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 OF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND JANET NAPOLITANO, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA, IN OPPOSITION

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QUESTION PRESENTED

Whether the government has satisfied the requirements for the drastic and extraordinary remedy of a writ of mandamus ordering the district court to halt completion of the administrative record and discovery where: (i) the administrative record filed by the government consists of just 14 previously-published documents totaling 256 pages (including 192 pages of judicial opinions); (ii) the government does not challenge the lower courts' determination that it is not credible that the government decided to terminate a program providing legal protection to approximately 800,000 individuals based solely on these documents; (iii) the government's arguments that courts lack authority to order agencies to complete the administrative record, and that agencies have unreviewable authority to exclude from the administrative record documents they deem to be privileged or irrelevant to the agency's stated ground of decision, are contrary to multiple legal authorities and, at a minimum, not "clearly and indisputably" correct; (iv) the government did not properly present (or, in many instances, present at all) its objections in the courts below; and (v) the government retains other means to obtain relief.

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STATEMENT

1. Since 1956, every presidential administration has exercised its authority to set "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), by adopting deferred action programs protecting certain categories of otherwise removable immigrants from deportation. *See* AR 15; D.Ct. Dkt. 111-1 (summarizing 17 pre-DACA deferred action programs).[1] These programs recognize that the federal government lacks resources to "enforce all of the [immigration] rules and regulations presently on the books," and that "[i]n some situations, application of the literal letter of the law would simply be unconscionable and would serve no useful purpose." D.Ct. Dkt. 121-1 at 2. The legality of these programs was widely accepted, and none was challenged in court.

In 2012, the Secretary of Homeland Security issued a memorandum establishing the Deferred Action for Childhood Arrivals (DACA) program. Pet. App. 47a. DACA applies to "certain young people who were brought to this country as children and know only this country as home." *Id.* at 47a-48a. Eligibility is limited to individuals who (1) came to the United States under the age of sixteen; (2) continuously resided in the United States since June 15, 2007, and were present in the United States on June 15, 2012 and on the date they requested DACA; (3) are in

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[1] "AR" refers to the administrative record filed by the government in the district court in No. 17-cv-5211. "D.Ct. Dkt." refers to documents filed in the district court.

school, have graduated from high school, have obtained a GED, or have been honorably discharged from the United States military or Coast Guard; (4) have clean criminal records and are not a threat to national security or public safety; (5) were under the age of 31 as of June 15, 2012; and (6) do not have lawful immigration status. Pet. App. 48a. To apply for DACA, eligible individuals were required to provide the government with sensitive personal information, including their home address and fingerprints, submit to a rigorous background check, and pay a substantial fee. D.Ct. Dkt. 121-1 at 169-70, 172. Applicants were then evaluated on a case-by-case basis. *See* AR 2.

Nearly 800,000 young people have applied for and received deferred action under DACA. D.Ct. Dkt. 1 at 8. DACA confers life-changing benefits on its recipients. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058-59 (9th Cir. 2014). During the period of deferred action, they are not subject to deportation, nor do they accrue time for "unlawful presence" for purposes of the bars on re-entry under the Immigration and Nationality Act. *See* 8 U.S.C. § 1182(a)(9)(B)-(C). They may obtain social security numbers and employment authorization. *See* 8 C.F.R. § 274a.12(c)(14); D.Ct. Dkt. 121-1 at 167-70. Other benefits flow from these documents, such as driver's licenses, medical insurance, and tuition benefits, as well as access to bank accounts, credit, and the ability to purchase homes and vehicles. *See* D.Ct. Dkt. 111 at 8. DACA recipients also obtain favorable consideration for advance parole, allowing them to travel abroad and then return without being detained. D.Ct. Dkt. 124-2 at 2. *See* 8 C.F.R. § 212.5(f); D.Ct. Dkt. 121-1 at 183-84.

2. Until September 2017, the government consistently defended the legality of DACA. In a 2014 opinion, the Office of Legal Counsel memorialized its pre-promulgation advice "that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis." AR 21 n.8. In court, the government argued that DACA is "a valid exercise of the Secretary's broad authority and discretion to set policies for enforcing the immigration laws." Br. of United States as Amicus Curiae at 1, *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901 (9th Cir. No. 15-15307), 2015 WL 5120846 at *1. No court has ever held DACA unlawful. In February 2017, then-Secretary of Homeland Security John Kelly issued a memorandum establishing new enforcement priorities and rescinding prior enforcement policies. AR 230. But DACA was explicitly carved out from the scope of that rescission. *Id.*

In June 2017, officials from the Department of Justice (DOJ), including Attorney General Sessions, and the Department of Homeland Security (DHS) began communicating with several state attorneys general who previously had challenged another deferred action program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—which, unlike DACA, was never implemented and had not fostered any reliance interests. D.Ct. Dkt. 124 at 80-82. Those discussions culminated in a June 29, 2017 letter from nine state attorneys general to Attorney General Sessions, demanding "that the Secretary of Homeland Security rescind" and "phase out the DACA program," and

threatening to bring suit if that did not occur by September 5. AR 239.

