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9
10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

12 CITY OF SAN JOSE and BLACK ALLIANCE
13 FOR JUST IMMIGRATION,

14 Plaintiffs,

15 v.

16 WILBUR L. ROSS, JR., *et al.*,

17 Defendants.

Civil Action No. 3:18-cv-02279-RS

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF REVIEW ON THE
ADMINISTRATIVE RECORD**

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1 Pursuant to the Court’s *Order Granting Stipulation*, see ECF No. 47, Defendants write to
2 address the propriety of discovery in this case. On June 8, 2018, Defendants produced an
3 administrative record consisting of more than 1,300 pages of all non-privileged factual material
4 directly or indirectly considered by the Secretary in deciding whether to reinstate a citizenship
5 question on the 2020 Census. See ECF No. 38. This record serves as the proper basis upon which to
6 decide this case should it survive Defendants’ impending motion to dismiss.

7 Despite this being a challenge to an agency decision under the Administrative Procedure Act
8 (“APA”), Plaintiffs City of San Jose and Black Alliance for Just Immigration (collectively,
9 “Plaintiffs”) assert that discovery should be permitted. ECF No. 47, at 2. This contention should be
10 rejected for at least three reasons. First, with certain limited exceptions not applicable here, review
11 of claims challenging final agency action—including where, as here, constitutional claims overlap
12 with APA claims—is limited to the administrative record produced by the agency. Plaintiffs have not
13 shown that the administrative record does not contain appropriate information to permit this Court to
14 review the Secretary’s decision. See *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir.
15 1988) (affirming no discovery where “[t]he [plaintiff] makes no showing that the district court needed
16 to go outside the administrative record to determine whether the [agency] ignored information”), as
17 amended by 867 F.3d 1244 (9th Cir. 1989). Second, no extra-record discovery should occur until the
18 Court has resolved whether the Secretary’s decision to reinstate a citizenship question on the 2020
19 Census is judicially reviewable, as the Supreme Court recently explained in an analogous case from
20 this District. *In re United States*, 138 S. Ct. 443, 445 (2017) (directing that “[t]he District Court should
21 proceed to rule on the Government’s threshold arguments” before addressing issues regarding
22 completeness of the administrative record). Third, Defendants should not be required to produce a
23 privilege log in conjunction with the administrative record, as privileged materials are not properly
24 part of an administrative record.

25 **BACKGROUND**

26 **I. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR THE CENSUS**

27 The U.S. Constitution requires that an “actual Enumeration” of the population be conducted
28 every 10 years and vests Congress with the authority to conduct that census “in such Manner as they

1 shall by Law direct.” U.S. Const. art. I § 2, cl. 3. Through the Census Act, Congress has delegated
2 to the Secretary of Commerce the responsibility to conduct the decennial census “in such form and
3 content as he may determine,” 13 U.S.C. § 141(a), and has “authorized [him] to obtain such other
4 census information as necessary,” *id.* The Bureau of the Census assists the Secretary in the
5 performance of this responsibility. *See id.* §§ 2, 4. As required by the Constitution, a census of the
6 population has been conducted every 10 years since 1790. *See* U.S. Census Bureau, Measuring
7 America: The Decennial Censuses From 1790 to 2000,
8 https://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf. Censuses from 1890-1950,
9 as well as many of the earlier censuses, asked all respondents whether, if foreign born, they were
10 citizens or (in a different formulation of the same basic inquiry) had naturalized. *Id.* Censuses from
11 1960-2000 asked a sizeable sample of the population for citizenship or naturalization status, *id.*, and
12 the American Community Survey (“ACS”) has asked a sample of the population for citizenship every
13 year since 2005, *see* U.S. Census Bureau, Archive of Am. Community Survey Questions,
14 <https://www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html>.

15 **II. REINSTATEMENT OF A CITIZENSHIP QUESTION IN THE 2020 CENSUS**

16 In early 2017, the new leadership at the Department of Commerce began evaluating various
17 issues in connection with the upcoming 2020 census, including the reinstatement of a citizenship
18 question. As part of that evaluation process Commerce reached out to federal government
19 components, including the Department of Justice (“DOJ”).

