GOVERNING FOR IMPACT

The Administrative Record

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Issue Brief

TABLE OF CONTENTS

I. INTRODUCTION

In determining whether an agency's action complied with the Administrative Procedure Act, the statute instructs that "the court shall review the whole record or those parts of it cited by a party."[1] Federal courts have long held 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."[2] And courts have typically deferred to the agency to compile the administrative record, on the assumption that agencies are in the best position to identify, and can be trusted to compile, the complete set of materials they considered during the decisionmaking process.

But that assumption has come under serious strain. Since the beginning of President Trump's second term, courts have, by one count, found that the federal government misrepresented or withheld information in over ninety cases (under the APA and otherwise).[3] Litigants might understandably be concerned that the government will excise critical or unfavorable information from the administrative record—materials that cut against the agency's position,[4] reveal impermissible bias or animus,[5] or disclose the true basis for the agency's actions,[6] to identify just a few possibilities. In such cases, litigants might consider moving to introduce evidence from outside the record, or even for discovery.

This Issue Brief begins by defining the administrative record—what goes in, what stays out, and how agencies prepare and submit it. This Issue Brief then explains how litigators might introduce extra-record evidence, including evidence already in their possession, to support both APA and constitutional claims. Finally, this Issue Brief addresses some unique considerations that arise in using discovery to extract information from the government.

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[1] 5 U.S.C. § 706.

[2] *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

[3] *See* Ryan Goodman et al., *The "Presumption of Regularity" in Trump Administration Litigation (4th Edition)*, Just Security, https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation/ (last updated Mar. 19, 2026).

[4] *See, e.g.*, *Mercado v. Noem*, 800 F. Supp. 3d 526, 542 (S.D.N.Y. 2025).

[5] *See, e.g.*, *R.I. St. Council of Churches v. Rollins*, 808 F. Supp. 3d 370, 385 (D.R.I. 2025).

[6] *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, 799 F. Supp. 3d 967, 979 (N.D. Cal. 2025).

II. THE CONTENTS OF THE ADMINISTRATIVE RECORD

Generally speaking, the administrative record consists of "all materials compiled by the agency that were before the agency at the time the decision was made."[7] Among other things, an administrative record might include: all of the comments submitted to the agency on its proposed rule; transcripts of public hearings concerning the rule; other communications received by the agency; studies, analyses, and raw data; books, articles, and other secondary sources; past agency documents; judicial decisions; statutory and regulatory provisions; and countless other types of materials, including materials required by other statutes or regulations.[8] Administrative records can be short or, more commonly, quite lengthy—for particularly complex rulemakings, the record might contain hundreds of thousands or even millions of pages.[9]

The standard for inclusion in the administrative record is expansive. "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision."[10] "The 'whole' administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers."[11] "Indirectly" is key—"[a]s part of the record, the Court may consider 'any document that might have influenced the agency's decision' and not merely those documents the agency expressly relied on in reaching its final determination."[12] The administrative record must also include

[7] *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quotations omitted).

[8] *See, e.g.*, 42 U.S.C. § 7607(d)(7) (Clean Air Act); 40 C.F.R. § 300.810 (regulations implementing the Comprehensive Environmental Response, Compensation, and Liability Act); *see also Est. of Insinga by Gilmore v. Comm'r of Internal Revenue*, 149 F.4th 709, 723 (D.C. Cir. 2025) (holding that IRS inappropriately omitted materials required to be in the record by regulation).

[9] *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016) (noting that the administrative record for the Obama administration's "Waters of the United States" rulemaking was "more than a million pages long").

[10] *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

[11] *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted).

[12] *Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 23 (D.D.C. 2016) (quoting *Nat'l Courier Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975)).

"evidence contrary to the agency's position";[13] an agency "may not skew the record in its favor by excluding pertinent but unfavorable information," or by "exclud[ing] information on the grounds that it did not rely on the excluded information in its final decision."[14] The administrative record is generally considered to have "closed" when the agency takes its final action, in keeping with the principle that the court should have no greater access to information than the agency.[15]

However, agencies often withhold or redact materials subject to certain privileges from the administrative record. The most common is the deliberative process privilege, which applies to materials that are both "predecisional" — "generated before the adoption of an agency policy" — and "deliberative" — "reflect[ing] the give-and-take of the consultative process."[16] Thus, "documents reflecting advisory opinions, recommendations[,] and deliberations comprising part of a process by which governmental decisions and policies are formulated"[17] are "ordinarily privileged, and need not be included in the record."[18] Moreover, some courts have held that such documents are irrelevant because the "actual subjective motivation of agency decisionmakers is immaterial as a matter of law."[19] Other commonly withheld materials include materials subject to attorney-client and attorney work product privileges;[20] confidential business information and trade secrets;[21] and

[13] *Thompson*, 885 F.2d at 555 (citation omitted); *see also Insinga*, 149 F.4th at 726 (rejecting effort to rely on "truncated record" that omitted helpful information for the plaintiff).

