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A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action

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A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action

Peter Constable Alter*

Recent cases involving controversial actions taken by federal agencies under the Trump Administration have highlighted a preliminary procedural nuance unique to litigation under the Administrative Procedure Act of 1946 (APA): the “administrative record.” The APA provides for liberal judicial review of federal agency actions, but limits that review to the “whole record, or those parts of it cited by a party.” This “record rule” limits judicial review to the “administrative record” before the agency when it made the decision at issue. The APA defines the administrative record for agency action subject to its formal procedural requirements, but leaves open the question of what an administrative record consists of for informal agency action not subject to those procedural requirements but nevertheless subject to judicial review.

Lower courts, without definitive statutory text, legislative history, or Supreme Court precedent for guidance, have developed a divergent and sometimes inconsistent body of case law addressing the proper scope of an administrative record for informal agency action. The traditional approach generally would focus on those materials directly considered by the agency decisionmaker alone while categorically excluding most, if not all, internal documents. But more recently, some lower courts have begun to apply an expansive construction of the record rule, requiring agencies subject to litigation to submit any material considered by agency personnel involved in the decision-making process, including an array of internal materials. Two recent cases, involving the Department of Homeland Security’s attempted revocation of the Deferred Action for Childhood Arrivals (DACA) program and Secretary of Commerce Wilbur Ross’s attempts to add a citizenship question to the 2020 Department of Commerce, illustrate the wider movement towards an expansive construction of the record rule for informal agency action.

In this Note, I argue that the expansive approach to the record rule for informal agency action becoming popular in some lower courts is correct, both in terms of the judicial review provisions of the APA it serves and the principles of administrative law the APA furthers.

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The broader adoption of an expansive approach to the record rule has implications for any area of law touched by federal agencies. Indeed, as the DACA and 2020 Census litigation demonstrate, the composition of an administrative record can have significant consequences for issues of national importance.

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INTRODUCTION

The Trump Administration is no stranger to controversies. Many of these controversies, indeed some of the most contentious, involve the actions of Trump-appointed Officials in federal agencies. The Administration’s decisions to rescind the Deferred Action for Childhood Arrivals (DACA) program and add a question about citizenship to the 2020 Census are two of the most noteworthy examples, which various stakeholders have since challenged in federal court. In the case of DACA, the University of California, among others, brought suit against Acting Secretary of Homeland Security (DHS) Elaine Duke in September 2017, alleging violations of the Administrative Procedure Act of 1946, 5 U.S.C. § 500 *et seq.* (2012) (APA), and seeking to enjoin the DHS from rescinding DACA.¹ Similarly, in the case of the 2020 Census, numerous states, cities, and counties, the District of Columbia, and the United States Conference of Mayors, brought suit against Secretary of Commerce Wilbur Ross in April 2018, alleging violations of the APA and seeking to enjoin the Department of Commerce from including the citizenship question in the 2020 census.²

These two cases have highlighted an overlooked preliminary issue unique to APA litigation: the “administrative record.” The APA standardizes “the procedures by which federal agencies are accountable to the public,”³ and provides for liberal

1. *See* Complaint, Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec., No. 3:17-cv-05211 (N.D. Cal. Sept. 8, 2017). The claim also names the Department of Homeland Security as a defendant, alleges constitutional violations, and seeks declaratory relief. *Id.* In this Article, I will use “the DACA litigation” or “the DACA case” to refer to this matter collectively.

2. *See* Complaint, New York v. U.S. Dep’t of Commerce, No. 1:18-cv-02921 (S.D.N.Y. Apr. 3, 2018).

3. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

judicial review of federal agency actions,⁴ “creat[ing] a comprehensive remedial scheme for those allegedly harmed by agency action.”⁵ However, the APA limits judicial review of agency action to “the whole record, or those parts of it cited by a party.”⁶ Under *Citizens to Preserve Overton Park, Inc. v. Volpe*, this “record rule”⁷ limits judicial review to the “administrative record that was before the [decisionmaker] at the time he [or she] made his [or her] decision.”⁸ As such, in APA cases the administrative record is “the focal point for judicial review,”⁹ with traditional discovery unavailable outside of extreme circumstances.¹⁰

However, as Judge Furman rankled in *Department of Commerce*, “the term ‘administrative record’ is not particularly helpful in clarifying the proper object of judicial review.”¹¹ That is especially true where the challenged agency action is “informal”—that is, the action is not subject to the APA’s more formal procedural provisions, which provide guidance for what would be included in an administrative record.¹² Indeed, informal agency actions are the sort at issue in the DACA litigation and *Department of Commerce*. Courts and commentators generally agree that the APA’s text and legislative history sheds minimal light on the record rule as it should apply to informal agency action¹³ and the Supreme Court has not helped matters, providing essentially no guidance as to the proper scope of the administrative record for informal agency action outside of the above quote from *Overton Park*. This has led to a disjointed and inconsistent body of case law as lower courts develop their own theories of the proper scope of an administrative record.¹⁴

Traditionally, lower courts would apply a narrow construction of the record rule, defining the whole administrative record for informal agency action to include primarily external documents submitted to the agency and considered directly by the agency decisionmaker, excluding most if not all internal documents and communications.¹⁵ But more recently, some district courts have begun to apply an

4. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (the APA’s “‘generous review provisions’ must be given a hospitable interpretation”), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977).

5. *Navajo Nation v. U.S. Dep’t of Interior*, 819 F.3d 1084, 1090 (9th Cir. 2016).

6. 5 U.S.C. § 706 (2018).

7. *Nat’l Audubon Soc’y. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).

8. *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*), 401 U.S. 402, 420 (1971).

9. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

10. See *Bos. Redevelopment Auth. v. Nat’l Park Serv.*, 838 F.3d 42, 48 (1st Cir. 2016) (“additional discovery may on rare occasions be proper in an APA case”); *Cnty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990) (“*Overton Park* allows discovery of the agency decisionmaking process only in two circumstances.”).

11. *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 631 (S.D.N.Y. 2019).

12. See 3 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 8:27 (3d ed. 2010).

13. See, e.g., *U.S. Dep’t of Commerce*, 351 F. Supp. 3d at 631 (“[T]he term ‘administrative record’ is not particularly helpful in clarifying the proper object of judicial review.”); Aram A. Gavoov & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 19–20 (2018).

14. See Gavoov & Platt, *supra* note 13, at 4–45; see *infra* Part III.

15. See, e.g., *Norris & Hirshberg, Inc. v. Sec. & Exch. Comm’n*, 163 F.2d 689, 693 (D.C. Cir. 1947) (“Briefs, and memoranda made by the Commission or its staff, are not parts of the

expansive reading of the record rule in reviewing informal agency action. These courts define the administrative record to include any materials considered by agency personnel involved in the decision-making process (not just the ultimate decisionmaker), including “internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes [that] inform an agency’s final decision.”¹⁶ They also require the agency produce formal privilege logs documenting any assertion of privilege for withheld documents.¹⁷ Judges Furman and Alsup adopted similarly expansive readings of the record rule in their preliminary rulings in *Department of Commerce* and the DACA litigation respectively.¹⁸

In this Note, I argue in favor of the expansive construction of the record rule becoming popular with some district courts reviewing informal agency action. In lieu of definitive statutory text or legislative history, I explain the proper scope of an administrative record for informal agency action with reference to the APA’s broader scheme, specifically the judicial review provisions the record rule serves.¹⁹ I begin, in Part I, by providing an overview of the relevant provisions of the APA. In doing so, I define informal agency action and describe the APA’s judicial review provisions, paying particular attention to the arbitrary and capricious standard of review that applies to informal agency action and requires such action be the product of “reasoned decisionmaking.”²⁰ In Part II, I describe the evolution of the administrative record concept, expounding on the divergent case law and identifying the key areas of dispute. Then, in Part III, I argue that the expansive construction of the administrative record illustrated by *Department of Commerce* and the DACA litigation is correct, both in terms of what is required for meaningful judicial review of informal agency action and in terms of the administrative law principles that underlie the APA.

The DACA litigation puts a fine point on the stakes. Is the administrative record for an agency action revoking legal protection for 800,000 people simply 256

[administrative] record.”); *Does 1-72 v. U.S. Citizenship & Immigration Servs.*, No. CV 15-273 (CKK), 2016 WL 10771344, at *5 (D.D.C. Jan. 8, 2016); *Oceana, Inc. v. Pritzker*, 217 F. Supp. 3d 310, 318 (D.D.C. 2016); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005).

16. *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574-VC, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017); *see also Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930-B, 2018 WL 4103724, at *3 (N.D. Tex. Aug. 29, 2018); *S.F. Bay Conservation & Dev. Comm’n v. U.S. Army Corps of Eng’rs*, No. 16-cv-05420-RS(JCS), 2018 WL 3846002, at *7 (N.D. Cal. Aug. 13, 2018); *Sierra Club v. Zinke*, No. 17-cv-07187-WHO, 2018 WL 3126401, at *4–45 (N.D. Cal. June 26, 2018); *Indigenous Envtl. Network v. U.S. Dep’t of State*, No. CV-17-29-GF-BMM, 2018 WL 1796217, at *4–45 (D. Mont. Apr. 16, 2018); *Ctr. for Food Safety v. Vilsack*, No. 15-cv-01590-HSG(KAW), 2017 WL 1709318, at *4–6 (N.D. Cal. May 3, 2017); *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, No. C05-03508 EDL, 2006 WL 708914, at *4 (N.D. Cal. Mar. 16, 2006).

17. *See supra* note 16.

18. *See infra* Part II.C.

19. *See Abramski v. United States*, 573 U.S. 169, 179 (2014) (“[I]nterpret the relevant words not in a vacuum, but with reference to the statutory context, structure . . . and purpose.”) (internal quotation marks omitted).

20. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011).

pages of fourteen publicly available documents?²¹ The current DHS would have you believe so.²² Or, is that administrative record the emails, letters, memoranda, notes, media items, opinions, and other materials considered by the Acting Secretary and her subordinates in the process of making the determination to revoke those legal protections? This Note argues that it must be the latter because that allows courts to fulfill their obligation under the APA to ensure federal agencies engaged in reasoned decision-making, with implications for any area of law involving agency action—from immigration, to telecommunications,²³ healthcare,²⁴ employment,²⁵ environmental protection,²⁶ land use,²⁷ Native American affairs,²⁸ and agriculture.²⁹

I. INFORMAL AGENCY ACTION AND JUDICIAL REVIEW UNDER THE APA

In this Part, I provide an overview of the APA's relevant provisions as context for understanding the proper scope of the administrative record for an informal agency action. I begin by defining informal agency action, which can only be done by contrasting it with the formal agency actions prescribed by the APA's procedural provisions. Then, I describe the standard of review applicable to informal agency under the APA's judicial review provisions. In doing so, I demonstrate that although informal agency actions are (by definition) exempt from the APA's formal procedural provisions, they are nevertheless subject to a minimum procedural requirement under its judicial review provisions, which requires that even informal agency action must be the product of an agency's "reasoned decisionmaking."³⁰

A. Agency Action: Formal and Informal

Put simply, an informal agency action is one that is *not* subject to the APA's formal procedural provisions.³¹ Thus, even though this Note is focused on informal

21. See *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017), *cert. granted, and judgment vacated*, 138 S. Ct. 443 (2017).