20 On December 12, 2017, DOJ submitted a letter to the Census Bureau “formally request[ing]
21 that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship.”
22 Letter from Arthur Gary, General Counsel, DOJ, to Ron Jarmin, performing the nonexclusive duties
23 of the Director, U.S. Census Bureau (Dec. 12, 2017) (“DOJ Letter”), Administrative Record (“A.R.”)
24 at 663. DOJ stated that “this data is critical to the Department’s enforcement of Section 2 of the
25 Voting Rights Act” (“VRA”), now codified at 52 U.S.C. § 10301, and instrumental “[t]o fully enforce
26 those requirements.” *Id.*

27 On March 26, 2018, after examining the issue and considering input from a variety of sources,
28 the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020

1 census questionnaire. Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs,
2 from the Sec’y of Commerce on Reinstatement of a Citizenship Question on the 2020 Decennial
3 Census Questionnaire (Mar. 26, 2018) (“Ross Memo”), A.R. at 1313. The Secretary determined that
4 the census should collect such information in order to provide DOJ with census-block-level data to
5 assist in enforcing the VRA. *Id.* DOJ had explained that “the decennial census questionnaire is the
6 most appropriate vehicle for collecting that data” because it would provide census-block-level
7 citizenship voting age population (“CVAP”) data that are not currently available from the ACS (which
8 provides data only at the larger census block group level). *Id.* DOJ explained that having citizenship
9 data at the census block level will permit more effective enforcement of the VRA. *Id.* at 663-64.

10 In his decision, the Secretary first emphasized the goal of conducting a complete and accurate
11 decennial census. A.R. at 1313. The Secretary also observed that collection of citizenship data in the
12 decennial census has a long history and that the ACS has included a citizenship question since 2005.
13 *Id.* at 1314. The Secretary therefore found that “the citizenship question has been well tested.” *Id.*
14 He also confirmed with the Census Bureau that census-block-level citizenship data are not available
15 using the annual ACS. *Id.*

16 The Secretary had asked the Census Bureau to evaluate the best means of providing the data
17 requested by DOJ, and the Census Bureau initially presented three alternatives: Option A would have
18 continued the status quo and provided DOJ with ACS citizenship data at the census-block-group level,
19 rather than the block level requested in the DOJ Letter; Option B would have placed the ACS
20 citizenship question on the decennial census, which goes to every American household; and Option C
21 instead would have provided block-level citizenship data for the entire population using existing
22 federal administrative-record data.¹ A.R. at 1314-16. In his decision memo, the Secretary concluded
23 that Option A would not provide DOJ with improved CVAP data, as there was no guarantee that the
24 accuracy or level of detail of the ACS data could be enhanced to meet DOJ’s requirements even using

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26 ¹ Administrative records include data from the Internal Revenue Service, the Social Security Administration, the
27 Centers for Medicare and Medicaid Services, the Department of Housing and Urban Development, the Indian Health
28 Service, the Selective Service, and the U.S. Postal Service. 2020 Census Operational Plan: A New Design for the
21st Century, at 22-26 (Sept. 2017, v.3.0), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>. Administrative records will be utilized only if the data is corroborated by at least two sets of records.

1 sophisticated modeling methods. *Id.* at 1314-15. After discussing Options B and C, *id.* at 1315-16,
2 the Secretary indicated that he had asked the Census Bureau to develop and implement a fourth
3 alternative, Option D, which would effectively combine Options B and C. *Id.* at 1316. Under this
4 fourth option, a citizenship question would be reinstated on the decennial census in the same form as
5 it appears on the ACS, imposing on each of the country’s inhabitants the legal obligation to respond.
6 *Id.* at 1316-17. The Secretary directed the Census Bureau to work to further enhance its
7 administrative-record data sets, protocols, and statistical models to maximize its ability to match the
8 decennial census responses with administrative records. *Id.* at 1316. The combination of responses
9 to the question and more-developed practices for comparing those responses with administrative
10 records would then permit the Census Bureau to determine the inaccurate response rate (whether for
11 non-response, conflicting responses, or other reasons) for the entire population. *Id.* at 1317. The
12 Secretary concluded that this combined option would provide DOJ with the most complete and
13 accurate CVAP data. *Id.*

