June 26, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' letter brief regarding discovery outside of the administrative record, *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Defendants take the unsupportable position that Plaintiffs' challenge to the demand for person-by-person citizenship status should not be reviewed on the "whole record" of the agency action, 5 U.S.C. § 706, but rather on a partial – and admittedly incomplete – record. This approach is inconsistent with the text and purpose of the Administrative Procedure Act, ignores Plaintiffs' well-founded allegations of bad faith, and disregards Plaintiffs' constitutional claim. Accordingly, Plaintiffs respectfully request that this Court (1) direct Defendants to complete their deficient administrative record and produce a privilege log for any materials withheld on a claim of privilege; (2) authorize extra-record discovery in light of Plaintiffs' allegations of bad faith and the need to explain complex subject matter; (3) permit discovery on Plaintiffs' constitutional claim, which is not subject to the record rule at all; and (4) order that discovery should begin immediately and proceed on an expedited schedule.

1. The Court should direct Defendants to complete their administrative record. The APA requires this Court to conduct "plenary review of the Secretary's decision, . . . to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also* 5 U.S.C. § 706 (in evaluating agency action, "the court shall review the whole record"). This "whole record" requirement is a necessary element of effective judicial review, because the § 706(2) standard requires the Court to determine, *inter alia*, whether the agency "relied on factors which Congress has not intended it to consider," made a decision 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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

The Court cannot properly conduct this inquiry without access to the whole record, as opposed to simply those parts of the record Defendants have selectively presented. Here, the administrative record is facially deficient in numerous respects. For example:

- Defendants recently supplemented the administrative record to disclose for the first time that the Secretary began evaluating the citizenship demand in early 2017, and that as part of that evaluation process, the Secretary and his staff "consulted with Federal governmental components," including the Department of Justice (DOJ). AR 1321 (Docket No. 189). But apart from background materials, the record includes no documents that pre-date DOJ's December 2017 request or that reflect this outreach to other agencies.
- Defendants acknowledge that the Secretary had numerous conversations about the citizenship demand that are nowhere reflected in the record. For example, the Secretary testified to

extensive discussions with the Justice Department – "We spent a lot of time talking with Justice about the request."[1] – but the record contains no documents reflecting any communications with DOJ about the citizenship request apart from the single December 2017 letter.[2]

- Although the record includes summaries of conversations between Secretary Ross and some stakeholders, the record omits any information regarding how that limited group was selected, and excludes the briefing materials that a Cabinet Secretary would routinely review before conducting fact-finding on such a consequential decision. *See NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975) (omission of agency head's briefing books from the administrative record was error).
- The Census Bureau's Chief Scientist concluded that adding a citizenship demand "is very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources." AR 1277. But the record includes none of the materials that he relied on in reaching this view, which are materials "indirectly considered" by the Secretary and therefore necessary to complete the whole record. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989).

The Court should therefore direct Defendants to complete the deficient record in this case. *See Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (reversing grant of summary judgment where there was "a strong suggestion that the record before the Court was not complete").

In addition, the Court should direct Defendants to produce a privilege log for all materials withheld from the record on a claim of privilege. Defendants have represented that the record contains only the "non-privileged" material considered by the Secretary, and Defendants have acknowledged withholding unspecified additional materials on privilege grounds.[3] To exclude probative material – without even stating the claim of privilege or allowing it to be tested – undermines the Court's obligation to review the "whole record."

Where a litigant asserts that privilege doctrines justify withholding documents germane to the litigation, as Defendants claim here, a court may direct the production of "an adequately detailed privilege log" in order "[t]o facilitate its determination" of that issue. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (quotation marks omitted). This requirement is no less applicable where the litigant is a federal agency, and the legal claims implicated by the document arise under the APA. Indeed, the Second Circuit has rejected the argument that no privilege log should be produced in an APA challenge, reasoning that withheld

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[1] *Review of the FY2019 Budget Request for the U.S. Dep't of Commerce: Hearing Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the S. Comm. on Appropriations*, 115th Cong. 16 (May 10, 2018) (testimony of Secretary Ross), at 2018 WL 2179074.

