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 Respondents Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, Jirayut Latthivongskorn, the County of Santa Clara, and Service Employees International Union Local 521 in Opposition

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QUESTION PRESENTED

Since 2012, the Deferred Action for Childhood Arrivals program (DACA) has enabled nearly 800,000 undocumented individuals who were brought to the United States as children to live and work without fear of deportation. The President has reaffirmed the government's commitment to DACA. But in September 2017, the Acting Secretary of Homeland Security abruptly decided to terminate the program.

Respondents brought suit to challenge that decision. The district court directed the government to produce the record on which the decision was made. The government produced an administrative record of only 14 publicly available documents—obviously not the entire basis for determining the fate of the 800,000 Dreamers. The district court therefore ordered the government to compile the "whole record." 5 U.S.C. § 706. The government identified and claimed privilege for 84 additional documents; the court reviewed them *in camera* and ordered that only 35 of them be included in the record. Regarding discovery, the court, at the government's request, limited the number of interrogatories, requests for document production, and depositions. The court has not yet ordered the government to produce any item in discovery.

The question presented is:

Whether the extraordinary remedy of mandamus is justified here, where the district court has required the government to complete the administrative record with non-privileged material to permit judicial review of the decision to eliminate DACA, and the court has not ordered the government to produce any particular materials in discovery.

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BRIEF IN OPPOSITION

This case is about whether 800,000 young adults who came to the United States as undocumented immigrant children and have lived their entire lives here will be subject to removal because the government decided to rescind the Deferred Action for Childhood Arrivals (DACA) program. Since 2012, DACA has allowed these individuals, known as "Dreamers," to obtain an education, work, and contribute to our Nation. The program has been an unqualified success, and DACA recipients have relied on the federal government's repeated promises of protection from removal.

In September 2017, the federal government dramatically reversed course and announced that it would terminate DACA as of March 5, 2018. The fate of the Dreamers has captured the attention of the administration, Congress, and millions of Americans who worry about the devastating impact that terminating DACA will have on families, schools, communities, and our economy.

Respondents brought this lawsuit to challenge the government's decision to end DACA. To evaluate that challenge, the district court directed the government to compile the record on which the decision was made, as is required under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. Surprisingly, the government submitted an administrative record consisting only of 14 publicly available documents—which the government admits did not include all materials used to make the decision. The district court therefore directed the government to complete the administrative record. The court did not order the government to

turn over documents willy nilly—rather, the court reviewed each additional document the government supplied *in camera* and considered any claims of privilege, ultimately ordering production of less than half of the additional documents. With respect to respondents' non-APA claims, the court ordered only limited discovery, and it has not ordered the government to comply with any specific discovery request.

The court of appeals reviewed the district court's work and concluded that the district court took "a reasonable approach to managing the conduct and exigencies of this important litigation." Pet. App. 15a.

The government now seeks mandamus from this Court to relieve it of its statutory obligation to compile the full record used to make the momentous decision to end DACA. The government also seeks to stop all discovery on respondents' non-APA claims. This Court should not take those drastic steps. The courts below applied settled principles of agency review—including the principle that review occurs on the "whole record," meaning "the full administrative record that was before the [agency] at the time [it] made its decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). And there is no reason for this Court to prevent discovery before the district court has even entered any order requiring production.

Mandamus is particularly unwarranted because it is the *government*—not the district court—that seeks to upend the normal process of judicial review. The government's position boils down to an assertion that the Executive, not the Judiciary, sets the rules for review of administrative agency decisions. That is not

the law. And having a full record for judicial review is especially important here, where the government abruptly reversed position, to the detriment of the 800,000 people who have been relying on DACA to order their lives. This Court should deny the petition for a writ of mandamus and allow judicial review to proceed.

OPINIONS BELOW

The order of the court of appeals denying a petition for a writ of mandamus (Pet. App. 1a–20a) is not yet reported in the Federal Reporter but is available at 2017 WL 5505730. The order of the district court requiring completion of the administrative record (Pet. App. 26a–44a) is not published in the Federal Supplement but is available at 2017 WL 4642324. Two additional orders of the district court (Pet. App. 21a–25a, 45a–46a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1651 and 1254(1).

STATEMENT

1. The DACA program gives young adults who were brought to the United States as children the opportunity to lawfully live and work in this country. Pet. App. 47a–51a. In particular, DACA permits qualifying undocumented immigrants to obtain work authorization and a social security number, open a bank account or credit card account, purchase a home or car, and travel overseas and lawfully return to the

United States. *See* D.Ct. Dkt. 121-1 at 1787–88[1]; D.Ct. Dkt. 1-2 at 18–19; Compl. ¶¶ 27–32.[2] Nearly 800,000 people have benefited from DACA since it was established in 2012. Compl. ¶ 1.

The Dreamers have relied on the promise of DACA to further their education, serve in the U.S. military, open businesses, start families, and make many other life-changing decisions. *See, e.g.*, *id.* ¶¶ 37, 41, 48–98. Like so many other DACA recipients, the six individual respondents here—Dulce Garcia, Miriam Gonzalez Avila, Saul Jimenez Suarez, Viridiana Chabolla Mendoza, Norma Ramirez, and Jirayut Latthivongskorn—embody the American Dream. Each has achieved remarkable success through hard work, fierce determination, and incredible resilience. *Id.* ¶¶ 4–9. DACA has created pathways for them to become lawyers, medical professionals, and teachers—professions chosen because of their deep commitment to public service. *Id.* ¶¶ 53–55; 59–61; 72–75; 78–81; 85–89; 95–98. Without DACA, these individuals will have to choose between the prospect of deportation—leaving behind their families, communities, professions, and the only country most have ever known—and returning to the shadows in an effort to avoid deportation. *Id.* ¶¶ 48–49, 56, 63, 76, 83, 91, 128.

