UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 19-1872 (KBJ)
KEVIN K. McALEENAN, Acting Secretary of Homeland Security, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STRIKE EVIDENCE OUTSIDE OF THE ADMINISTRATIVE RECORD

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INTRODUCTION

Although Plaintiffs' lawsuit appears to be the first to challenge the agency training materials at issue here, that lawsuit is nevertheless a challenge to purported agency action under ordinary principles of record review. In this Circuit, it is blackletter law "principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *See, e.g., IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997).

Notwithstanding the clear import of this Circuit's record rule, in moving for summary judgment, Plaintiffs have unilaterally submitted and relied on evidence that is not in the administrative record. And although there are limited exceptions to that rule, including certain motions to complete or supplement the record, Plaintiffs have not availed themselves of such motions, let alone made the heightened showings necessary to invoke these exceptions, for example bad faith on the part of the government. Indeed, the Court set a deadline for Plaintiffs to file such a motion. Plaintiffs elected not to—instead choosing to wait and see what argument the government proffered on summary judgment, and then amassing a new "record" in response, which, of course, is a textbook violation of the record rule. Accordingly, Defendants have moved to strike Plaintiffs' extra-record evidence and "Statements of Undisputed Fact." Defs.' Mot. to Strike Evidence Outside of the Administrative Record (ECF No. 52); *see* Defs.' Memo. of Law in Supp. of Their Mot. to Strike Evidence Outside of the Administrative Record (ECF No. 52-1) ("Defs.' Mot. to Strike").

In response, Plaintiffs freely acknowledge that the evidence they rely on comes from outside of the administrative record. Pls.' Memo. of Law in Opp. to Defs.' Mot. to Strike Evidence Outside of the Administrative Record at 1 (ECF No. 59) ("Pls.' Mot. to Strike Opp.")

(referring to the evidence in dispute as "extra-record," and not arguing to the contrary). However, they appear to assert that they are exempt from the record rule and may supplement the administrative record at will, neither acknowledging the record rule nor their obligation to receive leave of Court to introduce extra-record materials after the Court had already entered a schedule to address the scope of the record and for briefing summary judgment *based on that record*. Further, they rely on grounds for supplementing the record that have no basis in statute or case law—for example, their argument that Defendants' brief somehow constitutes extra-record evidence itself, therefore Plaintiffs were "forced to" file extra-record evidence. *Id.* And Plaintiffs may not use judicial notice to circumvent the record rule.

Finally, contrary to Plaintiffs' request for relief raised in their opposition papers, Defendants' papers fully complied with Local Civil Rule 7(h) and the Court's General Order, and there is no basis for the Court to treat Plaintiffs' factual representations as conceded. This Court should grant Defendants' motion and strike the extra-record evidence and associated "Statements of Undisputed Facts."

BACKGROUND

A. The Default Rule Is the Administrative Record.

Record review is "based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Put differently, "[t]he Court's function in administrative-law cases is solely 'to determine whether or not as a matter of law the *evidence in the administrative record* permitted the agency to make the decision it did.'" *Otsuka Pharm. Co. v. Burwell*, 302 F. Supp. 3d 375, 389 (D.D.C. 2016) (K.B. Jackson. J.) (emphasis added), *aff'd sub nom. Otsuka Pharm. Co. v. Price*, 869 F.3d 987 (D.C. Cir. 2017). Plaintiffs concede this elementary principle of administrative review. Pls.' Mot. to Strike Opp. at 5 (calling

"unremarkable" the "proposition that a court's evaluation of the legality of an agency action must be based on the reasons given and the record collected by the agency itself").[1]

As a corollary, "[s]upplementing administrative records in APA cases"—what Plaintiffs have tried to do here—"is the exception, not the rule." *Safari Club Int'l v. Jewell*, 111 F. Supp. 3d 1, 4 (D.D.C. 2015); *accord Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1104 n.18 (D.C. Cir. 1979). Plaintiffs attempt to circumvent this principle by fixating on labels. They argue that Defendants "conflate supplementing the record, which Plaintiffs have not sought to do, with the introduction of extra-record evidence[;] Plaintiffs do not seek to supplement the record, so neither the timing nor the standard for doing so applies here." Pls.' Mot. to Strike Opp. at 7-8.

To the contrary, Plaintiffs have the phrases confused. "Completing" the record means to add materials actually considered by the decisionmaker; "supplementing" the record means to add new evidence not considered by the decisionmaker. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564, 2574 (2019) (so employing this terminology); *In re United States*, 138 S. Ct. 443, 444-45 (2017) (same, with completion); *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1104 n.18 (same, with supplementation); *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018) ("Supplementation involves the addition of newly created evidence or of documents that were not before the agency when the decision was made, but should have been; supplementation generally requires a showing that an exception to the record rule

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[1] Notwithstanding, Plaintiffs elsewhere imply the record rule should not apply, arguing that reliance on it would be asking the "Court to blind itself to reality." Pls.' Reply Memo. of Law in Supp. of Their Cross-Motion for Summary J. at 1 (ECF No. 60) ("Pls.' Summary J. Reply Br."); Pls.' Mot. to Strike Opp. at 2, 11. Even assuming that Plaintiffs' evidence is indeed "reality" (it is not), Plaintiffs may disagree with the record rule, but it is firmly part of U.S. Supreme Court and D.C. Circuit case law, not to mention the law of this case. *See* Op. & Order Denying Pls.' Mot. to Compel at 8 (ECF No. 32).

