No. 17A570

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES OF AMERICA, ET AL.

REPLY IN SUPPORT OF
APPLICATION FOR A STAY PENDING DISPOSITION
OF PETITION FOR A WRIT OF MANDAMUS
AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In these five related cases under the Administrative Procedure Act (APA), respondents challenge the former Acting Secretary of Homeland Security's discretionary determination to wind down, in an orderly fashion, a policy of prosecutorial discretion based on her assessment of the legal and policy issues at stake, including the risks posed by imminent potential litigation. The decision was not based on any factual findings or particular evidentiary record. If reviewable at all, it plainly requires no factual materials to evaluate its reasonableness.

Yet absent relief from this Court, the government will be forced to undertake an onerous page-by-page review of thousands of documents collected from the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the White House itself, to be ready on December 22, 2017, either to publicly file an expanded administrative record that would improperly include deliberative materials or to submit privileged documents for in camera review -- with no assurance its assertions of privilege will not promptly be overruled. On the same day, respondents' discovery demands will be reinstated, which (in conjunction with

related litigation) have not only implicated 1.6 million documents, but include demands for depositions designed to probe the mental processes of agency officials, including the former Acting Secretary herself. At the same time, the government must publicly file a memorandum from the White House Counsel to the President along with 34 other privileged documents -- as to which the district court summarily overruled or disregarded applicable privileges, without any briefing or argument -- all in the name of facilitating expeditious judicial review. In light of respondents' failed effort to have the district court stay these same orders pending resolution of the government's motion to dismiss and respondents' motion for provisional relief, they cannot credibly claim they will suffer prejudice from a temporary stay.

For these reasons, this case easily satisfies the criteria for a stay pending mandamus or certiorari review. See Appl. 18. The district court's orders directing discovery and expansion of the administrative record exceed the court's authority in this suit for judicial review of agency action and "constitute[] a 'clear abuse of discretion.'" Pet. App. 16a (Watford, J., dissenting). The harms caused by those orders are immediate and irreparable. Petitioners respectfully request that this Court stay the district court's orders while it considers the government's petition for a writ of mandamus or, in the alternative, a writ of certiorari.[1]

[1] Respondents incorrectly assert (Indiv. Opp. 15-18) that the government failed to comply with Sup. Ct. R. 23.3. The government moved in both the district court and the court of

ARGUMENT

1. There is a fair prospect that the Court will grant the government's petition because the district court's orders mandating expansion of the administrative record and authorizing intrusive discovery are irreconcilable with bedrock principles of judicial review of agency action. See Appl. 21-25; Pet. 18-32.

a. First, the district court's orders violate the fundamental principle that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam); see Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (APA review is based on "the record the agency presents to the reviewing court."); Appl. 21-23; Pet. 19-26.

Respondents urge (State Opp. 24-29; Indiv. Opp. 19) that the

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appeals for a stay of all record expansion and discovery pending this Court's review -- precisely the same relief it seeks here. C.A. Doc. 36 (Nov. 17, 2017); D. Ct. Doc. 191 (Nov. 19, 2017). The court of appeals concluded it lacked jurisdiction to grant the request, Appl. Add. 1-2, while the district court granted a brief extension but otherwise "[d]enied" the government's motion, id. at 3-4. Rule 23.3 requires nothing more. Respondents complain (State Opp. 45-46; Indiv. Opp. 16-17) that the stay application includes declarations not filed in district court. But "[a]ffidavits * * * may be attached to [a stay] application [in this Court] if thought desirable," including where the application references "facts * * * not in the record or opinions below." Stephen M. Shapiro et al., Supreme Court Practice § 17.9, at 890 (10th ed. 2013). See, e.g., INS v. Legalization Assistance Project of the L.A. County Fed'n of Labor, No. A-426, stay granted, 510 U.S. 1301 (1993); McNary v. Haitian Ctrs. Council, Inc., No. A-775, stay granted, 503 U.S. 1000 (1992); U.S. Dep't of Justice v. Rosenfeld, No. A-936, stay granted, 501 U.S. 1227 (1991).

