No. 17-72917

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA, *et al.*,

Petitioners.

UNITED STATES OF AMERICA; DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; and ELAINE DUKE, Acting Secretary of Homeland Security,

Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, President of the University of California; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MARYLAND; STATE OF MINNESOTA; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; SAUL JIMENEZ SUAREZ; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; JIRAYUT LATTHIVONGSKORN; COUNTY OF SANTA CLARA; and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,

Real Parties in Interest-Plaintiffs.

BRIEF AMICUS CURIAE OF NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF REAL PARTIES IN INTEREST-PLAINTIFFS

MICHAEL E. WALL
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Natural Resources Defense Council, Inc., submits that it has no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in Amicus.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS CURIAE 1

INTRODUCTION 1

ARGUMENT 4

I. Judicial review under the Administrative Procedure Act requires the litigants and the court to have access to the "whole" record of the agency's proceedings 4

II. If an agency wishes to exclude deliberative-process materials from an administrative record, it must justify the claim of privilege 10

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Aera Energy LLC v. Salazar,
642 F.3d 212 (D.C. Cir. 2011) 9

American Bioscience, Inc. v. Thompson,
269 F.3d 1077 (D.C. Cir. 2002) 14

Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.,
273 F.3d 1229 (9th Cir. 2001).....4, 5

Assembly of Cal. v. U.S. Dep't of Commerce,
968 F.2d 916 (9th Cir. 1992).....12, 15

Bar MK Ranches v. Yuetter,
994 F.2d 735 (10th Cir. 1993) 6

Bonnichsen v. United States,
217 F. Supp. 2d 1116 (D. Or. 2002).....2, 8, 11

Burlington Truck Lines v. United States,
371 U.S. 156 (1962) 2

Camp v. Pitts,
411 U.S. 138 (1973) 6

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 5, 11, 16

City of Sausalito v. O'Neill,
386 F.3d 1186 (9th Cir. 2004).....11

Ctr. for Biological Diversity v. Evans,
No. C 04-04496, 2005 WL 1514102 (N.D. Cal. June 14, 2005).....11

D.C. Fed'n of Civic Assocs. v. Volpe,
459 F.2d 1231 (D.C. Cir. 1971) 5, 9

Defs. of Wildlife v. Kempthorne,
No. 04-1230, 2006 WL 2844232 (D.D.C. Sept. 29, 2006) 11

Dopico v. Goldschmidt,
687 F.2d 644 (2d Cir. 1982).....6

Earth Island Inst. v. Hogarth,
494 F.3d 757 (9th Cir. 2007).....11

EEOC v. BDO USA, L.L.P.,
856 F.3d 356 (5th Cir. 2017).....15

Envtl. Def. Fund, Inc. v. Blum,
458 F. Supp. 650 (D.D.C. 1978) 5-6

Epsilon Electronics., Inc. v. U.S. Department of the Treasury,
857 F.3d 913 (D.C. Cir. 2017) 14

FTC v. Warner Commc'ns Inc.,
742 F.2d 1156 (9th Cir. 1984).....3, 12, 17

Georgia ex rel. Olens v. McCarthy,
833 F.3d 1317 (11th Cir. 2016).....2

Grand Jury Subpoena Dated Aug. 9, 2000,
218 F. Supp. 2d 544 (S.D.N.Y. 2002) 16

Hughes River Watershed Conservancy v. U.S. Forest Serv.,
81 F.3d 437 (4th Cir. 1996).....9

Idaho Farm Bureau Fed'n v. Babbitt,
58 F.3d 1392 (9th Cir. 1995).....11

In re Franklin Nat'l Bank Sec. Litig.,
478 F. Supp. 577 (E.D.N.Y. 1979) 3, 12

In re Grand Jury Subpoena Dated Aug. 9, 2000,
218 F. Supp. 2d 544 (S.D.N.Y. 2002) 13

Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.,
99 F. Supp. 3d 1033 (N.D. Cal. 2015) 2