applies."); *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 n.14 (D.D.C. 2013).[2] The evidence Plaintiffs seek to introduce comes from outside the administrative record, and they do not allege that Defendants actually considered these materials in promulgating the Lesson Plan. *See* Pls.' Mot. to Strike Opp. at 1 & n.3, 4, 5, 6, 7, 8, 10, 12. Therefore, by attempting to use extra-record evidence that was not before U.S. Citizenship and Immigration Services ("USCIS") when it issued the Lesson Plan, Plaintiffs are trying to supplement the record.[3]

B. Plaintiffs' Extra-Record Evidence Largely Does Not Fall into an Exception for Supplementing the Administrative Record

Because record supplementation is "the exception, not the rule," *Safari Club Int'l*, 111 F. Supp. 3d at 4, Plaintiffs must demonstrate that their evidence meets an exception to the default rule that judicial administrative review is based solely on the record presented by the agency.

As a threshold matter, the Court should reject Plaintiffs' extra-record evidence because

[2] Unfortunately, Plaintiffs and a minority of courts—but not the Supreme Court or D.C. Circuit—have used the term "supplementation" to mean "completion," i.e., adding material to the record that was omitted but should have been included because the agency considered it in making the decision in question. *Compare, e.g.*, *Fort Sill Apache Tribe*, 345 F. Supp. 3d at 9, *with, e.g.*, *Cape Hatteras Access Preservation Alliance v. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009) ("[i]f it can be shown that the materials sought to be included in the record before the court, were indeed before the agency, supplementation is appropriate."). Similarly, such courts have used "extra-record evidence," on the other hand, to mean "supplementation": adding material that was never considered by the decisonmaker. *See, e.g.*, Pls.' Mot. to Strike Opp. at 8 (citing *Oceana, Inc. v. Pritzker*, 126 F. Supp. 3d 110, 112 n.2 (D.D.C. 2015)). *See Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 44 (D.D.C. 2009) (noting "confusion" in word usage); *Fort Sill Apache Tribe*, 345 F. Supp. 3d at 9 (noting "the parties' conflation of completion of the record and supplementation of the record in APA cases"). To be clear, this brief and Defendants' motion to strike use "supplementation" in its most common sense to mean going beyond the record—which is what Plaintiffs have attempted to do in this case. *See Dep't of Commerce*, 139 S. Ct. at 2564, 2574; *Fort Sill Apache Tribe*, 345 F. Supp. 3d at 9.

[3] Plaintiffs' resort to a supplementation/extra-record evidence distinction is also nonsensical because they appear to believe that if they cast their evidence as "extra-record evidence"—i.e., material not before the agency—they may supplement the record at will, without any judicial oversight. *E.g.*, Pls.' Opp. Br. at 10 n.10. Such conflicts with the record rule and with the Court's prior, careful approach to the administrative record, which included the imposition of a scheduling order to address record disputes.

Plaintiffs failed to move to supplement the record. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("Here, CTS did not even move to supplement the record. Instead, CTS simply attached the new evidence to its brief . . . ."). That alone is grounds for the Court to deny their evidence. *See id.* at 65 ("[The petitioner] opt[ed] instead for an end run around the agency's substantive geological judgments in the this court. We cannot provide such administrative consideration of its arguments and evidence in the first instance."); *see also Grace v. Whitaker*, 344 F. Supp. 3d 96, 112-13 (D.D.C. 2018) (in a case Plaintiffs cite for the proposition that record supplementation is allowed, noting that the *Grace* plaintiffs had first filed a motion to place additional materials before the court, which Plaintiffs here did not do).[4]

Plaintiffs failed to comply with the Court's scheduling order (ECF No. 22), which required Plaintiffs to "file any motion to complete, compel, or supplement the administrative record on or before August 5, 2019." Scheduling Order at 2 (ECF No. 22) (emphasis omitted). Plaintiffs did not file such a motion (other than to contest the administrative record's certification), yet argue they were under no obligation to do so because they "do not seek to supplement the record." Pls.' Mot. to Strike. Opp. at 8. Again, under Supreme Court and D.C. Circuit case law, adding materials to the record that the decisionmaker did not consider is "supplementation"—as opposed to "completion"—a paradigm that the Court's order contemplated by referring to "completion" and "supplementation," not "supplementation" and a

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[4] This crucial distinction is present in two of the other cases Plaintiffs cite for the proposition that "courts consider extra-record evidence where parties have raised issues not addressed by the administrative record." Pls.' Mot. to Strike Opp. at 6-7 (citing *Am. Bar Ass'n v. U.S. Dep't of Educ.*, 370 F. Supp. 3d 1, 38 (D.D.C. 2019); *United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 3 (D.D.C. 2017)). The third case concerned Article III jurisdiction—which, as discussed *infra* section B.1, can be a permissible ground to supplement the administrative record. *See id.* at 7 (citing *Chesapeake Climate Action Network v. Exp.-Imp. Bank of the United States*, 78 F. Supp. 3d 208, 217 (D.D.C. 2015)).

purportedly distinct category of "extra-record evidence." The fact remains that Plaintiffs failed to file their supplementation motion on time, even though they previously asked the Court for an order against Defendants due to "the prejudice Plaintiffs would experience were Defendants not to duly evaluate the contours of the record prior to merits briefing in these expedited proceedings." Pls.' Mot. to Compel at 1 (ECF No. 24).[5] In light of this prejudice to Defendants, the Court should reject this evidence on this ground alone. Defs.' Mot. to Strike at 4; *see* Op. & Order Denying Pls.' Mot. to Compel at 7 (ECF No. 32) (recognizing the court is the "master of its docket" (quoting *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017))). The Court should especially do so given that Plaintiffs themselves believe that their claims are "established by the Administrative Record alone." Pls.' Mot. to Strike Opp. at 11.