22. See *id.*

23. See, e.g., *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227 (D.C. Cir. 2008).

24. See, e.g., *Dana-Farber Cancer Inst. v. Hargan*, 878 F.3d 336 (D.C. Cir. 2017).

25. See, e.g., *McNeely v. U.S. Dep't of Labor*, 720 F. App'x 825 (9th Cir. 2017).

26. See, e.g., *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015).

27. See, e.g., *Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018), *order amended and supplemented*, 369 F. Supp. 3d 1045 (D. Mont. 2018), *appeal dismissed and remanded sub nom.* *Indigenous Envtl. Network v. U.S. Dep't of State*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019).

28. See, e.g., *Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084 (9th Cir. 2016).

29. See, e.g., *Ctr. for Food Safety v. Perdue*, 320 F. Supp. 3d 1101 (N.D. Cal. 2018), *appeal dismissed*, No. 18-16378, 2018 WL 5304837 (9th Cir. 2018); *Ctr. for Food Safety v. Vilsack*, No. 15-CV-01590-HSG (KAW), 2017 WL 1709318, at *1 (N.D. Cal. May 3, 2017).

30. *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

31. See 3 KOCH, *supra* note 12, § 8:27 ("In the vernacular of administrative law, an 'informal' action is one that is not subject to a closed, well-defined record. Thus, under the APA, 'formal' (a/k/a 'on the record' or 'trial-type') actions are precisely those that are subject to the APA's statutory definition of the 'record.' The residual category of 'informal' agency action includes everything else. Thus, even though notice-and-comment rulemaking has, in the decades since the APA was adopted in

agency action, I must take a brief detour and describe those sorts of formal agency action that *are* subject to the APA's formal procedural provisions in order to define informal agency action as the remainder.

The APA provides a formal procedural framework for some sorts of agency action. The APA's procedural provisions, codified 5 U.S.C. § 551 *et seq.*, do so by first distinguishing “rulemakings” from “adjudications.” A rulemaking is the “agency process for formulating, amending, or repealing a rule.”³² A rule, in turn, “means the whole or a part of an agency statement of general or particular availability and future effect.”³³ In contrast, an adjudication is essentially a case-by-case determination, typically the application of a statute or rule to a particular circumstance.³⁴ The APA provides formal procedural requirements for both, which results in something akin to an evidentiary hearing for rulemakings³⁵ and something akin to a court trial in front of agency officials or an administrative law judge for adjudications.³⁶

However, the APA only mandates an agency follow these formal procedures where Congress requires the agency to do so by using certain triggering language in the underlying statute. An agency must follow formal rulemaking procedures only “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing.”³⁷ And an agency must follow formal adjudication procedures only when an adjudication is “required by statute to be determined on the record after an opportunity for an agency hearing.”³⁸ Thus, without doing so explicitly, the APA creates distinction between “formal agency action” (agency action subject to

1946, become encrusted with procedures and impact statements, it is still, counter-intuitively perhaps, a species of ‘informal’ agency action under the original APA framework. The vast majority of agency adjudications are not subject to a formal record requirement and thus also ‘informal’ in this sense.”)

32. 5 U.S.C. § 551(5) (2018).

33. *Id.* § 551(4).

34. Under § 551(7), an adjudication is an “agency process for formulating an order.” *Id.* § 551(7). An order, in turn, “means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making.” *Id.* § 551(6).

35. *See generally id.* §§ 553, 556, 557.

36. § 554(b) provides that persons entitled to an agency hearing must receive notice of “the time, place, and nature of the hearing,” “the legal authority and jurisdiction under which the hearing is to be held,” and “the matters of fact and law asserted.” *Id.* § 554(b). In the event the parties are unable to resolve the matter at issue by consent, § 556 and § 557 provide for trial-like hearings and decision-making, appealable to the agency head. If, however, the relevant statute does not trigger formal adjudication procedures, the APA does not subject the agency to a specific procedural regime. *Id.* §§ 556, 557.

37. *Id.* § 553(c) (2018). Although a statute in theory need not use the precise wording of § 553(c) to trigger formal rulemaking procedures, *see* *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 238–46 (1973), the precise phrasing is “virtually . . . a touchstone test.” *Mobil Oil Corp. v. Fed. Power Comm’n*, 483 F.2d 1238, 1250 (D.C. Cir. 1973).

38. 5 U.S.C. § 554(a) (2018). This language is not quite the “virtual touchstone” as for formal rulemaking, *see supra* note 37, but courts prefer not to invoke these procedural requirements without a clear expression of Congress’s intent to that effect, particularly where the agency does not interpret the relevant hearing requirement to trigger formal adjudication procedures. *See* *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 18–19 (1st Cir. 2006).

the APA's formal procedural requirements) and "informal agency action" (agency action not subject to the APA's formal procedural requirements). Courts and scholars alike have widely adopted this parlance.³⁹

Following the APA's rulemaking/adjudication framework, informal agency action can be understood as encompassing informal rulemakings and informal adjudications. Informal rulemakings include (1) rulemakings subject to the APA's less stringent "notice and comment" requirements and (2) rulemakings entirely exempt from the APA's procedural provisions.⁴⁰

Notice and comment procedures are the default procedural regime for rulemakings.⁴¹ However, the APA exempts from its notice and comment requirements those rulemakings that result in "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."⁴² Such rulemakings are not subject to the APA's procedural provisions at all.

For adjudications, the APA provides no intermediate procedural regime.⁴³ Thus, an informal adjudication is simply one not subject to the APA's formal adjudication procedures. Given the APA's emphasis on standardized administrative procedure, it might be easy to assume that formal agency action dominates the workings of federal agencies. However, while this may once have been true, the vast majority of agency action is now of the informal sort.⁴⁴ This includes innocuous activities such as the Forest Service's approval of a campfire permit for a National Forest but also agency actions with significant consequences for millions of Americans. For example, the Obama administration promulgated DACA and the related Deferred Action of Parents of Americans and Lawful Permanent Residents as general statements of policy (informal rules), and the Trump DHS has attempted

39. See *supra* note 31.

40. 5 U.S.C. § 553 (2018).

41. § 553 provides the procedural requirements for notice and comment rulemaking. *Id.* § 553. As the name suggests, under § 553, an agency must provide notice of a proposed rule, typically by publishing it in the Federal Register. *Id.* The notice must describe the "time, place, and nature of the public rule making proceeding," reference the "legal authority under which the rule is proposed," and provide an adequate description of the proposed rule. *Id.* Then, the agency must provide an opportunity for comment, whereby "interested persons" may submit "written data, views, or arguments." *Id.* The agency must consider the comments and in publishing the final rule, provide a "concise general statement of [the rule's] basis and purpose." *Id.*

42. *Id.* § 553(b)(A).

43. *Id.*

44. More popular at the time of the APA's enactment, formal rulemakings in particular have fallen out of favor due to the burdensome procedural requirements. The classic example of formal rulemaking's inefficiency is the Food and Drug Administration's (FDA) proceedings for food labeling in the 1960s. Most notably, one such proceeding took more than ten years to determine what level of peanuts to require in peanut butter in order to "promote honesty and fair dealing in the interest of consumers." The FDA sought a 90% peanut requirement but was vehemently opposed by the peanut butter industry, which sought an 87% peanut requirement. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 505 (Rachel E. Barkow et al. eds., 8th ed. 2017).

to repeal DACA in the same manner.⁴⁵ Likewise, the Department of Commerce’s decision to add a citizenship question to the 2020 Census—which could have significant political ramifications—took place without a formal adjudication.⁴⁶ Environmentalists are familiar with land use permits that approve controversial uses of federal land such as the Keystone XL pipeline.⁴⁷ Similarly, the Department of the Interior has implemented various controversial policies regarding Native American tribes through permitting and other informal actions.⁴⁸

Thus, though not subject to the APA’s formal procedural provisions, informal agency action plays a significant role in American life under the modern administrative state. However, federal agencies engaging in informal agency action are not entirely free from procedural limitations under the APA. Rather, as described in the next Section, the APA’s judicial review provisions, which apply to formal and informal agency action alike, require informal agency action be the product of the agency’s “reasoned decisionmaking.”⁴⁹

B. *Judicial Review of Agency Action*

Unlike the APA’s procedural provisions, which only apply to certain types of agency action, the APA’s judicial review provisions, codified 5 U.S.C. § 701 *et seq.*, apply to all forms of agency action, whether formal or informal.⁵⁰ The APA provides a right of review to any party “suffering legal wrong because of agency action,” waiving the federal government’s sovereign immunity for non-damages claims brought against agencies and their officers.⁵¹ This language “embodies the basic presumption [in favor] of judicial review” for APA claims—“judicial review of . . . agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”⁵² Section 704, however, does limit judicial review to “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.”⁵³ Nonetheless, the finality requirement is to be “interpreted in a ‘pragmatic’ and

45. *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017), *cert. granted, and judgment vacated*, 138 S. Ct. 443 (2017); *Texas v. United States*, 809 F.3d 134, 171–73 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (regarding DAPA).

46. *See* *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 631 (S.D.N.Y. 2019).

47. *See e.g.*, *Indigenous Envtl. Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 570–71 (D. Mont. 2018) (permitting Keystone XL pipeline).

48. *See, e.g.*, *Navajo Nation v. U.S. Dep’t of Interior*, 819 F.3d 1084, 1089–90 (9th Cir. 2016).

49. *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

50. 5 U.S.C. § 701(a) (2018) (judicial review provisions apply to administrative action except where statute precludes judicial review or the action is committed to agency discretion by law).

51. *Id.* § 702.

52. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

53. 5 U.S.C. § 704 (2018).

