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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN FRANCISCO DIVISION**

21 REGENTS OF UNIVERSITY OF
22 CALIFORNIA and JANET NAPOLITANO,
23 in her official capacity as President of the
24 University of California,

Plaintiffs,

v.

25 UNITED STATES DEPARTMENT OF
26 HOMELAND SECURITY and ELAINE
27 DUKE, in her official capacity as Acting
28 Secretary of the Department of Homeland
Security,

Defendants.

CASE NO. 17-CV-05211-WHA

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO COMPLETE THE
ADMINISTRATIVE RECORD IN
ACCORDANCE WITH 5 U.S.C. § 706;
MEMORANDUM IN SUPPORT**

Judge: Honorable William Alsup
Hearing: October 12, 2017, 8:00 AM

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STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, ELAINE C. DUKE, in her official capacity, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05329-WHA

DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZA, NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

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PLAINTIFFS’ NOTICE OF MOTION AND MOTION TO COMPLETE THE ADMINISTRATIVE RECORD IN ACCORDANCE WITH 5 U.S.C. § 706 1

MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION TO COMPLETE THE ADMINISTRATIVE RECORD IN ACCORDANCE WITH 5 U.S.C. § 706 2

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1 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPLETE**
2 **THE ADMINISTRATIVE RECORD IN ACCORDANCE WITH 5 U.S.C. § 706**

3 **INTRODUCTION**

4 This case concerns the government's decision to rescind the Deferred Action for Childhood
5 Arrivals ("DACA") program and expose the program's nearly 800,000 beneficiaries to deportation to
6 countries they have not lived in since they were children.¹ Many of these young people will face 10-
7 year or permanent bans on re-entry, even though they were brought to the United States as children
8 through no choice of their own and know only this country as home. *See* Tr. of Proceedings (Oct. 3,
9 2017) at 32:4-22, 91:4-94:14 (Dkt. No. 63). The government's decision will devastate the lives of
10 DACA recipients and tear apart their families, harm the American economy, and damage the
11 communities, schools, businesses, and institutions which rely on DACA recipients and which have
12 deeply benefited from their contributions.

13 The government's published statements regarding the DACA rescission made no attempt to
14 justify the decision as a matter of policy. Instead, in a September 4, 2017 letter, the Attorney General
15 asserted that the DACA program was illegal when enacted—even though no court has held that and
16 even though the government vigorously argued the opposite position in the Supreme Court less than a
17 year ago. Then, in the September 5, 2017 DHS memorandum rescinding the program, the government
18 purported to justify the decision with an oblique and perfunctory reference to the Attorney General's
19 assertion, stating that "[t]aking into consideration . . . the September 4, 2017 letter from the Attorney
20 General, it is clear that the June 15, 2012 DACA program should be terminated." *See* Rescission Mem.
21 at 4 (Dkt. No. 64-1, at AR 00000255).

22 The government's approach to the administrative record in this case is a microcosm of its
23 shameful approach to the DACA program. The purported record is patently inadequate: it includes only
24 materials considered personally by the Acting Secretary of Homeland Security; it excludes any material
25 that indirectly led to the decision, including materials considered by Attorney General Sessions or his
26

27 ¹ "DACA" refers to the June 15, 2012 Memorandum from former Secretary of Homeland Security
28 Janet Napolitano, titled "Exercising Prosecutorial Discretion With Respect to Individuals Who Came to
the United States as Children," and any and all implementations of that Memorandum.

1 subordinates, Acting Secretary Duke’s subordinates, and any communications from White House
2 officials or staff or other Executive Branch components sent to the U.S. Department of Homeland
3 Security (“DHS”) or U.S. Department of Justice (“DOJ”). The record produced by the government is
4 256 pages, but 185 pages are printouts of court decisions related to a different deferred action program,
5 known as Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”).
6 Forty-one pages consist of the original memoranda creating and extending DACA, along with an Office
7 of Legal Counsel (“OLC”) opinion opining on DAPA’s legality. That leaves a mere 30 pages of
8 material arguably pertinent to the rescission of DACA. This paltry record does not come even close to
9 what is required. For example, there is *one page* of material from DOJ, even though DOJ’s opinion
10 regarding the legality of DACA was the purported basis for the rescission. As another example, the
11 record produced by the government contains zero emails. Indeed, the record does not contain a single
12 document that was not already public when this case was filed. The government also has refused to
13 produce a privilege log.

14 The government’s production defies this Court’s directive against including in the administrative
15 record only “what helps” Defendants and “leav[ing] out what hurts them.” Tr. of Proceedings (Sept. 21,
16 2017) at 17:21-22 (Dkt. No. 52) (“09/21/17 Tr.”); *see also id.* at 17:24-18:1 (“[I]f there’s an e-mail that
17 hurts your case, . . . [i]t’s got to be in the administrative record. It can’t just be the select stuff that
18 supports your side.”). An adequate administrative record in this case must include every document and
19 communication directly or indirectly considered by DHS or DOJ, including communications from White
20 House officials or staff or from any other Executive Branch component sent to DHS or DOJ, as part of
21 the process of determining whether to continue, modify, or rescind the DACA program. Defendants
22 also are required to produce a privilege log that describes any document or communication withheld on
23 grounds of privilege, regardless of whether Defendants consider that record to be a part of the official
24 administrative record.

25 The government is playing a shell game intended to block Administrative Procedure Act review
26 of the government’s true decision-making process. Public accounts of the decision to rescind DACA
27 indicate that DOJ and the White House were integrally involved in the decision-making process.
28 Indeed, the decision was not even announced by the Acting Secretary of Homeland Security, whose

1 documents form the basis of the government’s purported record. Instead, it was announced by the
2 Attorney General, and the formal memorandum rescinding DACA referenced DOJ’s instruction that
3 DACA was supposedly illegal. The White House also issued a formal statement regarding the
4 rescission, again discussing rationales for the decision, and public reports leave no doubt that White
5 House officials were consulted about the decision. The government’s approach to the administrative
6 record would hide from review the documents considered directly by DOJ and the White House and
7 indirectly considered by the Secretary of Homeland Security.

8 To be clear, this is not a discovery motion; the administrative record is the backbone of an APA
9 case, and its contents largely determine the scope of this Court’s APA review. Accordingly, the
10 government’s obstruction presents a serious timing issue. The government took weeks to produce a
11 “record” consisting of publicly-available materials that could have been compiled by a Google search.
12 Because Plaintiffs’ ability to move for summary judgment and a preliminary injunction on their APA
13 claims on November 1—as directed by the Court in its scheduling order—depends on an adequate
14 administrative record, Defendants should be ordered to produce an adequate record and privilege log in
15 a matter of days not weeks.