[14] *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) (quotation omitted); *see also Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 20 (D.D.C. 2013), *aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015).

[15] *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) ("When a plaintiff challenges a final agency action, judicial review normally is limited to the administrative record in existence at the time of the agency's decision."); *Kent Cnty., Delaware Levy Ct. v. EPA*, 963 F.2d 391, 395-96 (D.C. Cir. 1992) (declining to supplement record with document that postdated agency's decision); *cf. San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002) ("As this case concerns agency inaction, there can be no final agency action that closes the administrative record or explains the agency's actions.").

[16] *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quotations omitted).

[17] *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quotations omitted).

[18] *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 13 (D.D.C. 2001).

[19] *In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Note, however, the oddity of excluding the very documents that might bear on why the agency took the action that it took.

[20] *See, e.g., Arizona Rehab. Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 270 (D. Ariz. 1998).

[21] *See, e.g., Serono Lab'ys, Inc. v. Shalala*, 35 F. Supp. 2d 1, 3 (D.D.C. 1999).

classified information.[22] Although case law generally supports the proposition that privileged materials need not be included in the administrative record, it is somewhat more divided concerning whether any withheld or redacted documents must be identified in a privilege log.[23]

"It is the agency's responsibility to compile" the administrative record for the court,[24] and agencies differ in how they do so.[25] Sometimes, agencies will compile the administrative record as they proceed through the administrative process, particularly when litigation over the agency's action is expected; in other instances, the agency will begin to compile the administrative record once litigation is filed. The agency staff who worked on a given decision will generally be asked to compile the administrative record, relying upon their own recollections and records of what the agency may have considered. Attorneys in the agency's Office of General Counsel or at the Department of Justice will often also provide guidance concerning what materials to include or exclude or to withhold pursuant to applicable privileges. It is unclear how these practices may have changed during the Trump administration's second term, if at all.

When the agency has finished compiling the administrative record, a knowledgeable agency official prepares a certification that the administrative record is complete, and the certified administrative record, often with an index of its contents, is produced to counsel for the plaintiffs in a given case.[26] The complete administrative

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[22] *See, e.g.*, *Olenga v. Gacki*, 507 F. Supp. 3d 260, 277 (D.D.C. 2020) (classified materials provided to the court *ex parte* and *in camera*).

[23] *See Nat'l Council of Negro Women v. Buttigieg*, 2024 WL 1287611, at *2-6 (S.D. Miss. 2024) (collecting cases). *Compare Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) ("[S]ince predecisional documents are irrelevant and therefore not … discoverable, they are not required to be placed on a privilege log.") (quotation omitted), *with Blue Mountains Biodiversity Project v. Jeffries*, 99 F.4th 438, 445 (9th Cir. 2024) ("But whether materials are in fact deliberative is subject to judicial review, and in appropriate circumstances district courts may order a privilege log to aid in that analysis."), *cert. denied*, 145 S. Ct. 1048 (2025).

[24] *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010).

[25] *See generally* Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, Admin. Conf. of the U.S. (May 14, 2013), https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf; *Guidance to Federal Agencies on Compiling the Administrative Record*, U.S. Dep't of Justice (Jan. 1999), https://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/eis/DOJ%20Guidance.pdf.

[26] *See, e.g.*, Certification of Administrative Record, *Sierra Club v. Trump*, No. 4:19-cv-892 (N.D. Cal. Sept. 16, 2019), ECF No. 206-1, *available at* https://www.aclu.org/cases/sierra-club-v-trump-challenge-

record can be, but often is not, filed on the case docket. Regardless, the parties often prepare appendices containing relevant parts of the record.[27]

In district court, the government often seeks to produce the administrative record after the resolution of any motion to dismiss, particularly if the motion involves jurisdictional threshold issues.[28] Even where local rules require the government to file a certified list of the contents of the record alongside the filing of a motion to dismiss,[29] the government is often successful at obtaining leave from the court to refrain from doing so.[30] However, litigants often seek to obtain the record earlier, including in connection with motions practice concerning preliminary injunctions or other expedited relief.[31] If production of the administrative record is delayed, litigants might consider whether they actually need the record to advance their claims. Although courts frequently refrain from addressing arbitrary-and-capricious claims without the record,[32] the record may not be necessary to resolve statutory or procedural claims that involve little in the way of facts, or that can be resolved based on stipulated facts or with explanations provided in any accompanying Federal Register publication.[33]

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trumps-national-emergency-declaration-construct-border-wall?document=sierra-club-v-trump-declaration-kenneth-rapuano-1.