‘flexible’ manner”⁵⁴ in order to give the APA’s “generous review provisions . . . hospitable interpretation.”⁵⁵

In contrast to this broad grant of reviewability stand the prescribed standards of review, which are narrow and deferential to the agency. Section 706 provides that “the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions” upon finding the action meets any of six standards.⁵⁶ The dominant standard, however—and the standard applied to the informal agency actions this Note is concerned with—requires the court to set aside an agency action upon finding it “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁷

Application of the arbitrary and capricious standard has developed a robust body of case law, elaborating—though perhaps not clarifying—the structure of arbitrary and capricious review. Although arbitrary and capricious review “is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”⁵⁸ However, “courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.”⁵⁹ Thus, arbitrary and capricious review focuses on the agency’s decision-*making*, not the ultimate decision:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely 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 is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁶⁰

54. *Dietary Supplemental Coal., Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992) (quoting *Abbott Labs.*, 387 U.S. at 149).

55. *Abbott Labs.*, 387 U.S. at 140–41 (internal quotation marks omitted).

56. 5 U.S.C. § 706 (2018).

57. *Id.* This “arbitrary and capricious” standard operates as a catch-all, providing the default standard of review where none of the other, more limited standards apply. *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) (Scalia, J.).

58. *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 416 (1971).

59. *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

60. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983).

The doctrine has developed various branches to address changes in agency position,⁶¹ flawed legal reasoning,⁶² improper political motivation,⁶³ and so forth.

Ultimately, under the APA's arbitrary and capricious standard, "not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."⁶⁴ The agency must "articulate[] a rational basis for its decision,"⁶⁵ and must provide a "rational connection between the facts found and the choice made."⁶⁶ Indeed, "the orderly

61. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters.") (citations omitted) (emphasis in original). There is some debate as to whether agency changes of position are subject to a heightened standard of review. In *Fox Television*, Justice Scalia, writing for the majority, is adamant that agency changes in position do not trigger any heightened standard of review. *See id.* at 514 ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance."). This position is consistent with *State Farm*, which "fully recognize[d] that 'regulatory agencies do not establish rules of conduct to last forever,' and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" 463 U.S. at 42 (1983). However, some Circuits still appear to apply a heightened standard to changes in agency policy. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 920 (9th Cir. 2009) ("To satisfy this requirement, the agency must provide not only a reasoned explanation for its current position, but also a reasoned explanation for why the change was warranted or why the new position is preferable.") (collecting cases); *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) ("There was a change in presidential administrations just days after the . . . Rule was promulgated in 2001. Elections have policy consequences. But, *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.").

62. *See, e.g., Safe Air for Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1101 (9th Cir. 2007).

63. *See State Farm*, 463 U.S. at 43–44; *see, e.g., Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1129, 1134–35 (9th Cir.), *opinion amended and superseded*, 494 F.3d 757 (9th Cir. 2007).

64. *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

65. *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008).

66. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Some courts describe this "reasoned decisionmaking" standard in terms of whether the agency has "taken a 'hard look' at the salient problems." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). However, there is some question as to whether the "hard look" language is appropriate. *See Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 n.15 (9th Cir. 2007) (acknowledging usage of "hard look" but concluding: "Because the Supreme Court has never explicitly embraced the 'hard look' approach to judicial review under the arbitrary and capricious standard of the APA, we adhere to the Supreme Court's explicit guidance in *State Farm* that an agency must cogently explain its actions and demonstrate a rational connection between the facts it found and the choice it made.") (citations omitted). *But see* 7 CHARLES H. KOCH, JR., WEST'S FEDERAL

functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”⁶⁷ Accordingly, “[c]ourts . . . may not accept post hoc rationalizations for agency action . . . nor may they supply a reasoned basis for the agency’s action that the agency itself has not given.”⁶⁸ Moreover, as the Supreme Court confirmed in *Department of Commerce*, an agency action will be found arbitrary and capricious if it rests on a contrived, pretextual justification.⁶⁹

In short, the APA generally limits judicial review of agency action to the agency’s process for picking between reasonable policy choices, not the policy merits of the choice itself. Of course, the APA’s judicial review provisions provide one further limitation on the judicial review of agency action: the record rule, which I explore in Parts II and III.

II. THE RECORD RULE

This Part provides an overview of the record rule—the APA’s limit on judicial review of agency action to “the whole record, or those parts of it cited by a party”⁷⁰—paying particular attention to its current application to informal agency action. First, I take a moment to describe the mechanics of disputing an administrative record in APA litigation. In doing so, my aim is to identify some key terms that will help clarify the muddled history and application of the record rule to informal agency action. Second, I provide an early history of the record rule, from its limited pre-APA roots to the post-APA Supreme Court cases that provide limited guidance as to its scope. Third, I describe the current state of the record rule, identifying areas of agreement but also the primary areas of dispute between agencies, private litigants, and the courts with regard to the proper scope of the administrative record for informal agency action.

A. *The Mechanics of Disputing an Administrative Record*

APA litigation is wrought with litigants’ attempts to get favorable evidence in front of the reviewing court, either as part of the administrative record, or through an exception to the record rule that allows the reviewing court to consider extra-record evidence.⁷¹ This has resulted in generally accepted—but frequently

ADMINISTRATIVE PRACTICE § 8106 (“Without using the term [‘hard look’], the Supreme Court used the hard look approach in [*State Farm*]”).

67. *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

68. *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1043 (N.D. Cal.), *aff’d sub nom.*, *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); *see also State Farm*, 463 U.S. at 43–44 (“The reviewing court should not attempt itself to make up for such deficiencies: ‘We may not supply a reasoned basis for the agency’s action that the agency itself has not given.’”), *quoting*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

69. *See* *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

70. 5 U.S.C. § 706 (2012).

71. *See, e.g.*, cases cited *supra* note 16.

misabeled—mechanisms by which the administrative record is presented and contested in APA litigation.

After the plaintiff files a complaint alleging an APA violation, the defendant agency certifies and files with the court what it asserts to be the administrative record upon which the challenged action was based and judicial review is to consider.⁷² Although an “agency may not unilaterally determine what constitutes the Administrative Record,” the agency’s preparation and certification of the administrative record is subject to a “presumption of administrative regularity,”⁷³ which traditionally makes it difficult for a plaintiff to add materials favorable to its case.⁷⁴ Unless the plaintiff is able to resolve any administrative record disputes with the agency informally,⁷⁵ it is left with two options to get materials not included in the certified administrative record in front of the judge.

First, the plaintiff could bring a “motion to complete” the administrative record with certain materials or categories of materials.⁷⁶ This would involve arguing that the materials in question were properly a part of the administrative record—i.e., that the materials were a part of the record on which the agency based its decision. To be successful, the plaintiff would need to overcome the presumption of regularity, which requires a showing of “clear evidence to the contrary.”⁷⁷ Such proof would include direct evidence that an agency decisionmaker considered the material question or a showing that the agency relied on an erroneous definition of the administrative record in compiling it.⁷⁸ A successful motion to complete the administrative record results in a court order that the agency certify a new record including specified materials or categories of materials.⁷⁹

Second, the plaintiff could bring a “motion to supplement” the administrative record.⁸⁰ This would involve arguing that even if the materials in question are not properly considered part of the administrative record (i.e., because they were not before the agency during the decision-making process), the materials fall within a recognized exception to the record rule such that the lower court should consider

72. See *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006); *Gavoor & Platt*, *supra* note 13, at 11–13.

73. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739–40 (10th Cir. 1993) (“However, the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity.”).

74. 3 KOCH, *supra* note 12, § 8:27.

75. See *Gavoor & Platt*, *supra* note 13, at 35 n.226.

76. See, e.g., *Ctr. for Food Safety v. Vilsack*, No. 11-1310-SC, 2011 WL 5038500, at *1 (N.D. Cal. Oct. 24, 2011).

77. *Bar MK Ranches*, 994 F.2d at 740.

78. See, e.g., *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324, at *3 (N.D. Cal. Oct. 17, 2017); *Pitman v. U.S. Citizenship and Immigration Servs.*, No. 2:17-cv-00166-CW-EJF, 2018 BL 234618, at *4 (D. Ut. July 2, 2018).

79. See, e.g., *Regents of Univ. of Cal.*, 2017 WL 4642324, at *3; *Pitman*, 2018 BL 234618, at *4.

80. See, e.g., *Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 161 (D.D.C. 2014).

them.⁸¹ Courts have recognized various exceptions to the record rule where informal agency action is at issue, including where: (1) the plaintiff makes a showing of bad faith or improper behavior;⁸² (2) the agency failed to consider relevant factors;⁸³ (3) background information is necessary to help the court understand a technical issue;⁸⁴ and (4) the record is so incomplete as to frustrate judicial review.⁸⁵ These circumstances may also justify discovery.⁸⁶ As a rule, the exceptions to the record rule are narrowly applied.⁸⁷

The completion/supplementation dichotomy is a straightforward way of characterizing disputes over an administrative record's contents. It allows for a distinction between materials that should be considered because they were properly a part of the administrative record from the beginning (in the case of completion) and materials that are not properly part of the record but may be considered nonetheless (in the case of supplementation). However, I should note that although the mechanisms and process for disputing an administrative record are generally consistent, this vernacular is not consistently used, as some courts and commentators have lamented.⁸⁸ This terminological inconsistency serves as a bit of an appetizer for the broader confusion regarding what an agency is obliged to include in the administrative record for informal agency action. Nevertheless, in the

81. See generally Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984).

82. See *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 420 (1971); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988), *amended*, 867 F.2d 1244 (9th Cir. 1989) ("Courts may inquire outside the agency record when plaintiffs make a showing of agency bad faith. For this exception to apply, [n]ormally there must be a strong showing of bad faith or improper behavior before the court may inquire into the thought processes of administrative decisionmakers.") (citation omitted).

83. See 3 KOCH, *supra* note 12, § 8:27 ("The 'relevant factors' ground for supplementation comes into play where a party seeks to demonstrate that an agency decision was arbitrary because the agency did not consider some important aspect of the regulatory problem before it."). In some cases, this would be grounds for completing the record, if materials before the agency showed the relevant factor, but it is an appropriate ground for supplementation where the material was not before the agency.

84. See *Esch v. Yeutter*, 876 F.2d 976, 991 n.166 (D.C. Cir. 1989) (collecting cases).

85. See *Overton Park*, 401 U.S. at 420. Courts sometimes allow parties to "supplement" the record with documents the agency in fact "relied" on in coming to its decision but that were not included in the certified administrative record. See, e.g., *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993). However, adding such documents to the administrative record is more properly understood as "completion" as they should always have been a part of the record. See *Gavoor & Platt*, *supra* note 13, at 31–35. Conflating completion with supplementation glosses over the distinction between materials considered by the agency and materials not considered by the agency, which nevertheless may be relevant for judicial review. See *id.*

86. See *Overton Park*, 401 U.S. at 420; *Hodel*, 840 F.2d at 1437.

87. See, e.g., *Citizens for Alts. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) ("It is only in 'extremely limited circumstances, such as where the agency ignored relevant factors it should have considered or considered factors left out of the formal record' that we will consider extra-record evidence.>").