On September 4, 2017, Attorney General Sessions sent a one-page letter to the Acting Secretary of DHS, Elaine Duke. *See* AR 251. The letter advised that DHS "should rescind" DACA because it was "effectuated … without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." *Ibid.* It stated summarily that DACA "has the same legal and constitutional defects that … courts recognized as to" the DAPA program, which had been preliminarily enjoined in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). *Ibid.* Although *Texas* did not address the legality of the DACA program, which is factually and legally distinct from DAPA—and although no court has ever found any "constitutional defect[]" in DAPA—the letter asserted that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.*

The next day, Attorney General Sessions held a press conference and announced that DACA "is being rescinded." D.Ct. Dkt. 1-3 at 2. He reiterated the conclusions in his letter and made additional claims in support of rescission: that DACA "contributed to a surge of unaccompanied minors on the southern border"; "denied jobs to hundreds of thousands of Americans by allowing [them] to go to illegal aliens"; was an example of a failure to enforce the immigration laws that "has put our nation at risk of crime, violence, and even terrorism"; and that rescission of DACA would "make us safer and more secure" and

"further economically the lives of millions who are struggling." *Id.* at 2-3.

Later that day, Acting Secretary Duke issued a memorandum formally rescinding DACA. Pet. App. 61a-69a. She provided a two-sentence explanation:

> Taking into consideration the Supreme Court's and the Fifth Circuit's rulings in the ongoing [DAPA] litigation, and the September 4, 2017 letter from the Attorney General, it is clear that the June 15, 2012 DACA program should be terminated. In the exercise of my authority in establishing national immigration policies and priorities … I hereby rescind the June 15, 2012 memorandum.

Id. at 67a. The rescission memorandum instructed DHS to immediately stop accepting DACA applications or approving new applications for advance parole; to accept renewal applications only from individuals whose current deferred action would expire on or before March 5, 2018, and to accept such renewals only through October 5, 2017; and to allow DACA grants to expire beginning March 5, 2018. *Id.* at 67a-68a. Despite the Attorney General's statement that DACA is illegal, President Trump announced that "Congress now has 6 months to legalize DACA … If they can't, I will revisit this issue!" D.Ct. Dkt. 1 at 11.

3. Respondents have filed five related complaints in the District Court for the Northern District of California. Respondents University of California and

President Napolitano assert claims under the Administrative Procedure Act (APA), alleging that the decision to terminate DACA was arbitrary and capricious because the asserted rationale was pretextual and the government reversed a prior policy without addressing the consequences of its decision for DACA recipients and their families or their substantial reliance interests. Respondents also allege that the government failed to follow the notice-and-comment requirements of the APA and that the rescission violates the procedural due process requirement of the Fifth Amendment. *See* D.Ct. Dkt. 1 at 14-16. (The other four suits assert additional statutory and constitutional claims.)

4. The district court held a case management conference on September 21, 2017. Recognizing that tens of thousands of young people will begin to lose their DACA benefits beginning on March 5, 2018, the district court noted that "we need to come up with a plan to manage the cases so that we get the decisions that you need and also that they are done with such a record that the Court of Appeal can [review before] March 5th." C.A. Dkt. 13 at 59:8-11 (Tr. of Proceedings, 9/21/17).[2] The parties agreed that it was necessary for the government to produce the administrative record swiftly. *See id.* at 68-69. The court emphasized that it would be inappropriate for the government to "put[] in [the administrative record] what helps them and … leave out what hurts them." *Ibid.* It noted that if there are documents such as "memos" or "e-mails" that are part of the record

[2] "C.A. Dkt." refers to documents filed in the court of appeals in No. 17-72917.

before the agency, those documents must "be in the administrative record," even if they "hurt[] your case." *Ibid.*

On October 6, the government filed an administrative record consisting of fourteen documents totaling 256 pages. Pet. App. 5a; *see* D.Ct. Dkt. 64. The fourteen documents consist entirely of materials that were already publicly available, including 192 pages of court decisions. On October 9, plaintiffs moved for an order directing the government to complete the administrative record and to produce a privilege log, and sought rulings on certain related issues. *See* D.Ct. Dkt. 65. Following briefing and argument, the district court granted plaintiffs' motion in part and denied it in part. *See* Pet. App. 26a-44a.

The district court found that plaintiffs had established "by clear evidence[] that the agency relied on materials not already included in the record." *Id.* at 30a. Specifically, the court found that the proffered record did not contain "a single document from one of [Acting] Secretary Duke's subordinates" or advisers from other parts of the federal government; "any materials analyzing the [threatened] lawsuit or other factors militating in favor of and against the switch in policy"; any documents regarding the agency's decision in February 2017 to retain DACA; or the news articles regarding DACA that the government conceded the Acting Secretary had reviewed and were physically present in her office. *Id.* at 34a, 35a; *see id.* at 31a-37a.

Having made factual findings that the proffered record was incomplete, the district court—applying

circuit precedent—ordered the government to file a record containing all documents "directly or indirectly considered in the final agency decision to rescind DACA." *Id.* at 42a-43a; *see also Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The district court's order identified several categories of documents that must be added to the record, tracking the Department of Justice's longstanding guidance to federal agencies regarding the proper contents of the administrative record. *See* Pet. App. at 32a.

The district court expressly noted that privileged documents need not be included. *Id.* at 43a. Rather, the court ordered that the government should assert privileges in an itemized privilege log. *See id.* at 40a-42a. With respect to 84 documents that the government had already submitted for *in camera* review at the court's direction, the court sustained the government's privilege assertions with respect to 49 documents and overruled them with respect to 35. *See id.* at 43a; *see also* D.Ct. Dkt. 71-2 (privilege log).

