No. 17-801

IN THE

Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.,

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SCHOLARS AS *AMICI CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Robert M. Loeb
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Jacob Heath
Ethan Scapellati
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025

Darren S. Teshima
Counsel of Record
Suzette J. Barnes
Ariel Winawer
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
dteshima@orrick.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are professors and legal scholars who teach, write, and study matters of constitutional, administrative, and immigration law. They have extensively studied issues related to the privilege assertions made in connection with actions brought under the Administrative Procedure Act. As legal scholars and educators of the next generation of lawyers, *Amici* have an interest in ensuring that the purpose and intent of the Administrative Procedure Act to provide review of Executive Branch action are not undermined by an overly broad assertion of executive privilege.

Amici are the following scholars:[2]

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici* submitting this brief and their counsel represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *Amici* paid for or made a monetary contribution toward the preparation and submission of this brief. Pursuant to Rule 37.2, *Amici* notified Counsel of Record for all parties of their intention to file this brief. All parties consent to the filing of this brief.

[2] *Amici* join this brief as individuals. Their institutional affiliations are noted for informational purposes only and do not indicate endorsement by institutional employers of positions advocated.

Robert Barsky, Professor of Law, French, English and Jewish Studies, Vanderbilt University Law School

Michael Churgin, Raybourne Thompson Centennial Professor, University of Texas-Austin School of Law

Daniel Farber, Sho Sato Professor of Law, University of California, Berkeley School of Law

Lisa Heinzerling, Justice William J. Brennan, Jr., Professor of Law, Georgetown University Law Center

Sidney A. Shapiro, Frank U. Fletcher Chair of Administrative Law, Wake Forest University

David Vladeck, A. B. Chettle Chair in Civil Procedure, Georgetown University Law Center

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of the Administrative Procedure Act ("APA" or the "Act") is clear-cut: to serve as a necessary check against unbridled decision-making powers of the Executive Branch. The APA ensures independent judicial review of agency actions and, in so doing, protects the public from arbitrary, capricious, and unconstitutional agency decisions. *See* 5 U.S.C. § 706.

For the APA to serve its important intended purposes, federal agencies cannot be allowed to easily avoid meaningful review by concealing materials evidencing their decision-making process under the

guise of asserted privileges.[3] To ensure effective judicial review, the APA requires courts to examine agency decisions on the basis of "the whole [administrative] record," which consists of "the full administrative record that was before the [agency] at the time [it] made [its] decision." 5 U.S.C. § 706; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A complete administrative record enables courts to evaluate whether the agency "relied on factors which Congress has not intended it to consider," "entirely failed to consider an important aspect of the problem," or "offered an explanation for its decision that runs counter to the evidence before the agency," among other things. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Unwarranted assertions of privilege, as Petitioners—the United States, President Donald J. Trump, Acting Secretary of the Department of Homeland Security ("DHS") Elaine C. Duke, and Attorney General Jefferson B. Sessions, III (collectively, Petitioners)—appear to have done here, would undermine the ability of courts to review executive action by omitting critical documents from the administrative record.

---

[3] This brief specifically addresses Petitioners' assertions of the deliberative process and presidential communications privilege and does not address their assertions of the attorney-client privilege over certain materials they sought to withhold from the administrative record. This, however, does not constitute *Amici's* agreement with Petitioners' other privilege claims, including assertions of the attorney-client privilege.

Attempts to shield documents from judicial review by improperly asserting the deliberative process privilege can deprive the court of the full administrative record mandated by the APA. This privilege, which serves to foster open communications between government officials, should not be used as a means to circumvent agencies' obligations to provide courts materials necessary to evaluate potentially unlawful agency actions. Thus, to the extent applicable in APA actions, the deliberative process privilege is properly viewed as one qualified in nature, which can be overcome by an adequate showing of need. *See FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

Likewise, assertions of the presidential communications privilege are qualified in nature. The privilege extends only to communications involving the President, White House advisers, and their immediate staff that relate to the President's decision-making process. *United States v. Nixon,* 418 U.S. 683, 708 (1974). The purpose of this circumscribed privilege is to provide a degree of protection to the President's communications with his advisors to encourage candid, objective, and sometimes blunt or harsh discussions. *See id.* Given this limited purpose, the presidential communications privilege does not extend to communications the President did not participate in or to documents or communications that the President did not solicit or receive. *In re Sealed Case,* 121 F.3d 729, 743, 752 (D.C. Cir. 1997). Without evidence that the President was, in fact, part of the subject communications, or that the President solicited or received documents, this privilege does not apply. And even where it otherwise applies, it remains a

qualified privilege. A court must still examine whether the need for disclosure in the APA action outweighs the need for confidentiality in the particular context.

