IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT et al., Plaintiffs, v. U.S. DEPARTMENT OF STATE et al., Defendants.	No. 1:19-cv-1773 TNM

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

In asking the Court to compel the Secretary of State (the "Secretary"), the U.S. Department of State ("State Department" or "Department"), the Archivist of the United States (the "Archivist"), and the National Archives and Records Administration ("NARA") (collectively, "Defendants") to take action against the President pursuant to the Federal Records Act ("FRA"), Plaintiffs bear a burden akin to that in a mandamus action—to show that the action they seek is legally required. But that, in turn, requires Plaintiffs to prove as a matter of law that the President unlawfully removed material that qualifies as a "record" under the FRA when he allegedly took possession of so-called "notes" of a Department interpreter following a July 2017 meeting in Hamburg ("2017 meeting" or "Hamburg meeting") with Russian Federation President Vladimir Putin ("Mr. Putin"). Plaintiffs fail to meet this burden in their cross-motion and opposition filing. Indeed, Plaintiffs offer nothing that contradicts the administrative record submitted by Defendants, which demonstrates that the interpreter's notes at issue here do not qualify as federal records, so no obligation under the FRA to recover those notes has been triggered.

Plaintiffs' attempt to salvage their claims rests solely on a declaration of a former Department interpreter, Harry Obst. But Mr. Obst retired *over twenty years ago* and, according to Department records, has had only a single contract assignment in the past ten years, for one meeting in 2014. Mr. Obst has no knowledge of the Department's current practices. His description of his own purported past practices, and those of others decades ago, is irrelevant for purposes of the 2017 meeting at issue here and cannot meaningfully contradict the information provided by Dr. Lee, Chief of the Department's Interpreting Division since 2014, who has worked in the Division from 2009 to the present. Indeed, Dr. Lee, as well as another current Division interpreter and Yuri Shkeyrov, the retired interpreter who was assigned to the 2017 meeting at issue, now

confirm that the practices that, according to Mr. Obst, were followed during his tenure with the Department have not been in effect in their time at the Division, and that Mr. Shkeyrov would not have played—and did not play—any role in preparing a Memorandum of Conversation for that meeting. Indeed, Mr. Shkeyrov's declaration confirms that his notes, as a general matter as well as on the occasion of the 2017 meeting, were entirely of the kind described in the administrative record. Such notes cannot be deemed federal records.

Aside from Mr. Obst, Plaintiffs rely on the notion that Defendants would have needed to see the notes that they claim the President took in order to determine whether the notes are records. In effect, Plaintiffs argue that the FRA required Defendants to recover the notes from the President based on a mere *possibility* that they might be records. However, the FRA provision at issue, 44 U.S.C. § 3106, only addresses the "recovery of records," not any material that *might* be a record. To require Defendants now to recover the notes, and attest to their content, merely to show that no obligation under § 3106 has been triggered would exceed the ultimate relief that Plaintiffs seek in this lawsuit. Moreover, under the governing NARA regulation, the notes could not qualify as a record, regardless of their content, because they were not circulated within the Department for any official purpose. Plaintiffs' contrary interpretation is not in accord with the plain language of the regulation.

Plaintiffs' claims under § 706(1) therefore fail as a matter of law, and their alternative claims under § 706(2) are equally unavailing because the internal consultations that took place within the Department and NARA are not final agency actions subject to arbitrary and capricious review. The Court therefore should enter judgment in Defendants' favor on all claims.

ARGUMENT

I. PLAINTIFFS FAIL TO MEET THEIR BURDEN UNDER 5 U.S.C. § 706(1) TO SHOW DEFENDANTS FAILED TO TAKE LEGALLY REQUIRED ACTION

As discussed in Defendants' opening brief, the record in this case establishes that neither the Department nor the Archivist failed to take legally required action pursuant to § 3106 in regard to the so-called "notes" made by a Department interpreter during the July 7, 2017 meeting between the President and Mr. Putin. Def. Mem. [ECF 16-1] at 11-19. That is so, first and foremost, because any notes made by the interpreter while providing interpretation services are not federal records within the meaning of the FRA. *Id.* at 13-15.[1] As a result, the President's alleged action in taking possession of the notes cannot be deemed an unlawful "removal" of federal records that triggered agency obligations under § 3106. Def. Mem. at 15-16. Moreover, the inquiries made by the Department and the Archivist into the nature of interpreters' notes, after they saw news accounts of the July 2017 meeting, confirmed that the notes are not federal records. Neither the Department nor the Archivist thus knew or had reason to believe that federal records had been unlawfully removed. *Id.* at 17-22.

Plaintiffs' opposition relies heavily on a declaration submitted with their filing, in which a former Department interpreter purports to describe his experience over twenty years ago. Plaintiffs fail to explain why such assertions, which are at best outdated, should be credited over a certified administrative record containing authoritative background information provided by current Department employees with actual knowledge of Department practices in 2017—the time at issue

[1] Contrary to Plaintiffs' argument, Defendants have not shifted tactics by contending in their motion for summary judgment that the notes are not federal records. *See, e.g.*, Pl. Opp. [ECF 18-1], at 1. Defendants advanced the same argument as the primary ground for granting their motion to dismiss. Defs.' Mot. to Dismiss [ECF 9], at 13-16; Defs.' Reply [ECF 13], at 4-11. The argument was, of course, based on the allegations in the Complaint, not the facts as presented in the administrative record.

here. As discussed below, the extra-record evidence that Plaintiffs seek to introduce should be deemed inadmissible, or at a minimum, accorded no weight. Moreover, Plaintiffs fail to meet their burden to show that either the Department or the Archivist was legally required to take action against the President to recover an interpreter's notes.

A. The Secretary Had No Obligation To Act Pursuant To § 3106(a)

1. Plaintiffs' Extra-Record Evidence Is Inadmissible

In conjunction with Defendants' summary judgment filing, the Department submitted declarations from the Chief of the Department's Office of Language Services ("OLS") Interpreting Division ("LS/I"), Dr. Yun-Hyang Lee, as well as from the current Senior Diplomatic Interpreter for Russian, Marina Gross, attesting, based on their personal knowledge and present-day experience in LS/I, that any "notes" taken by Department interpreters while providing interpretation services consist of isolated words and symbols and are solely for the interpreters' own temporary use while interpreting, are not circulated afterwards to anyone else in the Department, are not intended to document the substance of meetings, and are not used for that purpose. Declaration of Dr. Yun-Hyang Lee [ECF 15-2, STATE AR 0008-0017] ("Lee Decl.") ¶¶ 12, 14-20; Declaration of Marina Gross [ECF 15-2, STATE AR 0038-0040] ("Gross Decl.") ¶¶ 4-6. Dr. Lee's declaration further confirmed that this was the case for the July 2017 Hamburg meeting. Lee Decl. ¶ 20. The Department certified that the information provided by Dr. Lee and Ms. Gross is part of an administrative record that the Department compiled in order to provide "true and complete copies of material reflecting background information relevant to the Department's failure to take action pursuant to § 3106, and the contemporaneous reasons for the absence of any such action." U.S. Dep't of State, Certification [ECF 15-2, STATE AR 0001], at 1. The Department is entitled to a "strong presumption" of regularity in regard to its compilation and certification of an administrative record. *Stand Up for California! v. U.S. Dep't of Interior*, 71

F. Supp. 3d 109, 123 (D.D.C. 2014); *accord Kiakombua v. McAleenan*, No. 19-cv-1872, 2019 WL 4051021, at *2 (D.D.C. Aug. 27, 2019) (presumption can be overcome only by "clear evidence of bad faith or gross impropriety"). Moreover, supplementation of an administrative record is generally inappropriate except in narrow circumstances. *See Stand Up for California!*, 71 F. Supp. at 116.

In their opposition, Plaintiffs ask the Court to consider extra-record evidence in the form of two newspaper articles and the Declaration of Harry Obst ("Obst Decl."), a former OLS Director who retired from the Department in 1997. *See* Pl. Opp. exs. A & B [ECF 18-2, 18-3]. Plaintiffs argue that the Court may consider this material because Defendants have failed to provide an "actual contemporaneous record" and instead have "submitted nothing besides declarations created for purposes of this litigation." Pl. Opp. at 8 n.1. However, as Plaintiffs essentially concede, this is not a situation where the record submitted by Defendants contains inappropriate post hoc rationalizations. *See NAACP v. Trump*, 315 F. Supp. 3d 457, 465-66 (D.D.C. 2018), *cert. granted*, 139 S. Ct. 2779 (2019) (No. 18-588) (recognizing purpose of rule against post hoc rationalizations is to "prevent courts from considering rationales offered by anyone other than the proper decisionmakers," such as litigation counsel). Rather, particularly in a situation like that here, where the agencies had no obligation to explain their reasons for not acting at the time, courts commonly rely on declarations prepared for the purpose of judicial review. *See Lever Bros. Co. v. United States*, 877 F.2d 101, 105 (D.C. Cir. 1989) (courts "accept[] . . . post-hoc justifications when [the] agency . . . had no duty to make a record" prior to the lawsuit); *Women Involved in Farm Economics* ("*WIFE*") *v. USDA*, 876 F.2d 994, 999 (D.C. Cir. 1989) (recognizing that where "an agency [has] no obligation to explain its actions contemporaneously, . . . the entire record, or a good part of it, is actually created for the sole purpose of judicial review"). Here, the declarations

in the administrative record properly set forth relevant "background information" as well as the agency decisionmakers' "contemporaneous reasons" for their failure to take action under § 3106. *See Empresa Cubana Exportadora de Alimentos y Productos Varios* ("*Empresa Cubana*") *v. U.S. Dep't of Treasury*, 606 F. Supp. 2d 59, 68-69 (D.D.C. 2009), *aff'd*, 638 F.3d 794 (D.C. Cir. 2011); *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996). The mere fact that Defendants' administrative record consists of declarations does not justify consideration of Plaintiffs' extra-record evidence.

