**U.S. Department of Justice**
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

October 16, 2017

**By ECF**
The Honorable James Orenstein
United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Batalla Vidal, et al., v. Baran, et al.*, 16-CV-4756 (NGG) (JO)
*State of New York, et al., v. Donald Trump, et al.*, 17-CV-5228 (NGG) (JO)

Dear Magistrate Judge Orenstein:

Pursuant to the Court's October 11, 2017 order, *Vidal* ECF No. 82, and in response to Plaintiffs' October 13, 2017 letter motion to complete the administrative record ("Pls.' Ltr. Mot."), *Vidal* ECF No. 84, Defendants respectfully submit the following letter in opposition. Defendants applied the correct legal standard in certifying and compiling the administrative record in this case, which includes all documents actually considered by the Acting Secretary of Homeland Security, Elaine C. Duke, as part of her decision to institute an orderly wind-down of the Department of Homeland Security's ("DHS") DACA policy. Plaintiffs' proposed standard does not meaningfully differ from the standard applied by Defendants, and to the extent that it does, is drawn from out-of-circuit case law in significantly different administrative contexts. Finally, as for the specific documents that Plaintiffs argue are missing from the administrative record, any such omissions, perhaps, would at most provide a basis for Plaintiffs to argue, on the merits, that the agency's decision was inadequate and should therefore be set aside (assuming that decision is reviewable), but they provide no basis to challenge the agency's compilation of the record, which is legally presumed to be adequate. Accordingly, Defendants respectfully request that the Court deny Plaintiffs' motion.

## I. Defendants Compiled The Administrative Record Using An Appropriate Legal Standard.

Defendants certified and produced an administrative record consisting of all documents actually considered by the Acting Secretary as part of her decision to wind-down the DACA policy—a construction of the record that fully complies with the applicable standard for the sort of informal agency action challenged here. *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (judicial review of agency action must "be based on the full administrative record that was before the Secretary at the time he made his decision"), *abrogated in part on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The record includes DHS documents, Department of Justice ("DOJ") documents, and congressional correspondence with the White House; it includes formal memoranda and informal letter correspondence; it includes published legal analysis of the DACA and DAPA policies; and it includes some documents suggesting that DACA be rescinded, and other documents suggesting that the policy should continue. No more is required, and this Court should reject Plaintiffs' attempt to force the inclusion of documents that were never considered by the actual agency

decision maker or that are internal to other components of the Executive Branch that did not actually take the action Plaintiffs challenge here.

**a.** Plaintiffs say, correctly, that judicial review of an administrative decision must "be based on the *full* administrative record that was before the Secretary at the time he made his decision," *Overton Park*, 401 U.S. at 420 (emphasis by Plaintiffs) (quoted in Pls.' Ltr. Mot. at 2). But the *Overton Park* standard is functionally identical to the standard applied by Defendants in this case. Defendants have produced the "full administrative record that was before the Secretary at the time [s]he made h[er] decision." *Id.*; *see also* Pls.' Ltr. Mot. at 2 ("Courts subsequently have defined the 'administrative record already in existence' for informal agency action as 'what [the decision maker] had before him when he acted.'") (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984)).

Ultimately, after citing a series of cases that are generally consistent with Defendants' understanding of the scope of an administrative record, Plaintiffs present their position as follows: "[C]ourts have required that agencies provide all documents that were *directly or indirectly* considered by the final decision makers in making their decision." Pls.' Ltr. Mot. at 2.

At least as a matter of linguistics, this standard is substantively indistinguishable from the standard applied by Defendants. If Plaintiffs replaced the words "directly or indirectly" with the word "actually," that sentence might have been an exact quote from undersigned counsel or Defendants' filings in this case. But those word-choice subtleties should ultimately make no difference here. Defendants used the modifier "actually" for purposes of transparency and fair notice, to make clear to Plaintiffs and the Court that the administrative record produced by Defendants was limited to documents considered by the "final decision maker" herself, Acting Secretary Duke—rather than including all documents related to the rescission of DACA from, say, rank-and-file personnel within DHS that were not considered by the Acting Secretary. *See infra*, Section I(b) (explaining why that decision was legally justified).[1]

In Defendants' view, if a document was "directly or indirectly considered" by the Acting Secretary, then it was "actually considered" (or just "considered") by her too. Put another way, if the United States Supreme Court issued an opinion that stated, with no further explanation, that an administrative record must include "all documents that were directly or indirectly considered by the final decision makers in making their decision," Pls.' Ltr. Mot. at 2 (emphasis added), Defendants would produce the same administrative record that they already produced on October 6. For that reason alone Plaintiffs' motion can be denied.[2]

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[1] As confirmation that Defendants do not intend to shy away from the "directly or indirectly considered" language, but instead use the phrase "actually considered" because it is more precise and clear, Defendants refer the Court (and Plaintiffs) to language in a recent filing by Defendants in another DACA-rescission case in the Northern District of California, in which Defendants also defended the "actually considered" language. *See* Defs.' Opp'n to Pls.' Mot. to Compel at 12 n.3, *Regents of Univ. of Cal. v. DHS*, No. 17-5211-WHA (N.D. Cal. Oct. 12, 2017), ECF No. 71 (referencing "the uncontroversial principle that an administrative record generally includes material considered directly and indirectly by the decisionmaker") (citation omitted).