[2] The Assistant Attorney General for Civil Rights is responsible for "[e]nforcement of all Federal statutes affecting civil rights, including those pertaining to elections and voting," 28 C.F.R. § 0.50(a), and the Voting Section of the Civil Rights Division employs dozens of attorneys, analysts, statisticians, and others responsible for carrying out this function. It is difficult to imagine that the Secretary could "spen[d] a lot of time talking with Justice" about the request for data to better enforce the vote-dilution prohibition in Section 2 of the Voting Rights Act, yet the record could plausibly contain no information from the staff responsible for enforcing that Act.

[3] During the parties' meet-and-confer, Defendants acknowledged that materials were withheld from the administrative record on privilege grounds; declined to identify even the categories of those materials; and refused to specify any bases for the claim of privilege except to state that various governmental privileges may apply.

materials may have been improperly excluded and that "without a privilege log, the District Court would be unable to evaluate the Government's assertion of privilege." *In re Nielsen*, No. 17-3345, slip op. at 3 (2d Cir. Dec. 27, 2017) (order denying mandamus petition) (Ex. 1); *see also Gill v. Dep't of Justice*, No. 14-cv-120, 2015 WL 9258075, at *6-7 (N.D. Cal. Dec. 18, 2015); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, No. 10-cv-2008, 2011 WL 1102868, at *3 (D. Kan. Mar. 23, 2011); *New York v. Salazar*, 701 F. Supp. 2d 224, 235 (N.D.N.Y. 2010) (magistrate's order), *aff'd*, 2011 WL 1938232 (N.D.N.Y. Mar. 8, 2011).

The ordinary practice of various federal agencies – including the Commerce Department itself – refutes any contention that producing a privilege log is unwarranted in APA litigation. A 2012 guidance document issued by a component of the Commerce Department recognizes that "[w]hen the Custodian . . . determines to withhold a directly or indirectly considered document under claims or privilege or protection, the Custodian must produce a Privilege Log," including "written justification for the withholding of documents," to allow resolution of "any disputes about whether such documents must be made available." U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., *Guidelines for Compiling an Administrative Record* 14 (Dec. 21, 2012), www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf. The Court should therefore direct Defendants to produce a privilege log that identifies any materials withheld from the record and states the basis for asserting any privilege.[4]

2. The Court should authorize extra-record discovery in this case. Although judicial review of agency action ordinarily proceeds on the basis of the administrative record alone, *see Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997), this "record rule" is subject to several exceptions that apply here.

First, the Supreme Court has authorized extra-record investigation where there is a showing of bad faith on the part of agency decisionmakers. *Citizens to Pres. Overton Park*, 401 U.S. at 420. Plaintiffs are required to make a "strong preliminary showing" of bad faith to expand the scope of review, *see Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974), and this case more than amply clears that bar.

Most notably, the public record demonstrates tremendous political pressure on the Census Bureau from the President and senior White House staff to add the citizenship question. *See* AR 764 (White House Chief Strategist Steve Bannon directed Kansas Secretary of State and Presidential Adviser[5] Kris Kobach to contact the Secretary in 2017 regarding the citizenship question); Am. Compl. ¶¶ 101-02 (Docket No. 85) (citing campaign statement that the President "officially mandated" the citizenship question). This evidence alone would warrant a conclusion of bad faith that justifies expanding the record. *See Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1280 (W.D. Wis. 1997) ("If there are adequate grounds to suspect that an agency decision was tainted by improper political pressure, courts have a responsibility to bring out the

[4] To the extent Defendants seek to assert the deliberative process privilege, that privilege cannot be invoked where, as here, Plaintiffs have made a "showing of bad faith." *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 234 (E.D.N.Y. 2006); *see also Salazar*, 701 F. Supp. 2d at 237 ("[W]hen the decision-making process itself is the subject of the litigation," the "overwhelming consensus" is that the deliberative process privilege does not apply).

