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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-SI

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL ADMINISTRATIVE RECORD

ORAL ARGUMENT REQUESTED

INTRODUCTION

The Supreme Court made clear in *Overton Park* that the "whole record" forms "the basis for review required by § 706 of the Administrative Procedure Act"—even at the preliminary injunction stage. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). Nothing in Defendants' briefing undermines this principle. As Defendants' own actions demonstrate, they were prepared to implement the Proclamation on its effective date and had "completed [their] decisionmaking process" on how to do so, with an "impact" that "is sufficiently direct and immediate and has a direct effect on day-to-day business" for individuals subject to the Proclamation. *Franklin v. Massachusetts*, 505 U.S. 788, 796–97 (1992) (internal punctuation and citation omitted). Plaintiffs challenge the implementation of the Proclamation as arbitrary and capricious, unconstitutional, ultra vires, and contrary to procedures required by law. A complete record is essential for the "substantial inquiry" and "thorough, probing, in-depth review" required under the APA. *Overton Park*, 401 U.S. at 415.

ARGUMENT

I. Plaintiffs' APA Claims Challenge Agency Action, Not Presidential Action

Defendants characterize Plaintiffs' claims as solely a challenge to the Proclamation. Opp. at 1, 6-7. That is wrong. Plaintiffs assert APA claims seeking to invalidate *agency action* to implement the Presidential Proclamation. Complaint ¶¶ 39–46; Motion for Preliminary Injunction ("PI Motion") at 10–12, 20–30). Agency action to implement an executive directive is reviewable under the APA. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1246 (9th Cir. 2018) ("Our power to review 'agency action' under [the APA] includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent . . . thereof. The [plaintiffs] have challenged the Rule as it incorporates the President's Proclamation."). Review of agency action to implement a Proclamation is consistent with the basic principle that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828

(Scalia, J., concurring)); *see also Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("[T]hat the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.").

Plaintiffs reject Defendants' contention that agency action to implement the Proclamation is consistent with the Presidents' authority under § 212(f) of the Immigration and Nationality Act (INA). *Compare* Defendants' Response in Opposition to Motion to Compel ("Opposition") at 7 *with* P.I. Motion at 18–19. But that is a merits issue that this court need not address now. A challenge to the legality of the Proclamation can proceed alongside a challenge to agency implementation of the proclamation under the APA. *See Hawaii v. Trump*, 878 F.3d 662, 680–81 (9th Cir. 2017) ("[B]ecause these agencies have consummated their implementation of the Proclamation, from which legal consequences will flow, their actions are 'final' and therefore reviewable under the APA"), *rev'd and remanded on other grounds*, *Trump v. Hawaii*, 138 S. Ct. 2392 (internal punctuation and citations omitted). Here, the agency —not the President—took the "final step[s]" to implement the Proclamation that Defendants challenge in their APA claim. *See Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir.1993) ("Franklin['s denial of judicial review of presidential action] is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."), *cert. denied*, 510 U.S. 1041, 114 S. Ct. 685, 126 L. Ed. 2d 652 (1994).

Defendants characterize the Proclamation as "self-executing." Opposition at 1, 6. That is also incorrect. The statutory structure of the State Department, its practical operations, the agencies' own conduct in this case and others, and the Proclamation itself rebut the notion that the Proclamation is self-executing; at a minimum, the policy it sets out is necessarily implemented by the State Department. *See, e.g.*, 8 U.S.C. § 1104 (a), (c) (The Secretary of State "shall be charged" with the administration and enforcement of the INA and within the Department of State there "shall be" a Visa Office.); *see also* Proclamation, P.I. Motion Ex. 1

(ECF 45-1) (stating that the executive order "shall be" implemented according to law); Emergency Notice, P.I. Motion Ex. 26 (ECF 45-26) (referring to the "information collection necessary for the Department to prepare consular officers to implement" the Proclamation). Here, State Department took actions to advise both the public and consular officers that it was changing its interview process and revising the basis for consular officers' decisions. If the Proclamation were really self-executing, none of that would have been required. In all events, the actions agencies actually took in this situation are reviewable under the APA, making it irrelevant whether the Proclamation could have been self-executing in the abstract.