[27] *See, e.g.*, Part 1 of Administrative Record, *Sierra Club*, ECF No. 206-2, *available at* https://www.aclu.org/cases/sierra-club-v-trump-challenge-trumps-national-emergency-declaration-construct-border-wall?document=Part-1-of-Administrative-Record.

[28] In the courts of appeals, the agency must file the entire record or parts designated by the parties with the clerk within 40 days of service of a petition for review, although that timeframe can be shortened, extended, or abrogated by stipulation. *See* Fed. R. App. P. 17.

[29] *See* D.D.C. LCvR 7(n).

[30] See, e.g., *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 294 (D.D.C. 2018).

[31] *See, e.g.*, *All. for Retired Americans v. Bessent*, 770 F. Supp. 3d 79, 96 (D.D.C. 2025) (noting that "binding precedent compels the Court to call for the administrative record before ruling on the likelihood of Plaintiffs' success on the merits of their APA claims") (quotation omitted) (citing *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001)).

[32] *Dist. Hosp. Partners, L.P. v. Sebelius*, 794 F. Supp. 2d 162, 171 (D.D.C. 2011) ("Even though the Court may refer to the Federal Register, it concludes that dismissal based solely on its contents would be premature here because a review of the administrative record is necessary to a determination of whether the Secretary's methodology was arbitrary and capricious.").

[33] *See, e.g.*, *Amica Ctr. for Immigrant Rts. v. Exec. Off. for Immigr. Rev.*, 2026 WL 662494, at *10 (D.D.C. 2026) (noting that "the legal question was narrow and could be resolved without consideration of an extensive administrative record").

III. ADMINISTRATIVE PROCEDURE ACT CLAIMS

In a typical Administrative Procedure Act case, "a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record,"[34] and "an agency is entitled to a strong presumption of regularity that it properly designated the administrative record."[35] But this so-called "record rule" is subject to a number of caveats, as laid out below.

The record rule originated in *Citizens to Preserve Overton Park v. Volpe* (1971),[36] which concerned whether the Secretary of Transportation had made certain required findings before "authorizing the use of federal funds to finance the construction of highways through public parks."[37] The Secretary made no "formal findings," and so the government instead "introduced affidavits, prepared specifically for th[e] litigation[,] [w]hich indicated that the Secretary had made the decision and that the decision was supportable."[38] That, the Supreme Court held, was insufficient: the "affidavits were merely 'post hoc' rationalizations," and "clearly d[id] not constitute the 'whole record'" required by the APA.[39] The Court therefore remanded the case so that the district court could review the Secretary's decision "based on the full administrative record that was before the Secretary at the time he made his decision."[40]

But *Overton Park* also planted the seeds of the record rule's exceptions. As the Court noted, "since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence, it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within

[34] *Dep't of Commerce v. New York*, 588 U.S. 752, 780 (2019).

[35] *Dist. Hosp. Partners, L.P.*, 971 F. Supp. 2d at 20 (quotation omitted).

[36] Although it has pre-APA roots in *SEC v. Chenery Corp.*, which held that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. 80, 95 (1943).

[37] 401 U.S. 402, 405, *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

[38] *Id.* at 409.

[39] *Id.* at 419 (citation omitted).

[40] *Id.* at 420.

the scope of his authority and if the Secretary's action was justifiable under the applicable standard."[41] For example, "[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action."[42] Although "such inquiry into the mental processes of administrative decisionmakers is usually to be avoided" except in instances where plaintiffs have made "a strong showing of bad faith or improper behavior," "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves," given that the Secretary made no formal findings.[43]

The Supreme Court described the record rule again in *Camp v. Pitts* (1973), in which a group of prospective bankers had unsuccessfully applied to the Comptroller of the Currency to open a bank.[44] After the district court upheld the Comptroller's decision, the court of appeals remanded, instructing the court to hold a "trial de novo."[45] The Supreme Court reversed, announcing that the "focal point for judicial review should be the administrative record already in existence."[46] If that record was so bare as to "frustrate effective judicial review, the remedy was not to hold a de novo hearing," but to obtain the affidavits and testimony contemplated by *Overton Park*.[47] The Court cautioned, however, that the existence of a "contemporaneous explanation" for the agency's decision meant that "[t]he validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding."[48]

Today, it is generally accepted "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."[49] It can therefore be challenging for litigants to introduce facts or evidence not contained in the record itself, or to seek discovery. To the extent litigants believe that the administrative

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] 411 U.S. at 138.

[45] *Id.* at 140.

[46] *Id.* at 142.

