No. 17A-570

IN THE
Supreme Court of the United States

IN RE UNITED STATES OF AMERICA, ET AL.

ON APPLICATION FOR A STAY PENDING DISPOSITION
OF A PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI

MEMORANDUM FOR RESPONDENTS THE STATES OF CALIFORNIA, MAINE, MARYLAND, AND MINNESOTA, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, JANET NAPOLITANO, AND THE CITY OF SAN JOSE IN OPPOSITION

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INTRODUCTION

On September 5, 2017, the federal government terminated the Deferred Action for Childhood Arrivals program (DACA). The government has already stopped accepting new applications for DACA protection or renewals of prior DACA grants. After March 5, 2018, hundreds of thousands of young Americans will begin to be at risk of removal from this country. The plaintiffs in these five cases maintain that the federal defendants' termination of DACA violates both the Administrative Procedure Act and the Constitution.

At a case management conference on September 21, the district court emphasized the need to litigate these claims in a way that would permit a final judgment before March 5. Defendants agreed to a schedule under which they would produce the administrative record by October 6; the parties would file dispositive motions on the plaintiffs' claims and defendants' jurisdictional defenses by November 1; and the motions would be argued on December 20.

The record defendants proffered on October 6 contained 14 documents totaling 256 pages—192 of them copies of court opinions from the preliminary injunction litigation over a different program. Defendants claimed that this was all the court and the public were entitled to see to evaluate their decision to terminate DACA, which they asserted was based solely on an assessment of "litigation risk." Unsurprisingly, the district court took a different view. It ordered defendants to complete their submission to better reflect "the whole record" on which the agency

acted (5 U.S.C. § 706), while of course allowing them to make specific assertions that particular documents should be withheld on privilege grounds.

Rather than produce that more complete record, defendants have sought emergency relief. The court of appeals held that mandamus was inappropriate here, because none of the rulings challenged by defendants is clearly erroneous. The district court then agreed to give defendants until December 22—just after a hearing on defendants' motion to dismiss and plaintiffs' motion for a preliminary injunction—to compile the completed administrative record, and stayed discovery on plaintiffs' non-APA claims until the same date. Defendants have now asked this Court to enter a stay of indefinite duration while it considers a new petition for mandamus or certiorari.

Defendants cannot make the showings required for such a stay. They cite no compelling argument either for certiorari or for mandamus relief from this Court, which would require the Court to hold (among other things) that defendants' contentions are "clearly and indisputably" correct. On the contrary, their administrative-record arguments are premised on a view of administrative law that finds no support in this Court's cases. Defendants argue that the administrative record is confined to whatever documents an agency chooses to present to a reviewing court to support the stated reason for its decision; that agencies may unilaterally exclude pre-decisional documents from the record, on the premise that they are all "deliberative"; and that courts are essentially powerless to order an agency to complete an administrative record, even if the agency clearly considered

omitted material before making its decision. Those arguments are directly contrary to lower court precedent and to the longstanding practice of federal agencies—including, at least until this litigation, the Department of Justice. And as to privilege issues, defendants seek mandamus regarding case- and document-specific rulings without first even satisfying the requirements for asserting the privileges on which they rely. They discuss only a few examples of the documents they believe to be privileged—in some cases relying on factual assertions made for the first time in this Court—without making any real effort to show that the district court's specific rulings were clearly and indisputably incorrect. Moreover, the privilege issues defendants seek to present here do not need to be resolved now, rather than on appeal from a later judgment (if they remain relevant at that time).

The balance of the equities also tilts steeply against an indefinite stay of the sort defendants seek. The burdens they point to—again supported by new factual assertions in declarations that were never presented to the lower courts—mostly involve the ordinary work required to assemble the "whole record." That work is required in every APA case, and here defendants agreed to undertake it on a compressed schedule. Similarly, the possibility of debatable privilege rulings as to specific materials is a routine one, and one routinely managed by district and appellate courts in the ordinary course—not through emergency writ proceedings in this Court. What is not routine about this case is the human and public harm that defendants' decision to rescind DACA has already imposed and imminently threatens. The public is entitled to know on what basis defendants made this

decision. Under the law, they must defend it on the "whole record" that was before them when they acted, which they are obliged to collect and make available for review by the courts. An indefinite stay of that obligation—indeed, of any obligation for defendants even to keep making progress toward that goal—could substantially compromise the lower courts' ability to manage this important litigation, and plaintiffs' ability to move it forward toward a full and fair hearing before the scheduled termination of DACA on March 5. That risk is not justified by any showing defendants have made here.

STATEMENT

1. On June 15, 2012, the Secretary of Homeland Security issued a memorandum establishing DACA. Pet. App. 47a. The memorandum applied to "certain young people who were brought to this country as children and know only this country as home," and noted that immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language." *Id.* at 47a-49a.[1] Since 2012, nearly 800,000 young people have applied for and received deferred action under DACA. D.Ct. Dkt 1 at 8.[2] A DACA

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[1] Under the DACA policy, individuals could apply for deferred action if they (1) came to the United States under the age of sixteen; (2) had continuously resided in this country since June 15, 2007, and were present here both on June 15, 2012 and on the date they requested deferred action; (3) were in school, had graduated from high school, had obtained a GED, or had been honorably discharged from the military or Coast Guard; (4) had clean criminal records and were not a threat to national security or public safety; (5) were under the age of 31 as of the date of the memorandum; and (6) did not have lawful immigration status. *See* Pet. App. 48a.

[2] Citations to the district court docket are to the docket in No. 17-cv-5211.

grant results in an initial two-year period of deferred action, which is "subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States." Pet. App. 50a. DACA recipients are permitted to reside in the United States and are generally protected from immigration arrest, detention, and removal. *See generally id.* at 48a-50a; *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058-1059 (9th Cir. 2014). During the period of deferred action, they do not 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 seek social security numbers and employment authorization. *See* 8 C.F.R. § 274a.12(c)(14); 20 C.F.R. § 422.107(e)(1); D.Ct. Dkt. 121-1 at 167-170. And they are eligible to receive favorable consideration for advance parole, allowing them to apply to travel abroad and return lawfully to the United States. *See* 8 C.F.R. § 212.5(f); D.Ct. Dkt. 121-1 at 183-184. DACA recipients may also become eligible to receive certain additional public and private benefits, such as driver's licenses, medical insurance, and tuition benefits. *See* D.Ct. Dkt. 111 at 8.

Before September 2017, the federal government had repeatedly defended the legality of DACA. In a 2014 opinion, the Office of Legal Counsel memorialized that it had given preliminary oral advice, before the announcement of DACA, "that such a program would be permissible, provided that immigration officials retained discretion to evaluate such application on an individualized basis." D.Ct. Dkt. 64-1 at 21 n.8; *see also* Pet. App. 49a (DACA memorandum noting that "requests for

relief pursuant to this memorandum are to be decided on a case by case basis" as "part of th[e] exercise of prosecutorial discretion"). In legal filings, 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, which includes according deferred action and work authorization to certain aliens who, in light of real-world resource constraints and weighty humanitarian concerns, warrant deferral rather than removal." Br. of United States as Amicus Curiae at 1, *Ariz. Dream Act Coal. v. Brewer* (9th Cir. No. 15-15307), 2016 WL 5120846 (filed Aug. 28, 2015).

2. In February 2017, then-Secretary of the Department of Homeland Security John Kelly issued a memorandum entitled "Enforcement of the Immigration Laws to Serve the National Interest." D.Ct. Dkt. 64-1 at 229. That memorandum set out new immigration policies and rescinded "existing conflicting directives, memoranda, or field guidance." *Id.* at 230. But it explicitly carved out DACA from the scope of that rescission. *Ibid.* Separately, Secretary Kelly publicly described "DACA status" as a "commitment . . . by the government towards the DACA person." D.Ct. Dkt. 121-1 at 273. For his part, President Trump agreed that the "policy of [his] administration [is] to allow the dreamers [*i.e.*, DACA grantees] to stay." *Id.* at 285.

