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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

Plaintiffs,

v.

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

Defendants.

Case No.: 3:19-cv-01743-SI

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

ORAL ARGUMENT REQUESTED

LR 7-1 CERTIFICATION

Pursuant to LR 7-1, counsel for Plaintiffs certify that the parties have conferred in good faith on the issues raised in this motion. On January 21, 2020, the parties conferred telephonically, and Plaintiffs identified for Defendants several categories of information that Plaintiffs believe have improperly been excluded from the administrative record and noted Plaintiffs' objections to the privilege log produced to date. On January 24, 2020, the parties conferred again in an attempt to narrow the issues in dispute. Notwithstanding those conferrals, the parties have been unable to reach a resolution.

MOTION

Plaintiffs respectfully move for an order compelling Defendants to complete the administrative record and produce a privilege log that includes documents withheld under any claim of privilege, including the deliberative process privilege. As explained below, both Plaintiffs and the Court are entitled to—and, indeed, require—the full administrative record for the Court to properly consider the merits of Plaintiffs' claims.

BACKGROUND

Plaintiffs challenge Presidential Proclamation 9945, "Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System," AR 3–6 ("the Proclamation")[1] and the Defendant agencies' implementation of the Proclamation. Plaintiffs allege, among other things, that the agencies' implementation violates the Administrative Procedure Act (APA), including the APA's procedural and substantive requirements.[2]

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[1] Citations and references to the "administrative record" (or "AR") throughout this motion refer to the page numbers that Defendants used in the Certified Administrative Record, ECF 118.

[2] This motion deals only with the completeness of the administrative record and the privilege log that Defendants have produced to date. Plaintiffs reserve their right to challenge the completeness of additional or supplemental records that Defendants produce, request extra-

On November 20, 2019, in response to this Court's Order, ECF 83, Defendants lodged a partial administrative record. The Court later ordered Defendants to lodge the full administrative record and provide Plaintiffs with a privilege log by January 10, 2020, acknowledging that "the parties have not yet agreed on whether the privilege log must contain documents withheld under the deliberative process privilege." ECF 117. On January 10, 2020, Defendants filed what they contend is the full administrative record, ECF 118, and produced to Plaintiffs a privilege log (attached hereto as Exhibit A).

Defendants' 133-page Certified Administrative Record is virtually identical to the partial record that Defendants submitted in November 2019, which was limited by this Court's order to "documents from the State Department's administrative record relating to the amendments to the Foreign Affairs Manual and the State Department's 'methodology' and other definitions implementing the Proclamation." *See* ECF 83, at 11. Indeed, it contains only eight pages of materials not already produced as part of that limited partial record. As explained below, the Certified Administrative Record that Defendants filed on January 10 impermissibly excludes several categories of documents that the agencies directly or indirectly considered in implementing the Proclamation. Defendants' privilege log also fails to list any documents withheld based on Defendants' assertion of the deliberative process privilege, rendering a full review of the record for completeness virtually impossible.

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record discovery as permitted under this Court's precedents, and propound discovery requests relating to Plaintiffs' non-APA claims as permitted under the Federal Rules of Civil Procedure.

ARGUMENT

I. There are reasonable, non-speculative grounds to conclude that Defendants' administrative record omits documents and information the agencies considered.

The APA requires courts to "review the whole record" underlying an agency's decision. 5 U.S.C. § 706. Thus, judicial review 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, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The "whole record" includes "all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted); *see also Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (same). Materials "indirectly considered" include those materials relied on by subordinates who directly advised the ultimate decision-maker. *See In re United States*, 875 F.3d 1200, 1207–08 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 443 (2017). In short, "a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *Pac. Shores Subdivision Calif. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (internal quotation marks omitted).

