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17 **UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

18
 19 REGENTS OF UNIVERSITY OF
 20 CALIFORNIA and JANET NAPOLITANO,
 in her official capacity as President of the
 21 University of California,

22 Plaintiffs,

23 v.

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

27 Defendants.
28

No. 3:17-cv-05211-WHA

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL
COMPLETION OF THE
ADMINISTRATIVE RECORD**

Hearing: Monday, Oct. 16, 11:00 a.m.

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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.

No. 3:17-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.

No. 3:17-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,

No. 3:17-cv-05380-WHA

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

4 Defendants.
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INTRODUCTION

1
2 Plaintiffs’ motion to complete the administrative record is premised on a fundamental
3 misunderstanding of the nature and scope of judicial review in challenges to agency action under
4 the Administrative Procedure Act (“APA”).

5
6 It is black-letter administrative law that where, as here, there is a “contemporaneous
7 explanation” for an agency’s decision, its validity “must . . . stand or fall on the propriety of that
8 finding.” *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam). “The task of the reviewing court
9 is to apply the appropriate APA standard of review to the agency decision based on the record the
10 agency presents to the reviewing court.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-
11 44 (1985) (citation omitted). “If that finding is not sustainable on the administrative record made,
12 then the . . . decision must be vacated and the matter remanded to [the agency] for further
13 consideration.” *Camp*, 411 U.S. at 143.

14
15 Here, the decision to wind down DACA is not subject to judicial review in the first place:
16 such exercises of prosecutorial discretion are generally committed to agency discretion by law,
17 *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), and Congress has expressly barred judicial
18 review of decisions to deny deferred action, 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-*
19 *Discrimination Comm.* (“AADC”), 525 U.S. 471, 485 & n.9 (1999). In any event, Defendants
20 have produced a 256-page administrative record that includes all of the non-privileged documents
21 that were actually considered by the decisionmaker. If Plaintiffs believe that that record is
22 “patently inadequate” to support the agency’s decision, Pls.’ Br. 2 (ECF No. 65), then the next
23 step is not to “complete” the record with documents never even considered by the decisionmaker.
24 It is instead for Plaintiffs to file a merits brief asking that the decision be set aside. *See Camp*,
25 411 U.S. at 143.
26
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1 To be sure, supplementation of an administrative record may be appropriate in some
2 circumstances—for example, upon a “strong showing” that the agency has acted in bad faith,
3 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), or where it is “clear”
4 that the decisionmaker relied on documents outside of the administrative record, *Havasupai Tribe*
5 *v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). But Plaintiffs make no charge of bad faith here,
6 *see* Pls.’ Br. 8, and they identify no nonprivileged document actually considered by the
7 decisionmaker that was not included in the administrative record.
8

9 Nor could Plaintiffs satisfy the basic rationale underlying these exceptions: that the
10 administrative record produced by the agency reflects “such [a] failure to explain administrative
11 action as to frustrate effective judicial review.” *Camp*, 411 U.S. at 142–43. The pathway to the
12 Acting Secretary’s decision here is plain: Given the significant litigation risk posed by the
13 Supreme Court and Fifth Circuit decisions in *Texas v. United States* upholding the nationwide
14 injunction of DAPA, and the substantial similarities between DAPA and DACA, when the *Texas*
15 plaintiffs threatened to amend their complaint to challenge DACA, the Acting Secretary was faced
16 with two options. On the one hand, she could take action to wind down DACA in an orderly
17 fashion, minimizing the disruption to current recipients. On the other, continued litigation would
18 in all likelihood risk *another* nationwide injunction that would abruptly end DACA as well,
19 plunging its 800,000 recipients into uncertainty. The Acting Secretary chose the least disruptive
20 option: an orderly wind-down. Plaintiffs may disagree with that choice, but they cannot credibly
21 claim that additional information is needed to understand the rationale behind it.
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25 Equally mistaken is Plaintiffs’ suggestion that the administrative record should include
26 materials that reflect the internal deliberations of Executive Branch officials. Indeed, it is widely
27 understood that deliberative and other privileged materials are not properly considered part of an
28

1 administrative record, and thus need not be included on a privilege log if omitted. As the Supreme
2 Court held long ago, it is “not the function of the court to probe the mental processes of the
3 Secretary.” *United States v. Morgan*, 313 U.S. 409, 422 (1941) (citation omitted). Thus, where,
4 as here, “a party challenges agency action as arbitrary and capricious the reasonableness of the
5 agency’s action is judged in accordance with its *stated* reasons.” *In re Subpoena Duces Tecum*,
6 156 F.3d 1279, 1279 (D.C. Cir. 1998) (emphasis added; citation omitted). The Ninth Circuit has
7 never held to the contrary.
8

9 Defendants recognize, of course, that this Court has directed them to “file . . . a privilege
10 log” regarding its order, ECF No. 67, albeit without the benefit of full briefing on the
11 issue. Defendants respectfully submit that that order is ambiguous, as it is unclear whether the
12 requested privilege log should be confined to the administrative record as they conceive of it—
13 that is, the documents actually considered by the decisionmaker—or instead the vastly broader
14 universe of documents that Plaintiffs wish to be included. A broad reading would not only be
15 inconsistent with the presumption of regularity accorded to the agency’s certification of the
16 record, but literally impossible to comply with in the roughly 52 hours that the Court allotted.¹ It
17 would also require Defendants to apply Plaintiffs’ vague conception of what they think should
18 fall within the scope of the administrative record, even though the Court has not yet opined on
19 that issue. Nevertheless, in a good-faith effort to comply with the Court’s order to the best of
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¹ As stated in the declarations attached to this Opposition as Exhibits B-E, the compilation of documents responsive to pending discovery requests, for DHS alone, have required the search, collection and processing of more than 1.2 million documents from more than 100 custodians. The collection effort alone has taken hundreds of hours. Review for responsiveness and privilege will likely require hundreds more. Plaintiffs’ broad construction of the administrative record would likely necessitate the search, collection, processing and review of a similar volume of data as Plaintiffs’ construction of the administrative record mimics the scope of the pending discovery requests.

1 their abilities, Defendants are filing herewith a privilege log that includes the privileged
2 documents actually considered by the decisionmaker.² In addition, Defendants will bring hard
3 copies of those documents identified in the privilege log to the October 16 hearing, as directed by
4 the Court. If the Court determines that it must review those documents, however, at most they
5 should be lodged *ex parte* and under seal. Moreover, if the Court determines that any of those
6 documents should be placed in the administrative record or released to Plaintiffs or others,
7 Defendants respectfully request that the Court stay any such order to enable them to seek
8 meaningful appellate review, potentially including mandamus, on an expedited basis.
9

10 Because Plaintiffs fail to meet their burden to demonstrate bad faith or provide clear
11 evidence that any nonprivileged document was actually considered by the decisionmaker—much
12 less show that the record is so bare that it somehow frustrates judicial review—the Court should
13 deny Plaintiffs’ motion and review the agency’s decision on the record it certified as full and
14 accurate.
15

16 **RELEVANT BACKGROUND**

17 **A. DACA**

18 On June 15, 2012, the Department of Homeland Security (“DHS”) announced the policy
19 now commonly known as DACA, or Deferred Action for Childhood Arrivals. *See* Memorandum
20 for David Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., from Janet
21 Napolitano, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with*
22 *Respect to Individuals Who Came to the United States as Children* (June 15, 2012) (“DACA
23
24

25
26 ² Consistent with the Court’s “Supplemental Order to Order Setting Initial Case Management
27 Conference in Civil Cases Before Judge William Aslup,” (ECF No. 23), Defendants attest that
28 steps have been taken to ensure the confidentiality of the records and communications listed in
the attached privilege log, and further affirm that they have no knowledge of distribution of these
records and communications outside of the federal government.

1 Memo”), Admin. R. (“AR”) 1–3 (ECF No. 64-1). DACA allowed for deferred action
2 consideration for “certain young people who were brought to this country as children” and
3 therefore “[a]s a general matter . . . lacked the intent to violate the law.” AR 1.

