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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CITY OF SAN JOSE and BLACK ALLIANCE FOR JUST IMMIGRATION,

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF REVIEW ON THE ADMINISTRATIVE RECORD

INTRODUCTION

Plaintiffs' motion to engage in discovery beyond the administrative record is premised on a fundamental misunderstanding of the nature and scope of judicial review in challenges to agency action under the Administrative Procedure Act ("APA").

As explained in Defendants' memorandum supporting review on the administrative record, it is black-letter administrative law that where, as here, there is a "contemporaneous explanation" for an agency's decision, its validity "must … stand or fall on the propriety of that finding." *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam). "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." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citation omitted). "If that finding is not sustainable on the administrative record made, then the … decision must be vacated and the matter remanded to [the agency] for further consideration" because "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142-43 (citation omitted).

Here, the decision to reinstate a citizenship question on the decennial census is not subject to judicial review in the first place: Plaintiffs lack standing to maintain this action, and review of the Secretary's decision is barred by both the political question doctrine and the fact that the Census Act commits the form and content of the census to the Secretary's discretion by law. Defendants nonetheless have produced a 1,300+ page administrative record that includes all of the non-privileged documents that were directly or indirectly considered by the decisionmaker. If Plaintiffs believe that that record is inadequate to support the agency's decision, then the next step is not to expand the basis for this Court's review to include documents never even considered by the decisionmaker or testimony probing the minds of agency officials—it is instead for Plaintiffs to file a merits brief asking that the decision be set aside. *See Camp*, 411 U.S. at 143.

To be sure, supplementation of an administrative record may be appropriate in some instances—namely, upon a "strong showing" that the agency has acted in bad faith, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), or where it is "clear" that the decisionmaker relied on documents outside the administrative record, *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). But Plaintiffs have not come close to satisfying their burden to demonstrate bad faith here,

and they identify no nonprivileged document actually considered by the decisionmaker that was not included in the administrative record. Nor could Plaintiffs satisfy the basic rationale underlying these exceptions: that the administrative record produced by the agency reflects "such [a] failure to explain administrative action as to frustrate effective judicial review." *Camp*, 411 U.S. at 142-43. To the contrary, the Secretary's decision memo, and the documents on which he based that decision, set forth his reasoning in great detail. Plaintiffs may disagree with the Secretary's rationale, but they cannot credibly claim that additional information is needed to *understand* it. Because Plaintiffs fail to meet their burden to demonstrate bad faith or provide clear evidence that any nonprivileged document was wrongly withheld—much less to show that the record is so bare that it somehow frustrates judicial review—the Court should deny Plaintiffs' motion and review the agency's decision, if at all, on the record it has provided.

ARGUMENT

Defendants certified and lodged an administrative record consisting of all non-privileged documents considered by the Secretary in deciding whether to reinstate a citizenship question on the decennial census. *See* AR 1-1,321. That record amply explains the basis for the agency's decision, and Plaintiffs could not credibly contend otherwise. Plaintiffs' alternative conception of the proper contents of the record—to include documents that were never considered by the decisionmaker, that are deliberative or otherwise privileged, and, most significantly, "communications with the White House"—bears no resemblance to any traditional or recognized definition of an administrative record and therefore should be squarely rejected. Indeed, both Plaintiffs' motion and their discovery request attempt to transform the proper definition of an administrative record into a wish-list of materials they would like the government to produce—whether or not those documents and communications actually form part of the record for the decision under review (or even exist).

As an initial matter, Plaintiffs' contention that they may obtain discovery on the basis of a less "stringent" showing than that required by *Overton Park* because "[t]here have been no administrative findings here—there was no hearing and no decision by an administrative law judge," is specious. Pls.' Mot. to Expand AR, ECF No. 48, at 8 (hereinafter "Pls.' Mot."). The "authority" cited for this proposition, *Nat'l Nutritional Foods Ass'n v. Food and Drug Admin.*, 491 F.2d 1141 (9th Cir. 1974), contains no such holding; to the contrary, that decision relied on *Overton Park* to deny discovery

and affirmed that "effective government requires" the court to afford the agency the presumption of regularity "absent the most powerful preliminary showing to the contrary," *id.* at 1146. Plaintiffs' assertion that there are "no administrative findings here," Pls.' Mot. 8, is disingenuous, given the length and depth of the Secretary's decision memo setting forth his findings. And in any event, the absence of formal *adjudicative* agency proceedings does not, as Plaintiffs suggest, lessen their burden to demonstrate bad faith.

Plaintiffs are equally misguided in citing *Public Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982), for the proposition that discovery should be permitted "when a petitioner alleges bad faith and is 'unable to develop and present' the claim without further discovery." Pls.' Mot. at 6. That decision permitted discovery on a showing that "[o]rdinarily … might not be sufficient to justify a discovery order" based on "compelling reasons" specific to "*the case before us*," unrelated to the petitioners' allegations of bad faith. *Pub. Power Council*, 674 F.2d at 794-95 (emphasis added). Plaintiffs here quote, out of context, a later statement of the court confirming that, *even though* "petitioners have not met th[e] burden" to demonstrate bad faith under *Overton Park*, they also could seek discovery related to their allegations of bad faith given that discovery already was warranted under other exceptions. *Id.* at 795. The court did not, as Plaintiffs claim, hold that discovery is proper anytime a plaintiff needs such evidence to develop and present a claim of improper agency behavior or motivation. Pls.' Mot. at 6.