[5] At the time of Kobach's communications with Secretary Ross, Kobach was serving as Vice Chair of the Presidential Advisory Commission on Election Integrity. Exec. Order 13,799, 82 Fed. Reg. 22,389 (May 16, 2017).

truth of the matter."); *see also Tummino v. Torti*, 603 F. Supp. 2d 519, 544-45 (E.D.N.Y. 2009) (noting that "the mere existence of 'extraneous pressure' from the White House or other political quarters would render [the agency's] decision invalid" under the APA) (quoting *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248-49) (D.C. Cir. 1971).

Defendants' shifting chronology further undermines their stated rationale. The Secretary's March 2018 decision memo states that the Secretary "set out to take a hard look" at the citizenship question "[f]ollowing receipt of the DOJ request" in December 2017, *see* AR 1313; and the Secretary has provided sworn testimony to Congress that "[t]he Department of Justice . . . initiated the request for inclusion of the citizenship question."[6] But Defendants now acknowledge that the Secretary actually began looking into the citizenship demand nearly a year before receiving the DOJ request, and that the Secretary in fact solicited that December 2017 request from DOJ. AR 1321 (Docket No. 189). *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) ("[A] plausible interpretation . . . is that senior management . . . had long since decided" how to proceed, "but needed to find acceptable rationales for the decision").

In addition, the record shows an extremely unusual decisionmaking process. The Census Bureau typically takes years to test the census design and validate new questions, Am. Compl. ¶¶ 58-62, but here Defendants decided to add the citizenship demand in a matter of months and with no testing. *See Tummino*, 427 F. Supp. 2d at 233-34 ("[T]hat the FDA's decisionmaking processes were unusual in four significant respects satisfies the court that the necessary showing of bad faith . . . has been made."). And the Secretary overruled the uniform view of his experienced professional staff and advisory committees, *see* AR 1277-85, which further supports a conclusion of bad faith. *Tummino*, 427 F. Supp. 2d at 231-33 (evidence that senior personnel overruled professional staff supports a "strong preliminary showing of bad faith").

Moreover, the record already includes strong evidence that the stated reason – to better enforce the vote-dilution prohibition – is pretext. The claim that Section 2 enforcement requires person-by-person citizenship information collected through the census is not credible given that those data have never been available since the Voting Rights Act was enacted in 1965. *See* Br. of the Leadership Conference on Civil & Human Rights et al. as Amici Curiae, at 12-17 (Docket No. 187). Indeed, the White House-directed briefing from Kobach to Secretary Ross identified the need to collect citizenship data for a different purpose: to address the claimed problem that "aliens" are "counted for congressional apportionment purposes." AR 764. The Court should therefore authorize extra-record discovery in light of this showing of bad faith.

Second, courts have authorized extra-record evidence to permit explanation of complex subject matter or to determine whether the agency has considered all relevant factors. *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Indeed, courts regularly consider expert testimony in APA litigation involving the census. *E.g.*, *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993) (describing expert testimony of statisticians and demographers in census challenge); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1093 (S.D.N.Y.

[6] *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (Mar. 22, 2018) (testimony of Secretary Ross), at 2018 WLNR 8951469.

1987) (same). If permitted, Plaintiffs intend to proffer expert testimony regarding (a) the operation of the federal statistical system and principles for designing valid statistical instruments[7]; (b) the standards for demonstrating racially polarized voting in Section 2 vote-dilution claims; (c) the harms that would attend a disproportionate population undercount; and (d) the deterrent effect on census participation of the citizenship demand.

3. The Court should permit Plaintiffs to take discovery to support their constitutional claim. Plaintiffs have pled a constitutional claim in addition to their APA claims – namely, that Defendants' demand for citizenship status will deter participation in the census and impede the "actual Enumeration" required by the Constitution. Am. Compl. ¶¶ 1, 7, 176-80. The "Supreme Court has held that a plaintiff who is entitled to judicial review of its constitutional claims under the APA is entitled to discovery in connection with those claims." *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 328 (D. P.R. 1999) (citing *Webster v. Doe*, 486 U.S. 592, 604 (1988)); *see also Rydeen v. Quigg*, 748 F. Supp. 900, 905-06 (D.D.C. 1990) (considering extra-record affidavits because "[w]hen reviewing constitutional challenges to agency decisionmaking, courts make an independent assessment of the facts and the law"). Plaintiffs are therefore entitled to take discovery regarding their constitutional claim.