4 Under DACA, an individual may be considered for deferred action if he:

- 5 • Was under 16 when he entered the United States;
- 6 • Was under 31 as of June 15, 2012;
- 7 • Was present in the United States on June 15, 2012, and when requesting DAPA, and has
8 continuously resided in the United States since June 15, 2007;
- 9 • Had no lawful immigration status as of June 15, 2012;
- 10 • Is currently in school, has graduated from high school, has obtained a GED, or was
11 honorably discharged from the U.S. Armed Forces or Coast Guard; and
- 12 • Has not been convicted of a felony, a significant misdemeanor, or multiple misdemeanors,
13 and does not otherwise pose a threat to national security or public safety.

14 *See id.* Following completion of a background check, successful applicants would receive
15 deferred action for a period of two years, subject to renewal. AR 2–3.

17 **B. DAPA and Expanded DACA**

18 DHS later expanded DACA and created a new, similar policy known as Deferred Action
19 for Parents of Americans and Lawful Permanent Residents, or DAPA. *See* Memorandum for
20 Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, from Jeh Johnson,
21 Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to*
22 *Individuals Who Came to the United States as Children and with Respect to Certain Individuals*
23 *Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014) (“DAPA Memo”),
24 AR 37–41. DAPA would have allowed for deferred action consideration for “the parents of U.S.
25 citizens or lawful permanent residents” who had lived in the United States for several years and
26 were “otherwise not enforcement priorities.” AR 39.

1 Under DAPA, an individual could be considered for deferred action if he:

- 2 • Had a child who was a U.S. citizen or lawful permanent resident on November 20,
3 2014;
- 4 • Had no lawful immigration status as of November 20, 2014;
- 5 • Was present in the United States on November 20, 2014, and when requesting DAPA,
6 and had continuously resided in the United States since January 1, 2010;
- 7 • Was not an enforcement priority—e.g., had not been convicted of a felony, a significant
8 misdemeanor, or three or more misdemeanors; was not a threat to national security,
9 border security, or public safety; and had not committed certain other immigration
10 violations; and
- Presented no other factors that made deferred action inappropriate.

11 AR 40.

12 The DAPA Memo also expanded DACA in three ways: it removed the age cap, allowing
13 individuals over 30 to file; it extended the DACA validity period from 2 to 3 years; and it adjusted
14 the date-of-entry cutoff, permitting individuals to request DACA if they had entered the United
15 States by January 1, 2010 (rather than June 15, 2007). AR 39–40.

17 **C. *Texas v. United States***

18 The DAPA Memo was challenged by a coalition of 26 states, led by Texas, who sought
19 to enjoin its implementation. The U.S. District Court for the Southern District of Texas issued a
20 nationwide preliminary injunction, holding that the plaintiffs were likely to succeed on their claim
21 that the DAPA Memo violated the APA’s notice-and-comment requirements. *Texas v. United*
22 *States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

24 The Fifth Circuit affirmed. It agreed that the plaintiffs were likely to succeed on their
25 notice-and-comment claim, and further held that the plaintiffs were likely to succeed on their
26 claim that the DAPA Memo was “manifestly contrary” to the INA, which sets forth a “careful
27

1 plan” prescribing how aliens may normalize their immigration status. *Texas v. United States*, 809
2 F.3d 134, 171–76, 186 (5th Cir. 2015).

3 The Supreme Court affirmed by an equally divided Court, *United States v. Texas*, 136 S.
4 Ct. 2271 (2016) (per curiam), and denied the government’s request for a rehearing upon the
5 confirmation of a ninth Justice, 137 S. Ct. 285 (2016), leaving the preliminary injunction in place.
6 On November 18, 2016, the parties jointly moved the district court to stay merits proceedings to
7 allow them to evaluate “how they might choose to move forward” given the upcoming “change
8 in Administration[s].” Joint Mot. to Stay Merits ¶ 2, *Texas v. United States*, No. 14-254 (S.D.
9 Tex. Nov. 18, 2016) (ECF No. 430).

10 On June 15, 2017, DHS rescinded the DAPA Memo, including its provisions expanding
11 DACA—a decision that is not challenged here. See Memorandum for Kevin McAleenan, Acting
12 Commissioner, U.S. Customs and Border Protection, et al., from John F. Kelly, Secretary of
13 Homeland Security, *Re: Rescission of November 20, 2014, Memorandum Providing for Deferred*
14 *Action for Parents of Americans and Lawful Permanent Residents* (June 15, 2017), available at
15 <https://go.usa.gov/xncr3>.
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19 On June 29, 2017, Texas and several other plaintiff states threatened to amend their
20 complaint to also challenge the DACA Memo, arguing that it suffers from the same infirmities as
21 the DAPA Memo. See Letter from Ken Paxton, Attorney General of Texas, to Jeff Sessions,
22 Attorney General of the United States (June 29, 2017), AR 238–240.

23 **D. Wind-Down of DACA**

24 On September 5, 2017, DHS adopted a plan to wind down the DACA policy in an orderly
25 fashion. See Elaine C. Duke, Acting Secretary of Homeland Security, *Memorandum on*
26 *Rescission of Deferred Action for Child Arrivals* (Sept. 5, 2017) (“Wind-Down Policy”), AR 252–
27
28

1 256. In view of the “substantial[] similar[ities]” between DACA and DAPA, AR 253, as well as
2 the significant litigation risk posed by “the Supreme Court’s and the Fifth Circuit’s rulings in the
3 ongoing litigation,” AR 255, the Acting Secretary rescinded the DACA Memo, instructing that
4 deferred action should instead be used “only on an individualized, case-by-case basis,” AR 253.

5 At the same time, to facilitate an orderly transition, the Wind-Down Policy provides that:

- 6 • For *current DACA recipients*, DHS “[w]ill not terminate the grants of previously
7 issued deferred action or revoke Employment Authorization Documents solely based
8 on the directives in this memorandum for the remaining duration of their validity
9 periods.” AR 255.
- 10 • For *new DACA requests*, DHS “[w]ill adjudicate—on an individual, case-by-case
11 basis—properly filed pending DACA initial requests and associated applications for
12 Employment Authorization Documents that have been accepted by [DHS] as of”
13 September 5, 2017, but “[w]ill reject all DACA initial requests and associated
14 applications for Employment Authorization Documents filed after” that date. *Id.*
- 15 • For *DACA renewal requests*, DHS “[w]ill adjudicate—on an individual, case by case
16 basis—properly filed pending DACA renewal requests and associated applications for
17 Employment Authorization Documents from current beneficiaries that have been
18 accepted by [DHS] as of” September 5, 2017. Further, DHS will similarly adjudicate
19 such requests and applications “from current beneficiaries whose benefits will expire
20 between [September 5, 2017,] and March 5, 2018, that have been accepted by the
21 Department as of October 5, 2017.” *Id.*

18 ARGUMENT

19 Defendants certified and lodged an administrative record consisting of all documents
20 actually considered by the Acting Secretary as part of her decision to institute an orderly wind-
21 down of DACA. *See* AR 1–256. That record amply explains the basis for the agency’s decision,
22 and Plaintiffs could not credibly contend otherwise—even if judicial review were not barred here.
23 *See Heckler*, 470 U.S. at 831–32 (agency enforcement decisions generally committed to agency
24 discretion); 8 U.S.C. § 1252(g); *AADC*, 525 U.S. at 485 & n.9 (“Section 1252(g) was directed
25 against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion”
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1 and “seems clearly designed to give some measure of protection to ‘no deferred action’
2 decisions.”).