14 In addition to discussing the operational aspect of DOJ’s request with the Census Bureau, the
15 Secretary described how he considered stakeholder views. He reviewed letters from local, state, and
16 federal officials and advocacy groups, monitored stakeholder commentary in the press, and spoke
17 personally to interested parties on both sides of the issue. A.R. at 1313-14. The Secretary considered
18 but rejected concerns raised by a number of parties that reinstating a citizenship question on the
19 decennial census would negatively impact the response rate for noncitizens. *Id.* at 1315-16, 1317-18.
20 While the Secretary agreed that a “significantly lower response rate by non-citizens could reduce the
21 accuracy of the decennial census and increase costs for non-response follow up operations,” *id.* at
22 1315, he concluded that “neither the Census Bureau nor the concerned stakeholders could document
23 that the response rate would in fact decline materially” as a result of reinstatement of the citizenship
24 question. *Id.* Based on his discussions with outside parties, Census Bureau leadership and others
25 within the Department of Commerce, the Secretary determined that, to the best of everyone’s
26 knowledge, limited empirical data exists on how reinstatement of a citizenship question might impact
27 response rates on the 2020 Census. *Id.* at 1315, 1317. Thus, “while there is widespread belief among
28 many parties that adding a citizenship question could reduce response rates, the Census Bureau’s

1 analysis did not provide definitive, empirical support for that belief.” *Id.* at 1316.

2 Certain stakeholders advised the Secretary that they believed that reinstating a citizenship
3 question could negatively impact response rates because of heightened, general distrust of the
4 government. But the Secretary concluded that those commenters referred to individuals who may
5 decline to participate regardless of whether the census includes a citizenship question and noted that
6 “no one provided evidence that there are residents who would respond accurately to a decennial census
7 that did not contain a citizenship question but would not respond if it did.” A.R. at 1317. The
8 Secretary further observed that, based on past experience, “certain interest groups consistently attack
9 the census and discourage participation.” *Id.* at 1318. The Secretary explained the Census Bureau
10 intends to take steps to conduct respondent and stakeholder-group outreach in an effort to mitigate the
11 impact of the foregoing issues on the 2020 decennial census. *Id.*

12 ARGUMENT

13 The Court should reject Plaintiffs’ request to conduct discovery in this administrative-record
14 case. First, no exception applies to the general rule that judicial review of final agency action is
15 limited to the administrative record and no extra-record discovery should be allowed. Specifically,
16 the APA contemplates review of constitutional claims and APA claims on the same administrative
17 record where, as here, such claims overlap. Second, as the Supreme Court recently held in an
18 analogous case, no extra-record discovery should occur until this Court has decided whether the
19 Secretary’s decision is judicially reviewable. Third, Defendants should not be required to produce a
20 privilege log in conjunction with the administrative record because privileged materials are not
21 considered part of an administrative record.

22 **I. NO DISCOVERY BEYOND THE ADMINISTRATIVE RECORD SHOULD BE** 23 **PERMITTED.**

24 Judicial review of final agency action is generally limited to the administrative record. *Ctr.*
25 *for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). This rule
26 “ensures that the reviewing court affords sufficient deference to the agency’s action” because “[w]hen
27 a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing
28 court to substitute its judgment for that of the agency.” *San Luis & Delta-Mendota Water Auth. v.*
Locke, 776 F.3d 971, 992 (9th Cir. 2014) (citation and quotations omitted). Hence, “the focal point

1 for judicial review should be the administrative record already in existence, not some new record
2 made initially in the reviewing court.” *Ctr. for Biological Diversity*, 450 F.3d at 943 (quoting *Camp*
3 *v. Pitts*, 411 U.S. 138, 142 (1973)).

4 The Ninth Circuit has recognized four exceptions to the record-review rule: (1) when extra-
5 record evidence provides background information necessary to determine whether the agency
6 considered all relevant factors, (2) when extra-record evidence is necessary to determine whether the
7 agency relied on documents not in the record, (3) when supplementing the record is necessary to
8 explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency
9 bad faith. *San Luis & Delta-Mendota*, 776 F.3d at 992. These exceptions are “narrowly construed,”
10 and “the party seeking to admit extra-record evidence initially bears the burden of demonstrating that
11 a relevant exception applies.” *Id.*; see also *Las Virgenes Mun. Water Dist.-Triunfo Sanitation Dist. v.*
12 *McCarthy*, Nos. 14-01392 & 98-04825, 2016 WL 393166, at *5 (N.D. Cal. Feb. 1, 2016), *appeal*
13 *dism’d*, 2017 WL 3895004 (9th Cir. Apr. 12, 2017); *Save Strawberry Canyon v. U.S. Dep’t of Energy*,
14 830 F. Supp. 2d 737, 759 (N.D. Cal. 2011).