Plaintiffs also suggest that the Court may consider their proposed evidence insofar as they assert claims under 5 U.S.C. § 706(1) and because their extra-record submission contains "necessary 'background information.'" Pl. Opp. at 8 n.1 (quoting *Grace v. Whitaker*, 344 F. Supp. 3d 96, 112-13 (D.D.C. 2018)). Neither rationale supports the admissibility of the newspaper articles and declaration that they submit here. Although courts have not always limited review of "agency inaction under 5 U.S.C. § 706(1)" to "the record as it existed at any single point in time," *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), the records submitted by Defendants here are sufficient to allow for judicial review because they describe the agencies' contemporaneous reasons and provide the background information necessary to understand the agencies' lack of action under § 3106. *Empresa Cubana*, 606 F. Supp. 2d at 69 (observing that such declarations are "routinely accepted by courts in this Circuit").

In contrast, Plaintiffs' proposed extra-record evidence consists of either inadmissible hearsay or irrelevant assertions by an individual who has no knowledge of current Department practices. Plaintiffs seek to rely on a newspaper article for the truth of its content. *See* Pl. Opp. at 5-6, 12, 17 n.5 (citing *Washington Post* article submitted by Plaintiffs as Exhibit A-1). They also

attach a second newspaper article that is not cited anywhere in their brief. *See id*. ex.A-2. However, "courts within this Circuit have consistently barred newspaper articles from introduction as evidence due to the fact that they constitute inadmissible hearsay." *Atkins v. Fischer,* 232 F.R.D. 116, 132 (D.D.C. 2005); *see also Konah v. D.C.*, 971 F. Supp. 2d 74, 80 (D.D.C. 2013); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 123-24 (D.D.C. 2002). Both articles therefore should be excluded from the Court's consideration.

Plaintiffs also heavily rely on the Obst declaration to support their argument that the interpreter's notes at issue here are federal records within the meaning of the FRA. Obst claims that when he was employed at OLS prior to 1997, interpreters who provided interpretation services at meetings "between high level officials, especially one attended by the President" used their notes to produce, or help others in producing, a "Memorandum of Conversation," or "MemCon," to "memorialize the discussion" at the meeting. Obst Decl. ¶¶ 9, 11-12. Obst also asserts that interpreters at such meetings sometimes provided their notes to the Executive Secretary in the Office of the Secretary of State so that they could be destroyed. *Id.* ¶ 14. Plaintiffs rely on Obst's description to argue that any notes made by the interpreter at the July 2017 Hamburg meeting were "created or used in the process of creating a subsequent record," and thus qualify as "intermediary records" governed by NARA's General Records Schedule 5.2. Pl. Opp. at 3, 17-18. Plaintiffs essentially ask the Court to credit Obst's assertions as if they were descriptions of current OLS practices, and to ignore the actual descriptions of current OLS practices provided by the current OLS Interpreting Division Chief and another current OLS employee.

One problem with Plaintiffs' theory is that, in asking the Court to disregard Defendants' submission, Plaintiffs make no effort to overcome the presumptions of regularity and good faith to which Defendants' certified records and sworn declarations are entitled. *See PETA v. U.S. Dep't*

of Agric., 918 F.3d 151, 158 (D.C. Cir. 2019) ("A 'presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"); *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) ("[A]bsent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record."); *Calton v. Babbitt*, 147 F. Supp. 2d 4, 8 (D.D.C. 2001) ("Absent a showing of bad faith, representations made by an administrative agency are entitled to a presumption of good faith.").

A second, and equally fatal, problem is that Obst's purported description of how certain interpreter notes may have been used before 1997, when he retired from OLS—even if accurate for that time period—are not relevant to whether the Secretary or the Archivist had an obligation to recover interpreter notes created twenty years later, in 2017, when interpreters' roles were far different from what Obst describes. Although Obst asserts that he has "periodically served as an interpreter on a contract basis" since his retirement, he concedes that he has not done so recently, and he does not claim that any contract assignment he may have had since retirement involved high-level officials. Obst Decl. ¶ 5. The Department's records, moreover, indicate that Obst had only one contract assignment in the past twenty years, in 2014. Supplemental Declaration of Dr. Yun-Hyang Lee ("Supp. Lee Decl.," attached hereto) ¶ 2. While Obst states that "[t]o the best of my knowledge, the policies and practices of OLS as I describe them remain the policies and practices of that Office in effect to this day," Obst Decl. ¶ 6, he in fact identifies no basis on which he could assert knowledge on that point.

Defendants submit herewith three declarations rebutting Obst's assertions.[2] The current Chief of OLS's Interpreting Division, Dr. Lee, who joined OLS in 2009; together with Thomas Ronkin, the European Branch Chief, who began interpreting for OLS on a contract basis in 1994 and has been employed there full-time since 2001; and Mr. Shkeyrov, who joined OLS in 1995 and has been in the Interpreting Division since at least 2000, all confirm that Obst does not accurately describe current practices, which have been in effect throughout their time at OLS. Supp Lee Decl. ¶¶ 4-8; Declaration of Thomas S. Ronkin ("Ronkin Decl.," attached hereto) ¶¶ 3-4; Declaration of Yuri Shkeyrov ("Shkeyrov Decl.," attached hereto) ¶¶ 3-5.[3] The Obst declaration therefore provides no "background information" that might be useful to resolve Plaintiffs' APA claims of alleged § 3106 violations involving notes of a meeting that took place in 2017. Certainly, practices that are, at best, long outdated are not a "relevant factor[]" that Defendants had any need to consider. *See* Pl. Opp. at 8 n.1 (citing *Grace*, 344 F. Supp. 3d at 112-13). For this reason, the declaration is inadmissible and should be excluded from the Court's consideration. *See, e.g.*, *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 85–86 (D.D.C. 2018) (rejecting extra-record evidence where it was "not at all clear that the Court needs to have this data in front of it"); *Midcoast Fishermen's Ass'n v. Gutierrez*, 592 F.Supp.2d 40, 46 (D.D.C. 2008) ("Supplementing the record

[2] Defendants do not seek to supplement the administrative record because the record as it stands sufficiently supports Defendants' entitlement to summary judgment. The additional declarations attached hereto are for the sole purpose of demonstrating that Mr. Obst does not accurately describe current practices of OLS interpreters, and in particular, the role of Mr. Shkeyrov during the 2017 meeting at issue here, and that Mr. Obst's declaration therefore contains no information relevant to this case and should be excluded from consideration. However, if the Court considers Mr. Obst's declaration when evaluating the merits of Plaintiffs' claims, it should also consider the information provided in the declarations attached hereto.

[3] Although none of these declarants has first-hand knowledge of practices like those Obst describes, Dr. Lee and Mr. Ronkin posit that the role of an LS/I interpreter has become more specialized and more narrowly focused on the task of interpreting since Obst worked at the Department. Supp. Lee Decl. ¶ 10; Ronkin Decl. ¶ 5.

with the bycatch data from an earlier period will not provide any 'background' useful to resolving the case.").

2. Plaintiffs Fail To Show that the Interpreter's Notes Are Federal Records

With or without their extra-record evidence, Plaintiffs fail to show that the interpreter's notes at issue here are federal records. Plaintiffs seek to pursue a theory that interpreters' notes are "created or used in the process of creating a subsequent record" and thus qualify as "intermediary records" under NARA's General Records Schedule 5.2. *See* Pl. Opp. at 3. However, the record submitted by Defendants shows that interpreters' notes are not created or used in the process of creating a subsequent record but instead are created solely for interpreters' own temporary reference while interpreting. Lee Decl. ¶¶ 14-20; Gross Decl. ¶¶ 4-6.

Plaintiffs attempt to discount the import of the administrative record, essentially through three arguments: (1) that the Department's descriptions of interpreters' notes are inadequate because they do not distinguish between notes made during meetings of high-level officials and notes made during other types of interpreter assignments; (2) that the Department's descriptions are also inadequate because they focus on interpreters' general practices rather than specifically describing the notes made at the July 2017 meeting; and (3) that interpreters' notes fall entirely outside the scope of 36 C.F.R. § 1222.12(c), the NARA regulation addressing "rough notes,". Each of these arguments fails.

a. Plaintiffs Fail To Show that LS/I Interpreters Play a Role in Documenting High-Level Meetings

First, in arguing that there is a distinction between interpreters' notes made at a meeting of high-level officials and those made during other assignments, Plaintiffs rely exclusively on the Obst declaration's assertions regarding purported practices in the Interpreting Division over twenty

years ago. *See, e.g.*, Pl. Opp. at 8, 12, 15. But the same lack of relevance that renders the Obst declaration inadmissible also deprives it of any evidentiary weight. As already explained, the Obst declaration at best describes practices that may have been in place in the past but were no longer in effect by the time of the 2017 meeting. The current Chief of OLS's Interpreting Division, Dr. Lee, plainly stated in her first declaration that LS/I interpreters—including the interpreter for the Hamburg meeting—do not use their notes to memorialize the substance of meetings, "regardless of the level of meeting for which services are being provided." Lee Decl. ¶ 12; *see id.* ¶¶ 17-19. In her second declaration, Dr. Lee confirms that the description set forth in the Obst declaration, even if an accurate representation of Obst's own experience over twenty years ago, does not accurately reflect practices of LS/I interpreters since she joined OLS in 2009—thus including the time of the Hamburg meeting in 2017. Supp. Lee Decl ¶¶ 5-8; *see also* Ronkin Decl. ¶¶ 3-4. Mr. Shkeyrov, who was the interpreter at the July 2017 meeting, also confirms that he did not play the role of note taker for that meeting or any other meeting and that his notes at that meeting were of the same variety as Dr. Lee previously described—in other words, that they were isolated words and symbols, solely for his short-term temporary use while interpreting. Shkeyrov Decl. ¶¶ 4-5. The underlying premise of Plaintiffs' first argument thus is wholly flawed and without any factual support.[4]