In the event the Court does not strike Plaintiffs' extra-record evidence due to their failure to file a motion for the Court to consider it, the Court should still reject Plaintiffs' evidence on the merits. "Exceptions to [the record] rule are quite narrow and rarely invoked." *CTS Corp.*, 759 F.3d at 64. It is Plaintiffs' burden to "demonstrate unusual circumstances justifying departure

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[5] Similarly, Plaintiffs earlier moved to compel a new record certification with the following statements suggesting an appreciation for defining the administrative record early on:

- "To ensure that the record on which Plaintiffs move for summary judgment next month, and on which the Court bases its review, is in fact the whole record, Plaintiffs respectfully request that the Court order Defendants to provide a [new certification.]"
- "By seeking to require Defendants to duly consider the contours of the administrative record at the outset—and to supplement their previous production if appropriate—Plaintiffs aim to avoid a situation in which further discovery is needed in order to permit effective judicial review."
- "Whatever record Defendants rest on, Plaintiffs aim to ensure that Defendants do not later seek to alter its contents after Plaintiffs demonstrate that the record requires setting aside the Lesson Plan."

Pls.' Mot to Compel at 1, 6, 8, 9 (ECF No. 24).

from th[e] general rule." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 6 (D.D.C. 2013) (deeming this a "heavy burden"). As shown below, Plaintiffs largely fail to carry their heavy burden of showing that their evidence falls under one of these "narrow" and "rare[]" exceptions.[6]

1. Other Than for Standing Purposes, Plaintiffs' Evidence Does Not Go Toward Article III Jurisdiction.

First, Plaintiffs argue that they can supplement the record under the exception for evidence bearing on Article III jurisdiction. Pls.' Mot. to Strike Opp. at 5-9. They argue that because "virtually" all of their evidence goes to "the threshold question of whether the Lesson Plan is reviewable," their evidence therefore may come in. *Id.* at 6, 8. Specifically, they claim that the evidence relates to whether the Lesson Plan is reviewable under 8 U.S.C. § 1252(e)(3). *Id.* at 8-9. They have also used their extra-record evidence (including extra-record assertions in amicus briefs) to argue APA merits issues. Pls.' Summary J. Reply Br. at 14, 16 (citing extra-record evidence to argue that the Lesson Plan is binding "final agency action"); *id.* at 27 (citing extra-record evidence to argue that the Lesson Plan is "arbitrary or capricious").

For this purpose, Plaintiffs cite: the declaration of a former USCIS officer (who is not alleged to be a decisionmaker, to the extent that would even matter) (Pls.' Ex. B); the assessment of a nonprofit as to how Lesson Plans in general operate (Pls.' Ex. P); an almost 18-year old memorandum from USCIS's predecessor agency that was not considered, directly or indirectly, in the promulgation of the Lesson Plan (Pls.' Ex. Q); and three amicus briefs (Pls.' Summary J.

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[6] Plaintiffs state, without citation, that "Defendants conflate [completing] the record with [supplementing the record], claiming only that the former is improper." Pls.' Mot. to Strike Opp. at 1. Defendants have never claimed that, and that would be incorrect as a matter of law. Neither completion nor supplementation of the record is *categorically* impermissible. But to supplement the record, Plaintiffs must overcome high hurdles, *see infra* Sections B.1-3, which they have not done here.

Reply Br. at 1, 3, 4 & n.6, 7 n.11, 9 n.14, 16, 20, 21, 23, 24, 25, 29, 30 (citing Amicus Br. of the Advocates for Human Rights (ECF No. 46); Amicus Br. of Nat'l Citizenship & Immigration Servs. Council 119 (ECF No. 47); Amicus Br. of Tahirih Justice Ctr. (ECF No. 55)). *See also* Pls.' Mot. to Strike Opp. at 8-9.

Plaintiffs fail to meet their burden here because the threshold questions of reviewability they reference are questions of *statutory* jurisdiction—not *Article III* jurisdiction—and are thus not subject to this record rule exception. "[T]wo things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given the court the capacity to take it, and an act of Congress must have supplied it." *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867). In other words, a court must have both constitutional jurisdiction and statutory jurisdiction. *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008) (appreciating the difference). Constitutional jurisdiction flows, as relevant here, from Article III's requirement that there be a case or controversy between the parties. *See United Bhd. of Carpenters & Joiners of Am. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of U.S. & Can.*, 721 F.3d 678, 687 (D.C. Cir. 2013). Article III jurisdiction thus implicates such doctrines as standing and mootness. *See id.*

Statutory jurisdiction, in contrast, relates to whether an act of Congress permits the suit to move forward. Accordingly, and as relevant to this case, whether a particular provision of the Immigration and Nationality Act permits or precludes review of particular agency conduct is a matter of statutory jurisdiction. *Joehar v. INS*, 957 F.2d 887, 889 (D.C. Cir. 1992) ("The Government's argument is not that Joehar's petition is moot and therefore beyond the constitutional power of an Article III court; rather, the Government's point is that under § 106(c) of the Immigration and Nationality Act the court is without statutory jurisdiction to consider

Joehar's petition.").