[2] Plaintiffs' letter says that, on a recent meet-and-confer call, "Defendants confirmed that the October 6 administrative record was limited to what Acting Secretary Duke had *directly considered* when deciding to terminate the DACA policy." Pls.' Ltr. Mot. at 1 (emphasis added). In fact, undersigned counsel said no such thing. Instead, undersigned counsel used the same language ("actually considered") used in this filing, previous filings, the administrative record certification filed on both coasts, and at the most recent status conference in this matter. *See*

**b.** Notwithstanding the fact that the standard offered by Plaintiffs appears, at least to Defendants, to be effectively indistinguishable from the standard applied by Defendants, Plaintiffs' filing does suggest that there is disagreement between the parties on one particular issue: whether the administrative record must include documents that were never considered by the Acting Secretary herself, but instead were considered *only* by her subordinates or other rank-and-file staffers at DHS. *See* Pls.' Ltr. Mot. at 2.

The Court should begin with the Supreme Court's decision in *Overton Park*, which holds that judicial review must "be based on the full administrative record that was before *the Secretary* at the time *he* made his decision"—making no mention of a broader record based on all documents that were before the entire agency, or before the Secretary's subordinates. 401 U.S. at 420 (emphasis added); *see also, e.g.*, *Data Processing*, 745 F.2d at 684 (the record includes "what [the decision maker] had before *him* when *he* acted") (emphases added). Plaintiffs' position finds no support in these decisions.

For a relatively recent holding from within the Second Circuit that directly addresses this precise issue with additional specificity, Defendants respectfully refer the Court to Judge Engelmayer's cogent and well-reasoned opinion in *Comprehensive Community Development Corporation v. Sebelius*, which ultimately concludes that "the administrative record does not consist[] of materials before any employee in the agency, but rather, the agency decision-makers." 890 F. Supp. 2d 305, 314 (S.D.N.Y. 2012); *see also, e.g.*, *Pac. Shores Subdivision, Calif. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6-7 (D.D.C. 2006) ("[I]t is not enough for Pacific Shores to state that the documents were before the entire Corps, but rather it must instead prove that the documents were before the Corps' decisionmaker(s)." (citing *Overton Park*, 401 U.S. at 420)). *Comprehensive Community Development Corporation* also quoted the "directly or indirectly considered" language on which Plaintiffs place such heavy weight—but Judge Engelmayer nonetheless rejected efforts to require documents considered only by the actual decision maker's subordinates to be included in the record:

> To rebut the presumption of administrative regularity, such a party must show that the materials sought to be added were before the agency decision-maker. It is not enough to show that these materials were somewhere within the agency, because interpreting the word "before" so broadly as to encompass any potentially relevant document existing within the agency would render judicial review meaningless.

*Comprehensive Cmty. Dev. Corp.*, 890 F. Supp. 2d at 309 (internal citations and alterations omitted). This is strong support for Defendants' position: that Plaintiffs' "directly or indirectly considered" language can and should be interpreted consistently with Defendants' "actually considered" formulation—

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Oct. 11, 2017 Tr. at 17:22-24 ("Mr. Pezzi: I believe the applicable standard are the documents that were actually considered by the relevant agency decision maker."). Counsel for Defendants promptly raised the inaccuracy and respectfully requested that Plaintiffs correct it. Counsel for Plaintiffs did not dispute undersigned counsel's recollection of the call, but nevertheless refused to correct the inaccuracy. Ultimately, Defendants do not believe this statement should have an effect on the Court's analysis of the issues at stake here, so, for that reason, and to avoid creating a mini-trial on a collateral issue, counsel has not submitted a declaration swearing to his recollection under penalty of perjury. Undersigned counsel is willing to do so, however, should the Court be inclined to place any significance on this inaccurate presentation of the parties' meet-and-confer call. *See generally* Ex. 1, Email Chain re: "EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record."

especially where, as here, the agency action at issue is an informal, policy-based decision of the type that an agency head may properly make without needing to rely on an extensive factual or evidentiary record compiled by her subordinates or the agency at large.

In this case, the only agency decision maker was Acting Secretary Duke, which is why Defendants limited the administrative record to documents that *she* actually considered—rather than documents considered only by her subordinates or rank-and-file DHS staffers. Holding to the contrary would have the effect of imposing discovery-like burdens on administrative agencies, as a matter of course, even when defending routine and informal agency actions—notwithstanding the well-settled presumption against discovery in Administrative Procedure Act ("APA") litigation.

As for the out-of-circuit authority that does appear to attribute some significance to the requirement to include documents "indirectly" considered by the relevant agency decision maker (rather than just quoting that phrase in passing with no further explanation), those cases typically arise in the context of some *formal* agency action, or full-on notice-and-comment rulemaking, in which "the work and recommendations of subordinates" are far more likely to play an important role in the decision making process. *See, e.g.*, *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001). In other words, Plaintiffs rely on language sometimes invoked in the context of formal rulemakings, formal adjudications, or other agency actions quite unlike the informal, policy-based decision at issue here; in such cases a range of internal, predecisional materials necessarily exists, often as well as extensive factual, scientific, or evidentiary material—or even thousands of comments from the general public. Administrative records in those sorts of cases, to be sure, are often much larger than the record produced in this case.