[4] Plaintiffs speculate, citing the *Washington Post* article attached to their brief, that then-National Security Adviser H.R. McMaster and others sought to rely on Mr. Shkeyrov's notes after the July 2017 meeting in order to prepare a MemCon. *See* Pl. Opp. at 17 n.5. However, the article suggests that McMaster and others had first attempted to get a read-out of the meeting from then-Secretary Tillerson, indicating that they had not planned to rely on the interpreter or his notes for that purpose. *See* ECF 18-2, at 13, 14. Moreover, the article does not state that McMaster or anyone else expected the interpreter to have taken notes to provide a summary of the meeting or to use his notes for that purpose. By Obst's own description, even in his time an interpreter did not play the role of note taker and was not responsible for preparing a MemCon unless there was no designated note taker at the meeting, Obst Decl. ¶¶ 11-12, but Plaintiffs have not shown there was no designated note taker at the 2017 meeting. Mr. Shkeyrov indicates that he did not play that role.

b. Plaintiffs' Speculation Regarding the Specific Content of Mr. Shkeyrov's Notes Should Be Rejected

Second, in arguing that Defendants' record addresses only interpreters' general practices rather than the notes made at the July 2017 meeting, Plaintiffs downplay Dr. Lee's confirmation that Mr. Shkeyrov's practice conformed with her description, failing to mention this until page 19 of their brief. Other than attempting to dismiss this evidence, Plaintiffs merely speculate that the notes might have contained a date, time, name, title, or word identifying "broad subjects discussed" at the meeting, sufficient to make them a "record." Pl. Opp. at 11, 14. However, for their claims under 5 U.S.C. § 706(1), Plaintiffs bear the burden of showing that Defendants failed to take legally required action. *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1172 (D.C. Cir. 2016); *cf. Kirwa v. U.S. Dep't of Defense*, 285 F. Supp. 3d 257, 267 (D.D.C. 2018) (to prevail in a § 706(1) claim, "plaintiffs must demonstrate" that the agency "failed to take a *discrete* agency action that it is *required* to take," under a standard that "reflects the common law writ of mandamus" (internal quotation omitted)); *Skalka v. Kelly*, 246 F. Supp. 3d 147, 152 (D.D.C. 2017) ("The standard by which a court reviews this type of agency inaction is the same under both § 706(1) of the APA and the Mandamus Act, 28 U.S.C. § 1361.").

Plaintiffs attempt to shift this burden by arguing that "what information the Hamburg Meeting Notes actually contain" is "uniquely within the possession of the Government"—by which they apparently mean the President, who they claim took those notes. Pl. Opp. at 19. However, Plaintiffs cannot lump the President together with the Department and NARA as "the Government" for purposes of their burden-shifting effort when their claim, by its very nature, is

Shkeyrov Decl. ¶ 5. The possibility that an interpreter may on some occasions be asked after the fact for their recollections about a meeting has no bearing on whether jottings the interpreter made during the meeting for the interpreter's own use while interpreting are federal records.

premised on a distinction between these entities, seeking to require the Department and NARA to initiate a recovery action *against* the President. *Cf. Wyler v. Korean Air Lines Co*., 928 F.2d 1167, 1171 (D.C. Cir. 1991) ("One federal agency should not be charged with knowledge of what another is doing simply because both are components of the same federal government." (internal quotation omitted)). Moreover, the information provided by Dr. Lee and Ms. Gross about LS/I interpreters' practices and the nature of interpreters' notes since 2008 or 2009, when they joined the Department, is certainly relevant to understanding whether any notes made by Mr. Shkeyrov during the July 2017 meeting were "records" within the meaning of the FRA. Indeed, as discussed below, this information conclusively shows that interpreters' notes do not qualify as records under the applicable NARA regulation, 36 C.F.R. § 1222.12(c). And Mr. Shkeyrov's declaration defeats any notion that the notes that he made at the 2017 meeting were in any way different from the practices described in the record. *See* Shkeyrov Decl. ¶¶ 4-5.

Plaintiffs attempt to analogize the situation here to that in *Armstrong v. Exec. Office of the President* ("*EOP*") ("*Armstrong II*"), 1 F.3d 1274 (D.C. Cir. 1993), claiming that the D.C. Circuit in that case recognized that even isolated written details about a government activity, such as a date or time, qualify as a "record" under the FRA. Pl. Opp. at 14. But *Armstrong II* recognized no such thing, and Plaintiffs' reliance on the court's decision in that case is misplaced. Unlike here, the parties in *Armstrong II* stipulated that the e-mails at issue, reflecting seven years' worth of government communications, contained information about agency activities. *Armstrong II*, 1 F.3d at 1283. The only issue in *Armstrong II* was whether, despite their substance, the e-mails could be destroyed because paper print-outs already existed. *See id.* at 1284 (identifying issue as whether "a document, once denominated a federal record," could "shed[] that appellation at a later point"). The court concluded that the paper print-outs did not render the original e-mails "extra copies"

under 44 U.S.C. § 3301 because the print-outs did not contain the same metadata as the originals. *See Armstrong II*, 1 F.3d at 1284. Nothing in *Armstrong II* suggests that such metadata, isolated from substantive information about a government activity and never circulated within an agency, qualifies as a federal record. And here, of course, Plaintiffs have not shown that Mr. Shkeyrov's notes in fact contained any such information in the first place. Their argument on this point therefore should be rejected as pure speculation.

Plaintiffs also attempt to rely on *Armstrong II* to argue that Defendants do not have "unfettered discretion" to make a categorical determination that interpreters' notes do not qualify as federal records. *See* Pl. Opp. at 19 (citing *Armstrong II*, 1 F.3d at 1283). Again, however, their argument misses the mark. Defendants have not asserted "unfettered discretion" to deem interpreters' notes non-records, nor have they argued that a challenge to the Department's recordkeeping guidelines, insofar as they deem interpreters' notes non-records, would be unreviewable.[5] But Plaintiffs here raise no challenge to an agency recordkeeping guideline. Instead, they seek to compel the Department to initiate a recovery action against the President pursuant to § 3106 on the theory that the Department knew or had reason to believe an unlawful removal of records had occurred. Plaintiffs have the burden to show that the specific interpreter's notes at issue in their claim qualify as records, but they have failed to meet this burden.

c. LS/I Interpreters' Notes Do Not Qualify as Records Under 36 C.F.R. § 1222.12(c)

Third, Plaintiffs' argument that Mr. Shkeyrov's notes may have "informational value," and thus may fall within the FRA's definition of "record" in 44 U.S.C. § 3301(a)(1)(A), is a misguided attempt to evade the significance of the applicable NARA regulation, 36 C.F.R. § 1222.12(c). As

[5] Of course, any such challenge would fail on the merits, given the nature of interpreters' notes as described in the administrative record submitted here.

Defendants have explained, § 1222.12(c) excludes "[w]orking files and similar materials," including "rough notes," from the FRA's definition of "record" unless they have been "circulated or made available to employees, other than the creator, for officials purposes." 36 C.F.R. § 1222.12(c)(1). Essentially, this regulation means that "rough notes" and similar material are not "appropriate for preservation," do not provide "evidence" of Government activities, and have no "informational value" within the meaning of § 3301(a)(1)(A) *unless* the criteria delineated in the regulation are satisfied. The NARA regulation quite reasonably recognizes that agency employees might jot something down on a notepad for their own short-term reference without thereby creating something governed by the FRA. Only where such notes play a role beyond the employee's own use, by being "circulated . . . for official purposes," could such material attain the status of a record, and only if the notes met the additional requirement of "contain[ing] unique information." *See* 36 C.F.R. § 1222.12(c).

Pursuant to § 1222.12(c)(1), LS/I interpreters' notes, including Mr. Shkeyrov's notes, fall squarely outside the FRA's definition of "records" because they are not used for any purpose other than to aid the short-term memories of the interpreters who make them, and they are not circulated within the Department for any official purpose. Lee Decl. ¶¶ 14-20; Gross Decl. ¶¶ 4-6.[6] Rather, interpreters' notes are no different from any other agency employee's "rough notes," made for the employee's own temporary reference while carrying out work responsibilities. *See id.*

Plaintiffs argue that § 1222.12(c) only applies where there is "a final product that itself constitutes a federal record." *See* Pl. Opp. at 17. However, Plaintiffs provide no basis for their

[6] To the extent the Court considers Mr. Obst's assertions, it is worth noting that nowhere in his declaration does he suggest that, even twenty years ago, interpreters' notes were circulated to anyone else for review or use, even for the purpose of preparing a MemCon. Plaintiffs thus concede that interpreters' notes do not satisfy the criteria for records under 36 C.F.R. § 1222.12(c).

interpretation, which is at odds with both the regulation's language and with common sense. First, nothing in the regulation requires the existence of a record containing the same information contained in a "rough note" *unless* the note has been "circulated . . . for official purposes." *See* 36 C.F.R. § 1222.12(c). Plaintiffs' interpretation effectively reads the circulation requirement out of the regulation. Plaintiffs ignore other aspects of the regulatory language as well. The regulation applies to "preliminary drafts," "rough notes," and "other similar materials," suggesting that "preliminary drafts" and "rough notes" are different, and that "working files and similar material" include *any* random written material that an agency employee produces in the course of working, other than final work product, not just "preliminary drafts." *See id.* The regulation thus contemplates the very situation presented here, where an agency employee takes notes purely for the employee's own use. NARA's exclusion of such material from the statutory definition of "record" reflects an understanding that, under such circumstances—where an employee's notes are never seen by anyone in the agency but the employee, were created for the employee's own use, and play no formal role in any agency process—the notes are categorically not "appropriate for preservation" because they do not qualify as "evidence" of agency activity, and they have no "informational value" for FRA purposes. *See* 44 U.S.C. § 3301(a)(1)(A).