15 Plaintiffs assert that the fourth exception should apply because “the agency decision was made
16 in bad faith.” ECF No. 47, at 2. “An agency acts in bad faith when it engages in willful misconduct.”
17 *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1260-61 (E.D. Cal. 1997). But this
18 bad faith exception to the record-review rule only comes into play if a plaintiff makes “a strong
19 showing of bad faith or improper behavior” by the agency. *McCrary v. Gutierrez*, 495 F. Supp. 2d
20 1038, 1043 (N.D. Cal. 2007) (quoting *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d
21 1250, 1262 (11th Cir. 2007)). Plaintiffs’ conclusory allegations here do not meet this burden.

22 The Complaint alleges only that “[t]he stated purpose of adding the question—that it is
23 necessary to enforcing Section 2 of the Voting Rights Act—is not borne out by the facts and is a
24 pretext for other unstated and ulterior purposes.” Compl. ¶ 115; see also *id.* ¶ 70. Although it is not
25 clear to what Plaintiffs are referring,² neither of these statements refers to any specific evidence of
26 bad faith or even alludes to a basis for concluding that bad faith existed. First, whether a decision is

27 _____
28 ² Pursuant to the Court’s June 12, 2018 Order Granting Stipulation, see ECF No. 47, the Parties are filing simultaneous briefs concerning whether discovery is appropriate in this action. Accordingly, Defendants address these discovery-related issues only insofar as they are raised by Plaintiffs’ Complaint. Defendants will respond, as appropriate, to any arguments in Plaintiffs’ brief when they file their reply brief on June 21, 2018.

1 “borne out by the facts” is not a question of bad faith, but a question of whether the decision withstands
2 the APA’s arbitrary and capricious review. *See Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*,
3 273 F.3d 1229, 1236 (9th Cir. 2001) (the APA’s “arbitrary and capricious standard” requires a court
4 to consider whether the agency “articulated a rational connection between the facts found and the
5 choice made”). If the decision is not factually sustainable on the record before the agency, then it
6 must be set aside, *see Camp*, 411 U.S. at 141-43, so engaging in discovery is neither necessary nor
7 appropriate. Second, a decisionmaker’s “unstated and ulterior purposes” (if any) are not by
8 themselves relevant in a record-review case and do not alone constitute evidence of bad faith. As the
9 Supreme Court held long ago, it is “not the function of the court to probe the mental processes of” the
10 agency decisionmaker. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (citation omitted); *see*
11 *also In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (“the actual subjective
12 motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of
13 bad faith or improper behavior”); *Confederated Tribes & Bands of Yakama Nation v. McDonald*, No.
14 02-cv-3079, 2003 WL 1955763, at *17 (E.D. Wash. Jan. 24, 2003). Accordingly, plaintiffs’ bare
15 allegations do not come close to making the necessary showing of bad faith. *See Citizens to Preserve*
16 *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (noting that “there must be a strong showing
17 of bad faith or improper behavior before” probing the mental processes of an administrative
18 decisionmaker); *see also Animal Def. Council*, 840 F.2d at 1438 (limiting review to administrative
19 record where plaintiff “fails to show that the Bureau acted in bad faith or acted improperly . . . or that
20 discovery would have helped the [plaintiff] make that showing”).

21 Plaintiffs also rely on a record-review exception not recognized by the Ninth Circuit: extra-
22 record evidence should be permitted, they say, because their Complaint asserts a constitutional claim
23 in addition to an APA claim. But Congress did not carve out constitutional claims from the record-
24 review procedures that govern challenges to final agency actions. Indeed, § 706 of the APA provides
25 for judicial review of final agency action that is “contrary to constitutional right, power, privilege, or
26 immunity.” 5 U.S.C. § 706(2)(B). Courts across the country have held that § 706 precludes discovery
27 beyond the administrative record even where constitutional claims are presented. *See Jarita Mesa*
28 *Livestock Grazing Ass’n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1232–33 (D.N.M. 2014); *Evans v.*