3 Plaintiffs’ alternative conception of the proper contents of the record—to include
4 documents that were never considered by the decisionmaker, that are deliberative or otherwise
5 privileged, and that are internal to other agencies—bears no resemblance to any traditional
6 definition of an administrative record and should be squarely rejected. Indeed, Plaintiffs attempt
7 to transform the proper definition of an administrative record into a wish-list of materials they
8 would like the government to produce—whether or not those documents and communications
9 were actually part of the decision under review (or even exist)—and notwithstanding that
10 Plaintiffs are taking full advantage of the expedited discovery that this Court has permitted to
11 proceed over Defendants’ continued objection. Plaintiffs’ motion should be denied.
12
13

14 **I. EVEN ASSUMING THIS CASE WERE JUSTICIABLE, PLAINTIFFS FAIL TO MEET THEIR**
15 **BURDEN TO REBUT THE PRESUMPTION THAT THE ADMINISTRATIVE RECORD WAS**
16 **PROPERLY DESIGNATED**

17 The Supreme Court has repeatedly explained that when there is a “contemporaneous
18 explanation” for an agency’s decision, its validity “must . . . stand or fall on the propriety of that
19 finding.” *Camp*, 411 U.S. at 143. “The task of the reviewing court is to apply the appropriate
20 APA standard of review to the agency decision based on the record the agency presents to the
21 reviewing court.” *Florida Power*, 470 U.S. at 743–44. “If that finding is not sustainable on the
22 administrative record made, then the . . . decision must be vacated and the matter remanded to
23 [the agency] for further consideration.” *Camp*, 411 U.S. at 143. Thus, “the focal point for judicial
24 review should be the administrative record already in existence, not some new record made
25 initially in the reviewing court.” *Id.* at 142.
26

27 It is therefore a fundamental principle of administrative law that, with rare exceptions,
28 judicial review is “confined to the administrative record” designated by the agency. *Texas Rural*

1 *Legal Aid Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991). This rule recognizes
2 that, in APA cases, “the agency and not the court is the principal decision maker,” and it
3 discourages courts from “cavalierly . . . supplement[ing] the record . . . in the belief that they were
4 better informed than the administrators empowered by Congress.” *San Luis Obispo Mothers for*
5 *Peace v. NRC*, 751 F.2d 1287, 1325 (D.C. Cir. 1986) (en banc). Accordingly, the agency officials
6 familiar with the decision under review are presumed to have properly designated the
7 administrative record ““absent clear evidence to the contrary.”” *Cook Inletkeeper v. EPA*, 400 F.
8 App’x 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th
9 Cir. 1993)).

10
11 To overcome this presumption, it is not enough merely to cast aspersions at the agency’s
12 motives, *see* Pls.’ Br. 3 (complaining of a supposed “shell game”), or to suggest that the record is
13 incomplete because its contents fall short of Plaintiffs’ capacious imagination, *see id.* at 9–10.
14 Rather, they must make a “strong showing” of bad faith, *Overton Park*, 401 U.S. at 420, or offer
15 ““clear evidence”” that records actually considered by the decisionmaker were deliberately or
16 negligently excluded from the record, *Cook Inletkeeper*, 400 F. App’x at 240 (citation omitted).
17 Indeed, a “plaintiff must present ‘well-nigh irrefragable proof’ of bad faith or bias on the part of
18 governmental officials” to overcome the presumption that the agency discharged its duties in good
19 faith. *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (citations omitted). That is because
20 “[s]upplementation of an administrative record is the exception, not the rule” in APA cases.
21 *Cactus Corner, LLC v. USDA*, 346 F. Supp. 2d 1075, 1105 (E.D. Cal. 2004).

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25 Moreover, these exceptions are narrow departures from the more general prohibition on
26 intrusion through litigation into the deliberative process of the agency. *See United States v.*
27 *Morgan*, 313 U.S. 409, 422 (1941) (it is “not the function of the court to probe the mental
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1 processes of the Secretary”). Where, as here, “a party challenges agency action as arbitrary and
2 capricious the reasonableness of the agency’s action is judged in accordance with its *stated*
3 reasons.” *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (emphasis added).
4 “That is because the actual subjective motivation of agency decisionmakers is *immaterial* as a
5 matter of law—unless there is a showing of bad faith or improper behavior.” *Id.* at 1279-80
6 (emphasis added). Accordingly, it is generally accepted that deliberative and other privileged
7 materials “are not part of the administrative record.” *Nat’l Ass’n of Chain Drug Stores v. HHS*,
8 631 F. Supp. 2d 23, 27-28 (D.D.C. 2009) (collecting cases).

9
10 Plaintiffs rightly concede that DHS’s certification of the record is entitled to a presumption
11 of completeness, Pls.’ Br. 7, which can be overcome only by a “showing of impropriety in the
12 process.” *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir.
13 1993). Plaintiffs fail to rebut that presumption here.

14
15 **A. Plaintiffs Point to No “Clear Evidence” that the Administrative Record**
16 **Lacks Any Nonprivileged Document Actually Considered by the Acting**
17 **Secretary**

18 Plaintiffs contend that the administrative record should consist of “every document and
19 communication considered by [any employee within] DHS or DOJ, including any
20 communications from White House officials or staff or any other Executive Branch component
21 sent to [any employee] of DHS or DOJ, as part of the process of determining whether to continue,
22 modify, or rescind DACA.” Pls.’ Br. 8. They cite no case adopting such an expansive view of
23 the contents of an administrative record, and any such rule, if applied generally, would impose
24 crushing, discovery-like burdens on Executive Branch agencies defending even routine agency
25 action.
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1 Moreover, the cases that Plaintiffs do cite actually undermine their argument. For
 2 example, they appear to infer their sweeping rule from *Thompson v. United States Department*
 3 *of Labor*, 885 F.2d 551 (9th Cir. 1989), which they cite for the oft-repeated proposition that an
 4 administrative record generally ““consists of all documents and materials directly or indirectly
 5 considered by agency decisionmakers.”” Pls.’ Br. 7 (quoting *Thompson*, 885 F.2d at 555). But,
 6 in that case, the court emphasized that it was “reviewing the *Secretary’s* decision dismissing
 7 [the plaintiff’s] complaints . . . , not the ALJ’s recommended decision.” *Thompson*, 885 F.2d at
 8 555. Because “judicial review is to be based on the full administrative record before the agency
 9 *when it made its decision*,” the court concluded that “the critical inquiry is whether these
 10 [documents] were before the *Secretary* at the time of the decision.” *Id.* at 555–56 (citing
 11 *Overton Park*, 401 U.S. at 420) (second emphasis added).³

14 The administrative record produced here is faithful to that principle, and contains every
 15 nonprivileged document actually considered by the decisionmaker. Plaintiffs point to no “clear
 16 evidence” to the contrary. *Cook Inletkeeper*, 400 F. App’x at 240.

18 **B. Deliberative and Other Privileged Documents Are Not Properly Part of an
 19 Administrative Record**

20 Equally misplaced is Plaintiffs’ suggestion that documents reflecting deliberations within
 21 the Executive Branch—such as drafts, recommendations, option memos, and the like, *see* Pls.’
 22 Br. 7, 9–10—were improperly omitted from the administrative record. In fact, it is generally
 23

25 ³ Likewise, in *People of State of California ex rel. Lockyer v. U.S. Department of Agriculture*,
 26 Nos. C05-3508 & C05-4038, 2006 WL 708914 (N.D. Cal. Mar. 16, 2006), as in *Thompson*, the
 27 court merely applied the uncontroversial principle that an administrative record generally
 28 includes material considered directly and indirectly by the decisionmaker. *See id.* at *2.
 Moreover, the *Lockyer* plaintiffs challenged an agency final rule, implemented through formal
 rulemaking and based on an expansive factual record—a context vastly different from the policy
 judgment at issue here.

1 accepted that deliberative and other privileged materials are not properly considered part of an
2 administrative record.

3 Plaintiffs insist that, by withholding privileged materials, Defendants attempt to “shield
4 wide swaths of the administrative record” from review. Pls’ Br. 14. But that argument rests on
5 the incorrect premise that privileged materials, including internal agency deliberations and
6 communications of the sort Plaintiffs seek, are part of an administrative record in the first
7 instance. They rely principally on a handful of district court decisions crediting that premise and
8 requiring the production of a privilege log. Yet Plaintiffs avoid mention of the Ninth Circuit’s
9 and other appellate courts’ contrary decisions on this issue, and also fail to account for the many
10 district court decisions rejecting their argument.
11
12