16 **BACKGROUND**

17
18 On September 21, 2017, the Court held a case management conference and ordered Defendants
19 to file the administrative record by October 6, 2017. 09/21/17 Tr. at 17:17-18, 18:7-8. The Court
20 further instructed Defendants regarding the contents of the administrative record:

21 You know, I used to work in the Justice Department years ago, and
22 I learned one thing about administrative records. The Government always
23 puts in there what helps them and they leave out what hurts them, like
24 memos—in those days it was memos. They didn’t have e-mails.

25 But if there’s an e-mail that hurts your case, it’s got to go in there.
26 It’s got to be in the administrative record. It can’t just be the select stuff
27 that supports your side. So you’ve got to do a good job on it, but it can be
28 done.

You know, you’re the one—the Government is the one that has
created the urgency by putting a deadline, and we’ve got to take that and I
respect your deadline, but at the same time you’ve got to respect the fact

1 that I've got to get the case done. So October 6 is when you ought to give
2 everybody the administrative record.

3 *Id.* at 17:19-18:8.

4 On October 1, 2017, Plaintiffs sent Defendants a letter setting forth Plaintiffs' understanding of
5 the required contents of the administrative record. *See* Ex. 1 to Decl. of J. Davidson, Letter from J.
6 Davidson to B. Shumate & B. Rosenberg (Oct. 1, 2017). That letter explained Defendants' obligation to
7 include in the administrative record all "materials directly or indirectly considered" as part of the
8 process of determining whether to continue, modify, or rescind DACA. *Id.* at 4 (internal quotation
9 marks omitted). It also explained Defendants' obligation to "produce a privilege log describing any
10 document or communication that is withheld on grounds of privilege." *Id.* at 5.

11 On October 5, 2017, Defendants provided to Plaintiffs a letter setting out Defendants' contrary
12 interpretation of their obligations regarding the administrative record. *See* Ex. 2 to Decl. of J. Davidson,
13 Letter from B. Rosenberg to J. Davidson (Oct. 5, 2017) ("Rosenberg Letter"). In that letter, Defendants
14 took the position that the administrative record need only "consist of documents that were actually
15 considered by Acting DHS Secretary Duke as part of the decision to rescind DACA." *Id.* at 1.
16 Defendants also indicated that they would not produce a privilege log. *Id.* at 2.

17 On October 6, 2017, Defendants filed what they allege to be the administrative record in this
18 case. *See* Notice of Filing Administrative Record (Dkt. No. 64). The sparse 256-page record produced
19 by the government includes, in its entirety:

- 20 1. The original memorandum creating DACA (June 15, 2012) (AR 00000001-AR 00000003);
- 21 2. The November 2014 OLC opinion addressing the legality of a new deferred action program
22 called Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")
23 (AR 00000004-AR 00000036);
- 24 3. The November 2014 memorandum extending DACA and creating DAPA (AR 00000037-AR
25 00000041);
- 26 4. A judicial opinion concerning the legality of the DAPA program, *Texas v. United States*, 86
27 F. Supp. 3d 591 (S.D. Tex. 2015) (AR 00000042-AR 00000129);
- 28

- 1 5. An appellate opinion on the same subject, *Texas v. United States*, 809 F.3d 134 (5th Cir.
- 2 2015) (AR 00000130-AR 00000226);
- 3 6. A one-sentence decision by an equally-divided Supreme Court affirming the prior order,
- 4 *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (AR 00000227-AR 00000228);
- 5 7. A February 2017 memorandum from DHS leaving DACA in place (AR 00000229-AR
- 6 00000234);
- 7 8. A June 2017 memorandum from DHS abrogating the DAPA program (AR 00000235-AR
- 8 00000237);
- 9 9. A June 2017 letter from certain state attorneys general to the U.S. Attorney General
- 10 threatening litigation if DACA were not rescinded (AR 00000238-AR 00000240);
- 11 10. Three letters from certain members of Congress urging the retention of DACA (AR
- 12 00000241-AR 00000250);
- 13 11. A letter from Attorney General Sessions to Acting DHS Secretary Duke opining that DACA
- 14 was unconstitutional (AR 00000251);
- 15 12. The September 2017 DHS memorandum rescinding DACA (AR 00000252-AR 00000256).

16 All of this material was already in the public domain prior to Defendants' filing of the administrative
17 record. Among other shortcomings, the record contains no emails, no materials from the White House,
18 and no Department of Justice materials other than the public letter opining on the legality of DACA.

19 Consistent with the Rosenberg Letter, Defendants excluded from the administrative record any
20 material considered by Attorney General Sessions, his subordinates, or Acting Secretary Duke's
21 subordinates, as well as any communications from White House officials or staff or other Executive
22 Branch components sent to DHS or DOJ. To date, Defendants have not produced any privilege log, and
23 counsel for Defendants have indicated that in their view a privilege log is not required.

24 During a telephonic meet-and-confer on October 6, 2017, counsel for Defendants agreed that the
25 parties are at an impasse over the contents of the administrative record and that motion practice should
26 proceed.

ARGUMENT

I. The Administrative Record Must Contain Every Document And Communication Directly Or Indirectly Considered In Determining Whether To Continue, Modify, Or Rescind DACA.

Section 706 of the APA states that courts “shall review the whole record” of agency decision-making. 5 U.S.C. § 706. Judicial review of agency action must therefore be “based on the full administrative record that was before the [agency] at the time [it] made [its] decision.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The administrative record is “not necessarily those documents that the agency has compiled and submitted as ‘the’ administrative record,” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989), and the Court need not take the government’s production at face value. Rather, “[t]he ‘whole’ administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.” *Id.* (internal quotation marks omitted). For an administrative record to be complete, it “must contain materials that are *directly or indirectly related* to the agency’s decision, *not just those materials that the agency relied on.*” *People of State of Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, Nos. C05-3508 & C05-4038, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006) (emphasis added); *see also Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 71 (D.D.C. 2008) (administrative record must include “all materials that might have influenced the agency’s decision, and not merely those on which the agency relied in its final decision” (internal quotation marks omitted)).

A “document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record.” *Lockyer*, 2006 WL 708914, at *2 (quoting *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996)). Thus, a complete administrative record must include “the work and recommendations of subordinates.” *Kempthorne*, 587 F. Supp. 2d at 71 (internal quotation marks omitted); *see also Amfac Resorts, L.L.C. v. U.S. Dep’t of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (“[I]f the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well.”).