Defendants' implementation of another Presidential suspension on entry—the "travel or Muslim ban" of Presidential Proclamation No. 9645—is instructive. Although Defendants claim that consular officers simply and automatically apply entry suspensions under 8 U.S.C. § 1182(f) the same way that they apply other § 1182 inadmissibility grounds, the implementation of Proclamation No. 9645's entry suspension required extensive changes to the Foreign Affairs Manual ("FAM") and a series of State Department cables and "Q&A" training materials issued to consular officers.[1] Those materials, among other things, provided specific definitions of eligibility criteria for a waiver of Proclamation No. 9645's entry suspension; required consular officers to seek managerial approval when granting waivers under Proclamation No. 9645; and instructed consular officers how to document visa refusals under Proclamation No. 9645; were produced as the administrative record in two cases challenging the implementation of Proclamation No. 9645's waiver provision.[2] Indeed, in denying a motion to dismiss an APA claim challenging this implementation process under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the U.S. District Court for the Northern District of California

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[1] *See, e.g.*, U.S. Department of State, Freedom of Information Act, Virtual Reading Room Documents Search Results for Case Nos. F-2018-00009, F-2017-09834, and F-2017-14678, https://foia.state.gov/Search/Results.aspx?caseNumber=F-2018-00009; https://foia.state.gov/Search/Results.aspx?caseNumber=F-2017-09834; https://foia.state.gov/Search/Results.aspx?caseNumber=F-2017-14678.

[2] *Emami v. Nielsen*, No. 3:18-cv-01587 (N.D. Cal.), filed March 13, 2018; *Pars v. Pompeo*, No. 3:18-cv-07818-JD (N.D. Cal.), filed July 31, 2018.

found that the Defendants' actions in implementing Proclamation No. 9645 constituted reviewable final agency action. *See Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1019–21 (N.D. Cal. 2019). Defendants concede that the State Department issued a cable "providing guidance on implementing the Proclamation" and prepared amendments to the FAM. Opposition at 9 n.2. In other words, there is an administrative record as to the implementation of the Proclamation, and this Court should order its immediate production.

II. Plaintiffs are Entitled to the Administrative Record Because They Assert a Challenge to Final Agency Action to Implement the Proclamation

Defendants cannot deny that they took the actions Plaintiffs allege in their Complaint, as well as others that have been shielded from the public, like the cable to consular officers they mention in their Opposition. Opposition at 9 n.2. Instead, their arguments reduce to assertions that any actions they have taken are not "final" agency actions. But Defendants cannot evade APA review by unilaterally characterizing their conduct as non-final. *Hemp Inds. Ass'n v. D.E.A.*, 333 F.3d 1082, 1087 (9th Cir. 2003) ("[T]he court need not accept the agency characterization [of its own actions] at face value."). Defendants' arguments are also flawed because this Court does not need to resolve the question of finality before requiring the agency to produce the administrative record. Courts routinely decide whether agency action is "final" under the APA only after the administrative record has been produced. *See, e.g.*, *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006) ("The administrative record establishes that [the challenged agency action] is the Forest Service's 'last word'" and constitutes final agency action); *Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F. Supp. 2d 966, 976 (E.D. Cal. 2012) (decision as to whether agency action was "final . . . requires a review of the full administrative record" (citation omitted)); *id.* at 976–77 (without the "entire administrative record" the court "cannot, at this junction, determine whether there has been final

agency action.").[3] In all events, Plaintiffs have alleged final agency action, as described below.

A. Defendants' Implementing Announcement Constitutes Final Agency Action

Defendants' issuance of an implementing announcement on its website constitutes final agency action for the reasons stated in Plaintiffs' Motion for a Preliminary Injunction. P.I. Motion at 5, 21–22. The State Department has referred to the consular interview as the "most significant part of the visa issuing process." 9 FAM 505.7. Through its website, the State Department announced new requirements for the interview in particular that were not mentioned in the Proclamation itself. P.I. Motion at 5-6, 21–22. The announcement included mandatory instructions to both individuals seeking visas and consular officials. Because the agency directive was to go into effect on November 3, it is clear that the agency's decisionmaking had been consummated for all practical purposes and it was intended to compel immediate compliance. *See id.*; *see also Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1006–07 (D.C. Cir. 2014) (agency action is final if it provides "firm guidance to enforcement officials" about how to handle their decisions even if the guidance may be subject to change).