88. See *Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1261 n.4 (D. Colo. 2012); *Gavoor & Platt*, *supra* note 13, at 31–35, 64; James N. Saul, Comment, *Overly Restrictive Records and the Frustration of Judicial Review*, 38 ENVIR. L. 1301, 1319–20 (2008).

interest of relying on the most precise vocabulary available, I adopt the completion/supplementation distinction for the purposes of this Note.⁸⁹

B. *The Early History of the Record Rule*

Courts appear to have applied a rudimentary version of the record rule in reviewing agency action before the Congress enacted the APA in 1946, which limited judicial review to the record the subject agency action was based on and typically prevented the parties from conducting discovery.⁹⁰ However, there is limited case law as to the scope of this pre-APA record rule due perhaps in part to the relatively limited role of federal agencies before the New Deal.⁹¹

Enacted in 1946, the APA limits judicial review of agency action to the “the whole record, or those parts of it cited by a party.”⁹² However, the significant legislative history surrounding the APA provides only a cursory mention of the “whole record” requirement.⁹³ For formal adjudications and formal rulemakings, the APA defines the administrative record as “[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”⁹⁴ Indeed, the APA’s formal rulemaking and adjudication procedures serve in part to create a well-defined administrative record for judicial review.⁹⁵ However, the APA provides no such guidance for informal agency action, which left open the possibility that courts would review informal agency action based on evidence presented in the first instance to the reviewing court.⁹⁶ The Supreme Court rejected this possibility in *Overton Park*, the seminal case regarding the application of the record rule to informal agency action.⁹⁷ Indeed, what limited legislative history exists

89. See generally Gavoor & Platt, *supra* note 13, at 31–35 (doing the same); Saul, *supra* note 88, at 1319–20.

90. See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (“Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held . . . that it was not the function of the court to probe the mental processes of the Secretary. Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.”) (internal quotation and citations omitted); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 443 (1930) (“The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him . . .”). But see *Cincinnati, New Orleans & T.P. Ry. Co. v. Interstate Commerce Comm’n*, 162 U.S. 184, 196 (1896) (“We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved.”).

91. See Gavoor & Platt, *supra* note 13, at 14–18.

92. 5 U.S.C. § 706 (2012).

93. See Gavoor & Platt, *supra* note 13, at 18–20 (theorizing this may have been because of stricter standing requirements at the time).

94. 5 U.S.C. § 556(e) (2012).

95. See 3 KOCH, *supra* note 12, § 8:27; Gavoor & Platt, *supra* note 13, at 12.

96. See 3 KOCH *supra* note 12, § 8:27 (“One possible judicial response to the absence of any statutory definition of the “record” for informal proceedings would be to regard them, simply, as non-record proceedings. On this approach, an agency attempting to defend its action during judicial review would not be bound by a record it created during its own proceedings.”)

97. See *id.*

regarding the record rule suggests its drafters intended the record rule to apply to all forms of agency action.⁹⁸

The Supreme Court first addressed the record rule in *Overton Park*. In that case, various local and national stakeholders challenged the Secretary of Transportation's authorization of federal funding for the construction of a six-lane highway through Overton Park, a 342-acre public park in Memphis, Tennessee.⁹⁹ Under the relevant statutes, the Secretary could only approve funding for the project if "no feasible and prudent" route around the park existed and there had been "all possible planning to minimize harm to the park."¹⁰⁰ In the district court, the agency presented affidavits from the Secretary, which indicated that his decision could be supported by the relevant facts.¹⁰¹ The Court found these "post-hoc rationalizations" to be an "inadequate basis for [judicial] review."¹⁰² Rather, the Court concluded that judicial review under the APA's record rule "is to be based on the full administrative record that was before the Secretary at the time he made his decision," not evidence presented to the reviewing court in the first instance.¹⁰³ This statement now serves as the baseline rule for an administrative record.¹⁰⁴ Because that record had not been presented, and had not been compiled in the process of the agency's decision-making, the Court remanded to the district court for it to develop the administrative record without providing further guidance as to its proper scope.¹⁰⁵

In *Camp v. Pitts*, the Court re-affirmed 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."¹⁰⁶ There, the Court considered the Comptroller of Currency's rejection of the plaintiff's application for authorization to organize a new bank in Hartsville, South Carolina.¹⁰⁷ In rejecting the application, the Comptroller communicated the decision through a letter to the applicants, which the office reiterated in a second letter upon a request for reconsideration.¹⁰⁸ The agency presented the two letters and associated documents that were part of the preparation of those letters as the administrative record in the district court.¹⁰⁹ Before the Court was the Fourth Circuit's remand instruction, which envisioned the creation of an evidentiary record through a de novo hearing in front of the district court.¹¹⁰ The Court rejected that instruction, which it found to "put aside the

98. *See id.*

99. *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 406 (1971).

100. *Id.* at 404–06.

101. *Id.* at 409.

102. *Id.* at 419.

103. *Id.* at 420.

104. *See supra* Part II.C.

105. *Overton Park*, 401 U.S. at 420–21.

106. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

107. *Id.* at 138.

108. *Id.* at 138–39.

109. *Id.*

110. *Id.* at 140.

extensive administrative record already made and presented to the [district] court.”¹¹¹ Rather, the Court remanded to the Fourth Circuit for further consideration, advising that if the court of appeal found that the proffered administrative record could not support the Comptroller’s decision, the proper action was to vacate that decision and remand to the agency for further consideration.¹¹²

C. *The Current State of the Record Rule*

Taken together, *Overton Park* and *Camp* clarify some aspects of the record rule as applied to informal agency action. First, the record rule does in fact apply to informal agency action.¹¹³ Second, judicial review must focus on the record in existence at the time of the decision.¹¹⁴ Third, discovery beyond the administrative record is disfavored but allowed at least where there is no record for judicial review to consider.¹¹⁵ Fourth, where the administrative record does not support a decision, the proper judicial action is to vacate the action and remand to the agency for further consideration.¹¹⁶

Lower courts have since found common ground on other rules for the administrative record’s scope. Courts today generally agree the administrative record should not be limited to those materials directly considered by the agency decisionmaker.¹¹⁷ Rather, lower courts generally agree that an administrative record should include materials considered by subordinates involved in the ultimate decision.¹¹⁸ This, however, is where the consensus ends, and the inconsistency begins. Moreover, as the DACA litigation and *Department of Commerce* illustrate, the government has recently insisted that the administrative record need not include anything more than what passed before the ultimate decisionmaker’s eyes, reverting to a particularly narrow version of the record rule.¹¹⁹

111. *Id.* at 142.

112. *Id.* at 142–43.

113. *See* 3 KOCH, *supra* note 12, § 8:27.

114. *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 419 (1971).

115. *Id.* at 420.

116. *Id.*; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

117. *See Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (“The whole administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency’s position.”) (internal quotation marks omitted); *Bethlehem Steel Corp. v. U.S. E.P.A.*, 638 F.2d 994, 1000 (7th Cir. 1980); *Nat’l Courier Ass’n v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (“The proper approach, therefore, would appear to be to consider any document that might have influenced the agency’s decision . . .”); *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275 (D. Colo. 2010) (“If the agency decision maker based his decision on the work and recommendations of subordinates, those materials should be included in the record.”); *Clairton Sportsmen’s Club v. Pa. Tpk. Comm’n*, 882 F. Supp. 455, 465 (W.D. Pa. 1995) (“A document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record.”).

118. *See* cases cited *supra* note 117. *But see Dopico v. Goldschmidt*, 518 F. Supp. 1161, 1181 (S.D.N.Y. 1981), *aff’d in part, and rev’d in part*, 687 F.2d 644 (2d Cir. 1982).

119. *See Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2017

The APA's reference to the "whole record,"¹²⁰ and *Overton Park's* insistence on the "full administrative record"¹²¹ before the agency suggest a broad application of the record rule for informal agency action. This, however, has rarely been the case. Indeed, lower courts faced with motions to complete an administrative record in such cases traditionally insisted on a narrow scope, generally excluding internal materials, especially communications, from the proper scope of an administrative record.¹²² This is consistent with some agency guidance for compiling an administrative record, which excludes most materials (such as emails, notes, drafts, and other informal materials) outside of formalized final agency documents.¹²³

More recently, some lower courts have begun to buck the traditional approach and grant broad orders to complete the administrative record with not just specific documents identified by the parties but also entire categories of excluded materials, including "internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes [that] inform an agency's final decision" along with privilege logs documenting any assertions of deliberative process, attorney/client, or other privilege.¹²⁴ These courts may find the agency's initially certified record incomplete on the basis of the agency's use of an overly narrow definition of what constitutes the "whole record" or on the basis of documents presented by the plaintiff, or a combination of both factors.¹²⁵ The DACA case and *Department of Commerce* provide two of the most noteworthy illustrations.

In the DACA litigation, the University of California, among others, alleged that then-Acting DHS Secretary Elaine Duke's decision to revoke DACA was arbitrary and capricious in violation of the APA.¹²⁶ DHS then certified an administrative record that "consisted of fourteen documents spanning 256 pages,

WL 4642324, at *3 (N.D. Cal. Oct. 17, 2017); Transcript of Oral Argument at 81, *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 1:18-cv-02921).

120. 5 U.S.C. § 706 (2012) (emphasis added).

121. *Overton Park*, 401 U.S. at 420 (emphasis added).

122. See, e.g., *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44 (D.C. Cir. 1986) (en banc); *ASSE Int'l, Inc. v. Kerry*, No. SACV 14-00534-CJC-(JPRx), 2018 WL 3326687, at *4 (C.D. Cal. Jan. 3, 2018); *Coastal Conservation Ass'n v. Locke*, No. 2:09-cv-641-FtM-29SPC, 2010 WL 1439071, at *4 (M.D. Fla. Apr. 12, 2010) (citing *Moye, O'Brien, O'Rourke, Hogan & Prickett v. National R.R. Passenger Corp.*, 376 F.3d 1270, 1278 (11th Cir. 2004)); *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) ("[D]eliberative intra-agency memoranda and other such records . . . need not be included in the record.") (citing *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *Madison County Bldg. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 622 F.2d 393, 395 n.3 (8th Cir. 1980); *Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 331 (2d Cir. 1977)); *Richard McMillan, Jr. & Todd D. Peterson, The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 342 (1982).

123. *Saul*, *supra* note 88, at 1314–19; see *Gavoor & Platt*, *supra* note 13, at 11–13.

124. *Inst. for Fisheries Res. v. Burwell*, No. 16-cv-01574-VC, 2017 WL 89003, at *1; see also cases cited *supra* note 16.