Landry v. FDIC,
204 F.3d 1125 (D.C. Cir. 2000) 12

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989) 5, 9

Miami Nation of Indians v. Babbitt,
979 F. Supp. 771 (N.D. Ind. 1996) 11

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 2, 4, 5, 10

Nat. Res. Def. Council, Inc. v. SEC,
606 F.2d 1031 (D.C. Cir. 1979) 3

Nat. Res. Def. Council v. Kempthorne,
506 F. Supp. 2d 322 (E.D. Cal. 2007) 11

Nat. Res. Def. Council v. Pritzker,
828 F.3d 1125 (9th Cir. 2016) 8, 9, 11

Nat. Res. Def. Council v. Rodgers,
381 F. Supp. 2d 1212 (E.D. Cal. 2005) 11

Nat. Res. Def. Council v. U.S. Forest Serv.,
421 F.3d 797 (9th Cir. 2005) 9

Northrop Corp. v. McDonnell Douglas Corp.,
751 F.2d 395 (D.C. Cir. 1984) 16

Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.,
18 F.3d 1468 (9th Cir. 1994).....8

Ocean Advocates v. U.S. Army Corps of Eng'rs,
402 F.3d 846 (9th Cir. 2005).....11

Ocean Mammal Inst. v. Gates,
No. Civ. 07-00254, 2008 WL 2185180 (D. Haw. May 27, 2008).....15

Paisley v. CIA,
712 F.2d 686 (D.C.Cir.1983) 15

Portland Audubon Soc'y v. Endangered Species Comm.,
984 F.2d 1534 (9th Cir. 1998).....6, 12

Pub. Power Council v. Johnson,
674 F.2d 791 (9th Cir. 1982).....10

San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission,
789 F.2d 26 (D.C. Cir. 1986) 13-14

Suffolk Cty. v. Sec'y of Interior,
562 F.2d 1368 (2d Cir. 1977).....13

Texaco P.R., Inc. v. Dep't. of Consumer Affairs,
60 F.3d 867 (1st Cir. 1995) 4

Thompson v. U.S. Dep't of Labor,
885 F.2d 551 (9th Cir. 1989).....6, 7

United States v. Morgan,
313 U.S. 409 (1941) 17

United States v. Nixon,
418 U.S. 683 (1974) 16

United States v. Reynolds,
345 U.S. 1 (1953) 16

United States v. Rozet,
183 F.R.D. 662 (N.D. Cal. 1998) 16

Walter O. Boswell Mem'l Hosp. v. Heckler,
749 F.2d 788 (D.C. Cir. 1984) 2-3, 5, 13, 15, 16

Wash. Toxics Coal. v. U.S. Dep't of Interior,
457 F. Supp. 2d 1158 (W.D. Wash 2006) 11

W. Watersheds Project v. Kraayenbrink,
632 F.3d 472 (9th Cir. 2011).....9, 11

STATUTES

5 U.S.C. § 553(a) 7

5 U.S.C. § 553(c) 8

5 U.S.C. § 554.....7

5 U.S.C. § 556.....7

5 U.S.C. § 556(d).....7

5 U.S.C. § 556(e) 8, 14

5 U.S.C. § 557.....7

5 U.S.C. § 557(d)(1)(A) 7

5 U.S.C. § 706 ..... *passim*

5 U.S.C. § 706(2)(A) 4

42 U.S.C. § 2239(a) 13

42 U.S.C. § 5851(b)(2)(A) 7

INTERESTS OF AMICUS CURIAE

Amicus Natural Resources Defense Council, Inc. (NRDC), a nonprofit advocacy group with hundreds of thousands of members, litigates to protect health and the environment, to vindicate its members' rights, and to ensure the lawfulness and transparency of agency actions. Because courts often review agency action on the "administrative record," NRDC seeks to ensure that the records agencies submit to the courts completely and accurately reflect the agencies' proceedings.[1]

INTRODUCTION

Whether courts review the lawfulness of agency action based on the "whole record," 5 U.S.C. § 706, or a partial, potentially sanitized record, is a question of profound significance to the functioning of our government. The answer affects judges' ability to fairly and accurately assess agency decisions, and the public's ability to check agency excesses in court.