APA provides for review of "the whole record," 5 U.S.C. 706, and posit (State Opp. 25) that this Court's decisions in Camp and Florida Power "start from the premise" that the "whole record" is available for review. But those arguments assume respondents' conclusion that the "whole record" must include every "email[], letter[], memo[], note[], media item[], opinion[] [or] other material[]" that was "seen or considered, however briefly" by the Acting Secretary or considered by any person "anywhere in the government" that provided her with "input" into her decision. Pet. App. 42a-43a. To the contrary, in the absence of a "strong showing of bad faith or improper behavior," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), an agency determines the contents of the administrative record, not plaintiffs and not the reviewing court. An agency can decide what materials are relevant to its decision and on what basis it is willing to defend its actions. See Florida Power, 470 U.S. at 744 ("[C]ourts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.") (emphasis added); see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (Courts may not "impose upon the agency [their] own notion of which procedures are 'best.'"). That is especially so for a discretionary statement of enforcement policy like the one at issue here.

Respondents contend (State Opp. 30; Indiv. Opp. 23-24) that, so read, this Court's precedents would "gravely impair judicial

review." Again, this Court has held otherwise. "[I]f the reviewing court * * * cannot evaluate the challenged agency action on the basis of the record before it," judicial review is not thwarted; rather, the action is not sustained, and, "except in rare circumstances," the matter is "remand[ed] to the agency for additional investigation or explanation." Florida Power, 470 U.S. at 744. In other words, it is "the agency [that] bears the risk associated with filing an incomplete record, not the challengers." Pet. App. 17a (Watford, J., dissenting).

In any event, respondents provide no reason why the existing record in this case affords an insufficient basis for review of the Acting Secretary's decision. Respondents assert that an expanded record is necessary to determine whether she "failed to consider an important aspect of the problem," Indiv. Opp. 19, 27 (citations omitted), like the "costs to the government and the economy" of rescinding DACA, State Opp. 31. But the Acting Secretary clearly identified, in the Rescission Memo, the bases for her decision. No additions to the record or discovery is needed to determine whether those bases were sufficient to survive deferential arbitrary-and-capricious review.

Nor are additions to the record or discovery needed to ensure that the Acting Secretary's explanation for her decision did not "run[] counter to the evidence before [the agency]." State Opp. 25 (citation omitted); see Indiv. Opp. 19. The Acting Secretary's action was a statement of enforcement policy informed by an

assessment of litigation risk. She relied not on any particular evidentiary record for that assessment, but on the legal and policy issues at stake. Her explanation cannot run counter to a "stud[y] or analysis of the consequence of the Rescission," Indiv. Opp. 21, when it did not depend on any factual finding of what those might be. And it makes no difference if her analysis differed from those of her subordinates; the lawfulness of her action is a question that, if reviewable at all, should be determined objectively, not by canvassing the opinions of agency personnel.[2]

b. The district court also clearly erred by directing the inclusion of vast amounts of deliberative materials in the administrative record, contrary to the principle that it is "not the function of the court to probe the mental processes" of agency decisionmakers. Appl. 23 (quoting Morgan v. United States, 304 U.S. 1, 18 (1938) (per curiam)); see Appl. 23-24; Pet. 27-31.

Respondents seek to distinguish (State Opp. 33; Indiv. Opp. 26) between depositions probing the decisionmaking process and the compelled production of emails, memoranda, and notes memorializing internal deliberations of those same individuals. But as the D.C.

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[2] Respondents again rely (State Opp. 29 & n.15; Indiv. Opp. 19-20) on informal guidance provided by DOJ's Environment and Natural Resources Division (ENRD) to its client agencies on compiling an administrative record (and its client agencies' subsequent guidelines). But as the government has explained (Pet. 24-25), because an agency bears the risk of producing an insufficient record, it may reasonably choose to include more than the law requires in the record it compiles. That ENRD formerly suggested agencies should take this cautious approach says nothing at all about what a court may order an agency to produce.