Defendants are incorrect to suggest that final agency action could occur only at an interview before a Consular Officer. Opposition at 8–9. The announcement of a new policy can constitute final agency action even in the absence of an individualized decision under the policy. As the Ninth Circuit has explained, "[a]n agency action can be final even if its legal or practical effects are contingent on a future event." *Gill v U.S. Dep't of Justice*, 913 F.3d 1179, 1185 (9th Cir. 2019). This is particularly true when an agency sets a standard and there is an "immediate understanding" that agency staff will "conform to the standard." *Id.*; *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1066 (N.D. Cal. 2018) (final agency action requirement satisfied where plaintiffs' claim

[3] *See also Anderson v. McCarthy*, No. C 16-00068 WHA, 2016 WL 6834215, at *12 (N.D. Cal. Nov. 21, 2016) (determining whether agency action was final only after a "prior order directing the EPA to lodge the administrative record"); *John Doe, Inc. v. Gonzalez,* No. CIV.A.06-966(CKK), 2006 WL 1805685, at *15 (D.D.C. June 29, 2006) (analyzing agency's claim that a decision was non-final after requiring submission of an administrative record), *aff'd sub nom. John Doe, Inc. v. Drug Enf't Admin.*, 484 F.3d 561 (D.C. Cir. 2007).

did not challenge individual decisions but sought to bar "adoption of a dubious legal theory to justify a blanket policy of denying SIJ to juveniles between the ages of 18-20"). Given the mandatory language of the State Department's announcement, there is every reason to think that agency staff was expected to conform to its standards when conducting interviews.

B. The State Department's Misuse of the Information Collection Process Constitutes Final Agency Action

Defendants' Emergency Notice of Information Collection pursuant to the Paperwork Reduction Act ("PRA") was both a final agency action unto itself and compelling evidence of other final agency action to implement the Proclamation. Contrary to Defendants' reading of the administrative posture of this case (and Plaintiffs' arguments),[4] APA review of the Emergency Notice is available and, therefore, production of the full administrative record is required.

The State Department's publication of the Emergency Notice, *see* 84 Fed. Reg. 58199, was a final agency action because it notified Plaintiffs and putative class members that they would be subject—via collection of data by a consular officer—to the Proclamation's requirements. Defendants do not deny that the Proclamation imposes new burdens on Plaintiffs and gives rise to legal consequences—namely, the inability of previously eligible prospective immigrants to gain admission to the United States. In fact, Defendants have, consistent with the Emergency Notice, repeatedly informed prospective immigrants that they will have to answer questions about their insurance coverage at consular interviews. *See* Declaration of Dagmar Butte ISO Motion for Preliminary Injunction ("Butte Decl."), ECF 62, at ¶¶ 3–4.[5] Under both long-standing precedent and the dictates of pragmatism, the Emergency Notice constitutes final

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[4] Defendants' legal argument on this point boils down to the fact that the PRA and APA are not the same statute. True enough. But Plaintiffs do not seek relief under the PRA; the PRA merely supplied a procedure by which Defendants were required to announce their plans for implementing the Proclamation. As explained herein, Plaintiffs claim that the Emergency Notice announced a final agency action of one sort (information collection) and confirmed the existence of final agency action of another sort (procedures for implementing the Proclamation).

[5] *See also* Presidential Proclamation on Health Care, Nat'l Visa Ctr., https://travel.state.gov/content/travel/en/us-visas/immigrate/Presidential-Proclamation-on-Health-Care.html (last visited Nov. 14, 2019).

agency action that is reviewable under the APA. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (courts have "long taken" a "pragmatic" approach to determining whether an agency action is final for APA review).

Apart from announcing collection of insurance coverage information during consular interviews, the Emergency Notice is also compelling evidence that the State Department has taken final action as to *how* it will implement and enforce the Proclamation. *See* 84 Fed. Reg. 58199. The Emergency Notice sets out definitions of key terms, including "reasonably foreseeable medical expenses," in order to "prepare consular officers to implement PP 9945 when it goes into effect." *Id.* This is evidence of deliberation and decisionmaking that is far from tentative or interlocutory. *See Hawkes Co.*, 136 S. Ct. at 1815. Indeed, in their Opposition, Defendants disclosed for the first time that implementation of the Proclamation had gone even further than the Emergency Notice, including a cable that the Department of State "issued . . . to consular officers to be prepared for [a] new Foreign Affairs Manual" which will "provid[e] guidance on implementing the Proclamation." Opposition at 9 n.2. Although Defendants claim that no final decision has yet been made, that assertion cannot be squared with the Supreme Court's flexible, pragmatic standard for finality. Nor can it be squared with the undisputed fact that, absent this Court's TRO, Defendants would have implemented the Proclamation on November 3, 2019. Because the Emergency Notice makes clear that the State Department has taken final action to implement and enforce the Proclamation, the APA applies and Plaintiffs are entitled to the complete administrative record.