13 The Ninth Circuit, like every other court of appeals, has never held that privileged
14 materials must be included as part of an administrative record. To the contrary, the Ninth Circuit
15 has distinguished between, on the one hand, what must properly be included in the record and, on
16 the other, “predecisional transcripts and related documents” concerning “the internal deliberative
17 processes of the agency [and] the mental processes of individual agency members.” *Portland*
18 *Audubon Soc’y*, 984 F.2d at 1549 (citing *San Luis Obispo Mothers for Peace*, 751 F.2d at 1325)
19 (“The principle that judges review administrative action on the basis of the agency’s stated
20 rationale and findings, and our correlative reluctance to supplement the record, is well-
21 established.”) (emphasis omitted)). This approach moreover accords with that taken by the other
22 court of appeals to have considered the question. *See, e.g., San Luis Obispo Mothers for Peace,*
23 *v. Nuclear Regulatory Comm’n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc) (explaining that,
24 absent bad faith, transcripts of deliberative agency proceedings must not be considered on judicial
25 review), *cert. denied*, 479 U.S. 923 (1986); *Town of Norfolk v. U.S. Army Corps of Eng’rs*, 968
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1 F.2d 1438, 1455-58 (1st Cir. 1992) (upholding non-inclusion in record of documents that were
2 subject to attorney-client and deliberative process privileges); *Norris & Hirshberg, Inc. v. SEC*,
3 163 F.2d 689, 693 (D.C. Cir. 1947) (“[I]nternal memoranda made during the decisional process .
4 . . . are never included in a record”); *see also Madison Cty. Bldg. & Loan Ass’n v. Fed. Home Loan*
5 *Bank Bd.*, 622 F.2d 393, 395 n.3 (8th Cir. 1980) (stating that “staff memoranda and
6 recommendations . . . used by an agency in reaching a decision . . . may be excluded from the
7 record because of concerns over proper agency functioning”). The rationale underlying these
8 decisions upholding the exclusion of privileged materials from the record is, as the D.C. Circuit
9 has explained, because “the reasonableness of the agency’s action is judged in accordance with
10 its *stated* reasons.” *In re Subpoena*, 156 F.3d at 1279–80 (emphasis added). “[T]he actual
11 subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is
12 a showing of bad faith or improper behavior.” *Id.* at 1279-80.⁴

15 Based on the reasoning of *Portland Audubon Society*, which is aligned with that of other
16 courts of appeals, district courts both within and beyond this circuit have repeatedly declined to
17 require inclusion of privileged materials in the administrative record. *See, e.g., United States v.*
18 *Carpenter*, No. 3:99-CV-00547-RLH, 2011 WL 4763675, at *3 (D. Nev. Oct. 7, 2011) (denying
19 motion to complete record with documents that “are otherwise protected by privilege”);
20

23 ⁴ Indeed, in the D.C. Circuit—where perhaps the majority of record-review cases are litigated—it
24 has long been the general rule that “internal memoranda made during the decisional process . . .
25 are never included in a record.” *Norris & Hirschberg Inc. v. SEC*, 163 F.2d 689, 693 (D.C. Cir.
26 1947); *see also, e.g., Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008) (“A complete
27 administrative record . . . does not include privileged materials, such as documents that fall
28 within the deliberative process privilege, attorney-client privilege, and work product privilege.”);
Nat’l Ass’n of Chain Drug Stores, 631 F. Supp. 2d at 27-28 (“deliberative materials are not part
of the administrative record”); *Amfac Resorts LLC v. U.S. Dep’t of Interior*, 143 F. Supp. 2d 7,
13 (D.D.C. 2001) (“Deliberative intra-agency memoranda and other such records are ordinarily
privileged, and need not be included in the record.”).

1 *California v. Dep't of Labor*, No. 13-2069, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014)
2 (noting that “internal agency deliberations are properly excluded from the administrative
3 record”); *see also Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312
4 (S.D.N.Y. 2012) (“[D]eliberative materials antecedent to the agency’s decision fall outside the
5 administrative record.”); *Coal. to Protect Cowles Bog Area v. Salazar*, No. 2:12-CV-515, 2013
6 WL 595895, at *4 (N.D. Ind. Feb. 13, 2013) (denying motion to supplement record and affirming
7 agency’s decision to exclude draft documents).
8

9 Here, large swaths of the documents that Plaintiffs seek fall squarely within the
10 deliberative process privilege. *See* Pls.’ Br. 9–10 (seeking, *inter alia*, “All documents and
11 communications discussing policy alternatives to rescinding DACA and any materials relating to
12 the internal review, inter-agency review, or experts’ feedback regarding these alternatives,” and
13 “All documents analyzing, considering, or attempting to reconcile the inconsistency between the
14 portions of the Attorney General and Acting DHS Secretary that DACA is illegal and their earlier
15 contrary positions.”). That privilege protects internal agency deliberations from disclosure in
16 order to (1) encourage open and frank discussions among decisionmakers; (2) guard against
17 premature disclosure of proposed policies before they are adopted; and (3) avoid public confusion
18 from the disclosure of reasons that were not in fact ultimately the grounds for an agency’s
19 decision. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *Russell v. Dep’t*
20 *of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep’t of*
21 *Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).
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25 These documents are inherently predecisional and deliberative, and Plaintiffs offer no
26 reason to doubt that they fall within the scope of the privilege. Moreover, several of the cases
27 that Plaintiffs *themselves* cite explicitly recognize that deliberative and other privileged materials
28

1 need not be included in an administrative record. For example, Plaintiffs rely on *Amfac Resorts*
2 *LLC v. U.S. Department of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001), for the proposition
3 that “if the agency decisionmaker based his decision on the work and recommendations of
4 subordinates, those materials should be included as well.” Pls.’ Br. 7. But they conspicuously
5 omit what that court said next: “However, deliberative intra-agency memoranda and other such
6 records are ordinarily privileged, and need not be included in the record.” *Amfac*, 143 F. Supp.
7 2d at 13. Likewise, in *Lockyer*, the court explained: “Even under the correct standard, some
8 agency documents, such as purely internal deliberative materials, may be protected from inclusion
9 in the administrative record.” 2006 WL 708914, at *4
10

11 For similar reasons, Plaintiffs’ reliance *Miami Nation of Indians of Indiana v. Babbitt*, 979
12 F. Supp. 771 (N.D. Ind. 1996), is misplaced, as it cannot be squared with Supreme Court
13 precedent. In that case, the agency determined that the plaintiffs did not meet the criteria for
14 federal recognition as an Indian tribe, and published the reasons for that decision. *Id.* at 774.
15 Finding that the “essence of judicial review of administrative action is scrutiny of the reasoning
16 process of the decision maker,” *id.* at 776 (citation omitted), the court ordered the administrative
17 record to be supplemented with draft reports prepared by government contractors, and notes of
18 government staff members. *Id.* at 778, 781. This intrusive view of the Court’s role is
19 fundamentally at odds with the principles that it is “not the function of the court to probe the
20 mental processes of the Secretary,” *Morgan*, 313 U.S. at 422 (emphasis added), and that “the
21 reasonableness of the agency’s action is judged in accordance with its *stated* reasons,” *In re*
22 *Subpoena Duces Tecum*, 156 F.3d at 1279 (emphasis added). It should not be followed here.
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1 **C. Internal DOJ Documents Not Actually Considered by the Acting Secretary**
2 **Have No Place in the Administrative Record**

3 Plaintiffs’ suggestion that internal DOJ documents should be included in the
4 administrative record is similarly mistaken. It is the Secretary, not the Attorney General, who is
5 vested with the statutory authority to enforce our Nation’s immigration laws, *see* 8 U.S.C
6 § 1103(a)(1), and Plaintiffs do not dispute that the decision to wind down DACA was ultimately
7 hers.

8 In their APA challenge, Plaintiffs specify, as they must, an alleged “final agency action,”
9 *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting 5 U.S.C. § 704), that they believe is unlawful
10 and causing them harm: the September 5, 2017, DHS memorandum, signed by Acting Secretary
11 of Homeland Security Elaine C. Duke, rescinding the DACA policy. That APA challenge—to a
12 DHS memorandum, rescinding a DHS policy, which had been announced by a previous DHS
13 memorandum, and which was applied by DHS over the past five years—is necessarily a challenge
14 to allegedly unlawful agency action by DHS. *See* 5 U.S.C. § 702 (creating a cause of action for
15 “[a] person suffering legal wrong because of agency action”).
16
17

18 That the Acting Secretary received advice from others members of the Executive Branch
19 is not only commonplace, but entirely appropriate, and it does not change the analysis. Indeed,
20 that is exactly why Defendants included some DOJ documents in the administrative record:
21 because (1) they were nonprivileged and (2) they were actually considered by the Acting
22 Secretary in making her decision. *See* AR 4–36 (Office of Legal Counsel Memorandum); AR
23 238–40 (letter to the Attorney General); AR 251 (letter from the Attorney General). But internal
24 DOJ—or, for that matter, White House—documents that were not considered by the Acting
25 Secretary, by contrast, have no place in the administrative record for a DHS decision.
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28 **II. A PRIVILEGE LOG SHOULD NOT BE REQUIRED**