Although there is a “presumption that the administrative record submitted by Defendants is complete,” Plaintiffs can rebut that presumption “with clear evidence to the contrary.” *Lockyer*, 2006

1 WL 708914, at *2. The inadequacy of an administrative record does not require a showing of “bad faith
2 or improper motive.” *Id.* Rather, a plaintiff must show only “reasonable, non-speculative grounds for
3 the belief that the documents were considered by the agency and not included in the record,” which can
4 be satisfied by a showing that the government applied an incorrect standard in preparing the record. *Gill*
5 *v. U.S. Dep’t of Justice*, No. 14-3120, 2015 WL 9258075, at *6 (N.D. Cal. Dec. 18, 2015) (internal
6 quotation marks omitted).

7 The administrative record in this case should contain all material that was directly or indirectly
8 considered as part of the process of determining whether to continue, modify, or rescind DACA,
9 including all evidence “contrary to the agency’s position.” *See Thompson*, 885 F.2d at 555 (internal
10 quotation marks omitted); *see also* 09/21/17 Tr. at 17:17-18:8 (reaffirming government’s obligation to
11 produce emails and other documents that are not favorable to the government’s case). As a result,
12 Defendants are required to provide the “whole record” as of September 5, 2017, the date the government
13 rescinded DACA, meaning every document and communication considered by DHS or DOJ, including
14 any communications from White House officials or staff or any other Executive Branch component sent
15 to DHS or DOJ, as part of the process of determining whether to continue, modify, or rescind DACA.

16 The time period for the record materials should commence, at the latest, on January 20, 2017
17 (Inauguration Day), and continue through September 5, 2017 (the date of the Rescission
18 Memorandum).² The early portion of this time period is critical because, among other things,
19 Defendants issued a memorandum explicitly leaving DACA in place as of February 20, 2017. *See*
20 *Mem. from John Kelly, Sec’y of Homeland Security, Enforcement of the Immigration Laws to Serve the*
21 *National Interest*, at 2 (Feb. 20, 2017) (Dkt. No. 64-1, at AR 00000230). Thus, Defendants’
22 consideration of the decision whether to continue, modify, or rescind DACA dates back at least to that
23 time. The administrative record accordingly should include documents describing and explaining the
24

25 _____
26 ² If any relevant materials generated prior to January 20, 2017 (for example, by the Presidential
27 Transition team or other third parties) were transmitted to DOJ or DHS, they should be included in the
28 administrative record as well.

1 government's about-face from a February 2017 decision *retaining* DACA to a September 2017 decision
2 *rescinding* DACA.

3 The types of documents that should be part of the administrative record include, at a minimum:

- 4 • All documents and communications³ circulated within DHS or DOJ that were considered,
5 directly or indirectly, in the process of determining whether to continue, modify, or rescind
6 DACA, including, but not limited to, any documents and communications relating to the legality
7 of DACA.
- 8 • All documents and communications between DHS or DOJ and any other component of the
9 Executive Branch, including the White House, regarding the decision to continue, modify, or
10 rescind DACA.
- 11 • All documents and communications between DHS or DOJ and members of the public (including
12 individuals or organizations either opposed to or supporting DACA) that were considered,
13 directly or indirectly, in connection with the decision to continue, modify, or rescind DACA.
- 14 • All documents and communications between DHS or DOJ and Members of Congress regarding
15 the decision to continue, modify, or rescind DACA.
- 16 • All documents and communications between DHS or DOJ and state authorities—including, but
17 not limited to, state Attorneys General and Governors' offices—regarding the decision to
18 continue, modify, or rescind DACA.
- 19 • All notices, minutes, agendas, list of attendees, notes, memoranda, or other communications
20 from meetings relating to the decision of whether to continue, modify, or rescind DACA.
- 21 • All documents and communications evaluating the costs and benefits, direct or indirect, of
22 continuing, modifying, or rescinding DACA and any materials relating to the internal review,
23 inter-agency review, or experts' feedback regarding these evaluations.

24
25
26 ³ As used in this memorandum, “communications” includes any contact between two or more
27 persons by which any information or knowledge is transmitted or conveyed. It should include, for
28 example, all written contact by means such as letters, memoranda, e-mails, text messages, instant
messages, encrypted communications, tweets, and social networking messages or posts.

- 1 • All documents and communications discussing policy alternatives to rescinding DACA and any
- 2 materials relating to the internal review, inter-agency review, or experts' feedback regarding
- 3 these alternatives.
- 4 • All documents analyzing, considering, or attempting to reconcile the inconsistency between the
- 5 positions of the Attorney General and the Acting DHS Secretary that DACA is illegal and their
- 6 earlier contrary positions, including, but not limited to, (a) the decision of Secretary Kelly in
- 7 February 2017 to retain DACA, and (b) the arguments made by DOJ to the District Court for the
- 8 Southern District of Texas and the Fifth Circuit and by the Solicitor General to the Supreme
- 9 Court in *United States v. Texas* that DACA is legal.
- 10 • All documents and communications, including but not limited to internal guidance documents,
- 11 policies, FAQs, or directives—including those distributed to enforcement agents and other
- 12 employees—regarding the decision whether to continue, modify, or rescind DACA.
- 13 • All data or factual information used during the process of evaluating whether to continue,
- 14 modify, or rescind DACA.⁴

15 A record containing these categories of information is what the law requires. For example, in
 16 *Lockyer*, Magistrate Judge Laporte granted plaintiffs' motion to compel completion of the administrative
 17 record over the Department of Agriculture's objection. The court explained that to be complete, the
 18 record must include "internal and external agency documents relating to the decision-making process,"
 19 including "materials directly or *indirectly* considered by the agency." 2006 WL 708914, at *3
 20 (emphasis in original). Accordingly, the court ordered the agency to produce "internal and external
 21 communications regarding the [agency's] decision-making process," including "drafts, internal reviews
 22 and critiques, inter-agency reviews, dissent from agency scientists, e-mail exchanges or other

23
 24 ⁴ This representative list is drawn in part from the Department of Justice's own guidance regarding
 25 the appropriate contents of an administrative record. *See* U.S. Dep't of Justice, Env't and Nat. Res.
 26 Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999),
 27 http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf. It also
 28 is consistent with case law from various jurisdictions, including the Northern District of California. *See*,
e.g., *Ctr. for Food Safety v. Vilsack*, No. 15-1590, 2017 WL 1709318, at *3-4 (N.D. Cal. May 3, 2017);
Inst. for Fisheries Res. v. Burwell, No. 16-1574, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017);
Lockyer, 2006 WL 708914, at *2-4.