Significantly, Plaintiffs have not raised a challenge to NARA's regulation in this case; instead, they merely misinterpret it. But even if Plaintiffs' claim were construed to raise such a challenge, it should be rejected. Plaintiffs fail to show that Congress "unambiguously foreclosed" NARA's interpretation of the FRA's definition of "record." *See Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009). To the contrary, § 1222.12(c) comports with the FRA's purpose of "[j]udicious" preservation, "prevent[ing] the creation of unnecessary records" and "unnecessary Federal paperwork," and "[s]implification of the . . . processes of records creation, maintenance,

transfer and use." 44 U.S.C. § 2902(3), (5). Rather than requiring individualized evaluation of every scrap of paper that an agency employee has written on, the NARA regulation reasonably distinguishes between notes that might qualify as a "record" and those that do not based on whether they are circulated within the agency for official purposes. The regulation therefore is entitled to *Chevron* deference. *Cf. Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 57 (D.C. Cir. 2005) (at *Chevron* step two, "'the [reviewing] court defers to the [agency]'s interpretation so long as it is 'based on a permissible construction of the statute'"). Because Plaintiffs fail to show that any notes made by Mr. Shkeyrov while he provided interpretation services to the President in the July 2017 meeting were "records" within the meaning of the FRA, their claims under § 706(1) fail, and Defendants are entitled to judgment on this basis alone.

3. Plaintiffs Fail To Show that the President Unlawfully Removed Federal Records from the Department

As explained in Defendants' opening brief, the non-record status of Mr. Shkeyrov's notes also dooms the second prong of Plaintiffs' § 706(1) claim because there could be no "unlawful" removal of non-records under the FRA. *See* Def. Mem. at 15. In their brief, Plaintiffs simply repeat their flawed argument that the notes are "records," again relying on the Obst declaration's irrelevant descriptions of purported practices from twenty or more years ago. Pl. Opp. at 21. Significantly, given Plaintiffs' burden to establish the elements of their § 706(1) claims, Plaintiffs offer no admissible evidence whatsoever showing that the President took the notes in the first place, relying solely on the same hearsay news account they cited at the motion to dismiss stage. *E.g.*, Compl. ¶ 25. In any event, for the same reasons explained above, Plaintiffs also fail to meet their burden to show that any such action would be unlawful—which would at a minimum require that any such notes be "records" within the meaning of the FRA. Their § 706(1) claim fails as a matter of law on this ground as well.

4. Plaintiffs Fail To Show that the Secretary Knew or Had Reason To Believe that Federal Records Were Unlawfully Removed from the Department

Because the record submitted by the Department shows that any interpreter's notes from the July 2017 meeting were not federal records, the Court need not reach the third element that Plaintiffs would need to establish in order to prevail in their § 706(1) claim. However, even aside from Plaintiffs' failure to establish the first two elements, Plaintiffs' claim also fails because they have not satisfied their burden to show that the Secretary knew or had reason to believe that the President unlawfully removed federal records. As explained in Defendants' opening brief, the record shows that the Department's Records Officer, Timothy Kootz, understands and has reason to believe that interpreters' notes do *not* qualify as federal records and that, as a result, any removal of interpreters' notes from the Department would *not* be an unlawful removal of federal records triggering obligations under § 3106(a). *See* Def. Mem. at 16-17; Declaration of Timothy Kootz ("Kootz Decl.") [ECF 15-2, STATE AR 0003-0007] ¶¶ 4, 9-10.

In contrast, Plaintiffs have provided no admissible evidence showing that the Secretary knew or had reason to believe that an unlawful removal of federal records had occurred. Plaintiffs argue that either then-Secretary Tillerson or Mr. Kootz knew that the President had taken possession of Mr. Shkeyrov's notes following the July 2017 meeting. Pl. Opp. at 22. For this assertion, they rely on the inadmissible hearsay descriptions in the *Washington Post* article, and on Mr. Kootz's acknowledgment that he had read similar news reports. *See* Kootz Decl. ¶ 9. Of course, reading a news report is not the same as knowing or having reason to believe that it is true. Nor is knowing about an "allegation" that the President took the notes the same as knowing that the President took the notes. *See* Pl. Opp. at 22.

Most importantly, knowing that the President took the notes is not the same as knowing

that an unlawful removal of federal records had occurred. Plaintiffs fail to show that either then-Secretary Tillerson or Mr. Kootz knew or had reason to believe that Mr. Shkeyrov's notes were federal records, or that the President's taking possession of those notes would be unlawful. Again, they seek to rely on the Obst declaration, but Plaintiffs have submitted nothing to suggest that either then-Secretary Tillerson or Mr. Kootz was aware of the practices that, according to Mr. Obst, were in effect twenty years ago, before either of them had joined the Department, or that they believed similar practices were in effect in 2017. Mr. Kootz has attested to the contrary, explaining that his office received information indicating that interpreter's notes were not federal records. Kootz Decl. ¶ 9. There can therefore be no dispute that Mr. Kootz did not know or have reason to believe Mr. Shkeyrov's notes were federal records. And to the extent Plaintiffs rely on the notion that the specific contents of Mr. Shkeyrov's notes would determine whether they qualify as a federal record, Plaintiffs fail to show that anyone in the Department—including Mr. Shkeyrov—had reason to conclude that these particular notes qualified as a federal record.

Significantly, Plaintiffs' reliance on *Competitive Enter. Inst. v. U.S. Envt'l. Prot. Agency* ("*CEI*"), 67 F. Supp. 3d 23 (D.D.C. 2014), gets them nowhere. Pl. Opp. at 22. The court in that case denied the Government's motion to dismiss because it was "implausible that EPA Administrators would not have suspected the destruction of any federal records with the removal of over 5,000 Agency text messages," and because, at that stage of proceedings, the plaintiff was "entitled to the benefit of all reasonable inferences." *Id.* at 34 (explaining that the court would not "require[] [the plaintiff] to prove the merits of its claim on a motion to dismiss"). At summary judgment, Plaintiffs cannot rely on a similar inference, particularly where the information available from LS/I indicated to Mr. Kootz, and continues to show, that interpreters' notes do not qualify as federal records. *See* Kootz Decl. ¶¶ 8-10.

Plaintiffs also assert that the Secretary need not have made a specific finding of an FRA violation before an obligation under § 3106(a) is triggered. Pl. Opp. at 23. Defendants' summary judgment filing does not argue otherwise. However, the language of § 3106(a) does plainly require that the Secretary "know[] or ha[ve] reason to believe" of an unlawful removal of federal records before any obligation to initiate action arises. 44 U.S.C. § 3106(a). Plaintiffs' failure to show that the Secretary knew or had reason to believe an unlawful removal of federal records occurred before they filed suit thus dooms their claim. Indeed, the record submitted by the Department shows that there continues to be no reason to believe an unlawful removal occurred. The Court therefore should enter judgment in favor of the Secretary.

B. The Archivist Had No Obligation To Act Pursuant To § 3106(b)

Plaintiffs' § 706(1) claim against the Archivist also fails as a matter of law. As explained in Defendants' opening brief, the same fundamental defects that apply to Plaintiffs' § 706(1) claim against the Secretary also apply to their claim against the Archivist: Any action by the President to take possession of Mr. Shkeyrov's notes following the July 2017 meeting was not an unlawful removal of federal records. Def. Mem. at 17-18. Moreover, the specific requirement in § 3106(b)—that there first be a "notifi[cation]" of an unlawful action[7] and passage of a "reasonable period of time" for the Secretary to take action himself, or that the Archivist believe that the Secretary is

[7] Section 3106(b) refers to "a reasonable period of time after being notified of any such unlawful action described in subsection (a)." 44 U.S.C. § 3106(b). In their opening brief, Defendants read the "notify[cation]" described in subsection (b) to cross-reference the "notif[ication]" of the Archivist described in subsection (a). Def. Mem. at 18. Plaintiffs argue that, instead, subsection (b) requires that the Secretary have been notified of an unlawful removal. Pl. Opp. at 24-25. Plaintiffs' alternate interpretation does not change the fact that no obligation under § 3106(b) was ever triggered. Regardless of who must receive the notice, § 3106(b) is clear that some notification of unlawful action must have taken place, or that the Archivist believe the Secretary is "participating" in an unlawful action. 44 U.S.C. § 3106(b). Here, neither the Secretary nor the Archivist was ever notified of an unlawful removal, nor is there any suggestion that the Secretary participated in an unlawful removal.

"participating" in the unlawful action—has not been satisfied. *See* 44 U.S.C. § 3106(b).

Plaintiffs again fail to meet their burden to show otherwise. Plaintiffs concede that the Archivist would at least have to be aware of an unlawful removal before any obligation would arise under § 3106(b) to take action. Pl. Opp. at 25. They further acknowledge the explanation of NARA's Chief Records Officer, Mr. Brewer, that his office is not aware that any unlawful removal by the President occurred because, in NARA's understanding, interpreters' notes do not qualify as federal records. *See* Declaration of Laurence Brewer ("Brewer Decl.") [ECF 15-3, NARA AR 0003-0008] ¶¶ 10-11. Plaintiffs thus essentially concede that no obligation of the Archivist under § 3106(b) has been triggered.

Rather than showing that the Archivist has any obligation under § 3106(b), Plaintiffs attempt to show that the Archivist might have become aware of an unlawful removal if he had considered "the actual content of the Hamburg Meeting Notes." Pl. Opp. at 26. Plaintiffs do not explain how the Archivist could have accessed Mr. Shkeyrov's notes, other than pursuing an enforcement action that requires awareness of an unlawful removal to begin with. But in any event, it is undisputed that no one at NARA has seen the notes, and the plain language of § 3106(b) does not require action based on a mere possibility of an unlawful removal.