The local, state, and federal governments have realized many administrative, law enforcement, economic, and public-safety benefits from DACA. *Id.*

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[1] "D.Ct. Dkt." refers to the electronic docket for *Regents of the University of California v. DHS*, Case No. 3:17-cv-05211 (N.D. Cal.).

[2] "Compl." refers to the complaint filed in *Garcia v. United States*, Case No. 3:17-cv-05380 (N.D. Cal.).

¶ 19. In December 2016, then-Secretary of Homeland Security Jeh Johnson said that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." *Id*. ¶ 41. After the change in administration, the government affirmed its commitment to DACA. In March 2017, then-Secretary of Homeland Security John Kelly stated that DACA embodies a "commitment . . . by the government towards the DACA person, or the so-called Dreamer." *Id.* ¶ 46. In April 2017, the President personally assured DACA recipients they could "rest easy" and confirmed that the "policy of [his] administration [is] to allow the dreamers to stay." *Id.* ¶ 47.

2. On September 4, 2017, the administration abruptly reversed course. The Attorney General sent a one-page letter to Acting Secretary of Homeland Security Elaine Duke, summarily concluding that "DACA was effectuated by the previous administration through executive action, without proper statutory authority" and "was an unconstitutional exercise of authority by the Executive Branch." *Id.* ¶ 118. The next day, he announced the government's decision to end DACA. *Id.* ¶ 119.

Acting Secretary Duke then issued a memorandum formally rescinding DACA. Pet. App. 61a–69a. Her memo referred to the Attorney General's letter and stated that the threat of litigation prompted the decision to terminate DACA. *See id.* at 67a. It did not analyze the purported litigation risk (10 States had threatened to sue the government, but 20 States opposed that effort, Compl. ¶¶ 115–16), and it did not weigh DACA's widespread benefits against the many

harms that would befall DACA recipients, their families and employers, and the national economy if DACA were rescinded. Acting Secretary Duke then released a statement where she said—directly contrary to the President's and the prior Secretary's statements—that "DACA was fundamentally a lie." D.Ct. Dkt. 121-2 at 1869.

3. Given the government's change in position and the certain harms that will result from the Acting Secretary's decision, respondents sued the federal government and various federal officials. Respondents challenge DACA's termination on constitutional, statutory, and equitable grounds. In essence, they seek basic judicial review of an Executive Branch decision that will hurt 800,000 DACA recipients, as well as their families and communities, in profound and irreversible ways.

The district court immediately took steps to ensure that the litigation would proceed in an orderly and timely manner. In an initial case management conference, the court discussed how to manage the case in light of the government's March 2018 deadline for rescinding DACA. Stay Opp. Add. 7–8. The government agreed that getting "to final judgment quickly makes a lot of sense in this case" and said that it was "prepared to brief this case quickly." *Id.* at 18.

The court accordingly selected October 6 as the deadline for producing the administrative record and November 1 for filing dispositive motions. *Id*. at 18, 51. The court advised the government that the administrative record should contain all materials used in the decision to rescind DACA, not just "the select stuff

that supports your side." *Id*. at 17–18. The government agreed to produce the record by the deadline. *Id*. at 17.

As for discovery, the district court decided that, to expedite the litigation, the government "should respond to [respondents'] discovery requests if they're reasonable." *Id.* at 22. The court assured the government that if discovery "gets going too far sideways, I'll put a stop to it." *Ibid.* The government did not object to discovery but instead proposed limits on the number of discovery requests allowed. *Id.* at 55. The court agreed and limited respondents' collective discovery to 20 interrogatories, 20 requests for production, and a "reasonable number" of depositions. Pet. App. 22a. Respondents have served discovery requests that comply with those limits. The government made six witnesses available for depositions but has not responded to the written interrogatories or produced any responsive documents. Notably, the government has not challenged any specific discovery request in the district court, and the district court has not issued any order compelling the government to provide discovery.

4. The government produced an administrative record—an exceedingly sparse one. It consisted of only 14 publicly available documents, mostly judicial opinions, for a total of 256 pages. D.Ct. Dkt. 64, 64-1. It included only some of the documents that Acting Secretary Duke personally reviewed, and no documents considered by her direct advisors.

That limited record was surprising, because the fate of the Dreamers is a national issue affecting 800,000 people, and various administration officials

(including the President) have publicly expressed views about it. Respondents therefore asked the district court to require the government to complete the administrative record, including with documents considered by the Acting Secretary's advisors. D.Ct. Dkt. 65.

Sensitive to potential claims of privilege, the district court decided to review *in camera* any documents for which the government claimed privileges, including "emails, internal memoranda, and communications with the Justice Department on the subject of rescinding DACA." D.Ct. Dkt. 67 at 1. The government submitted a privilege log listing 84 new documents—again, only documents considered by the Acting Secretary herself. Pet. App. 40a; Pet. 21, 29.