NRDC has litigated hundreds of record-review cases. Some of these cases have been prosecuted against federal agencies; others have been

[1] No party's counsel authored any part of this brief. No party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person (other than amicus curiae, its members, or its counsel) contributed money to fund any aspect of this brief.

litigated alongside the government. The administrative records in record-review cases often span tens of thousands, or sometimes more than a million, pages.[2] There are many reasons for this: The work of regulatory agencies is nuanced, complex, and serious. Rulemakings often last years. And an administrative record, at its best, discloses all the evidence and argument before the agency, the considerations the agency weighed, and the agency's conclusions and reasoning.

These issues are, after all, the issues that a reviewing court must evaluate. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))). "To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case," which would impede a court's ability "to review an agency's action fairly." *Walter O. Boswell Mem'l*

---

[2] *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1044 (N.D. Cal. 2015); *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1120 n.2 (D. Or. 2002).

Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984). And that risk would be magnified if agencies could exclude documents they deemed privileged as deliberative process without specifically asserting or justifying their claims.

Congress did not intend that result when it directed courts to review agency action on the "whole record." 5 U.S.C. § 706. The deliberative-process privilege is a qualified, common-law protection intended "to protect the quality of agency decisions." *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). But there are competing interests, manifest in the Administrative Procedure Act, "in opening for scrutiny the government's decision making process," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), and "ensuring the rationality and fairness" of that decision making. *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). For these reasons, "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Warner Commc'ns*, 742 F.2d at 1161.

If an agency wishes to assert the deliberative-process privilege to exclude documents from the record for judicial review, it must show why the agency's interest in the secrecy of specific documents outweighs

"society's interest in the accuracy and integrity of factfinding, and the public's interest in honest, effective government." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). Absent such a showing, judicial review on the "whole record" should proceed. 5 U.S.C. § 706.

ARGUMENT

I. Judicial review under the Administrative Procedure Act requires the litigants and the court to have access to the "whole" record of the agency's proceedings

The Administrative Procedure Act (APA) provides for judicial review of agency action on "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. These words should be construed "with a view to their place in the overall statutory scheme." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1241 (9th Cir. 2001) (citation omitted).

Under the APA's arbitrary-or-capricious standard, *see* 5 U.S.C. § 706(2)(A), a court reviews the "whole record" to decide, among other things, whether the agency based its decision on the relevant factors, *see Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236; explained its decision in a way that "runs counter to the evidence before [it]," *Motor Vehicle Mfrs.*, 463 U.S. at 43; or failed to offer a "rational connection between the facts found and the choice made," *id*. While this inquiry is circumscribed, courts' review

must be "searching and careful." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

A court that does not have the whole record cannot "carefully review[] the record and satisfy[] [itself] that the agency has made a reasoned decision based on [the agency's] evaluation of the [evidence]." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). A court cannot, for example, assess whether an agency decision "runs counter to the evidence," *Motor Vehicle Mfrs.*, 463 U.S. at 43, without all the evidence. And a court certainly cannot evaluate whether the agency based its decision on the "relevant factors," *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236—or on impermissible ones, *see D.C. Fed'n of Civic Assocs. v. Volpe*, 459 F.2d 1231, 1249 (D.C. Cir. 1971)—without knowing what factors the agency weighed.

To fairly decide these questions, the reviewing court should "have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. Anything "less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Id.* The agency 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, Inc. v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978). As this Court has said, "[a]n incomplete record must be viewed as a 'fictional account of the actual decisionmaking process.'" *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1998) (citation omitted).

The whole record is thus "everything that was before the agency pertaining to the merits of its decision." *Id*. at 1548 (citing *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989)); *see also 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."); *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (holding that the "whole administrative record" includes the agency's "informational base" when it made its decision). This is what the Supreme Court referred to in *Camp v. Pitts,* when it stated 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." 411 U.S. 138, 142 (1973) (per curiam). The record already in existence is "not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record." *Thompson*, 885 F.2d at 556 (emphasis in original) (citation omitted).