1 Given the judicial consensus that privileged materials do not form part of the record, *see*
2 *supra* Section I(B), it is hardly surprising that the Ninth Circuit has declined to require an agency
3 to supply a privilege log with the record. *See Cook Inletkeeper*, 400 F. App'x at 240. Numerous
4 district courts within this circuit have followed the Ninth Circuit's lead. *See San Luis & Delta-*
5 *Mendota Water Auth. v. Jewell*, No. 1:15-CV-01290-LJO-GSA, 2016 WL 3543203, at *19 (E.D.
6 Cal. June 23, 2016) ("To require a privilege log as a matter of course in any administrative record
7 case where a privilege appears to have been invoked would undermine the presumption of
8 correctness."); *California*, 2014 WL 1665290, at *13; ("[B]ecause internal agency deliberations
9 are properly excluded from the administrative record, the agency need not provide a privilege
10 log."); *Sierra Pac. Indus. v. Dep't of Agric.*, No. CIV S-11-1250 KJM EFB, 2011 WL 6749837,
11 at *3 (E.D. Cal. Dec. 22, 2011). And that conclusion is, of course, not limited to district courts
12 within this circuit. *See, e.g., Nat'l Ass'n of Chain Drug Stores*, 631 F. Supp. 2d at 27 (denying
13 the plaintiff's motion to compel defendants to produce a privilege log of any privileged documents
14 since such predecisional, deliberative documents "are not part of the administrative record to
15 begin with"); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 801 (E.D. Va. 2008); *Great Am. Ins. Co. v.*
16 *United States*, No. 12 C 9718, 2013 WL 4506929, at *8-9 (N.D. Ill. Aug. 23, 2013).

17 Faced with a substantial body of contrary authority, Plaintiffs rely on a handful of cases
18 from this Court that are either distinguishable on their facts or decided before the Ninth Circuit's
19 ruling in *Cook Inletkeeper*. Pls.' Br. 6–8. They lean most heavily on *Gill v. Department of*
20 *Justice*, in which another judge of this Court required the Government to "revisit the
21 administrative record to ensure its completeness." No. 14-CV-03120-RS (KAW), 2015 WL
22 9258075, at *6 (N.D. Cal. Dec. 18, 2015). The Court did so, however, only after finding that the
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1 agency's certification was facially deficient. The unduly narrow scope of the record certified in
2 *Gill* is not present in this case.

3 Plaintiffs also point to a January 1999 guidance memorandum from the Department of
4 Justice's Environment and Natural Resources Division ("ENRD") concerning the materials that
5 should be included in an administrative record. What Plaintiffs fail to acknowledge, however, is
6 that the cited ENRD guidance memorandum is outdated and was expressly superseded in 2008.
7 *See* Memorandum from Ronald J. Tenpas, Assistant Attorney General, Department of Justice
8 (Dec. 23, 2008) ("2008 DOJ Memo"), annexed to Decl. of Kate Bailey. The correct articulation
9 of the position of the Department of Justice, stated expressly in the 2008 DOJ Memo but ignored
10 by Plaintiffs, is that deliberative documents are *not* part of the administrative record on review.
11 *See id.* at 1 ("The Department of Justice has defended in litigation the legal position that
12 deliberative documents are not generally required in an administrative record, and . . . [that] no
13 privilege log reflecting such documents would need to be prepared."). It is therefore hardly
14 surprising that multiple courts have rejected similar attempts by other plaintiffs to rely on the
15 outdated ENRD guidance. *See Oceana, Inc. v. Gutierrez*, No. 08-00318 (ESH/AK), 2009 WL
16 1491516, at *4 n.4 (D.D.C. May 28, 2009), *rev'd on other grounds*, 670 F.3d 1238 (D.C. Cir.
17 2011); *Coastal Conservation Ass'n v. Locke*, No. 2:09-cv-641-FtM-29SPC, 2010 WL 1439071,
18 at *4 (M.D. Fla. Apr. 12, 2010).

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21
22 Finally, practical considerations underlying APA litigation warrant denial of Plaintiffs'
23 request for a privilege log, which would otherwise lead only to discovery disputes and likely
24 further motion practice. As the Supreme Court has made clear, "the focal point for judicial review
25 should be the administrative record already in existence, not some new record made initially in
26 the reviewing court." *Camp*, 411 U.S. at 142. This form of judicial review permits the Court to
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1 focus on the agency's stated reasons, rather than probing the immaterial subjective views of
2 individual agency personnel. *In re Subpoena Duces Tecum*, 156 F.3d at 1279. A rule "requiring
3 the United States to identify and describe on a privilege log all of the deliberative documents
4 would invite speculation into an agency's predecisional process and potentially undermine the
5 limited nature of review available under the APA." *Great Am. Ins. Co.*, 2013 WL 4506929, at
6 *9. It would also pose substantial burdens on agencies, leading to delays and frustrating APA
7 judicial review on the merits. "The privilege question would have to be resolved before judicial
8 review of the administrative decision could even begin." *Blue Ocean Inst. v. Gutierrez*, 503 F.
9 Supp. 2d 366, 372 & n.4 (D.D.C. 2007).

10
11 Although Defendants expressly maintain their position that no log is required to
12 substantiate the withholding of privileged documents from a properly constructed administrative
13 record, consistent with this Court's Order of October 10, 2017, Defendants have filed a privilege
14 log that includes all documents actually considered by Acting Secretary Duke in her decision to
15 rescind the DACA policy. Because the administrative record is complete, no further privilege log
16 should be required.
17
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19 **III. THE ACTING SECRETARY'S DECISION TO RESCIND DACA ON THE BASIS OF**
20 **SUBSTANTIAL LITIGATION RISK DID NOT WAIVE ANY APPLICABLE PRIVILEGE**

21 Plaintiffs' final argument—that Defendants have waived *all* assertions of *any* applicable
22 privilege—also lacks merit. Plaintiffs contend that the Acting Secretary placed the "lawfulness
23 of DACA directly at issue" by "claiming that a purported concern about DACA's legality
24 motivated the decision." Pls.' Br. 15. That argument fundamentally misconstrues the purpose
25 and scope of this Court's review under the APA, even assuming that this case were justiciable at
26 all. This case does not turn on Plaintiffs'—or, indeed, this Court's—*independent* judgment about
27 the legality of DACA. Nor does it turn on whether Acting Secretary Duke's assessment that
28

1 DACA was vulnerable to the same type of nationwide injunction upheld by the Supreme Court
2 in the DAPA litigation would ultimately have proven correct. Rather, under the limited scope of
3 this Court’s review under the APA, the question is whether, given the circumstances—including
4 the significant litigation risk posed by the pending proceedings in *Texas v. United States*—that
5 decision was irrational, *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.
6 29, 43 (1983), which requires the Court to assess whether the “contemporaneous explanation of
7 the agency decision” is “sustainable on the administrative record made,” *Camp*, 411 U.S. at 143.
8
9 Were Plaintiffs’ argument accepted, the government would be deemed to have waived all
10 privileges any time an assessment of the legal landscape informed an agency’s decisionmaking.
11 Tellingly, Plaintiffs cite no authority for this stunning proposition.

12
13 The cases cited by Plaintiffs are inapposite. Plaintiffs quote, without context, language
14 from *Bittaker v. Woodford* suggesting that litigants may not use privilege as both “a shield and a
15 sword.” 331 F.3d 715, 719 (9th Cir. 2003). But that case, which arose in the fundamentally
16 different context of a habeas corpus petition alleging ineffective assistance of counsel, merely
17 applied the longstanding rule that a party waives attorney-client privilege by placing “the lawyer’s
18 performance at issue.” *Id.* at 718. That decision has no relevance here, where Defendants’
19 assertions of privilege ensure only that the Court decides this case based on a properly constructed
20 administrative record. And the primary case on which Plaintiffs rely, *National Council of La*
21 *Raza v. U.S. Department of Justice*, stands only for the unremarkable proposition that an agency
22 can waive the deliberative process privilege by choosing to expressly adopt and incorporate by
23 reference in its official policy material that would otherwise be privileged. 411 F.3d 350, 356-57
24 (2d Cir. 2005). Defendants have not expressly adopted or incorporated the materials Plaintiffs
25 seek—indeed, their motion seeks the forced disclosure of information that has not been made
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1 public and for which no waiver applies. The Court should therefore reject Plaintiffs' argument
2 that Defendants have waived any assertion of privilege.