After *in camera* review, briefing, and argument, the district court partially granted respondents' motion to complete the administrative record. Pet. App. 26a–44a. The court found "clear evidence" that the government had failed to include in the proffered record "documents that were considered, directly or indirectly, by DHS in deciding to rescind DACA." *Id.* at 31a. The court explained that the "government's *in camera* submission confirms that [the Acting Secretary] did receive substantial DACA input" from others. *Id.* at 34a. The court also held that the government waived attorney-client privilege by placing government officials' legal analysis directly at issue; litigation risk was the sole reason the Acting Secretary cited in terminating DACA. *Id.* at 39a. The court accepted many of the government's claims of privilege, completely withholding 49 documents and partially withholding another two. *Id.* at 40a, 43a. It also promised that when the government provides the

complete record, the court will review *in camera* any documents for which the government claims privilege. *Id.* at 43a.

5. The government filed an emergency mandamus petition with the court of appeals, which the court denied. Pet. App. 1a–20a. The court of appeals concluded that the district court took "a reasonable approach to managing the conduct and exigencies of this important litigation." *Id.* at 15a. The court agreed that respondents had rebutted "the presumption of regularity that attaches to the government's proffered record," observing 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 (footnote omitted). The court also rejected the government's broad claim of privilege, explaining that there is no "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 government also had sought an order precluding all discovery on respondents' non-APA claims. C.A. Dkt. 1-2 at 1, 30. But the district court had not ordered the government to produce anything, and so the court of appeals concluded that discovery issues "are not properly before [the Court] at this time" and therefore "d[id] not address them." Pet. App. 2a–3a n.1; *see also* Resp. C.A. Br. 1–2, 28–29.

Judge Watford dissented. Pet. App. 16a–20a. Although he recognized that "a policy shift of th[is] magnitude presumably would not have been made without

extensive study and analysis," *id*. at 16a, he believed that respondents had not made a sufficient showing to justify adding to the proffered record, *id.* at 17a–19a.

6. The district court ordered defendants to file the "complete administrative record" by November 22. D.Ct. Dkt. 188 at 1. The government sought an emergency stay pending the filing of its petition in this Court, first in the court of appeals (which dismissed the motion on jurisdictional grounds, C.A. Dkt. 42) and then in the district court, D.Ct. Dkt. 191. The district court declined to stay its order but extended the deadline for filing the administrative record to December 22 and stayed discovery until that date. D.Ct. Dkt. 193, 193-1.

The government filed a stay motion in this Court, which was granted over the objection of four Justices.

ARGUMENT

The government seeks truly extraordinary relief: mandamus to overturn the district court's order to provide the complete administrative record and to preclude all discovery on the non-APA claims in the case. To justify mandamus, the government must establish that the district court took an action so far outside its normal role that the only option is for this Court to intervene. *See Will v. United States*, 389 U.S. 90, 95 (1967). The government has not satisfied that high burden in this case. Nor has the government demonstrated that certiorari is warranted to review the district court's fact-bound application of settled principles of administrative law. The petition therefore should be denied.

I. The government has failed to justify mandamus

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). To establish a basis for mandamus, the government must show that (1) it has no other adequate means to obtain relief; (2) its right to mandamus relief is "clear and indisputable"; and (3) mandamus is "appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also* S. Ct. R. 20.1. None of those requirements has been met.

A. The government has adequate means to obtain relief from the lower courts

The government makes essentially three arguments regarding alternative avenues for relief. Each is mistaken.

First, the government contends (Pet. 18) that complying with the district court's orders will be a burden. But the government already has identified the documents that potentially will be added to the administrative record. It made available (for *in camera* review) 84 additional documents over which it asserted claims of privilege. *See* D.Ct. Dkt. 71-2. And it identified approximately 6,000 additional documents to review for possible inclusion in the administrative record. Stay Appl. 14.[3] The government told respondents

[3] That is consistent with the size of other administrative records underlying important decisions. *E.g.*, *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 184 (5th Cir. 1989); *Citizens for Smart Growth v. Sec'y of Dep't of Transp.*, 669 F.3d 1203, 1208 (11th Cir. 2012).

it could compile those documents in three weeks. Stay Opp. Add. 74.

The relevant question is not burden but whether the government has avenues other than mandamus in this Court to test the district court's case-management orders. It plainly does. The district court's most recent order denied a stay and ordered the government to produce the record by December 22. If the government wishes not to comply, it can seek an extension of time in the district court or seek review of the order in the court of appeals. *See* Pet. App. 2a. To the extent the government complains about timing, that is attributable to the government's unilateral decision to terminate DACA in March 2018. The government created the exigency here.

Second, the government claims (Pet. 18) that, absent mandamus, "various privileges . . . will have been breached." That ignores the district court's *in camera* document-by-document evaluation of claims of privilege. *See, e.g.*, *Kerr*, 426 U.S. at 405–06 ("[I]n camera review is a highly appropriate and useful means of dealing with claims of governmental privilege."). The district court did not just order the government to turn over documents; it requested a privilege log, carefully reviewed the documents, and protected more than half of them from disclosure. And for future filings, the district court has pledged to review any documents for which the government claims privilege *in camera*, Pet. App. 43a; if the court orders production, the government may seek review in the court of appeals.

Significantly, the government has not challenged any particular privilege ruling of the district court.