Beginning in June 2017 or earlier, officials at DOJ and DHS began discussing DACA with officials from the Texas Attorney General's Office. D.Ct. Dkt. 124 at 80-82. On June 29, the attorneys general of Texas and eleven other States sent a letter to Attorney General Sessions demanding "that the Secretary of Homeland Security

rescind" and "phase out the DACA program," and threatening to bring a legal challenge if that did not occur by September 5. D.Ct. Dkt. 64-1 at 239. Following that letter, and after then-Secretary Kelly was reported as suggesting that Attorney General Sessions might make the final decision about whether to rescind DACA, President Trump announced that any such decision is "a decision that I make, and it's a decision that's very very hard to make."[3]

On September 4, 2017, Attorney General Sessions sent a one-page letter to the Acting Secretary of DHS, Elaine Duke. *See* D.Ct. Dkt. 64-1 at 251. The letter advised that DHS "should rescind" DACA because it "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" a separate deferred action, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which had been preliminarily enjoined. *Ibid.* The letter asserted that "it is likely that potentially imminent litigation would yield similar results with respect to DACA." *Ibid.*[4]

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[3] Lauter, *Trump Says He'll Make the Final Call on DACA, Not Subordinates*, L.A. Times, July 13, 2017, *available at* http://beta.latimes.com/politics/washington/la-na-essential-washington-updates-president-trump-says-he-not-1499977334-htmlstory.html (last visited Dec. 5, 2017); *see* D.Ct. Dkt. 64-1 at 242 (quoting article).

[4] As plaintiffs have explained in their briefing before the district court, the court decisions in *United States v. Texas* to which the Attorney General referred do not control any inquiry into the legality of the DACA program, which is both legally and factually different from DAPA. *See* D.Ct. Dkt. 111 at 25-27. Moreover, contrary to the Attorney General's assertion, those decisions did not recognize any "constitutional defect[]" in DAPA.

The next day, Attorney General Sessions held a press conference and announced the termination of DACA. *See* D.Ct. Dkt. 1-3 at 2. He reiterated the new legal positions stated in his letter, and also characterized DACA as "contribut[ing] to a surge of unaccompanied minors on the southern border" and "den[ying] jobs to hundreds of thousands of Americans." *Ibid.* He emphasized a policy assertion that the rescission of DACA would "make us safer and more secure" and "further economically the lives of millions who are struggling." *Id.* at 3.

The same day, Acting Secretary Duke issued a memorandum formally rescinding DACA. *See* Pet. App. 61a-69a. She offered 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 memorandum instructed DHS to immediately stop accepting DACA applications or applications for advance parole and to accept (until October 5, 2017) renewal applications only from individuals whose current deferred action will expire on or before March 5, 2018. *See id.* at 67a-68a. It prohibited renewal for those whose current deferred action will expire on March 5, 2018 or later. *See ibid.* Later that day, 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.[5]

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[5] *See also* Press Release, White House Office of the Press Secretary, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept.

(continued…)

3. Shortly after defendants rescinded DACA, plaintiffs filed five related complaints in the District Court for the Northern District of California.[6] Although the specific claims and the named defendants vary, all of the complaints name the Acting Secretary of DHS as a defendant and assert claims under the Administrative Procedure Act and the Fifth Amendment, including claims regarding DACA's termination and the government's use of sensitive personal information provided by DACA applicants. Plaintiffs' APA claims allege that the decision to terminate DACA was arbitrary and capricious, including because the asserted rationale was pretextual and defendants reversed a prior policy without addressing the consequences that decision would have for DACA grantees and their families or the substantial reliance interests at stake. *See, e.g.*, D.Ct. Dkt. 111 at 15-31; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52, 54 (1983) ("reasoned decisionmaking" requires agencies to consider all "important aspect[s] of

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(…continued)

5, 2017) ("Today, the Trump Administration is rescinding the previous Administration's memorandum creating the unlawful Deferred Action for Childhood Arrivals (DACA) program"), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law (last visited Dec. 5, 2017).

[6] *See* N.D. Cal. Nos. 17-cv-5211 Dkt. 1, 17-cv-5235 Dkt. 1, 17-cv-5329 Dkt. 1, 17-cv-5380 Dkt. 1, 17-cv-5813 Dkt. 1. The decision to rescind DACA also prompted litigation in New York, Maryland, and the District of Columbia. Appl. 10. The district court in the case pending in New York has issued orders on discovery and record completion. *See Batalla Vidal v. Duke*, No. 16-cv-04756 (E.D.N.Y.). Those orders are currently subject to a mandamus petition pending before the Second Circuit, which is scheduled for argument on December 14, 2017. *See* Appl. 10 n. 3. The present mandamus petition does not encompass review of the orders in the New York case.

the problem" and to "look at the costs as well as the benefits" of their actions). Plaintiffs also contend that the decision should have been subject to notice-and-comment procedures. *See, e.g.*, D.Ct. Dkt. 111 at 31-33.

The district court held a case management conference on September 21. Recognizing that thousands of young people would begin to lose their DACA benefits 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 done and also that they are done with such a record that the Court of Appeals can [review before] March 5th." C.A. Dkt. 13 at 59 (transcript). The parties agreed that it was necessary for defendants to produce the administrative record swiftly. *See id.* at 68-69. Defendants initially suggested an October 13 production date, but then informed the court that they could produce it by October 6. *See id.* at 69. The court emphasized that it would be inappropriate for defendants to "put[] in [to the administrative record] what helps them and . . . leave out what hurts them." *Ibid.* It noted that if there were documents such as "memos" or "e-mails" that are part of the record before the agency, those documents have "to be in the administrative record," even if they "hurt[] your case." *Ibid.*

The district court suggested that, after production of the administrative record, the parties could move for summary judgment or for a preliminary injunction. C.A. Dkt. 13 at 73. The court also noted that it was inclined "to give both sides a chance to take some discovery" on an expedited basis in advance of the deadline for those motions, but warned that it would "put a stop to" any

unreasonable discovery. *Id.* at 72, 74. Defendants responded that they believed discovery would be premature and that "our view coming into the hearing was that we should be permitted to file a motion to dismiss quickly within 30 days to test the allegations." *Id.* at 74, 75. After the court noted that "[i]t would have to be a lot quicker than that," however, defendants responded: "we are comfortable with the suggestion that we do cross-motions for summary judgment," allowing the court to "get to final judgment very quickly." *Id.* at 75. Defendants initially proposed a December 1 due date, but later stated they were "comfortable with the schedule that the plaintiffs have proposed," under which the motions would be due on November 1, followed by oppositions on November 22, replies on December 8, and a hearing later in December. *Id.* at 92; *see id.* at 75, 89. The district court entered a case management order reflecting that agreed-upon plan and setting a December 20 hearing date for the motions. Pet. App. 21a, 25a.

On October 6, defendants proffered an administrative record consisting of fourteen documents totaling 256 pages. Pet. App. 5a; *see* D.Ct. Dkt. 64 (notice of filing of administrative record). All "of the documents in the government's proffered record had previously been included in filings in the district court in this case, and 192 of its 256 pages consist of the Supreme Court, Fifth Circuit, and district court opinions in the *Texas v. United States* litigation" regarding the legality of the separate DAPA program. Pet. App. 5a-6a.

On October 9, plaintiffs moved for an order directing defendants to complete the administrative record and to produce a privilege log, and sought a ruling on

certain related privilege 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. 42a-44a.

The district court noted that judicial review of agency action under the APA "shall be based on 'the whole record,'" which "'ensures that neither party is withholding evidence unfavorable to its position and that the agencies are not taking advantage of post hoc rationalizations for administrative decisions.'" Pet. App. 29a (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). Although it is presumed that the administrative record submitted by an agency is complete, that presumption can be rebutted, including where plaintiffs "show, by clear evidence, that the agency relied on materials not already included in the record." Pet. App. 30a. The court held that plaintiffs here had rebutted the presumption that the record is complete. It noted that the proffered record contained only fourteen publicly available documents, and did not contain "a single document from one of [Acting] Secretary Dukes' 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 this switch in policy"; any documents regarding the agency's decision in February 2017 to retain DACA; or the news articles regarding DACA that defendants conceded the Acting Secretary had reviewed and were physically present in her office. *Id.* at 34a, 35a; *see id.* at 31a-37a.

In ordering defendants to complete the administrative record, the district court relied on longstanding precedent holding 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.'" Pet. App. 29a (quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). Accordingly, the court directed defendants to file an administrative record containing all documents "directly or indirectly considered in the final agency decision to rescind DACA," and it identified five particular categories of documents falling within the scope of that order. *Id* at 42a-43a (describing categories of documents considered directly the Acting Secretary or by government officials who provided her with direct input on her decision). The court noted that those categories were informed in part by guidance to federal agencies regarding the proper contents of the administrative record issued by the Environment and Natural Resources Division of the Department of Justice. *See id.* at 32a.[7]

The district court also held that privileged documents need not be produced in the public administrative record. Pet. App. 43a. It reasoned that it was appropriate

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[7] The referenced guidance document is available at http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf (U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999)). On October 20—after the district court's order requiring defendants to complete the administrative record and the same day that defendants filed their petition for a writ of mandamus in the court of appeals—the acting head of the Environment and Natural Resources Division circulated a memorandum to agency counsel directing that the guidance document "should be disregarded" insofar as it conflicts with the federal government's current litigating positions. C.A. Dkt. 15 at 28; see Pet. App. 10a-11a.

for such documents to be noted in a privilege log, particularly given that plaintiffs had overcome any presumption that the proffered administrative record was complete. *See id.* at 40a-42a. The court directed defendants to lodge copies of any documents withheld on privilege grounds to allow the court to "review and rule on each item." *Id.* at 43a. With respect to 84 purportedly privileged documents that defendants had already submitted for *in camera* review at the court's direction, the court excluded 49 documents from the administrative record, while holding that 35 documents should be included in whole or in part. *See ibid.*; *see also* D.Ct. Dkt. 71-2 (privilege log). The 35 documents included, among other things, "commentary in media articles regarding DACA" that "government counsel admitted that the Acting Secretary had seen." Pet. App. 36a.