4. The Court should direct that discovery may proceed immediately. Defendants take the indefensible position – already rejected by the Second Circuit – that "in evaluating agency action, a court may only consider materials that the Government unilaterally decides to present to the court." *In re Nielsen*, slip op. at 2 (Ex. 1). Because there are strong grounds to compel Defendants to complete the record and to authorize Plaintiffs' tailored requests for extra-record discovery, Plaintiffs propose the following schedule:

- Defendants should complete the record and produce a privilege log by July 13;
- The parties should provide initial disclosures by July 13;
- Plaintiffs' expert reports should be disclosed by September 12;
- Defendants' expert reports (if any) should be disclosed by September 26;
- Plaintiffs' rebuttal reports (if any) should be disclosed by October 5;
- Fact and expert discovery should close by October 12; and
- The parties should be trial ready by October 31.

Plaintiffs in 18-CV-2921 have conferred with the plaintiffs in 18-CV-5025 and have jointly advised Defendants that we currently anticipate seeking twenty fact depositions total between the two cases, as permitted by Fed. R. Civ. P. 30(a)(2)(A)(i).[8]

[7] On this point, Plaintiffs intend to proffer the testimony of Dr. Hermann Habermann, who, among other roles, has served as Chief Statistician of the United States and Deputy Director of the Census Bureau. Plaintiffs have sought, but not received, Defendants' assurance that they will not seek to preclude Dr. Habermann's testimony by reliance on the Commerce Department's *Touhy* regulations at 15 C.F.R. Part 15, subpart B. Plaintiffs will seek appropriate relief from the Court if the Department seeks to apply those regulations to Dr. Habermann's expected testimony. *See* Letter to Peter B. Davidson, General Counsel, U.S. Dep't of Commerce (June 22, 2018) (Ex. 2).

[8] At the May 9 case conference in this action, Plaintiffs' counsel advised the Court that three or four depositions may be warranted, subject to a review of the administrative record. *See* Tr. of Initial Pretrial Conf. at 10 (May 9, 2018) (Docket No. 151). The administrative record that was subsequently produced identifies a number of additional witnesses with pertinent information whose identity could not have been known to counsel at the time.

Dated: June 26, 2018

Respectfully submitted,

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Exhibit 1

E.D.N.Y.-Bklyn
16-cv-4756
17-cv-5228
Garaufis, J.
Orenstein, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand seventeen.

Present:

Barrington D. Parker,
Gerard E. Lynch,
Christopher F. Droney,
Circuit Judges.

In re Kirstjen M. Nielsen, Secretary of Homeland Security,

17-3345

Petitioner.*

Petitioner Kirstjen M. Nielsen, the Secretary of the Department of Homeland Security, seeks a writ of mandamus to stay discovery orders entered by the District Court that required the Government (1) to supplement the administrative record it filed with the District Court and (2) to file a privilege log, in litigation challenging the decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program.

Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED, and the stay of the District Court's discovery orders is LIFTED. Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). To be entitled to mandamus relief, a petitioner must show (1) that it has "no other adequate means to obtain the relief [it] desires," (2) that "the writ is appropriate under the circumstances," and (3) that the "right to issuance of the writ is clear and undisputable." *In re Roman Catholic Diocese of Albany, Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (quoting *Cheney*, 542 U.S. at 380–81). We have "expressed reluctance to issue writs of mandamus to overturn discovery rulings," and will do so only "when a discovery question is of extraordinary significance or there is an extreme need for reversal of the district court's mandate before the case goes to judgment." *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (internal quotation marks omitted). "Because the writ of mandamus is such an extraordinary remedy, our analysis of whether the petitioning party has a

* In accordance with Fed. R. App. P. 43(c)(2), the Clerk of Court is directed to amend the caption as set forth above.

clear and indisputable right to the writ is necessarily more deferential to the district court than our review on direct appeal," *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108–09 (2d Cir. 2013) (internal quotation marks omitted), and the writ will not issue absent a showing of "a judicial usurpation of power or a clear abuse of discretion," *In re City of New York*, 607 F.3d at 943 (emphasis omitted) (internal quotation marks omitted).