Circuit has repeatedly recognized, the compelled disclosure of deliberative agency materials -- such as transcripts of closed meetings, draft opinions, or internal memoranda -- is no less intrusive. See Pet. 27-28 & n.6 (citing, e.g., San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 28, 44-45 (en banc) (plurality opinion), cert. denied, 479 U.S. 923 (1986); Checkosky v. SEC, 23 F.3d 452, 489 (1994) (Randolph, J.)). Just as it would be wholly improper to require a district court to include a law clerk's bench memorandum (or "verbal inputs," D. Ct. Statement 4) in the record for appellate review, "so [too] the integrity of the administrative process must be equally respected." United States v. Morgan, 313 U.S. 409, 422 (1941).

Respondents speculate (State Opp. 35) that if an agency were not required to submit a privilege log documenting the deliberative materials it has withheld, the agency would become the "sole arbiter" whether a document is privileged or the privilege could be overcome. That argument misconceives the relationship of courts and agencies in judicial review. An agency's internal deliberations are not matters that the APA considers relevant to the court's review but then grudgingly affords some protection. Contra D. Ct. Statement 3 (referring to privileged documents as "otherwise legitimate contents of the administrative record"). Because the subjective motivations or opinions of agency employees are irrelevant to judicial review of agency action, pre-decisional deliberative materials are "immaterial as a matter of law." In re

Subpoena Duces Tecum, 156 F.3d 1279, 1279 (D.C. Cir. 1998). At least absent a strong showing of bad faith, they are excluded entirely from the court's review.

c. The district court compounded its errors by summarily overriding the government's invocations of privilege, including deliberative-process, executive, and attorney-client privileges, after ordering the government to submit documents for in camera review. Appl. 24-25; Pet. 31-32. The individual respondents confusingly assert (at 27) that the government "does not challenge the district court's process for making those rulings." To the contrary, the district court's conclusory disregard for multiple important privileges -- including the privilege attaching to presidential communications -- confirms the urgent need for this Court's intervention. For their part, the State respondents attempt to defend (at 37) the district court's dismissive treatment of government privileges based on the perceived need to resolve this litigation quickly. But respondents do not remotely justify the district court's rush to decide sensitive issues of privilege, summarily and without briefing, in a span of 24 hours, weeks before the parties' deadlines for submitting their threshold motions.

d. Finally, the district court erred by ordering record expansion and discovery before even considering the government's arguments that the Acting Secretary's discretionary enforcement policy is precluded from review by 8 U.S.C. 1252(g) and committed to agency discretion by law, see 5 U.S.C. 701(a)(2); Heckler v.

Chaney, 470 U.S. 821, 831 (1985). See Appl. 22; Pet. 20-21.

Respondents assert (Indiv. Opp. 22) that Section 1252(g) cannot apply because the decision to rescind DACA does not directly commence proceedings, adjudicate a case, or execute a removal order. But Section 1252(g) was "designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations," so that "if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed" for determining an alien's removability. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 485 (1999). Respondents' challenge to the Acting Secretary's "no deferred action" determination outside that streamlined process is precisely what Section 1252(g) is supposed to prevent.

As for 5 U.S.C. 701(a)(2), respondents assert (Indiv. Opp. 22) only that the Fifth Circuit previously rejected the argument that DAPA and the expansion of DACA were unreviewable exercises of discretion. The government, however, has never stated any agreement with those justiciability rulings. And even if a court could have reviewed the adoption of DACA as "an abdication of [DHS's] statutory responsibilities," Chaney, 470 U.S. at 833 n.4, that would not make its rescission subject to review. See Texas v. United States, 809 F.3d 134, 168 (5th Cir. 2015) (affirming that a "denial of voluntary departure" by DHS would be nonjusticiable), aff'd by equally divided Court, 136 S. Ct. 2271 (2016).