Finally, the district court addressed whether defendants had waived the attorney-client privilege with respect to certain documents bearing on the legality of DACA. *See* Pet. App. 37a-39a. The court acknowledged defendants' argument "that DHS had to rescind DACA because it exceeded the lawful authority of the agency," and their "backup argument 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 the Attorney General" other than the one-page "September 4 legal opinion of the Attorney General." *Id.* at 38a. Noting that assessment of the proffered rationale for the agency's decision under the APA entails consideration of "the underlying legal analysis so far withheld from view," the court invoked the principle that, where "a party raises a claim, which in fairness

to its adversary requires it to reveal the information or communication that claim is predicated upon, it has implicitly waived any privilege over that communication." *Id.* at 37a-38a. Applying that principle here, the court held that defendants 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.

Concurrent with the district court proceedings on the administrative record relating to the APA claims, plaintiffs have served discovery on their non-APA claims, including a set of requests for production of documents, requests for admission, and interrogatories. As of this filing, defendants have not provided plaintiffs with any responses or objections to that discovery, and have not yet produced any documents. Plaintiffs also noticed several depositions and defendants have made six witnesses available for deposition. While the parties have jointly raised a few discovery issues with the magistrate judge, defendants have not presented any such issue to the district court. Nor are defendants currently subject to any order from the district court compelling the production of witnesses, discovery responses, or documents (other than the administrative record).

4. On October 20, defendants 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 granted a stay limited to "discovery and record supplementation in the district court," noting

that the "parties may continue to file motions to dismiss or motions for provisional relief" before the lower court court. C.A. Dkt. 14.[8]

After briefing and argument, the court of appeals denied the petition and lifted the stay. Pet. App. 15a. It held that defendants 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 of appeals first 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.'" Pet. App. 4a-5a (quoting 5 U.S.C. § 706). Under settled precedent, 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), and citing *James Madison Ltd. by Heckt v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996), *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993), and *Thompson*, 885 F.2d at 555). The court of appeals reasoned that the presumption that the administrative record proffered by

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[8] The following day, the district court ordered that the agreed-upon briefing and hearing schedule would remain in place, but would be limited to motions to dismiss and for provisional relief. *See* D.Ct. Dkt. 100. On November 1, defendants filed a motion to dismiss and plaintiffs filed a motion for preliminary injunction. *See* D.Ct. Dkt. 111, 114.

the government was complete had been rebutted under the circumstances of this case. *Id.* at 6a-7a. "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." *Ibid.*

Although it acknowledged defendants' 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," the court of appeals explained that "this is not what the law dictates." Pet. App. 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).

The court of appeals also concluded that it was not clear error for the district court to specify particular categories of documents to be included in the completed administrative record. Pet. App. 9a-12a. It noted that courts in the Ninth Circuit

and elsewhere routinely require administrative records "to include materials relied on by subordinates who directly advised the ultimate decision-maker" (*id.* at 9a (collecting cases)), a practice consistent with the position the federal government has taken in litigation and with longstanding guidance from DOJ (*see id.* at 9a-11a & n.6), as well as internal guidance from other federal agencies (*see infra* p. 29).

With respect to the district court's privilege log requirement, the court of appeals noted that while many district courts had "required a privilege log and *in camera* analysis of assertedly deliberative materials in APA cases," the issue had not yet been addressed at the appellate level. Pet. App. 14a. These factors weighed strongly against any finding of clear error. *See ibid.*

Finally, the court of appeals addressed defendants' privilege concerns. Although the court was "[]mindful of the separation-of-powers concerns raised by" defendants, it disagreed with their contention "that *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), bars the completion of the administrative record with any White House materials." Pet. App. 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. In addition, *Cheney*'s reasoning turned "on the fact that the Vice President himself was the subject of discovery." *Id.* at 13a. Here, although the President is a named

defendant in some of the complaints, defendants made no showing "that either his documents or those of the Vice President would fall within the completed administrative record as ordered by the district court." *Ibid.*

The court of appeals recognized that defendants "also appear[] to challenge the district court's individual privilege determinations" regarding the 35 documents that the district court had reviewed *in camera* and ordered included in the administrative record. Pet. App. 12a n.8. But although it was their burden to do so, defendants "provided little in the way of argument regarding the specific documents," and the court of appeals was "unable to conclude that the government has met its burden of showing that the district court's privilege analysis was clearly erroneous as a matter of law." *Ibid.*

Judge Watford dissented. *See* Pet. App. 16a. He acknowledged that the "decision to rescind DACA will profoundly disrupt the lives of hundreds of thousands of people, and a policy shift of that magnitude presumably would not have been made without extensive study and analysis beforehand." *Ibid.* But he accepted defendants' argument that the administrative record is whatever the agency presents to the reviewing court (*see id.* at 16a-17a), and reasoned that plaintiffs had "not made the showing necessary to trigger" expansion of the administrative record (*id.* at 18a).

5. Shortly after the court of appeals denied mandamus, the district court ordered defendants to complete the administrative record by November 22, and directed the parties to meet and confer about the schedule going forward. D.Ct.

Dkt. 188. On November 17, defendants instead filed an emergency motion for a stay in the court of appeals, asking it to stay its order pending resolution by this Court of a forthcoming application for a stay and petition for mandamus or certiorari. C.A. Dkt. 36 at 9. The court of appeals set a briefing schedule, directing the parties to address "whether the motion for a stay should instead be filed in the district court." C.A. Dkt. 37 at 2.

On November 19, plaintiffs asked the district court to stay discovery and defendants' obligation to file and serve the complete administrative record until after the district court's ruling on defendants' pending motion to dismiss and plaintiffs' pending motion for a preliminary injunction. D.Ct. Dkt. 190; *see id.* at 190-2 (proposed order). Plaintiffs explained that this temporary stay would enable the court and the parties to focus on the pending motions while allowing for a ruling on defendants' arguments concerning subject matter jurisdiction before further discovery or production of the administrative record, and noted that the district court's ruling on the pending motions could moot or clarify the issues on review in any further mandamus proceeding. *See* D.Ct. Dkt. 190 at 1-4.[9] Later that day,

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[9] Defendants repeatedly characterize plaintiffs' stay motion as "intended to obviate this Court's review." Appl. 5; *see id.* at 17, 25, 31; Pet. 16. That is not a fair description of the motion, which is available on the district court's electronic docket. The motion noted that defendants had announced their intent to seek emergency relief from this Court on November 20. *See* D.Ct. Dkt. 190 at 1. It proposed a temporary stay as a means of accommodating defendants' perceived need to pursue additional emergency proceedings, noting that the proposed stay would address defendants' argument that the district court "must assess and find subject matter jurisdiction before ordering completion of the Administrative Record or permitting

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defendants belatedly filed their own motion for a stay in the district court, asking it to stay its orders requiring discovery and completion of the administrative record "pending the Supreme Court's resolution of Defendants' forthcoming petition." D.Ct. Dkt. 191 at 2.

On November 20, the district court "allow[ed] the government an additional month to compile and to file the augmented administrative record, which due date will now be December 22, 2017," two days after the hearing on the pending motions. Pet. App. 45a. The district court further ordered that "all discovery is hereby stayed until December 22, 2017," but noted that defendants should continue to "locate and compile the additional materials" for the administrative record to allow them to meet the December 22 deadline, "in order to have a realistic opportunity to reach a final decision on the merits before [DACA's] March 5 termination date." *Id.* at 45a-46a.

The court of appeals dismissed defendants' stay motion on November 21, observing that because "the order denying relief was effective immediately upon its issuance, *see Ellis v. U.S. Dist. Court*, 360 F.3d 1022, 1023 (9th Cir. 2004) (en banc),

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discovery," while also allowing the court and the parties to focus on the pending motions. *See id.* at 1-2. That is what the reference to "obviat[ing] Defendants' efforts" to obtain an emergency stay meant. *See id.* at 4; *see also id.* at 2 (noting that stay would help "clarify the issues on which Defendants have indicated they will seek emergency review in the Supreme Court").

jurisdiction now lies with the district court, and not with this court." C.A. Dkt. 42. Ten days later, defendants filed this further emergency application for a stay.