C. The Conduct of the National Visa Center Since Issuance of the TRO Confirms Final Agency Action Has Been Taken

Defendants' actions since this Court issued its TRO confirm that the Proclamation is not, in fact, self-executing, and that Defendants have taken final agency action to implement the Proclamation. As noted in Plaintiffs' Motion to Compel, even after this Court's TRO, the National Visa Center ("NVC") was issuing an e-mail to individuals requiring consular

processing, informing them that they "must be able to demonstrate to the consular officer at the time of interview" that they satisfy the Proclamation's requirements, and that "[i]nability to meet this requirement will result in the denial of the visa application."[6] The automatic issuance of those e-mails demonstrates that Defendants had "completed their decisionmaking process" on how to implement the Proclamation and that this process "will directly affect the parties" subject to the Proclamation. *Franklin*, 505 U.S. at 797. Defendants' actions enforcing the Proclamation have a "direct and immediate effect on the day-to-day business of the subject party" and constitute final agency action. *U.S. Forest Serv.*, 465 F.3d at 987 (internal punctuation and citation omitted).

As recently as November 12, 2019, the NVC was still including information about the Proclamation in automated e-mails, warning immigrant visa applicants that "[o]n October 4, 2019, the President issued [the Proclamation]" and instructing them to visit a State Department website "[f]or the most up to date information on how [the Proclamation] might affect your case." Not only does this language create a chilling effect for applicants who may not click on the link provided, or who may not understand the legal language on the State Department website, but it demonstrates that Defendants have "completed their decisionmaking process" on how to implement the Proclamation and that this process "will directly affect the parties" subject to the Proclamation. *Franklin*, 505 U.S. at 797.

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6 *See* Butte Decl. ¶ 4, ECF No. 62.

III. PLAINTIFFS' MOTION IS NOT PREMATURE

The administrative record is necessary for the Court's evaluation of the merits of Plaintiffs' APA claims. *See Overton Park*, 401 U.S. at 416–19 ("Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;'" and "[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors"). Indeed, *Overton Park* makes clear that production of the administrative record is not premature at the preliminary injunction stage; in that case, when the plaintiffs sought to enjoin the construction of a federal highway through a local park, the Supreme Court found that review on "litigation affidavits" was insufficient, as such affidavits "clearly do not constitute the 'whole record' compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act." *Id.* at 419; *see also Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (finding it "not sufficient" that the district court "relied on the parties' written or oral representations to discern the basis on which [the agency] acted," rather "than calling for the administrative record"). Defendants do not even attempt to address the import of *Overton Park*, and none of Defendants' authorities—which address expedited discovery for *non*-APA claims, Opp. at 13—suggests that production of the administrative record is "premature" at this stage of the litigation.

Finally, Defendants cannot evade production of the administrative record on grounds that the decision to grant or deny an immigrant visa is a matter of agency discretion under the doctrine of consular nonreviewability. Plaintiffs do not challenge immigrant visa decisions. Opposition at 10–11; P.I. Motion at 10–12, 20–30. Rather, Plaintiffs challenge the *implementation* of the Proclamation, "which is separate issue." *Najafi v. Pompeo*, No. 19-cv-05782-KAW, 2019 WL 5423467, at *2 (N.D. Cal. Oct. 23, 2019). Defendants' assertion that individual decisions will be non-reviewable consular action only confirms that there is no

adequate remedy under the law absent a challenge under the APA.[7]

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to enter an order compelling immediate production of the administrative record.

[7] In the alternative, the circumstances of this case at least warrant jurisdictional discovery into "the nature of the agency action [at] issue." *Doe 1 v. Nielsen*, No. 18-CV-02349-BLF(VKD), 2018 WL 4266870, at *3 (N.D. Cal. Sept. 7, 2018) (ordering jurisdictional discovery after defendants submitted declaration denying agency action); *see also Najafi v. Pompeo*, No. 19-cv-05782-KAW, 2019 WL 5423467 (N.D. Cal. Oct. 23, 2019) (granting plaintiff's motion for expedited discovery on Defendants' implementation of the waiver process pursuant to Presidential Proclamation 9645, which is commonly referred to as the "travel ban"); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. Mar. 27, 2017) ("Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party."). Indeed, expedited discovery is appropriate in some cases involving requests for preliminary injunction, like this one. *Meritain Health Inc. v. Express XScripts*, No:412-cv-266-CEJ, 2012 WL 1320147, at *2 (E.D. Mo. Apr. 17, 2012).

DATED this 14th day of November, 2019.

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