Finally, the district court addressed whether the government had waived the attorney-client privilege with respect to certain documents bearing on the legality of DACA. *See* Pet. App. 37a-39a. The court noted that the government's primary argument was "that DHS had to rescind DACA because it exceeded the lawful authority of the agency," and their "backup argument [was] that the agency's legal worry was 'reasonable' even if wrong." *Id.* at 37a-38a. Yet the proffered administrative record excluded all "legal analysis available to the Acting Secretary and to the Attorney General" other than the one-page "September 4 legal opinion of the Attorney General."

Id. at 38a. Applying the well-settled principle that a party cannot shield inquiry into legal advice it is using as a sword in litigation, the court held that the government had "waived attorney-client privilege over any materials that bore on whether or not DACA was an unlawful exercise of executive power and therefore should be rescinded." *Id.* at 39a.

5. On October 20, the government filed a petition for a writ of mandamus and an emergency motion for a stay in the court of appeals. C.A. Dkt. 1. The court of appeals granted a temporary stay, limited to discovery and record supplementation, but thereafter denied the mandamus petition. Pet. App. 15a.

The court of appeals held that the government had "not met the high bar required for mandamus relief" because "the district court did not clearly err by ordering the completion of the administrative record." *Id.* at 3a. Rather, the district court's order was "a reasonable approach to managing the conduct and exigencies of this important litigation—exigencies which were dictated by the government's March 5, 2018 termination date for DACA." *Id.* at 15a.

The court noted that the APA requires arbitrary and capricious review to "be based upon 'the whole record or those parts of it cited by a party.'" *Id.* at 4a-5a (quoting 5 U.S.C. § 706). The "whole record 'includes everything that was before the agency pertaining to the merits of its decision.'" *Id.* at 5a (quoting *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)). Having identified the governing standard, the court found that there had been a clear demonstration that

the administrative record was incomplete. *Id.* at 6a. "Put bluntly, the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible." *Id.* at 6a-7a.

The court acknowledged the government's contention "that because the Acting Secretary's stated justification for her decision was litigation risk, materials unrelated to litigation risk need not be included in the administrative record," but explained that "this is not what the law dictates." *Id.* at 8a. Rather, the "administrative record consists of all materials '*considered by* agency decision-makers,' not just those which support or form the basis of the agency's ultimate decision." *Ibid.* (quoting *Thompson*, 885 F.2d at 555 and citing *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)) (internal citations omitted). Moreover, "even if the record were properly limited to materials relating to litigation risk, the district court did not clearly err in concluding that it is implausible that the Acting Secretary would make a litigation-risk decision" without considering documents beyond those in the proffered record, including materials concerning the "factors militating in favor of and against the switch in policy." *Ibid.* (internal quotation marks omitted).

Finally, the court of appeals addressed the government's privilege concerns. Although the court was "[m]indful of the separation-of-powers concerns raised by the government," it disagreed with their contention "that *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), bars the completion of the administrative

record with any White House materials." *Id.* at 3a, 12a. The court explained that *Cheney* involved "overbroad" civil discovery requests—not "an administrative agency's obligation under the APA to provide the court with the record underlying its decision-making"—and did not "impos[e] a categorical bar against requiring DHS to either include White House documents in a properly-defined administrative record or assert privilege individually as to those documents." *Id.* at 12a-13a. The court of appeals found that the government had failed to properly challenge the district court's privilege rulings in the district court and had "provided little in the way of argument regarding the specific documents." *Id.* at 12a n.8.

6. Shortly after the court of appeals denied mandamus, the district court set a revised deadline of December 22 for the government to complete the administrative record. *Id.* at 45a.

Following additional filings in the district court and the court of appeals concerning a stay, the government sought mandamus from this Court. On December 8, the Court granted a stay pending disposition of the government's mandamus petition.

REASONS FOR DENYING THE PETITION

I. The Government Has Not Satisfied the Stringent Requirements for a Writ of Mandamus

Mandamus is a "drastic and extraordinary" remedy that is reserved for "really extraordinary cases." *Cheney*, 542 U.S. at 380. Issuance of an

extraordinary writ "is not a matter of right, but of discretion sparingly exercised," and such writs are "rarely granted." S. Ct. R. 20. Indeed, over a recent eight-year period in which the Court received hundreds of petitions for writs of mandamus and other extraordinary writs each year, it did not grant a single one. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* § 11.1 at 661 n.9 (10th ed. 2013).

To qualify for a writ of mandamus, the government must demonstrate that (a) it has a "clear and indisputable" right to relief, (b) it has "no other adequate means to attain the relief [it] desires," and (c) "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). These are exceptionally demanding requirements. The government has not met them here.

A. The Government Has Not Shown a "Clear and Indisputable" Right to Relief

1. *Providing the "Whole" Administrative Record to the Courts.* When a court reviews agency action under the APA, Congress has directed that "the court shall review the whole record." 5 U.S.C. § 706. As this Court has explained, the "whole record" consists of "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Courts of appeals have held that the administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555; *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)

("An agency may not unilaterally determine what constitutes the Administrative Record ….").[3] Similarly, longstanding U.S. Department of Justice guidance (withdrawn on the same day the government filed its mandamus petition in the court of appeals) stated that the record "consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision," "is not limited to documents and materials relevant only to the merits of the agency's decision," and includes documents "not specifically considered" by the decisionmaker. *See* U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999), at 1-2, http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf ("Guidance to Federal Agencies").[4]

In addition, Federal Rule of Appellate Procedure 16(a) provides that "the record on review or

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[3] *See also In re United States*, No. 15-3751, 2016 WL 5845712, at *1-2 (6th Cir. Oct. 4, 2016) (per curiam) (record includes all materials "either directly or indirectly considered"); *Bimini Superfast Operations LLC v. Winkowski*, 994 F. Supp. 2d 103, 105 (D.D.C. 2014) (documents properly included in administrative record "even if the agency considered it only indirectly"); *Pension Benefit Guar. Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 341 (S.D.N.Y. 1988); *Exxon Corp. v. U.S. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981); *Tenneco Oil Co. v. U.S. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).