1 correspondence between and among the agencies and/or others involved in the process and agency
2 meeting notices regarding discussions of the impact of scientific uncertainties on the selection of
3 alternatives.” *Id.* at *4; *see also Burwell*, 2017 WL 89003, at *1 (“It is obvious that in many cases
4 internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes
5 will inform an agency’s final decision. Therefore, the government is wrong to assert that these types of
6 materials, as a categorical matter, should be excluded from the universe of materials directly or
7 indirectly considered by agency decision-makers.” (internal quotation marks omitted)).

8 **II. The Administrative Record Must Include All Documents And Communications Considered**
9 **By DOJ And All Communications From The White House To DOJ Or DHS.**

10 Both materials considered by DOJ and communications from the White House to DOJ or DHS
11 regarding the decision to continue, modify, or rescind DACA must be included in the administrative
12 record in this case.

13 That the administrative record must include material considered by DOJ is underscored by
14 DOJ’s significant and public participation in the process of rescinding DACA. The Rescission
15 Memorandum itself references a September 4, 2017 letter from Attorney General Sessions regarding
16 DACA. *See* Rescission Mem. at 4 (Dkt. No. 64-1, at AR 00000255) (“Taking into consideration . . . the
17 September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program
18 should be terminated.”). In that letter, Attorney General Sessions asserted that DACA “was effectuated
19 . . . without proper statutory authority” and “was an unconstitutional exercise of authority by the
20 Executive Branch,” and stated that “DHS should consider an orderly and efficient wind-down process”
21 for DACA. *See* Letter from Att’y Gen. Sessions to Acting Sec’y of DHS Duke (Sept. 4, 2017) (Dkt. No.
22 64-1, at AR 00000251). The next day, Attorney General Sessions held a press conference “to announce
23 that the program known as DACA . . . is being rescinded.” *See* Ex. C to Compl. at *1, Attorney General
24 Sessions Delivers Remarks On DACA (Sept. 5, 2017) (Dkt. No. 1-3). He further stated that “[o]ur
25 collective wisdom is that the policy is vulnerable to the same legal and constitutional challenges that the
26 courts recognized with respect to the DAPA program.” *See id.* And he reported that “[t]he Department
27 of Justice has advised the President and the Department of Homeland Security that DHS should begin an
28

1 orderly, lawful wind down, including the cancellation of the memo that authorized this program.” *Id.* at
2 *2.

3 DOJ’s extensive and public participation in the decision whether to continue, modify, or rescind
4 DACA is, therefore, undisputed, yet the government has included only a single page—the Sessions
5 letter—originating with DOJ. There can be no question that documents within DOJ are among those
6 “documents and materials directly *or indirectly* considered” in deciding whether to continue, modify, or
7 rescind DACA. Defendants cannot artificially insulate the administrative record from materials
8 considered within DOJ.

9 Likewise, communications from the White House to DHS or DOJ concerning the decision to
10 continue, modify, or rescind DACA should also be included in the administrative record. From the early
11 days of this Administration, the President has repeatedly emphasized his personal involvement in the
12 question of whether to retain or rescind DACA. For example, on February 16, 2017, he said during a
13 press conference, “DACA is a very, very difficult subject for me, I will tell you. To me, it’s one of the
14 most difficult subjects I have” *New York Times*, President Donald Trump Holds Press Conference,
15 YouTube, at 1:06:25 (Feb. 16, 2017), <https://www.youtube.com/watch?v=ZGqhhx8cxMg>. The White
16 House publicly affirmed President Trump’s central role in the decision to rescind DACA. For example,
17 on September 5, 2017, the White House released a statement announcing that “President Donald J.
18 Trump Restores Responsibility and the Rule of Law to Immigration” by rescinding DACA. *See* Press
19 Release, The White House Office of the Press Secretary, President Donald J. Trump Restores
20 Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law>. The
21 announcement underscores President Trump’s personal involvement and actions: “If President Trump
22 allowed DACA to go to court, it is likely that the court would abruptly enjoin the program,” and “[i]f
23 President Trump had refused to act, many States were prepared to pursue litigation to end DACA by
24 court order.” *Id.*

26 DOJ and White House officials also have been heavily involved in decision-making regarding
27 DACA. For example, *The New York Times* reported that “the president followed through on his
28 campaign pledge” to rescind DACA “at the urging of Mr. Sessions *and other hard-line members inside*

1 *his White House, including Stephen Miller, his top domestic policy adviser.*” Michael D. Shear & Julie
 2 Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. Times (Sept. 5,
 3 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>
 4 (emphasis added).

5 Given the manifest involvement of the White House and DOJ in the decision, Defendants cannot
 6 sustain their narrow interpretation of their obligation to produce an administrative record. Indeed,
 7 Defendants’ approach would undermine the fundamental purpose of Congress’s requirement that
 8 government agencies compile administrative records when their actions are challenged. Under
 9 Defendants’ narrow reading, DOJ (or another Executive Branch component) would be able to undertake
 10 a full-blown administrative process, issue a one-page letter to another department head recommending a
 11 particular course of action, and assert in subsequent litigation that the administrative record comprises
 12 nothing more than the one-page letter that it sent to that department head. That result would permit the
 13 government to manipulate the administrative record to contain only favorable information—functionally
 14 shielding government decision-making from the transparent review that Congress mandated under the
 15 APA. *See Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)
 16 (“An incomplete record must be viewed as a fictional account of the actual decisionmaking process. . . .
 17 If the record is not complete, then the requirement that the agency decision be supported by ‘the record’
 18 becomes almost meaningless.” (internal quotation marks omitted)); *Walter O. Boswell Mem’l Hosp. v.*
 19 *Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (“To review less than the full administrative record might
 20 allow a party to withhold evidence unfavorable to its case . . .”). Likewise, Defendants’ position would
 21 enable the White House to exercise enormous—even determinative—influence over agency decision-
 22 making and yet shield the evidence of that influence from the record on which courts must review
 23 agency decision-making. The Court should not permit such an assault on transparency and judicial
 24 review.