[47] *Id.* at 142-43.

[48] *Id.* at 143.

[49] *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Different rules may apply when other statutes are in play, such as the National Environmental Policy Act. *See, e.g.*, *Ohio Valley Env't Coal. v. U.S. Army Corps of Eng'rs*, 2006 WL 8438090, at *2-3 (S.D.W. Va. 2006) ("[T]here is strong precedent for exceptions to the record-only review where NEPA claims are asserted.") (collecting cases).

record lacks materials that would be helpful in advancing their claims, they might consider three approaches: (1) moving to "complete" the record, (2) moving to "supplement" the record, or (3) introducing materials that are relevant to issues other than the reasonableness of the agency's action.

Note, however, that much of the law of the administrative record has been developed by lower courts working in the shadows of the Supreme Court's rather vague pronouncements decades ago. For that reason, confusion abounds; among other things, courts frequently refer to both completion and supplementation as "supplementation,"[50] or simply list examples of when "extra-record evidence" or "discovery" may be appropriate.[51] This Issue Brief therefore attempts to distill the circumstances in which extra-record evidence has been permitted as they are best and most commonly understood.

A. Completion of the Administrative Record

To start, litigants might seek to "complete" the administrative record by "show[ing] that materials exist that were actually considered by the agency decision-makers but are not in the record as filed."[52] "Completion entails ensuring that the entire record is before the court" with "the addition of those documents that influenced the agency in its decisionmaking,"[53] therefore ensuring compliance with the APA's mandate that judicial review be conducted on "the whole record."[54] Consequently, the only obstacle to completing the record is the presumption that the agency has already furnished a complete record.[55]

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[50] *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 632-34 & n.55 (S.D.N.Y. 2018) (describing confusion); *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 78 (D.D.C. 2018) (same); Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 Kan. L. Rev. 1, 43 (2018) (same).

[51] For example, *Esch v. Yeutter* listed eight "exceptions countenancing use of extra-record evidence," lumping together some exceptions that are best categorized today as completion, supplementation, or involving non-merits issues, and others still which are no longer recognized. 876 F.2d 976, 991 (D.C. Cir. 1989); *see Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (noting that "*Esch* has been given a limited interpretation since it was decided").

[52] *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012).

[53] *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018).

[54] 5 U.S.C. § 706; *Charleston Area Med. Ctr.*, 216 F. Supp. 3d at 23.

[55] *See Sweet v. DeVos*, 495 F. Supp. 3d 835, 844 (N.D. Cal. 2020).

"A plaintiff may show that the record is '[i]nsufficien[t]' — *i.e.*, incomplete — only if she is able to 'specif[y] … documents that ha[ve] been omitted.'"[56] To do so, the plaintiff "must put forth concrete evidence" and "'identify reasonable, *non-speculative grounds* for its belief that the documents were *considered* by the agency and not included in the record.'"[57] In cases dealing with documents provided to the agency by an outside party, a plaintiff might also be required to "describe when the documents were presented to the agency, to whom, and under what context."[58] Generally, however, a plaintiff need not demonstrate any "unusual circumstance[s]," such as the "exclusion of adverse information" in particular or "bad faith."[59]

For these reasons, moving for completion of the administrative record might sometimes be the procedurally easiest option, although its scope is necessarily limited to documents that the agency actually considered. To the extent litigants believe that materials helpful to their case were in fact before the agency, they might begin with a motion to complete the record before utilizing more aggressive approaches, as discussed further below.

B. Supplementation of the Administrative Record

In contrast, supplementing the record generally means adding information that was not part of the record in the first place, including through discovery. It is therefore "the exception, not the rule"[60] — limited to "gross procedural deficiencies"[61] rather than anodyne agency missteps. Although the various circuits may use different formulations, they have generally converged upon the same criteria for when

[56] *Pub. Emps. for Env't Resp. v. EPA*, 2026 WL 571217, at *2 (D.D.C. 2026) (quoting *NRDC v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975)).

[57] *Marcum*, 751 F. Supp. 2d at 78 (quoting *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006)); *see also Authors Guild v. NEH*, 2025 WL 3678097, at *5 (S.D.N.Y. 2025) (adopting the same standard).

[58] *Pac. Shores*, 448 F. Supp. 2d at 7.

[59] *PEER*, 2026 WL 571217, at *3 (quotation omitted). *But see City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 288 (D.D.C. 2013) (conflating completion and supplementation).

[60] *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010); *Fort Sill Apache Tribe*, 345 F. Supp. 3d at 9 ("A motion to supplement — to look beyond the complete record — generally requires the presence of an exception to the record rule.").