But that should come as no surprise—none of those cases speak to the sort of informal, policy-based decision at issue here, which centered on a judgment about litigation risk and the uncertain legal footing of a purely discretionary agency policy (rather than a complicated weighing of evidentiary, factual, or scientific material). Plaintiffs cite no cases in which a court ordered "completion" of an administrative record to include materials "indirectly considered" in a challenge to an informal policy decision of the type at issue here—even assuming that that standard has any independent significance or differs in any way from the standard Defendants have already applied. And, as the Second Circuit has explained, "[w]hat will constitute an adequate record for meaningful review may vary with the nature of the administrative action to be reviewed," and "when the judgment is one of policy . . . findings of fact such as would be required in an adjudicatory proceeding or in a formal 'on the record' hearing for rulemaking need not be made." *United States v. Nova Scotia Food Products Corp.*, 568 F. 2d 240, 249 (2d Cir. 1977) (internal quotation omitted).

**c.** Plaintiffs rely on a February 2000 article, written by an attorney who formerly worked for DOJ's Environment and Natural Resources Division ("ENRD"), which adopts a broader view of what should be included in an administrative record. *See* Pls.' Ltr. Mot. at 3 (citing Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record* (Feb. 2000).[3] But that article never represented any binding statement of the position of the United States with respect to the compilation of an administrative record, and subsequent authoritative DOJ guidance has made explicit that any such guidance has been superseded. *See* Mem. of Ronald J. Tenpas, Assistant Attorney General, U.S. Dep't of Justice, to Selected Agency Counsel (Dec. 23, 2008), Ex. 2 (rejecting nearly identical guidance originally issued by ENRD). In any event, the litigating position of the United States is reflected in

[3] *Available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab4801.pdf.

Defendants' filings in these matters—not in articles or superseded internal memoranda from specific DOJ attorneys or components.

## II. Plaintiffs' Arguments About Allegedly Omitted Documents Do Not Rebut The Presumption Of Regularity, And Are Primarily Merits Arguments.

Plaintiffs also offer a host of specific documents (and categories of documents) that they claim should have been included in the administrative record. These arguments all suffer from three critical flaws: (1) they largely ignore the presumption of regularity that attaches, as a matter of law, to the administrative record compiled by the agency; (2) they generally overstate the significance of the documents in question; and (3) they are, in any event, merits arguments that (at most) go to the basis (or lack thereof) for the Acting Secretary's decision, rather than the completeness of the administrative record.

**a.** As Judge Garaufis put it, "[t]he agency's designation of the administrative record 'is generally afforded a presumption of regularity.'" *See* Oct. 3, 2017 Order at 3, *Vidal* ECF No. 72 (quoting *Comprehensive Cmty. Dev. Corp.*, 890 F. Supp. 2d at 309); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) ("The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary."). This rule recognizes that, in APA cases, "the agency and not the court is the principal decision maker," and it discourages courts from "supplement[ing] the record . . . in the belief that they were better informed than the administrators empowered by Congress." *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1325 (D.C. Cir. 1984), *vacated in part on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985). In other words, the agency officials familiar with the decision under review are presumed to have properly designated the administrative record, absent a showing by Plaintiffs that extra-record materials are necessary to reveal the agency's rationale for the decision. *See Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2009). Here, Plaintiffs have not made such a showing—nor could they, given the existence of the September 5, 2017 rescission memo, which summarized and presented Acting Secretary Duke's reasoning. Plaintiffs may disagree with that reasoning, or find the explanation deficient, *see infra*, Section II(c), but there is no mystery as to the reasons offered by the Acting Secretary to justify this decision. Accordingly, the presumption of regularity holds, and these arguments can be rejected on that basis alone.

**b.** As for the specific documents (or categories of documents) that Plaintiffs claim are missing from the administrative record, Plaintiffs fault the agency for allegedly failing to include documents "that purport to explain Defendants' decision to slowly wind down a program they assert is unlawful" or detailing "how the agency chose crucial dates in the termination process." Pls.' Ltr. Mot. at 4. But in any event, both the Attorney General's letter to Acting Secretary Duke, AR 251, and the rescission memo itself, AR 252-56, address this topic, albeit briefly. But otherwise, documents on this subject are classic pre-decisional and deliberative communications that are protected by (at least) the deliberative-process privilege and were properly omitted from the record on that basis. *See, e.g.*, *Mothers for Peace*, 789 F.2d at 44-45 (explaining that, absent a showing of bad faith, transcripts of deliberative agency proceedings must not be considered on judicial review); *Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (affirming district court's refusal to order production of deliberative intra-agency memoranda in a record-review case).

Plaintiffs' suggestion that internal DOJ (and perhaps even White House) documents should be included in the administrative record, even if never shared with DHS or the Acting Secretary, is similarly mistaken. It is the Acting Secretary, not the Attorney General, who is vested with the

statutory authority to enforce our nation's immigration laws, *see* 8 U.S.C. § 1103(a)(1). And, in fact, the administrative record already includes DOJ documents, to the extent they are non-privileged and were considered by the Acting Secretary as part of her decision to rescind the DACA policy. *See* Administrative Record, AR 4-36 (Office of Legal Counsel Memorandum), AR 238-40 (letter to the Attorney General), AR 251 (letter from the Attorney General).