25 **III. Defendants Failed To Produce A Required Privilege Log.**

26 The Court’s September 13, 2017 Supplemental Order states that “[p]rivilege logs shall be
 27 promptly provided and must be sufficiently detailed and informative to justify the privilege.” Suppl.
 28

1 Order to Order Setting Initial Case Mgmt. Conf. ¶ 18 (Dkt. No. 23). Defendants nevertheless maintain
2 that they are not required to produce any privilege log at all—in their view, they may shield wide swaths
3 of the administrative record based on privileges that they do not even need to identify, much less defend.
4 Defendants do not cite any Northern District of California or Ninth Circuit authority supporting their
5 assertion that they are exempted from the requirement to produce a privilege log. *See* Rosenberg Letter
6 at 1-2 (citing three out-of-circuit cases).

7 As Magistrate Judge Westmore has held, however, privilege logs are required in APA cases; she
8 rejected the same argument Defendants make here:

9 While Defendants argue that no . . . privilege log is necessary because
10 deliberative material is, in any event, not part of the AR, they have not
11 pointed to binding Ninth Circuit authority that stands for the proposition
12 that in an APA action, an agency may withhold documents on the basis of
13 privilege without providing so much as a privilege log. Absent any such
14 authority, the Court will follow the same approach adopted by other judges
15 in this district. Therefore, if, while in the process of completing the AR,
16 Defendants wish to withhold certain documents on the basis of the
17 deliberative process privilege, they shall provide a privilege log that
18 describes the document, identifies the basis for its withholding, and
19 substantiates any claimed deliberative process privilege.

20 *Gill*, 2015 WL 9258075, at *7; *see also Ctr. for Food Safety*, 2017 WL 1709318, at *5 (same); *Burwell*,
21 2017 WL 89003, at *1 (“[T]he scope of the [deliberative process] privilege doesn’t define the scope of
22 the material directly or indirectly considered. If a privilege applies, the proper strategy isn’t pretending
23 the protected material wasn’t considered, but withholding or redacting the protected material and then
24 logging the privilege.”); *Lockyer*, 2006 WL 708914, at *4 (“ . . . Defendants must make a specific
25 showing establishing the application of a privilege for each document that it contends that it may
26 withhold based on privilege. . . . If Defendants withhold any documents from the record based on
27 privilege, they shall also provide a privilege log . . .”). These principles are not unique to decisions in
28 this Court, but are also contained in the government’s own guidance issued by DOJ to other federal
agencies. *See* Guidance to Federal Agencies on Compiling the Administrative Record, *supra*, at 4 (“If
documents and materials are determined to be privileged or protected, the index of record must identify
the documents and materials, reflect that they are being withheld, and state on what basis they are being
withheld.”).

1 Under this Court’s rules, Defendants’ failure to furnish a privilege log “will be deemed a waiver
 2 of the privilege or protection.” Suppl. Order ¶ 18. They should therefore be ordered to produce all
 3 withheld materials. At the very minimum, Defendants must produce a privilege log, and that privilege
 4 log must: (i) identify which documents or communications were omitted from the administrative record;
 5 (ii) explain the basis for the omission; and (iii) substantiate any claimed privilege. *See Gill*, 2015 WL
 6 9258075, at *7. The Court’s Supplemental Order further requires the log to identify: (iv) all persons
 7 making or receiving the privileged or protected communication; (v) the steps taken to ensure the
 8 confidentiality of the communication, including affirmation that no unauthorized persons have received
 9 the communication; (vi) the date of the communication; and (vii) the subject matter of the
 10 communication. Suppl. Order ¶ 18. The log must be “sufficiently detailed and informative to justify the
 11 privilege.” *Id.* Defendants should be ordered to promptly comply with these obligations in a matter of
 12 days not weeks.

13 **IV. Defendants Have Waived Any Assertion Of Privilege By Putting The Legality Of DACA At**
 14 **Issue.**

15 In addition to their failure to produce a privilege log, Defendants have already waived any
 16 assertion of privilege. They have done so by claiming that a purported concern about DACA’s legality
 17 motivated the decision to rescind the program, putting the lawfulness of DACA directly at issue. If a
 18 party puts certain information “at issue” during litigation, it waives any privilege or immunity that
 19 otherwise would apply to the information. *See Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)
 20 (en banc); *see also Chevron Corp. v. Penzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992). “In practical
 21 terms, this means that parties in litigation may not abuse the privilege by asserting claims the opposing
 22 party cannot adequately dispute unless it has access to the privileged materials.” *Bittaker*, 331 F.3d at
 23 719; *see id.* (“The principle is often expressed in terms of preventing a party from using the privilege as
 24 both a shield and a sword.”).

25 For instance, in the closely-related context of the Freedom of Information Act, the Second
 26 Circuit rejected DOJ’s assertions of deliberative process and attorney-client privilege where

27 the repeated references to the [unpublished] OLC Memorandum made by
 28 the Attorney General and his high-ranking advisors, the substance of their
 comments, and the way in which their comments were used—that is, to

1 Time is of the essence. The government wasted weeks producing a wholly inadequate
2 administrative record, excluding entire categories of documents they were directly instructed to provide,
3 and now seek to further obstruct judicial review by silently withholding documents based on unstated
4 privileges. In order for this litigation to proceed on the accelerated schedule set by this Court, the
5 government must be directed to complete the administrative record immediately.

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1 Dated: October 9, 2017
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ATTESTATION

I, Jeffrey M. Davidson, hereby attest, pursuant to Civil L.R. 5-1, that I have received authorization to electronically sign and file this document from each of the persons identified in the signature block.

Dated: October 9, 2017

/s/ Jeffrey M. Davidson

Jeffrey M. Davidson

*Counsel for Plaintiffs The Regents of
the University of California and
Janet Napolitano, in her official
capacity as President of the University of
California*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF
CALIFORNIA and JANET NAPOLITANO,
in her official capacity as President of the
University of California,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY and ELAINE
DUKE, in her official capacity as Acting
Secretary of the Department of Homeland
Security,

Defendants.

