAL STANDARDS

In reviewing an agency's action, the Administrative Procedure Act requires a court to review "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Courts must generally limit their review to the administrative record before the agency at the time the decision was made. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). This principle is often referred to as the record rule.

"Supplementation of the administrative record is not allowed unless the moving party demonstrates 'unusual circumstances justifying a departure' from the general presumption that review is limited to the record compiled by the agency." *Medina Cnty. Envir. Action Ass'n v.*

Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). Supplementation is allowed when: "(1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . . (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review." *Id.*

But *Medina* did not "purport to overrule prior decisions concerning exceptions." *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Engineers*, No. 3:13-CV-126, 2015 WL 1883522, at *3 (S.D. Tex. April 20, 2015). District courts in this circuit routinely allow extra-record evidence to be introduced under the following "*Davis Mountains*" circumstances:

1. When agency action is not adequately explained in the record before the court;
2. When the agency failed to consider factors which are relevant to its final decision;
3. When an agency considered evidence which it failed to include in the record;
4. When a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
5. In cases where evidence arising after the agency action shows whether the decision was correct or not;
6. In cases where agencies are sued for a failure to take action;
7. In cases arising under NEPA; and
8. In cases where relief is at issue, especially at the preliminary injunction stage.

NFIB v. Perez, No. 5:16-CV-066-C, 2016 WL 3766121, at *23 (N.D. Tex. June 27, 2016) (quoting *Davis Mts. Trans-Pecos Heritage Ass'n v. United States Air Force*, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003) (citation omitted), *vacated sub nom. on other grounds, Davis Mts. Trans-Pecos Heritage Ass'n. v. Fed. Aviation Admin.*, 116 Fed. App'x 3 (5th Cir. 2004)).

"Courts within the Fifth Circuit have concluded that '[m]ost, and perhaps all, of the eight *Davis Mountains* exceptions fit within the three broader categories in *Medina*' and 'it does not seem that there will often be a significant practical distinction between the eight exceptions listed in *Davis Mountains* and the three listed in *Medina*.'" *Id.* at n. 9 (quoting *Gulf Coast*, 2015 WL 1883522, at *3); *Gulf Coast,* 2015 WL 1883522, at *3 ("[*Medina* was not] a sea change in this circuit's law on extra-record evidence.").

But even when considering extra-record evidence, "its use by the reviewing court should be limited to the purpose which justified a departure from the record rule." *Gulf Coast*, 2015 WL 1883522, at *4.

ANALYSIS

Relying on the record rule, Defendants moved to strike "Plaintiffs' extra record evidence . . . in the form of Plaintiffs' Appendix . . . [b]ecause Plaintiffs' Appendix constitutes irrelevant and extra-record evidence." ECF No. 62 at 1. As an initial matter, Defendants' Motion is overly broad for several reasons.

A. The record rule does not apply to standing.

Although Defendants initially moved to strike Plaintiffs' entire appendix, the record rule does not apply to non-merit issues such as standing. This type of evidence does not run afoul of the record rule because courts consider it "not in order to supplement the administrative record on the merits, but rather to determine [their own] jurisdiction." *Nw. Envir. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Courts routinely rely on extra-record evidence to support standing in APA cases. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–54 (2010) (relying on declarations to find that plaintiffs had

Article III standing in an APA case); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (same).

Without the ability to introduce evidence of standing, it would be impossible to challenge unlawful agency action. An administrative record certified by a federal agency has no reason to include evidence of standing. And even if the agency had reason to consider particular would-be plaintiffs, "Article III's standing requirement does not apply to agency proceedings," so there is "no reason to include facts sufficient to establish standing as a part of the administrative record." *Nw. Envir. Def. Ctr.*, 117 F.3d at 1527–28. Only when a plaintiff "later seeks judicial review, [does] the constitutional requirement that it have standing kick[] in." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Accordingly, a plaintiff must "supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." *Id.* at 899–900. Thus, where Plaintiffs are relying on the Appendix to establish standing, Defendants' Motion is misguided. *See* ECF No. 53 at 21–28; ECF No. 67 at 12–16.

B. The record rule does not apply to remedies.

Similar to issues of standing, the record rule also does not limit the evidence this Court can consider when determining the propriety of injunctive relief. The APA permits courts to assess "the balance of the equities and the public interest" for injunctive relief using extra-record evidence. *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1106–08 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020), *aff'd sub nom. East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021). This is because "injunctive relief is generally not raised in the administrative proceedings below and, consequently, there usually will be no administrative record developed on these issues." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) (quotation omitted). "Thus, it will often be necessary for a court to take new

evidence to fully evaluate claims of irreparable harm and claims that the issuance of the injunction is in the public interest." *Id.* (quotation omitted).