To the extent Defendants claim that the administrative record includes only materials directly considered "by the decisionmaker," Pet. 3, they err. As this Court has explained, the "whole record" includes materials considered either "directly or *indirectly*" by the decisionmaker. *Id.* at 18 (quoting *Thompson*, 885 F.2d at 555). It is difficult to see what "*indirect*[] consider[ation]" could mean if it required that the ultimate decisionmaker actually review the documents.

Notwithstanding Defendants' contrary suggestion, *Thompson v. U.S. Department of Labor* does not hold that the "record" of informal agency actions includes only materials transmitted to the ultimate decisionmaker. The *Thompson c*ourt reviewed an agency adjudication conducted pursuant to the APA's special procedural safeguards for formal proceedings.[3] *See* 885 F.2d at 555. Those safeguards, which do not apply to informal rulemakings, include a prohibition on *ex parte* communications, 5 U.S.C. § 557(d)(1)(A); a right to call and cross-examine witnesses, *id.* § 556(d); and transcribed

[3] The APA's formal procedural safeguards applied because *Thompson* arose under a statute that required the agency to make its decision on the record after a hearing. 42 U.S.C. § 5851(b)(2)(A). This standard triggers the formal procedural safeguards set out in 5 U.S.C. §§ 556 & 557. *See* 5 U.S.C. §§ 553(a), 554.

hearings, *id.* § 556(e). The APA specifies that the "record" for such formal proceedings includes only the transcript, exhibits, and materials "filed in the proceeding." *Id*. None of these procedures apply to informal agency action. *See id*. § 553(c).

Outside the formal adjudicative context, however, the administrative record necessarily encompasses the review and analysis of agency staff who then digest the record and make recommendations to their leadership. The decisionmaker "indirectly" considers this information through agency staff. If courts could not consider the work those staff did—work that informs summaries and recommendations sent to decisionmakers—then much of the basis for agency decisions would be hidden from judicial view.

Informal agency proceedings, such as most rulemakings, may take months or years to complete. Vast administrative records are often collected, *see supra* note 2, potentially including public comments,[4] communications among or concerns voiced by the agency's own staff,[5]

[4] *See, e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1474 (9th Cir. 1994).

[5] *See, e.g.*, *Bonnichsen*, 217 F. Supp. 2d at 1130; *Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1136 (9th Cir. 2016).

sister agencies' viewpoints,[6] scientific evaluations,[7] and economic studies.[8] The heads of federal agencies cannot practicably review and evaluate all this material themselves. Yet, under Defendants' theory, all such material, unless provided directly to the final decisionmaker, would be properly excluded from the record for judicial review. That theory cannot be squared with the courts' routine reliance on such material in their decisions.

Courts need "a full-scale administrative record" to "dispel any doubts about the true basis of [the agency's] action." *D.C. Fed'n of Civic Assocs.*, 459 F.2d at 1249; *accord Aera Energy LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011). A "contrary approach" would "render judicial review generally meaningless" and contravene "the demand that courts ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" *Marsh*, 490 U.S. at 378. Thus, if the record lodged by the agency in

---

[6] *See Pritzker*, 828 F.3d at 1136-37 (referring to concern voiced by Marine Mammal Commission).

[7] *See, e.g.*, *id.* at 1136-40; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 479, 497-98 (9th Cir. 2011).

[8] *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 801-02, 807 (9th Cir. 2005); *Hughes River Watershed Conservancy v. U.S. Forest Serv.*, 81 F.3d 437, 446-47 (4th Cir. 1996).

court does not include all that material, the court may order the record completed. *See Pub. Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982) (Kennedy, J.).

II. If an agency wishes to exclude deliberative-process materials from an administrative record, it must justify the claim of privilege

Contrary to Defendants' assertions, internal agency documents disclosing the agency's deliberations are not automatically excluded from the administrative record. The deliberative-process privilege is a qualified, common-law privilege that must be justified on a document-by-document basis. It does not trump Congress's requirement that judicial review of agency action proceed on the "whole record." 5 U.S.C. § 706.