[61] *Hill Dermaceuticals*, 709 F.3d at 47.

supplementation is permissible.[62] We focus on the two that have been most widely identified and that tend to be the most important in APA litigation: "when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review."[63]

1. "Bad Faith"

Since *Overton Park*, the Supreme Court has "recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'": where there has been a "'strong showing of bad faith or improper behavior.'"[64] The basic idea is that the administrative record does not tell the real story for the agency's action — because of agency misconduct, it presents a distorted or incomplete picture of the agency's reasoning.[65] This exception might therefore be of particular use to litigants challenging the Trump administration's actions.

The Court applied the bad faith exception most recently in *Department of Commerce v. New York* (2019), which dealt with the Trump administration's effort to add a citizenship question to the 2020 Census. In holding that the Trump administration's stated need for the question (to enforce the Voting Rights Act) was an impermissible pretext, the Court relied substantially on extra-record evidence concerning the administration's decisionmaking process — evidence that "reveal[ed] a significant mismatch between the decision the Secretary made and the rationale he provided."[66] The Court also noted that, in its view, the district court's decision to permit discovery

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[62] *See, e.g.*, *Murphy v. Comm'r of Internal Revenue*, 469 F.3d 27, 31 (1st Cir. 2006); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005); *Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).

[63] *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 514 (quoting *Com. Drapery Contractors*, 133 F.3d at 7).

[64] *Dep't of Com.*, 588 U.S. at 781 (quoting *Overton Park*, 401 U.S. at 420).

[65] *In re U.S. Dep't of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022) ("Bad faith is a requirement because when the agency has been dishonest, further judicial scrutiny is justified and, in fact, necessary to effectuate judicial review."). To use one particularly evocative description, "[t]he 'administrative record' leaves the reader with the feeling that he is being led, blindfolded, along a carefully plotted path through a dense, unseen wood. Here and there, he may hear a rustle in the trees, feel the dark silhouette of a towering form, or intuit some other hint at the forest beyond, but never is he afforded an unfettered view of the landscape through which he passes." *Am. Fed'n of Gov't Emps., AFL-CIO*, 799 F. Supp. 3d at 981.

[66] *Dep't of Com.*, 588 U.S. at 783.

was "premature," but "ultimately justified."[67] Although the district court should have required the government to complete the administrative record first, the Court agreed that the completed record "largely justified such extra-record discovery as occurred."[68] Under *Department of Commerce*, pretext claims might be an especially strong vehicle for introducing extra-record evidence.[69]

Several more recent decisions have provided other examples of the requisite bad faith. For instance, in one of the challenges to the Trump administration's efforts to revoke Temporary Protected Status, the court held that the plaintiffs had shown bad faith because the Secretary of Homeland Security had made statements that indicated that racism, rather than an assessment of country conditions, had driven her decisionmaking.[70] Similarly, in a challenge to a reduction-in-force (RIF) at the Department of Education, the court held that a mismatch between the purported goals of the RIF—"operational efficiency" and "fiscal sustainability"—and public statements about how "the RIF is intended to shut down the Department" were "enough prima facie evidence of pretext to warrant a finding of bad faith."[71]

Pretext is not the only circumstance in which such evidence might be permitted. "Bad faith" might also include unlawfully "predetermining" a matter before the agency or "harboring a prejudice" against a party,[72] relying upon "impermissible political and ideological considerations,"[73] or engaging in "ex parte contacts" where those contacts are forbidden by law or regulation.[74] But the mere fact that the agency's action may have been motivated by "other unstated reasons," "political considerations," or "an Administration's priorities" will not suffice to establish bad

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[67] *Id.* at 781.

[68] *Id.* at 782.

[69] *See* Governing for Impact, *Challenging Agency Action Based on Pretextual Reasons* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Challenging-Agency-Action-Based-on-Pretextual-Reasons.pdf. Note, however, that Justices Thomas, Gorsuch, and Kavanaugh questioned both the *Overton Park* exception and pretext review. *See Dep't of Com.*, 588 U.S. at 792 ("We have never before found *Overton Park*'s exception satisfied, much less invalidated an agency action based on 'pretext.'") (Thomas, J., concurring in part and dissenting in part).

[70] *See Nat'l TPS All. v. Noem*, 2025 WL 2419266, at *2-3 (N.D. Cal. 2025).

[71] *New York v. McMahon*, 2026 WL 622484, at *7 (D. Mass. 2026).

[72] *Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (quotation omitted).

[73] *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009), *amended sub nom. Tummino v. Hamburg*, No. 05-CV-366 ERK VVP, 2013 WL 865851 (E.D.N.Y. Mar. 6, 2013).

[74] *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977).

faith.[75] After all, agency decisions "are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns."[76] The key is instead to demonstrate that the agency's decisionmaking process was in some way tainted.

