No. 20-1145

Consolidated with Cases No. 20-1167, -1168, -1169, -1173, -1174, -1176, -1177 & -1230

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION et al.,

Respondents,

REPLY IN SUPPORT OF MOTION TO COMPLETE AND SUPPLEMENT THE RECORD

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INTRODUCTION

Respondents' opposition to the motion to complete and supplement the record with six interagency-review documents does not dispute key propositions on which the motion rests. Respondents National Highway Traffic Safety Administration (NHTSA) and Environmental Protection Agency (EPA) do not contest that the two drafts of the Agencies' final rules submitted to the Office of Management and Budget (OMB) and the two sets of EPA comments to NHTSA were among the materials before both Agencies when they promulgated their final rules, nor do they deny that draft rulemaking notices and interagency comments that are part of the OMB review process for Clean Air Act rules must be made public by statute, *see* 42 U.S.C. § 7607(d)(4), and hence fall outside the deliberative process privilege.

The Agencies likewise do not dispute that in issuing emissions standards under the Clean Air Act, "EPA [was] obligated … to exercise [its] own independent judgment in fulfilling [its] statutory mission[]," Rollback, 85 Fed. Reg. 24,174, 25,137 (2020), and explicitly claimed to have done so by "exercis[ing] its own judgment in this final rule," *id.* at 25,119. And they do not contest that the documents Petitioners seek to add to the record show that (1) EPA staff had no opportunity to review the draft rule before NHTSA sent it to OMB for review in January 2020; (2) EPA staff subsequently submitted comments to NHTSA pointing out analytical and factual errors in NHTSA's submission to OMB; (3) NHTSA sent its revised final rule to OMB with less than one day's notice to EPA; and (4) EPA, after finding that NHTSA had not addressed a large

number of EPA's prior comments, sent NHTSA further comments on the deficiencies in its final rulemaking notice.

These undisputed points should determine the outcome of this motion. Completing NHTSA's record with the four interagency-review documents that originated with NHTSA or were sent to NHTSA by EPA will reveal no privileged deliberative materials. The Agencies' argument that materials involving agency deliberations are, per se, outside the record even if they are not privileged misreads this Court's caselaw and contradicts the holding of a decision the Agencies endorse: *Banner Health v. Sebelius*, 945 F. Supp. 2d 1 (D.D.C. 2013), which ruled that the government's "assertion that internal agency materials fall outside the definition of an administrative record even when they are publicly available is incorrect." *Id.* at 22.

As for supplementing the Agencies' records, the Agencies contend that the interagency-review materials fall outside the "recognized narrow exceptions" permitting supplementation. Opp. 11. But the Agencies acknowledge that one such exception is when an agency has "deliberately … excluded documents that may have been adverse to its decision." *Id.* That precisely describes the circumstances here, where EPA claims it exercised its own independent judgment and expertise, but seeks to exclude documents directly showing the opposite. Moreover, the Agencies' denial that the documents are probative of bad faith is irreconcilable with *Department of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019), which allowed supplementation based on evidence that an agency's stated basis for its decision was pretextual.

ARGUMENT

I. The Court should order completion of NHTSA's record.

The Agencies do not dispute that the two draft rules submitted to OMB and EPA's two comments on the drafts fall within the statutory disclosure requirement for interagency-review materials concerning EPA rules. 42 U.S.C. § 7607(d)(4). Nor do they contest that public disclosure requirements foreclose invocation of deliberative process privilege. Rather, they contend that "deliberative" materials are necessarily excluded from the record even when a public disclosure requirement renders them nonprivileged.

That assertion ignores *National Courier Ass'n v. Board of Governors of Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975). There, this Court rejected the argument that internal agency staff documents are necessarily outside the record. Instead, it stated that "[t]he proper approach" is "to consider any document that might have influenced the agency's decision to be 'evidence' within the statutory definition, but subject to any *privilege* that the agency *properly* claims." *Id.* at 1241 (emphasis added). The court held "that the same exceptions exist to the privilege for deliberative inter-agency memoranda as against inclusion in the public record on appeal." *Id.* at 1242. The Agencies do not dispute that a legal requirement of disclosure is such an "exception … to the privilege." *Id.* Thus, under *National Courier*, it is likewise an exception to any otherwise applicable limit on including deliberative materials in the record.

Instead of addressing *National Courier*, the Agencies cite an out-of-context quotation from *Oceana, Inc. v. Ross*, 920 F.3d 855 (D.C. Cir. 2019), to suggest that privilege

is irrelevant to whether deliberative materials may be included in the record. Opp. 10. The cited passage, however, states only that "[t]he fact that the agency could also assert the deliberative process privilege … does not change the analysis" as to whether the agency must provide a log of privileged materials withheld from the record. 930 F.3d at 865. Nothing in that passage suggests that a court should ignore an agency's *inability* to assert privilege in determining whether *nonprivileged* materials belong in the record.