As Defendants have previously pointed out, evidence relevant to *Article III* jurisdiction falls within an exception to the administrative record rule. Defs.' Mot. to Strike at 5 (citing *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012); Memo. of Law in Supp. of Defs.' Mot. for Summary J. at 14 n.10 (ECF No. 31-1) (same). Plaintiffs previously acknowledged this principle of law. Pls.' Combined Corrected Memo. of Law in Supp. of Their Cross-Mot. for Summary J. & in Opp. to Defs.' Mot. for Summary J. at 8 n.4 (ECF No. 38) ("Pls.' Summary J. Br.") (The Court may consider Plaintiffs' submissions regarding the nature of the Lesson Plan in determining its Article III jurisdiction . . . ."). Thus, Defendants agree that Plaintiffs can introduce evidence to establish Article III jurisdiction.

However, Plaintiffs cite extra-record evidence for the purpose of proving their *statutory* jurisdiction arguments. Pls.' Summary J. Reply Br. at 3, 4. Plaintiffs have cited no authority for their suggestion that evidence relevant to *statutory* jurisdiction—e.g., whether 8 U.S.C. § 1252(e)(3) permits their suit and on what terms—falls within an exception to the administrative record rule. *Cf. Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002) ("When the petitioner's *standing* is not self-evident, however, the petitioner must supplement the record to the extent necessary . . . ." (emphasis added)). They failed to do so even though they carry the burden of demonstrating the propriety of supplementing the administrative record. Absent such authority, the default rule applies, and supplementation is not permitted. *E.g.*, *Fla. Power & Light Co.*, 470 U.S. at 743-44.

At times, Plaintiffs cast this statutory jurisdictional issue as one of Article III jurisdiction. Pls.' Mot. to Strike Opp. at 11 (summarizing the statutory jurisdiction section by noting that the exhibits "establish the Court's Article III jurisdiction"); *see also id.* at 8, 13. Plaintiffs use extra-

record evidence (like an amicus's unsupported description, and a declaration of a former USCIS employee who is not alleged to be a decisionmaker) to argue, for example, that the Lesson Plan is a binding policy directive or guideline and originates policies not found elsewhere. Pls.' Summary J. Reply Br. at 3, 4 & n.6. But the issues Plaintiffs claim their evidence goes toward—whether the Lesson Plan is a written "policy directive," "policy guideline," or "procedure" under 8 U.S.C. § 1252(e)(3)(A)(ii)—are statutory issues, not constitutional issues arising under Article III. Again, Plaintiffs have failed to demonstrate that such issues are properly excepted from the record rule.

Plaintiffs have failed to carry their burden of showing that their evidence is admissible to prove issues of statutory jurisdiction. Therefore, for issues of statutory jurisdiction (such as whether § 1252(e)(3) or the APA allow review of these claims), the Court should hew to the administrative record, the contents of which Plaintiffs failed to timely expand back in August.[7] The Court should strike evidence to that effect, including Plaintiffs' "Statements of Undisputed Fact" 28-40 and Exhibits B, P, and Q. *See* Pls.' Summary J. Reply Br. at 3, 4 & n.6.

2. There Is No Exception to the Administrative Record Rule for a Party to Rebut Perceived Evidence, to Rebut Arguments that a Party Perceives the Other Party "Opened the Door To," to Corroborate the Party's Arguments, or to Cite Extra-Record Assertions of Amici.

Without acknowledging the record rule, Plaintiffs try to justify the Court's consideration of other categories of evidence besides those bearing on Article III jurisdiction: (1) evidence to rebut "factual representations" that Plaintiffs claim were made via argument in Defendants'

[7] The D.C. Circuit's apparent exception for evidence related to constitutional jurisdiction and not for evidence related to statutory jurisdiction also makes sense. For instance, Federal Rule of Civil Procedure 12(h)(3) requires the Court to dismiss a case if at any time it determines that it lacks subject-matter jurisdiction. And even if there were not a rule on point, the Constitution's Article III requirements of standing and mootness would trump the APA's administrative records requirements. *See* U.S. Const., art. VI, cl. 2.

briefs; (2) evidence "put at issue" by Defendants; (3) evidence to "corroborate" the administrative record; and (4) the factual representations of the amicus briefs which do not appear in the administrative record. None of these categories is a recognized exception to the record rule, even if Plaintiffs had timely raised them. Further, to the extent Plaintiffs *do* veer into recognized exceptions to the record rule—for example, the unusual circumstance where the challenger makes a "strong showing of bad faith or improper behavior," *Dep't of Commerce*, 139 S. Ct. at 2573-74—Plaintiffs failed to raise that claim by the Court's scheduling deadline over two months ago (thus depriving the Court of briefing on the topic), much less show now that they meet that high standard. For these reasons, the Court should deny the consideration of Exhibits B and I-Q, plus the factual assertions of amici originating from outside the administrative record.