Often, plaintiffs will need to produce the very evidence they want added to the record, ask the court to take judicial notice of it, and convince the court that it satisfies the criteria for supplementation.[77] That means adducing documentary evidence suggesting, for instance, that the agency possessed motivations other than those identified in its rulemaking, suffered from undue political pressure, departed from ordinary procedures, or that settled on a particular decision irrespective of the evidence. (Notably, though, some judges—including one Supreme Court justice—have been willing to consider public statements of government officials as evidence that the stated justifications for administrative action are suspect without a formal motion to supplement the record.[78]) Other times, plaintiffs will need to convince a court—either by pointing to such extrinsic evidence or holes in the record—that the agency's decision cannot adequately be explained without discovery, as discussed below.

2. "Bare Record"

In other instances, the administrative record may be "so deficient as to preclude effective review," meaning that the court simply cannot tell whether the agency

[75] *Dep't of Com.*, 588 U.S. at 781.

[76] *Id.*; *see also Interfaith Ctr. on Corp. Resp. v. SEC*, 786 F. Supp. 3d 97, 141 (D.D.C. 2025) ("[P]olicy choices are agency actions that courts may not disturb.").

[77] A "court may judicially notice a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). That rule allows courts to "take judicial notice of matters of public record." *Philips v. Pitt. Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

[78] *See Nat'l Fed. of Indep. Bus. v. OSHA*, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring) (quoting the public statements of former White House Chief of Staff Ron Klain in opining "that the agency pursued its regulatory initiative"—an emergency temporary standard mandating that certain employers require their employees to be vaccinated against or regularly test for COVID-19—"only as a legislative 'work around.'"); *West Virginia v. EPA*, 597 U.S. 697, 745 (2022) (Gorsuch, J., concurring) (noting President Obama's statement that "if Congress won't act soon … I will" as evidence that the EPA's Clean Power Plan violated the major questions doctrine).

performed its job correctly on the existing record.[79] There are several variations on that theme in the cases.

First, the agency may have "deliberately or negligently excluded documents that may have been adverse to its decision."[80] Although the D.C. Circuit has repeatedly identified this as a circumstance where "supplementation" is appropriate, it is somewhat unclear what role this exception is intended to play.[81] If the agency considered certain documents but failed to include them in the administrative record, then *completion* is typically appropriate regardless of the agency's mental state.[82] But if, for some reason, the agency failed to even consider certain documents that it perhaps should have, then supplementation might be appropriate. For example, in one D.C. Circuit case, the agency searched its records for documents to support its decision and seemingly missed certain relevant documents held in a regional office.[83] In another, the court criticized the agency for "looking only at the records most readily at hand or favorable to a [decision] while omitting other available and material information."[84]

Second, "background information" may be needed "to determine whether the agency considered all the relevant factors."[85] "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

[79] *Hill Dermaceuticals*, 709 F.3d at 47.

[80] *Am. Wildlands v. Kempthorne,* 530 F.3d 991, 1002 (D.C. Cir. 2008) (quotation omitted)

[81] Id.

[82] *See Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 2020 WL 5642287, at *10 (D.D.C. 2020) ("Whether admitting documents that an agency possesses but does not know about amounts to completing the administrative record or admitting extra-record evidence is a question that the Court need not decide for present purposes.").

[83] *See Kent Cnty.*, 963 F.2d at 396; *see also Sears, Roebuck & Co. v. U.S. Postal Serv.*, 118 F. Supp. 3d 244, 248 (D.D.C. 2015) (describing *Kent* as "an unusual circumstance where 'the agency blatantly ignored a specific document that was readily available and directly on point'") (quoting *Midcoast Fishermen's Ass'n v. Gutierrez*, 592 F. Supp. 2d 40, 45 (D.D.C. 2008)).

[84] *See Insinga*, 149 F.4th at 726.

[85] *Am. Wildlands*, 530 F.3d at 1002 (quotation omitted); *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) ("[A] reviewing court may consider extra-record evidence" where the evidence "is necessary to determine whether the agency has considered all relevant factors and explained its decision.") (quotation omitted).

of the regulatory problem before it."[86] If the agency failed to consider an important factor at all, then the record might naturally be silent upon the subject. However, if the agency considered the general issue, the court may not consider extra-record evidence "to determine the correctness or wisdom of the agency's decision."[87] Thus, some courts have explained that, "[t]o satisfy the 'relevant factors' exception, the document in question must do more than raise nuanced points about a particular issue; it must point out an *entirely new* general subject matter that the defendant agency failed to consider."[88]

