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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; 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-SB

PLAINTIFFS' MOTION TO COMPEL ADMINISTRATIVE RECORD

ORAL ARGUMENT REQUESTED

EXPEDITED CONSIDERATION REQUESTED

LR 7-1 CERTIFICATION

Pursuant to LR 7-1, counsel for Plaintiffs certifies that the parties have conferred in good faith on the issues raised in this motion.[1] Plaintiffs, for their part, requested that Defendants produce the full administrative record consistent with 5 U.S.C. § 706 and the U.S. Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (holding that judicial review of agency action must be "based on the full administrative record that was before the [agency] at the time [it] made [its] decision"). Defendants have refused to produce the administrative record on three grounds: first, that "no administrative record for the Proclamation is required or appropriate" because "the President is not an administrative agency subject to the APA"; second, that no record is required for the "[Department of] State's notification regarding the Proclamation on its website"; and third, that, "[a]s to the Federal Register notice regarding information collection, Plaintiffs are not challenging OMB's approval of the information collection under the Paperwork Reduction Act."[2] Notwithstanding the parties' meaningful attempts to reach a resolution, they have been unable to do so.

MOTION

Plaintiffs respectfully move for entry of an order compelling Defendants to produce the administrative record before briefing on Plaintiffs' Motion for Preliminary Injunction is complete. As explained below, the administrative record is necessary to determine the issues raised in Plaintiffs' Motion. *See Citizens to Preserve Overton Park*, 401 U.S. at 420–21; *see also Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (holding that the

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[1] *See generally* Declaration of Nadia H. Dahab ISO Plaintiffs' Motion to Compel ("Dahab Decl.") ¶¶ 2–7.

[2] Dahab Decl. ¶ 7. Defendants do not contend, and have not asserted, that no administrative record exists.

administrative record is required for a determination of likelihood of success on the merits). Because Defendants refuse to produce it, an order compelling production is appropriate.

ARGUMENT

Section 706 of the Administrative Procedure Act (APA) requires courts to "review the whole record" underlying an agency's decision. 5 U.S.C. § 706. Judicial review of agency action must be "based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park*, 401 U.S. at 420. That requirement—which applies equally at the preliminary injunction stage, *see id.* at 420–21, ensures that neither party is withholding evidence unfavorable to its position, *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Thus, when an agency engages in final agency action from which legal consequences flow, "it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it,'" making "findings that support its decision" and which "must be supported by substantial evidence." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) (citations omitted). In other words, the agency "must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983) (quoting *Burlington*, 371 U.S. at 168).

I. Defendants Have Engaged in Reviewable Final Agency Action.

The APA's judicial review provision applies when "the agency has completed its decisionmaking process, and [when] the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). There can be no doubt that has happened here. First, although Defendants appear to suggest otherwise, the Proclamation is not

self-executing. By statute and practice, the Department of State implements policies that pertain to the issuance of immigrant visas.[3] Indeed, the Proclamation commands actions relating to the implementation of its entry suspension from several of the Defendant government officials, including the Secretary of State, the Secretary of Health and Human Services, and the Secretary of Homeland Security.[4]

Second, public actions taken by the Defendant agencies make clear that the Defendant agencies and government officials were prepared to implement the Proclamation on its effective date and had made decisions and taken specific steps on how to do so. At this stage of the litigation, because they have not yet produced the administrative record, only Defendants know the full extent of actions they have taken to implement the Proclamation. But, at a minimum, the

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[3] *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 (last visited Nov. 6, 2019), 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.")

[4] The Proclamation states that "approved health insurance" may include "any other health plan that provides for adequate coverage for medical care *as determined by the Secretary of Health and Human Services or his designee*"; it also excepts from the Proclamation's entry suspension "any alien whose entry would further important United States law enforcement objectives, *as determined by the Secretary of State or his designee based on a recommendation of the Attorney General or his designee*," as well as "any alien whose entry would be in the national interest, *as determined by the Secretary of State or his designee* on a case-by-case basis"; moreover, the Proclamation instructs the Secretary of State to consult with the Secretary of Health and Human Services, the Secretary of Homeland Security, and the heads of other appropriate agencies as to the "continued necessity" of the Proclamation's entry suspension (emphasis added). To the extent that the Defendant agencies were prepared to implement the Proclamation on November 3, 2019, which their publicly available materials have confirmed, and had made decisions on how that implementation would occur, any such decisions constitute final agency action even if they were not publicly disclosed, and such final agency actions cannot be shielded from judicial review under the Administrative Procedure Act simply because they are not made public.