Plaintiffs contend that "Attorney General Sessions'[s] letter contains no legal analysis to support his bare conclusion." Pls.' Ltr. Mot. at 5. Even if that were true, the validity of the underlying legal judgments embedded within the Attorney General's letter to the Acting Secretary are not at stake in this litigation—assuming it is reviewable at all, this case requires the Court to determine, at most, whether the Acting Secretary's decision is rational, for the reasons she stated and on the record that she relied upon. Defendants will ultimately argue that the Acting Secretary's decision was sound—whether or not the Attorney General's underlying legal conclusion and predictions about future litigation would have proven to be accurate if the *Texas v. United States* litigation had continued.

Similarly, Plaintiffs contend that the record is incomplete because it contained judicial decisions from the *Texas* litigation, but did not include other opinions in other cases "that actually concern the DACA program." Pls.' Ltr. Mot. at 5. First of all, contrary to Plaintiffs' suggestion, the *Texas* litigation resulted in a nationwide injunction of not just DAPA, but also an expanded version of the DACA policy.[4] And the *Texas* plaintiffs recently threatened to amend their complaint to directly challenge what remained of DACA after the *Texas* injunction, on the same legal theory that had been accepted by the Fifth Circuit and affirmed by the Supreme Court. *See* AR 238-40. In any case, this is an improper attempt by Plaintiffs to tell the agency decision maker what she *should* have considered in making her decision—it says nothing about what she actually considered, and that is the relevant question at this stage of the litigation. Plaintiffs do not assert that these other opinions were considered by the Acting Secretary as part of her decision, and there is no obligation to include every single potentially relevant legal authority as part of an administrative record for a decision of this sort—otherwise DHS would have had to, for example, include the entirety of the Immigration and Nationality Act and the United States Constitution in the administrative record.

Plaintiffs also argue that the record is incomplete because it does not contain an August 14, 2017 letter from law professors offering their views to the President (copying Acting Secretary Duke) on the legality of DACA. This example is particularly unpersuasive because it is not, as Plaintiffs argue, "the relevance of [] communications to the DACA-policy termination," Pls.' Ltr. Mot. at 5, that determines whether a document should be included in the administrative record—even accepting that an unsolicited letter from law professors is "relevant" to a decision like this one. An agency decision maker is not required to consider every communication from any member of the public in making a decision. Plaintiffs may wish that the Acting Secretary had considered that letter in making her decision, but her focus on other documents is the *reason* it was not included—it does not call into question the completeness of the record.

Plaintiffs also make much of a footnote in the Acting Secretary's September 5, 2017 memorandum, which reports that, although deferred action policies are generally "meant to be applied only on an individualized case-by-case basis," in fact, "USCIS has not been able to identify specific

[4] *See, e.g.*, *Texas v. United States*, 86 F. Supp. 3d 591, 678 n.111 (S.D. Tex. 2015) ("While this Court's opinion concentrates on the DAPA program, the same reasoning applies, and the facts and the law compel the same result, to the expansions of DACA contained in the DAPA Directive").

denial cases where an applicant appeared to satisfy the programmatic categorical criteria . . . but still had his or her application denied based solely on discretion." Sept. 5, 2017 Memo at 2 & n.1, AR 253. But this factual statement is about the *lack* of certain data, not its existence, and the absence of additional documentation considered by the Acting Secretary therefore raises no questions about the completeness of the administrative record—the relevant conclusion is presented in the decision memo itself. And as discussed further below, *see infra*, Section II(c), to the extent Plaintiffs believe that the Acting Secretary's decision is not supported by the record, that is ultimately a merits argument.

Finally, Plaintiffs' suggestion that the presumption of completeness ordinarily afforded an administrative record may be more easily overcome "where, as here, no formal agency proceedings have concretely determined the scope of the administrative record" is unsupported. Pls.' Ltr. Mot. at 3. Plaintiffs rely on *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982), but that case involved "a strong suggestion that the record before the Court was not complete: conspicuously absent were the . . . fundamental documents—the very basis for federal decision-making about [the challenged grants]." *Id.* No such showing of conspicuously absent, fundamental documents has been made here.

**c.** Setting aside their merit on a document-by-document basis, Plaintiffs' arguments about what they would have expected to find in the administrative record are all, ultimately, *merits* arguments—not a justification for a broader administrative record. It is a well-settled principle of administrative law that where, as here, there is a "contemporaneous explanation" for an agency's decision, its validity "must . . . stand or fall on the propriety of that finding." *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam). "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citations omitted). "If that finding is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded to [the agency] for further consideration." *Camp*, 411 U.S. at 143 (citation omitted). Here, Defendants have produced a 256-page administrative record that includes all of the non-privileged documents that were actually considered by the agency decision maker. If Plaintiffs believe that that record is insufficient to support the agency's decision, then their remedy is not to compel the production of a broader administrative record—it is for Plaintiffs to file a merits brief asking that the decision be set aside, to which Defendants will respond on the merits. *See id.*

## III. Plaintiffs' Have Already Obtained Extra-Record Documents.

Plaintiffs claim that "[i]n arguing that Plaintiffs are not entitled to discovery to challenge the completeness of the administrative record, Defendants have incorrectly conflated the need to complete the record with the need to supplement the record." Pls.' Ltr. Mot. at 6. To the extent Plaintiffs are referring to Defendants' *prior* filings opposing *discovery*, Defendants have not "incorrectly conflated" anything, but instead have made straightforward arguments about the general inappropriateness of judicial review of the Executive Branch's exercise of prosecutorial discretion in the immigration context, and the importance of limiting any judicial review that does take place to the administrative record compiled by the agency—a record that is legally presumed to be regular. That is true even where, as here, Plaintiffs bring constitutional claims, because constitutional claims challenging allegedly unlawful agency action are still APA claims, because both the waiver of sovereign immunity and the source of Plaintiffs' private right of action on their constitutional claims derive from the APA. *See* 5 U.S.C. § 706(2)(B) (the reviewing court may "hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity").