See Pet. App. 12a n.8 (government "provided little in the way of argument regarding the specific documents ordered disclosed by the district court"). If the government disagrees with a privilege ruling, it should explain why—to the court of appeals in the first instance—rather than levying broad and unfounded attacks on the district court.

Third, the government asserts (Pet. 18) that it will be subject to unwarranted discovery. That claim is particularly far-fetched, because the district court *has not ordered the government to comply with any discovery request.* All the court has done is to place limits on discovery, at the government's request, and ask the government to respond to discovery requests "if they're reasonable." Stay Opp. Add. 22. The government has voluntarily produced six witnesses for deposition (who refused to answer many questions on grounds of privilege) and has yet to respond to any of respondents' discovery requests. If the government objects to a particular request, the district court can consider the reasons for the objection and decide whether to enter a protective order, quash the discovery request, or order compliance. Those types of rulings are well within the district court's purview. *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). If the government dislikes the court's ruling, it can seek review from the court of appeals. What it cannot do is enlist this Court to preemptively usurp the district court's authority to manage discovery based only on speculation.

B. The government does not have a clear and indisputable right to mandamus relief

The government is required to show that its right to relief is "clear and indisputable." *Perry*, 558 U.S. at 190. It cannot do so, because it seeks to deviate from the normal rules of judicial review that were followed by the courts below.

1. Completion of the administrative record

a. The government contends (Pet. 18) that the district court clearly and indisputably erred in ordering it to produce the full administrative record underlying the decision to rescind DACA. That is wrong.

It is well established that review under the APA must be based on the "whole record," 5 U.S.C. § 706, meaning "the full administrative record that was before the [agency] at the time [it] made [its] decision," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). That includes "all materials that were directly or indirectly considered by agency decision-makers," including "evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *see Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). Providing that record will allow the reviewing court to evaluate whether the agency "relied on [impermissible] factors," "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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Until recently, the government accepted that settled understanding: Longstanding U.S. Department

of Justice guidance (which the government rescinded the day it filed a mandamus petition in the court of appeals) said that the administrative record "consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision," including documents "not specifically considered" by the decisionmaker herself. *See* U.S. Dep't of Justice, ENRD, *Guidance to Federal Agencies on Compiling the Administrative Record* (Jan. 1999), available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf (last visited Dec. 13, 2017) (1999 DOJ Guidance).[4]

Although courts initially must presume that an agency's proffered record is complete, this presumption can be rebutted by "clear evidence to the contrary." *Bar MK*, 994 F.2d at 740. An agency "may not unilaterally determine what constitutes the administrative record" without any court review. *Id.* at 739. Such a rule would make judicial review toothless.

b. Here, respondents established a significant basis for the courts below to conclude that the administrative record produced by the government was incomplete.

First, as the court of appeals recognized, it is facially implausible that the government made a decision that affects the fate of 800,000 people and has been the subject of widespread national attention

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[4] The government (Pet. 25 n.5) argues that its guidance is not binding, but that misses the point, which is that the government, like everyone else, recognized these established principles of administrative law, and the government's (newfound) disagreement with that understanding does not justify mandamus.

based only on 14 publicly available documents. Pet. App. 6a–7a (it is "not credible" 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"); *id.* at 16a (Watford, J., dissenting) (making the same point).

Second, the government's own representations demonstrated that the Acting Secretary considered more than 14 documents. The government identified (and claimed privilege on) 84 more documents. D.Ct. Dkt. 71-2. The government also acknowledged that the Acting Secretary considered other non-privileged documents, including communications about DACA with state attorneys general and "media articles." Pet. App. 36a.

Third, certain additional documents are obviously missing from the record. For example, the sole justification for the decision was litigation risk, *see* Pet. App. 66a—yet the government included only the letter received from the 10 States that opposed DACA, and not the one from the 20 States that support DACA (which provided legal analysis to support their view). D.Ct. Dkt. 64-1. The proffered record contained no "materials analyzing the [potential] lawsuit." Pet. App. 35a. Further, despite public pronouncements about the President's and Attorney General's roles in making this decision, the record contained no documents (public or otherwise) from the White House and only one (public) document from DOJ. Pet. App. 33a–34a.

Fourth, the government's change in position undercuts its assertion that only 14 documents informed

the decision to terminate DACA. In APA review, courts ordinarily require the government to "display awareness that it is changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted). Yet nothing in the proffered record explains the administration's about-face, from the President's and then-Secretary Kelly's promises to protect DACA recipients in spring of 2017 to the Acting Secretary's determination in September 2017 that DACA was "a lie." Pet. App. 34a–35a. There likewise was no discussion of "factors militating in favor and against this switch in policy." *Id.* at 35a. An explanation is particularly warranted because, after the Acting Secretary announced her decision, the President weighed in, suggesting—contrary to the prior announcement—that he would continue to protect the Dreamers. D.Ct. Dkt. 1 at 11 ("Congress now has 6 months to legalize DACA . . . If they can't, I will revisit this issue!").

Finally, the government fully admits that it is taking an exceedingly narrow view of the administrative record. It says that it need only include documents the Secretary "personally viewed" (Pet. App. 35a)—even though it previously acknowledged, in line with court of appeals precedent, that the record includes all material considered "directly or indirectly" by the decisionmaker. 1999 DOJ Guidance 1–2; *see also Thompson*, 885 F.2d at 555. Everyone knows that supervisors make decisions based on the work and recommendations of subordinates. That is true for large administrative agencies, especially when they are considering issues on which many parts of the Executive Branch have views. The material considered by

a decisionmaker's advisors necessarily informs the agency's decision and properly constitutes part of "the evidence on which it was based." *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (citation omitted).