Moreover, as previously explained, Plaintiffs' theory that the notes might be records, depending on their actual content, is itself flawed. This theory again relies on the Obst declaration's assertion that interpreters' notes taken during a 2017 meeting of the President would be circulated within the Department or used to create a MemCon. Because Mr. Obst at best describes practices that might have been in effect twenty years ago but have not been in effect since that time, whether in 2017 or today, *see* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5, Plaintiffs fail in raising even a hypothetical possibility that Mr. Shkeyrov's notes qualify as federal

records. *See* 36 C.F.R. § 1222.12(c). The Court therefore should enter judgment in favor of the Archivist on this claim.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' CLAIMS UNDER 5 U.S.C. § 706(2)(A)

A. Plaintiffs Fail To Show that Their § 706(2)(A) Claims Properly Challenge a Final Agency Action

Plaintiffs' attempt to assert alternative claims under § 706(2)(A) also fails because Plaintiffs have identified no "final agency action" by either the Department or NARA that could be the subject of such a challenge. *See* Def. Mem. at 19-20 (explaining "agency action" requirement). In their brief, Plaintiffs argue that Defendants made final "determinations" that they can challenge under § 706(2)(A). With respect to the Department, Plaintiffs identify Mr. Kootz's "conclu[sion]" that any notes made by the interpreter at the July 2017 meeting was not a federal record. Pl. Opp. at 27. With respect to the Archivist, Plaintiffs identify the "determin[ation]" by Mr. Brewer's office that "any removal or seizure of the interpreter's notes would not qualify as an unlawful removal or destruction of records contemplated by the FRA." *Id.* at 28. However, in their Complaint, Plaintiffs identified neither of these as the subject of a § 706(2) claim. Rather, they asserted that Defendants' "failures to act" under § 3106—i.e., Defendants' failures to initiate action against the President to recover Mr. Shekyrov's notes—were the "final agency actions" that they sought to challenge. Compl. ¶¶ 49, 51. Plaintiffs' brief thus only further muddies the question of exactly what they seek to challenge in their § 706(2)(A) claims.

Plaintiffs' attempts to show that Defendants undertook actions that were "final" with respect to their failure to act under § 3106 are similarly confused. As a member of the D.C. Circuit has recognized, the finality test under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), "does not easily accommodate an agency's failure to act," and "[i]f an agency has failed to act with respect

to a matter that a complaining party seeks to compel under § 706(1), it is hard to comprehend the contested inaction as 'final action' as that term is defined in *Bennett v. Spear*." *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1247 (D.C. Cir. 2018) (Edwards, J., concurring). Here, Defendants' declarants explain that, upon seeing news reports alleging that the President took an interpreter's notes, they engaged in internal discussion and informal consideration of whether some action on their part might be warranted. Kootz Decl. ¶ 9; Brewer Decl. ¶ 10. However, their inquiries ended when they learned that interpreters' notes were used by interpreters only as a short-term memory aid and concluded that such notes do not meet the criteria to be considered federal records. Kootz Decl. ¶¶ 9-10; Brewer Decl. ¶ 11. These conclusions by the Department and NARA do not qualify as final agency action, nor did the Department or NARA engage in any final agency action based on those conclusions. Instead, these conclusions logically precluded any consideration of whether to take action under § 3106.

First, the conclusions did not represent "actions" that were the "consummation of a decisionmaking process" because neither agency initiated a "decisionmaking process" regarding the nature of interpreters' notes, nor did either agency take any "agency action" with respect to interpreters' notes, equivalent to the issuance of a "rule, order, license, sanction, [or] relief." *See* 5 U.S.C. § 551(13). Although Plaintiffs argue that the term "agency action" is broad, it is not so broad that it covers every single thing that happens or does not happen within an agency—such as, here, conversations between agency employees. The consultations that occurred here were precisely the type of internal inquiry that happens in the course of "the common business of managing government programs." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19-20 (D.C. Cir. 2006). Indeed, courts—including a decision Plaintiffs rely on, *Med. Comm. for Human Rights v. Sec. & Exch. Comm'n*, 432 F.2d 659 (D.C. Cir. 1970), *vacated on other*

grounds by 404 U.S. 403 (1972)—have recognized that the "formalities preceding and attending the administrative action" are relevant to whether it qualifies as reviewable. *See id.* at 667 (internal quotation omitted) (concluding that the "attributes" of the "final proxy determinations" before it were sufficiently formal to allow review under the Securities Exchange Act). Where these cases criticize the distinction between "negative" and "affirmative" orders, *see Rochester Tel. Corp. v. United States*, 307 U.S. 125, 141–42 (1939), also cited by Plaintiffs, they merely recognize the well-established principle that, for example, a denial of a rulemaking petition can qualify as a "final agency action," just as can the grant of a license, where both are formal agency determinations made pursuant to standard processes. Nothing in *Med. Comm.* or *Rochester* suggests that a consultation between employees, resulting in their informal conclusion that no action is required under a particular statute, qualifies as a final agency action subject to arbitrary and capricious review under § 706(2).

Second, the considerations that Mr. Kootz and Mr. Brewer undertook did not determine "rights or obligations" or lead to "legal consequences," *Bennett*, 520 U.S. at 178 (internal quotation omitted). Plaintiffs argue that Mr. Kootz and Mr. Brewer made decisions that directly affect Plaintiffs' rights by preventing Plaintiffs from seeking the interpreter's notes from the July 2017 meeting under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Pl. Opp. at 28-29. They analogize these decisions to agency guidance that "altered the legal regime by resolving" a previously open question of statutory interpretation. *See id.* (citing *NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011)). However, Plaintiffs are incorrect in positing that before Mr. Kootz and Mr. Brewer consulted with each other and with OLS, there was an open question of statutory interpretation that their informal inquiries resolved. Nothing that Mr. Kootz or Mr. Brewer did changed the nature of interpreters' notes under the FRA or affected Plaintiffs' ability to obtain

such notes through FOIA requests—which would require that the notes qualify as "agency record" under FOIA. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 217 (D.C. Cir. 2013). Instead, interpreters' notes were not federal records prior to these inquiries, and Mr. Kootz simply confirmed his understanding that that was the case by consulting with OLS, the office with greatest familiarity with such material, and conveyed that understanding to Mr. Brewer. Moreover, Plaintiffs do not suggest that they were ever able to obtain interpreters' notes through FOIA requests prior to 2019, when Mr. Kootz and Mr. Brewer came across the news reports that led them to make their inquiries—particularly notes that an interpreter made while interpreting for the President, who is not an "agency" subject to FOIA. *See id.* at 222–23 (explaining that "documents that an agency created in response to requests from, and information provided by, a governmental entity not covered by FOIA" were not agency records subject to FOIA).

Plaintiffs attempt to analogize these inquiries to the "jurisdictional determination" that the Supreme Court addressed in *U.S. Army Corp of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). However, the Court in *Hawkes* explained that Army Corps of Engineers' "jurisdictional determinations" are issued pursuant to a specific process dictated by regulation and thus did not simply reflect an informal consultation of one agency employee with another. *See id.* at 1812. Moreover, the Court recognized that the jurisdictional determination served to warn companies that any attempt to discharge pollutants on the land at issue without a permit would be "at the risk of significant criminal and civil penalties." *Id.* at 1815. The conclusions at issue here—that interpreters' notes are not federal records, meaning no consideration of whether to initiate action under § 3106 was warranted—pose no similar risk to Plaintiffs.

Plaintiffs also cite *Cal. Communities Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019), but that case illustrates why, even under a "pragmatic approach," no final agency action is at issue

here. The court there concluded that an EPA memo setting forth the agency's interpretation of a statute was not a final agency action, citing several factors: (1) the memo did not qualify as a "source" that regulated parties could "rely on" in any agency proceeding and thus had no "independent legal authority"; (2) the memo did not put anyone at risk of any "penalty or liability of any sort"; and (3) the memo did not foreclose any challenge to the legal interpretation that it set forth. *Id.* at 637-38. The internal consultations that Plaintiffs attempt to challenge here are even further removed from a final agency action than an EPA memo because they did not produce any public writing that signified a new legal interpretation by the agencies. Instead, Mr. Kootz and Mr. Brewer simply consulted informally with other agency employees and confirmed that interpreters' notes are not federal records, obviating any need to consider whether to take action under § 3106. Neither the Department nor NARA produced anything that has independent legal authority or could subject anyone to any penalty or liability, nor have they foreclosed any challenge to any underlying legal interpretation, provided that the challenge is brought pursuant to a statutory cause of action or properly falls within an APA cause of action. Plaintiffs thus fail to identify a "final agency action" that could be challenged under § 706(2), and judgment on these claims should therefore be entered in Defendants' favor.

B. Any Action by Defendants Subject To a § 706(2) Challenge Was Not Arbitrary or Capricious

Even aside from the lack of any final agency action that could be challenged under § 706(2), Defendants' inaction under § 1306 was not arbitrary or capricious for the same reasons explained above with respect to Plaintiffs' § 706(1) challenges. Both the Department and NARA reasonably did not initiate a recovery action under § 3106 on the ground that interpreters' notes do not qualify as federal records and that, as a result, no unlawful removal of federal records could have occurred. Kootz Decl. ¶ 10; Brewer Decl. ¶ 11.

In arguing to the contrary, Plaintiffs posit that Defendants "fail[ed] to consider that an interpreter's notes for meeting between high-level government officials are different than for run-of-the-mill, routine interpreting missions." Pl. Opp. at 31-32. As discussed, however, Plaintiffs are simply wrong in advancing such a theory, which relies solely on Mr. Obst's declaration, which at best describe practices that have not been in effect for over ten years. *See* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5. Mr. Obst does not identify any factors that Defendants should have considered because, contrary to his assertions, LS/I interpreters play no role in creating MemCons and do not use their notes for such a purpose, even for meetings involving the President and a foreign leader. *See* Lee Decl. ¶ 12; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5. Plaintiffs' arguments thus fail, and Defendants are entitled to judgment in their favor on this ground as well.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, the Court should enter summary judgment in favor of Defendants.

Dated: May 1, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005
Tel. (202) 616-8475 / Fax (202) 616-8470
kathryn.wyer@usdoj.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT et al., Plaintiffs, v. U.S. DEPARTMENT OF STATE et al., Defendants.	No. 1:19-cv-1773 TNM

SUPPLEMENTAL DECLARATION OF DR. YUN-HYANG LEE

1. I am the Chief of the Interpreting Division and the Senior Diplomatic Interpreter for Korean in the Office of Language Services (LS/I) at the U.S. State Department. As described in my previous declaration, I am familiar with the plaintiffs' claims in the above-captioned case. I have also reviewed the Declaration of Harry Obst filed by the plaintiffs. I write this declaration in order to respond to the assertions in Mr. Obst's declaration concerning the practices of LS/I interpreters and to explain that, although Mr. Obst was an employee here more than 20 years ago, his description of an interpreter's role in meetings involving high-level officials does not accurately reflect my understanding and is not in accord with current practices of LS/I interpreters during the time period at issue in this case.