1 *Salazar*, No. 08-cv-0372, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010); *Harvard Pilgrim*
 2 *Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004); *Charlton Mem'l*
 3 *Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993) (adding constitutional claims to APA claims
 4 “cannot so transform the case that it ceases to be primarily a case involving judicial review of agency
 5 action”).³

6 Extra-record discovery is particularly inappropriate in cases where, as here, Plaintiffs’
 7 constitutional claims fundamentally overlap with their other APA claims. *See, e.g., Chiayu Chang v.*
 8 *U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017); *Alabama-Tombigbee*
 9 *Rivers Coal. v. North*, No. CV-01-S-0194-S, 2002 WL 227032, at *3-6 (N.D. Ala. Jan. 29, 2012).
 10 Indeed, Plaintiffs’ constitutional challenge under the Enumeration Clause duplicates their APA claim:
 11 under both theories, Plaintiffs allege that the Secretary’s decision to reinstate a citizenship question
 12 will diminish census response rates, resulting in an undercount of the population. Compl. ¶¶ 92, 99-
 13 100. Permitting discovery for such overlapping constitutional and APA challenges would
 14 “incentivize every unsuccessful party to agency action to allege . . . constitutional violations to trade
 15 in the APA’s restrictive procedures for the more even-handed ones of the Federal Rules of Civil
 16 Procedure.” *Jarita Mesa Livestock*, 58 F. Supp. 3d at 1238. Accordingly, Plaintiffs should not be
 17 allowed to circumvent the APA’s record-review rule in here.⁴

18 **II. NO DISCOVERY SHOULD TAKE PLACE BEFORE RESOLUTION OF**
 19 **THRESHOLD ARGUMENTS IN DEFENDANTS’ MOTION TO DISMISS.**

20 In the event the Court rules that extra-record discovery is permissible in this case, such
 21 discovery should be stayed pending the Court’s resolution of the threshold arguments in Defendants’

22 ³ While some courts have allowed extra-record discovery when a plaintiff asserts both constitutional claims and APA
 23 claims, they have done so under unique circumstances. For example, discovery has been allowed where there is no
 24 administrative record with respect to certain claims, *Puerto Rico Pub. Hous. Admin. v. U.S. Dep’t of Hous. & Urban*
 25 *Dev.*, 59 F. Supp. 2d 310, 328 (D.P.R. 1999), where there is a procedural due process claim not countenanced by the
 26 administrative record, *Grill v. Quinn*, No. 10-cv-0757, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012), or where
 27 there are alleged constitutional violations that are either “*ultra vires* or [are] made pursuant to an unconstitutional
 grant of power from the sovereign,” *Evans*, 2010 WL 11565108, at *2 (distinguishing *Little Earth of United Tribes,*
Inc. v. U.S. Dep’t of Hous. & Urban Dev., 675 F. Supp. 497, 531 (D. Minn. 1987)). Even in such cases, however,
 courts admonish that “wide-ranging discovery is not blindly authorized at a stage in which an administrative record
 is being reviewed.” *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008) (quoting *Puerto Rico Pub. Hous.*
Admin., 59 F. Supp. 2d at 328).

28 ⁴ In any event, if the record is inadequate to support the Secretary’s decision, the remedy is not to open up the agency’s
 files to discovery—rather, if the decision of the agency “is not sustainable on the administrative record made, then
 the . . . decision must be vacated and the matter remanded . . . for further consideration.” *Camp*, 411 U.S. at 143.

1 motion to dismiss, which will be filed shortly. That motion will present substantial threshold
2 arguments under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), including that (1) Plaintiffs
3 lack standing to bring this action, (2) Plaintiffs' case is barred by the political question doctrine,
4 (3) judicial consideration of Plaintiffs' APA claim is barred because the Secretary's decision is
5 committed to agency discretion, and (4) Plaintiffs fail to state a claim under the Enumeration Clause.
6 An analogous situation recently arose from this District, involving a request to expand the
7 administrative record and obtain burdensome discovery before the Court had ruled on the justiciability
8 of a decision by the Acting Secretary of the Department of Homeland Security. There, the Supreme
9 Court granted a writ of mandamus and overturned an order to supplement the administrative record,
10 concluding that the District Court should have "first resolved the Government's threshold arguments"
11 because "[e]ither of those arguments, if accepted, likely would eliminate the need for the District
12 Court to examine a complete administrative record." *In re United States*, 138 S. Ct. at 445. This
13 Court likewise should resolve Defendants' motion to dismiss—raising similar justiciability issues—
14 before authorizing any extra-record discovery.