[4] Similar guidance documents remain in effect. *See, e.g.*, Memorandum from Pete Raynor, Assistant Solicitor, Fish, Wildlife, and Envtl. Prot. Branch, U.S. Dep't of the Interior to Dir., U.S. Fish and Wildlife Serv. (Jan. 7, 2000), http://www.nmfs.noaa.gov/pr/pdfs/recovery/appendix_f-j.pdf (incorporating 1999 Department of Justice guidance).

enforcement of an agency order" includes "any findings or report on which it is based" as well as "the pleadings, evidence, and other parts of the proceedings before the agency." Rule 16 expressly provides that courts may direct the government to complete or supplement the record. *See* Fed. R. App. P. 16(b) ("The parties may at any time, by stipulation, supply any omission from the record … or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed."). Rule 16(b) "gives courts of appeals wide latitude in correcting omissions from the agency record under review." *Consumers Union of U.S., Inc. v. Fed. Power Comm'n*, 510 F.2d 656, 661 (D.C. Cir. 1974) (per curiam); *see also Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1248 (11th Cir.) (courts have "discretion to correct the administrative record"), *modified on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006).[5]

The government does not dispute that it is required to make "the whole record" available to the court for judicial review. Nor does it dispute that the administrative record it submitted in this case consists of only 14 documents, comprising a total of 256 pages (including 192 pages of court opinions), all of which were already in the public record. Pet. App.

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[5] Although this case originated in district court, "reviews of agency action in the district courts must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1251 n.2 (10th Cir. 2009) (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994)).

5a-6a. Nor does the government challenge the lower courts' determination that "the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible." *Id.* at 6a-7a. Indeed, the government has acknowledged that the administrative record submitted excludes non-privileged documents considered by the Acting Secretary. *See id.* at 36a ("[P]rivilege log entries reveal several documents that were considered in arriving at the decision to rescind DACA. For example, at least seven entries refer to commentary in media articles regarding DACA. At oral argument, government counsel admitted that the Acting Secretary had seen several media items on the issue.").

Despite all this, the government seeks an extraordinary writ of mandamus to "halt all expansion of the administrative record." Pet. 34. In effect, the government argues that when a court reviews administrative action under the APA, the administrative record consists of whatever the agency chooses to make available to the court. The government cites no authority for this extreme position, and certainly has not shown that it is "clearly and indisputably" correct. To the contrary, courts of appeals regularly require the government to complete administrative records that were found to be deficient. *See, e.g.*, *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) ("defendants' assurances that they have submitted the full record will not substitute for the Court's independent consideration of that issue after some opportunity for discovery"); *Boston Redev. Auth.*

v. Nat'l Park Serv., 838 F.3d 42, 48 (1st Cir. 2016); *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984).

The government's proposed approach poses a serious threat to the courts' ability to review the legality of agency action. When a court reviews agency action under the arbitrary and capricious standard of the APA, it must determine, among other things, whether the agency overlooked relevant factors, considered irrelevant factors, or made a decision that runs "counter to the evidence before [it]." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In *Overton Park*, for example, this Court remanded the case because the record was not adequate to permit a "searching and careful" review of "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416. If agencies are free to exclude parts of the record that do not support their decisions, courts will be unable to conduct the searching review the APA requires.

Decisions such as *State Farm* and *Overton Park* contradict the government's assertion (made without supporting citation) that "[i]f the agency's rationale is reasonable and the record presented supports that rationale, then the reviewing court's inquiry is at an end." Pet. 24. Such an approach would permit agencies to cherry-pick the materials they present to the courts, suppressing materials that cast doubt on agency decisions. This Court has weighed in against such an approach. *See, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-89 (1951) (in determining

whether an agency's decision is supported by substantial evidence, courts must consider evidence before the agency that undermines the agency's decision because that "is clearly the significance of the requirement … that courts consider the whole record").

The government's approach would also permit agencies to provide incomplete or pretextual reasons for their actions and then limit the administrative record to documents supporting the stated reason while suppressing documents relevant to other factors that contributed to the agency's decision. Indeed, there is evidence that this is what happened in this case. *See* D.Ct. Dkt. 111 at 29-31. While the government insists that the decision to terminate DACA was based on litigation risk, the Attorney General in announcing the decision asserted that rescission would reverse the loss of hundreds of thousands of jobs to illegal aliens and reduce crime, violence, and terrorism. D.Ct. Dkt. 1-3 at 2-3. None of these assertions—or the wealth of contrary evidence on the benefits of DACA to our society, economy, and the safety of our communities, *see, e.g.*, D.Ct. Dkt. 111 at 14, 18—are mentioned in the Acting Secretary's decision or reflected in the administrative record.