Accordingly, the district court appropriately directed the government to discharge its obligation under the APA to provide the complete administrative record.

c. The district court's application of bedrock principles of administrative agency review cannot constitute "clear and obvious" error. The court's direction to the government to compile the "whole record" is consistent with the APA, Supreme Court and circuit law interpreting it, and the government's own (prior) guidance.

The government's position essentially is that the Executive, and not the Judiciary, defines the record to be used for judicial review of administrative agency action. But the government provides no authority for that sweeping proposition, and settled law is to the contrary. *See Thompson*, 885 F.2d at 555; *Bar MK*, 994 F.2d at 739. This Court has been quite skeptical of similar assertions of unilateral agency authority. *See, e.g., Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652 (2015) ("Absent [judicial] review, the Commission's compliance with the law would rest in the Commission's hands alone."); *see also United States v. Stevens*, 559 U.S. 460, 480 (2010).

In the government's view (Pet. 24), so long as "the agency's rationale is reasonable and the record presented supports that rationale, then the reviewing court's inquiry is at an end"—even when the agency's

proffered administrative record is "not credible," Pet. App. 7a., and the agency's decision "will profoundly disrupt the lives of hundreds of thousands of people," Pet. App. 16a (Watford, J., dissenting). But a court cannot effectively evaluate whether an agency's explanation for its decision "runs counter to the evidence before the agency," *State Farm*, 463 U.S. at 43, when the agency presents only a selective record, one that excludes "evidence contrary to the agency's position," *Thompson*, 885 F.2d at 555. Nor can the reviewing court evaluate whether the agency "has relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. The only way for courts to ascertain whether an agency has relied on impermissible factors or disregarded evidence before it is to analyze all of the materials that were before the agency decisionmaker.

Moreover, the district court here did not "go beyond the agency record" by "'requir[ing] the administrative officials who participated in the decision to give testimony explaining their action,'" which would have required a "'showing of bad faith or improper behavior.'" Pet. 20 (quoting *Overton Park*, 401 U.S. at 420). Rather, the court found that "the full administrative record"—*i.e.*, what "was before the Secretary at the time he made his decision," *Overton Park*, 401 U.S. at 420—had never been presented in the first place. *See* Pet. App. 8a.[5] Similarly, the government's reliance (Pet. 20) on the principle that the reviewing

[5] Respondents have argued that the government acted in bad faith in refusing to provide the whole administrative record, but that issue has not yet been resolved by the district court. *See, e.g.*, D.Ct. Dkt. 111 at 29.

court "appl[ies] the appropriate APA standard of review . . . based on the record the agency presents to the reviewing court," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985), does not aid the government; that decision recognized that a court must consider the complete and actual "record before the agency" at the time of its decision, *id.* at 744, not some partial record chosen by the government.

The government's citation (Pet. 17) to *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), also misses the mark. This case is not about discovery specifically targeted at the Vice President that "asks for everything under the sky," *id.* at 387; instead, respondents asked the government to fulfill its obligation under the APA to compile the materials used to make the decision to rescind DACA. As the court of appeals explained here, there is no reason to believe that "either [the President's] documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." *Id.*[6] The government seeks a change in the law to narrow the record on administrative review. But that is not what mandamus is for—mandamus is for remedying an error that is clear and indisputable under existing law.

At base, the government's position is the Executive Branch may control the record on review in APA cases, thereby circumscribing judicial review of its

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[6] The government also asserts (Pet. 20) that the decision to terminate DACA is "entirely unreviewable" under 8 U.S.C. § 1252(g). That is an open issue not yet considered by the courts below. *See* D.Ct. Dkt. 205 at 9–11. This Court should not reach out to decide it in the first instance.

own actions. That view strikes at the heart of separation of powers. Accepting the government's view would severely limit the Judiciary's critical role "in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Like other limits on Executive Branch action, administrative agency review "safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other." *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (internal quotation marks omitted). The government's position boils down to "trust us." But the government's contradictory statements and facially implausible record submission provides ample reason not to do so.

2. *In camera* review of documents for which the government claimed deliberative-process privilege

The government asserted deliberative-process privilege over 84 documents, and the district court reviewed them *in camera* and considered claims of privilege. Pet. App. 40a, 43a. The government now contends (Pet. 27, 31–32) that the court so egregiously erred in making those determinations that mandamus is warranted. Not so.

In response to the government's claim of privilege, the district court did what district courts do all the time. It followed the Court's guidance 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. And it went document-by-document to carefully evaluate claims of privilege. The court did so even though the government's privilege

log failed to properly substantiate its claims of privilege. *See Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (setting out requirements for claiming deliberative-process privilege). Contrary to the government's assertion (Pet. 17, 31), the court did not treat the government's deliberative materials in a wholesale, "sweeping," and "dismissive" manner.

In conducting its review, the district court applied the established deliberative-process balancing test, Pet. App. 40a, under which a "litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure," *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). After evaluating each of the 84 documents using that standard, the district court found 49 documents privileged in whole and two documents privileged in part. Pet. App. 40a, 43a. The district court relied on existing law, and its individual resolutions of deliberative-process claims using that law do not come close to clear and indisputable error.