Although "[t]he administrative record submitted by the government is entitled to a presumption of completeness," that presumption "may be rebutted by clear evidence to the contrary." *In re United States*, 875 F.3d at 1206.[3] The Court may compel the agencies to

[3] In the Joint Proposed Case Management Order, ECF 116, Defendants cite *Overton Park* for the proposition that the administrative record is entitled to a "presumption of regularity." *See* ECF 116, at 11. But *Overton Park* notes merely that an agency head's *decision* "is entitled to a presumption of regularity." 401 U.S. at 415. "[T]hat presumption is not to shield [agency] action from a thorough, probing, in-depth review." *Id.*

complete the administrative record "when it appears the agency has relied on documents or materials not included in the record" submitted to the court. *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982). In those circumstances, Plaintiffs need only "(1) identify reasonable, non-speculative grounds for [their] belief that the documents were considered by the agency and not included in the record, and (2) identify the materials allegedly omitted from the record with sufficient specificity." *Audubon Soc'y of Portland v. Zinke*, 2017 WL 6376464, at *4 (D. Or. Dec. 12, 2017) (internal citations and quotations omitted).

Here, there are reasonable, non-speculative grounds to conclude that the administrative record that Defendants lodged is incomplete. Missing or redacted from the administrative record are at least five categories of documents or information considered by the agencies, including (1) comments in response to the State Department's request for emergency review by the Office of Management and Budget (OMB), AR 129–31; (2) comments and redacted material related to the public charge interim final rule, AR 38–57, and the public charge questionnaire, AR 58–63; (3) documents relating to decisions the agencies made relating to the implementation of the Proclamation; (4) names of agency officials; and (5) documents that are referred to directly in the record or support specific data that the agencies considered.

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

The administrative record shows that the State Department received over 300 comments in response to its notice of request for emergency review by OMB. AR 131. The State Department's "response to public comments" states that the Department had "determined that the majority of comments" fall within four categories, further noting that the Department was "currently reviewing all submissions to identify responsive comments, and will respond to those comments as appropriate." AR 131. All of the submitted comments were therefore "materials directly or indirectly considered by agency decision-makers," making them necessary

components of a complete administrative record. *See Thompson*, 885 F.2d at 555; *see also Nw. Envtl. Advocates v. U.S. Fish & Wildlife Serv., Inc.*, 2019 WL 6977406, at *5 (D. Or. Dec. 20, 2019) ("If it appears an agency relied on documents or materials not included in the administrative record, completion of the record is appropriate."). Indeed, public comments are a standard part of the record in any review of agency action. *See, e.g.*, *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1257 (E.D. Cal. 1997).

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

Defendants have also excluded from the administrative record all comments received in response to the public charge rule and questionnaire, *see* AR 38–63, and have improperly redacted portions of documents that Defendants claim "[c]ontai[n] non-responsive content on the Department's interim final rule on public charge." *See generally* Ex. A. But as the administrative record makes clear, the determinations that consular officers have been instructed to make under the Proclamation and the public charge rule "are related." AR 118. Indeed, Defendants included in the record both the public charge rule itself, AR 38–57, and the 60-day notice of information collection on the public charge questionnaire, AR 58–63. Moreover, the guidance that Defendants provided to consular officers—in the webinar presentation and the transcript that follows, AR 70–120—addressed the two determinations collectively and stated that the public charge questionnaire "will also be useful to posts in adjudicating both Public Charge and the Proclamation." AR 120. Thus, to the extent that Defendants' redactions suggest that "content on the . . . interim final rule on public charge, " Ex. A, was neither directly nor indirectly considered by the Defendant agencies in implementing the proclamation, *see Thompson*, 885 F.2d at 555, that suggestion is belied by the very record Defendants have produced. *See also City of Laguna Niguel v. Fed. Emergency Mgmt. Agency*, 2009 WL

10687971, at *6 (C.D. Cal. Nov. 20, 2009) ("It is difficult to justify redacting a portion of a document as being non-responsive . . . while the other portion was indeed considered and has been provided. At the very least, . . . these portions would be a part of the record based on indirect consideration . . . .").