The government cites this Court's statements that "[t]he APA specifically contemplates judicial review on the basis of the *agency* record," and that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (emphasis added); *see also Camp v. Pitts*, 411 U.S. 138, 142

(1973) (per curiam). But these statements, read in context, mean only that a court reviewing agency action rarely should create a *new* record that includes materials that were not before the agency when it made its decision. In *FP&L* and *Camp*, there was no dispute that the record was complete; the dispute was over whether the parties could add to the record that was before the agency. These cases do not support—let alone "clearly and indisputably" require—the conclusion that courts must accept whatever administrative record the agency chooses to make available.

The government also cites this Court's cases holding that courts rarely should inquire into the "mental processes" of administrative decisionmakers. *United States v. Morgan*, 313 U.S. 409, 422 (1941). But inquiring into subjective mental processes is quite different from examining the materials that were before the agency decisionmaker in order to determine whether the agency's decision was arbitrary and capricious. The latter determination is an objective inquiry that does not depend on the decisionmaker's internal mental processes. *See In Re United States*, No. 17A570 (17-801), 2017 WL 5972687, at *4-*5, 583 U.S. ____ (2017) (Breyer, J., dissenting). Accordingly, the government's reliance on these cases is misplaced. Moreover, *Morgan* and the D.C. Circuit cases cited by the government involved on-the-record adjudicatory proceedings, where the decisionmaker plays a quasi-judicial role. *See, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). The same considerations are not present where the agency engages in informal rulemaking that does not produce a trial-type record. Similarly, the decision in *San Luis Obispo Mothers for*

Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 44-45 (D.C. Cir. 1986), on which the government also relies, concerned a transcript of deliberations by a multi-member agency, which the court of appeals analogized to the mental processes of a single decisionmaker. Like the *Morgan* decisions themselves, this case casts no doubt on the requirement that the agency provide a complete administrative record so that the court can conduct arbitrary-and-capricious review.

The government makes the surprising claim that "[n]o factual or evidentiary record is required" at all in this case, because the Acting Secretary was making a "policy and legal judgment." Pet. 21. But an agency's "policy" and "legal" judgments may be arbitrary and capricious if they are based on consideration of the wrong factors, rest on legal errors, or are inconsistent with the relevant information before the agency. *See, e.g.*, *State Farm*, 463 U.S. at 52.

Lastly, the government argues that it should not have to complete the administrative record because it believes the Acting Secretary's decision is not subject to any judicial review, Pet. 21. But the district court has not yet ruled on the government's threshold defenses, and identical arguments have been rejected in the New York DACA litigation. *See Batalla Vidal v. Duke*, Nos. 16-4756, 16-5228, 2017 WL 5201116 (E.D.N.Y. Nov. 9, 2017). It would be extraordinary for this Court to decide these issues in the first instance. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court … is one of final review, not of first view.") (quotation marks omitted). Such a course would be particularly extraordinary in this case,

because the government made a strategic litigation decision *not* to file a motion to dismiss at the outset of the case, despite an invitation from the district court to do so. *See* C.A. Dkt. 13 at 73-75. In any event, the threshold issues the government seeks to raise—whether the rescission was "agency action … committed to agency discretion by law," 5 U.S.C. § 701(a)(2), or whether judicial review is precluded by the narrow jurisdiction-stripping provision of the INA, 8 U.S.C. § 1252(g)—have now been fully briefed and are scheduled for hearing before the district court on December 20.

At a minimum, the government's assertion that it cannot be required to add any additional materials to the administrative record is not "clearly and indisputably" correct. Accordingly, the government has not established a right to mandamus relief.[6]

2. *Asserting Deliberative Process Privilege.* The government appears to assert that the Executive Branch has unreviewable discretion to determine

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[6] The government acknowledges that if the administrative record compiled by the agency is inadequate, "the agency's decision is vacated and the matter is remanded to the agency for it either to change its decision or to compile a record that will support it." Pet. 24. In this case, both courts below have determined that the administrative record *is* inadequate. Thus, the government's own analysis would likely lead to a decision vacating the Acting Secretary's decision unless and until the agency "compile[s] a record that will support it." *Ibid.* This is grossly inefficient and would allow agencies to put forward the narrowest possible record, and if found insufficient, start over (perhaps multiple times).

whether documents are subject to a claim of deliberative process privilege, and to withhold those documents from the record without any opportunity for the courts to evaluate whether they are in fact privileged, or whether the qualified privilege is overcome in the circumstances. *See* Pet. 29-30. It cites no authority for this extreme position, and ignores numerous cases reaching the opposite result.[7] In addition, the government disregards this Court's longstanding recognition that "in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege." *Kerr* 426 U.S. at 405-06. It also ignores the government's own (recently rescinded) guidance explaining that "the administrative record includes privileged documents and materials," and that "the index of record must identify the documents and materials, reflect that they are being withheld, and state on what basis they

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[7] *See, e.g.*, *Desert Survivors v. U.S. Dep't of Interior*, 231 F. Supp. 3d 368, 386 (N.D. Cal. 2017); *Mickelson Farms, LLC v. Animal & Plant Health Inspection Serv.*, No. 15-0143, 2017 WL 2172436, at *4 (D. Idaho May 17, 2017); *W&T Offshore, Inc. v. Jewell*, No. 14-2449, 2016 WL 8260549, at *2 n.5 (W.D. La. Feb. 23, 2016); *Wyoming v. U.S. Dep't of Interior*, Nos. 07-0319 & 08-0004, 2008 WL 11335191, *2 (D. Wyo. Oct. 6, 2008); *Seabulk Transmarine I, Inc. v. Dole*, 645 F. Supp. 196, 202 (D.D.C. 1986). Some district courts have held that privilege logs for deliberative materials need not be compiled as a matter of course in APA cases. These courts agree, however, that privilege logs must be provided where—as here—plaintiffs have "rebutted the presumption of regularity" regarding the composition of the administrative record. *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 33 (D.D.C. 2013); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 800 (E.D. Va. 2008).

are being withheld." Guidance to Federal Agencies, *supra*, at 4.