To the contrary, judicial review under the APA almost invariably examines the agency's deliberative process. The reviewing court is called to determine whether the agency "failed to consider an important aspect of the problem," "offered an explanation for its decision that runs counter to the evidence before the agency," or made no "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43-44.

In answering these questions, this Court routinely considers internal agency documents that evaluate evidence, make recommendations, reveal

disagreements among staff, and otherwise disclose candid agency deliberations; a few examples of this Court's reliance on such material are cited in the margin.[9] District courts routinely consider such material as well.[10] Candid, internal agency documents are a core part of the "whole record," 5 U.S.C. § 706, and often critical to a "searching and careful" judicial inquiry. *Citizens to Preserve Overton Park*, 401 U.S. at 416.

---

[9] *See, e.g.*, *Pritzker*, 828 F.3d at 1136-40 (agency scientists' analysis and recommendation); *W. Watersheds Project*, 632 F.3d at 479, 497 (agency scientists' analyses); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768-69 (9th Cir. 2007) (agency "internal memoranda," "briefing packet," and "talking points"); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 862-63 & n.4 (9th Cir. 2005) (agency emails); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1218 (9th Cir. 2004) (internal agency memo); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1396 (9th Cir. 1995) (provisional draft).

[10] *See, e.g.*, *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 372 (E.D. Cal. 2007) (interagency emails); *Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1183-85 & n.19, 1190-93 & n.28 (W.D. Wash 2006) (agency staff emails, draft letters, meeting minutes, and notes); *Defs. of Wildlife v. Kempthorne*, No. 04-1230, 2006 WL 2844232, at *11 n.8 (D.D.C. Sept. 29, 2006) (agency staff email); *Nat. Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1236 n.41, 1239-40 & nn.47, 52, 1244-45 (E.D. Cal. 2005) (agency staff emails and similar internal correspondence); *Ctr. for Biological Diversity v. Evans*, No. C 04-04496, 2005 WL 1514102, at *5 (N.D. Cal. June 14, 2005) (agency memos and draft rule never released to public); *Bonnichsen*, 217 F. Supp. 2d at 1130 (internal agency communications and meeting minutes); *see also Miami Nation of Indians v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996) ("draft reports," "notes and logs," and "guidelines, directives, and manuals").

Yet much of this internal material arguably falls within what an agency might deem deliberative-process privileged. *See generally Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) (discussing scope of deliberative-process privilege). Defendants' theory that the administrative record does not include predecisional, deliberative material would thus require this Court to depart sharply from past practice and precedent. It would also require the Court to abandon its definition of the "whole record" as "everything that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc'y*, 984 F.2d at 1548.

Nothing in the APA suggests that Congress intended the enfeebled judicial review that would flow from Defendants' approach. The deliberative-process privilege is a qualified privilege, and one created by the courts. *Warner Commc'ns*, 742 F.2d at 1161; *accord Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). The doctrine protects agency documents from discovery "so that the public will benefit from more effective government." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 582.

That justification is "attenuated," however, when "the public's interest in effective government would be furthered by disclosure," *id.*, such as where a court reviews the agency action for lawfulness. After all,

Congress thought that the public interest would be best served by judicial review on the "whole" record, 5 U.S.C. § 706—that is, "neither more nor less information than . . . the agency [had] when it made its decision." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. Thus, while the deliberative-process privilege has its place, the interests it serves do not outweigh a court's need to consider materials "germane to the [agency] decision and not duplicated elsewhere in the record." *Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977); *see In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002) ("The deliberative process privilege is qualified; it may be overcome by a showing of need . . . .").

The divided decision in *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), provides no persuasive argument to the contrary. That case arose from a formal Nuclear Regulatory Commission adjudication. *See id.* at 29 (citing 42 U.S.C. § 2239(a)). To protect the "frank deliberations of Commission members," the court refused to supplement the record with a transcript of the Commissioners' closed-door deliberations. 789 F.2d at 44; *see also id.* at 45-46 (Mikva, J., concurring). That refusal is best understood as a particularized determination that the deliberative-process concerns that

would flow from disclosure of that transcript outweighed the need for disclosure in that case. The court did not address the contents of administrative records in *informal* agency proceedings, which do not afford similar procedural safeguards, *see supra* pp. 7-8, and which do not have the same constraints on the "record," 5 U.S.C. § 556(e). Nor did the court hold that agencies may exclude deliberative-process materials from administrative records on their own say-so, without producing a privilege log and justifying the exclusion.