This Court should afford the agency the presumption of having properly designated the administrative record "absent clear evidence to the contrary." *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 240 (9th Cir. 2010) (internal quotation and citation omitted). To overcome this presumption, it is not enough merely to cast aspersions at the agency's motives, *see* Pls.' Br. 9 (alleging that "the AR itself suggests that Ross's decision … was based on a plainly unlawful motive, *i.e.*, to avoid making an 'actual Enumeration'"), or to suggest that the record is incomplete because its contents fall short of Plaintiffs' capacious imaginations, *see id.* (complaining of the lack of White House communications).[1] Rather, a "[p]laintiff must present 'well-nigh irrefragable proof' of bad faith or

[1] Considering that the administrative record includes more than 1300 pages of various types of material, encompassing that which does *not* support the ultimate decision, Plaintiffs' complaint that the record lacks "any substantive material other than the short summaries regarding Defendant Ross's meetings with stakeholders," makes little sense. Pls.' Mot. 9.

bias on the part of government officials," to overcome the presumption that the agency discharged its duties in good faith. *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (citations omitted).

Specifically, Plaintiffs' contention that isolated, unsolicited communications from Kris Kobach demonstrate bad faith on the part of Secretary Ross misses the mark. Pls.' Mot. 4 (citing A.R. 763-64). For one thing, Plaintiffs' assertion that, following these communications, "Ross concluded that the proper course of action was to include the exact question that Messrs. Kobach and Bannon had requested," Pls.' Mot. 2, is flatly incorrect. Kobach advocated inclusion of a question asking non-citizens for information on their immigration *status*, *see* A.R. 764, but the Secretary rejected that request and opted instead to include the same question that has been asked on the American Community Survey since 2005. *See* https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/Quest05to06.pdf. And Kobach's stated opinion that a lack of citizenship data for the entire U.S. population "leads to the problem that aliens … are still counted for congressional apportionment purposes," *id.* at 764, does not, as Plaintiffs argue, "suggest that Ross's decision to include the citizenship question was based on a plainly unlawful motive, *i.e.*, to avoid making an 'actual Enumeration' of the population," Pls. Mot. 9. Kobach's rationale for contacting the Secretary cannot be imputed to the Secretary. Nothing in the record remotely suggests that Ross shares Kobach's view on the proper basis for apportionment—much less that he does not intend to perform a person-by-person count of the population—notwithstanding the fact that Ross's "actual subjective motivation … is *immaterial* as a matter of law—unless there is a showing of bad faith or improper behavior." *In re Subpoena Duces Tecum on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (emphasis added). Plaintiffs' insistence that, standing alone, evidence of outreach to the Secretary by a state official establishes bad faith is unpersuasive.

Moreover, even if Kobach reached out to the Secretary at the request of the President or his staff, such communications are neither improper nor evidence of bad faith. Interactions and consultations between the President and high-ranking members of the Executive Branch are not only commonplace, but entirely appropriate, and do not change the relevant analysis here. "The authority of the President to control and supervise executive policymaking is derived from the Constitution … Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive." *Sierra Club v. Costle*, 657

F.2d 298, 406-07 (D.C. Cir. 1981) (recognizing that "courts [must] tread with extraordinary caution in mandating disclosure" of Presidential communications with Executive officials). And there is nothing untoward in an agency decisionmaker then exercising independent judgment to make a decision on the stated basis—*even if* additional motivations may be present—as long as the decision may be sustained on the articulated rationale. *See id.* at 407 (explaining that record review does not require disclosure of White House communications in informal rulemaking setting because any decision "must have the requisite factual support in the rulemaking record").

And Plaintiffs' more general suggestion that the administrative record "is facially incomplete" because it lacks "communications with the White House," i.e., the internal deliberations of Executive Branch officials, is deeply flawed. Pls.' Mot. 9. Indeed, it is widely recognized that deliberative and other privileged materials are not properly considered part of an administrative record, and thus need not be included or set forth on a privilege log. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986 (en banc). Plaintiffs' argument rests on the incorrect premise that privileged materials, including such communications, are part of an administrative record in the first instance.[2] *Id.* But the Ninth Circuit, like every other court of appeals, has not held that privileged materials must be included as part of an administrative record. To the contrary, the Ninth Circuit has distinguished between, on the one hand, what must properly be included in the record and, on the other, "predecisional transcripts and related documents" concerning "the internal deliberative processes of the agency [and] the mental processes of individuals agency members." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993) (internal citation omitted). This approach moreover accords with that taken by the other courts of appeals to have considered the question. *See, e.g.*, *San Luis Obispo Mothers for Peace*, 789 F.2d at 44-45; *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1455-58 (1st Cir. 1992). Here, the communications Plaintiffs seek fall squarely within the deliberative-process privilege and, even more significantly, are subject to executive privilege, and in particular, the presidential communications privilege. Plaintiffs

[2] Plaintiffs' reliance on *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016), which considered whether an agency's regulation warranted *Chevron* deference, conflates the standard for merits review of an agency decision with record-review principles applicable to the construction of an agency record. Pls.' Mot. 9. *Encino* has nothing to do with, and provides no support for, Plaintiffs' discovery arguments.

fail to even grapple with the scope of these privileges or offer any cogent reason why they should be overcome; instead, they blithely assert that the absence of these documents evidences the incompleteness of the administrative record. The Court should reject Plaintiffs' attempt to engage in wide-ranging discovery beyond the administrative record designated by the agency. At a bare minimum, this Court should "rule on the Government's threshold arguments" before requiring the production of additional materials because "those arguments, if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *In re United States*, 138 S. Ct. 443, 445 (2017) (granting writ of mandamus to district court).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to engage in discovery beyond the administrative record should be denied.

Date: June 21, 2018

Respectfully submitted,

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