As to specific documents that the district court has reviewed *in camera*, the government does not argue that the district court applied the wrong legal standard, and it has not established that any of the district court's rulings on specific documents is clearly and indisputably incorrect. As for documents on which the district court has not yet made a privilege ruling, mandamus relief is clearly premature. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111-12 (2009) (mandamus may be appropriate in "extraordinary circumstances" to challenge actual "privilege rulings" and "disclosure order[s]" not *potential* rulings or orders); *see also McDaniel v. U.S. Dist. Court for D. Nev.*, 127 F.3d 886, 887 n.3 (9th Cir. 1997) (per curiam) (denying mandamus petitions as premature before the district court made a final ruling on discovery orders); *see also In re Prall*, 487 F. App'x 47 (3d Cir. 2012) (same); *infra* Pt. II (mandamus may issue only if all other avenues of relief have been exhausted).

Mandamus is inappropriate for the additional reason that the government has not properly asserted its privilege claims in the district court. Ordinarily, a government privilege—such as deliberative process or executive privilege—"must be formally asserted and delineated in order to be raised properly." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). A proper privilege assertion must include "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion

of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation [of] why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).[8] The government has not satisfied these requirements, even though six weeks have elapsed since the district court issued its rulings and nine days remain before the government will be required to make public any assertedly privileged documents. Nothing prevents the government from seeking reconsideration of the district court's order as to specific documents that the court reviewed *in camera* and supporting this request with a properly asserted claim of privilege (as well as information presented to this Court for the first time). Because the government has not exhausted these avenues, mandamus is inappropriate.

3. *Protecting Other Privileges.* The government also contends that the district court has forced it to disclose documents protected by executive privilege and other privileges. Pet. 31-32. Here too, the government has failed to establish that the district court clearly and indisputably erred.

When the government files its completed administrative record on December 22, 2017, it may withhold documents it believes are protected by any applicable privilege and substantiate its reasons for

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[8] In some circumstances, it is sufficient for the claim of privilege to be made by "supervisory personnel … of sufficient rank to achieve the necessary deliberativeness in [the] assertion." *Landry*, 204 F.3d at 1136.

doing so. Pet. App. 43a. The district court will then "review and rule on each item." *Ibid.* If the government objects to the district court's rulings, it can present its objections to the court of appeals if necessary.

Nor is mandamus review appropriate for the 35 documents the district court has reviewed *in camera* and ordered included in the administrative record. Evidentiary rulings on the application of privilege are the daily bread-and-butter work of the district courts. Moreover, the government did not present an adequate challenge to any of the district court's specific privilege rulings in its mandamus petition to the court of appeals, and also failed to provide important information even to the district court. *See id.* at 12a n.8 ("The government … has provided little in the way of argument regarding the specific documents ordered disclosed by the district court.").

Before this Court, the government focuses on one of the documents the district court reviewed *in camera*, asserting that it is a "*memorandum from the White House Counsel to the President*," which the government maintains is plainly subject to executive privilege. Pet. 31-32 (emphasis in Petition). The government did not provide this description of the document to the district court or the court of appeals; it was provided for the first time to this Court. App. Add. 26; *see also* Pet. App. 13a (observing that "there is no indication that either [the President's] documents or those of the Vice President would fall within the completed administrative record"). Indeed, it is unclear if the district court, which reviewed the document *in camera*, could discern from the face of the

document that it was a memorandum from the White House Counsel to the President. The privilege log states only that the memorandum is a "Draft White House memorandum regarding litigation related to DACA." D.Ct. Dkt. 71-2 at 2. This Court should not grant mandamus based on information that the government could have, but did not, provide to the lower courts.

Furthermore, the fact that a document originates in the White House does not, without more, render it privileged or exempt it from inclusion in the administrative record. *See, e.g., Portland Audubon*, 984 F.2d at 1548-49 (ordering ex parte communications from White House added to the record); *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 26 (D.D.C.), *vacated in part on reconsideration on other grounds*, 2013 WL 11241368 (D.D.C. July 30, 2013) (rejecting the government's argument "that all communications with the White House in connection with interagency reviews are excluded from the administrative record"). The memorandum the government now emphasizes was located in the files of DHS, not the White House, and it was specifically considered by the Acting Secretary herself in determining whether to rescind DACA. D.Ct. Dkt. 71-2. The APA requires courts to review agency action on the basis of "the whole record" that was before the agency decisionmaker, 5 U.S.C. § 706, regardless of where in the government the record materials originated. *See Overton Park*, 401 U.S. at 420 ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision.").

B. The Government Has Not Shown That It Has No Other Adequate Means to Obtain Relief

1. Mandamus is inappropriate unless the party seeking relief establishes that "no other adequate means [exist] to attain the relief he desires." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curium) (alteration in original) (quoting *Cheney*, 542 U.S. at 380). Accordingly, the writ may issue only if the party seeking relief "has exhausted all other avenues of relief." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *see also Cheney*, 542 U.S. at 379 ("mandamus may not issue so long as alternative avenues of relief remain available"). Here, the government has not exhausted all other avenues of relief.