CASE NO. 17-CV-05211-WHA

**DECLARATION OF JEFFREY M.
DAVIDSON IN SUPPORT OF PLAINTIFFS'
MOTION TO COMPLETE THE
ADMINISTRATIVE RECORD IN
ACCORDANCE WITH 5 U.S.C. § 706**

Judge: Honorable William Alsup
Hearing: October 12, 2017, 8:00 AM

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STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, ELAINE C. DUKE, in her official capacity, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05329-WHA

DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZA, NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

1 I, Jeffrey M. Davidson, hereby declare as follows:

- 2 1. I submit this declaration in support of Plaintiffs' Motion to Complete the Administrative Record
3 in Accordance with 5 U.S.C. § 706.
- 4 2. I am an attorney at Covington & Burling LLP and serve as outside counsel for Plaintiffs The
5 Regents of the University of California and Janet Napolitano, in her official capacity as President
6 of the University of California, in the above-captioned matter. In this position I have personal
7 knowledge of the matters set forth herein.
- 8 3. During a telephonic meet-and-confer on October 6, 2017, counsel for Plaintiffs and counsel for
9 Defendants agreed that the parties are at an impasse over the contents of the administrative
10 record in the above-captioned matter and that motion practice should proceed.
- 11 4. Attached hereto as Exhibit 1 is a true and correct copy of the letter dated October 1, 2017, from
12 Jeffrey M. Davidson, Counsel to Plaintiffs The Regents of the University of California and Janet
13 Napolitano, in her official capacity as President of the University of California, to Brett A.
14 Shumate and Brad P. Rosenberg, U.S. Department of Justice.
- 15 5. Attached hereto as Exhibit 2 is a true and correct copy of the letter dated October 5, 2017, from
16 Brad P. Rosenberg, U.S. Department of Justice, to Jeffrey M. Davidson.

17 I declare under penalty of perjury under the laws of the United States that the foregoing is true
18 and correct and that this declaration is executed this 9th day of October, 2017, in San Francisco,
19 California.

20
21 DATED: October 9, 2017

By: /s/ Jeffrey M. Davidson
Jeffrey M. Davidson

EXHIBIT 1

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BEIJING BRUSSELS DUBAI JOHANNESBURG LONDON
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BY ELECTRONIC MAIL

October 1, 2017

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Re: Contents of Administrative Record in *The Regents of the University of California et al. v. U.S. Dep't of Homeland Security et al.*, No. 3:17-cv-05211-WHA (N.D. Cal.); *State of California et al. v. U.S. Department of Homeland Security et al.*, No. 17-cv-05235 (N.D. Cal.); *City of San Jose v. Trump et al.*, No. 5:17-cv-05329-WHA (N.D. Cal.); *Garcia et al. v. United States of America et al.*, No. 3:17-cv-05380-WHA (N.D. Cal.)

Dear Messrs. Shumate and Rosenberg:

On behalf of my clients, The Regents of the University of California and Janet Napolitano in her official capacity as President of the University of California—plaintiffs in the above-captioned case (“Plaintiffs”) and joined by counsel for all plaintiffs in the above-referenced cases, I write to set forth Plaintiffs’ understanding of the required contents of the administrative record that Defendants the United States Department of Homeland Security (“DHS”) and Acting DHS Secretary Elaine Dukes (“Defendants”) have been ordered to produce no later than 12:00 pm PST on October 6, 2017. *See* Case Management Order for All DACA Actions in this District, ECF No. 49 (Sept. 22, 2017). We had discussions with you about the administrative record during our meeting on September 21, 2017 before the Case Management Conference and the issue was also discussed with Judge Alsup during the Conference. This letter is to provide further information about Defendants’ obligations. As detailed below, Defendants are required to produce an administrative record that includes every document and communication considered within any component of the Executive Branch as part of the process of

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determining whether to continue, modify, or rescind the program known as the Deferred Action for Childhood Arrivals (“DACA”).¹

In accordance with Judge Alsup’s Supplemental Order to Order Setting Initial Case Management Conference, Defendants also are required to produce a privilege log at the time that the administrative record is produced. *See* ECF No. 23 ¶ 18 (Sept. 13, 2017). The privilege log should include every document and communication considered within any component of the Executive Branch as part of the process of determining whether to continue, modify, or rescind DACA that is not being produced and as to which the Defendants assert a claim of privilege, regardless of whether the Defendants consider that record to be part of the official administrative record. In accordance with Judge Alsup’s Supplemental Order, failure to furnish this information on October 6, 2017, constitutes a waiver of the privilege or protection. *Id.* We also remind you that where the deliberative process privilege is claimed, only portions of the document reflecting recommendations may be withheld and reasonably segregable portions must be disclosed.

A. Contents of Administrative Record

Through this lawsuit, Plaintiffs challenge Defendants’ September 5, 2017 rescission of the program known as DACA. *See* Complaint, ECF Nos. 1 (Sept. 8, 2017); *see also* Ex. A to Zahradka Decl., ECF No. 35-1 (Sept. 15, 2017); Ex. 1 to Fineman Decl., ECF No. 38-2 (Sept. 18, 2017); Ex. A to Dettmer Decl., ECF No. 39-2 (Sept. 19, 2017).

In order to facilitate effective judicial review of Plaintiffs’ claims brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”), Defendants are required to produce the “whole” administrative record. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). This record should contain all material that was considered as part of the process of determining whether to continue, modify, or rescind DACA, including all evidence “contrary to the agency’s position.” *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quotation marks omitted); *see also* Tr. of Proceedings before the Hon. W. Alsup, Sept. 22, 2017, 17:17-18:8. To be complete, the administrative record “must contain materials that are directly or indirectly related to the agency’s decision, not just those materials that the agency relied on.” *People of State of Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, No. C05-03508 EDL, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006).

Specifically, the administrative record should include the types of materials listed below that were considered within any component of the Executive Branch—including, but not limited to the Department of Homeland Security, the Department of Justice (“DOJ”), and the White House. This list reflects the broad categories of documents that

¹ “DACA” refers to the June 15, 2012 Memorandum from former Secretary of Homeland Security Janet Napolitano, titled “Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children,” and any and all implementations of the Memorandum.

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are required to be included in the record. It is a representative list and is not intended to be exhaustive, nor does it define the scope of Defendants' obligations under the law. Furthermore, this letter in no way waives Plaintiffs' right to object to the contents of the administrative record once it is produced.