Amici file this brief to underscore that Petitioners' deliberative process privilege and presidential communication privilege assertions are unprecedented and unfounded. If accepted, these claims would enfeeble judicial review in APA cases and undermine the judiciary's ability to serve as a meaningful check on arbitrary or illegal Executive Action.

Amici urge the Court to deny this petition. The District Court's rulings on the asserted privileges do not represent such an abuse of power that would warrant this Court's extraordinary intervention in this discovery matter, which would disrupt the proceedings below and forestall consideration of the merits of this important case. Here, the District Court properly recognized the qualified nature of these privileges and the limits on their applications. Moreover, the petition does not raise any novel question of law or circuit split on recurring legal questions.

Accordingly, the Court should deny both the petition for a writ of mandamus and the alternative request for a writ of certiorari.

ARGUMENT

I. The Deliberative Process Privilege Is A Limited Privilege That Does Not Override The Requirements Of The Administrative Procedure Act

A. Broad assertions of the deliberative process privilege undermine the intent and purpose of the Administrative Procedure Act.

The APA allows for the judicial review of all final agency action to ensure that agency decisions are not "arbitrary, capricious … or otherwise not in accordance with [the] law." 5 U.S.C. § 706(2)(A). The APA also makes actionable all final agency action that results in harm to individuals. *Id.* § 702. Judicial review of agency decisionmaking cannot be effective, however, when the agency provides a deficient administrative record. In fact, the APA provides that courts are required to review "the whole [administrative] record." *Id.* As the Supreme Court held in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), the "whole record" means "the full administrative record that was before the [agency] at the time [it] made [its] decision." In other words, the administrative record consists of all materials "considered by agency decision-makers," *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added), not just those which support or form the basis for the agency's ultimate decision. *See also, e.g., Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("[A] complete administrative record should include all materials that might

have influenced the agency's decision, and not merely those on which the agency relied in its final decision.") (citation and quotations omitted).

Here, Petitioners argue that materials should be excluded from the "whole record," because they implicate the Executive's deliberations. Of course, pursuant to the APA, it is part and parcel of the review for a court to understand the nature and basis of an agency's decision.

The deliberative process privilege is most commonly asserted in Freedom of Information Act ("FOIA") litigation, where Congress by statute (5 U.S.C. § 552(b)(5)) has provided an exemption for deliberative materials from disclosure to a FOIA request.[4] No similar exception is provided for by the APA. Indeed, broad assertions of such a privilege in cases arising under the APA would work to preclude judicial review of agency decisionmaking.[5] As the District Court recognized here, "[s]ince enactment of the Administrative Procedure Act, this Court has not approved withholding of otherwise legitimate contents

---

[4] *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 848 (1990) (listing cases).

[5] Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 St. Louis U. L.J. 349, 386 (2009); ("[T]here is mounting evidence that the Executive Branch is using the deliberative process privilege … arguably as a subterfuge to cover up decisions that are being made largely on political grounds…."); Wetlaufer, *supra* note 4, at 863.

of an administrative record based on a "deliberative" privilege …" in APA cases. District Ct. Stay Opp. 3.

In contexts where it is recognized, the deliberative process privilege is a limited privilege that can allow the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The purpose of the privilege is to allow for frank and open discussions between high-ranking government officials regarding their policymaking deliberations. The limited privilege, however, does not protect "material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737.

Additionally, to rely on the deliberative process privilege, a government agency must establish that the material in question is both predecisional and deliberative. *Id.* A "predecisional" document is one prepared "to assist an agency decisionmaker in arriving at his decision," *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975), and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866

(D.C. Cir. 1980). Predecisional materials are privileged only "to the extent that they reveal the mental processes of decisionmakers," or are part of decisionmakers' *deliberative* process, for example, their "preliminary opinions and explorations." *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (citation omitted). But, even where material is predecisional and deliberative, the privilege remains qualified and can be overcome by a sufficient showing of need. *In re Sealed Case*, 121 F.3d at 284; *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

An overly generous application of a deliberative process privilege in the APA context cannot be squared with *Overton Park*'s "full administrative record" requirement. Although *Overton Park* did not involve judicial review of a regulation or adjudicatory order, the case makes clear that an agency cannot unilaterally decide to withhold documents from an administrative record simply based on its say so. Such unbridled agency discretion would circumvent the judicial review allowed under the APA, and hinder courts' ability to fully "consider whether [an agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). To allow such manipulation of the record, would impair a court's ability to "review an agency's action fairly." *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Rather than seek material that would "probe the mental processes of [agency]" decisionmakers, as was the concern in *United States v. Morgan*, 313 U.S. 409,

422 (1941), the District Court here simply ordered Petitioners to complete an otherwise deficient administrative record. As Justice Breyer noted in his dissent to Petitioners' application for a stay, "probing a decisionmaker's subjective mental reasoning … is distinct from the ordinary judicial task of evaluating whether the decision itself was objectively valid, considering all of the materials before the decisionmaker at the time he made the decision." Stay Decision at 4-5 (Breyer, J. dissenting).