3 **CONCLUSION**

4 For the foregoing reasons, Plaintiffs' motion to compel completion of the administrative
5 record should be denied.

6
7 Dated: October 12, 2017

Respectfully submitted,

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9 Acting Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, I electronically transmitted the foregoing document and attachments to the Clerk of Court using the ECF System for filing.

/s/ Kate Bailey
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UNITED STATES DISTRICT COURT FOR THE
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.

Hon. William Alsup

Case No. 17-cv-05211-WHA

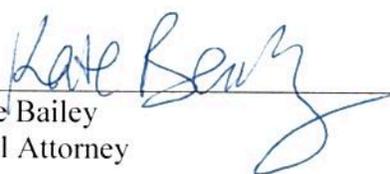
DECLARATION OF KATE BAILEY

I, Kate Bailey, do hereby declare and state as follows:

1. I am a Trial Attorney for the United States Department of Justice, Civil Division, Federal Programs Branch. I am one of the attorneys who is responsible for the litigation of this matter. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. Attached to this declaration is a true and correct copy of a December 23, 2008 Department of Justice, Environment and Natural Resources Division memorandum entitled "Guidance to Federal Agencies on Compiling the Administrative Record."

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 12, 2017.


Kate Bailey
Trial Attorney



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
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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.

DOCID	To	FROM	CC	SUBJECT LINE	TOPIC	DOCDATE	CUSTODIAN	DHSQ Privilege	DHSQ Priv Descriptions
DACA_RLIT00000001					DHS memorandum regarding executive discretion in immigration	8/1/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy
DACA_RLIT00000002					Deliberations on talking points regarding DACA	8/11/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000003					Deliberations on talking points regarding DACA	8/14/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000006					Pre-briefing document for meeting regarding status and future of DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00000007					DHS memorandum regarding OLC memo on DAPA	8/22/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00000015					Deliberations on talking points regarding DACA	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00000025					Notes from deliberations regarding DACA	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding rescission of DACA program
DACA_RLIT00000027					Background information provided for deliberations regarding DACA	unknown	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Deliberations regarding DACA policy; Draft document created litigation
DACA_RLIT00000028					Notes on DHS memorandum regarding immigration reform priorities and DACA	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000031					Notes from deliberations regarding DACA policy	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000033					Notes from deliberations on talking points regarding DACA	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission
DACA_RLIT00000034					Deliberations on talking points regarding DACA	9/5/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission
DACA_RLIT00000057					Notes on article regarding DACA program	8/15/2012	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00000059					DHS memorandum containing information for use in deliberations regarding DACA, immigration enforcement policy, and other matters in litigation	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; deliberations regarding immigration enforcement policy and matters in litigation
DACA_RLIT00000061					Notes on deliberations on talking points regarding DACA and other immigration enforcement priorities	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000066					Notes on Texas v. United States decision by the Fifth Circuit	11/25/2015	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; Deliberations regarding rescission of DACA program

DACA_RLIT0000067					Notes on DHS memorandum summarizing deliberations regarding rescission of DACA and how it would be implemented	8/24/2017	Duke, Elaine C	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000068					Notes on media articles regarding DACA	multiple	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT0000069					Draft White House memorandum regarding litigation related to DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000070					Notes on participant list for deliberations regarding DACA	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program
DACA_RLIT0000072					Notes on prior statements by the President regarding DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy; Deliberations regarding rescission of DACA program
DACA_RLIT0000073					Notes on pre-briefing document for meeting regarding status and future of DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000074					Notes on memorandum regarding options for DACA	unknown	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000075					Notes on DHS memorandum discussing future of DACA	unknown	Duke, Elaine C	AC - Attorney Client Privilege; DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding DACA policy; Deliberations regarding implementation of DACA rescission; Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding DACA policy; Seeking or providing legal advice regarding implementation of DACA rescission; Seeking or providing legal advice regarding litigation risk; Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT0000102	John K. Mashburn (WH); Matthew J. Flynn (WH); Anthony M. Paranzino (WH)	Frank Wuco (DHS)	Elizabeth Neumann (DHS); Chad Wolf (DHS)	170831 DHS Daily Cabinet Affairs Report	Email regarding Cabinet report containing deliberations on DACA	8/31/2017	Duke, Elaine C	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding DACA policy

DACA_RLIT00000103					Cabinet report containing deliberations on DACA	8/31/2017	Duke, Elaine C	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding DACA policy
DACA_RLIT00000226	Elaine C. Duke (DHS)	Chad Wolf (DHS)		Memo + Outline	Email regarding draft DHS memoranda discussing rescission of DACA and implementation	9/3/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000227					Draft DHS memorandum regarding rescission of DACA	9/3/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000228					Draft DHS memorandum regarding implementation of rescission of DACA	9/3/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program; Deliberations regarding implementation of DACA rescission
DACA_RLIT00000230	Kevin K. McAleenan (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Gene Hamilton (DHS)	Chad Wolf (DHS)	Thomas Homan (DHS)	RE: Preparations for Pending Policy Announcement	Email discussion regarding strategies for implementing rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00000231	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Memo + Outline	Email discussions regarding rescission of DACA and talking points regarding rescission	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00000232	Kevin K. McAleenan (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Gene Hamilton (DHS)	Chad Wolf (DHS)	Thomas Homan (DHS)	RE: Preparations for Pending Policy Announcement	Email discussion regarding strategies for implementing rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00000234	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Calls	Email discussion of deliberations regarding rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process;PII - Personal Privacy	Deliberations regarding rescission of DACA program
DACA_RLIT00000235	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Memo + Outline	Email regarding draft DHS memoranda discussing rescission of DACA and implementation	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Deliberations regarding rescission of DACA program; Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00000236					Draft DHS memorandum regarding rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000237	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: Draft Memo	Email discussion regarding draft memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program;
DACA_RLIT00000238	Elaine C. Duke (DHS)	Chad Wolf (DHS)	Chad Wolf (DHS)	AS1 Public Statement	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000239					Draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000240	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000241	Elaine C. Duke (DHS)	Chad Wolf (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000242	Elaine C. Duke (DHS)	Chad Wolf (DHS)	Chad Wolf (DHS)	AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000243					Draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000245	Elaine C. Duke (DHS)	Chad Wolf (DHS)		FW: Draft Memo	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00000246					Draft DHS memorandum regarding rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000247	Elaine C. Duke (DHS)	Chad Wolf (DHS)		DHS Press Release	Email regarding draft press release discussing DACA rescission	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000248					Draft press release discussing DACA rescission	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000450	John F. Kelly (WH); Kirstjen M. Nielsen (WH)	Elaine C. Duke (DHS)	Chad Wolf (DHS)	DACA	Email discussion regarding potential rescission of DACA and implementation	8/24/2017	Duke, Elaine C	DP - Deliberative Process;EP - Executive Privilege	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program