ARGUMENT

The "'party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion.'" *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam). This Court grants such relief "only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Here, defendants must show either "a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay," or "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Defendants cannot carry either burden.

Even if they could, the "conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. GroupHosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). It "is ultimately necessary" for the Court "'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Id.* at 1305; *cf. Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). The balance here tilts steeply in favor of requiring defendants to complete the

administrative record in the manner and on the schedule directed by the district court.

I. DEFENDANTS HAVE NOT MADE THE SHOWINGS NECESSARY TO JUSTIFY A STAY OF THEIR OBLIGATION TO COMPILE AND PRODUCE THE WHOLE ADMINISTRATIVE RECORD

Defendants first seek a stay that would free them from any obligation to compile or produce the whole record underlying their decision to terminate DACA until after this Court disposes of the pending petition for a writ of mandamus or certiorari. The Court should deny that stay because defendants have not established any fair prospect of obtaining relief on mandamus or certiorari review. Moreover, such a stay would threaten to disrupt the fair and prompt adjudication of the underlying claims in a way that could cause harm to plaintiffs and the public at large far exceeding any inconvenience to the defendants of completing the work necessary to compile the whole record.

A. There Is No Fair Prospect of Mandamus or Certiorari

1. Defendants Have No "Clear and Indisputable" Right to Relief

Mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). In seeking it, defendants must show, first and foremost, that they have a "clear and indisputable" right to relief. *E.g.*, *id.* at 381 (internal quotation marks omitted). In their effort to carry that burden, defendants assert that the lower courts have "violate[d] multiple fundamental principles of judicial review of agency action" (Appl. 21) by rejecting their arguments about the proper scope and contents of the

administrative record. But the principles that defendants characterize as "fundamental" are not supported by this Court's precedents. Indeed, they conflict with the longstanding practices of federal agencies (including the Department of Justice) in compiling administrative records in comparable cases.

a. *Proper contents of the administrative record.* Defendants first contend that federal agencies have essentially unreviewable discretion to decide what documents are included in the administrative record in an APA case. *See* Appl. 21-22. They read this Court's decisions as limiting judicial review of agency decisions to "'the record the agency presents to the reviewing court'" (Appl. 21 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)))—which they apparently understand to mean whatever the agency chooses to present. Defendants also appear to believe that it is improper for a court to order an agency to complete the administrative record even where, as here, it seems clear that the proffered 14-document record does not include all of the documents that were before the agency at the time of its decision. *See* Appl. 21 & n.5; *see also* Pet. App. 6a-7a, 31a-36a.[10]

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[10] Before this Court, defendants assert that the 14-document record produced on October 6 includes "all non-deliberative materials considered by the Acting Secretary in reaching her decision to rescind DACA." Appl. 11; Pet. 7. In the district court, however, defendants' counsel acknowledged that there were at least some materials—"media items"—that were retrieved from the Acting Secretary's office and that she personally saw but that "were not . . . in the [proffered] administrative record." Pet. App. 36a (district court order); *see* C.A. Dkt. 13 at 167, 170 (transcript of Oct. 16, 2017 district court hearing). And in oral argument at the court of appeals, counsel explained that non-privileged documents were excluded from the record based on a unilateral determination that they were "irrelevant" to the agency's *proffered basis* for the decision to rescind. C.A. Arg. Video 54:43-54:44;

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Defendants' position that the administrative record consists of whatever an agency chooses to present to a reviewing court as the basis for its decision finds no support—let alone any clear or indisputable grounding—in the APA or this Court's cases. On the contrary, the APA directs that review of agency decisions, including under the arbitrary-and-capricious standard, "shall" be conducted based on "the whole record." 5 U.S.C. § 706. And access to the whole record that was before the agency is especially important when courts conduct arbitrary-and-capricious review, which must consider, among other things, whether an agency explained its decision in a way that "runs counter to the evidence before [it]," or failed to offer a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The cases cited by defendants start from the premise that the agency has already satisfied its statutory obligation to produce that "whole record." For example, in *Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam), this Court observed that the "*entire* administrative record was placed before" the district court. *Id.* at 139 (emphasis added). And in *Florida Power*, the Court contemplated judicial review based on "the record before the agency." 470 U.S. at 744; *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("review is to be based

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see id. at 54:23-54:36 ("What we are saying is the record that we based our decision on is what we have provided and anything else is either deliberative or not part of the record."); *id.* at 57:02-57:10 (responding affirmatively to the question, "you're saying that by virtue of the reasons given by the Acting Secretary, that, in effect, defines the scope of the administrative record?").

on the full administrative record that was before the Secretary at the time he made his decision"). The point of those cases was not that agencies have unreviewable discretion to pick and choose what documents to include in the record they present for review by the courts. *Camp* and *Florida Power* stand only for the proposition that if a court determines based on consideration of the *whole* record that an agency action cannot be sustained on APA review, the proper remedy is "to remand to the agency for additional investigation or explanation," not "to conduct a *de novo* inquiry into the matter being reviewed" in order to create a *new* record in the district court. *Florida Power*, 470 U.S. at 744; *see Camp*, 411 U.S. at 142.

Lower courts, too, have properly insisted that APA review be based on the whole record that was before the agency. *See, e.g.*, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (""The "whole" administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by the agency decision-makers and includes evidence contrary to the agency's position.""); *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("[A] complete administrative record should include all material that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision." (quoting *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994, 1000 (7th Cir. 1980))). Courts have recognized that the whole record "'is not necessarily those documents that the *agency* has compiled and submitted as

"the" administrative record.'" *Thompson*, 885 F.2d at 551. And where there is good reason to believe that an agency has not produced the complete record that was before it when it made a decision, they have routinely ordered agencies to complete the administrative record.[11]

Nor are defendants correct in suggesting that the only circumstance in which a court may order an agency to include additional documents in the record is when there is a showing of bad faith or improper behavior. See Appl. 21 & n.5 (quoting *Overton Park*, 401 U.S. at 420). That argument conflates two different legal concepts. Although courts and commentators sometimes use similar terms imprecisely, administrative law recognizes a distinction between *supplementing* an administrative record and ordering an agency to *complete* the administrative record it has proffered for review. A court may supplement even a facially complete record, including through discovery or even depositions of agency officials, based on "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. That showing is not necessary, however, when a court orders an agency to complete the administrative record because "it appears the agency has relied on documents or

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[11] *See, e.g.*, *Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 26 (D.D.C. 2016) ("[T]he Court finds that the Secretary must complete the record by adding the 2003 outlier-payment regulation's interim final rule and impact file" notwithstanding defendant's argument that the interim rule "is irrelevant"); *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1269 (D. Colo. 2012) ("I find Federal Respondents must complete the Record with the Colby Notes."); *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996) ("The United States is directed to complete the administrative record by adding to it all materials considered by the agency in deciding the Miami petition for recognition not already included therein.").

materials not included in the record." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.).[12] An order to "complete" the record merely assures that the courts base their APA review on the "whole record" before the agency. 5 U.S.C. § 706. The authority of courts to order completion of an administrative record follows from this statutory text and from "the rule that judicial review is based upon the full administrative record in existence at the time of the agency decision." *Public Power*, 674 F.2d at 794; *see* Administrative Conference of the United States Recommendation 2013-4: The Administrative Record in Informal Rulemaking 11-12 (adopted June 14, 2013) ("Supplementation *or* completion may be appropriate when the presumption of regularity has been rebutted, such as in cases where there is a strong showing that an agency has acted improperly or in bad faith *or* there are credible allegations that the administrative record for judicial review is incomplete." (emphasis added)).[13] There was no need

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[12] *See* Beck, Report to the Administrative Conference of the United States, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* 67 (May 14, 2013) ("Introduction of new material into an administrative record for judicial review is generally divisible into two categories: (1) Completion of the certified administrative record with material possessed and considered by the agency but not included in the certified administrative record, and (2) Supplementation of the certified administrative record with material that was not considered by the agency."), *available at* https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf (last visited Dec. 5, 2017).