2. OLS records confirm that Mr. Obst retired in 1997. Records indicate that, after his retirement and prior to 2000, Mr. Obst had a few contract assignments with OLS. However, from 2000 to the present, records indicate Mr. Obst provided interpretation services for OLS on only one occasion, which occurred in 2014 on a single-contract basis. I was Interpreting Division Chief at the time of this assignment.

3. Mr. Obst asserts that, when he was at OLS, interpreters followed different rules and procedures when they were assigned to provide interpretation services at meetings involving high level officials. He asserts that, uniquely for such meetings, interpreters participated in creating a Memorandum of Conversation (MemCon) memorializing the substance of the meetings. According to Mr.Obst, interpreters sometimes were responsible for preparing a MemCon themselves, and sometimes assisted an official note taker who prepared the MemCon, but either way, Mr. Obst suggests that interpreters would consult and rely on their notes to ensure the accuracy of the MemCon. Mr. Obst further suggests that, once a MemCon was prepared, the interpreter was responsible for delivering the MemCon to the Executive Secretary in the Department's Office of the Secretary of State, who then lodged it in the Department's official files and also either took possession of the interpreter's notes for the purpose of destroying them, or directed the interpreter to destroy the notes. Mr. Obst also asserts that interpreters received training on how to prepare a MemCon as part of their standard training when joining OLS.

4. When Mr. Obst was hired on a contract basis in 2014, I did not ask him to participate in preparing a MemCon for that assignment, and I am not aware of anyone else in the Department asking him to do so. My expectation as Interpreting Division Chief would be that Mr. Obst had no involvement with preparing a MemCon for that assignment.

5. Since I joined OLS in 2009, LS/I interpreters have not received training in preparing MemCons. I did not receive any such training, and as Interpreting Division Chief, I have not provided such training for interpreters in my Division. LS/I interpreters also have not followed special rules or procedures, in regard to their "notes" or any participation in memorializing the substance of meetings, when those meetings involve high level officials, including meetings between the President and foreign officials. As Interpreting Division Chief, my expectations and

directions with respect to LS/I interpreters' role are uniform across all meetings for which the office provides services, regardless of the level or rank of the meeting's participants. I have never been asked by officials within the State Department, the White House, or any other agency to apply a different set of rules or expectations for Cabinet- or Presidential-level meetings.

6. The descriptions that I provided in my previous declaration apply to meetings involving high-level officials, including the President. LS/I interpreters do not have a duty to help construct or confirm the accuracy of a MemCon, nor as a matter of practice do they have any responsibility or role in the creation of documents memorializing a meeting. LS/I interpreters do not act as "note takers" in the sense of someone assigned to take notes for purposes of documenting the substance of a meeting, and I do not expect them to retain any notes or jottings that they made to help construct or confirm the accuracy of a MemCon or for any other purpose. LS/I interpreters do not deliver MemCons to the Executive Secretary, nor do they give their notes to the Executive Secretary. As I explained in my previous declaration, an LS/I interpreter's role is limited to providing on-site language interpretation services, and any "notes" an LS/I interpreter may take during on-site interpretation serve only as an ad hoc and temporary aid for the interpreter's short-term memory recall.

7. Since 2009, I have provided interpretation services at numerous Presidential or Cabinet-level meetings, both before and after I became the Interpreting Division Chief in 2014. I have never played any formal role in generating a MemCon or similar document—whether drafting, editing, or clearing on such a document—during or following such meetings, nor was I asked or directed to do so. I also was never asked to preserve for any purpose any written "notes" I may have created, nor was I ever asked to turn over notes I made.

8. As Division Chief since 2014, I would be aware of any obligation of LS/I interpreters to memorialize such meetings if any such obligation existed. Indeed, I would be responsible for ensuring any such obligation be fulfilled. There is, however, no such obligation. As Division Chief, I have never asked or directed an LS/I interpreter to participate in the drafting of a MemCon, nor have I directed LS/I interpreters to preserve any written "notes" they may have created. During my tenure, I am not aware of an instance where an interpreter's written "notes" were turned over to anyone else in the Department, including the Executive Secretariat. Again, this is consistent with the fact that, in my own experience and understanding, such involvement would be far outside the scope of an interpreter's role because interpreters' sole purpose, when serving as interpreters, is to engage in real-time language interpretation for whomever we are assigned to interpret.

9. Between 2009 and the present, there have been only a few occasions when I was contacted by National Security Council staff following a White House meeting for which I interpreted, and was asked to help clarify particular details of a conversation, though I was never told, and do not know, whether the request was made for the purpose of helping NSC staff memorialize a conversation through a MemCon or to confirm their own memory of the conversation for some other purpose. On those occasions, I recall providing answers to one or two brief questions. These follow-up conversations were informal and took place on an ad-hoc basis. I believe both parties to these conversations understood I was providing my recollections as a courtesy, not pursuant to any professional obligation or duty.

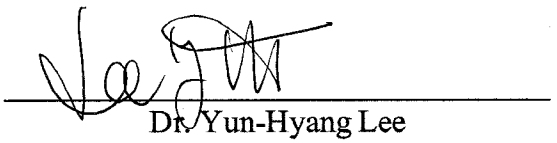
10. I am not sure what accounts for the difference between Mr. Obst's descriptions of interpreter practices at meetings involving high level officials while he was employed in OLS more than twenty years ago and current practices. As stated above, his descriptions are at odds with my

own understanding of an interpreter's role, and I was surprised to read his account. Even if Mr. Obst's descriptions accurately reflect practices in effect at some time in the past prior to 1997, I can only infer that, since that time, the role of an LS/I interpreter has become more specialized and in line with the professional and ethical standards for professional interpreter. Today, and at least since I joined the office in 2009, LS/I provides a critical but narrowly defined service for offices and officials across the U.S. Government—to facilitate conversations between U.S. officials and foreign counterparts that speak languages other than English. An LS/I interpreter's obligations with respect to a particular meeting assignment, regardless of the level or rank of the participants, are fulfilled once the meeting has concluded. An LS/I interpreter has no responsibility to convey their recollections of the substance of a meeting to myself or anyone else in the State Department or in Government, nor are interpreters expected to retain any written "notes" they may have jotted down in the course of interpreting principal's remarks. This strict construction of our interpreters' role is consistent with my expectations as Interpreting Division Chief and, as I described in my previous declaration, with the professional standards for language interpreters. It also reflects the present practice of OLS, which was in effect at the time of the meeting at issue in this case.

* * *

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 1st day of May 2020, Washington D.C.



Dr. Yun-Hyang Lee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT et al., Plaintiffs, v. U.S. DEPARTMENT OF STATE et al., Defendants.	No. 1:19-cv-1773 TNM

DECLARATION OF THOMAS S. RONKIN

1. I am the European Branch Chief and Senior Diplomatic Interpreter for French in the Interpreting Division of the Office of Language Services at the U.S. State Department (LS/I). French interpretation and translation have been my sole professional activity for more than 35 years. In 1994, I began interpreting for OLS on a contract basis. I have supported Presidential and other high-level meetings since approximately 2001, and I became a full-time staff member with the Interpreting Division in 2003. I became European Branch Chief in 2018. I am not currently a member of International Association of Conference Interpreters (AIIC), but as a professional interpreter, I follow the Code of Professional Ethics developed by AIIC and adopted by LS/I.

2. I am familiar with the claims in this case and understand that questions have been raised regarding the scope of a State Department interpreter's duties and responsibilities, and the nature of so-called "notes" taken by interpreters during meetings for which they provide interpretation services.

3. I have never been asked to serve as a note taker at any meeting for which I was assigned to interpret. As European Branch Chief, I am not aware of any interpreter whose

assignment I managed being asked to take summary notes of a meeting. I have never been asked to participate in the drafting of a memorandum of conversation following a meeting, nor am I aware of any interpreter whose assignment I managed being asked to do so. I have never received any training with respect to the drafting of documents memorializing the substance of a meeting and do not myself know of any interpreters who have received such training. I am not aware of any distinction in LS/I interpreters' role for Presidential or high-level meetings as opposed to other meetings. As European Branch Chief, I have never instructed interpreters to conduct themselves differently, or to provide additional services, because of the rank or level of the principals associated with a particular assignment. During my tenure with the Interpreting Division, there has never been any protocol or practice that interpreters turn over notes to the Executive Secretariat or any other State Department official.

4. Although I might jot down a word, abbreviation, or symbol while interpreting, those "notes" are not meant to provide a way to track the content of the discussion so that it could be reconstructed for a summary or other documentation of the meeting that was prepared afterwards. Instead, these "notes" would only be for my own personal reference while I am interpreting so that I can remember a specific detail and interpret it accurately. I do not believe anything about what happened at the meeting could be understood by looking at my notes after the meeting was over.

5. During the early years of my tenure with the Department, I recall hearing of previous interpreters who were involved in the substantive diplomatic mission surrounding particular Presidential meetings. Because my knowledge of such practices is based only on second-hand accounts, I cannot speak to the extent such practices were either common or rare, or whether or not these practices reflected some official office protocol or policy. To the extent that such practices occurred, I can only speculate that they reflected a difference in professional culture

at the time, and that interpreters might in at least some instances have been perceived then as a substantive participant within a presidential or diplomatic envoy. Certainly by the time I began interpreting for Presidential meetings in 2002, a diplomatic interpreter's role was much more specialized. In my experience, an interpreter's professional responsibilities are limited to providing language interpretation services on-site, meaning that our role is complete once a meeting is concluded, and we play no role in the diplomatic mission other than interpreting for a principal. On rare occasions, I have provided brief responses to requests in person or by telephone emanating from note takers, authorized US officials or meeting participants who were seeking a clarification about a specific detail from a meeting, such as a date, a figure or a proper name. I consider the current practice to be consistent with the professional and ethical standards for professional interpreters.

* * *

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this __1st____ day of May 2020, Washington D.C.