C. Documents relating to decisions about implementation of the Proclamation

The administrative record makes clear that Defendants have also withheld significant categories of documents relating to specific decisions the agencies made in implementing the Proclamation. For example, Defendants have asserted, before this Court and the Ninth Circuit, that the agencies have construed the Proclamation to permit an intending immigrant to switch to a non-"approved" health insurance plan upon entry into the United States. *See, e.g.*, ECF 84, at 6. But nothing in the administrative record reflects or supports how that decision was made or how it squares with the Proclamation's express penalties for "circumvent[ing] the application of th[e] proclamation through fraud [or] willful misrepresentation of a material fact," AR 5, which itself is a lifetime bar to admission under the INA, *see* 8 U.S.C. § 1182(a)(6)(C)(i). That decision, together with the absence of any documents to support it, constitutes reasonable, non-speculative grounds for Plaintiffs' belief that the record is incomplete. *See Nw. Envtl. Advocates*, 2019 WL 6977406, at *5. Similarly, the Proclamation states that the consequences of any "fraud [or] willful misrepresentation of a material fact" would include becoming "a priority for removal by the Department of Homeland Security," AR 5, but Defendants' record omits any communication between the two departments at all, let alone communications about on how that provision of the Proclamation will be implemented.

The administrative record also reflects Defendants' decision that consular posts need not consider whether the "approved health insurance plan" the individual has purchased will actually

cover their preexisting medical condition(s), *see* AR 115,[4] and their decision that coverage by a "family member's plan" satisfies the Proclamation "even if the coverage is a subsidized health plan on a state's individual market," which otherwise would not qualify, AR 94. But again, nothing in the administrative record supports or reflects how those decisions were made. On those grounds, an order compelling completion of the administrative record is necessary and appropriate. *See Nw. Envtl. Advocates*, 2019 WL 6977406, at *5.

D. Redactions of individual names

Defendants have also redacted, again improperly, the "names of Department officials below the Deputy Assistant Secretary (DAS) level." *See generally* Ex. A. Defendants offer no explanation for those redactions, and do not assert that individuals below the DAS level were not part of the decision-making process.[5] Without any basis for the redactions, this Court should order them removed.

E. Documents referred to in the record or supporting the data underlying the implementation of the Proclamation

Defendants have also excluded from the administrative record specific documents either referred to directly in the record or supporting specific data that agencies clearly considered. Specific documents excluded from the administrative record include, for example, the following:

- The Secretary of State's approval of the amendments to the Foreign Affairs Manual, referred to in the Declaration of Rachel Sunden, Special Assistant in the Visa Office of the Bureau of Consular Affairs, included as page 1 of the partial administrative

[4] "Bangkok asks 'Is Post required to dig into the insurance to make sure pre-existing conditions the app[licant] has will be covered?' No, they are not required to do that. If they have an approved health insurance plan you don't need to consider whether that will cover their medical condition." AR 115.

[5] To the extent Defendants rely on a FOIA exemption as the basis for those redactions, *see* 5 U.S.C. § 552(b)(6), that is improper. *See Fontana v. Caldera*, 2001 WL 506234, at *1 (D.D.C. May 4, 2001) ("[T]he exemptions in FOIA cannot possibly be transmuted into exemptions from the government's burden to produce the entire administrative record.").

record, ECF 91. Both the Sunden Declaration and the Secretary of State's approval should be included in the administrative record.

- Information from the Centers for Disease Control and Prevention (CDC) relating to the care costs of certain medical conditions and chronic diseases. For example, the administrative record cites information from CDC on "costs associated with certain chronic diseases," which "can be costly to treat" and indicate that "an alien is a high risk of incurring significant medical costs if he or she has such a condition." *See, e.g.*, AR 47. The record also cites to information from the Department of Health and Human Services Agency for Healthcare Research and Quality (AHRQ) in discussing these health care costs and related considerations. AR 47.

- "DHS's analysis of Survey of Income and Program Participation," referred to several times the administrative record, *see, e.g.*, AR 45, 47, and cited as a source the agencies considered in determining that "health insurance is indicative of an alien's ability to be self-sufficient" and as support for their decision to "consider as a heavily weighted positive factor" in the public charge analysis "that an alien is covered by private health insurance (other than health insurance obtained with premium tax credits under the [ACA]) that can be used in the United States during the entire period of the alien's anticipated stay in the United States." AR 48.

Supporting documents excluded from the administrative record include the following:

- Documents supporting the State Department's estimate, reflected in the Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage, that its information collection request will impact 450,500 respondents. *See* AR 129; *see also* AR 126. Documents supporting or considered in determining that estimate clearly are materials on which the agency must directly have relied.