125. See, e.g., *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324, at *3 (N.D. Cal. Oct. 17, 2017); *Department of Commerce*, Oral Ruling on Administrative Record, Docket No. 205 at 81 (July 20, 2018).

126. See *supra* note 1.

each of which was already available to the public.¹²⁷ Plaintiffs moved for completion of the administrative record, arguing that it (1) only contained documents directly considered by Acting Secretary Duke, improperly excluding indirectly considered documents and (2) did not even include all of the documents Acting Secretary Duke herself considered.¹²⁸ DHS opposed the motion, arguing that an administrative record is properly limited to those unprivileged materials directly considered by the decisionmaker.¹²⁹ Judge Alsup ordered DHS to complete the administrative record and provide a privilege log for any documents withheld based on an assertion of privilege.¹³⁰ Specifically, Judge Alsup ordered DHS to

complete the administrative record by adding to it all emails, letters, memoranda, notes, media items, opinions and other materials directly or indirectly considered in the final agency decision to rescind DACA, to the following extent: (1) all materials actually seen or considered, however briefly, by Acting Secretary Duke in connection with the potential or actual decision to rescind DACA (except as stated in the next paragraph below), (2) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with written advice or input regarding the actual or potential rescission of DACA, (3) all DACA-related materials considered by persons (anywhere in the government) who thereafter provided Acting Secretary Duke with verbal input regarding the actual or potential rescission of DACA, (4) all comments and questions propounded by Acting Secretary Duke to advisors or subordinates or others regarding the actual or potential rescission of DACA and their responses, and (5) all materials directly or indirectly considered by former Secretary of DHS John Kelly leading to his February 2017 memorandum not to rescind DACA.¹³¹

This order came prior to Judge Alsup ruling on DHS's pending motion to dismiss, which could have rendered the need for an administrative record moot.¹³²

The Ninth Circuit, in a split decision ruling on the government's petition for a writ of mandamus, found no clear error in Judge Alsup's order: "Put bluntly, the notion that the head of a United States agency would decide to terminate a program giving legal protections to roughly 800,000 people based solely on 256 pages of publicly available documents is not credible, as the district court concluded."¹³³ On appeal, the Supreme Court did not address the administrative record issue directly. Rather, in a per curiam opinion, the Court ruled that the district court should have granted the government's earlier motion to stay completion of the record until it

127. *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324, at *3 (N.D. Cal. Oct. 17, 2017).

128. *Id.*

129. *Id.*

130. *Id.* at *9–10.

131. *Id.*

132. *See In re United States*, 138 S. Ct. 443, 445 (2017).

133. *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017) (footnotes omitted), *cert. granted, and judgment vacated*, 138 S. Ct. 443 (2017).

ruled on the government's motion to dismiss, vacating the Ninth Circuit's decision and remanding for further proceedings.¹³⁴ However, the Court acknowledged "[t]he Government makes serious arguments that at least portions of the District Court's order are overly broad," referring to the order to complete the administrative record.¹³⁵ Justice Breyer, joined by the Court's other liberal justices, dissented from an earlier stay pending review, finding no error in Judge Alsup's order.¹³⁶ On remand, the district court denied the government's two motions to dismiss as to plaintiff's claims that the decision to rescind DACA was arbitrary and capricious in violation of the APA.¹³⁷ In a subsequent order, Judge Alsup doubled down on his construction of the record rule and required the government to complete the administrative record in a manner substantially the same as he had previously, narrowing the order only so far as to limit it to materials held by the agency (as opposed to materials held by the White House) among a few other marginal changes.¹³⁸ The Ninth Circuit upheld Judge Alsup's ruling on the government's motion to dismiss,¹³⁹ and the government has petitioned the Supreme Court for a writ of certiorari on the issue, leaving open the question of what the "whole record" for the DACA litigation will ultimately consist of.

In *Department of Commerce*, various states, municipalities, and other stakeholders brought suit alleging that Secretary of Commerce Wilber Ross's decision to add a citizenship status question to the 2020 Census was arbitrary and capricious in violation of the APA.¹⁴⁰ Commerce then certified an administrative record that, like DHS's first certified record in the DACA litigation, only contained documents Secretary Ross considered directly.¹⁴¹ Moreover, the record began with a Department of Justice memorandum to Commerce supporting the addition of the citizenship question, which Secretary Ross had claimed publicly to be the impetus for adding the citizenship question.¹⁴² Plaintiffs moved for completion of the record, arguing Commerce's first certified record was incomplete (1) for its failure to include materials the Secretary considered indirectly—i.e. materials his subordinates considered before advising the Secretary—and (2) because emails and

134. *See In re United States*, 138 S. Ct. at 445.

135. *Id.*

136. *In re United States*, 138 S. Ct. 371, 374 (2017) (Breyer, J., dissenting).

137. *Regents of Univ. of Cal. V. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049–50 (N.D. Cal. 2018).

138. *Regents of the Univ. of Cal. V. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2018 WL 1210551, at *8–12 (N.D. Cal. Mar. 8, 2018).

139. *See generally* *Regents of Univ. of Cal. V. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (government's first motion to dismiss), *aff'd sub nom.*; *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1308 (N.D. Cal. 2018) (government's second motion to dismiss), *aff'd sub nom.*; *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).

140. *See* Complaint, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-02921 (S.D.N.Y. Apr. 3, 2018).

141. *See id.*

142. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 530–31 (S.D.N.Y. 2019).

other correspondence plaintiffs had obtained through Freedom of Information Act (FOIA)¹⁴³ requests demonstrated the decision-making process in fact begun well before the Justice memoranda.¹⁴⁴ Ruling from the bench, Judge Furman granted plaintiffs' motion to complete the administrative record.¹⁴⁵ But rather than provide a detailed order as Judge Alsup did in the DACA litigation, Judge Furman simply directed Commerce to complete the record on the bases of the deficiencies identified by the plaintiffs and provide a privilege log for any documents withheld on the basis of an assertion of privilege.¹⁴⁶ However, Judge Furman implicitly adopted a broad reading of the record rule consistent with that from the DACA litigation, given that much of plaintiff's proffered FOIA materials—the basis of the completed record—were the same sorts of internal, informal documents (emails, drafts, etc.) referenced in Judge Alsup's order.¹⁴⁷

Much of the subsequent procedural disputes in *Department of Commerce*, centered around Judge Furman's concurrent order allowing plaintiffs to depose Secretary Ross and certain of his subordinates.¹⁴⁸ But, for our purposes, it is enough to note that Judge Furman, following a bench trial, ultimately rendered a verdict that Secretary Ross's decision to a citizenship question to the 2020 Census was arbitrary and capricious, taking pains to demonstrate that the administrative record alone supported his decision, without reference to any extra-record evidence.¹⁴⁹ The government appealed this decision directly to the Supreme Court, which upheld it, holding that Secretary Ross's decision to add a citizenship question to the 2020 Census was arbitrary and capricious because it rested on a pretextual justification contrived to disguise the agency's actual reason for wishing to add the question.¹⁵⁰ As to the issue of the administrative record, the Court again refused to delineate the appropriate boundaries of an administrative record for informal agency action, repeatedly emphasizing that the 12,000 odd documents the government added to their original record were added by stipulation of the parties.¹⁵¹ And unlike the lower court, the Supreme Court based its conclusion on the entire record, including the extra-record discovery and deposition testimony that had been admitted.¹⁵² Thus, the Court left unsettled the appropriate scope of the administrative record for lower courts and commentators alike to debate.¹⁵³

143. 5 U.S.C. § 552 (2012).

144. *Dep't of Commerce*, 351 F. Supp. 3d at 530.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See, e.g., In re Dep't of Commerce*, 139 S. Ct. 16, 16–18 (2018).

149. *Dep't of Commerce*, 351 F. Supp. 3d at 514–19, 660.

150. *Dep't of Commerce v. New York*, No. 18-966, slip op. at 28–29 (S. Ct. June 27, 2019).

151. *Id.* at 7, 25.

152. *Id.* at 25–26.

153. *Id.* at 25. There are a few nuggets of dicta that could be mined to glean a suggestion of the Court's leanings on the matter. On the one hand, the Court acknowledged that when Judge Furman ordered the government to complete the administrative record while simultaneously authorizing extra-record discovery, "the most that was warranted was an order to complete the administrative

Part of that debate is the larger movement in the lower courts towards a broad definition of the record rule for APA challenges of informal agency action, which the DACA litigation and *Department of Commerce* are representative of.¹⁵⁴ As I argue in the next Part, this broad application of the record rule is necessary for meaningful judicial review of whether the informal agency action is the product of the agency's reasoned decision-making, and desirable in terms of the administrative law principles that motivated the APA's adoption and subsequent interpretation.

III. THE "WHOLE RECORD" FOR INFORMAL AGENCY ACTION

The record rule and the concept of an administrative record derive from the APA's requirement that judicial review of agency action, even informal agency action, be based on the "whole record."¹⁵⁵ The traditional approach to the record rule limits judicial review of informal agency action to only those materials directly

record." *Id.* But this does not indicate that the Court agreed with the extent of the completion that came about. On the other hand, the Court remarked without elaboration that "[i]t is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be." *Id.* at 28. But this statement does not specify the "administrative record" and is likely attributable to the Court's stated issues with the timing of Judge Furman's discovery orders, which contributed to the larger "record" for review. *See id.* at 25. In short, the Court dashed the hopes of anyone hoping it would take the opportunity in *Department of Commerce* to clarify the scope of an administrative record for informal agency action. *See, e.g.,* Gavoor & Platt, *supra* note 13, at 25, 76–77.