Accordingly, requiring an agency to provide the complete administrative record for review simply requires that agency to produce materials relevant to its decision that were already in existence when the decision was made. And contrary to Petitioners' assertion, they cannot exclude every predecisional agency document from review without preparing a privilege log. The District Court here acknowledged as much when it directed that Petitioners could withhold material from the publicly filed record "based on deliberative-process, or any other privilege" subject to a requirement that they log the document, assert any claimed privilege, and make the document available for in camera review by the court. Pet. App. 43a. Petitioners' position "would convert the deliberative process privilege from a qualified privilege to a categorical exclusion from the record…" State Opp. 37.

B. Shielding the internal government deliberations undermines the public's interest in honest and effective government.

Even where recognized, courts retain the authority to deny assertions of the deliberative process privilege where shielding of internal government deliberations does not serve "the public's interest in honest, effective government." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995); *see also In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979) (shielding evidence of governmental wrongdoing does not enhance the effectiveness of government); *see also Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401-03 (E.D. Mich. 1965) ("the real public interest under such circumstances is not the agency's interest in its administration but the citizen's interest in due process"), *aff'd*, 377 F.2d 496 (6th Cir. 1967).

For example, the court in *Franklin* rejected attempts by the Office of the Comptroller of the Currency to shield from review reports it authored related to a bank's collapse. In overruling the assertion of deliberative privilege, the court held that the reports requested provided a "unique and objective contemporaneous chronicle" of the bank's decline and that "no satisfactory substitute exist[ed]" for the public's benefit. *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 586. And in *Texaco*, the court similarly held that the public's interest in understanding the reasoning behind a state agency's decision to regulate the profit margins of petroleum wholesalers overrode

the agency's objection to produce documents containing evidence of its deliberations over the issue. 60 F.3d at 885.

Here, Respondents allege that the implementation of the DHS Memorandum and DACA's rescission without a clearly articulated basis was arbitrary and capricious. State Opp. 7, 9. Petitioners characterized their decision to terminate the program as a "discretionary enforcement policy decision," but absent from the record is any analysis of the purported litigation risk or any cost-benefit analysis of DACA's benefits to program recipients, or the potential harms to the program's 800,000 beneficiaries. *See generally id.* at 3-4, 9. Without evidence on which DHS relied in making this decision, the public is deprived of well-reasoned government decisionmaking. The public does not have a "satisfactory substitute" from which it can even begin to understand DHS's reasoning. *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 586. If agencies could take such unreviewable action whenever it saw a litigation risk, however large or small, without providing evidence of the factors that went into its decision, the public's faith in effective government would surely wane.

In this case, the District Court considered the relevant factors and exercised its authority to balance the public's need for the materials against the qualified privilege. Its ruling was not such an extraordinary abuse of power that could warrant this Court's exercise of its mandamus power.

II. The Presidential Communications Privilege Applies Only In Limited Circumstances

The presidential communications privilege is a qualified privilege for communications that involve the President and those assisting him in in his decision making process. *See Nixon,* 418 U.S. at 708 (recognizing the privilege's necessity "for [the] protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking"). The purpose of the privilege is to "guarantee the candor of presidential advisers and to provide [a] President and those … assist[ing] him …[with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express privately." *In re Sealed Case,* 121 F.3d at 743 (quoting *U.S. v. Nixon,* 418 U.S. at 708) (recognizing the qualified nature of the presidential communication privilege and stating that "neither the doctrine of separation of powers, nor the need for confidentiality … without more, can sustain an absolute, unqualified Presidential privilege of immunity...."); *Judicial Watch, Inc. v. Dep't of Justice,* 365 F.3d 1108, 1115 (D.C. Cir. 2004) (the privilege is "rooted in the President's 'need for confidentiality in the communications of his office' …in order to effectively and faithfully carry out his … duties and 'to protect the effectiveness of the executive decision-making process'"); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't. of Justice*, 658 F. Supp. 2d 217, 235 (D.D.C. 2009).

Recognizing that potential for abuse, courts have construed the presidential communications privilege

narrowly only to cover communications and documents that reflect the President's decisionmaking and deliberations that the President believes should remain confidential. *Nixon,* 418 U.S. at 712-13 (allowing the privilege "to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts"); *In re Sealed Case*, 121 F.3d at 751-52 ("[t]he presidential communications privilege should never serve as a means of shielding information regarding government operations that do not call ultimately for direct decisionmaking by the President"); *see also Judicial Watch, Inc.,* 365 F.3d at 1114-15 (refusing to extend the presidential communications privilege to officials within the Justice Department that were not solicited or received by the President or his immediate White House advisors).