The Agencies also invoke two decisions excluding transcripts of agency deliberations from the record: *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), and *Kansas State Network, Inc. v. FCC*, 720 F.2d 185 (D.C. Cir. 1983).[1] In those cases, the transcripts were offered so the Court could probe agency decisionmakers' mental processes by examining "the agency's actual deliberations." *Kan. State Network*, 720 F.2d at 191; *accord Mothers for Peace*, 789 F.2d at 44. The cases thus implicated the rule of *United States v. Morgan*, 313 U.S. 409, 422 (1941), which requires heightened protection against inquiry into the thoughts of agency decisionmakers.

Publicly available documents revealing considerations that were before an agency do not present the same concerns. Thus, courts have concluded that interagency-review

[1] The Agencies also cite *Deukmejian v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1326 (D.C. Cir. 1984), the panel decision preceding the en banc decision in *Mothers for Peace*. Although the Court did not vacate the relevant part of the *Deukmejian* panel opinion when it granted rehearing, the en banc Court's resolution of the same issue reflects this Court's final holding on the point.

records required to be made public are not categorically excluded from the administrative record because they do not pose the risk of injury to agency deliberations that this Court saw in the transcripts in *Mothers for Peace*. *See Lee Mem'l Hosp. v. Burwell*, 109 F. Supp. 3d 40, 48–49 (D.D.C. 2015); *see also Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 30 (D.D.C. 2013). The Agencies instead cite *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, as exemplifying their preferred approach. But *Banner Health*, like *Lee Memorial Hospital* and *District Hospital Partners*, held that interagency-review materials are *not* categorically excluded from an administrative record, *see id.* at 26–27, and ordered a draft rule submitted for OMB to be added to the record, *see id.* at 27.

The Agencies deny that the reason *Banner* added the draft rule to the record was that it was publicly available. Opp. 9. In fact, the outcome hinged on public availability: The court rejected the government's "assertion that internal agency materials fall outside the definition of an administrative record even when they are publicly available," 945 F. Supp. 2d at 22, and held that the rationale for excluding confidential executive branch communications does not extend to interagency-review materials that "are in fact required to be made publicly available," *id.* at 27. The court *also* determined that the omitted document was adverse to the agency's decision and went to the heart of the challengers' arguments that it was arbitrary and capricious. *See id.* at 26. The same is true here.

II. The Court should supplement the record with the interagency materials.

The Agencies nowhere dispute that the Clean Air Act's general exclusion of interagency-review materials from the administrative record, 42 U.S.C. § 7607(d)(4)(B)(ii), can be overcome by the same showing generally applicable to a request to supplement an administrative record. *See* Mot. 17–18 n.7. Instead, they argue that this standard is not met here. *See* Opp. 10–11. That argument rests on an unduly limited view of the circumstances that justify supplementation and a failure to recognize that Petitioners' request satisfies even the Agencies' restrictive statement of the standard.

The Agencies contend that this Court has identified only three "unusual circumstances" in which supplementation is permissible: "if the agency deliberately or negligently excluded documents that may have been adverse to its decision, if background information is needed to determine whether the agency considered all the relevant factors, or if the agency failed to explain administrative [action] so as to frustrate judicial review." Opp. 11 (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). In fact, *American Wildlands* says the Court has allowed supplementation in "at least" those three circumstances. 530 F.3d at 1002. Although the Agencies apparently view "bad faith" as insufficient to justify supplementation, *see* Opp. 11, decisions the Agencies cite recognize "bad faith or improper behavior" as another ground for supplementation. *Oceana*, 920 F.3d at 865.[2] And the Supreme Court's recent decision in

[2] In citing another case to claim that the "motivation of agency decision makers is immaterial," Opp. 13, the Agencies omit the key qualifier that follows: "unless there

Department of Commerce v. New York leaves no doubt that evidence of bad faith, including an agency's assertion of a pretextual justification for its action, is a basis for supplementation. *See* 139 S. Ct. at 2573–74.

In any event, even under the Agencies' formulation, there are ample grounds for supplementation here. The Agencies have "deliberately … excluded" from the record "documents that may have been adverse to their decision." *Am. Wildlands*, 530 F.3d at 1002. Specifically, the four documents exchanged among the Agencies and OMB, and the two internal EPA documents, include EPA analysis directly adverse to NHTSA's rationale for its decision. They also contradict the Agencies' key assertions that EPA's greenhouse gas emissions standard reflects EPA's independent judgment and expertise. The documents reveal that the final rulemaking notice was drafted by NHTSA without participation by EPA, forcing EPA twice to offer comments on what was ostensibly its own proposal after NHTSA sent it to OMB (and, on the second occasion, after NHTSA ignored many of EPA's prior comments).