First, Plaintiffs argue that they should be able to supplement the record with extra-record evidence because Defendants purportedly did the same. Pls.' Mot. to Strike Opp. at 10 ("It is disingenuous for Defendants to make factual representations not based in the Administrative Record, only to turn around and fault Plaintiffs for using extra-record evidence to rebut those representations."); *accord id.* at 1, 2, 7, 8, 11. To make this argument, Plaintiffs essentially claim that Defendants' summary judgment briefs are giant sworn affidavits: they claim that Defendants' briefs made "unsupported factual assertions" and "factual representations outside the Administrative Record." *Id.* at 7. Thus, Plaintiffs reason, they were "forced to submit evidence," and "cannot be faulted for citing extra-record materials to rebut those assertions." *Id.* at 1, 7.

Plaintiffs' argument is novel and without legal basis. The assertions that Defendants made in their briefs regarding the Lesson Plan *do* have an independent factual basis, the only one

that matters in an APA case: the administrative record. *See, e.g.*, Defs.' Summ. J. Br. at 26 (pervasively citing the administrative record for its discussion of the Lesson Plan). In no way are Defendants attempting to use their briefs as independent factual representations.

Nor *could* Defendants use their Lesson Plan as evidence, even if they tried. Obviously, a legal brief is not evidence. *See Caldwell v. District of Columbia*, 201 F. Supp. 2d 27 (D.D.C. 2001) (referencing the familiar maxim that the statements and arguments of lawyers are not evidence); *Kight v. United States*, 850 F. Supp. 2d 165, 170 n.2 (D.D.C. 2012) (in a record-review case, refusing to consider allegations in a complaint that did not refer to the administrative record). Indeed, even to establish standing—which *is* a recognized exception to the administrative record rule, *see Sierra Club*, 292 F.3d at 900-01—a summary judgment movant must still submit affidavits or other evidence beyond mere allegations. *E.g.*, *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)), *cited in* Memo. of Law in Opp. to Pls.' Cross-Mot. for Summary J. & Reply in Supp. of Defs.' Mot. for Summary J. at 2 (ECF No. 49) ("Defs.' Summary J. Reply Br.").

And even if Defendants *had* submitted new factual materials to support their statutory arguments (which, clearly, they did not), that would not give Plaintiffs license to violate the APA's record rule and the Court's scheduling order. Quite simply, there is no recognized exception to the record rule for "the other party did it first." *Contra* Pls.' Mot. to Strike Opp. at 1, 7 (stating, without support, that "Plaintiffs were forced to submit evidence to rebut Defendants' representations," and that "Plaintiffs cannot be faulted for citing extra-record materials to rebut [Defendants' purported factual] assertions").

By recasting Defendants' legal filings as evidence, Plaintiffs have erected a record-rule straw man. The Court should not allow them to swat down that straw man with new evidence.

And even if Defendants did do what Plaintiffs claim (which Defendants clearly did not), then the appropriate course of action would have been to file a motion to strike, as Defendants are now doing. The Court should exclude the evidence Plaintiffs submitted for this basis.

Second, Plaintiffs argue that Defendants' papers have "put[] at issue Defendants' purpose and intent in revising the Lesson Plan." Pls.' Mot. to Strike Opp. at 10; *see also id.* at 11. Defendants can discern no legal relevance to their subjective intent in issuing the Lesson Plan, at least as far as Plaintiffs have briefed this case. Although it generally argues that Defendants had untoward motives in issuing the Lesson Plan, Plaintiffs' summary judgment motion does not argue that the Lesson Plan is unlawful because it was founded on pretext (e.g., that Defendants' motives rendered it arbitrary or capricious). Pls.' Summary J. Br. at 39-44 (Plaintiffs' APA arbitrary-or-capricious section of their summary judgment motion). Of course, an agency's reasoning is relevant only if the Court finds that it has jurisdiction and concludes that the Lesson Plan is both "final" and "agency action" such that the APA's substantive standards apply. Defs.' Summary J. Br. at 25, 29, 31, 32, 44; Defs.' Summary J. Reply Br. at 12-15. And indeed, an agency's decision must identify *some* legitimate and rational basis—but an agency need not reveal *every* additional motive in the mind of the decisionmaker (assuming there are even such additional motives). *Dep't of Commerce*, 139 S. Ct. at 2573 (agency must "disclose the basis of its order," but "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons"); *see also Judulang v. Holder*, 565 U.S. 42, 53 (2011) (similar). Plaintiffs have claimed in this lawsuit that the Lesson Plan is unlawful based on its reasoning (or alleged lack thereof)—not on pretext. *See* Pls.' Summary J. Br. at 39-44; *see also* Am. Compl. (failing to bring, for example, an equal protection claim).

In support of their new "Defendants opened the door" argument to justify the

introduction of extra-record evidence, Plaintiffs cite *Department of Commerce v. New York*, which set aside agency action because the Supreme Court concluded that the decisionmaker's proffered explanation conflicted with the administrative record. Pls.' Mot. to Strike Opp. at 10 n.10. But *Department of Commerce* illustrates that Plaintiffs failed to follow the appropriate process and standards for supplementing the administrative record. In *Department of Commerce*, the administrative record itself disclosed that the explanation was "incongruent" with the decisionmaking process. 139 S. Ct. at 2575. That mismatch was revealed *after* the parties went through the process of supplementing the record with extraneous evidence. *Id.* at 2574. The challengers had to meet a threshold standard of a "strong showing of bad faith or improper behavior." *Id.* at 2573-74. Here, Plaintiffs have not made that "strong showing." Moreover, Plaintiffs were required to file a motion to supplement the record if they believed that pretext exists. *See* Scheduling Order at 2. They declined to, and they may not now unilaterally act as though they have met the standard and introduce whatever evidence they wish. The Court should reject this unfounded "put at issue" exception to the record rule.