The Government argues that it cannot be ordered (1) to supplement its administrative record or (2) to produce a privilege log for materials withheld from the record. With respect to the Government's first argument, the Government's position appears to be that in evaluating agency action, a court may only consider materials that the Government unilaterally decides to present to the court, rather than the record upon which the agency made its decision. To the contrary, judicial review of administrative action is to be based upon "the full administrative record that was before the Secretary at the time [s]he made [her] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "The [Administrative Procedure Act ("APA")] specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) Allowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the "thorough, probing, in-depth review" of the agency action with which it is tasked. *Overton Park*, 401 U.S. at 415.[1]

We have previously held that whether the complete record is before the reviewing court "may itself present a disputed issue of fact when there has been no formal administrative proceeding." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). This is particularly true in a case like the one before us "where there is a strong suggestion that the record before the Court was not complete." *Id.* In such a situation, a court must "permit[] plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court." *Id.*

Plaintiffs in the District Court have identified specific materials that appear to be missing from the record. For example, in her memorandum terminating DACA, then-Acting Secretary Elaine C. Duke indicated that "[United States Citizenship and Immigration Services] has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the [original DACA] memorandum, but still had his or her application denied based solely upon discretion." Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, Dep't of Homeland Security (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca. Presumably, then-Acting Secretary Duke based this factual assertion upon evidence, yet that evidence is not in the record filed in the District Court. Additionally, in parallel litigation challenging the repeal of DACA in

[1] In arguing for a different rule, the Government cites language from *Florida Power* indicating that the "task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." 470 U.S. at 743–44 (citation omitted). However, the Government takes this language out of context. The *Florida Power* Court used this language in explaining that, ordinarily, additional factfinding in the District Court is inappropriate; the Court did not suggest that the Government may prevent a reviewing court from considering evidence that the agency considered by not filing that evidence as part of the administrative record in the reviewing court. *Id.* at 743–45.

the Northern District of California in which the Government filed the same administrative record, the District Court—following *in camera* review of documents considered during the repeal of DACA but not included in the record filed with the court—concluded that 48 of those documents were not subject to privilege. *See* Statement of District Court in Response to Application for a Stay at 3, *In re United States*, 583 U.S. ___, 2017 WL 6505860 (Dec. 20, 2017) (No. 17-801); *see also Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, Nos. C 17-05211, C 17-05235, C 17-05329, C 17-05380, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017). Also, as the Supreme Court pointed out, nearly 200 pages of the 256 page record submitted to the District Court consist of published opinions from various federal courts. *In re United States*, 2017 WL 6505860, at *1. It is difficult to imagine that a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages, even accepting that litigation risk was the reason for repeal. Accordingly, "there is a strong suggestion that the record before the [District Court] was not complete," entitling the plaintiffs to discovery regarding the completeness of the record. *Dopico*, 687 F.2d at 654.

The Government also argues that it should not be required to produce a privilege log of documents that it withheld from the record on the basis of privilege because disclosure would "'probe the mental processes' of the agency." Full Pet. For Mandamus 22 (quoting *United States v. Morgan*, 304 U.S 1, 18 (1938)). First, while it is true that "review of deliberative memoranda reflecting an agency's mental process . . . is usually frowned upon, in the absence of formal administrative findings"—*e.g.*, in the case of "[a] nonadjudicatory, nonrulemaking agency decision"—"they may be considered by the court to determine the reasons for the decision-maker's choice." *Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (citations omitted). Thus, the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded. Second, without a privilege log, the District Court would be unable to evaluate the Government's assertions of privilege. *See Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (finding no abuse of discretion in District Court refusal to compel disclosure *after* it reviewed documents *in camera* and concluded they were protected by deliberative privilege).[2]