Those circumstances also constitute bad faith under *Department of Commerce* insofar as they reveal that the stated basis for EPA's rule—the agency's claim to have fulfilled its statutory obligations to exercise its own independent judgment and expertise—was pretextual. *See* 139 S. Ct. at 2574.

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is a showing of bad faith or improper behavior." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279–1280 (D.C. Cir. 1998).

The Agencies portray these documents as revealing only a garden-variety case of "intra-agency discord." Opp. 12 (quoting *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 488 (D.C. Cir. 2011)). They liken the circumstances to the ordinary "back and forth of agency decision-making" involving "pre-decisional give-and-take among agency officials," Opp. 12, or to the situation in *Air Transport Association*, in which "a dissenting member of the agency's board" expressed the "impression that other board members had prejudged the merits," *id.* (citing *Air Transp. Ass'n*, 663 F.3d at 488).

Those analogies are off the mark. This is not a case in which documents indicate only that some staff members disagreed with an agency's ultimate decision. Nor is it one where supplementation of the record is sought based on one agency member's speculation about the internal thoughts of fellow agency decisionmakers, or on legitimate differences of "opinions on the correct course of [the] agency's future actions." *Air Transp. Ass'n*, 663 F.2d at 488.

By contrast, this is the rare case in which there is concrete evidence directly contradicting an agency's express statement of the bases for its decision. The materials Petitioners ask the Court to add to the record demonstrate not merely "back and forth" among agency officials, but outright exclusion of EPA from the process of preparing a rule that EPA nonetheless claimed reflected its own independent judgment and expertise. And the extraordinary directive that EPA's experts send their comments to NHTSA in hard copy without copying OMB, *see* Mot. 6—evidently in hopes of evading the statutory requirement that comments exchanged between the Agencies during the

interagency-review process be publicly docketed—is even stronger evidence of the impropriety of the proceedings leading to promulgation of the Agencies' actions.

The Agencies nonetheless assert that the Court should not supplement the record because "[t]he court's task in reviewing agency action is to determine whether the agency's final decision articulates a rational connection between its factual judgments and its ultimate policy choice." Opp. 12. As *Department of Commerce* illustrates, however, that principle gives way when evidence reveals that an agency's stated ground for its decision is not genuinely the basis on which it acted. Indeed, *Department of Commerce* expressly held that the agency's decision articulated a rational basis for the action. 139 S. Ct. at 2569–71. Nonetheless, the Supreme Court held that review of the agency's action *required* consideration of evidence outside of the record as certified by the agency, *id.* at 2574, and that the action could not be sustained if the record, as supplemented, revealed that there was a "disconnect between the decision made and the explanation given," *id.* at 2575. So too here, where the materials Petitioners ask the Court to add to the record are essential to evaluating EPA's continued insistence that its regulation reflects its own "considered judgment" (Opp. 12).

The Agencies argue that *Department of Commerce* does not apply because there the government *agreed* to include in the record materials that would otherwise have been outside it, whereas "[t]here is no such agreement here." Opp. 14. That argument is not plausible. In *Department of Commerce*, the Court held that the district court should not have taken the extraordinary step of allowing extra-record *discovery* until it first ordered

completion of the administrative record with materials allowing it to assess whether the record, as so expanded, showed evidence of pretext. *See* 139 S. Ct. at 2574. Nothing in *Department of Commerce* indicates that the court's authority to take that step would depend on the government's agreement. Petitioners here ask only that the Court add to the record materials necessary to evaluate their claim that the rule misstates the basis for EPA's action—exactly the course *Department of Commerce* endorsed.

Moreover, the ultimate holding in *Department of Commerce* was that still further expansion of the record was proper, notwithstanding the government's objection, because materials already in the record provided evidence of pretext. To be sure, the Court noted that those materials had been included by stipulation of the government, *see id.*, but it nowhere suggested that the government has unilateral authority to block creation of a complete record on pretext simply by objecting to including evidence of its own misconduct. Such a reading of *Department of Commerce* would render the decision self-defeating: It would serve no conceivable purpose to give agencies the power to thwart judicial review of pretextual decisions by withholding the necessary record.

CONCLUSION

This Court should grant the motion of Petitioners in Nos. 20-1167, 20-1168, and 20-1169 to complete and supplement the record before merits briefing.

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CERTIFICATE OF COMPLIANCE

The foregoing reply was prepared in 14-point Garamond font using Microsoft Word 365 (July 2020 ed.), and it complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 27(d)(1)(E). The reply contains 2,575 words and complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A).

/s/ Matthew Littleton
Matthew Littleton

CERTIFICATE OF SERVICE

On September 25, 2020, I served a copy of the foregoing reply using this Court's CM/ECF system. All parties are represented by registered CM/ECF users that will be served by the CM/ECF system.

/s/ Matthew Littleton
Matthew Littleton