In its petition, the government specifies four purported harms for which it claims to have no adequate remedy absent mandamus relief: (i) it "will [be] required to collect, review, and assert privilege as to thousands of additional documents"; (ii) "numerous deliberative materials will [be] made public"; (iii) "various privileges, including executive privilege, will [be] breached"; and (iv) "high-ranking government officials will [be] deposed" in connection with plaintiffs' non-APA claims. Pet. 18. For each claimed harm, the government has available avenues for relief short of mandamus.

As to depositions, the only deposition-related issue decided by any court to date is an order by the magistrate judge permitting a deposition of the Acting Secretary. The government has not appealed that decision to the district court, and neither the district

court nor the court of appeals has ruled on this issue.[9] Although the government complains that six depositions of mid-level officials have taken place, it never moved for a protective order to prevent those depositions. And, of course, the government retains the opportunity to ask the lower courts to regulate the number of depositions.

Similarly, the government can renew its privilege arguments for any of the documents already reviewed *in camera* after making a proper assertion of privilege. The same is true for documents not yet subjected to *in camera* review. To the extent the government is concerned about public disclosure of deliberative materials, it can file a motion to seal parts of the administrative record. *See MacKay v. DEA*, 664 F.3d 808, 811 n.5 (10th Cir. 2011) (sealing administrative record in APA case). Should the district court issue an adverse ruling on such a motion, the government can seek relief from the court of appeals.

The government's contention that the burden of complying with the district court's orders entitles it to mandamus relief is unpersuasive. The government relies on declarations that were never presented to either court below. *See* App. Add. 18-38. If the government believes these declarations justify a modification of the district court's orders, it can present them to the district court and seek a

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[9] The district court expressed a tentative view that such a deposition would be appropriate, Pet. 12, but that does not relieve the government of its obligation to make a formal objection to the district court, and then the court of appeals, if necessary, before seeking mandamus from this Court.

modification. Moreover, as explained below, *see infra* 30-31, the government's declarations do not show that the district court has imposed an excessive burden.

2. The government has failed to show that the district court's rulings are effectively unreviewable on appeal. The district court's rulings regarding the contents of the administrative record readily can be reviewed on direct appeal. If a reviewing court finds that the district court erroneously required inclusion of a document in the administrative record, that document can be disregarded on appeal. Nor are the district court's rulings on privilege unreviewable. "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Mohawk Industries*, 558 U.S. at 109. Moreover, the government can seek to avoid disclosure of documents as to which it claims privilege by seeking to place them under seal, and by seeking relief from the court of appeals if necessary.

C. The Government Has Not Shown That a Writ of Mandamus Is Appropriate Under the Circumstances

The government argues that mandamus is appropriate because the district court acted outside its powers, and that denying relief would cause unwarranted harm to the government while imposing "minimal burdens" on DACA recipients. *See* Pet. 32-33. This argument misses the mark.

First, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion" can justify the "extraordinary remedy" of mandamus. *Cheney*, 542 U.S. at 380 (internal citations and quotation marks omitted). As explained above, there has been no such abuse of discretion in this case—let alone a "clear" one. To the contrary, it is clear that the administrative record omits documents the agency considered when it decided to terminate DACA. The district court therefore acted within its discretion by ordering the government to complete the record.

Second, the government's decision to revoke longstanding DOJ guidance on the same day that it filed a mandamus petition counsels against mandamus relief. The government was willing to live by its guidance for many years, and it was in effect when the government prepared the administrative record at issue here. There is no compelling reason why this Court should grant the government extraordinary relief from its own longstanding guidance.

Third, the burden on the agency arising from the district court's order is neither unusual nor uniquely onerous. Administrative records resulting from rulemaking proceedings often contain tens or hundreds of thousands of pages of documents, and thus a voluminous page count does not free the government from fulfilling its statutory duty to produce the complete record. *See Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) (administrative record "more than a million pages long"). The number of documents at issue here

appears to be much smaller, and the government has already largely borne the burden of producing the additional documents. Of the documents DHS has already compiled, it reports that only "approximately 18,671 documents" are potentially relevant, and only "5,195 documents have been identified" as "needing further, second-level review to ascertain whether they should … be included in the expanded administrative record." App. Add. 23. Meanwhile, of the documents collected from the Department of Justice, only "1,700 … have been initially identified as potentially within the scope" of the administrative record ordered by the district court. The burdens of completing this garden-variety document review do not justify the extraordinary remedy of mandamus. Meanwhile, the order directing the government to complete the record was issued on October 17, and the deadline for completion is still nine days away. In all, the three months that will have been allowed for production of the record matches the default period under the district court's local rules. *See* N.D. Cal. Civ. Loc. R. 16-5. This timeframe is not excessively onerous, especially in light of the time-sensitive nature of this case, and is the direct consequence of the government's own arbitrary decision to rescind DACA on March 5, 2018.

Fourth, the burdens alleged by the government pale in comparison to the catastrophic harms that DACA recipients are experiencing as they lose their ability to work and remain legally in this country. Although the government claims that not all 800,000 DACA recipients will be deported by March 2018, all of them must prepare for that possibility and are currently making wrenching choices about whether to

stay in school, take the next steps in their careers, or even begin families. D.Ct. Dkt. 111 at 10-15. It was the government's decision to rescind DACA within such a short period of time that created the urgent need for prompt judicial review in the first place. Although this case can move forward on the incomplete record submitted by the agency, doing so will hamstring the courts' review of the agency's action.