154. *See* Saul, *supra* note 88, at 1314–19; *see also* Gavoor & Platt, *supra* note 13, at 11–13. There has been relatively little academic commentary on the proper scope of an administrative record, although the issue has received some attention in recent years, with limited arguments for and against a narrow or expansive approach to the record rule. On the one hand, Gavoor & Platt, *supra* note 13, represent a modern "strict" approach to the record rule, which adheres more closely to what I describe as the "traditional" approach to the record rule. Gavoor and Platt acknowledge that an administrative record should include materials considered by agency staffers involved in the decision-making process, not simply materials considered by the ultimate decisionmaker. *Id.* at 33. However, they would apparently categorically exclude "deliberative" pre-decision documents, regardless of whether they are formally privileged. *Id.* at 39 ("Because these materials do not belong in the record in the first place, no log is required for deliberative-process material not included in the administrative record. In other words, whether the deliberative-process material is privileged is irrelevant. A court may prefer to review the withheld or redacted information in camera to ensure it is properly outside the scope of the record (e.g., deliberative process) or properly privileged. A court may also require the government file the unredacted version under seal.") (footnotes omitted). On the other hand, Saul, *supra* note 88, at 126–29, argues in favor of an expansive definition of the administrative record. I build on Saul's argument by specifically approaching the issue in terms of the sorts of documents that inform arbitrary and capricious review, providing a complimentary analysis informed by subsequent case law of why an expansive definition of the record rule is necessary for meaningful arbitrary and capricious review. Recent work by Professor Michael Ray Harris also provides insight into the debate. *See* Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349 (2009). Harris's contention is that overly broad assertions of deliberative process privilege frustrate APA review by depriving the reviewing court of materials of fundamental relevance to the arbitrary and capricious inquiry. *Id.* at 353, 386. As Harris's focus is more narrow—on assertions of privilege, not the place of deliberative documents writ large, whether or not privileged or claimed to be—he does not directly contend that deliberative and communicative internal documents should be categorically included in administrative records, subject to a justified assertion of privilege, as I do here. *Id.*

155. 5 U.S.C. § 706 (2012).

considered by the agency decisionmaker and categorically excludes most, if not all, internal documents and communications from the administrative record.¹⁵⁶ Recently, some lower courts have adopted a more expansive approach to the record rule, requiring that an administrative record of informal agency action include materials considered by agency personnel involved in the decision-making process beyond the decisionmaker, and categorically including internal materials subject to a justified claim of privilege by the agency.¹⁵⁷

In this Part, I contend that the expansive approach is the better interpretation of the APA's "whole record" requirement for two reasons. First, the expansive approach better enables courts reviewing informal agency action to engage in the "thorough, probing, in-depth review" of the agency's decision-making mandated by the APA's arbitrary and capricious standard.¹⁵⁸ Second, the expansive approach comports with the fundamental principles of administrative law that underlie the APA. I conclude this Part by rebutting the most common critiques of the expansive approach.

A. The Record Rule and Arbitrary and Capricious Review

Overton Park serves as a baseline for the record rule as it applies to informal agency action. Under *Overton Park*, the administrative record includes only those materials (a) "before" the agency (b) at the time of its decision.¹⁵⁹ Both the narrow and the expansive approach to the record rule acknowledge these limitations, which properly keep the reviewing court's focus on the agency's actual decision-making process, not advantageous post-hoc rationalizations or materials the agency never considered.¹⁶⁰ But *Overton Park* is unclear as to what it means for material to be "before" the agency. This leads to the two areas of dispute in record rule jurisprudence: (1) whether an administrative record should include any material considered by personnel involved in the decision-making process or only the decisionmaker; and (2) what types of materials should be a part of the "whole" administrative record—i.e., whether and to what extent an administrative record should include internal documents. In what follows, I address each issue, arguing at both turns that the expansive approach to the record rule better enables the

156. See cases cited *supra*, note 122; *Dopico v. Goldschmidt*, 518 F. Supp. 1161, 1181 (S.D.N.Y. 1981), *aff'd in part, and rev'd in part*, 687 F.2d 644 (2d Cir. 1982).

157. See cases cited *supra* note 16.

158. *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 406 (1971).

159. *Id.* at 420.

160. Of course, in some cases an agency action will be arbitrary and capricious because of the agency's failure to account for an important aspect of the problem at issue. Much of the time, the administrative record properly constructed will contain the evidence of such a failing. For example, where a public comment raises an important issue that the agency fails to address, that comment is appropriately part of the record because it was at some point considered by the agency. In more uncommon circumstances, where the agency failed to even consider an important issue, supplementation, not completion, of the record is the appropriate course.

reviewing court to engage in meaningful judicial review under the arbitrary and capricious standard.

1. Materials before whom?

Put simply, an administrative record for informal agency action must include materials considered by all agency personnel involved in the decision-making process—not just the ultimate decisionmaker—because this is the only way to capture the intricacy of modern administrative decision-making, which is the product of complex bureaucratic institutions.¹⁶¹ This position is not particularly controversial—lower courts, even if they apply a narrow approach to the record rule in another respect, today generally agree that an administrative record should include materials considered by any agency personnel involved in the decision-making process.¹⁶² But the issue is worth addressing in light of the Trump Administration’s recent insistence, in the DACA litigation and *Department of Commerce*, that an administrative record should be limited to only those materials directly considered by the ultimate decisionmaker.¹⁶³

Including indirectly considered materials reflects the reality that limiting judicial review to only those materials directly considered by the ultimate decisionmaker would render the administrative record a “fictional account of the actual decisionmaking process.”¹⁶⁴ Take, for example, the Department of the Interior, which employs over 70,000 people across nine bureaus and countless offices under the Secretary.¹⁶⁵ One such bureau is the Bureau of Land Management, headed by a Director charged with permitting authority over an array of uses of federal land, such as rights-of-way for pipelines, railroads, or highways.¹⁶⁶ Approval of these projects frequently requires the preparation of an environmental assessment under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (2012) (NEPA), which the agency must take into account during the approval process.¹⁶⁷ These reports can span thousands of pages.¹⁶⁸ No one seriously suggests the ultimate decisionmaker has read these thousands of pages—rather, it is accepted that the decisionmaker relied on summaries prepared by subordinate staff or as part of the assessment itself. But nor does anyone seriously suggest that these whole

161. See Saul, *supra* note 88.

162. See sources cited *supra* note 117. But see *Dopico v. Goldschmidt*, 518 F. Supp. 1161, 1181 (S.D.N.Y. 1981), *aff’d in part, and rev’d in part*, 687 F.2d 644 (2d Cir. 1982); McMillan & Peterson, *supra* note 122, at 342.

163. See *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324 (N.D. Cal. Oct. 17, 2017).

164. See *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 54 (D.C. Cir. 1977).

165. *Bureaus*, U.S. DEP’T INTERIOR, <https://www.doi.gov/bureaus> [<https://perma.cc/QUY7-XKTS>] (last visited Feb. 10, 2020); *Interior Offices*, U.S. DEP’T INTERIOR, <https://www.doi.gov/bureaus/offices> [<https://perma.cc/UZM3-AJ6K>] (last visited Feb. 10, 2020).

166. See generally *Federal Land Policy and Management Act of 1976*, 43 U.S.C. §§ 1701–1782 (2012) (“FLPMA”); *National Environmental Policy Act*, 42 U.S.C. §§ 4321–4347 (2012) (“NEPA”).

167. See, e.g., *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).

168. See *id.*

environmental assessments should not be in the record. Indeed, the underlying report is necessary to test the accuracy of the summary and/or the reasonableness of the ultimate decision.

Limiting judicial review to only those materials considered directly to the agency decisionmaker would hobble arbitrary and capricious review. A construction of the record rule limiting judicial review to only those materials directly considered by the ultimate decisionmaker would create a gaping loophole for agencies to exploit by having subordinates submit only those materials supporting a favored course of action regardless of the contrary evidence. This would fundamentally undermine the concept of reasoned decision-making by turning agency action into an exercise in cherry-picking favorable evidence for presentation to the reviewing court. That possibility is inconsistent with *Overton Park* itself, which rejected the Secretary's proffering of evidence favorable to his position at trial, calling instead for a review of all the evidence before the Secretary and implicitly rejecting any interpretation that would allow the Secretary to proffer only that material favorable to his position from that universe of materials.¹⁶⁹ A record that is only those materials that support the agency action is in no sense the "whole record," and courts have strongly rejected a construction of the record rule that would allow an agency to unilaterally decide the contents of an administrative record.¹⁷⁰ Limiting judicial review to only those materials considered by the agency decisionmaker would functionally allow just that and thus cannot be correct.

2. *Should an administrative record include internal documents?*

The more controversial question is: which of those materials considered by agency personnel involved in the decision-making process are properly part of the administrative record? The narrow approach would categorically exclude most internal documents, functionally limiting judicial review to external sources consulted by the agency. The expansive approach categorically includes internal materials—emails, letters, memoranda, opinions, meeting notes, and the like—subject to a justified assertion of privilege. As I will explain, the expansive approach is desirable because it ensures materials directly relevant to the arbitrary and capricious decision-making inquiry will be made available to the reviewing court. The narrow construction is inappropriate because it categorically excludes documents relevant to the arbitrary and capricious inquiry.

As discussed in Part I, agencies can fail arbitrary and capricious review in a variety of ways, including by offering post-hoc and pretextual rationalizations to justify the action in question, failing to consider important aspects of the problem

169. *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*), 401 U.S. 402, 419 (1971).

170. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *see Saul, supra* note 88; Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review* "On the Record," 10 ADMIN. L.J. AM. U. 179, 222 (1996).

addressed, or relying on improper factors deciding whether and how to act.¹⁷¹ A review of the case law demonstrates that internal materials are regularly relevant to that inquiry—validating the expansive approach, which better ensures such materials are part of the administrative record so that the reviewing court can engage in its “substantial inquiry” into whether the agency action at issue was the product of arbitrary and capricious decision-making.¹⁷²

A few examples illustrate the relevance and significance of internal documents to arbitrary and capricious review. *Department of Commerce* is itself an example of the role internal documents can play in arbitrary and capricious review.¹⁷³ In *Department of Commerce*, emails between Secretary Ross and subordinate officials were evidence that the explanation provided for adding the 2020 Census citizenship question was a pretextual rationalization rendering the action arbitrary and capricious.¹⁷⁴ Secretary Ross had contended that the decision to add a citizenship question to the 2020 Census was prompted by a December 2017 request to do so by the Department of Justice.¹⁷⁵ But internal emails between the Secretary and other officials demonstrated that Commerce had prompted Justice to draft and send the request so that Commerce would have a reason for adding the question.¹⁷⁶ Those emails indicated Commerce had been seeking such a request from other agencies but had been denied and repeatedly referenced the Secretary’s frustration that the question was taking so long to be added.¹⁷⁷ Although the Supreme Court based its affirmation of this portion of the decision on the whole record, including extra-record discovery, after finding it warranted (if untimely),¹⁷⁸ Judge Alsup specifically based his conclusion that the addition of a citizenship question violated the APA and was arbitrary and capricious on the administrative record alone, demonstrating the importance of those internal documents.¹⁷⁹

In another example, *Earth Island Institute*, the Ninth Circuit invalidated as arbitrary and capricious another Department of Commerce action finding that purse seine tuna fishing¹⁸⁰ had no significant adverse impact on dolphin

171. See, e.g., *Bar MK Ranches*, 994 F.2d at 739; see Saul, *supra* note 88; Young, *supra* note 170.

172. See Nat. Res. Def. Council v. Gutierrez, No. C 01-0421 JL, 2008 WL 11358008, at *4 (N.D. Cal. Jan. 14, 2008).

173. The DACA litigation may likewise prove an example, but remains on appeal at the motion to dismiss stage and so the lower court is yet to apply arbitrary and capricious review to the underlying record.