Third, the agency may have "failed to explain administrative action so as to frustrate judicial review."[89] For certain agency actions — e.g., decisions that did not go through a notice-and-comment rulemaking process, decisions with relatively minor consequences, or internal agency operational decisions — the agency may not have prepared a contemporaneous explanation for its decision. In *Overton Park*, for instance, the Secretary did not make any formal findings, and so the Court suggested that affidavits or testimony may be needed to ascertain the basis for the Secretary's decision.[90] Sometimes, it may even be the agency that needs to introduce additional materials, like declarations or testimony from agency officials, when the "record fails to adequately explain the challenged action."[91]

However, this basis for supplementation should not be construed as an opportunity to introduce post hoc explanations for the agency's decision. Because "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained,"[92] any "new materials should be merely explanatory of the original record and should

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[86] *Ctr. for Biological Diversity v. U.S. Off. of Surface Mining Reclamation & Enf't*, 2025 WL 1503802, at *12 (D.D.C. 2025) (quoting *Oceana, Inc. v. Ross*, 454 F. Supp. 3d 62, 69 (D.D.C. 2020).

[87] *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (quotation omitted).

[88] *Ctr. for Biological Diversity*, 2025 WL 1503802, at *12 (quoting *Oceana*, 454 F. Supp. 3d at 70). In notice-and-comment rulemaking, however, the onus may be on the plaintiff to have presented the subject to the agency during the comment process. *See* Governing for Impact, *Arbitrary-and-Capricious Challenges* 21 (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Arbitrary-and-Capricious-Challenges.pdf.

[89] *Am. Wildlands*, 530 F.3d at 1008 (quotation omitted).

[90] 401 U.S. at 420.

[91] *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009) (collecting cases), *aff'd*, 638 F.3d 794 (D.C. Cir. 2011).

[92] *Chenery Corp.*, 318 U.S. at 95.

contain no new rationalizations."[93] Thus, "neither party is entitled to supplement th[e] record with litigation affidavits or other evidentiary material that was not before the agency."[94] Similarly, courts typically do not permit parties to supplement the record with evidence that postdates the agency's decision, which sheds little light on whether the agency's decision comported with the record before it when it acted.[95]

Fourth, the court may determine that "supplemental information" would assist it in assessing any technical or complex issues presented by the agency's decision. "[C]ourts are not straightjacketed [sic] to the original record in trying to make sense of complex technical testimony, which is often presented in administrative proceedings without ultimate review by nonexpert judges in mind."[96] In one recent case, for example, the court concluded that the Social Security Administration's recordkeeping practices were "not a subject of common knowledge," so declarations providing additional detail were "important to the Court's understanding of the issues."[97] But such evidence is permissible simply to "educate the court and to illuminate the administrative record, not to substitute the court's judgment for the [agency's]],"[98] so it might not be helpful to litigants seeking to undermine the agency's decision.

C. Non-Merits Issues

Aside from completion and supplementation, there are other contexts in which courts have allowed parties to introduce extra-record evidence (and to seek discovery). These contexts typically involve circumstances where the evidence is presented on an issue other than the reasonableness of the agency's action — on

[93] *Env't Def. Fund*, 657 F.2d at 285.

[94] *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 617-18 (D.C. Cir. 1988).

[95] *See Am. Wildlands*, 530 F.3d at 1002; *cf. Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) (noting that "[a] reviewing court must tread cautiously in considering events occurring subsequent to promulgation of a rule," but that a court need not "blind itself to such events").

[96] *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977).

[97] *Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. SSA*, 778 F. Supp. 3d 685, 716 (D. Md. 2025).

[98] *Arkla Expl. Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984).

"non-merits issues," so to speak.[99] These include the existence of agency action, challenges to agency inaction, and questions of standing, remedy, and compliance.

1. The Existence of Agency Action

Courts have often permitted extra-record evidence and discovery (sometimes described as "jurisdictional" discovery) regarding whether an agency has taken an action or changed its policies.[100] That approach may be particularly helpful where the agency denies that it has taken action or where a set of individual agency determinations appear to stem from an unwritten or undisclosed policy (e.g., in the government funding[101] or employment[102] contexts).

The D.C. Circuit's decision in *Hispanic Affairs Project v. Acosta* (2018) provides an example. In *Hispanic Affairs Project*, the plaintiff challenged "[the Department of] Homeland Security's alleged pattern and practice of automatically extending H-2A visas beyond the regulatory definition of temporary employment."[103] The agency

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[99] Notably, *Camp*'s insistence that "the focal point for judicial review should be the administrative record" came in the context of "applying th[e] standard" set forth by 5 U.S.C. § 706(2)(A) (i.e., merits issues). 411 U.S. at 142.