The kinds of documents that Plaintiffs believe should be part of the administrative record include:

- Any and all documents and communications² considered within any component of the Executive Branch (including government personnel at the White House and the Office of Management and Budget) as part of the process of determining whether to continue, modify, or rescind DACA, including, but not limited to, any documents and communications relating to the legality of DACA.
- Any and all documents and communications between any component of the Executive Branch and any other component of the Executive Branch regarding the decision to continue, modify, or rescind DACA.
- Any and all documents and communications between any component of the Executive Branch and members of the public regarding the decision to continue, modify, or rescind DACA.
- Any and all documents and communications between any component of the Executive Branch and members of Congress regarding the decision to continue, modify, or rescind DACA.
- Any and all documents and communications between any component of the Executive Branch and state authorities—including, but not limited to, state Attorneys General and Governors' offices—regarding the decision to continue, modify, or rescind DACA.
- Any and all notices, minutes, agendas, list of attendees, notes, memoranda, or other communications from meetings relating to the decision of whether to continue, modify, or rescind DACA.
- Any and all documents and communications evaluating the costs and benefits, direct or indirect, of continuing, modifying, or rescinding DACA and any materials relating

² As used in this letter, "communications" includes any contact between two or more persons (including any individual, corporation, proprietorship, partnership, association, government agency or any other entity) by which any information or knowledge is transmitted or conveyed, or attempted to be transmitted or conveyed, and shall include, without limitation, written contact by means such as letters, memoranda, telegrams, telecopies, telexes, e-mails, text messages, instant messages, tweets, social networking sites, or any other document, and oral contact, such as face-to-face meetings, video conferences, or telephone conversations.

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to the internal review, inter-agency review, or experts' feedback regarding these evaluations.

- Any and all documents and communications discussing policy alternatives to rescinding DACA and any materials relating to the internal review, inter-agency review, or experts' feedback regarding these alternatives.
- Any and all documents and communications, including but not limited to internal guidance documents, policies, FAQs, or directives—including those distributed to enforcement agents and other employees—regarding the decision whether to continue, modify, or rescind DACA.
- Any and all data or factual information used during the process of evaluating whether to continue, modify, or rescind DACA.

This representative list is drawn in part from the Department of Justice's own guidance regarding the appropriate contents of an administrative record.³ It also is consistent with case law from various jurisdictions, including the Northern District of California.

For example, in *People of State of California ex rel. Lockyer v. U.S. Department of Agriculture*, the District Court for the Northern District of California granted plaintiffs' motion to compel completion of the administrative record over the defendant Department of Agriculture's objection. The court explained that to be complete, the record must include "internal and external agency documents relating to the decision-making process," including "materials directly or indirectly considered by the agency." 2006 WL 708914, at *3. Accordingly, the court ordered the agency to produce "internal and external communications regarding the agency's decision-making process, including drafts, internal reviews and critiques, inter-agency reviews, dissent from agency scientists, e-mail exchanges or other correspondence between and among the agencies and/or others involved in the process and agency meeting notices regarding discussions of the impact of scientific uncertainties on the selection of alternatives." *Id.* at *4. *See also Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590 (HSG) (KAW), 2017 WL 1709318, at *4 (N.D. Cal. May 3, 2017) ("[C]ourts in this district have uniformly concluded that internal agency communications and drafts are part of the administrative record.")

Similarly, in *Miami Nation of Indians of Indiana v. Babbitt*, the court ordered the Department of Interior to include in the administrative record draft reports prepared by an expert with whom the agency contracted; draft reports prepared by various agency components; and notes, logs, guidelines, directives, and manuals from those components. 979 F. Supp. 771, 778 (N.D. Ind. 1996). *See also Water Supply &*

³ *See Env't and Natural Res. Div., U.S. Dep't of Justice, Guidance to Federal Agencies on Compiling the Administrative Record (1999), available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.*

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Storage Co. v. U.S. Dep't of Agric., 910 F. Supp. 2d. 1261, 1268-69 (D. Colo. 2012) (concluding that informal meeting notes taken by non-agency personnel were necessary to complete record); *Tenneco Oil Co. v. U.S. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979) (“[I]t strains the Court’s imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals.”). Judge Alsup reaffirmed the government’s obligation to produce emails and other documents that are not favorable to the governments’ case. Tr. of Proceedings before the Hon. W. Alsup, Sept. 22, 2017, 17:17-18:2.

In light of Defendants’ obligations to produce an administrative record that accurately reflects their decision-making process, the record will not be complete if the above-listed categories of documents are not included. *See, e.g., Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) (“It is obvious that in many cases internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes will inform an agency’s final decision. Therefore, the government is wrong to assert that these types of materials, as a categorical matter, should be excluded from the universe of materials directly or indirectly considered by agency decision-makers.” (internal quotation marks omitted)).

B. Time Period for Production

The time period for documents collected and produced should commence at the latest, on January 20, 2017, and continue through September 5, 2017. If there were any documents considered that were created or dated before January 20, 2017—including, but not limited to documents created as part of the presidential administration transition—they should also be produced.

C. Privilege Log

In accordance with Judge Alsup’s Supplemental Order to Order Setting Initial Case Management Conference, Defendants also must produce a privilege log describing any document or communication that is withheld on grounds of privilege. Consistent with Northern District of California precedent, the privilege log must: (i) identify which documents or communications were omitted from the administrative record; (ii) explain the basis for the omission; and (iii) substantiate any claimed privilege. *See Gill v. Dep’t of Justice*, 2015 WL 9258075, at *7 (N.D. Cal. Dec. 18, 2015).

Judge Alsup’s Supplemental Order further requires the log to identify: (iv) all persons making or receiving the privileged or protected communication; (v) the steps taken to ensure the confidentiality of the communication, including affirmation that no unauthorized persons have received the communication; (vi) the date of the communication; and (vii) the subject matter of the communication. ECF No. 23 ¶ 18. The log must be sufficiently detailed and informative to justify the privilege. Defendants’ failure to describe a pertinent document in the privilege log due constitutes a waiver of any later assertion of privilege. *Id.*

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We hope that this information will aid you in assembling the administrative record and privilege log as required by Judge Alsup's Orders in this case and precedent from the Northern District of California. If you have any questions or would like to discuss this issue, please do not hesitate to contact me.

Sincerely,

s/ Jeffrey M. Davidson

Jeffrey M. Davidson
*Counsel to Plaintiffs The Regents of the
University of California and Janet
Napolitano, in her official capacity as
President of the University of California*

cc: James F. Zahradka II
Nancy L. Fineman
Theodore J. Boutrous, Jr.

EXHIBIT 2



U.S. Department of Justice
Civil Division, Federal Programs Branch

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October 5, 2017

Via electronic mail

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Re: *N.D. Cal. DACA Cases*, Nos. 17-cv-5211, 17-cv-5235, 17-cv-5329, 17-cv-5380

Dear Mr. Davidson:

Thank you for your October 1 correspondence setting forth the various plaintiffs' thoughts regarding the scope of the administrative record in the above-referenced cases. We have also discussed, in person on September 21 and October 3, plaintiffs' views regarding these and related issues.