[13] *Available at* https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf (last visited Dec. 5, 2017).

for the district court to make a finding of bad faith or improper behavior before ordering defendants to complete the record.[14]

Defendants' argument that the administrative record is confined to whatever documents an agency decides to present also conflicts with the longstanding practice of federal agencies, including the Department of Justice. Until very recently, DOJ guidance had instructed federal agencies that, "in compiling the administrative record of agency decisions other than a formal rulemaking or an administrative adjudication," the 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 final agency decision-maker," and "is not limited to documents and materials relevant only to the merits of the agency's decision." Guidance to Federal Agencies on Compiling the Administrative Record, *supra*, 1-2. DOJ recently instructed other agencies to "disregard[]" that longstanding guidance—on the same day that it filed its mandamus petition in the court of appeals in this case. C.A. Dkt. 15 at 28. But it appears that other federal agencies continue to instruct their staff to compile and produce a complete administrative record in the conventional manner.[15]

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[14] Here, plaintiffs have argued that defendants' proffered rationale for rescinding DACA was pretextual. *See, e.g.*, D.Ct. Dkt. 111 at 29. Although the district court has not yet ruled on this issue, a finding of pretext would supply a basis for record supplementation under *Overton Park*.

[15] *See, e.g.*, U.S. Dep't of the Interior, Standardized Guidance on Compiling a Decision File and Administrative Record 5 (June 27, 2006), *available at*

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Defendants' position is not just legally unsupported; it would create dangerous incentives for federal agencies and interfere with the ability of courts to review APA claims. For a court "to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The APA thus "requires review of 'the whole record,'" because a review of "less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Ibid.*[16] If, as defendants seem to suggest, a federal agency had virtually unfettered discretion to decide the contents of the administrative record, it could "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund, Inv. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). That would hamstring judicial review by forcing it to proceed based on "a fictional account of the actual decisionmaking process." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977).

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https://www.fws.gov/policy/e1282fw5.pdf (last visited Dec. 5, 2017); U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Guidelines for Compiling an Administrative Record 4-7 (Dec. 21, 2012), *available at* http://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf (last visited Dec. 5, 2017).

[16] *See also* S. Rep. 752, 79th Cong., 1st Sess. 28 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."); H.R. Rep. No. 1980, 79th Cong., 2nd Sess. 46 (1946) (same); *cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-490 (1951) (discussing history of APA "whole record" requirement in context of review of formal agency factfinding).

There is no merit to defendants' suggestion that they are relieved of their obligation to produce the complete administrative record here "because of the nature of the agency action at issue," which they characterize as a "discretionary enforcement policy decision" based on their newfound concerns about the legality of DACA and "the prospect of litigation attacking DACA." Appl. 9, 22, 23.[17] The APA requires review based on "the whole record" before the agency, regardless of the proffered final basis for the agency's decision. 5 U.S.C. § 706; *see* Pet. App. 8a. Even the basis proffered by the agency here—its "litigation-risk" rationale—cannot be evaluated, or even sensibly understood, without consulting the whole record of non-privileged materials that were before the agency. For example, defendants acknowledge that staff at DHS and DOJ communicated with state officials regarding the purported litigation threat. *See, e.g.*, D.Ct. Dkt. 124 at 80-82. Materials documenting those communications would not be privileged, and any such materials that were before the agency when it made its decision would surely be relevant in assessing the stated rationale. Moreover, any rational assessment of how to respond to litigation risk would balance that threat against the costs to the government and the economy of abandoning a policy that allowed hundreds of thousands of residents to obtain work authorization and other benefits. Factual information that was before the agency regarding those costs should also be

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[17] Since almost any agency decision or policy is at least potentially subject to litigation, a rule allowing an agency to unwind a policy or program based on purported litigation risk and then shield the record underlying that decision from the view of the courts and the public could create opportunities for abuse.

considered during arbitrary-and-capricious review. *See generally State Farm*, 463 U.S. at 42 (review under the arbitrary and capricious standard considers whether an agency decision "is rational" and was "based on consideration of the relevant factors"); *cf.* Pet. App. 8a, 35a.[18]

b. *"Deliberative" documents.* Next, defendants argue that an agency may unilaterally exclude any documents it deems to be "deliberative" from the administrative record it proffers to a reviewing court (Appl. 23), without affording plaintiffs or the courts any opportunity to understand or challenge those exclusions. Although defendants characterize this argument as a "fundamental principle[]" of judicial review of administrative decisions (*id.* at 21), they cite no precedent from this Court actually supporting it—let alone establishing that they are clearly and indisputably correct.

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[18] To put the same point in a different light, when the Attorney General announced the termination of DACA, he emphasized empirical and policy assertions that DACA had "contributed to a surge of unaccompanied minors" seeking entry to the country, with "terrible humanitarian consequences," and had "denied jobs to hundreds of thousands of Americans," so that terminating it would "make us safer" and confer economic benefits on "millions who are struggling." D.Ct. Dkt. 1-3 at 2-3; *see supra* p. 8. The district court has not yet had a chance to address whether those and similar statements help show that defendants' asserted "litigation risk" rationale for their termination of DACA is pretextual. But even accepting that proffered rationale for the moment, it seems quite clear that defendants' evaluation of what to do about any such risk was influenced by an apparent conclusion, at least by the Attorney General, that the policy was an affirmatively harmful one to begin with. Yet the record produced by defendants for judicial review includes not a single document either supporting or undercutting that conclusion.

Defendants invoke the settled rule that courts reviewing administrative-law claims generally should not "probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan I*); *see also* Appl. 23-24; Pet. 27. The *Morgan* line of cases involved formal agency adjudications, in which the government had produced administrative records comprising thousands of pages of documents that were before the agency. *See Morgan I*, 304 U.S. at 16; *United States v. Morgan*, 313 U.S. 409, 417 (1941) (*Morgan II*). In that context, the Court observed that it was inappropriate to depose the Secretary regarding administrative-law claims, *see Morgan II*, 313 U.S. at 422, or to probe the Secretary's "mental processes" in making a decision, *Morgan I*, 304 U.S. at 18; *but see Overton Park*, 401 U.S. at 420 (courts "may require the administrative officials who participated in [a] decision to give testimony" based on "a strong showing of bad faith or improper behavior").

Nothing in those cases suggests that an agency may exclude all "pre-decisional documents" relating to a challenged decision (Appl. 23)—such as "'emails, letters, [and] memoranda'" (*ibid.*)—from the record it proffers to a reviewing court, based on nothing more than the agency's unilateral determination that all such documents are subject to the deliberative process privilege. On the contrary, such documents routinely appear in administrative records produced by federal agencies and reviewed by courts. *See, e.g.*, *Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017) (pre-decisional memorandum analyzing evidence before the agency). Before changing its mind partway through this litigation, DOJ

itself advised federal agencies that their administrative records generally should include emails, notes, draft documents circulated for comment, minutes or transcripts of meetings, decision documents, and other pre-decisional materials. *See* Guidance to Federal Agencies on Compiling the Administrative Record, *supra*, 3-4; *see also id.* at 4 (agencies should prepare log for documents withheld on privilege grounds). There is no basis for a position that all such documents are simply excluded from the record.[19]

Of course, certain pre-decisional documents will be protected from public disclosure under the deliberative process privilege or otherwise. The district court here acknowledged as much, when it directed that defendants could withhold material from the publicly filed record "based on deliberative-process, or any other privilege," subject to a requirement that they log the document, assert any claimed privilege, and make the document available for *in camera* review by the court. Pet. App. 43a. But defendants are quite wrong to suggest that *every* pre-decisional agency document not otherwise public is automatically excludable, without any

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[19] Defendants also rely (at Appl. 24) on *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986). In reviewing a formal agency adjudication by the Nuclear Regulatory Commission, the court in *San Luis Obispo* refused to supplement the administrative record with transcripts of private and pre-decisional deliberations between commissioners. *See id.* at 44-45. But *San Luis Obispo* did not involve an informal agency proceeding like this one, and it did not hold that agencies may unilaterally exclude all internal, pre-decisional materials from an administrative record. To the extent some lower courts have adopted positions regarding deliberative documents that are closer to defendants' new position than the approach followed by the courts below (*see* Pet. 27-28 & n.6), that hardly establishes that defendants have a clear and indisputable right to relief on this issue. *See* Pet. App. 14a-15a.

obligation on the agency to identify the exclusion or assert a specific privilege justifying it. That position ignores the other requirements for successful assertion of the deliberative process privilege. First, the document must truly be "deliberative." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). That is, the document must "reflect advisory opinions, recommendations and deliberations comprising" the process leading to a government decision. *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The privilege does not protect "material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737. Second, the "deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need"—a determination courts must make "on a case-by-case, ad hoc basis." *Ibid.*; *see Warner Commc'ns Inc.*, 742 F.2d at 1161.