Against this established authority, the government urges the Court to adopt a "categorical[]" privilege against disclosure of all "pre-decisional" documents, citing case law concerning inquiry into decisionmakers' "mental processes." Pet. i, 27, 30. The cases the government cites are inapposite; they concern attempts to obtain testimony from decisionmakers explaining their actions *after* a decision had been made or a complete record was created. *See Overton Park*, 401 U.S. at 420 (post-decision testimony of decisionmakers "explaining their action"); *United States*

v. Morgan, 313 U.S. 409, 422 (1941) (testimony of Secretary of Agriculture regarding process by which he "reached [his] conclusions"); *see also, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 487–89 (D.C. Cir. 1994); *Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983). Because such testimony did not exist when the agency made its decision, it necessarily could not be part of the administrative record. *See Florida Power*, 470 U.S. at 743 ("[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.") (citation omitted). Decisions placing limits on *post*-decision inquiries into the decisionmaker's mental processes do not justify a rule that all *pre*-decisional deliberative materials be excluded from the administrative record.

San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 44–45 (D.C. Cir. 1986), addressed pre-decisional deliberations of the members of a multimember agency. But it is inapposite, because the record at issue—a transcript of a closed meeting of the agency—represented the "collective mental processes of the agency." *Id.* at 44. The government has made no showing that the 35 documents to be disclosed in this case meet that high bar—let alone that they clearly and indisputably do.[7]

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[7] Depositions of even high-ranking agency officials are appropriate in certain circumstances, such as where "the official has first-hand knowledge related to the claim being litigated." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). In light of this authority, the magistrate judge authorized a limited deposition of Acting Secretary Duke—a decision that the government has yet to challenge in the district court. *See* D.Ct. Dkt. 94 at 1; *see also* D.Ct. Dkt. 88 at 1-5 and n.3.

Under existing law, the deliberative-process privilege is a qualified one. The government now seeks to convert it to an absolute privilege—not with the benefit of lower court decisions, briefing, and argument, but on mandamus review, which is limited to correcting egregious and obvious errors. If, as the government suggests, the record must omit all pre-decisional "emails, letters, memoranda, notes, media items, opinions and other materials" considered by the Acting Secretary, the district court could not conduct effective APA review, *see* 5 U.S.C. § 706, and any reviewing court (including this Court) would be similarly hamstrung. For that reason, federal agencies routinely produce, and courts regularly review, these types of pre-decisional documents. *See, e.g.*, *Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017). Until quite recently, the Department of Justice agreed, advising federal agencies to include these documents in their administrative records. *See* pp. 14–15, *supra*.

The government's sweeping attempt to shield all pre-decisional materials, if accepted, would seriously intrude on the role of the courts. *See United States v. Nixon*, 418 U.S. 683, 703–13 (1974) (categorical withholding of Executive Branch documents seriously impairs Judiciary's role). That is why the deliberative-process privilege is a qualified one. Courts appropriately assess whether the "need for accurate fact-finding override[s] the government's interest in non-disclosure," *Warner*, 742 F.2d at 1161, rather than treating the government's mere assertion of deliberative-process privilege as sufficient to withhold any deliberative document.

3. Evaluation of executive privilege and attorney-client privilege claims

The government's complaints (Pet. 31) about the district court's treatment of executive privilege and attorney-client privilege are unfounded.

a. The government contends (Pet. 31) that the district court "gravely erred by ordering disclosure of various White House documents." This argument concerns four documents where the court ordered inclusion in the record over the government's claim of executive privilege. Pet. App. 43a. They are documents that, to this point, only the government and the district court have seen. *See ibid.*

First, the government failed to present any specific argument about those documents to the court of appeals (or to the district court since its initial ruling). *See* Pet. App. 12a n.8. Instead, the government lumped all of the district court's rulings together. C.A. Dkt. 1-2 at 22–23. As a result, the court of appeals concluded that it did not have sufficient information to evaluate disclosures of specific documents. Pet. App. 12a n.8. But the court of appeals confirmed that the government *could* challenge specific disclosures in that court. If the government has arguments to make about particular documents, it should present those arguments to the courts below. The district court has already sustained a majority of the government's privilege claims under this procedure, and the government will have the same opportunity to make its case for privilege (both in the district court and court of appeals) moving forward.

Notably, the mandamus petition to this Court is the first time that the government ever suggested that

one of the 84 documents provided to the district court for *in camera* review was a "memorandum from the White House Counsel to the President." Pet. 31–32. In the courts below, the government described that document as a "Draft White House memorandum regarding litigation related to DACA," D.Ct. Dkt. 71-2 at 5, and the government's privilege log (all that respondents are allowed to see) indicated that the document was located in the Acting Secretary's files, not White House files, *ibid.* Apparently neither the author nor the recipient of the memorandum was obvious from the document itself, because the district court concluded, after *in camera* review, that it did not "fall within the executive privilege." Pet. App. 40a n.7. If the government has additional information to share about this document (or any other document for which it claims privilege), it should share it with the district court.