The possibility for mischief created by Defendants' approach is disturbing. Federal agencies often *do* include deliberative materials in their agency records, at least when they believe the materials will help them. For example, in *Epsilon Electronics, Inc. v. U.S. Department of the Treasury*, the federal agency included in the record and relied in court on an internal, predecisional agency memo analyzing the evidence before the agency. 857 F.3d 913, 928 (D.C. Cir. 2017). And in *American Bioscience, Inc. v. Thompson*, the agency included in the administrative record a declaration of its decisionmaker intended to explain his otherwise inadequately explained decision. 269 F.3d 1077, 1082-83 (D.C. Cir. 2002). That is much like the sort of decisionmaker testimony that Defendants claim is impermissible in the

present case. Allowing an agency to pick when deliberative materials are included or excluded from the record for judicial review would allow the agency to "withhold evidence unfavorable to its case," *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792, rendering judicial review ineffective.

If an agency seeks to withhold a document (or part of a document[11]) as deliberative-process privileged, the court should require the agency to assert the privilege as to each document. Privilege determinations are not so self-evident that an agency, defending a lawsuit, should be trusted to make the determination on its own, without disclosing to the parties or the court what is being withheld and why. A privilege log is essential to let the opposing party and the court "determine whether specific items on the log are actually privileged."[12] *EEOC v. BDO USA, L.L.P.*, 856 F.3d 356, 364 (5th Cir. 2017).

A privilege log alone is not enough, however. Since the deliberative-process privilege is qualified, the agency must also show, when it invokes

---

[11] The deliberative-process privilege does not protect reasonably segregable factual information. *See Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983).

[12] Cases overruling agency deliberative-process privilege claims are common. *See, e.g.*, *Assembly of Cal.*, 968 F.2d at 920-23; *Ocean Mammal Inst. v. Gates*, No. Civ. 07-00254, 2008 WL 2185180, at *14-16 (D. Haw. May 27, 2008).

the privilege, that "the consequences of disclosure of the information," *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 n.11 (D.C. Cir. 1984), outweigh the public interest in searching and accurate judicial review. *See Citizens to Preserve Overton Park*, 401 U.S. at 416; *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792; *see also United States v. Nixon*, 418 U.S. 683, 706 (1974) (rejecting executive privilege claim based "solely on the broad, undifferentiated claim of public interest in the confidentiality of . . . conversations" between presidents and advisors).

The agency must make this showing through an affidavit of "the head of the department after actual personal consideration." *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (holding that staff attorneys may not invoke the privilege); *see Northrop Corp.*, 751 F.2d at 405 n.11; *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). If an agency does not make that showing, its deliberative materials remain in the record, and must be produced to allow effective judicial review.[13]

---

[13] Defendants' protests about depositions of high-ranking officials, Pet. 16-17, 19-20, are not a basis to exclude deliberative-process materials from administrative records. Whether discovery is appropriate and what an administrative record includes are different questions, especially where the complaint alleges both record-review and non-record-review claims. Defendants' suggestion, *see id.* at 19-20, that including deliberative-process

CONCLUSION

The "whole record," 5 U.S.C § 706, for judicial review includes all material considered directly or indirectly by the agency decisionmaker, including material considered by subordinates. If an agency wishes to exclude a document from an administrative record as deliberative-process privileged, it must justify that assertion by producing a privilege log and showing, with respect to each document, that the interests the privilege serves outweigh the need for accurate and meaningful judicial review.