We are unpersuaded by the Government's argument that compliance with the orders would be overly burdensome due to the scope of the documents that it must review to comply with the District Court's order and the protracted timeline allowed for compliance. Administrative records, particularly those involving an agency action as significant as the repeal of DACA, are often quite voluminous. *See, e.g.*, *Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th

[2] We express no opinion at this juncture as to whether discovery is appropriate in connection with plaintiffs' non-APA claims. We note, however, that even if the Government were correct that a deliberative privilege prevents discovery with respect to the APA claims, the Government could not rely on such privilege to avoid all discovery with respect to plaintiffs' constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding that in the context of a suit against the Central Intelligence Agency, "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission."); *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the [deliberative process] privilege as a shield.").

Cir. 2016) (noting that the administrative record "is more than a million pages long"); *Chem. Mfrs. Ass'n v. U.S. EPA*, 870 F.2d 177, 184 (5th Cir. 1989) (noting that the administrative record was 600,000 pages). Moreover, in order to accommodate the Government's concerns, the District Court three times modified the magistrate judge's discovery order, the first time by extending the deadline, the second time by limiting the order's scope to documents before the Department of Justice and the Department of Homeland Security, and the third time by limiting it to documents considered by then-Acting Secretary Duke or Attorney General Jefferson B. Sessions or their "first-tier subordinates—i.e., anyone who advised them on the decision to terminate the DACA program." *Batalla Vidal v. Duke***,** Nos. 16 CV 4756, 17 CV 5228, 2017 WL 4737280, at *5 (E.D.N.Y. Oct. 19, 2017). At oral argument, the Government conceded that the number of documents covered by the order, as modified, is approximately 20,000, a far smaller number than the Government's papers led this Court to believe. We are satisfied that under the circumstances, compliance with the District Court's order would not be an undue burden on the Government.

We have been particularly attentive to the Supreme Court's recent opinion granting certiorari and remanding to the District Court in parallel litigation in the Northern District of California. *See In re United States*, 2017 WL 6505860. Contrary to the Government's argument, however, we conclude that that decision does not strengthen the Government's position in the matter before this Court, because the posture of this case in the District Court here, and the orders issued by the District Court in this matter, are significantly distinguishable from those in the California case. Further, the Supreme Court did not decide the merits of the discovery dispute, instead remanding to the District Court to first resolve the Government's threshold arguments "that the Acting Secretary's determination to rescind DACA is unreviewable because it is 'committed to agency discretion,' 5 U.S.C. § 701(a)(2), and that the Immigration and Nationality Act deprives the District Court of jurisdiction." *Id.* at *2. In the case before this court, the District Court has already considered and rejected these threshold arguments. *Batalla Vidal v. Duke*, No. 16 CV 4756, 2017 WL 5201116, at *9, 13 (E.D.N.Y. Nov. 9, 2017). Of course, as the Supreme Court pointed out, the Government has the right to ask the District Court to certify its ruling for interlocutory appeal under 28 U.S.C. § 1292(b), and has announced its intention to do so. While we decline to reserve decision on this petition while the Government pursues an interlocutory appeal, it may be prudent for the District Court to stay discovery pending the resolution of such proceedings. *See In re United States*, 2017 WL 6505860, at *2.

We acknowledge that the Supreme Court noted that "[t]he Government makes serious arguments that at least some portions of the District Court's order are overly broad." *Id*. However, in the case pending in the Northern District of California, the District Court's discovery order applied to documents considered by persons "anywhere in the government," *id.*, which appears to include White House documents, creating possible separation of powers issues not at issue in this case, *see Cheney*, 542 U.S. at 382 ("[S]eparation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President.") The California order also appears to cover a far larger universe of documents than the contested orders before this Court. In contrast, here, the District Court's order covers only documents considered by then-Acting Secretary Duke and Attorney General Sessions, as well as their first-tier subordinates. The order thus does not encompass White House documents, and, as noted above,

the number of officials whose files would be reviewed, and the number of documents that would be involved in that review, would be dramatically fewer than in the case before the Supreme Court.