Third, Plaintiffs also claim an entitlement to introduce evidence "for the limited purpose of corroborating" their account of the administrative record. Pls.' Mot. to Strike Opp. at 10 n.10. Plaintiffs cite no authority for a "corroboration" exception to the administrative record rule, and needless to say, none exists.

Fourth, since Defendants filed their motion to strike three weeks ago, Plaintiffs have proceeded to cite *more* factual representations not properly before the Court, specifically from amicus briefs. In their reply brief in support of their motion for summary judgment, Plaintiffs cite the factual assertions of amici over a dozen times. *See* Pls.' Summary J. Reply Br. at 1, 3, 4 & n.6, 7 n.11, 9 n.14, 16, 20, 21, 23, 24, 25, 29, 30. That these factual representations originate

in amicus briefs is no exception to the record rule. The Court should disregard Plaintiffs' reliance on those amicus brief sections as well. *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793-94 & n.7 (D.C. Cir. 1984) (in affirming the striking of extra-record amicus affidavits, citing the record review rule and noting that "Parties besides the *amicus* have referred to the affidavits in their briefs. This court has ignored those references and the few accompanying sentences that directly relate to the affidavits.").

At bottom, Plaintiffs are using extra-record evidence to prove the merits of this case and issues of statutory reviewability, including with Exs. B, I-Q. *See* Pls.' Exs. (ECF Nos. 36-3, 57); Pls.' Summary J. Br. at 27, 41, 43, 44; Pls.' Summary J. Reply Br. at 1, 9 & n.9, 14, 16, 26, 27, 29. This evidence includes the factual assertions of the amicus briefs, which are also facts not in the administrative record and which Plaintiffs have not asked the Court to allow into the administrative record. The Court should reject these unfounded justifications for supplementing the administrative record.

3. Plaintiffs Fail to Show the Propriety of Using Judicial Notice to Circumvent the Administrative Record Rule.

Plaintiffs argue that at least some of their extra-record evidence should be considered because the Court can take judicial notice of it. Plaintiffs ask for this treatment to apply to Defendants' "public statements"—and to those statements alone. Pls.' Mot. to Strike Opp. at 10 n.7 (ECF No. 38). Plaintiffs seek to have the Court consider this evidence for the purpose of establishing Defendants' intent in issuing the Lesson Plan. Pls.' Mot. to Strike Opp. at 11-12.

Plaintiffs cited Federal Rule of Evidence 201 as the authority for this treatment. Pls.' Summary J. Br. at 10 n.7; Pls.' Mot. to Strike Opp. at 11-13. As Defendants pointed out, Federal Rule of Evidence 201 governs judicial notice of only adjudicative facts, not legislative facts. Fed. R. Evid. 201(a), *cited in* Defs.' Summary J. Br. at 7-8.

Plaintiffs effectively concede that the exhibits they seek to introduce on this score are legislative facts, not adjudicative facts, as they offer no rebuttal to that argument. Their only response is that "Federal Rule of Evidence 201 does not limit the judicial notice of non-adjudicative facts." Pls.' Mot. to Strike Opp. at 12 n.11. While strictly true, this tack conflicts with Plaintiffs' exclusive reliance on Rule 201, which by its terms applies only to legislative facts. *Id.* at 11-13 (citing only Rule 201 as a ground to take judicial notice). Because Plaintiffs rely on Rule 201, but concede it does not apply, the Court should decline to take judicial notice under Rule 201.

Further, the administrative record rule prohibits the judicial notice Plaintiffs ask the Court to take even were Rule 201 not an obstacle. As Judge Chutkan recently synthesized case law in this District, "[j]udicial notice is typically an inadequate mechanism for a court to consider extra-record evidence when reviewing an agency action." *Level the Playing Field v. FEC*, 381 F. Supp. 3d 78, 92 (D.D.C.), *appeal filed*, 19-5117 (D.C. Cir. 2019). Consistent with Defendants' arguments elsewhere in this brief and in this motion, "[t]his general rule rests on the premise that plaintiffs should not be permitted to exploit the standard for judicial notice to circumvent the strict standard for supplementing the administrative record." *Id.*; *accord Rifflin v. Surface Transp. Bd.*, No. 16-1147, 2016 WL 6915552, at *1 (D.C. Cir. Oct. 6, 2016); *Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 172 (D.D.C. 2014). In other words, a document should be given judicial notice only "if it qualifies for supplementation as extra-record evidence." *Id.* (quoting *Dist. Hosp. Partners*, 971 F. Supp. 2d at 32 n.14); *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 176 (D.D.C. 2017) ("The plaintiffs' position that the Court may take judicial notice of documents on an agency's website does not find support in the caselaw. To the contrary, to take judicial notice in a § 706 APA case, the materials must still come within one of

the judicially delineated exceptions to the rule against supplementation and consideration of extra-record documents."), *aff'd in part, rev'd in part on other grounds*, 901 F.3d 378 (D.C. Cir. 2018).[8]

Again, Plaintiffs have identified no exception to the record rule that would allow them to supplement the administrative record with these documents via judicial notice. They claim they need the documents to show "motive or intent," Pls.' Mot. to Strike Opp. at 11-12 (quoting Fed. R. Evid. 201, advisory committee notes (1972)), but as discussed above, "motive or intent" is not a freestanding exception to the administrative record rule.[9] And even if the Court *could* take judicial notice of these materials, it should not, because the materials are irrelevant. *See* Defs.' Mot. to Strike at 8 (citing Fed. R. Civ. P. 56(c)(2); Fed. R. Evid. 402); Pls.' Mot. to Strike Opp. at 13 ("[T]he Court need not resolve the question of whether to consider [these materials] to hold the Lesson Plan unlawful.").[10]