Plaintiffs note that Defendants implicitly recognized this rule when they submitted extra-record evidence regarding the propriety of injunctive relief. *See* ECF No. 64. But Defendants nonetheless moved to strike Plaintiffs' evidence regarding whether the public interest favors injunctive relief. *See* ECF No. 62 at 6 (arguing the Polaris Project report should be stricken because it was not "considered by Defendants"); ECF No. 53 at 33–34 (citing the Polaris Project report to show that the public interest in preventing human trafficking favors injunctive relief). Accordingly, Plaintiffs' use of their Appendix regarding remedies is allowable.[1]

C. The record rule does not apply to several of Plaintiffs' claims.

Plaintiffs contend the June 1 memo violated, in addition to the APA, (1) the Constitution, (2) a statute, and (3) a binding Agreement between Texas and the federal government. Plaintiffs further contend that these claims do not implicate the record rule because they do not turn on or challenge the judgment of the agency. ECF No. 72 at 8–9. In response, Defendants aver that, no matter the cause of action, Plaintiffs can not avoid the structure and limitations of APA review. The Court finds that the record rule does not implicate Plaintiff's constitutional, statutory, or Agreement-based claims.

1. Circuit precedent allows extra-record evidence for constitutional claims.

Initially, the Court notes that Fifth Circuit has long held that a court reviewing the constitutionality of agency action must make "an independent assessment of a citizen's claim of constitutional right." *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). Accordingly, courts

[1] Defendants did not specify which parts of the Appendix should be struck until their Reply. The lack of specificity in the original motion to strike meant that Plaintiff had to attempt to defend the entire appendix. This lack of specificity provides an alternative basis to deny the motion, but the Court prefers to rule on the merits of the argument.

have allowed the introduction of extra-record evidence on constitutional claims. *See, e.g.*, *Rydeen v. Quigg*, 748 F. Supp. 900, 903–04, 906 (D.D.C. 1990) (citing *Porter* and distinguishing between the record reviewed in relation to plaintiff's APA claims and the record reviewed in relation to plaintiff's constitutional claims); *Grill v. Quinn*, No. 2:10-CV-757, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012) ("A direct constitutional challenge is reviewed independent of the APA. As such the court is entitled to look beyond the administrative record into this claim.") (citing *Porter*, 592 F.2d at 781).

Defendants argue that *Porter*'s "independent assessment" only referred to the standard of deference a district court employs when reviewing agency action and *not* to the factual record. The Court disagrees. *Porter* states:

> Moreover, [the plaintiff] would of course have a right to sue directly under the constitution to enjoin her supervisors and other federal officials from violating her constitutional rights. In that case there would be *no statutory reason* for the court to defer to agency *findings or rulings*. Whether [plaintiff] sues directly under the constitution to enjoin agency action, or instead asks a federal court to "set aside" the agency actions as "contrary to (her) constitutional right(s)" under § 706(2)(B), the role of the district court is the same.
>
> *Porter*, 592 F.3d at 781 (emphasis added).

Defendants also cite to other district court cases which refused to allow a plaintiff to supplement the record even for a constitutional claim, including a well-reasoned D.C. District Court case. *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32 (D.D.C. 2018).

In *Bellion Spirits*, the district court was faced with deciding whether to allow extra-record evidence on a First Amendment claim that was substantially similar to plaintiff's APA claims. *Id.* at 43. ("[T]he gravamen of [plaintiff's] constitutional complaint in Count I faults a decision made by an administrative agency — namely, its conclusion that [Plaintiff's] health claims are misleading."). The district court proceeded by noting that "[t]he caselaw on a plaintiff's ability to

supplement an administrative record to support a constitutional cause of action is sparse and in some tension." *Id.* at 41.

After reviewing several cases, the district court observed that the "common thread" in cases where the district court *denied* the introduction of extra-record evidence was "when a constitutional challenge to agency action require[d] evaluating the *substance* of an agency's decision made on an administrative record." *Id.* at 43 (emphasis added).[2] Concluding its analysis, the district "decline[d] to adopt any bright line or categorical rule" because of the "dearth of caselaw on point." *Id.*

Here, the Court finds that Plaintiffs' constitutional claim does not implicate the record rule. First, as noted above, circuit precedent allows for extra-record evidence on constitutional claims. Second, even adopting the Defendants' proposed standard from *Bellion Spirits*, the Court finds that Plaintiffs' constitutional challenge does not challenge the "substance" of the agency's decision. Rather, Plaintiff's constitutional challenge focuses on the *effect* of the June 1 memo on the federal government's ability to fulfill its duties under federal law. *See* ECF No. 53 at 16–19.