- Documents supporting the estimate, which was provided to all consular posts, that the lifetime cost of diabetes treatment is $85,000. AR 116. Documents supporting that estimate clearly are documents on which the agency must have relied.

- Documents supporting and/or considered in connection with the statement that uncompensated care costs have exceeded $35 billion in each of the last 10 years and that "data show that lawful immigrants are about three times more likely than United States citizens to lack health insurance." AR 3.

II. A privilege log that includes entries for deliberative materials is necessary to evaluate fully the completeness of the administrative record.

The Court should also order Defendants to produce a privilege log of any materials withheld under a claim of privilege, including the deliberative process privilege. Again, under the APA, the "whole record" includes "all documents and material directly or indirectly

considered by agency decision-makers. *Thompson*, 885 F.2d at 555; *see also Kalispel Tribe of Indians v. U.S. Dep't of Interior*, 2018 WL 9391703, at *1 (E.D. Wash. Mar. 8, 2018) ("An inclusive approach to the record, rather than exclusive, promotes transparency vital to meaningful public scrutiny and judicial review."). By definition, deliberative materials are "part of the universe of materials considered by the agency and must be included in the administrative record unless omitted on the basis of privilege." *Ctr. for Envtl. Health v. Perdue*, 2019 WL 3852493, at *2 (N.D. Cal. May 6, 2019) (citations and internal quotation marks omitted). Defendants must carry their burden to "demonstrate that the privilege applies." *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988); *Nw. Envtl. Advocates v. EPA*, 2008 WL 111054, at *4 (D. Or. Jan. 7, 2008) ("Because the agencies bear the burden of establishing that a privilege applies, they must reveal, through a detailed log, the documents excluded from the record.").

As the Ninth Circuit has observed, "many district courts within this circuit have required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases." *In re United States*, 875 F.3d at 1210 (denying mandamus petition challenging district court decision "to require a privilege log and to evaluate documents allegedly protected by the deliberative process privilege. And with good reason. Without a log, Plaintiffs have "no way to challenge assertion of the privilege, and this court has no way to evaluate the claim." *Nw. Envtl. Advocates*, 2008 WL 111054, *4.[6]

A privilege log is particularly important when an agency invokes the deliberative process privilege, which is both "narrowly construed," *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 2007 WL 9718960, at *4 (D. Or. Oct. 18, 2007), and "qualified," *FTC v. Warner Commc'ns Inc.*,

[6] Defendants are incorrect in their claim that *Portland Audubon Society* stands for a proposition to the contrary. *See* ECF 116, at 11 (citing *Portland Audubon Soc'y*, 984 F.2d at 1549).

742 F.2d 1156, 1161 (9th Cir. 1984). Indeed, "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Warner Commc'ns Inc.*, 742 F.2d at 1161. A privilege log will enable the Court to assess both whether the privilege applies to any withheld materials and whether it is outweighed as to some documents or parts of documents. *E.g.*, *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) (requiring submission of factual portions of deliberative materials unless they are "so interwoven" that they are not segregable).

The Court should therefore order Defendants to produce a privilege log describing any documents withheld under any claim of privilege, including the deliberative process privilege, and identifying the privilege claimed as to each particular document. *See* Fed. R. Civ. P. 26(b)(5)(A) (a party withholding information under a claim of privilege must "expressly make the claim" and "describe the nature of the documents"). Such an order would be consistent with orders from district courts across the Ninth Circuit. *See, e.g.*, *In re United States*, 875 F.3d at 1210 (collecting cases); *Nw. Envtl. Advocates*, 2008 WL 111054, at *4; *Desert Survivors v. U.S. Dep't of the Interior*, 231 F. Supp. 3d 368, 386 (N.D. Cal. 2017). Without a complete privilege log, neither Plaintiffs nor the Court can evaluate fully the completeness of the record or assess whether the privilege (if validly asserted) is outweighed as to particular materials.

CONCLUSION

A complete record is essential for the Court to conduct the "substantial inquiry" and "thorough, probing, in-depth review" required by the APA. *Overton Park*, 401 U.S. at 415. Plaintiffs respectfully request that this Court order Defendants to supplement the administrative record as set forth above and to produce a privilege log with entries for documents withheld under any claim of privilege.

DATED this 24 day of January, 2020.

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