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[8] In the only APA case that Plaintiffs cite regarding judicial notice, the court did not take judicial notice of the evidence in question. *See Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 89 n.25 (D.D.C. 2017). Moreover, the government "[did] not take issue" with the court relying on that extra-record evidence—as opposed to this case, where Defendants do oppose the consideration of this evidence. *Id.*

[9] If Plaintiffs sought to invoke the "strong showing of bad faith or improper behavior" exception to the record rule, *see Dep't of Commerce*, 139 S. Ct. at 2573-75—which they have not—then as with any other ground to supplement the administrative record, they should have complied with the Court's Scheduling Order and sought to do so through motion practice. In any event, they do not make a "strong showing" in this case.

[10] The Court should also reject Plaintiffs' evidence relevant to the non-merits factors of injunctions, for the same reason of irrelevance. Plaintiffs suggest that they may end-run the record rule here with evidence on the non-merits factors of an injunction. Pls.' Mot. to Strike Opp. at 6, 10 n.9. But as Defendants have explained, the Court has no authority to vacate or enter an injunction against the Lesson Plan, as Plaintiffs request, just vacatur of specific legal issues. Defs.' Summary J. Br. at 51-53. As such, there is no relevance to the factors of a permanent injunction. Only if the Court agrees that an injunction is a permissible and appropriate remedy would this evidence be relevant, but then only for the limited purpose of demonstrating non-merits factors.

Plaintiffs point to other materials as necessary to provide background information. Pls.' Mot. to Strike Opp. at 11-13 (citing, e.g., online materials covered in Defs.' Mot. to Strike at 3); *see* Pls.' Summary J. Br. at 8-10 (citing to Exs. I-N). Defendants pointed out Plaintiffs may not supplement the record for the purpose of establishing "background." Defs.' Mot. to Strike at 5. Plaintiffs brush past this point by calling the distinction between "background" and Article III jurisdiction "inconsequential." Pls.' Mot. to Strike Opp. at 13. To the contrary—D.C. Circuit case law has established that evidence bearing on Article III jurisdiction may be introduced despite the general rule against supplementing the administrative record with extra-record evidence. *Grocery Mfrs. Ass'n*, 693 F.3d at 174. Defendants are unaware of any case law permitting the introduction of evidence for "background" purposes, and Plaintiffs provide none. They thus fail to carry their "heavy" burden to demonstrate circumventing the record rule with their background evidence. The Court should decline to take judicial notice of Exhibits I-M or any of the extra-record materials Plaintiffs cite in their briefs.

In sum, with the exception of evidence going to Article III jurisdiction—in this case, standing and mootness[11]—the administrative record rule presumptively excludes the extra-record evidence Plaintiffs are seeking to use to supplement the record. As explained above, if Plaintiffs believed that the Court should have more evidence to consider, then they should have followed the Scheduling Order and filed a motion to supplement the record back in August. They did not. Even now, they have failed their heavy burden of demonstrating that the addition of these materials is justified. The Court should reject consideration of these materials, which Plaintiffs

[11] Plaintiffs also argue that they should be able to use a redline comparison chart as a demonstrative exhibits. Pls.' Opp. Br. at 4-5. Defendants have no objection to the use of the chart for that specific purpose. *See also Dep't of Commerce*, 139 S. Ct. at 2564 (suggesting that the stipulation of the parties is a valid basis to complete or supplement the record).

admit the Court need not consider anyway. Pls.' Mot. to Strike Opp. at 2, 13.

C. Defendants Complied with Local Civil Rule 7(h) and the General Order.

Finally, Plaintiffs argue that, instead of striking their inappropriate extra-record evidence, the Court should actually treat those facts as conceded. Pls.' Mot. to Strike Opp. at 3-4. Plaintiffs claim that "Defendants refuse to acknowledge the Court's General Order," and that Defendants have violated the General Order. *Id.* at 3, 4 n.5. As a remedy, Plaintiffs ask the Court to treat their Statement of Facts as conceded. *Id.* at 3. There is no basis in the Local Rules or the Court's General Order to do so. The Court should decline Plaintiffs' request, which they did not file a motion for.

The Court's General Order is related to this dispute, but has less relevance than Local Civil Rule 7, which Defendants *did* cite (but which Plaintiffs' opposition ignores). Defs.' Mot. to Strike at 8 & n.8; *see also* Defs.' Summary J. Br. at 4 n.1. In the usual case, as Defendants have noted, Rule 7(h)(1) requires a summary judgment movant to include a statement of material facts with citations to the record. Then, in such cases, "the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." LCivR 7(h)(1).

But in record-review cases such as this one, Rule 7(h)(2) unequivocally states that "Paragraph (1) shall not apply." LCivR 7(h)(2). Instead, the parties need only file a statement of facts from the administrative record (as opposed to statements of material fact), and the opposing party has no obligation to controvert such statements. *Id.* Such a rule excusing the parties from having to controvert record statements makes sense, because in record-review cases "involving cross-motions for summary judgment, the district judge sits as an appellate tribunal. The entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083

(D.C. Cir. 2001) (alterations omitted).