November 1, 2017

Respectfully submitted,

/s/ Michael E. Wall

MICHAEL E. WALL
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100

materials in an administrative record could serve no purpose but to improperly "probe the mental processes" of the ultimate decisionmaker, *United States v. Morgan*, 313 U.S. 409, 422 (1941), also implicitly misrepresents the contours of the deliberative-process doctrine. The deliberative-process privilege may encompass an array of existing agency documents, written and compiled by staff, that constitute no more than a contemporaneous record of an agency doing its work. *See Warner Commc'ns*, 742 F.2d at 1161. *Morgan*, by contrast, involved an attempt to depose the Secretary of Agriculture. *Id*. These are not equivalents.

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), to the extent that rule applies in mandamus proceedings, because the amicus brief contains 3660 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 and 14-point Book Antiqua font.

November 1, 2017

/s/ Michael E. Wall
Michael E. Wall

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 1, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 1, 2017 /s/ Michael E. Wall
Michael E. Wall

No. 17-72917

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: UNITED STATES OF AMERICA, *et al.*,

Petitioners.

UNITED STATES OF AMERICA; DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; and ELAINE DUKE, Acting Secretary of Homeland Security,

Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, President of the University of California; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MARYLAND; STATE OF MINNESOTA; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; SAUL JIMENEZ SUAREZ; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; JIRAYUT LATTHIVONGSKORN; COUNTY OF SANTA CLARA; and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,

Real Parties in Interest-Plaintiffs.

MOTION OF NATURAL RESOURCES DEFENSE COUNCIL FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST-PLAINTIFFS

MICHAEL E. WALL
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Natural Resources Defense Council, Inc., submits that it has no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in amicus.

Natural Resources Defense Council, Inc. (NRDC) respectfully moves for leave to file an amicus curiae brief in support of Real Parties in Interest-Plaintiffs. Real Parties in Interest-Plaintiffs have consented to this motion. Counsel for Petitioners-Defendants has represented that her clients do not oppose this motion.[1]

I. NRDC's Interests as Amicus

Founded in 1970, NRDC is a nonprofit environmental and health group with hundreds of thousands of members throughout the United States. NRDC's staff of scientists, lawyers, and other professionals advance NRDC's mission through analysis, public advocacy, and—when necessary—litigation to vindicate NRDC's members' rights, enforce the law, and advance its mission.

NRDC has litigated hundreds of cases involving claims against federal agencies. Much of this litigation arises under statutes that require judicial review to be conducted on an administrative record. *See, e.g.*,

[1] No party's counsel authored any part of the proposed amicus brief. No party or party's counsel contributed money intended to fund the preparation or submission of the brief. No person (other than amicus curiae, its members, or its counsel) contributed money to fund any aspect of the brief.

5 U.S.C. § 706. In some of that litigation, disputes have arisen about the proper scope of the administrative record. NRDC seeks leave to file this amicus brief because it wishes to ensure that the administrative records that agencies submit to the courts completely and accurately reflect agency proceedings.

II. Reasons Why NRDC's Amicus Brief Is Desirable and Relevant

NRDC's proposed amicus brief draws on NRDC's nearly fifty years of experience with record-review litigation against federal agencies in district and appellate courts to address two issues central to this mandamus proceeding: (1) Does the Administrative Procedure Act's requirement that judicial review be based on the "whole record," or the parts cited by the parties, 5 U.S.C. § 706, generally require agency administrative records to encompass all information directly and indirectly considered by the agency during the course of its proceeding? (2) When withholding materials from the administrative record based on an assertion of the qualified deliberative-process privilege, must the government identify the materials on a privilege log and justify its assertion of the qualified privilege through a declaration of the agency head showing that the agency's interest in nondisclosure of specific

documents or parts of documents outweighs the public interest in judicial review based on the whole record?

NRDC's proposed amicus brief presents citations and analysis on both questions that are different from those in the parties' briefs. NRDC therefore respectfully moves for leave to file its brief to assist the Court in reaching a just and accurate resolution.

November 1, 2017

Respectfully submitted,

/s/ Michael E. Wall

MICHAEL E. WALL
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because it contains 429 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 and 14-point Book Antiqua font.

November 1, 2017

/s/ Michael E. Wall
Michael E. Wall

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 1, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 1, 2017 /s/ Michael E. Wall
Michael E. Wall