15 **III. PLAINTIFFS ARE NOT ENTITLED TO A PRIVILEGE LOG FOR THE**
16 **ADMINISTRATIVE RECORD.**

17 Defendants should not be required to provide a privilege log listing privileged materials (such
18 as deliberative memoranda or attorney-client communications) that were not included in the
19 administrative record. Privileged materials, including those that are deliberative in nature, do not
20 form part of the record. *See In re Subpoena Duces Tecum*, 156 F.3d at 1279-80; *San Luis Obispo*
21 *Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 45 (D.C. Cir. 1986); *San Luis*
22 *& Delta-Mendota Water Auth. v. Jewell*, No. 15-cv-01290, 2016 WL 3543203, at *19 (E.D. Cal. June
23 23, 2016) ("deliberative documents are not part of the administrative record" (quoting *Nat'l Ass'n of*
24 *Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27-28 (D.D.C.
25 2009))). The Ninth Circuit has declined to require an agency to supply a privilege log with the record.
26 *See Cook Inletkeeper v. U.S. EPA*, 400 F. App'x 239, 240 (9th Cir. 2010) (denying motion to require
27 preparation of a privilege log). Numerous district courts within this circuit have applied this rule. *See*
28 *San Luis & Delta-Mendota Water Auth.*, 2016 WL 3543203, at *19 ("To require a privilege log as a
matter of course in any administrative record case where a privilege appears to have been invoked

1 would undermine the presumption of correctness.”); *California v. U.S. Dep’t of Labor*, No. 13-cv-
2 02069, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014) (“[B]ecause internal agency deliberations
3 are properly excluded from the administrative record, the agency need not provide a privilege log.”);
4 *Sierra Pac. Indus. v. U.S. Dep’t of Agric.*, No. 11-cv-1250, 2011 WL 6749837, at *3 (E.D. Cal. Dec.
5 22, 2011) (denying motion to include privilege log filed in separate litigation where “plaintiffs have
6 failed to articulate any argument for why the court should include extra-record materials that implicate
7 the intent of the administrative decisionmakers”); *see also, e.g., Great Am. Ins. Co. v. United States*,
8 No. 12-cv-9718, 2013 WL 4506929, at *8-9 (N.D. Ill. Aug. 23, 2013); *but see, e.g., Ctr. for Food*
9 *Safety v. Vilsack*, No. 15-cv-01590, 2017 WL 1709318, at *4 (N.D. Cal. May 3, 2017); *Inst. for*
10 *Fisheries Res. v. Burwell*, No. 16-cv-01574, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017).

11 Practical considerations further warrant denial of any request for a privilege log, as requiring
12 such a log would invite tangential discovery disputes about the adequacy of *that* document and likely
13 lead to unnecessary and distracting motions practice incompatible with the purposes of limited APA
14 review of agency decisions. As the Supreme Court has made clear, when review of an agency decision
15 is at issue, “the focal point for judicial review should be the administrative record already in existence,
16 not some new record made initially in the reviewing court.” *Camp*, 411 U.S. at 142. This form of
17 judicial review permits the Court to focus on the agency’s stated reasons, rather than probing the
18 immaterial subjective views of individual agency personnel. *In re Subpoena*, 156 F.3d at 1279. A
19 rule “requiring the United States to identify and describe on a privilege log all of the deliberative
20 documents would invite speculation into an agency’s predecisional process and potentially undermine
21 the limited nature of review available under the APA.” *Great Am. Ins. Co.*, 2013 WL 4506929, at *9.
22 It would also pose substantial burdens on agencies, requiring them to collect and catalogue the
23 privileged materials, and then create delay as “[t]he privilege question would have to be resolved
24 before judicial review of the administrative decision could even begin.” *Blue Ocean Inst. v. Gutierrez*,
25 503 F. Supp. 2d 366, 372 & n.4 (D.D.C. 2007). Such burdens and delays would frustrate the scheme
26 for orderly and limited judicial review on the merits set forth in the APA. Accordingly, no privilege
27 log should be required.

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Date: June 14, 2018

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