The Court's General Order, which emphasizes that it follows the Local Civil Rules, is not to the contrary. General Order and Guidelines Applicable to APA Cases Assigned to Judge Ketanji Brown Jackson at 1 (ECF No. 3) ("General Order"). Rather, the General Order's section of summary judgment is largely inapplicable to this case. The General Order, as Plaintiffs note, requires the parties to submit a statement of undisputed material facts "with specific citations to those portions of the administrative record upon which the party relies in fashioning the statement." Pls.' Mot. to Strike Opp. at 3 (quoting General Order ¶ 4.c.i). But what Plaintiffs omit is the citation that follows: the General Order cites Local Civil Rule 7(h)*(1)*, the general summary judgment provision, and not 7(h)*(2)*, the provision applicable to administrative record-review cases. General Order ¶ 4.c.i; *see also id.* (also mandating that motions for summary judgment must comply with Rule 7(h) generally). As noted above, Rule 7(h)(2) declares inapplicable the requirement that an opposition to a motion for summary judgment must include admit or deny the alleged statements of material fact. Thus, Defendants satisfied the rule by including a statement of facts citing the administrative record in their summary judgment brief.

Paragraph 4 of the General Order's inapplicability to this case is further shown in its discussion of parties' "statement of *material* facts." *Id.* ¶ 4.c.ii-iv (emphasis added). *Contra* Pls.' Opp. Br. at 3 (failing to note this distinction when citing the General Order). Only summary judgment motions under paragraph (1) of Rule 7(h), not record-review summary judgment motions under paragraph (2), require statements of *material* fact. LCvR 7(h)(2); *see* LCvR 7(h) cmt. ("This provision recognizes that in cases where review is based on an administrative record the Court is not called upon to determine whether there is a genuine issue of *material* fact, but rather to test the agency action against the administrative record. As a result the normal summary

judgment procedures requiring the filing of a statement of undisputed *material* facts is not applicable." (emphasis added)). Accordingly, the General Order does not apply to all summary judgment motions, and Plaintiffs err by reading its requirements uncritically.

Thus, the General Order's requirements regarding filing and controverting statements of material facts do not bear on this case. Defendants have complied with the Rule 7(h) and the General Order by designating facts with pinpoint citations to the administrative record. Defs.' Summary J. Br. at 4 n.1; *see id.* at 4-11. Defendants further complied with the Local Rules and the General Order by declining to respond paragraph-by-paragraph to Plaintiffs' unwarranted statement of *material* facts. The Court should reject out of hand Plaintiffs' request to treat Plaintiffs' purported facts as conceded. *See, e.g.*, *Woodson v. District of Columbia*, No. 18-cv-1824 CRC-DAR, 2019 WL 3431154, at *1 n.1 (D.D.C. July 15, 2019) (rejecting a plaintiff's contention that the government in a record-review case failed to oppose the plaintiff's statement of material facts, because Rule 7(h)(2) does not require statements of material fact on summary judgment), *report and recommendation adopted*, 2019 WL 3713524 (D.D.C. July 30, 2019); *Glob. Tropical Imports & Exports LLC v. Bernhardt*, 366 F. Supp. 3d 110, 116 n.6 (D.D.C.) ("Global suggests that the Department failed to file a statement of material facts. . . . But no such statement is required in cases, like this one, in which judicial review is based solely on the administrative record. LCvR 7(h)(2)."), *appeal filed on other grounds*, No. 19-5056 (D.C. Cir. 2019); *Gore v. District of Columbia*, 67 F. Supp. 3d 147, 151 (D.D.C. 2014) ("[P]arties are not required to submit a statement of undisputed materials facts in cases where 'judicial review is based solely on the administrative record.'").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their

motion. If Plaintiffs believed that the Court needed more evidence before it to decide this case, Plaintiffs had the opportunity and obligation to file a motion over two months ago. Scheduling Order at 2. They did not do so, and instead decided among themselves that they could unilaterally supplement the record on various grounds not shown to be recognized in D.C. Circuit jurisprudence, and that they could do so in the middle of summary judgment briefing. Plaintiffs did so despite having earlier expressed an appreciation for the record being closed *before* summary judgment briefing began. *See supra* note 5 and accompanying text. The Court should reject their attempt.

As relief, Defendants request that the Court, with the exceptions identified below, strike Plaintiffs' "Statement of Undisputed Facts" (ECF No. 36-2); strike Plaintiffs' exhibits (ECF Nos. 36-3, 57); and decline to consider these materials and all other extra-record materials cited by Plaintiffs in support of their motion for summary judgment (ECF No. 36) or in opposition to Defendants' motion for summary judgment (ECF No. 31). The exceptions to this relief would be the few pieces of evidence that Plaintiffs have shown fall within an exception to the administrative record rule: Plaintiffs' personal affidavits, Exs. C-G, insofar as they prove Article III jurisdiction including standing. Another exception would be the redline chart Plaintiffs created, used as a demonstrative exhibit.

In sum, then, Defendants ask the Court to strike Exs. B and I-Q (ECF Nos. 36-3, 57), and, if it does not strike all of Plaintiffs' Statement of Undisputed Facts (ECF No. 36-2), to strike factual assertions 3-6, 8, and 28-40. Defendants also ask the Court to ignore Plaintiffs' reliance on the amicus briefs for those briefs' extra-record factual representations.

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