As you are likely aware, agency action is judged only on the basis of the agency's stated reasons for its decision. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Here, the relevant agency is the Department of Homeland Security ("DHS"). That Department administered the Deferred Action for Childhood Arrivals ("DACA") program, and therefore also issued the decision to rescind that program. It is that rescission by DHS that is being challenged in these lawsuits. There is, and can be, no other administrative record regarding the rescission of the DACA program. We therefore disagree with plaintiffs' suggestion that the administrative record should include documents other than those being compiled by DHS.

As I discussed on October 3, the administrative record will consist of documents that were actually considered by Acting DHS Secretary Duke as part of the decision to rescind DACA, as she is the relevant decisionmaker here. By definition, that record excludes privileged documents, because any such documents are not part of a properly constructed administrative record as a matter of law. *See San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*) (refusing to supplement the record to consider transcripts of agency proceedings protected by the deliberative-process privilege); *Town of Norfolk v. Army Corps of*

Eng'rs, 968 F.2d 1438, 1455-58 (1st Cir. 1992) (upholding exclusion of documents from administrative record on attorney-client and deliberative-process privilege grounds). Accordingly, agencies need not (and generally do not) produce privilege logs in connection with an administrative record. *See, e.g., Great Am. Ins. Co. v. United States*, No. 12-9718, 2013 WL 4506929, at *8 (N.D. Ill. Aug. 23, 2013) (“The law is clear: [since] predecisional and deliberative documents are not part of the administrative record to begin with, . . . they do not need to be logged as withheld from the administrative record.”).

During our conversation on October 3, we discussed the government providing to plaintiffs the same privilege log that the government had been ordered to produce in the various DACA cases pending in the United States District Court for the Eastern District of New York, even though any documents that might have appeared in that log would not have been included as part of the actual administrative record in any of these cases. After our conversation, the government was relieved of its obligation to produce that privilege log by October 6, with the court noting that it could not determine on the current record whether “Defendants should be required to produce a privilege log.” *See* Order, *Vidal v. Duke*, Order, No. 1:16-cv-04756-NGG-JO (E.D.N.Y. Oct. 3, 2017), ECF No. 72, at 4; Order, *State of New York v. Trump*, No. 1:17-cv-05228-NGG-JO (E.D.N.Y. Oct. 3, 2017), ECF No. 51, at 4. Accordingly, and because the administrative record will not include any privileged documents, the government will not be providing a privilege log on October 6.

Moreover, plaintiffs are incorrect that Judge Alsup’s standing order requires the production of a privilege log in conjunction with an administrative record. That order does not address the treatment of administrative records, and the provision plaintiffs cite relates to privilege logs in the discovery context. *See* ECF No. 23 at 4-9 (privilege log requirements listed in “discovery” section of order). To the extent that plaintiffs believed that a privilege log was required, they could have raised the issue at the September 21 case management conference. Plaintiffs failed to do so and, as a result, the Case Management Order that applies to these cases and that sets numerous, specific deadlines and requirements is completely silent on the issue. That order only requires the government file and serve its administrative record by noon on October 6, which we intend to do. *See* ECF No. 2 ¶ 3.¹

¹ Even if a privilege log were required, neither Judge Alsup’s standing order’s provisions regarding discovery nor Judge Kim’s standing order require that the log be produced immediately at the time of withholding. Instead, Judge Alsup’s order requires that the log “be promptly provided,” whereas Judge Kim’s standing order—which governs discovery in this case—requires that a party “promptly prepare and provide” a log if a party withholds information that is responsive to a discovery request. *See* ECF No. 23 ¶ 18 (Judge Alsup Order); ECF No. 54-1 at 6 (Magistrate Judge Kim Order). The references to potential waiver in the orders relate to the scope of information that needs to be included in a privilege log at the time the privilege log is provided. *See id.*

We appreciate the opportunity to work with you regarding these issues.

Very truly yours,

/s/ Brad P. Rosenberg

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Theodore J. Boutrous, Jr. (via email)

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Attorneys for Plaintiff City of San Jose

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN FRANCISCO DIVISION**

20 REGENTS OF UNIVERSITY OF
21 CALIFORNIA and JANET NAPOLITANO,
22 in her official capacity as President of the
23 University of California,

Plaintiffs,

v.

24 UNITED STATES DEPARTMENT OF
25 HOMELAND SECURITY and ELAINE
26 DUKE, in her official capacity as Acting
27 Secretary of the Department of Homeland
28 Security,

Defendants.

CASE NO. 17-CV-05211-WHA

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION TO COMPLETE
THE ADMINISTRATIVE RECORD**

Judge: Honorable William Alsup
Hearing: October 12, 2017, 8:00 AM

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STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ELAINE DUKE, in her official capacity as Acting Secretary of the Department of Homeland Security, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05235-WHA

CITY OF SAN JOSE, a municipal corporation,

Plaintiff,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, ELAINE C. DUKE, in her official capacity, and the UNITED STATES OF AMERICA,

Defendants.

CASE NO. 17-CV-05329-WHA

DULCE GARCIA, MIRIAM GONZALEZ AVILA, SAUL JIMENEZ SUAREZ, VIRIDIANA CHABOLLA MENDOZA, NORMA RAMIREZ, and JIRAYUT LATTHIVONGSKORN,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, in his official capacity as President of the United States, U.S. DEPARTMENT OF HOMELAND SECURITY, and ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security,

Defendants.

CASE NO. 17-CV-05380-WHA

1 Having considered Plaintiffs' Motion to Complete the Administrative Record in Accordance
2 with 5 U.S.C. § 706 ("Plaintiffs' Motion"),

3 IT IS HEREBY ORDERED THAT:

- 4 1) Plaintiffs' Motion is hereby granted;
- 5 2) Defendants are ordered to complete the administrative record and include therein every
6 document and communication considered by the U.S. Department of Homeland Security
7 ("DHS") or U.S. Department of Justice ("DOJ"), including communications from White
8 House officials or staff or from any other Executive Branch component sent to DHS or DOJ,
9 as part of the process of determining whether to continue, modify, or rescind the program
10 known as the Deferred Action for Childhood Arrivals;
- 11 3) Defendants are ordered [to produce documents previously withheld on the basis of
12 privilege/to produce a privilege log consistent with the Court's September 13, 2017
13 Supplemental Order].

14 **SO ORDERED**, this __ day of _____, 2017.

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17 WILLIAM ALSUP
18 UNITED STATES DISTRICT JUDGE
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