Defendants' position would convert the deliberative process privilege from a qualified privilege to a categorical exclusion from the record, under which the agency is the sole arbiter of whether a document is privileged and courts have no opportunity to test whether a document is truly deliberative or to decide whether the privilege has been overcome. Even based on the limited information now available to plaintiffs, this case illustrates the hazards of that approach. When defendants produced their hand-picked administrative record, they certified that it contained all "of the non-privileged documents that were actually considered by" the Acting Secretary "in connection with" the decision to rescind DACA. D.Ct. Dkt. 64

at 3. But the privilege log they later produced revealed more than a half-dozen news articles that the Acting Secretary "actually considered . . . in her decision to rescind the DACA policy" but were not included in the proffered record. D.Ct. Dkt. 71 at 28; 71-2. Defendants asserted the deliberative-process privilege with respect to each of those documents, apparently because they contained hand-written notes. Even if those notes are privileged, however, the underlying articles are not, and defendants were required to include clean or redacted versions of the articles in the administrative record. *See, e.g.*, *Loving v. Dep't of Defense*, 550 F.3d 32, 41 (D.C. Cir. 2008) ("[T]he government has the 'burden of demonstrating that no reasonably segregable information exists within . . . documents withheld' under the deliberative process privilege"). If agencies had unreviewable discretion to exclude documents from the administrative record presented to the court on the basis of unilateral agency determinations that they are "deliberative," these and other agency omissions would never even come to light.

c. *Privilege rulings.* Finally, defendants seek mandamus relief regarding privilege rulings by the district court, including its rejection of defendants' privilege claims with respect to certain documents that it reviewed *in camera*. *See* Appl. 24-25. Appellate courts are typically reluctant to use the extraordinary power of mandamus to police pretrial privilege disputes, including those involving privileges asserted by the federal government. *See, e.g.*, *In re Shalala*, 996 F.2d 962, 964-965 (8th Cir. 1993). There is no reason for deviating from that practice here, nor any

basis for concluding that defendants have carried their burden of showing that the district court's privilege rulings were clearly and indisputably incorrect.

Defendants complain that the district court "summarily overrode" their privilege claims without first "receiving . . . briefing regarding any specific assertion of privilege." Appl. 24. Given that the parties had agreed to file cross-motions for summary judgment on November 1, and would need to review the administrative record before filing those motions, it was understandable that the district court acted with dispatch in reviewing the tranche of 84 documents and the accompanying privilege log that defendants provided it on October 16. After reviewing the documents *in camera*, the court ruled on each privilege claim (Pet. App. 43a) and directed defendants to produce the complete record by October 27 (D.Ct. Dkt. 80 at 1). Defendants' suggestion that the court's review was slipshod is belied by the fact that it *agreed* with defendants that 49 of the documents should be wholly excluded from the public record, and that two other documents should be withheld in part. Pet. App. 43a.

If defendants were genuinely concerned that they were prejudiced by an inability to file a brief with argument and authorities regarding their remaining privilege claims, they could easily have submitted such briefing in the context of a motion for reconsideration or clarification. In the seven weeks since the district court's ruling, however, they have not done so. Moreover, in all that time defendants have made no effort to satisfy any of the threshold criteria for asserting the privileges on which they rely. Among other things, government privilege

assertions must be made "by supervisory personnel" at a "sufficient rank to achieve the necessary deliberateness in the assertion." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000); *see, e.g.*, *ibid.* (deliberative process privilege "requires: (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"); *cf. Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (discussing requirements for asserting presidential communications privilege). Rather than make the particularized assertions and showings necessary to support their privilege claims in the trial court, defendants appear to favor an approach that attempts to manage privilege issues by seeking extraordinary writ relief on the basis of sweeping assertions about their right to insulate administrative actions from informed review.

But even in their mandamus petitions, defendants have not made any showing that could allow a court to conclude that individual privilege rulings by the district court were clearly and indisputably wrong. The court of appeals observed that defendants provided it so "little in the way of argument regarding the specific documents ordered disclosed by the district court" that it was "unable to conclude that the government has met its burden of showing that the district court's privilege analysis was clearly erroneous as a matter of law." Pet. App. 12a, n.8. The same is true here. The mandamus petition defendants have filed in this Court devotes just three paragraphs to the district court's privilege rulings. *See* Pet. 31-32. It offers

high-level descriptions of a few documents but does not even attempt to establish that each of the district court's individual rulings was clearly erroneous.

Nor have defendants demonstrated any clear and indisputable entitlement to exclude all documents originating in the White House from the administrative record. *See* Appl. 19, 22, 24-25. No one disputes that documents actually subject to the presidential communications privilege should remain confidential. That privilege does not, however, apply to every document emanating from the White House complex. *See Judicial Watch*, 365 F.3d at 1114. The district court already excluded three documents out of the seven collected from the Acting Secretary's office for which defendants asserted "executive privilege," and defendants remain free to present the lower courts with concrete arguments about why any other document is subject to the same privilege.[20] But any suggestion that all documents originating in the White House are categorically ineligible for inclusion in an agency record is unsupported.

In particular, although defendants rely extensively on *Cheney* (*see* Appl. 22; Pet. 22, 26, 30, 32), they do not grapple with the differences between that case and

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[20] In this Court, defendants assert for the first time that one of the documents they seek to protect is a draft "memorandum from the White House Counsel to the President himself." Appl. 24-25; *see* Appl. Add. 26. It is difficult for plaintiffs to assess that characterization without seeing the document. But defendants did not include information about the drafter or intended recipient of that document in their privilege log. *See* Dkt. 71-2 at 2 (privilege log entry for DACA_RLIT00000069 omitting information in "To" and "From" columns). And they never advanced those details before the district court or the court of appeals as a basis for protecting the document.

this one. The nub of the problem in *Cheney* was that the district court authorized "overly broad discovery requests" directed at the Vice President and other members of an internal White House working group established "to give advice and make policy recommendations to the President." 542 U.S. at 372, 386. Given the nature of the working group, the breadth of the requests, and the status of the officials to whom they were directed, it could safely be presumed that substantially all of the requested documents would be subject to genuine claims under the presidential communications privilege. This Court thus concluded that requiring the Vice President to assert the privilege on a document-by-document basis was inappropriate. *See id.* at 388-389. Here, the district court required the collection of DACA-related documents from only those White House staff who directly advised the Acting Secretary on her decision, and it underscored that defendants were under no obligation to "scour the . . . White House for documents for inclusion in the administrative record." Pet. App. 43a-44a. The defendants here have made absolutely no showing—in this Court or below—that compliance with the district court's order would impose burdens on them similar to those resulting from the discovery requests in *Cheney*. For example, they have not asserted that the order would affect a large number of White House staff, or that some substantial portion of those staffers' documents are likely to be privileged based on the nature of their position or their activities.

Defendants also attack the district court's finding that they waived the attorney-client privilege regarding certain communications bearing "on whether or

not DACA was an unlawful exercise of executive power and therefore should be rescinded." Pet. App. 39a; *see* Appl. 25. But they mischaracterize the nature of that ruling. The district court did not hold "that an agency waives its attorney-client privilege on a categorical basis simply by weighing legal risks or announcing a particular view of the law." Appl. 25. Indeed, it flatly rejected that overbroad characterization of its holding. *See* Pet. App. 38a. The district court instead found an "at issue" waiver (*id.* at 37a-39a.) based on the particular circumstances of this case, in which the government terminated a longstanding policy that it previously had repeatedly defended as legally valid (*see supra* p. 6); the sole proffered explanation cited a legal about-face by the Attorney General (Pet. App. 67a); and defendants disclosed the one-page statement of the Attorney General's changed position (D.Ct. Dkt. 64-1 at 251) but not any significant explanation or analysis addressing either the new position or the change. Under those circumstances, the district court made a limited waiver finding based on the settled principle that a litigant may not use the attorney-client privilege as both a sword and a shield. Defendants have not established that they are likely to demonstrate a clear and indisputable right to interlocutory relief from that ruling.