D. At a Minimum, the Court Should Not Grant the Government the Sweeping Relief It Seeks

The government has asked this Court "to halt all expansion of the administrative record and discovery." Pet. 34. For the reasons explained above, the government has not satisfied the extremely demanding requirements for mandamus, and therefore its petition should be denied in its entirety. But even if this Court were to conclude that the government has satisfied the requirements for mandamus as to one or more particular aspects of the district court's order, any writ of mandamus should be limited to those aspects. For example, if the Court were to conclude that mandamus is warranted to exclude from the administrative record what the government represents is a memorandum from the White House Counsel to the President (despite the government's failure to properly raise this issue in the courts below), the writ of mandamus should be limited to that aspect of the district court's order.

In the circumstances of this case, in which the administrative record appears incomplete on its face, both courts below have determined that it is

incomplete, and it has been established that the government omitted non-privileged materials that were directly considered by the decisionmaker, an extraordinary writ of mandamus prohibiting *any* completion of the administrative record clearly is unwarranted. Moreover, it appears from the declarations executed on December 1 that substantial portions of the expanded administrative record are not subject to privilege claims and are ready for production on December 22.

II. The Government Has Not Shown That Certiorari Is Warranted

1. In a single paragraph of its petition, the government suggests that the Court may wish to construe the government's petition as a petition for certiorari and reverse the court of appeals' decision denying a writ of mandamus. Pet. 17. The government does not offer a developed argument in support of certiorari, but instead asserts in conclusory fashion that the court of appeals' decision denying mandamus is "inconsistent with the precedents of this Court, and creates a conflict with decisions of the D.C. Circuit." *Ibid.* These assertions cannot withstand scrutiny.

First, the court of appeals' decision does not conflict with decisions of this Court. Instead, it draws support from decisions such as *Overton Park* and *State Farm*. As noted above, the statements the government relies on from *Florida Power & Light Co. v. Lorion* and *Camp v. Pitts* address the inapposite situation where the administrative record is complete, but a party seeks to generate a new record containing materials that were not before the agency. Similarly, the Court's statements in the *Morgan* cases do not

address the agency's obligation to assemble the "whole record" so that a court can make an objective determination of whether the agency's action is arbitrary and capricious. And *Cheney*, which involved extremely broad discovery requests for White House documents in civil litigation against the Vice President, has little to do with this case.

Second, the Ninth Circuit's decision does not conflict with decisions of other courts of appeals. *San Luis Obispo Mothers for Peace*, on which the government relies, extended *Morgan* to a transcript of deliberations by a multi-member agency. Moreover, several courts of appeals have said that the administrative record includes all materials directly or indirectly considered by the agency decisionmaker. *See, e.g.*, *Thompson*, 885 F.2d at 555; *In re United States*, 2016 WL 5845712, at *1-2. The government cites no cases to the contrary.

Third, even if the government could show that the Ninth Circuit "clearly and indisputably" erred in denying the petition for mandamus, this Court almost never grants a petition for certiorari to correct an erroneous application of well-settled law, and should not depart from its usual practice here. *See* S. Ct. R. 10. And to the extent the government's petition raises any "important question of federal law that has not been … settled by this Court," *see ibid.*, it is unlikely the government could obtain extraordinary mandamus relief for such an unsettled question.

Fourth, this case is an exceptionally poor vehicle for deciding basic questions about the government's duty to compile the administrative record for judicial

review. Because the case arises in the context of a mandamus petition, the Court will be limited to deciding issues under the highly deferential mandamus standard. In addition, because the case is in an interlocutory posture, the Court does not have the benefit of a full record. Additional proceedings in the district court may shed light on the issues the government raises and could even moot those issues. For example, the government's motion to dismiss and plaintiffs' motion for provisional relief have been fully briefed in the district court and are scheduled for oral argument on December 20. If the lower courts were to determine that the government acted in bad faith or behaved improperly, it is undisputed that the district court would be justified in going beyond the record compiled by the agency. *See* Pet. 20 (quoting *Overton Park*, 401 U.S. at 420). Thus, within a short time, this Court's decision could be overtaken and rendered unnecessary by other developments in the case.

2. If the Court is inclined to rule on the government's more sweeping arguments, the better course would be to treat the petition as a petition for certiorari, grant the petition, and set the case for briefing on the merits and oral argument. Despite the government's arguments to the contrary, its petition raises issues that are neither simple nor well-settled in the government's favor. These include the government's contentions that courts lack authority to order agencies to complete administrative records, that agencies have unreviewable discretion to exclude from the administrative record documents that do not support the agency's action and that the agency regards as privileged, and that agencies are free to narrow the stated reasons for an agency action in

order to limit the scope of the record provided to a reviewing court. The government's arguments have the potential to radically circumscribe judicial review of agency decisions in areas ranging from telecommunications to energy distribution to railroad regulation to the safety of food and drugs. The Court's review of such matters would benefit from following the usual procedures and setting the case for briefing on the merits and oral argument. By allowing additional time for the Court to consider these issues, and for the parties and *amici curiae* to develop and present arguments, the Court can reduce the risk that it will overlook important points or reach an ill-advised decision that could substantially alter judicial review of agency action.

Finally, to the extent the Court's December 8 stay remains in effect, the government would not be prejudiced by setting this case for merits briefing and oral argument.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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