Thomas S. Ronkin

Thomas S. Ronkin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT et al., Plaintiffs, v. U.S. DEPARTMENT OF STATE et al., Defendants.	No. 1:19-cv-1773 TNM

DECLARATION OF YURI SHKEYROV

1. I formerly served as Senior Diplomatic Interpreter for Russian in the Office of Language Services, Interpreting Division (LS/I) at the U.S. State Department. In approximately 1993, I began interpreting for the Office of Language Services on a contract basis. I joined the Office of Language services as a full-time employee in the Translating Division in 1995. During my time in the Translating Division, I performed interpreting assignments on an occasional basis. In approximately 1999 or 2000, I transferred from the Translating Division to the Interpreting Division, where I remained until my retirement in 2018.

2. I understand that the plaintiffs in this case have raised a question about the role of a Department interpreter and are claiming that interpreters may serve as note takers in meetings where they are interpreting, and may also either draft Memoranda of Conversations or other documentation or summaries for these meetings or review Memoranda, documentation or summaries that others have drafted or otherwise help with creating such Memoranda, documentation, or summaries. I understand the plaintiffs specifically claim that interpreting notes are used to create such "MemCons."

3. In my experience providing interpretation services since 1995, I never served as a note taker or prepared a summary or memorandum of conversation for a meeting, nor was I ever asked to do so. Such a function was never one of my job responsibilities. I never received training on how to prepare Memoranda of Conversations, either when I began working as a contractor, when I joined the Translating Division, or when I joined the Interpreting Division. My role as interpreter was not different at meetings involving high-level officials, including the President. My role was always limited to providing interpretation services at the meeting.

4. As a professional interpreter, I developed my own style and techniques for consecutively interpreting a principal's remarks from English to Russian. For any given assignment, I may or may not jot down "notes" in the form of a symbol, word or abbreviation. If I do make "notes," it is for the sole purpose of helping me remember specific details as I am interpreting. The extent to which I may need to jot down a symbol, word, or abbreviation depends on the length and complexity of a principal's remarks, as well as the speed at which they are delivered. My methodology with respect to written notes includes quickly jotting down a word, number, symbol, or some other scribbled-down figure that would be comprehensible only to myself. I do not organize these jottings in any particular manner, as there is no need to refer to a "note" or understand its context once a particular set of remarks has been interpreted. Because the "notes" are only for a temporary and immediate purpose, I do not mark them with any title or label or date that identifies the meeting or the participants. I do not believe it would be reasonably possible for anyone else to accurately reconstruct the content of a meeting that I've provided interpretation services for by reviewing "notes" I may have written down. Following a meeting, I have not been asked to retain my notes nor have I treated or preserved them as Department records or delivered them to any Department office or official.

5. I served as the interpreter for the meeting between President Trump and Russian Federation President Putin on July 7, 2017. I recall that the jottings that I made on that occasion were in line with my general practices described above. Specifically, they consisted only of intermittent, isolated and disorganized scribblings that I used to recall specific details as I was engaged in the immediate task of interpreting. As with all of the other interpretations I conducted during my career at the Department, I was not assigned to serve as a note taker for that meeting, in the sense of taking notes to make a record of what happened at the meeting, nor did I attempt to play that role. The "notes" that I made were not that kind of notes but were interpreting notes for my temporary and immediate use as I described above. I do not believe it would be possible for someone else to accurately reconstruct what happened at that meeting or what was discussed from the jottings that I made in the course of interpreting. I am not aware of any request by anyone at the State Department or elsewhere in the Executive Branch to use my jottings to prepare a Memorandum of Conversation of the July 2017 meeting.

6. During my time as an interpreter for LS/I, I heard of interpreters who served before me who had in the past been more substantively engaged in certain Presidential meetings, including providing input on diplomatic considerations before a meeting or helping draft MemCons following a meeting. I, however, have no first-hand knowledge of such practices, and cannot speak to the extent to which these anecdotes reflected some official policy or protocol of the office or the individual experience of certain interpreters. I can only state that, based on my own experience, this was certainly not the practice of Interpreting Division interpreters by 1998 or 1999, when I first started being assigned to interpret for Presidential-level meetings, and certainly was not the practice in July 2017.

* * *

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 1st day of May 2020, Washington D.C.

Yuri Shkeyrov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE et al.,

Defendants.

No. 1:19-cv-1773 TNM

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

Defendants provide the following response to Plaintiffs' Statement of Facts, ECF No. 18-4.[1]

Plaintiffs' Statement	Defendants' Response and/or Counter-Statement
4. For certain meetings involving high level U.S. government officials, and especially those attended by the President, OLS interpreters use their notes to assist a designated note taker in preparing a memorandum of conversation ("MemCon") documenting the substance of the meeting. Declaration of Harry Obst ("Obst Decl."), attached to Pl. Mot. for Summ. J., Ex. B, ¶ 11. If a meeting of this kind does not have a designated note taker in attendance, then the interpreter becomes primarily responsible for preparing the MemCon and "the interpreter	4. Denied. Plaintiffs' assertion is based on the proposed extra-record testimony of Harry Obst, which should be excluded from consideration because Mr. Obst concedes that he retired in 1997 and has no recent relevant experience with Department practices. Obst Decl. ¶¶ 2, 5; *see* Supplemental Declaration of Dr. Yun-Hyang Lee ("Supp. Lee Decl.," submitted with this filing) ¶ 3. The U.S. Department of State ("Department")'s certified administrative record shows that OLS interpreters do not use their notes to assist in the preparation of a MemCon or other

[1] Plaintiffs' summary judgment filing purports to include a Response to Defendants' Statement of Undisputed Material Facts and Counter-Statement of Undisputed Material Facts pursuant to LCvR 7(h)(1). However, Defendants' initial summary judgment filing included a Statement of Facts pursuant to LCvR 7(h)(2), which applies to "cases in which judicial review is based solely on the administrative record." *See* LCvR 7(h)(2). In cases, such as this one, governed by LCvR 7(h)(2) rather than (h)(1), no response to the moving party's statement of facts is required. *See id.* In submitting a response to Plaintiffs' statement of facts, Defendants do not concede that LCvR 7(h)(1) rather than (h)(2) properly applies.

would rely principally on their interpreter notes to refresh their memory of the contents" of the meeting for this purpose. *Id.* ¶¶ 12–13. Once completed, the MemCon would be delivered "to the Executive Secretary in the Office of the Secretary of State" for retention in the Department's files, and the notes would either be turned over to the Executive Secretary for destruction or destroyed by the interpreter, "their purpose of facilitating the preparation of the MemCon having been served." *Id.* ¶ 14.	documentation of meetings where they provide interpretation services, and interpreters play no role in creating such documentation. Declaration of Timothy Kootz ("Kootz Decl.")[2] ¶ 8); Declaration of Dr. Yun-Hyang Lee ("Lee Decl.")[3] ¶¶ 11-12, 14, 17, 18-20); Declaration of Marina Gross ("Gross Decl.") [4] ¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 4-7; Declaration of Thomas S. Ronkin ("Ronkin Decl.," submitted with this filing) ¶¶ 3-4; Declaration of Yuri Shkeyrov ("Shkeyrov Decl.," submitted with this filing) ¶¶ 3-5.
5. OLS interpreters are, at all times, "performing duties as employees or contractors of the State Department, and specifically OLS," and, accordingly, they "report to the Director of OLS, who reports to the Assistant Secretary for Administration, who reports to the Under Secretary for Management." Obst Decl. ¶ 7. OLS interpreters remain bound to follow the directives of the State Department and applicable record retention policies, such as the Federal Records Act. *Id.* ¶ 18.	5. Admitted in part but immaterial. Admitted that OLS interpreters are employees or contractors of the Department and have corresponding obligations. However, OLS interpreters do not report to the Director of OLS or to the Assistant Secretary regarding the substance of the meetings they interpret for, nor do they create federal records at such meetings. Kootz Decl. ¶¶ 4, 8-10; Lee Decl. ¶¶ 11-12, 19. Any reporting by an interpreter to the Department after an assignment is limited to administrative matters such as comp-time worked, travel comp-time, or travel/expense reimbursement requests. Lee Decl. ¶ 11.
6. Although an interpreter could not prepare a verbatim transcript, interpreters' notes can contain important details and substantive content from the meeting. *See* Obst Decl. ¶ 8 ("[E]ven interpreters who use a lot of ideograms will still, by necessity, record many words in their notes."); *see also id.* ¶ 11–14 (describing the role interpreter notes play in preparing a substantive MemCon). At	6. Denied. Plaintiffs' assertion that interpreters' notes can contain "important details and substantive content" from a meeting is not supported by Mr. Obst's declaration, which states only that some interpreters "record many words in their notes." Obst Decl. ¶ 8. Mr. Obst's extra-record declaration should also be excluded from consideration for the reasons stated

[2] Mr. Kootz's declaration is included in the Department's administrative record [ECF 15-2] at STATE AR 0003-0007.

[3] Dr. Lee's declaration is included in the Department's administrative record at STATE AR 0008-0017.