Similarly, Plaintiffs claim that "[a]t this time, Plaintiffs are not moving to supplement the record." Pls.' Ltr. Mot. at 6. Again, Defendants do not fully understand this statement, but to the extent it is a belated concession that judicial review in this case may be, as is typical, limited to the administrative record (either with or without the documents Plaintiffs claim should be included), Defendants welcome it. Defendants are currently expending hundreds of hours per week processing and reviewing massive numbers of extra-record documents, and responding to interrogatories and requests for admission, as a result of Plaintiffs' discovery requests that go well beyond the administrative record. Extra-record documents have already been produced to Plaintiffs at their request, so Plaintiffs' sudden disclaimer of interest in those documents is hard to understand.

## IV. Defendants' Pending Objection Letter Raises Potentially Overlapping Issues.

Finally, Defendants respectfully note that Defendants' objection letter regarding this Court's September 27, 2017 case-management and scheduling order, *Vidal* ECF No. 67, remains pending before Judge Garaufis. Although that letter focused primarily on Section II(c) of this Court's September 27, 2017 Order (which required the production of a privilege log along with the administrative record), the letter also raised broader arguments about the proper scope of judicial review in this case, including the breadth of the administrative record and any associated privilege log, and the propriety of any discovery beyond the administrative record. Judge Garaufis has stated his intent to rule on those broader objections no later than October 20, 2017, *see* Oct. 3, 2017 Order at 4, and that ruling is likely to inform this Court's analysis on at least some of the issues raised in Plaintiffs' motion to complete the administrative record. Of course, this Court has the authority to dispose of Plaintiffs' motion at any time. But in the interest of judicial efficiency, this Court may wish to await that forthcoming ruling from Judge Garaufis before addressing Plaintiffs' motion to complete the administrative record.

* * *

Defendants thank the Court for its consideration of this matter, and respectfully request that Plaintiffs' motion be denied.

Respectfully submitted,

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BRIDGET M. ROHDE
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JENNIFER D. RICKETTS
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*/s/ Stephen M. Pezzi*
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*Counsel for Defendants*

# Exhibit 1

## Email Chain re: "EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record"

| | |
|---|---|
| **From:** | Susanna Evarts |
| **To:** | Pezzi, Stephen (CIV); Victoria Roeck; Diane Lucas |
| **Cc:** | Colleen Melody (ColleenM1@ATG.WA.GOV); Bailey, Kate (CIV); Lourdes Rosado; Abigail Taylor; Nadeau, Genevieve (AGO); Rosenberg, Brad (CIV); Batalla@maketheroadny.org; BatallaVidal_LSO@mailman.yale.edu; Marsha Chien; Marutollo, Joseph (USANYE); Batalla |
| **Subject:** | Re: [Batallavidal_lso] EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record |
| **Date:** | Sunday, October 15, 2017 8:32:48 PM |

Mr. Pezzi,

Thank you for your email, and for reaching out about your concerns. As a preliminary matter, the *Batalla Vidal* and State Plaintiffs' summary of our meet and confer reflects Plaintiffs' understanding of that conversation, and Defendants are free to clarify their position in their response.

Regarding the two complaints you raised, Plaintiffs do not believe they require us to file a corrected motion. First, in the context of our letter motion, there is no meaningful distinction between "actually considered" and "directly considered," especially since Defendants represented that materials considered by subordinates but not by Acting Secretary Duke herself were not produced in the administrative record. Second, Plaintiffs believe our statement that "no documents considered or relied on by subordinates or other decision makers were included," does not imply the record was limited to documents that *only* Acting Secretary Duke considered. Indeed, such a reading would be nonsensical, especially since the administrative record only included documents that were publicly available.

Please let us know if you have any additional questions or concerns.

Best,

Susanna

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Susanna D. Evarts
Law Student Intern
Jerome N. Frank Legal Services Organization
susanna.evarts@ylsclinics.org



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**From:** <batallavidal_lso-bounces@mailman.yale.edu> on behalf of "Pezzi, Stephen (CIV)" <Stephen.Pezzi@usdoj.gov>
**Date:** Saturday, October 14, 2017 at 10:41 AM
**To:** Victoria Roeck <victoria.roeck@ylsclinics.org>, Diane Lucas <diane.lucas@ag.ny.gov>