174. *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 660 (S.D.N.Y. 2019); see also *State v. Ross*, 358 F. Supp. 3d 965, 974 (N.D. Cal. 2019).

175. *Dep’t of Commerce*, 351 F. Supp. 3d at 660–62.

176. *Id.*

177. *Id.*

178. *Dep’t of Commerce v. New York*, No. 18-966, slip op. at 25–26 (S. Ct. June 27, 2019).

179. Judge Alsup then bolstered the conclusion with extra-record evidence. *Dep’t of Commerce*, 351 F. Supp. 3d at 661.

180. *Earth Island Inst. v. Hogarth*, 484 F.3d 1123 (2007). Tuna will sometimes swim under dolphin pods—purse seine fishing involves encircling the tuna and dolphin with the aim of harvesting the tuna and releasing the dolphins. *Id.* at 1126–27.

populations.¹⁸¹ Congress had delegated the inquiry to Commerce, requiring it to collaborate with other agencies and review the best available science to make the finding, which would trigger certain labeling requirements.¹⁸² Specifically, a finding of no adverse impact would allow tuna caught using the method to be labeled as “dolphin-safe,” which had significant economic implications for producers.¹⁸³ The Ninth Circuit relied on various internal materials to find that the policy was the result of improper political and foreign affairs concerns—“factors Congress had not intended it to consider”—and therefore arbitrary and capricious.¹⁸⁴ Those materials included: (1) an internal memorandum and briefing materials referencing the government of Mexico’s desire to have tuna caught with the method labeled as “dolphin-safe”; (2) various internal communications regarding the foreign policy issues related to the labeling; (3) changing drafts of internal memoranda around the time of the most significant political pressures, which retreated from claims that the available data did not support a finding of no adverse impact, emphasizing foreign policy issues instead.¹⁸⁵

Similarly, in *Native Village of Point Hope v. Jewell*, the Ninth Circuit invalidated an environmental assessment as arbitrary and capricious, relying on internal emails to do so.¹⁸⁶ The case involved an environmental assessment conducted by the Department of the Interior’s Bureau of Ocean Energy Management (BOEM) in the process of approving oil and gas development leases off the coast of Alaska.¹⁸⁷ Under NEPA, the agency was required to consider various alternatives discussed in the environmental assessment before making the decision to lease (or how much to lease).¹⁸⁸ The BOEM recommended the Interior choose the more expansive leasing option based on environmental data premised on an estimate that in the event oil and gas development occurred, one billion barrels of oil would become economically recoverable.¹⁸⁹ However, internal emails revealed that the one billion barrel estimate was chosen without an adequate scientific basis and was, as one

181. *Id.* at 1128.

182. *Id.* at 1127.

183. *Id.*

184. *Id.* at 1129, 1134–35; see *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983). It is perhaps not a surprise that a number of the cases referenced herein involve a degree of political intrigue. For a discussion of the appropriate place for political concerns in arbitrary and capricious review, see generally Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

185. *Earth Island Inst.*, 484 F.3d at 1129, 1134–35. The lower court relied on internal documents to find Commerce’s “no adverse impact” finding arbitrary and capricious for another reason. Specifically, it relied in part on an internal email raising concerns regarding the reliability of certain relevant data to find that the agency failed to rely on the “best available science” as required by the statutory scheme. *Earth Island Inst. v. Evans*, 26 I.T.R.D. 1993, *22 (N.D. Cal. 2004), *aff’d as modified sub nom. Earth Island Inst.*, 484 F.3d 1123. The Ninth Circuit upheld the lower court’s conclusion but did not reference the same internal documents. *Earth Island Inst.*, 484 F.3d at 1131.

186. *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 503–05 (9th Cir. 2014).

187. *Id.* at 492.

188. *Id.* at 492–94.

189. *Id.*

agency scientist wrote, “entirely speculative,” and up to twelve billion gallons of oil could have been economically recoverable if prices remained steady.¹⁹⁰ The court thus found the assessment arbitrary and capricious, remanding to the agency for further consideration using a reasoned estimate for the amount of oil likely to become economically recoverable.¹⁹¹

Critically, a narrow construction of the record rule would have categorically excluded the crucial evidence in *Department of Commerce, Point Hope*, and *Earth Island*, and the various other cases decided based on internal documents,¹⁹² from the administrative record.¹⁹³ This would place an extremely high burden on the plaintiff, who would have to argue for supplementation of the record under the extremely narrow exceptions to the record rule that warrant supplementation, drastically reducing the likelihood that the relevant material is available to the reviewing court. Thus, the expansive construction of the record rule is desirable because it better ensures internal materials relevant to the arbitrary and capricious inquiry are a part of the administrative record.

B. *The Record Rule and Principles of Administrative Law*

The expansive construction of the record rule for informal agency action also comports with the principles of administrative law at the heart of the APA. Broadly speaking, the APA represented a compromise between New Dealers, who called for a dramatically expanded role for administrative agencies in American government, and critics (including the American Bar Association) who were skeptical of the unchecked power agencies would enjoy under such a system.¹⁹⁴ New Dealers justified their vision of the bureaucracy in terms of the need for expertise and flexibility: the modern world required complex solutions to new problems that required technical expertise and the ability to exercise flexible discretion that Congress lacked.¹⁹⁵ Critics argued that administrative bureaucrats were politically unaccountable, insofar as they are not elected directly, and that, if unchecked, such

190. *Id.* at 499–505.

191. *Id.* at 505.

192. *See, e.g.*, *Bethlehem Steel Corp. v. U.S. E.P.A.*, 638 F.2d 994, 1000–04 (7th Cir. 1980); *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 372–73 (E.D. Cal. 2007) (relying on internal emails to find environmental assessment arbitrary and capricious for failing to consider relevant data); *Wash. Toxics Coal. v. U.S. Dep’t of Interior, Fish & Wildlife Serv.*, 457 F. Supp. 2d 1158, 1187–94 (W.D. Wash. 2006) (relying on internal correspondence conveying criticism of agency’s approach to find environmental assessment arbitrary and capricious for failing to consider relevant data).

193. *See generally* Harris, *supra* note 154 at 393–409. Much of Harris’s argument that unwarranted assertions of privilege frustrate arbitrary and capricious review supports my broader contention that deliberative, yet non-privileged documents must be made part of the administrative record for judicial review to be meaningful.

194. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 34–38 (Rachel E. Barkow et al. eds., 8th ed. 2017); Harris, *supra* note 154, at 373–81 (2009); *see generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1267 (1986).

195. *See* Harris, *supra* note 154, at 352.

a system would veil bureaucratic decision-making, rendering any indirect accountability through election of the president ineffective.¹⁹⁶ Years of discussion on the matter resulted in the APA,¹⁹⁷ which “sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.”¹⁹⁸ Under this system, federal administrative agencies enjoyed the broad discretion necessary to address complex modern issues, but were held accountable through procedural requirements and judicial review that ensured their actions were truly the result of an application of their expertise.¹⁹⁹

The expansive construction of the record rule as applied to informal agency action comports with this history. First, the expansive construction serves to ensure agency action is, in fact, the product of agency expertise. Including internal documents such as memos, emails, drafts, meeting notes, etc. paints the most accurate picture possible of what motivated the agency’s decision, the factors it considered, and the analysis that went in to the ultimate decision. Where informal action at issue is the product of reasoned decision-making that applies agency expertise, an expansive administrative record will show so and serve to support the action. Where it is not, an expansive administrative record will demonstrate the agency failed to apply its expertise. In such cases, the justifications for agency discretion and flexibility are undermined and are to be corrected by judicial review. Critically, the result is not to foreclose the course of action, but to remand to the agency for further consideration. This ensures that the agency’s chosen course of action is not permanently foreclosed, but that if and when it is adopted it is adopted because it comports with the agency’s expertise and reasoned decision-making.

Second, an expansive administrative record ensures agency officials and the Presidential Administrations they serve remain accountable to the public. An expansive administrative record provides the public with the most accurate picture of the agency’s decision-making, unveiling the agency’s policy motivations and its assessment of the issues. Where the administrative record reveals the agency’s decision is based on unpersuasive or unpopular reasoning, then the public can and should hold the agency accountable through the President even if the court does not invalidate the policy as arbitrary and capricious.²⁰⁰ But this accountability mechanism is undermined where the record rule is interpreted to allow the agency to present only favorable evidence or the most convenient rationales that shield its decision-making from public scrutiny. Various statutes involving administrative actions acknowledge the value inherent in agencies “showing their work,” even if

196. *See id.*

197. *See* *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950) (“The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”).

198. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 498–99 (9th Cir. 2018).

199. *See* *Harris*, *supra* note 154, at 352–53.

200. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

doing so may not change the ultimate decision. NEPA, for example “ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.”²⁰¹ The disclosure may not change the ultimate action, but it does allow the public to hold an administration accountable for policy choices with damaging environmental consequences, or policy choices that place an unpopular environmental burden on commercial interests.

As the D.C. Circuit remarked in analyzing the record rule: “Private parties and reviewing courts alike have a strong interest in fully knowing the basis and circumstances of an agency’s decision. The process by which the decision has been reached is often mysterious enough without the agency’s maintaining unnecessary secrecy.”²⁰² The DACA litigation presents a case in point. There, DHS’s first certified record told a brief story about the rescission of a program it believed contrary to the governing law, a reasonably benign rationale.²⁰³ But the expansive record seems likely to expose a more complex, and more controversial reasoning related to the current administration’s broader immigration policies. An expansive approach to the record rule ultimately may not preclude the administration from rescinding DACA. But it would ensure the administration’s basis for rescinding the program are publicly acknowledged such that the public can hold the administration accountable for its choice in the forthcoming election.²⁰⁴

C. Addressing Common Arguments Against an Expansive Record Rule

Courts and commentators justify a narrow approach to the record rule in two ways: a narrow construction, the reasoning goes, (1) is more efficient, for agencies and reviewing courts; and (2) prevents judicial overreach beyond what is called for by arbitrary and capricious review.²⁰⁵ But these arguments overstate the impact wider adoption of an expansive approach to the record rule would have. Moreover, and perhaps more importantly, any limited impact is a worthwhile tradeoff for effective judicial review and the assurance agency action is the product of agency expertise.

Efficiency concerns related to the expansive record rule are easily addressed or overblown. First, an expansive record rule is a reasonably bright line for courts

201. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

202. *Nat’l Courier Ass’n v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975).

203. *See In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 443 (2017).

204. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 498–99 (9th Cir. 2018) (“But public accountability for agency action can only be achieved if the electorate knows how to apportion the praise for good measures and the blame for bad ones. Without knowing the true source of an objectionable agency action, ‘the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.”’ In then-Professor Kagan’s words, ‘the degree to which the public can understand the sources and levers of bureaucratic action’ is ‘a fundamental precondition of accountability in administration.’”).