[4] Ms. Gross's declaration is included in the Department's administrative record at STATE AR 0038-0040.

least for high level meetings involving the President, like the Hamburg meeting, interpreters rely on their notes to confirm the accuracy of information that will appear in a MemCon, or if no note taker is present, to refresh their recollection for purposes of creating a MemCon. *Id.*	above. Any words that might be jotted down by an interpreter are not selected based on their substantive importance to the speakers or to the Department but solely to aid an interpreter's short-term memory, and an interpreter's notes would not allow the interpreter or anyone else to reconstruct the substance of a meeting. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6.
7. Interpreter notes have discernible context and are useful, at a minimum, to the interpreters who create them in confirming the accuracy of information that will appear in a MemCon prepared by a designated note taker, or if no note taker was present, to refresh their recollection for purposes of creating a MemCon. *Id.* ¶¶ 11–13.	7. Denied. Plaintiffs' assertion is based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. Interpreters' notes are not useful, nor are they used, in the preparation of MemCons. Lee Decl. ¶¶ 14, 16-19; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
8. Interpreter notes convey meaningful information, at a minimum, to the interpreters who create them and are used in confirming the accuracy of information that will appear in a MemCon prepared by a designated note taker, or if no note taker was present, to refresh their recollection for purposes of creating a MemCon. Obst Decl. ¶¶ 11–13.	8. Denied in part. Plaintiffs' assertion is based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. Admitted that interpreters' notes convey meaningful information to the interpreters who create them, but only temporarily and only insofar as the notes jog the interpreters' short-term memory and assist in performing interpretation services. The notes are not used in the preparation of MemCons. Lee Decl. ¶¶ 14, 16-19; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
9. For meetings involving the President, a MemCon will be created and interpreter notes are used by the interpreter to confirm the accuracy of information that will appear in a MemCon prepared by a designated note taker, or, if no note taker was present, to refresh their recollection for purposes of creating a MemCon. Obst Decl. ¶¶ 11–13. Once the MemCon is prepared, the interpreter delivers it to the Executive Secretary in the Office of the Secretary of	9. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny Plaintiffs' assertions regarding White House or Department practices in creating MemCons. Denied that OLS interpreters or their notes play any role in creating MemCons. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which

State, who lodges it in the official files of the State Department. *Id.* ¶ 14. The Executive Secretary then "either take[s] possession of the interpreter['s] notes to destroy them or direct[s] the interpreter to destroy them, their purpose of facilitating the preparation of the MemCon having been served." *Id.* Thus, the content of the notes is circulated and transmitted through their incorporation into a MemCon to other officials within the Department who are granted access to the MemCon, including the Secretary of State.	should be excluded from consideration for the reasons stated above. Interpreters' notes are not used in the preparation of MemCons, provided to the Executive Secretary, or circulated within the Department, and interpreters do not participate in the preparation of MemCons. Lee Decl. ¶¶ 14, 16-19; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5. Whether MemCons of meetings involving the President are created or circulated within the Department is immaterial. If any MemCon contains words that also appear in an interpreters' notes, it is coincidental and thus immaterial.
10. Defendants' own statements confirm that they considered whether interpreter notes could, as a categorical matter, meet the FRA's definition of "record," Kootz Decl. ¶ 9; Brewer Decl. ¶ 10 (noting that "[b]ased on this description [of interpreter practices], my office agreed that interpreter notes do not meet the FRA definition of a federal record"), and, accordingly, made a final determination not to pursue the matter further, *see* Kootz Decl. ¶ 10; Brewer Decl. ¶ 11 ("Because the interpreter notes were not federal records, NARA determined that any removal or seizure of the interpreter's notes would not qualify as an unlawful removal" and "[a]ccordingly, NARA did not initiate any formal inquiry into the matter").	10. Denied. Department and NARA records offices informally consulted with other Department employees in a manner that is typical of their daily work. Kootz Decl. ¶ 9; Declaration of Laurence Brewer ("Brewer Decl.")[5] ¶¶ 10-11. Neither agency initiated formal consideration of or issued a formal determination regarding whether to take action under the FRA to recover interpreter's notes. *See id.*
11. Defendants acknowledge that they reviewed news accounts of the President's seizure of the Hamburg Meeting Notes in January 2019. Kootz Decl. ¶ 9; Brewer Decl. ¶ 10. Defendants separately received letters from Plaintiffs alerting them to the President's seizure of the Hamburg Meeting	11. Admitted in part and denied in part. Admitted that Department and NARA records office staff became aware of such news accounts and that the Department and NARA received letters from Plaintiffs, and that the news accounts and letters alleged that the President had seized an interpreter's notes.

[5] Mr. Brewer's declaration is included in NARA's administrative record [ECF 15-3] at NARA AR 0003-0008.

Notes and the associated FRA violations. *Id.*; Compl. ¶¶ 31–34.	Denied that the news accounts or letters alerted Defendants to FRA violations. Kootz Decl. ¶ 9; Brewer Decl. ¶¶ 10-11. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny whether the assertions in news accounts are accurate. The newspaper articles that Plaintiffs have submitted are inadmissible hearsay. The accuracy of assertions in the news accounts is immaterial because any notes created by the interpreter are not federal records.
12. The OLS interpreter who provided interpretation services at the July 7, 2017 Hamburg meeting created a set of written notes during the meeting (the "Hamburg Meeting Notes"). Compl. ¶ 28; Miller Article. No other record was created to document the July 7, 2017 meeting. Compl. ¶ 29; Miller Article.	12. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny whether the OLS interpreter who provided interpretation services at the July 7, 2017 Hamburg meeting created a "set of written notes," or whether any record was created to document the July 7, 2017 meeting. The newspaper articles cited by Plaintiffs is inadmissible hearsay. Denied insofar as Plaintiffs assert that the interpreter's notes documented the meeting. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5. Admitted that Mr. Shkeyrov sometimes made jottings in the manner described in the administrative record, solely for his own short-term use while interpreting. Lee Decl. ¶ 20; Shkeyrov Decl. ¶¶ 3-5.
13. Following the July 7, 2017, President Trump seized the Hamburg Meeting Notes from the OLS interpreter who created the notes and instructed the interpreter not to discuss the contents of the meeting with other members of the Administration. Compl. ¶ 25; Miller Article.	13. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny whether, following the July 7, 2017 meeting, the President seized the OLS interpreter's notes and instructed him not to discuss the contents of the meeting with others. The newspaper article cited by Plaintiffs is inadmissible hearsay.

14. Most of the interpreting missions performed by OLS interpreters do not involve high-level officials and are not otherwise highly sensitive. Obst Decl. ¶ 15. For these meetings, OLS interpreters are not required to preserve their notes for any period of time because the meeting would not have had any particular historical or record-keeping value. *Id.* Notes created during meetings involving sensitive information or high level government officials, and especially those involving the President, are treated "starkly different." *Id.* ¶ 16. It is critical to ensure that a record of these meetings is prepared and maintained and OLS interpreters are instructed to treat their notes with the same level of care and sensitivity as a classified document and to maintain the notes until a MemCon can be prepared. *Id.*	14. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny whether "most" interpreting missions performed by OLS interpreters involve high-level officials or are highly sensitive. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. Interpreters' notes are not used in the preparation of MemCons, provided to the Executive Secretary, or circulated within the Department, and interpreters do not participate in the preparation of MemCons. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
15. Following a meeting between high level officials, especially one attended by the President, a MemCon will be prepared to memorialize the discussion within a few days of its occurrence. Obst Decl. ¶ 9. The MemCon preserves for the historical record the contents of the discussion, and also provides Executive Branch officials authorized to receive it with a readout of what was discussed. *Id.*	15. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny Plaintiffs' assertions. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. Plaintiffs' assertions are immaterial because OLS interpreters do not participate in preparing MemCons. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
16. Where a designated note taker from either the State Department or White House is assigned to attend a high level meeting, like the July 7, 2017 Hamburg meeting, they will have primary responsibility for preparing a MemCon once the meeting concludes. Obst Decl. ¶ 11. In the course of preparing a MemCon, it is common for the note taker to ask the interpreter to preserve their notes until the MemCon is finalized. *Id.*	16, Denied. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. OLS interpreters do not use their notes to assist in the preparation of a MemCon, and interpreters play no role in creating MemCons or other documentation of meetings where they provide interpretation services. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp.

The note taker will typically share a draft of the MemCon with the interpreter prior to finalizing the document so that the interpreter can consult their notes and can confirm the accuracy and completeness of the MemCon. *Id.*	Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
17. If a note taker is not assigned to the meeting, the interpreter will be personally responsible for preparing the MemCon. Obst Decl. ¶ 12.	17. Denied. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. OLS interpreters do not use their notes to assist in the preparation of a MemCon, and interpreters play no role in creating MemCons or other documentation of meetings where they provide interpretation services. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
18. A designated note taker was not present at the July 7, 2017 Hamburg meeting. *See* Miller Article.	18. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny whether a designated note taker was present at the July 7, 2017 Hamburg meeting. The newspaper article cited by Plaintiffs is inadmissible hearsay, nor does it state that no one at the 2017 meeting served as a designated note taker. Plaintiffs' assertion is immaterial because interpreters do not act as note takers or participate in creating MemCons or other documentation of meetings where they provide interpretation services. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
19. A standard MemCon includes details like the date of the meeting, the start and end time, a list of attendees and their titles, and a notation that it is a memorialization of the meeting based on the interpreter's memory and notes. Obst Decl. ¶ 10. While it is not meant to provide a verbatim transcript, a proper MemCon will capture the substance of the parties' discussion. *Id.*	19. Denied that a MemCon includes a notation that it is the memorialization of a meeting based on an interpreter's memory and notes. OLS interpreters do not participate in creating MemCons or other documentation of meetings where they provide interpretation services. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.

	Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny Plaintiffs' other assertions, which are immaterial. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above
20. Once the MemCon is finalized, it will be submitted to the Executive Secretary within the Office of the Secretary of State. Obst Decl. ¶ 16. Only at that point would the Executive Secretary instruct the interpreter to hand the notes over for destruction or to otherwise destroy the notes. *Id.*	20. Denied. Plaintiffs' assertions are based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. OLS interpreters do not participate in creating MemCons or other documentation of meetings where they provide interpretation services. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.
21. A meeting principal requesting or demanding the notes of an interpreter is an extremely unusual and odd occurrence for an OLS interpreter. Obst Decl. ¶ 17.	21. Neither the administrative record nor the extra-record evidence offered by Plaintiffs provides evidence sufficient to allow Defendants to admit or deny Plaintiffs' assertion. Plaintiffs' assertion is based solely on the proposed extra-record testimony of Mr. Obst, which should be excluded from consideration for the reasons stated above. Plaintiffs' assertion is immaterial because the notes of an OLS interpreter are not federal records. Lee Decl. ¶¶ 17-18; Gross Decl. ¶¶ 4-6; *see also* Supp. Lee Decl. ¶¶ 5-8; Ronkin Decl. ¶¶ 3-4; Shkeyrov Decl. ¶¶ 3-5.

Dated: May 1, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
MARCIA BERMAN
Assistant Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005
Tel. (202) 616-8475 / Fax (202) 616-8470
kathryn.wyer@usdoj.gov
Attorneys for Defendants