**Cc:** "Colleen Melody (ColleenM1@ATG.WA.GOV)" <ColleenM1@ATG.WA.GOV>, "Bailey, Kate (CIV)" <Kate.Bailey@usdoj.gov>, Lourdes Rosado <lourdes.rosado@ag.ny.gov>, Abigail Taylor <Abigail.Taylor@MassMail.State.MA.US>, "Nadeau, Genevieve (AGO)" <genevieve.nadeau@state.ma.us>, "Rosenberg, Brad (CIV)" <Brad.Rosenberg@usdoj.gov>, "Batalla@maketheroadny.org" <Batalla@maketheroadny.org>, "BatallaVidal_LSO@mailman.yale.edu" <BatallaVidal_LSO@mailman.yale.edu>, Marsha Chien <MarshaC@ATG.WA.GOV>, "Marutollo, Joseph (USANYE)" <Joseph.Marutollo@usdoj.gov>, Batalla <Batalla@nilc.org>
**Subject:** Re: [Batallavidal_lso] EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record

Dear Counsel,

Sorry to bother you on a Saturday morning. There are two issues I would like to raise regarding your filing of yesterday evening about the administrative record:

First, I want to thank you for submitting your filing as one joint letter. My colleagues and I appreciate that, and I suspect that Magistrate Judge Orenstein does too.

Second, and more importantly, I am concerned that your filing contains some misrepresentations about things that I said on our meet-and-confer call of yesterday afternoon. I assume this was inadvertent, but I am respectfully requesting that you promptly submit a revised version of the filing that corrects the errors, or that you otherwise notify the Court of the inaccuracies.

Specifically, your filing says that, on our meet-and-confer call, "Defendants confirmed that the October 6 administrative record was limited to what Acting Secretary Duke had directly considered when deciding to terminate the DACA policy, and that no documents considered or relied on by subordinates or other decision makers were included."

As for the first half of this sentence, I used the words "actually considered," rather than "directly considered." I might normally let an error like that go, but given that the entire premise of your filing is that the government has adopted an incorrect legal standard on this very issue, and your repeated invocation of the language "directly or indirectly considered," had I actually conceded that we only included documents that were "directly considered," that could, potentially, have significance to the Court's analysis of these issues. And, in fact, I did not make any such statement.

As for the second half of this sentence, I also never said that "no documents considered or relied on by subordinates or other decision makers were included." To be sure, we have maintained (and I did say again yesterday) that the proper focus of the administrative record in this case is the Acting Secretary of Homeland Security herself, and the documents that she considered. But I never said that our definition excluded all "documents considered or relied on by subordinates or other decision makers." Nor would that make sense, as a legal matter – of course, if a non-privileged document was considered by the Acting Secretary as part of this decision, but also by her subordinates or others outside of DHS, that document would be included in the administrative

record. In fact, those sorts of documents do actually appear in the administrative record that we filed with the Court.

My assumption, of course, is that these inaccuracies were inadvertent. Nevertheless, I do respectfully request that you promptly submit a corrected version of the filing, or otherwise clarify your submission to the Court. I would be willing to submit a declaration swearing to my recollection of this call under penalty of perjury, although of course I hope that that proves to be unnecessary.

Thank you very much for your prompt consideration of this request. As always, please let me know if you would like to discuss this (or any other issue) further.

Sincerely,

**Stephen M. Pezzi**
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
(202) 305-8576 | stephen.pezzi@usdoj.gov

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**From:** Pezzi, Stephen (CIV)
**Sent:** Friday, October 13, 2017 11:51 AM
**To:** 'Victoria Roeck' <victoria.roeck@ylsclinics.org>; Diane Lucas <Diane.Lucas@ag.ny.gov>
**Cc:** batallavidal_lso@mailman.yale.edu; Batalla <Batalla@nilc.org>; Batalla@maketheroadny.org; Lourdes Rosado <Lourdes.Rosado@ag.ny.gov>; Abigail Taylor <Abigail.Taylor@MassMail.State.MA.US>; Nadeau, Genevieve (AGO) <genevieve.nadeau@state.ma.us>; Colleen Melody (ColleenM1@ATG.WA.GOV) <ColleenM1@ATG.WA.GOV>; Marsha Chien <MarshaC@ATG.WA.GOV>; Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Marutollo, Joseph (USANYE) <Joseph.Marutollo@usdoj.gov>
**Subject:** RE: EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record

Thanks very much. I look forward to speaking with everyone at 2.

**Stephen M. Pezzi**
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
(202) 305-8576 | stephen.pezzi@usdoj.gov

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**From:** Victoria Roeck [mailto:victoria.roeck@ylsclinics.org]

**Sent:** Friday, October 13, 2017 11:20 AM
**To:** Diane Lucas <Diane.Lucas@ag.ny.gov>
**Cc:** Pezzi, Stephen (CIV) <spezzi@CIV.USDOJ.GOV>; batallavidal_lso@mailman.yale.edu; Batalla <Batalla@nilc.org>; Batalla@maketheroadny.org; Lourdes Rosado <Lourdes.Rosado@ag.ny.gov>; Abigail Taylor <Abigail.Taylor@MassMail.State.MA.US>; Nadeau, Genevieve (AGO) <genevieve.nadeau@state.ma.us>; Colleen Melody (ColleenM1@ATG.WA.GOV) <ColleenM1@ATG.WA.GOV>; Marsha Chien <MarshaC@ATG.WA.GOV>; Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Marutollo, Joseph (USANYE) <Joseph.Marutollo@usdoj.gov>
**Subject:** Re: EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record

Dear Mr. Pezzi,

The Batalla Vidal Plaintiffs are available at 2 p.m. Here is a dial-in number for the call:

Conference Number:

([redacted]

Participants Code:

[redacted]

Best,
Victoria Roeck
--
Victoria Roeck
Law Student Intern
Jerome N. Frank Legal Services Organization
Yale Law School



> On Oct 13, 2017, at 10:31 AM, Diane Lucas <Diane.Lucas@ag.ny.gov> wrote:
>
> Mr. Pezzi,
>
> The Plaintiff States will also join the meet and confer today at 2pm EST.
>
> Best,
>
> Diane Lucas
> Assistant Attorney General
> Civil Rights Bureau
> Office of the NYS Attorney General

120 Broadway, 23rd Floor
New York, New York 10271
Tel: (212) 416-8149
Fax: (212) 416-8074

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**From:** Pezzi, Stephen (CIV) [mailto:Stephen.Pezzi@usdoj.gov]
**Sent:** Friday, October 13, 2017 8:00 AM
**To:** Victoria Roeck <victoria.roeck@ylsclinics.org>; Diane Lucas <Diane.Lucas@ag.ny.gov>
**Cc:** batallavidal_lso@mailman.yale.edu; Batalla <Batalla@nilc.org>; Batalla@maketheroadny.org; Lourdes Rosado <Lourdes.Rosado@ag.ny.gov>; Abigail Taylor <Abigail.Taylor@MassMail.State.MA.US>; Nadeau, Genevieve (AGO) <genevieve.nadeau@state.ma.us>; Colleen Melody (ColleenM1@ATG.WA.GOV) <ColleenM1@ATG.WA.GOV>; Marsha Chien <MarshaC@ATG.WA.GOV>; Rosenberg, Brad (CIV) <Brad.Rosenberg@usdoj.gov>; Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>; Marutollo, Joseph (USANYE) <Joseph.Marutollo@usdoj.gov>
**Subject:** RE: EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record

Ms. Roeck – thanks very much. How about 2 PM? Could you please circulate a dial-in?

Ms. Lucas – the position of the United States with respect to the proper scope of an administrative record has not changed since Wednesday, so, based on your email of yesterday evening, I assume that you therefore do not wish to participate in this meet-and-confer call. But, if you wish to reconsider that decision, please let us know (or just dial in for the 2 PM call).

Best,

**Stephen M. Pezzi**
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
(202) 305-8576 | stephen.pezzi@usdoj.gov

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**From:** Victoria Roeck [mailto:victoria.roeck@ylsclinics.org]
**Sent:** Thursday, October 12, 2017 9:44 PM
**To:** Diane Lucas <Diane.Lucas@ag.ny.gov>
**Cc:** Pezzi, Stephen (CIV) <spezzi@CIV.USDOJ.GOV>; batallavidal_lso@mailman.yale.edu; Batalla <Batalla@nilc.org>; Batalla@maketheroadny.org; Lourdes Rosado <Lourdes.Rosado@ag.ny.gov>; Abigail Taylor <Abigail.Taylor@MassMail.State.MA.US>; Nadeau, Genevieve (AGO) <genevieve.nadeau@state.ma.us>; Colleen Melody

(ColleenM1@ATG.WA.GOV) <ColleenM1@ATG.WA.GOV>; Marsha Chien <MarshaC@ATG.WA.GOV>; Rosenberg, Brad (CIV) <BRosenbe@civ.usdoj.gov>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Marutollo, Joseph (USANYE) <Joseph.Marutollo@usdoj.gov>

**Subject:** Re: EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record

Mr. Pezzi,

We are also willing to meet and confer tomorrow, together with Plaintiff States, regarding the scope of the administrative record. We are available before 10 a.m. or from 12:30 to 2:30 p.m. We would welcome any narrowing of the issues that is possible, consistent with the litigation schedule set by the court.

Best,
Victoria Roeck
--
Victoria Roeck
Law Student Intern
Jerome N. Frank Legal Services Organization
Yale Law School



> On Oct 12, 2017, at 5:49 PM, Diane Lucas <Diane.Lucas@ag.ny.gov> wrote:
>
> Mr. Pezzi,
>
> Thank you for your email. With respect to your request in the last paragraph, the Plaintiff States are willing to meet and confer regarding the scope of the administrative record if the Defendants' position has changed since our conference yesterday.
>
> Please let us know.
>
> Best regards,
>
> Diane Lucas
> Assistant Attorney General
> Civil Rights Bureau
> Office of the NYS Attorney General
> 120 Broadway, 23rd Floor
> New York, New York 10271
> Tel: (212) 416-8149
> Fax: (212) 416-8074

**From:** Pezzi, Stephen (CIV) [mailto:Stephen.Pezzi@usdoj.gov]
**Sent:** Thursday, October 12, 2017 3:44 PM
**To:** batallavidal_lso@mailman.yale.edu; Batalla <Batalla@nilc.org>; Batalla@maketheroadny.org; Victoria Roeck <victoria.roeck@ylsclinics.org>; Lourdes Rosado <Lourdes.Rosado@ag.ny.gov>; Diane Lucas <Diane.Lucas@ag.ny.gov>; Abigail Taylor <Abigail.Taylor@MassMail.State.MA.US>; Nadeau, Genevieve (AGO) <genevieve.nadeau@state.ma.us>; Colleen Melody (ColleenM1@ATG.WA.GOV) <ColleenM1@ATG.WA.GOV>; Marsha Chien <MarshaC@ATG.WA.GOV>
**Cc:** Rosenberg, Brad (CIV) <Brad.Rosenberg@usdoj.gov>; Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>; Marutollo, Joseph (USANYE) <Joseph.Marutollo@usdoj.gov>
**Subject:** EDNY DACA Rescission Litigation - Meet-and-Confer Obligations and Administrative Record

Dear Counsel,

It was nice to see some of you in Brooklyn yesterday. I hope all is well.