State Department posted on its website an implementing announcement,[5] and issued an Emergency Notice of Information Collection,[6] each of which constitutes reviewable final agency action.

Several weeks before the Proclamation was set to go into effect, a page on the State Department's website (the "Announcement") clearly instructed intending immigrants that, beginning November 3, 2019, failure to satisfy the Proclamation's requirements "will result in a denial of a visa application."[7] The Announcement commanded intending immigrants to "show to a consular officer or immigration official" that they satisfy the Proclamation's requirements, stated that consular officers "will review the medical and financial documentation" in an applicant's case file, and stated that consular officers would deny a visa if the applicant could not meet the Proclamation's requirements. Those unequivocal commands, together with the November 3 deadline, "amoun[t] to a definite statement of the agency's position" that has a "direct and immediate effect" on the rights and obligations of regulated parties, and makes clear that "immediate compliance is expected." *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 909 (9th Cir. 2003). Stated another way, the State Department Announcement signaled the agency's decision that "its deliberative process" was "sufficiently final to demand compliance with its announced position." *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986). That constitutes final agency action subject to judicial review. *Id.*

In addition to the Announcement, the State Department published in the *Federal Register*—on October 30, days before the Proclamation's effective date—a "Notice of Information Collection under OMB Emergency Review" (the "Emergency Notice") announcing

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5 Dahab Decl. ¶ 9, Ex. A.
6 Dahab Decl. ¶ 9, Ex, A.
7 Dahab Decl. ¶ 9, Ex. A.

a "methodology" for information collection that was "necessary for the [State] Department to prepare consular officers to implement [the Proclamation] when it goes into effect on November 3, 2019."[8] The Emergency Notice was open for comment for less than 48 hours (with comments due by October 31, 2019), and the Office of Management and Budget (OMB) approved the Emergency Notice on November 1, 2019, less than 24 hours after the close of the public comment period, and after Plaintiffs filed this lawsuit.[9] In a Response to Comments document, the State Department affirmed that the information collection methodology "is necessary to implement Presidential Proclamation 9945" and noted that it "cannot [and did not] respond to all comments prior to the implementation deadline of Presidential Proclamation 9945 on November 3, 2019."[10]

Like the Announcement posted on the State Department's website, the Emergency Notice reflects the agency's demand for immediate compliance and places unprecedented new burdens on regulated parties and consular officers untrained in evaluating health or healthcare costs. That Defendants labeled their action a "Notice of Information Collection," rather than a rule, is not dispositive for APA purposes. *See San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966, 970 (9th Cir. 1989) ("A time-honored principle of administrative law is that the label an agency puts on its actions is not necessarily conclusive." (internal punctuation and citation omitted)). As a practical matter, the Emergency Notice—like the Announcement—implements a new legislative rule demanding immediate compliance and therefore constitutes final agency action under the

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8 Dahab Decl. ¶ 10, Ex. B; 84 Fed. Reg. 58,199 (Oct. 30, 2019).

9 Dahab Decl. ¶ 11, Ex. C.

10 *Id.* That timeline, and the State Department's failure to review and meaningfully respond to comments received "prior to the implementation deadline" of the Proclamation, confirms that the State Department had concluded its decision-making process by the time the Emergency Notice was released.

APA.[11] Plaintiffs are entitled to the Administrative Record relating to Defendants' implementation of the Proclamation.

Third, actions taken even after the Proclamation's effective date demonstrate that the Defendant agencies and government officials had made decisions on how to implement the Proclamation and had set those decisions in motion. On November 6, 2019—four days after this Court issued its TRO—an immigration attorney in contact with Plaintiffs' counsel received an e-mail from the State Department's National Visa Center ("NVC") concerning consular processing for one of her clients. The e-mail stated,

> PRESIDENTIAL PROCLAMATION ON HEALTH CARE: You must be able to demonstrate to the consular officer at the time of interview you will be covered by approved health insurance within 30 days of entry into the United States or have the financial resources to pay for reasonably foreseeable medical costs. Inability to meet this requirement will result in the denial of the visa application. For complete requirements and/or exemptions, visit https://travel.state.gov/healthcare.[12]

That e-mail itself is proof positive that Defendants have taken actions to enforce the Proclamation that have a "direct and immediate effect on the day-to-day business of the subject party." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (internal punctuation and citation omitted). That is the definition of final agency action—that the agency "has rendered its last word on the matter"[13]—and Plaintiffs are entitled to the

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[11] Moreover, the "Notice of Information Collection" constitutes agency action that did not comply with the specific information collection requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3521, further demonstrating that Defendants' actions in implementing the Proclamation are not in accordance with law and are arbitrary and capricious.