The Supreme Court also indicated that "the District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue." *In re United States*, 2017 WL 6505860, at *2. The District Court here has required only a privilege log, and has not ordered the production of any documents over which the Government asserts privilege. The order thus plainly contemplates an orderly resolution of any claims of privilege, and we are confident that the District Court will provide the Government with an opportunity to be heard on any claims of privilege it may assert.

We have considered Petitioner's additional arguments and find no basis for the extraordinary remedy of mandamus relief. Accordingly, the petition is DENIED, and the stay of the District Court's discovery orders is LIFTED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

Exhibit 2

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

June 22, 2018

Peter B. Davidson
General Counsel
U.S. Department of Commerce
1401 Constitution Ave. NW, Room 5890
Washington, DC 20230

RE: Intent to proffer expert testimony of former Commerce Department employee in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF) (S.D.N.Y.).

Dear Mr. Davidson,

This letter is to advise you that the Plaintiffs in *State of New York, et al. v. U.S. Department of Commerce, et al.*, No. 18-CV-2921 (JMF) (S.D.N.Y.), a lawsuit challenging the Secretary's decision to add a demand for citizenship information to the 2020 decennial census, intend to proffer expert testimony from Dr. Hermann Habermann if expert testimony is allowed by the Court in this case. We write to request the Department's assurance that it will not seek to preclude Dr. Habermann's testimony by reliance on the Department's *Touhy* regulations at 15 C.F.R. Part 15, subpart B.

Dr. Habermann is a former employee of the Commerce Department (from 2002 to 2007). As a former employee, he is ostensibly subject to the Department's regulatory prohibition on providing expert testimony in this matter. *See* 15 C.F.R. § 15.18(a) ("[I]n legal proceedings in which the United States is a party, . . . [a] Department employee may not testify as an expert or opinion witness for any other party other than the United States."); *see also id.* § 15.12(f) (defining "[e]mployee" to include "all current or former employees").

This regulation, as you may know, is invalid and unenforceable in these circumstances. Two months ago, a federal district court rejected the Commerce Department's effort to rely on 15 C.F.R. § 15.18 to prevent Department employees of the National Marine Fisheries Service from providing expert testimony in litigation in which the United States was a party. *NRDC v. Zinke*, 1:05-cv-01207-LJO-EPG, 2018 WL 1899609, at *5-10 (E.D. Cal. Apr. 20, 2018) ("[T]he Court overrules the objection that the deposition should not proceed because USDOC regulations prohibit employees from testifying as an expert or opinion witness for any other party other than the United States in legal proceedings in which the United States is a party.") (magistrate's order), *aff'd*, 2018 WL 2382798 (E.D. Cal. May 25, 2018).

More generally, courts have held that *Touhy* regulations may not be enforced as to former employees like Dr. Habermann, as distinct from current employees, *see Gulf Grp. Gen. Enters. Co. W.L.L. v. United States*, 98 Fed. Cl. 639, 644 (2011); and, that *Touhy* regulations may not be

applied to limit expert testimony in matters in which the United States is a party. *See Resource Investments, Inc. v. United States*, 93 Fed. Cl. 373, 380 (2010); *Alexander v. FBI*, 186 F.R.D. 66, 70 (D.D.C. 1998). Further, the "housekeeping" statute that authorizes the Department's *Touhy* regulations specifically provides that the statute "does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301. There would therefore be no grounds to seek to apply the Department's *Touhy* regulations to Dr. Habermann's expected testimony here.

Please confirm that the Department will not seek to enforce its *Touhy* regulations in an effort to preclude Dr. Habermann from testifying as an expert in this case. I would appreciate your response by Monday, June 25, 2018, so that we may seek appropriate relief from the Court if you are unable to agree with this position. You may reach me at 212-416-6057 or Matthew.Colangelo@ag.ny.gov to discuss.

Sincerely,

/s/ Matthew Colangelo
Matthew Colangelo
Executive Deputy Attorney General

cc:
Dominika Tarczynska
Carlotta P. Wells
Carol Federighi
Stephen Ehrlich
Kate Bailey
U.S. Department of Justice