I write with a request that I am hopeful you are able to accommodate going forward. Yesterday, I learned, for the first time in front of our Magistrate Judge, of several concerns you had about a handful of our discovery objections. I can appreciate the expedited nature of our schedule and that it may take time to formulate your position on some of these issues, but it is difficult to respond meaningfully to those sorts of concerns when they are raised in open court for the first time. I am also confident that the Magistrate Judge, who wants to handle these cases efficiently, would appreciate the parties attempting to discuss and negotiate to resolve such disputes in good faith before raising them in court (which is presumably why he generally rejected those arguments as being not ripe for resolution in his minute order of yesterday). That is all separate and apart from Section II(f) of Magistrate Judge Orenstein's case-management order and Local Civil Rule 37.3(a), both of which explicitly require such efforts. I also feel obligated to point out that you have, more than once, and in filings with the Court, accused my colleagues and me of violating our obligations in this respect, even when (unlike here) we have attempted to confer about an issue before presenting it to the Court. I am fully aware that the expedited timing of these cases makes this more challenging than usual, but please at least try to meet and confer with us before raising such disputes with the Court in the future.

For much of the same reasons, I would also ask that you wait to receive

our written discovery responses before you raise issues with our objections, in this somewhat unusual context in which we are obligated to serve our objections separate and apart from our responses. It is difficult to evaluate one without the other.

To that end, I do appreciate Ms. Roeck's attempt to meet-and-confer regarding the scope of the administrative record, even though it came at 11 PM the night before the status conference and we were ultimately unable to have a meaningful discussion before yesterday's court appearance. I remain willing to discuss that issue, notwithstanding Magistrate Judge Orenstein's directive that we provide letter briefs on Friday and Monday. I am confident that we are unlikely to reach complete agreement, but I am happy to at least attempt to narrow our areas of disagreement before Friday. If you would be interested in that sort of conversation, please let me know.

Best regards,

**Stephen M. Pezzi**
Trial Attorney
United States Department of Justice
Civil Division - Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
(202) 305-8576 | stephen.pezzi@usdoj.gov

# Exhibit 2

**Mem. of Ronald J. Tenpas, Assistant Attorney General, U.S. Dep't of Justice, to Selected Agency Counsel (Dec. 23, 2008)**

**U.S. Department of Justice**

Environment and Natural Resources Division

*Assistant Attorney General*
*950 Pennsylvania Avenue, N.W.*
*Washington, DC 20530-0001*

*Telephone (202) 514-2701*
*Facsimile (202) 514-0557*

December 23, 2008

**MEMORANDUM**

To: Selected Agency Counsel

From: Ronald J. Tenpas RJT
Assistant Attorney General

Re: "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999)

In January 1999, the Environment and Natural Resources Division authored a document entitled "Guidance to Federal Agencies on Compiling the Administrative Record." That document identified issues that agencies may confront in assembling an administrative record. As explicitly stated in the document, it was intended only as internal Department of Justice guidance, and did not create any rights, substantive or procedural, nor did it limit the "otherwise lawful prerogatives of the Department of Justice or any other federal agency." As was stated in a recent brief by the Department of Justice, the 1999 memorandum "does not represent a formal policy of the Department of Justice, nor even an official directive of the Environment and Natural Resources Division (ENRD). The memorandum focuses on the compilation of an administrative record in the absence of a contemporaneous docket."

It has come to our attention, however, that outside parties have sought to use this 1999 document in litigation against federal agencies, and have argued that it supports a particular composition of the administrative record, or a particular process for its assembly. This memorandum serves to clarify that the January 1999 document does not dictate any requirement for, or otherwise provide binding guidance to, federal agencies on the assembly of the administrative record. The composition of an administrative record is left to the sound discretion of the relevant federal agency, within the bounds of controlling law. This is an agency responsibility in the first instance and the Supreme Court has made clear that an agency has discretion in how to create the record to make and explain its decisions. *See, e.g., Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978) (in rejecting the need for adjudicatory hearing in the context of rulemaking, the Court refers to the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" and noting that "the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence. . . .'").

The Department of Justice has defended in litigation the legal position that deliberative documents are not generally required in an administrative record, and thus has also defended the position that in such circumstances no privilege log reflecting such documents would need to be prepared. The 1999 document should not be read as casting doubt on this legal position. Obviously,

specific statutory provisions and/or case law in the jurisdiction will play a significant role in determining the appropriate approach in a particular case. Agencies would likely benefit from having their own internal guidance regarding the contents and compilation of the record. An agency's guidance should, of course, be informed by applicable case law and the agency's experience and internal procedures.

Should you have any question about the development of agency procedures for compiling an administrative record, or the preparation of a particular administrative record, the Division would be pleased to consult with you. This memorandum is being sent to agencies with whom the Division frequently works, although it is available for use or reference by any federal agency.