2. Plaintiffs' claims can be brought apart from the APA.

Additionally, Plaintiffs argue that their claims, except for their arbitrary-and-capricious claim, could be brought outside of the APA, so the record rule does not apply to them. ECF No. 72 at 9. Defendants aver that is not possible, because Plaintiffs have not identified a waiver of sovereign immunity for their claims. The Court agrees with Plaintiffs. As detailed below, the *Larson* doctrine is a well-established line of cases that lets plaintiffs sue, in effect, the United States even without an explicit waiver of sovereign immunity.

[2] The district court even noted that *Rydeen v. Quigg*, the case cited by Plaintiffs, was probably correctly decided. *Id.*

Plaintiffs argue they have a cause of action "at equity." ECF No. 53 at 19 (citing *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020). This "cause of action" has long allowed federal courts to enjoin federal officers from violating the Constitution and statutory limitations on their power. *Id.* (citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327–28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing back to England."). The equitable power to enjoin federal officials and the limitations on that power have come to be known as the *Larson* doctrine.

Under the *Larson* doctrine, there are two types of suits that can proceed against federal officers in their official capacities: (1) suits alleging a federal official acted *ultra vires* of statutorily delegated authority; and (2) suits alleging the officer acted in an unconstitutional manner or pursuant to an unconstitutional grant of authority. *Leal v. Azar*, No. 2:20-CV-185, 2020 WL 7672177, at *6 (N.D. Tex. Dec. 23, 2020) (citing *Larson v. Domestic & Foreign Com. Co.*, 337, U.S. 682, 689–90 (1949)); *see also Dugan v. Rank*, 373 U.S. 609, 621–22 (1963). As the Supreme Court stated, "in case of an injury threatened by his illegal action, the officer cannot claim [sovereign] immunity from injunction process." *Larson*, 337 U.S. at 690 (quoting *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912)).

Here, Plaintiffs' constitutional claim falls squarely within this Court's equitable power to enjoin unconstitutional action. Plaintiffs' statutory and "contract" claims do as well. First, Plaintiffs' statutory claim alleges that Defendants are violating the INA by failing to either detain or return aliens to Mexico as required by 8 U.S.C § 1225. ECF No. 53 at 17. And Plaintiffs further allege that Defendants are, as a result, being forced to abuse the parole system, which is an allegation of *ultra vires* activity. *Id.* at 18.

Second, Plaintiffs allege that the federal government has violated the binding Agreement with Texas. This "claim also falls within the ambit of *Larson*. Defendants cite *Ala. Rural Fire Ins. Co. v. Naylor* for the proposition that "the United States has not waived sovereign immunity for contract claims seeking specific performance. 530 F.2d 1221, 1229–30 (5th Cir. 1976). But *Naylor* actually supports *Plaintiffs'* position.

Naylor contains a detailed description of *Larson* and the *ultra vires* exception to sovereign immunity. *Id.* at 1226–28. In fact, *Naylor* held that the rescission of a contract could be challenged via *Larson* and the court's equitable power if "[plaintiff could] show that the [officers] in rescinding the award of the contract exceeded their statutory authority." *Id.* at 1226.

Here, Plaintiffs allege Defendants entered into a binding Agreement pursuant to the Secretary of the Department of Homeland Security's authority to "develop a process for receiving meaningful input from State and local government to assist the development of the national strategy for combating terrorism and other homeland security activities." 6 U.S.C. § 361(b)(4). This Agreement was allegedly authorized by the Secretary's power to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3).

By failing to follow the notice-and-consultation portions of the Agreement, Plaintiffs allege that acting DHS Secretary Pekoske acted *ultra vires* as he had no statutory authority to undo his predecessor's Agreement unilaterally. *See* ECF No. 67 at 9–12 (detailing how the Agreement functioned as an informal procedural rule enforceable by a federal court).

Accordingly, Plaintiffs' constitutional, statutory, and Agreement-based claims do not arise within the APA context and are therefore not bound by the statutorily created record rule.