2. Defendants Are Not Likely to Satisfy the Remaining Requirements for Mandamus

As to the other requirements for mandamus, defendants first assert that "the district court's orders will be effectively unreviewable on appeal from final judgment." Appl. 20; *see Cheney*, 542 U.S. at 380-381. In fact, all of the legal issues presented in the mandamus petition can be reviewed on appeal from a final

judgment. Most of defendants' arguments concern the proper scope of the administrative record. *See* Appl. 21-24. An appellate court can readily decide if the district court erred in ordering defendants to complete the administrative record—and, if so, can review an appeal of the district court's eventual decision on the APA claims by considering only the 14-document record produced by defendants in October. Likewise, "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege," as well as other privileges. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). The "[a]ppellate 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." *Ibid.*

Second, a grant of extraordinary relief would not be appropriate under the circumstances of this case. *See Cheney*, 542 U.S. at 381. Defendants chose to terminate a longstanding policy affecting hundreds of thousands of young people and set an arbitrary March 5, 2018 deadline for DACA grantees to begin losing their deferred action. They have now interfered with the ability of the courts to fairly and promptly adjudicate APA challenges to that extremely consequential decision by producing a hand-picked administrative record consisting of just a few documents. These are not circumstances of the type that warrant a discretionary exercise of this Court's mandamus power. *See ibid.*

3. This Court Is Not Likely to Grant Certiorari and Reverse the Court of Appeal's Denial of Mandamus

Defendants have also failed to establish "a reasonable probability that four Justices will consider" their petition "sufficiently meritorious to grant certiorari." *Perry*, 558 U.S. at 190. They do not identify any actual conflict between the courts of appeals that is implicated by the petition. While the underlying subject matter of this case is undoubtedly of great importance, defendants have not established that threshold record-related issues raised in their current petition warrant review by this Court. And even if the Court were inclined to take up some or all of those questions at an appropriate time, this interlocutory petition presents an exceptionally poor vehicle for review because it arises out of the court of appeals' denial of a mandamus petition. This Court would thus review the presented questions through the lens of the mandamus standard, rather than answering them on a de novo basis. Developments in the ongoing proceedings below, such as the district court's rulings on the pending motions to dismiss and for a preliminary injunction and on questions of whether defendants' asserted basis for rescinding DACA was pretextual, could affect either the need for or the context of review. Finally, even if this Court were to grant review, for the same reasons that the Court should not grant mandamus relief itself (*see supra* pp. 24-41), there is no "fair prospect that a majority of the Court [would] vote to reverse" the court of appeals' refusal to do so. *Perry*, 558 U.S. at 190.

B. The Balance of the Equities Tilts Sharply Against a Stay

Equitable considerations also weigh against a stay of defendants' obligation to compile and produce the administrative record. In considering stay applications, this Court balances the equities by exploring "'the relative harms to applicant and respondent, as well as the interests of the public.'" *Barnes*, 501 U.S. at 1305 (1991) (Scalia, J., in chambers). Defendants substantially overstate the harms they would suffer from denial of a stay and ignore the considerable harms that a stay would inflict on plaintiffs and the public at large.

1. Defendants' principal argument regarding harm is that compiling the whole administrative record underlying their decision to rescind DACA will consume time and resources. *See* Appl. 26-28. The mere collection of the documents that comprise the whole record for APA review, however, does not rise to the level of irreparable harm. Moreover, defendants undertook the burden of compiling the whole record in September, when they agreed to produce the whole administrative record by October 6, before the filing of any dispositive motions. *See* C.A. Dkt. 13 at 68-69 (transcript of case management conference). The district court made clear at the time that it expected that record to include documents such as "memos" and "e-mails" that were before the agency when it made its decision, and that defendants could not exclude documents that "hurt[] them" while including those that "help[] them." *Id.* at 69. By the December 22 deadline to produce the complete administrative record, defendants will have had three full months in which to fulfill their statutory obligation to compile the "whole record" that was before the agency.

5 U.S.C. § 706. That may be less time than it sometimes takes to compile what may, when completed, be a relatively sizeable record. But this is an important case, affecting hundreds of thousands of individuals, which must proceed quickly because of an on-rushing deadline for the commencement of harmful agency action, set by defendants themselves.

To substantiate the purported harms they are suffering from having to complete the administrative record, defendants rely on declarations from agency officials that were executed on December 1 and unveiled for the first time in this Court. *See* App. 26-27; App. Add. 18-38. The typical rule is that arguments in support of a stay should first be made in the lower courts. *See* Sup. Ct. R. 23.3. That requirement serves the interests of justice and efficiency because the judges of the lower courts are "'on the scene' and more familiar with the situation than the Justices of this Court." *Graves v. Barnes*, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers). Here, for example, when the district court ordered defendants to complete the administrative record on October 17, it underscored its desire to set "practical limits" on the extent of defendants' obligations in order to avoid undue burdens. D.Ct. Dkt. 79 at 13. And the court was receptive to a request to further postpone the deadline for producing the whole administrative record, Pet. App. 45a-46a, even without being presented with any specific evidence regarding the supposed burdens of compiling that record. If defendants believed there were concrete reasons why they needed even more time to comply with the October 17 order or additional practical accommodations, they could have presented the lower

courts with the information they now rely on here. But they opted not to do that, instead filing perfunctory stay motions with *no* discussion or evidence of harm. *See* C.A. Dkt. 36 (Nov. 17, 2017); D.Ct. Dkt. 191 (Nov. 19, 2017). That is a reason for this Court to ignore the specific averments of harm that defendants have belatedly presented to this Court in the first instance, or at least to discount them heavily.[21]

Even if the Court considers defendants' belated declarations, the information contained in them does not satisfy defendants' burden of establishing "that irreparable harm will likely result from the denial of the stay." *Perry*, 558 U.S. at 195. Based on their interpretation of the October 17 order, defendants assert that they have already identified "approximately 5,195 documents" at DHS and "more than 3,000 DOJ documents" that could be part of the administrative record. Appl. Add. 23, 32.[22] That is not a trivial number of documents, but it is not out of line

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[21] Defendants also submitted to this Court four declarations dated October 12 that *were* filed with the district court. Appl. Add. 5-17. But none of those declarations describes how much time it will take for defendants to comply with the requirements of the district court's October 17 order requiring completion of the administrative record. Instead, they describe the time and resources that would be involved in responding to pending discovery requests in these cases as well as those pending in New York, and in responding to "Plaintiffs' interpretation of the contents of the administrative record as defined in their Motion," which was broader than what the district court ordered on October 17. *Id.* at 12.

[22] The declarations also contain assertions about the defendants' preparations for responding to discovery requests regarding non-APA claims in these and other cases (*see* Appl. Add. 20-21, 32, 34-35), but that is a distinct issue. In any event, those purported burdens cannot support a stay of plaintiffs' obligation to complete the record—or of discovery—when defendants have not even served responses or objections to plaintiffs' written discovery requests, let alone sought a protective order. *See infra* pp. 52-53.

with the volume of documents frequently found in administrative records. Even in routine APA cases, administrative records often include tens of thousands of pages or more. *See, e.g.*, *Georgia ex. rel Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) ("more than a million pages"); *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1120 n.2 (D. Or. 2002) ("more than 22,000 pages"). It is not surprising that the complete administrative record would be of a comparable size for a momentous decision such as this one, regarding a policy that has been in place for half a decade and directly affects three-quarters of a million people.

Defendants also raise the concern that, absent a stay, they will need to produce 35 documents they believe to be privileged on December 22. Appl. 27-28. As noted above, however, this Court has explained that post-judgment appeals are generally sufficient to protect litigants' rights regarding privileged documents. *Mohawk Indus.*, 558 U.S. at 109. And defendants ignore other means to mitigate any perceived harm. Plaintiffs have previously noted the possibility that the disputed documents could be filed under seal (C.A. Dkt. 13 at 31), at least in the first instance. Alternatively, "[a]nother long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions," which can allow it to obtain appellate review of its privilege claims "without having to reveal its privileged information." *Mohawk Indus.*, 558 U.S. at 111.

2. Defendants contend that plaintiffs "will suffer no harm from a stay." Appl. 31; *see id.* at 25. That is incorrect. Plaintiffs claim that the decision to rescind DACA was arbitrary and capricious, in violation of the APA. All the parties have

agreed that it is important for the district court to reach a final judgment on those (and other) claims in advance of defendants' March 5 deadline. S*ee, e.g.*, C.A. Dkt. 13 at 70 (defendants' statement to the district court that "[w]e think your suggestion to get to final judgment quickly makes a lot of sense in this case"). After that date, hundreds of thousands of individuals will begin to lose their DACA status. For the courts to conduct the type of review mandated by the APA, defendants must compile and produce "the whole record" before then. 5 U.S.C. § 706. But a stay of defendants' obligation to compile and produce the record "pending disposition of the government's petition for a writ of mandamus (or certiorari) and any further proceedings in this Court" (Appl. 32) could easily last until long after March 5. If the Court construed the petition as one seeking a writ of certiorari, for example, it might not issue a decision until June. In the context of this time-sensitive case, the consequences of such a stay could be "tantamount to a decision on the merits in favor of" defendants. *E.g.*, *Nat'l Socialist Party of Am. v. Village. of Skokie*, 434 U.S. 1327 (1977) (Stevens, J., in chambers). That would profoundly harm the interests of plaintiffs, including the six individual plaintiffs who are DACA grantees.