DACA_RLIT00000451	Thomas Homan (DHS)	Elaine C. Duke (DHS)	Chad Wolf (DHS); Elizabeth Neumann (DHS)	Article	Email discussion regarding information for deliberations on potential rescission of DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000513	Chad Wolf (DHS); Jonathan Hoffman (DHS); Gene Hamilton (DHS)	Elaine C. Duke (DHS)		For our discussions	Email discussion regarding information for deliberations on DACA	8/9/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy
DACA_RLIT00000695	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: Memo + Outline	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000697	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: Memo + Outline	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided
DACA_RLIT00000698	Kevin McAleenan (DHS)	Elaine C. Duke (DHS)		RE: Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA and implementation	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00000703	Chad Wolf (DHS)	Elaine C. Duke (DHS)		Calls	Email discussion on deliberations regarding DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000705	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: Draft Memo	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided
DACA_RLIT00000706	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000707	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Public Statement	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000708	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000709	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00000711	Chad Wolf (DHS)	Elaine C. Duke (DHS)		RE: AS1 Statement to DHS Employees	Email regarding draft talking points for DACA	9/5/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001249	Elaine C. Duke (DHS); Claire Grady (DHS); Chad Wolf (DHS); Gene Hamilton (DHS)	Kevin McAleenan (DHS)	Thomas Homan (DHS)	Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA and implementation	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00001250	Chad Wolf (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Gene Hamilton (DHS)	Kevin McAleenan (DHS)	Thomas Homan (DHS)	RE: Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA and implementation	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00001372	Kevin McAleenan (DHS); Elaine C. Duke (DHS); Claire Grady (DHS); Chad Wolf (DHS); Gene Hamilton (DHS)	Thomas Homan (DHS)		RE: Preparations for Pending Policy Announcement	Email discussion regarding potential rescission of DACA	9/4/2017	Duke, Elaine C	PII - Personal Privacy;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission
DACA_RLIT00001396	Elaine C. Duke (DHS); Chad Wolf (DHS); Joseph Maher (DHS); Dimple Shah (DHS)	Gene Hamilton (DHS)		**CLOSE HOLD**	Email discussion regarding draft letter discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding rescission of DACA program; Contains legal advice provided by counsel and information from Executive review
DACA_RLIT00001397					Draft letter discussing rescission of DACA	9/4/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding rescission of DACA program; Contains legal advice provided by counsel
DACA_RLIT00001399	Elaine C. Duke (DHS); Chad Wolf (DHS)	Gene Hamilton (DHS)		Draft Memo	Email discussion regarding draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001400					Draft DHS memorandum discussing rescission of DACA	9/4/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001586	Nancy Clark (DHS)	Nancy Clark (DHS)		SIGNIFICANT CORRESPONDENCE REPORT: 08.02.17	Internal email summarizing correspondence from Rep. Lewis regarding DACA	8/2/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy

DACA_RLIT00001873					Notes on DHS memorandum summarizing deliberations regarding rescission of DACA and how it would be implemented	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00001874					Notes on DHS memorandum regarding OLC memo on DAPA	unknown	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001875					Notes on pre-briefing document for meeting regarding status and future of DACA	8/23/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001876					Draft White House memorandum regarding litigation related to DACA	8/24/2017	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process;EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding litigation risk;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001877					Notes on CNN article discussing DACA	8/29/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001878					Notes on Washington Post article discussing DACA	9/2/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001879					Notes on DHS memorandum regarding potential rescission of DACA and implementation	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding DACA policy;Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program

DACA_RLIT00001880					Notes on DHS memorandum regarding OLC memo on DAPA	unknown	Duke, Elaine C	AC - Attorney Client Privilege;WP - Work Product;DP - Deliberative Process	Attorney mental impressions regarding matter in litigation or anticipated litigation;Deliberations regarding DACA policy;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy
DACA_RLIT00001881					Notes on CNN article discussing DACA	9/1/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001882					Notes on media articles regarding DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001883					Notes on Politico article discussing DACA	8/24/2017	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001885					Notes on 2014 OLC memo to the Secretary of DHS and counsel to the President regarding prioritization of removal	11/19/2014	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program
DACA_RLIT00001887					Notes from deliberations regarding DACA rescission	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00001888					Notes from deliberations regarding DACA rescission	9/1/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding implementation of DACA; rescission;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001889					Notes on draft memorandum regarding rescission of DACA and implementation	unknown	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program
DACA_RLIT00001890					Notes from deliberations regarding DACA rescission	8/30/2017	Duke, Elaine C	AC - Attorney Client Privilege;DP - Deliberative Process	Deliberations regarding implementation of DACA rescission;Deliberations regarding rescission of DACA program;Seeking or providing legal advice regarding DACA policy;Seeking or providing legal advice regarding implementation of DACA rescission;Seeking or providing legal advice regarding rescission of DACA program
DACA_RLIT00001891					Notes on media articles regarding DACA	multiple	Duke, Elaine C	DP - Deliberative Process	Deliberations regarding rescission of DACA program

UNITED STATES DISTRICT COURT FOR THE
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.

Hon. William Alsup

Case No. 17-cv-05211-WHA

DECLARATION OF VIJAI CHELLAPPA

I, Vijai Chellappa, do hereby declare and state:

1. I am an E-Discovery Digital Forensic Analyst with U.S. Customs and Border Protection (CBP), E-Discovery Team, Security Operations, Cyber Security Directorate, Office of Information Technology (OIT). I have 15 years of experience in the Information Technology field, and I have worked for CBP, OIT since 2009. I have been an E-Discovery Digital Forensic Analyst since 2011.

2. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

3. In CBP's efforts to respond to discovery requests in this and related cases, I have assisted in the ongoing process of searching, collecting, reviewing, and analyzing documents

based on searches of more than 70 GB of data (90,219 electronic files) acquired from searches of 12 network drives and approximately 29 workstations.

4. Additionally, I developed and executed the search of CBP's e-mail mailbox journal servers which consisting of approximately 200 TB of data from CBP e-mail mailboxes to locate potentially responsive e-mail messages.

5. CBP, OIT has dedicated significant hours and all of the E-Discovery computer search resources to accelerate the total time needed to respond to pending discovery. To date, I have already expended approximately 48 hours in this effort, to include the searches, data transfers, and refining process for potential discovery material in this and related matters. Additionally, the Agency has experienced impacts to agency function and mission, as all E-Discovery computer server resources were reassigned and diverted to address the search for documents responsive to current discovery requests in the various pending DACA cases. Specifically, all of our work for other cases and court deadlines was put on hold to perform discovery tasks in this and related matters in order to expend the entire resource of E-Discovery's computer server in response to production of this discovery request. As a result, the agency is already more than a week behind in other litigation obligations and has also fallen behind on an ongoing critical surveillance operation.

6. Similar burdens would likely be incurred to immediately locate any additional materials that I understand Plaintiffs assert should be part of the administrative record.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12th day of October 2017.

A handwritten signature in black ink, appearing to read "Vijai Chellappa", is written over a solid horizontal line.

Vijai Chellappa

UNITED STATES DISTRICT COURT FOR THE
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.

Hon. William Alsup

Case No. 17-cv-05211-WHA

DECLARATION OF DAVID J. PALMER

I, David J. Palmer, do hereby declare and state:

1. I am the Chief of Staff for the Office of the General Counsel in the United States Department of Homeland Security. In this capacity, I supervise attorneys and other professional staff who are coordinating efforts at DHS Headquarters to respond to court orders and discovery requests in this case and other related actions. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record.

3. I have reviewed the Plaintiff's Motion to Complete the Administrative Record (*Regents of University of Cal. v. U.S. Dep't of Homeland Security*), Case No. 17-cv-5211, Dkt.

No. 65) (“Motion”) and their interpretation of the “administrative record,” on pages 9 and 10 of Plaintiffs’ motion.

4. If DHS Headquarters were required to search, review, and compile documents based on Plaintiffs’ interpretation of the contents of the proposed administrative record as defined in their Motion, DHS Headquarters would not have been able to search, collect, review, or provide the documents by October 6, 2017, nor would it be able to do so by October 12, 2017, due to the level of effort necessary and the complexity of the undertaking.

5. In response to the discovery requests served in the various DACA cases pending here and in the Eastern District of New York, DHS Headquarters is in the process of searching, collecting, reviewing and analyzing documents from more than 30 custodians which includes a collection of at least 30,118 documents from DHS Headquarters custodians alone, and likely far more given potential DHS Headquarters equities in documents that may be in the possession, custody or control of its component agencies. Similar burdens would likely be incurred to locate the materials Plaintiffs assert should be part of the administrative record.

6. We have dedicated a significant number of staff and hours to the efforts. For example, to date we have already expended more than 150 hours on compiling documents for potential discovery in the various DACA cases. We would experience impacts to agency functions and mission, as resources and personnel would have to be reassigned and diverted to address compiling the administrative record pursuant to Plaintiff’s interpretation. For example, we have already diverted staff from normal operational duties such as preventative maintenance of information technology systems and resolving customer issues. Litigation attorneys recruited to review and analyze documents in this action and other related actions also have full dockets of other litigation matters with pending briefing and discovery deadlines. All full time employees

on the DHS Headquarters litigation team have been assigned to review documents in the various DACA cases and there is no prospect of reassigning or rebalancing their work in other cases. In order to accomplish the review and analysis of documents, DHS Headquarters has also diverted attorney resources from five other legal practice areas.

7. Even with these diverted resources, given the careful review that must be conducted, the volume of the records, and prevalence of privilege issues, the agency would require substantial time and a significant expenditure of resources to identify and assess properly documents within the Plaintiffs' definition of administrative record.