D. The remaining portions of Plaintiffs' Appendix fall within select exceptions to the record rule.

Plaintiffs' remaining claim is that Defendants' termination of MPP was arbitrary and capricious under the APA. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). The role of the record rule is to ensure that "[a]gency action is to be upheld, if at all, on the basis of the record before the agency at the time it made its decision." *Lousiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 n. 8 (5th Cir. 1988); *see also Overton Park*, 401 U.S. at 420 ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision.").

This rule though is subject to well-established exceptions. *See infra*, p. 2–4. Here, two exceptions are most pertinent: (1) extra record evidence is needed to determine whether the agency "considered all the relevant factors" and (2) extra-record evidence is needed "to enable effective judicial review." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981); *Gulf Coast*, 2015 WL 1883522, at *2. "[A]n adequate record can sometimes only be determined 'by looking outside the [administrative record] to see what the agency may have ignored.'" *Davis Mts.*, 249 F. Supp. 2d at 776 (quoting *City of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977)).

The main thrust of Plaintiffs' argument in this case is that Defendants ignored critical factors, such as Defendants' own previous analyses of MPP, that should have been reviewed during the administrative process. *See, e.g.* ECF no. 67 at 2–3. The only means for "ignored" factors to come before the Court is for Plaintiffs to supplement the record.

As another example, Plaintiffs allege Defendants' termination of MPP is unlawful and violates 8 U.S.C. § 1225 because of how the termination of MPP interacts with Defendants' detention and parole practices. *See* ECF No. 53 at 16–18; ECF No. 67 at 6–7. The Administrative

Record does not include information about Defendants' detention practices. This information will be required by the Court to rule on Plaintiffs' statutory (and related Take Care Clause) claims.

Defendants arguments to the contrary fall short. For example, Defendants argue that "extrinsic evidence of internal detention practices . . . is irrelevant." ECF No. 74 at 10. But Plaintiffs' statutory claim is directly predicated on the interaction between MPP and Defendants' detention practices. ECF No. 53 at 16–18. Defendants may argue the evidence shows that there is no statutory violation, but the evidence is certainly relevant to that determination.

Another of Defendants' arguments is that *Medina* required the presence of "unusual circumstances" *in addition to* the presence of one of the exceptions. ECF No. 74 at 8. But Defendants misread the case. The "unusual circumstance" *is* the presence of an exception. It is not a stand-alone requirement. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (equating the "unusual circumstances" with the exceptions).[3]

E. Plaintiffs are not estopped from moving to supplement the record.

In response to Plaintiffs' Motion to Introduce Extra-Record Evidence, Defendants argue Plaintiffs should be estopped from making the motion because Plaintiff attached the Appendix and cited it in its Motion for Preliminary Injunction *before* Plaintiffs asked the Court to introduce the evidence. The Court disagrees for two reasons.

One, when Plaintiffs filed their Motion for Preliminary Injunction on June 8, there was no administrative record. In fact, the Administrative Record was not filed until June 22 because the Court granted Defendants' request for extra time to produce said record. ECF No. 52 at 4. Plaintiffs simply could not move to "supplement" or "complete" a record that did not yet exist.

[3] Because the Court finds Plaintiff's proffered evidence fits within the exceptions to the record rule, the Court need not decide whether Rule 12(f) is the appropriate vehicle for enforcing the record rule.

Two, Defendants have suffered no prejudice by Plaintiff's filing of the Appendix. Defendants have filed *three* briefs arguing to strike the Appendix. ECF Nos. 62, 74, 75. If Plaintiff had moved to supplement the record, Defendant would have been limited to *one* brief to explain why the Court should not view the evidence.

CONCLUSION

For the reasons stated above, the Court **DENIES** Defendants' Motion to Strike (ECF No. 62). Because the "use [of extra-record evidence] by the reviewing court should be limited to the purpose which justified a departure from the record rule." *Gulf Coast*, 2015 WL 1883522, at *4, the Court retains the right to refuse to evaluate evidence if th eCourt ascertains it is being used for an improper purpose. Subject to that caveat, Plaintiff's Motion to Introduce Extra-Record Evidence (ECF No. 73) is **GRANTED.**

SO ORDERED.

July 19, 2021.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS; STATE OF LOUISIANA, *Plaintiffs*, v. The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendants*.	Civ. Action No. 6:21-cv-00016

ORDER

Pending before the Court is Plaintiffs' Opposed Motion for Extra-Record Discovery. After due consideration, the Court GRANTS the Motion. Therefore, it is hereby ORDERED that extra-record discovery is allowed in this case.

It is SO ORDERED.

Signed this ___ of _____, 2021.

DREW B. TIPTON
UNITED STATES DISTRICT JUDGE