The district court's privilege determinations do not implicate the concerns this Court expressed in *Cheney*. The government claimed executive privilege as to seven of the 84 documents in the Acting Secretary's custody and the district court ordered that only four be included in the administrative record. *See* Pet. App. 43a; *see also* D.Ct. Dkt. 71-2. The government has not established that claiming privilege over these four documents imposes the sort of burdens at issue in *Cheney*, and so the courts below do not have the information required do the balancing analysis described in that case. The government should be required to substantiate its assertions of burden in the lower courts to allow reasoned analysis of the issue, rather than circumventing the process through mandamus in this Court.

b. The government attacks the district court's conclusion that it waived attorney-client privilege to the extent that it placed attorney-client communications "at issue" by using litigation risk as the sole justification to rescind DACA. Pet. App. 37a. But that ruling follows well-settled law that "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). The sole justification the Acting Secretary gave for rescinding DACA was "litigation risk"—the "sword" on which the government relies to terminate a program that has benefited 800,000 individuals. Yet the government has prevented any analysis of that "litigation risk" by withholding the relevant documents on attorney-client privilege grounds.

Under the circumstances of this case, the district court correctly found waiver of the attorney-client privilege. *See, e.g.*, *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 361 (2d Cir. 2005) (DOJ cannot make repeated public references to internal OLC legal analysis "when it serves the Department's ends but claim the attorney-client privilege when it does not"). And the court appropriately rejected the government's alternative argument—that "assessing [the] correctness [of the Acting Secretary's legal judgment] would not depend on the 'legal research' used to reach that conclusion." Pet. 32; *see also* Pet. App. 38a. As the district court explained, the government's litigation risk "would heavily turn on the underlying legal analysis so far withheld from view," and the "the reasonableness of the Secretary's legal rationale" also depends, in part, on "how consistent the analysis has been in the runup to the rescission." Pet. App. 38a.

The government identifies no sound basis to second-guess the results of the district court's *in camera* review of the claimed privileged documents, much less to conclude that the court committed error so extreme that it would justify mandamus. This Court ordinarily does not review interlocutory privilege decisions, including decisions involving the attorney-client privilege. *See Mohawk Indus.*, 558 U.S. at 108. Even in cases involving discovery into important matters of national security, this Court has trusted district courts to evaluate claims of privilege and courts of appeals to review those rulings. *See, e.g., Webster v. Doe*, 486 U.S. 592, 604 (1988) (explaining that district courts have considerable "latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"). If that latitude to evaluate documents and balance competing concerns is available even in the most sensitive national-security cases, it should be available here as well, where the decision will indisputably harm hundreds of thousands of DACA recipients.

4. Discovery

The government argues (Pet. 18) that the district court clearly and indisputably erred in "authorizing broad discovery." That is not a fair characterization of the district court's rulings. The district court has not ordered the government to produce any documents in discovery. All it has done is enter an initial discovery order, which (at the government's request) limited the number of discovery requests respondents could make to the government. Pet. App. 21a–25a.

The court also asked the government to go ahead and respond to discovery requests "if they're reasonable," Stay Opp. Add. 22, in light of the expedited nature of the litigation, *id.* at 17–18, 40. And the court assured the government that if discovery "gets going too far sideways, I'll put a stop to it." *Id.* at 22.

Apparently unsatisfied with that modest approach, the government now seeks to prevent all discovery on respondents' non-APA claims. But there is nothing erroneous, let alone clearly and indisputably erroneous, about the district court allowing focused discovery to proceed under these circumstances. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam); *FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig.*, 662 F.3d 887, 891 (7th Cir. 2011). District courts have wide discretion to enter discovery and similar case-management orders, and the district court carefully and appropriately exercised that discretion here.

This Court should be loath to circumvent the district court's authority to manage discovery, especially at such an early point in the process. *See Mohawk Indus.*, 558 U.S. at 108–10. There is simply no reason for this Court to step in before the government has even objected to any discovery request or been required to produce any document.

C. Mandamus is not appropriate under the circumstances of this case

1. The government argues (Pet. 33) that mandamus is necessary to prevent "unwarranted intrusions" into "the highest levels of the Executive Branch." But the district court did not order such intrusions. When

the court required disclosure, it did so because it concluded that disclosure was *warranted* after evaluating the government's interests using the deliberative-process balancing test. Pet. App. 40a, 43a. If any Branch of government faces "unwarranted intrusions," it is the Judiciary, whose role will be severely circumscribed if the Executive gets its way in this case. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008); *Nixon*, 418 U.S. at 707, 712. The Judiciary can only carry out its "important" role in reviewing agency action under the APA, *Judulang*, 565 U.S. at 53, if it has "the full administrative record that was before the Secretary," *Overton Park*, 401 U.S. at 420.

2. Granting mandamus in this case would expand the writ well beyond its traditional understanding. This Court has "generally denied review of pretrial discovery orders." *Mohawk Indus.*, 558 U.S. at 108 (internal quotation marks omitted); *see Will*, 389 U.S. at 96. That is for good reason—for our judicial system to work, district courts must have discretion to manage their dockets and control the pace and flow of litigation, including the timing and number of discovery requests. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *see also Allied Chem.*, 449 U.S. at 36.

Further, mandamus "indisputably contributes to piecemeal litigation." *Allied Chem.*, 449 U.S. at 35; *see Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (cautioning against an interpretation where "every interlocutory order" could be reviewed using mandamus). And mandamus is a particularly heavy-handed way to correct a district court's trial-management decisions. It "has the unfortunate consequence of making a district court judge a litigant,"

Allied Chem., 449 U.S. at 35—an outcome that should be reserved for only the most egregious cases (not this one).