8. The agency, however, is taking extraordinary steps to devote the resources necessary to accelerate the total time needed to respond to pending discovery. Given the number and complexity of documents at issue, the multiple layers of review required, and the difficulty of the issues presented, the agency's best, good faith analysis is that the agency would not have been able to search, collect, review, or provide the documents by October 6, 2017 nor by October 12, 2017 that would fit Plaintiffs' definition of an administrative record.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12 day of October 2017.



DAVID J. PALMER

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF CALIFORNIA
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California,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
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in her official capacity as Acting Secretary of the
Department of Homeland Security,

Defendants.

Hon. William Alsup

Case No. 17-cv-05211-WHA

DECLARATION OF JAMES W. McCAMENT

I, James W. McCament, do hereby declare and state:

1. I am the Deputy Director of U.S. Citizenship and Immigration Services. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record.

3. I have reviewed the Plaintiff's Motion to Complete the Administrative Record (*Regents of University of Cal. v. U.S. Dep't of Homeland Security*, Case No. 17-cv-5211, Dkt. No. 65) ("Motion") and their interpretation of the "administrative record," on pages 9 and 10 of Plaintiffs' motion.

4. If we were required to search, review, and compile documents in our agency based on Plaintiffs' interpretation of the contents of the administrative record as defined in their Motion, our agency would not have been able to search, collect, review, or provide the documents by October 6, 2017 nor by October 13, 2017 due to the level of effort and complexity of the undertaking.

5. In response to the discovery requests served in the various DACA cases pending here and in the Eastern District of New York, USCIS is in the process of searching, collecting, reviewing and analyzing documents from more than approximately 70 custodians, including more than 260,000 emails in addition to documents from approximately 30 shared drives or hard drives. We have dedicated significant staff and hours to the efforts and thus have diverted staff from meeting critical agency goals. For example, to date, I understand that we have already expended more than an estimated 290 hours on identifying and coordinating with custodians, and searching and compiling documents for potential discovery in this and related matters. Similar burdens would likely be incurred to locate the materials Plaintiffs assert should be part of the administrative record.

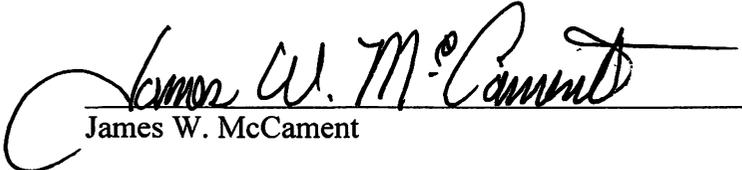
6. We would experience impacts to agency function and mission as resources and personnel would have to be reassigned and diverted to address compiling Plaintiff's interpretation of the administrative record. For example, as part of the ongoing efforts to respond to discovery requests in the various pending DACA cases, the Office of Information Technology (OIT) team has made responding to discovery requests in the various pending DACA cases its exclusive focus to meet the Court deadline. As a result, OIT postponed several other jobs, including three projects and two investigations that have been put on hold to support this and related case matters. The U.S. Citizenship and Immigration Services Office of the Chief

Counsel had to shift personnel to respond to discovery requests and the majority of assigned Counsels time is dedicated to discovery, whereas in their normal course of business, they would have been providing legal guidance on a wide array of issues. Finally, various reporting requirements and requests have had to be delayed so that resources could be reallocated to the discovery in this case and related case matters.

7. Even with these diverted resources, given the careful review that must be conducted and the volume of the records at issue, the agency would require substantial time and a significant expenditure of resources to find documents within the Plaintiffs' definition of administrative record.

9. The agency, however, is taking extraordinary steps to devote the resources necessary to accelerate the total time needed to respond to pending discovery. Given the number and complexity of documents at issue, the multiple layers of review required, and the difficulty of the issues thereby presented, the agency's best, good faith analysis is that the agency would not have been able to search, collect, review, or provide the documents by October 6, 2017 nor by October 13, 2017 that would fit Plaintiffs' definition of administrative record.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12 day of October 2017.


James W. McCament

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REGENTS OF UNIVERSITY OF CALIFORNIA
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Plaintiffs,

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UNITED STATES DEPARTMENT OF
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in her official capacity as Acting Secretary of the
Department of Homeland Security,

Defendants.

Hon. William Alsup

Case No. 17-cv-05211-WHA

DECLARATION OF RAYMOND MILANI

I, Raymond Milani, do hereby declare and state:

1. I am an Associate Legal Advisor with the Office of the Principal Legal Advisor (OPLA), U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS). OPLA is charged by statute with representing the agency in civil immigration proceedings before the nation's immigration courts and with providing specialized legal advice to agency personnel. 6 U.S.C. § 252(c). I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. In my position, I assist OPLA's legal divisions during the entire eDiscovery lifecycle, to include the distribution and monitoring of preservation notices, coordinating with ICE's Office of the Chief Information Officer (OCIO) to collect electronically stored data in a defensible manner, process, analyze, and search electronically stored information, set up

documents for review and redaction, and produce reviewed documents in a format and manner agreed to by opposing counsel/parties and in compliance with the Federal Rules of Civil Procedure. I am also involved in all aspects of the acquisition process for eDiscovery software and supporting systems (market research, statement of work, proposal evaluations, contract awards); responsible for the administration and configuration of eDiscovery software; am a liaison to OCIO on all issues related to eDiscovery and the support and maintenance of the application; and a point of contact assisting other DHS components with their eDiscovery implementation and acquisition. I have performed these functions since February 2008.

3. I am aware of the Court Order dated October 10, 2017, Dkt. No. 67, Order Shortening Time for Briefing Motion to Complete the Administrative Record.

4. I have reviewed Plaintiffs' Motion to Complete the Administrative Record (*Regents of University of Cal. v. U.S. Dep't of Homeland Security*), Case No. 17-cv-5211, Dkt. No. 65) ("Motion") and their interpretation of the "administrative record," on pages 9 and 10 of Plaintiffs' motion.

5. In the course of responding to discovery requests in this and related litigation initiated against the federal government related to Deferred Action for Childhood Arrivals (DACA), ICE is in the process of searching, collecting, reviewing, and analyzing documents from 26 custodians, including more than 872,000 documents.

6. For context, in less than five days, ICE has already expended more than 220 hours on compiling documents for potential discovery in this and related DACA litigation. Similar burdens would likely be incurred to locate the materials Plaintiffs assert should be part of the administrative record.

7. Consequently, an effort to satisfy Plaintiffs' "administrative record" interpretation would impose severe impacts upon agency function and mission, with resources and personnel reassigned and diverted to address compiling Plaintiff's interpretation of the administrative record. For example, ICE has delayed and put at risk other case deadlines in an effort to respond to discovery requests in the various pending DACA matters. Work on those non-DACA matters had to be halted to address discovery in this and related matters. ICE has pulled agency counsel and personnel from immigration court appearance responsibilities and other regular duties, essentially, having to devote 1 out of every 14 attorneys in ICE's legal offices across the country to handle the discovery in this and related DACA lawsuits filed against the federal government. And, even with such diverted resources, which are currently focused on general discovery obligations arising incident to such litigation, the careful review required to comb through the volume of records at issue and identify those that specifically satisfy Plaintiffs' "administrative record" interpretation would likely require substantial additional time.

8. Based on my experience, the efforts ICE has undertaken to respond to this and related DACA litigation is completely unprecedented, in terms of devotion of resources necessary to accelerate discovery production efforts. In responding to DACA-related discovery, ICE began its collection late Wednesday, October 4, and all potentially responsive records were assembled for processing by Friday morning, October 6. ICE's OCIO assigned 2 Active Directory Exchange (ADEX) personnel to work on the collection of documents from 26 custodians. ICE personnel spent a combined total of 220 hours on the project from early Wednesday evening, October 4, until late Monday afternoon, October 9. These efforts included substantial overnight and (holiday) weekend work. This size of this data pull was approximately 872,000 documents and 196 GB of data.

9. The agency has also devoted 82 individuals, the vast majority of whom are attorneys, to review the data collected to date. The discovery responses alone have impacted ICE's mission. One example is the delay in document review in another important district court class action suit. ICE placed that entire discovery project on hold for more than three business days to accommodate the DACA litigation discovery effort.

I declare that to the best of my current knowledge the foregoing is true and correct. Executed on this 12th day of October 2017.


Raymond Milani