2. The district court's orders will, unless stayed, cause irreparable harm to the government. By contrast, a stay of further discovery and record expansion pending this Court's review will cause respondents no discernible prejudice. See Appl. 25-31.

a. The district court's record-expansion order places DHS, DOJ, and the White House under an immediate obligation to process and review page-by-page thousands of documents, including numerous predecisional and deliberative materials. Appl. 26-27. All responsive documents must then be tendered to the district court on December 22, either by filing them publicly in the administrative record or providing them for in camera review together with a privilege log and proposed redactions. Pet. App. 43a, 45a-46a.

Similarly, if discovery is allowed to resume, the government will be forced to respond to respondents' sweeping document requests, including demands for "[a]ny and all documents and communications considered or created" anywhere within DHS or DOJ "as part of the process of determining whether to continue, modify, or rescind DACA." Appl. Add. 42. In response to that demand and similar requests in related litigation, the government has collected for potential review approximately 1.6 million documents at DHS alone. Id. at 20. Even after accounting for review already completed, it would take at least 2,000 hours to respond to respondents' pending document requests. Id. at 25. With all due respect, that discovery is anything but "limited, narrowly directed, [and] reasonable." D. Ct. Statement 3 (citation omitted).

Respondents do not dispute the tremendous intrusion and diversion of resources required to process and review the documents implicated by the district court's orders. Nor do they dispute that, absent relief from this Court, those efforts cannot be undone. Respondents strain to characterize these extraordinary burdens as "[m]ere litigation expenses," Indiv. Opp. 36, akin to those "required in every APA case," States Opp. 3.[3] But they do not and cannot identify any precedent requiring the government to redeploy its programmatic resources in the manner required here -- much less to do so to review documents that are beyond a reviewing court's authority to demand. See Appl. 29-30. And respondents have not explained how extending those burdens to any and all White House officials who consulted with the Acting Secretary -- including the President himself -- would be reconcilable with Cheney v. U.S. District Court, 542 U.S. 367 (2004).

Respondents' assertions (State Opp. 50-51; Indiv. Opp. 7, 17-18) that the government failed to preserve its objections to discovery are flatly incorrect. As noted (Pet. 6), the government repeatedly explained that any discovery in these cases would be "unnecessary" and "inappropriate." 9/21/17 Tr. 22; see id. at 23,

[3] Respondents observe that other APA cases, such as those involving factually intensive rulemakings, sometimes yield records spanning many thousands of pages (Indiv. Opp. 34-35). None of the examples cited by respondents remotely resembles this case, which concerns the issuance of a discretionary enforcement policy requiring no particular evidentiary foundation.

34-35. The government coordinated in good faith in the manner identified by respondents (e.g., Indiv. Opp. 7) only after the district court admonished that it was ordering immediate discovery and "you're not going to talk me out of that." 9/21/17 Tr. 36 (emphasis added); see id. at 20, 22-23, 34-36. When the government later decided to seek mandamus review of that erroneous ruling, the government moved to stay all discovery, see D. Ct. Doc. 81 (Oct. 18, 2017), and the district court promptly refused, see D. Ct. Doc. 85 (Oct. 19, 2017).

b. Absent a stay, on December 22, the government also will be compelled to publicly disclose dozens of documents that are protected by the deliberative-process privilege, executive privilege, or other privileges. See Appl. 27-28; Pet. App. 43a. Contrary to respondents' suggestion (State Opp. 3), nothing about those compelled disclosures is "routine"; among the documents is a memorandum from the White House Counsel to the President. Appl. Add. 26. Such improper "forced disclosure[s] of privileged material" constitute a classic form of "irreparable harm." In re Perrigo Co., 128 F.3d 430, 437 (6th Cir. 1997); see Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 110 (2009) (Mandamus review is appropriate for a "particularly injurious or novel privilege ruling.").