Moreover, a stay entered now allowing defendants to suspend all activities related to "locat[ing] and compil[ing]" the documents that are part of the whole record (Appl. 31) could easily impede the progress of this litigation, even if this Court then expedited proceedings and ultimately denied relief. If such a stay were lifted in early January, defendants have represented that they will "require

substantial time" to identify and assess properly documents potentially within the scope of the administrative record. Appl. Add. 34. That work should have been substantially completed in the last three months; if defendants are now freed of any obligation to advance that work until January, it will undoubtedly interfere with the timely conduct of this important litigation.[23]

3. Finally, defendants utterly fail to address "'the interests of the public at large.'" *Barnes*, 501 U.S. at 1305 (Scalia, J., in chambers). Like plaintiffs, the public has a powerful interest in the fair adjudication of plaintiffs' legal claims in advance of the March 5 deadline. Approximately 700,000 residents of the United States had a current grant of DACA status at the time of the September 5 rescission, allowing them to work lawfully and live openly without fear of detention or removal. As the federal government has recognized, DACA status enables these young people "to enroll in colleges and universities, complete their education, start

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[23] Defendants contend that plaintiffs "have freely acknowledged that consideration of their pending claims requires no immediate discovery or expansion of the administrative record" by moving for their own stay in the district court. Appl. 25. That is inaccurate. Plaintiffs proposed a temporary stay of record production (and discovery) until after the court's ruling on pending motions to dismiss and for provisional relief, which will be argued on December 20. As plaintiffs' motion explained, that proposal would have accommodated defendants' "concern that the [district court] should rule on subject matter jurisdiction before requiring production of the complete Administrative Record or permitting additional recovery." D.Ct. Dkt. 190 at 2. It was also designed to enhance efficiency by eliminating defendants' perceived need to seek emergency relief on November 20 (in the midst of district court briefing) and allowing the district court's rulings on the pending motions to moot or clarify some of the issues in this case. *Ibid.* Nothing in the motion "acknowledges" that it would be tenable to stay defendants' record-production obligations pending this Court's review of a petition for mandamus or certiorari.

businesses that help improve our economy, and give back to our communities as teachers, medical professionals, engineers, and entrepreneurs—all on the books." D.Ct. Dkt. 121-1 at 1823. Defendants have now terminated DACA in a manner that the plaintiffs in this case (and plaintiffs in many other cases pending across the country (*see* Appl. 10)) claim violated the APA. The public at large has a profound interest in fairly and expeditiously resolving those claims based on the whole record that was before the agency when defendants made this momentous decision.

II. DEFENDANTS ARE NOT ENTITLED TO A STAY OF DISCOVERY

In addition to seeking a stay of their obligation to compile and produce the administrative record, defendants request a complete stay of the pending discovery regarding plaintiffs' non-APA claims (which has already been stayed by the district court until December 22) until after the disposition of the government's petition and further proceedings in this Court. Appl. 32. Defendants are not entitled to a stay of discovery principally because the legal rulings from which their petition seeks relief do not actually address any dispute over discovery matters. It would be passing strange to prevent the parties from conducting *any* discovery—even following a denial by the district court of defendants' motion to dismiss—while this Court conducts mandamus or certiorari proceedings that will not ultimately entail any holding on discovery issues.

Defendants seem to misremember their own litigation decisions on the subject of discovery. They assert that they argued "at the outset of these actions that the suits were subject to threshold dismissal and that no discovery would be

appropriate," but the "district court overruled the government's objections" and authorized discovery to proceed before a ruling on a motion to dismiss. Appl. 10-11. True, defendants briefly noted their threshold arguments for dismissal at the initial case management conference on September 21, and expressed the view that discovery would be inappropriate before a ruling on those arguments. *See* C.A. Dkt. 13 at 74, 75 (transcript). In response, the district court indicated that it was inclined to allow some "reasonable" discovery to proceed but would also be open to considering a "quick[]" motion to dismiss. *Id.* at 74, 75. Rather than agree to file an expeditious motion to dismiss presenting their threshold arguments—which presumably could have been decided before discovery got underway—defendants proposed and agreed to an approach involving cross-motions for summary judgment due on November 1. *Id.* at 75, 92. So while defendants did convey their preference to hold off discovery to the district court, they ultimately embraced a case management plan under which they knew that both parties could serve limited discovery on the non-APA claims before a ruling on defendants' threshold arguments. *See id.* at 107 (noting defendants' request "that there's equality on all sides" for discovery requests, "including for any affirmative discovery that the Government might serve").

Moreover, any suggestion that the district court "overruled" any concrete "objections" (Appl. 11), as to either discovery generally or specific discovery requests, is unfounded. Prior to their requests for a stay of discovery pending their mandamus petitions, defendants never presented the district court with any motion

arguing that discovery was categorically inappropriate or presenting legal authority in support of that position. Nor have they sought any ruling from the district court as to particular discovery matters. For example, although defendants complain to this Court about the breadth and volume of plaintiffs' written discovery requests in service of their non-APA claims (Appl. 6-7, 29), they have yet to provide plaintiffs with written responses or objections, let alone to seek a protective order from the magistrate judge or the district court regarding those requests. And while defendants note with alarm that plaintiffs "took the depositions of six government officials and advisers" (Appl. 30), they neglect to mention that defendants made those witnesses available without seeking judicial relief.[24] Defendants are not

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[24] When operating under the initial agreed-upon schedule in which cross-motions for summary judgment were due on November 1, plaintiffs noticed several depositions and conferred with defendants about the possibility of other depositions that were not noticed. *See* Appl. 14 n.4. With the exception of Acting Secretary Duke, defendants have not sought a protective order regarding any of the noticed depositions. As to the Acting Secretary, the parties raised this issue with the magistrate judge in a joint letter. D.Ct. Dkt. 88. The magistrate judge concluded in October that a limited, four-hour deposition could proceed, in light of the Acting Secretary's unique access to information as the purported "sole decision maker" and the looming deadline for summary judgment briefs. D.Ct. Dkt. 94. But defendants have "not yet appealed that decision to the district court" (Pet. 13), and although they suggest that the district court has made up its mind on the matter based on a preliminary comment made from the bench in mid-October (Appl 30 & n.6), the court has made clear more recently that this issue is still open for decision (D.Ct. Dkt. 85 at 2). Any judicial assessment of whether a senior official should be subject to deposition will of course depend on the circumstances and the information available to the parties from other sources at the time. Now that the schedule for summary judgment motions has been substantially delayed, that will obviously affect the resolution of any continued dispute between the parties regarding this deposition.

presently subject to any order from the district court compelling them to produce any particular document, witness, or discovery response.

Given that defendants never directly asked the district court for relief on specific discovery matters, it is not surprising that their mandamus petition in the court of appeals (as in this Court) did not directly seek relief on specific district court rulings pertaining to discovery. That is why the court of appeals noted that "the propriety of discovery on the non-APA claims, including the propriety of depositions, are not properly before us at this time." Pet. App. 3a-4a n.1; *see* Pet. 18-19 n.4. To be sure, defendants' mandamus petitions include vague assertions that the district court's September 22 case management order authorizing limited discovery was inappropriate. *See* Pet. 19, 20, 22, 34; C.A. Dkt. 1 at 1. But given their failure to develop that issue before the district court, and the lack of any district court ruling on any concrete discovery dispute, the court of appeals correctly held that discovery issues were not a proper subject of mandamus review at this juncture. Defendants' stay application in this Court does not establish any likelihood that this Court will disturb that holding or itself grant mandamus relief regarding non-existent district court discovery rulings. *Perry*, 558 U.S. at 190.

Nor does the balance of the equities favor a prolonged stay of discovery. Defendants are not correct in suggesting that, absent a stay from this Court, they will face immediate harm when the district court's stay expires on December 22. *See* Appl. 28. By that date, the district court will have received briefing and heard argument on defendants' pending motion to dismiss, and may well have ruled on

some or all of the arguments in that motion. If defendants' arguments prevail in whole or in part, that could narrow their obligations with respect to discovery. In any event, once discovery resumes, defendants will presumably serve their responses and objections to plaintiffs' discovery requests. If the parties cannot reach an accommodation on areas of disagreement, defendants can seek a protective order. That is how civil litigation ordinarily functions. Any perceived harm that defendants fear they will suffer from having to participate in that process does not warrant an interlocutory exercise of this Court's authority to grant a stay under the All Writs Act.

On the other side of the balance, a categorical stay of discovery until after this Court disposes of defendants' petition threatens serious harm to the interests of plaintiffs and the public at large. As discussed above (*supra* p. 48), it is possible that the Court's review of the administrative-record issues that are actually presented in defendants' petition could extend well beyond March 5. In that event, the stay requested by defendants would deprive plaintiffs of any ability to obtain the discovery necessary to litigate their non-APA claims to final judgment until after the date on which hundreds of thousands of individuals begin to lose their DACA status. Even after a denial of defendants' motion to dismiss those claims by the district court, plaintiffs and the courts would be left without the information needed to fully adjudicate important claims regarding defendants' abrupt termination of DACA.

CONCLUSION

The application should be denied.

Respectfully submitted,

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