[12] Declaration of Dagmar Butte in Support of Plaintiffs' Motion for Preliminary Injunction ¶ 4, ECF No. 62. Plaintiffs' counsel immediately brought this NVC e-mail to the attention of Defendants' counsel.

[13] Indeed, agencies may not shield themselves from review under the APA by acting in secret and refusing to publish a reviewable rule. *See, e.g.*, *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Agency action, however, need not be in writing to be final and judicially reviewable."); *Grand Canyon Trust v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249,

Administrative Record with respect to all of Defendants' actions in implementing the Proclamation, including those that have and have not been made public to date. *Id.* at 984.

II. The Administrative Record Is Required for a Proper Adjudication of Plaintiffs' Claims under the APA.

The full administrative record underlying Defendants' actions and decisions with respect to implementing the Proclamation is necessary for this Court to "review an agency action's fairly." *Boswell Mem'l Hosp.*, 749 F.2d at 792. At a minimum, the Proclamation is filled with vague and undefined terms and standards. For the Court to evaluate how Defendants have defined these terms for the purpose of implementing and enforcing the Proclamation, and whether Defendants have done so in a manner that violates the APA, Defendants "must cogently explain why [they] [have] exercised [their] discretion in a given manner." *State Farm*, 463 U.S. 48.

Consular officers, for example, are charged with assessing an intending immigrant's "reasonably foreseeable medical costs," which—according to the definition the State Department chose to provide in the Emergency Notice—involves assessing "existing medical conditions, relating to health issues existing at the time of visa adjudication."[14] The Proclamation includes other vague standards, such as "adequate health coverage," "important law enforcement objectives," and "national interest"—all of which speak to how an intending applicant may comply with the Proclamation's requirements, and whose definition the Proclamation expressly entrusts to the Secretary of State and the Secretary of Health and Human Services.

How broadly or narrowly all these terms are defined directly affects whether the Proclamation will bar or allow an intending immigrant's entry to the United States. In choosing

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1252 (D.N.M. 2003) ("Unwritten agency actions have been subjected to judicial review under the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq.").

[14] Dahab Decl. ¶ 10, Ex. B.

how to define these terms to enforce the Proclamation, Defendants must not only "disclose the basis" of the decisions underlying these definitions, *Burlington*, 371 U.S. at 168, but also consider all relevant issues and factors to withstand arbitrary-and-capricious review under the APA. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995); *see also NW. Ecosys. All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140, 1145 (9th Cir. 2007); *State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem"). When "[t]here are no findings and no analysis . . . to justify the choice made," and "no indication of the basis on which the [agency] exercised its expert discretion," the APA "will not permit [the Court] to accept such practice." *State Farm*, 463 U.S. at 48 (internal punctuation and citations omitted). As a legislative rule, moreover, Defendants' implementation of the Proclamation "requires public notice, the opportunity for public comment, *and the creation of an administrative record*." *Kitlutsisti v. ARCO, Alaska, Inc.*, 592 F. Supp. 832. 841 (D. Ala. 1984) (emphasis added), *vacated on other grounds*, *Kitlutsisti v. ARCO Alaska, Inc.*, 782 F.2d 800 (9th Cir. 1986). The "whole record" forms "the basis for review required by § 706 of the Administrative Procedure Act." *Overton Park*, 401 U.S. at 419.

CONCLUSION

A complete record is essential if the Court is to conduct the "substantial inquiry" and "thorough, probing, in-depth review" required by the APA. *Overton Park*, 401 U.S. at 415; *see also Am. Bioscience, Inc.*, 243 F.3d at 582 (record is required to determine likelihood of success on the merits). Defendants' production of anything less than the "whole record" results in a "fictional account of the actual decisionmaking process" and renders judicial review practically meaningless. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th

Cir. 1993). Plaintiffs respectfully request that this Court order Defendants to produce the administrative record before briefing on the merits of a preliminary injunction is complete. In the alternative, if the Court determines that Defendants need not produce an administrative record at this time, Plaintiffs intend to request expedited discovery on their non-APA claims.

DATED this 11th day of November, 2019.

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