205. *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm’n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc); *see, e.g., Gavoor & Platt, supra* note 13, at 69–71 (efficiency).

and litigants to apply and so wider adoption would result in more complete administrative records filed in the first instance, reducing the needs for courts to attend to motions to complete or supplement the record and narrowing the scope of such motions where they do come. True, the expansive approach would result in larger administrative records. But any burden on the courts can be resolved with reference to the APA itself, which allows for review of the “whole record *or those parts of it cited by a party*.”²⁰⁶ Where the administrative record is particularly large, the reviewing court is free to rely solely on those parts of the record cited by the parties, limiting the strain on the reviewing court. Moreover, agencies, courts, and litigants already navigate expansive records in a variety of contexts, as Justice Breyer recognized in his DACA dissent, such that any increased burden on the agency is speculative in light of existing procedures to deal with large records.²⁰⁷ In an age of electronic record-keeping, an agency need only conduct an electronic search for relevant documents and supplement that search with the more traditional gathering of documents that only exist in a hard copy. Indeed, the infrastructure for such a process already exists given agencies’ obligations to comply with FOIA requests.²⁰⁸

As for concerns over judicial overreach, those fail to justify the gross overbreadth of a narrow construction of the record rule. Generally, these arguments assert that a narrow construction of the record rule is necessary to prevent the reviewing court from (1) replacing the agency’s expert policy choice with a policy choice preferred by the reviewing court; or (2) improperly inquiring into the mental processes of the agency decisionmaker.²⁰⁹ The first concern grants federal courts little respect. Even those lower courts that have applied an expansive construction of the record rule have properly limited their orders to those materials considered by the agency personnel.²¹⁰ Moreover, those courts have been careful to clarify that their review was limited solely to the agency’s decision-making, not the merits of the underlying decision.²¹¹ There is little evidence that judicial overreach occurs, whatever the scope of the administrative record in question, and the Supreme Court as currently constituted would be sure to correct such an overreach.

The second contends that internal documents are properly excluded from an administrative record because review of such materials would involve an

206. 5 U.S.C. § 706 (2012).

207. See *In re United States*, 138 S. Ct. 371, 374–75 (Breyer, J., dissenting).

208. There is some question about how ingenuous these claims of burden on the agency truly are, given that administrative records already reach significant lengths. See *In re United States*, 138 S. Ct. at 374 (Breyer, J., dissenting) (“The Government complains that it must review 21,000 documents as potentially part of the administrative record. But . . . that is by no means an unusually large number of documents; administrative records often contain hundreds of thousands of documents.”).

209. *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm’n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc); see, e.g., Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984).

210. See, e.g., *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 518, 660–61 (S.D.N.Y. 2019); see Young, *supra* note 170 (refuting the claim that courts regularly or inappropriately look beyond the administrative record).

211. See, e.g., *Dep’t of Commerce*, 351 F. Supp. 3d at 518, 660–61; Young, *supra* note 170.

impermissible inquiry into the thought process of the decisionmaker, or are subject to deliberative process privilege.²¹² True, *Overton Park* compels a reviewing court to avoid inquiries into the mental processes of the agency decisionmaker outside of a narrow set of circumstances.²¹³ But the case law suggests that this rule is properly limited to precluding literal transcripts of internal deliberations in addition to the depositions that were the Court's focus in *Overton Park*.²¹⁴ Moreover, as Justice Breyer emphasized in commenting on Judge Alsup's expansive order to complete the record in the DACA litigation: "At least facially, these [internal] documents do not seem to involve 'inquiry into the mental processes' of the decisionmaker at all."²¹⁵ Similarly, the deliberative process privilege appears to apply narrowly—certainly, it did not preclude consideration of the relevant documents in *Department of Commerce*.²¹⁶ To the extent it applies at all,

it will normally be far easier for the agency to establish its interest in suppressing such documents than for the private litigants to establish their interest in exposing them to judicial scrutiny. The proper approach, therefore, would appear to be to consider any document that might have influenced the agency's decision to be "evidence" . . . but subject to any privilege that the agency properly claims as protecting its interest in non-disclosure.²¹⁷

Given the narrow scope of materials that might reflect the decisionmaker's mental processes and the breadth of internal materials directly relevant to the arbitrary and capricious inquiry, the narrow construction of the record rule is inappropriately overbroad.

In sum, the expansive construction of the record rule illustrated by *Department of Commerce* and the DACA litigation is correct because it best enables a reviewing court to engage in the "thorough, probing, in-depth" arbitrary and capricious review of informal agency action mandated by the APA.²¹⁸ The narrow construction is inappropriate because it would categorically exclude relevant material, undermining

212. See Gavoor & Platt, *supra* note 13, at 35–42.

213. *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 420 (1971).

214. See *In re United States*, 138 S. Ct. 371, 372 (Breyer, J., dissenting) ("To be sure, we also said in *Overton Park* . . . that 'inquiry into the mental processes of administrative decisionmakers is usually to be avoided' absent a showing of bad faith or improper conduct. But we said that in the context of explaining the circumstances under which officials 'who participated in the decision' could be required 'to give testimony explaining their action.'" (emphasis in original) (citations omitted); *In re United States*, 875 F.3d 1200, 1210 (9th Cir. 2017) (citing *Portland Audubon Soc'y*, 984 F.2d at 1549); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993) (distinguishing *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc)); *S.F. Bay Conservation & Dev. Comm'n v. U.S. Army Corps of Eng'rs*, No. 16-cv-05420-RS(JCS), 2018 WL 3846002, at *7 (N.D. Cal. Aug. 13, 2018).

215. *In re United States*, 138 S. Ct. at 373 (Breyer, J. dissenting).

216. See *Dep't of Commerce*, 351 F. Supp. 3d at 547–72, 660–61.

217. *Nat'l Courier Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975).

218. *Overton Park*, 401 U.S. at 415.

judicial review of the agency's decision-making process. Nor do concerns of judicial overreach and efficiency—which are speculative and easily addressed by the text of the APA—justify the narrow construction.

CONCLUSION

Fairly or unfairly, administrative law bears a reputation for being a bit tedious—boring, even.²¹⁹ Perhaps that reputation is unavoidable given administrative law's association with the nuances of obscure product labeling regulations and its various procedural intricacies.²²⁰ But as any first-year Civil Procedure professor worth their salt would say: "Procedure affects substance." And when it comes to administrative law, the procedure affects the array of substantive areas federal agencies engage with: from immigration and healthcare, to employment and the environment. Thus, it would be a critical error for those involved in the myriad substantive fields touched by federal agencies to shy away from the procedural nuances of administrative law.

With this Note, I have attempted to shed some light on the impact one of those procedural nuances—the composition of an administrative record for informal agency action—can have. Tedious or not (hopefully the latter so far as this Note is concerned), the issue can be of critical importance to parties litigating issues of national importance, as the DACA litigation and *Department of Commerce* illustrate. In shedding light on the issue, I have done my best to explain why an expansive approach to the record rule, which would have an administrative record of informal agency action include materials considered by any agency personnel involved in the decision-making process and categorically includes internal materials, is the desirable approach. First because it best enables a reviewing court to assess an agency's decision-making under the APA's arbitrary and capricious review, and second because it comports with the principles of administrative law the APA was designed to serve.²²¹ The application of an expansive record rule ensures the ultimate decisions made by an agency are the product of reasoned decision-making and agency expertise, not the whims of political pressure, something more nefarious, or just plain laziness.

219. See, e.g., The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) ("[T]he subject of this lecture series is administrative law . . . so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture."); William Funk, *My Ideal "Casebook" or What's Wrong with Administrative Law Legal Education and How to Fix It*, in *A Nutshell (So to Speak)*, 38 BRANDEIS L.J. 247, 247 (2000) ("Administrative Law, the course, is commonly perceived as boring, technical, abstruse, not 'real.'").

220. See, e.g., *Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1126 (2007).

221. See *Abramski v. United States*, 573 U.S. 169, 179 (2014) ("[I]nterpret the relevant words not in a vacuum, but with reference to the statutory context, structure . . . and purpose.") (internal quotation marks omitted). Of course, "[r]eliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'" *King v. Burwell*, 135 S. Ct. 2480, 2495–96 (2015) (quoting *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939)). But without definitive text or legislative history, context is the best available medium.

The expansive construction to the record rule has gained some momentum in the lower courts. But implementation of the expansive record rule thus far has been a piece-meal process, gaining traction only with its adoption in a few district courts in each successive opinion. Without some sort of intervention, it seems unlikely the expansive construction will be adopted uniformly. The question then, is what might be done to facilitate wider adoption of the record rule. The Supreme Court, as currently constituted, is unlikely to hold in favor of the rule, given its skepticism of Judge Alsup's order in the DACA litigation. Legislative action is a more interesting proposition. Those on the right have espoused a profound skepticism in the leeway informal agency action enjoys and thus might be interested in clarifying the "whole record" requirement with an amendment of the APA.²²² Those on the left, seeing what the Trump Administration has done with informal agency action, might also be inclined to seek a more expansive reading of the record rule, perhaps having faith that officials under their own administrations might be more faithful to the APA's reasoned decision-making mandate. Perhaps that would be enough to overcome the legislative lethargy so characteristic of our modern Congress. Outside of those options, local rules might serve to speed the adoption of an expansive approach to the record rule.²²³

Agency action, especial informal agency action, operates in the shadows of modern American life. But "[s]ecrecy, whether intentional or otherwise, is inconsistent with fundamental notions of fairness implicit in due process and with the ideals of reasoned decision-making on the merits which undergirds all our administrative law."²²⁴ The broader adoption of an expansive construction of the record rule would serve to unveil the processes by which administrative agencies make decisions, big and small, assuring courts can hold agencies accountable where those decisions are not the product of reasoned decision-making, and the public can hold agencies accountable where those decisions are unpopular but within the agency's discretion. The procedural nuances of the issue might be tedious, but the consequences are anything but.

222. See, e.g., *Attorney General Jeff Sessions Ends the Department's Practice of Regulation by Guidance*, U.S. DEP'T JUST. (Nov. 17, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-department-s-practice-regulation-guidance> [<https://perma.cc/9WAD-HSZL>].

223. Gavoor & Platt argue for this approach as a potential medium for ensuring the uniform application of a narrower record rule. See Gavoor & Platt, *supra* note 13, at 6.

224. *Bethlehem Steel Corp. v. U.S. E.P.A.*, 638 F.2d 994, 1004 (7th Cir. 1980) (quoting *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 56 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829, 98 S. Ct. 111).