Respondents assert (State Opp. 37-38; Indiv. Opp. 28, 31-32) that the government did not exhaustively present its claims of privilege in district court.[4] Any failure to observe customary

[4] Respondents also suggest (State Opp. 47; Indiv. Opp. 31)

procedures for litigating privilege rests with the district court. The court required the government to file a "privilege log" with two days' notice, then promptly tender those privileged documents for in camera review. D. Ct. Doc. 67 (Oct. 10, 2017). One day after receiving them, the district court summarily ordered 35 documents disclosed without any briefing or argument. Pet. App. 43a. The government was never offered any opportunity to perfect its invocations of privilege, which -- if respondents had decided to pursue the matter, and if the district court had followed normal procedures -- would have been presented with a motion for protective order or in response to a motion to compel. See, e.g., In re Sealed Case, 121 F.3d 729, 741 (D.C. Cir. 1997) (The "White House ha[d] [no] obligation to formally invoke its privileges in advance of the motion to compel.").

c. Absent further relief, the government will also be required to produce numerous witnesses -- including the former Acting Secretary herself -- for depositions designed to probe the mental processes informing the agency's decision. See Appl. 30-

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that the government could seek leave to file privileged materials under seal. But the district court directed that the documents "shall be included" in the publicly filed administrative record, Pet. App. 43a, and, in any event, these documents do not belong in that record at all. Respondents' alternative suggestion -- that the government disobey the court's orders compelling disclosure of White House documents, invite sanctions to be entered against the Executive Branch, and appeal those sanctions upon final judgment (State Opp. 47) -- underscores the dramatic extent to which, absent this Court's intervention, respondents would set "coequal branches of the Government" on "a collision course." Cheney, 542 U.S. at 389.

31. Respondents do not deny that they intend to pursue those depositions, nor do they deny that the district court will likely allow them. Cf. id. at 30 n.6. Respondents instead argue that the government has not yet exhausted all opportunities to object to every "particular discovery matter[]" that respondents have initiated (State Opp. 52).[5] But the government's objection is not to a particular deposition or interrogatory; it is to the conduct of vast discovery that is wholly out of place in judicial review of agency action -- especially a discretionary enforcement policy -- and before the court even addresses the pending threshold motions. In light of the court of appeals' refusal to confine the district court to the proper bounds of its review authority, only this Court can grant the relief necessary to set this litigation back on course.

3. Respondents will suffer no harm from the requested stay. Respondents themselves maintain that, based on the existing administrative record, they are already entitled to an injunction affording them full relief. And at no time have respondents explained why record expansion or discovery is necessary to pursue their claims. To the contrary, respondents' unsuccessful attempt in district court to seek an indefinite stay of those very activities, in a tactical effort to "obviate" the need for this

[5] Respondents erroneously assert (Indiv. Opp. 37) that the government declined to appeal the magistrate judge's order compelling the Acting Secretary's deposition. The government "has not yet appealed that decision to the district court" only because of "intervening stays of discovery." Appl. 30 n.6. If discovery recommences, so will litigation of discovery matters.

Court's review, clearly belies any assertion that a stay pending this Court's review would somehow cause them any real and meaningful harm.

Respondents assert (e.g., State Opp. 4, 23, 42; Indiv. Opp. 3, 38-39) that a stay pending this Court's review would "threaten to disrupt" the district court's ability to resolve this litigation in the coming months. But even assuming this litigation needs to be completed by March 5, 2018 (which it does not),[6] respondents offer no explanation why final judgment in this case would need to await the conclusion of the record-expansion and discovery activities that even respondents have recognized are not the immediate "focus" of this litigation. State Opp. 20. If the requested stay of discovery and record expansion is granted pending this Court's review, nothing would prevent the district court from addressing the parties' respective threshold and merits arguments and resolving this litigation -- on an appropriately expedited basis -- in accordance with long-established principles governing the judicial review of agency action. Accord D. Ct. Statement 2.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2017

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[6] The Rescission Memo allowed individuals whose DACA requests would expire between September 5, 2017 and March 5, 2018 to file renewal requests, but the March 5 date does not mark a watershed of expirations. Existing DACA grants will remain in effect until they expire according to their terms, which may be as late as 2020 for some recipients. See Pet. 4-5.