3. The balance of the equities weighs strongly against mandamus. If the Court denies mandamus, then the Executive's decision to end DACA will be subject to ordinary judicial review. The government will have to assert and litigate claims of privilege and wait to challenge discovery until the court actually enters an order requiring production. Those are not extraordinary burdens; they are how the legal system is supposed to work. Here, the government has already told the district court that it could complete the administrative record in three weeks, Stay Opp. Add. 74; the district court will use *in camera* review to assess any claims of privilege, Pet. App. 43a; and the court of appeals stands ready to review any adverse privilege rulings—as soon as the government provides argument about the specific documents ordered disclosed, Pet. App. 12a n.8. Under the circumstances, any harms facing the government are speculative at best.

If the Court grants mandamus, then 800,000 DACA recipients will never know the full basis for the government's decision to take away promised benefits and subject them to removal from the United States. And without knowing that basis, reviewing courts (including this Court) will be hamstrung in trying to evaluate respondents' challenges to the decision to end DACA. It is undisputed that government officials who decided to end DACA considered more than the scant administrative record the government initially submitted. *See* pp. 15–17, *supra*. Indeed, the govern-

ment admits that there are 6,000 additional documents that were used to make the decision. *See* Stay Appl. 14.

The government's statement that depriving respondents of the record used to rescind DACA imposes only "minimal burdens" (Pet. 33) is plainly untrue and coldly dismissive. The decision to end DACA already is causing catastrophic and irreparable harm to DACA recipients, as the threat of deportation is forcing them to make wrenching choices of whether to leave their schools, jobs, and even their U.S. citizen children and other family members. D.Ct. Dkt. 1 ¶¶ 13–14; D.Ct. Dkt. 111; Compl. ¶¶ 128–32. For the courts to resolve whether that decision was lawful, the administrative record and discovery must be complete.

II. The government's alternative request for a writ of certiorari should be denied

The government has not established an entitlement to a writ of certiorari, and certainly not certiorari with summary reversal. The petition raises strictly fact-based challenges to the district court's interlocutory rulings—not legal issues where the lower courts have disagreed or the court below issued a ruling contrary to a decision of this Court. *See* S. Ct. R. 10. Nor does the district court's application of ordinary principles of administrative law provide the type of exceptional circumstances that could justify this Court's review in the absence of such a conflict.

The government strains to manufacture a conflict in authority (Pet. 17), but none exists. The legal principles the lower courts applied to determine whether the government produced the "whole" administrative

record are consistent with this Court's decisions, including the four decisions on which the government primarily relies. *Florida Power* involved a different question—expanding an already complete administrative record with materials that were not considered by the agency. 470 U.S. at 744. Here, the district court ordered completion of a facially deficient record, not supplementation of a complete one. Pet. App. 2a n.1, 6a–7a. *Overton Park* supports respondents' view, not the government's: There, the Court recognized that review of agency action must "be based on the full administrative record that was before the Secretary at the time he made his decision." 401 U.S. at 420; *see also* Pet. App. 3a, 6a–8a. Because the district court's order involved completing the administrative record with pre-decisional documents rather than expanding it with decisionmakers' post-decision testimony "explaining their action," *Overton Park*'s "bad faith or improper behavior" standard does not apply. *See* 401 U.S. at 420.

There is similarly no conflict with *Morgan,* because the documents the district court ordered to be included in the record pre-date the decision to rescind DACA; they are not post-decision testimony "prob[ing] the mental processes" of the agency, 313 U.S. at 422, which necessarily would not be part of the administrative record. And *Cheney*, 542 U.S. at 383, 387, is not 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." Pet. App. 13a. *Cheney* concerned exceptionally burdensome discovery directed to the Vice President himself, whereas here the gov-

ernment faces limited discovery requests and a district court poised to protect its privileged documents. Pet. App. 22a, 43a.

And there is no circuit conflict warranting review. As the court of appeals explained (Pet. App. 14a–15a), the D.C. Circuit's *San Luis Obispo* decision is inapposite here, because it involved "transcripts of literal deliberations among members of a multi-member agency board," Pet. App. 14a, which were analogous to disclosure of the "collective mental processes" of an individual decisionmaker in a deposition, 789 F.2d at 44. The district court did not order disclosure of any similar material here. *See* p. 23, *supra*.

Finally, the district court's case-management decisions do not "depart[] from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). To the contrary: To compile the administrative record, the court applied circuit precedent, which is wholly consistent with this Court's guidance. It (and the court of appeals) concluded, based on a number of factors, *see* pp. 7–9, *supra*, that the government's proffered record could not plausibly represent the "whole record" considered by the agency decisionmaker. Pet. App. 6a–8a, 35a. The courts below respected claims of privilege, and the court of appeals specifically invited the government to appeal particular privilege rulings with which it disagreed. Rather than follow the normal judicial-review process, the government leapfrogged to this Court, asking for the Court not only to undo the district court's careful work, but also to go ahead and usurp the district court's authority to manage discovery.

It is the government—not the district court—that has shown an "extraordinary disregard for settled principles of judicial review" (Pet 17). The President promised protection to the 800,000 Dreamers, and then the administration reneged on that promise. At the very least, the hundreds of thousands of people affected by the government's about-face should be afforded a fair opportunity to test the legality of that decision.

CONCLUSION

The petition for a writ of mandamus or certiorari should be denied.

Respectfully submitted.

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