In keeping with this narrow construction of the privilege, courts have consistently held that the presidential communications privilege only extends to the President, immediate White House advisers, and their staff. *In re Sealed Case,* 121 F.3d at 752 ("[n]ot every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege"); *Judicial Watch, Inc.*, 365 F.3d at 1115 (the privilege applies to "[a] President and those who assist him…"); *Ctr. For Biological Diversity v. OMB*, No. C07-04997, 2009 WL 1246690, *8 (N.D.Cal. May 5, 2009) (same). In particular, the presidential communications privilege does not apply to executive branch officials outside of the White House. It does not apply

to cabinet officials, executive agency heads, or executive agency staff. *See In re Sealed Case,* 121 F.3d at 752; *see also Judicial Watch,* 365 F.3d at 1121-22, 1123 (the presidential communications privilege applies only to documents "solicited and received" by the President or his immediate advisers in the Office of the President and refusing to extend the privilege to documents that make their way to the Office of the President); *Ctr. For Effective Gov't v. U.S. Dep't. of State*, 7 F. Supp. 3d 16, 26-27 (D.D.C. 2013) (recognizing that the presidential communications privilege would not extend to communications that do not reach the President or his closest advisers because they are unlike to have any relevance in the President's decisionmaking).

Even where it does apply, a party can overcome the qualified presidential communications privilege if the court finds that the party made an adequate demonstration of need. *See Nixon,* 418 U.S. at 713; *see also In re Sealed Case,* 121 F.3d at 745 (stating that "the privilege is qualified, not absolute and can be overcome by an adequate showing of need"); *Judicial Watch, Inc.,* 365 F.3d at 1113 (same). Further, the presidential communications privilege can be waived by conduct that reveals the nature of the communication. *See Ctr. For Effective Gov't,* 7 F. Supp. 3d at 25-26 (holding that the wide dissemination of a Presidential directive and its "widely publicized" nature undermined the directive's confidential nature).

Moreover, even where the President was involved in the ultimate decision, an agency seeking to withhold materials based on the presidential communications privilege must demonstrate that the documents

it seeks to withhold were in fact provided to the President or solicited by the President as part of his decisionmaking process. Instructive here is *Judicial Watch, Inc.* At issue in *Judicial Watch, Inc.* was a Freedom of Information Act ("FOIA") request seeking internal DOJ documents regarding its pardon recommendations to the President. *See* 365 F.3d at 1109-10. In an attempt to withhold the documents, the DOJ argued that the presidential communications privilege applied to the internal DOJ documents that did not actually accompany the DOJ's pardon recommendations to the President because they were prepared in the course of advising the President. *See id.*

The D.C. Circuit rejected the DOJ's argument and refused to extend presidential communications privilege to all agency documents prepared in the course of developing the Deputy Attorney General's pardon recommendations for the President. *See Judicial Watch, Inc.*, 365 F.3d at 1114-15. In so holding, the court reasoned that extending the presidential communications privilege broadly was not only inconsistent with well-established precedent, it would also significantly dilute the intended purpose of protecting communications intended for the President:

> Extension of the presidential communications privilege to the Attorney General's delegatee, the Deputy Attorney General, and his staff, on down to the Pardon Attorney and his staff, with the attendant implication for expansion to other Cabinet officers and their staffs, would, as the court pointed out in *In re Sealed Case, "pose a significant risk of expanding to a large swath of the executive*

> *branch a privilege that is bottomed on a recognition of the unique role of the President*."

See Judicial Watch, Inc., 365 F.3d at 1121 (emphasis added) (quoting *In re Sealed Case*, 121 F.3d at 752). Accordingly, the Court limited its application to communications "solicited and received" by the President or the Office of the President. *See id.* at 1114-15, 1123.

The presidential communications privilege does not apply to communications and documents in Petitioners' administrative record if the President did not solicit or receive those communications and documents.

CONCLUSION

Amici submit that acceptance of Petitioners' assertions of the deliberative process and presidential communication privileges would weaken judicial review in APA cases and undermine the judiciary's ability to serve as a meaningful check on arbitrary, capricious, and illegal Executive actions.

Accordingly, the Court should deny the petition for a writ of mandamus and the alternative request for a writ of certiorari.

Respectfully submitted,

Robert M. Loeb
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

Jacob Heath
Ethan Scapellati
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025

Darren S. Teshima
Counsel of Record
Suzette J. Barnes
Ariel Winawer
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
dteshima@orrick.com

Date December 13, 2017