[100] *See, e.g.*, *CASA, Inc. v. Noem*, 2025 WL 3514378, at *16 (D. Md. 2025) ("Courts have permitted extra-record discovery on APA claims challenging such a policy or practice."); *Amica Ctr. for Immigrant Rts. v. U.S. Dep't of Just.*, 2025 WL 1852762, at *10 (D.D.C. 2025) (considering extra-record evidence to "elucidate what the agency decided") (quotation omitted); *All. for Retired Americans v. Bessent*, 2025 WL 1114350, at *3 (D.D.C. 2025) (permitting discovery into specific actions taken by agency); *Florida v. United States*, 2022 WL 2431442, at *2 (N.D. Fla. June 6, 2022) ("[B]ecause Defendants deny the existence of the non-detention policy, Florida cannot be constrained by an administrative record as to that alleged policy."); *Manker v. Spencer*, 2019 WL 5846828, at *19 (D. Conn. 2019) ("[L]imited discovery outside of the administrative record may be necessary where the administrative record does not contain evidence of the challenged action.") (quotation omitted); *Doe 1 v. Nielsen*, 2018 WL 4266870, at *2 (N.D. Cal. Sept. 7, 2018) (permitting "jurisdictional discovery" into the "nature of the agency action"); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 149 (D.D.C. 2018) (finding that plaintiffs had sufficiently alleged existence of policy, although "[d]iscovery may show otherwise"); *cf. United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 5 (D.D.C. 2017) (permitting extra-record evidence regarding whether agency document announced a "new rule").

[101] *See Authors Guild v. Nat'l Endowment for the Human.*, 2025 WL 3678097, at *6 (S.D.N.Y. 2025) (permitting discovery where agency took a "single, centralized action affecting hundreds of awards at once"); *Urb. Sustainability Directors Network v. U.S. Dep't of Agric.*, 2025 WL 2374528, at *39-41 (D.D.C. 2025) (agreeing that plaintiffs could challenge a policy of terminating grants *en masse*, but holding that discovery was premature until the production of an administrative record).

[102] *See Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 2025 WL 2578412, at *1 (N.D. Cal. 2025) (noting discovery into agency RIF and reorganization plans).

[103] 901 F.3d 378, 388.

relied upon the Supreme Court's decision in *Lujan v. National Wildlife Federation* (1990), which held that a plaintiff may not assert wholesale or programmatic challenges to an agency's operations but must instead "direct its attack against some particular 'agency action' that causes it harm."[104] The D.C. Circuit rejected the government's argument, noting that *National Wildlife Federation* made plain that a plaintiff may challenge a specific order or regulation, "'applying some particular measure across the board.'"[105] The court therefore left the district court free on remand to "exercise its discretion to permit further discovery 'to ascertain the contours of the precise policy at issue.'"[106]

2. Challenges to Agency Inaction

There is mixed authority on whether the record rule applies to claims challenging agency *in*action — "agency action unlawfully withheld or unreasonably delayed" — under 5 U.S.C. § 706(1).[107] Some courts have noted that § 706 directs the court to "review the whole record" in making determinations under both § 706(1) and (2), and that in practice, it may be difficult to differentiate between challenges to action and inaction when the claims are asserted together.[108] Yet there may also be "failure-to-act cases where, as a practical matter, judicial review is difficult, if not impossible, absent extra-record evidence" — "there simply may not be a record to review because the agency quite literally has done nothing."[109] In these cases, review cannot be "'limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.'"[110] In mixed § 706(1) and (2) cases where courts do admit extra-record evidence, "they tend not to add that evidence to the administrative record," and instead consider it only for the purpose of assessing the § 706(1) claim.[111]

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[104] 497 U.S. 871, 891.

[105] *Hisp. Affairs Proj.*, 901 F.3d at 388 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 890 n.2).

[106] *Id.* (quoting *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 928 (D.C. Cir. 2008)).

[107] *See Dallas Safari Club v. Bernhardt*, 518 F. Supp. 3d 535, 539 (D.D.C. 2021) (collecting cases).

[108] *Id* (emphasis omitted).

[109] *Id.* at 540.

[110] *Democracy Forward Found. v. Pompeo*, 474 F. Supp. 3d 138, 148–49 (D.D.C. 2020) (quoting *Nat'l Law Ctr. on Homelessness & Poverty v. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130-31 (D.D.C. 2012)).

[111] *Ctr. for Biological Diversity*, 2025 WL 1503802, at *18.

3. Standing and Injunctive Relief

Finally, extra-record evidence is often necessary in considering questions of standing and injunctive relief. "When the petitioner's standing is not self-evident … the petitioner must supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review."[112] Similarly, courts have permitted extra-record evidence "in cases where relief is at issue, especially at the preliminary injunction stage,"[113] given that relief frequently turns on questions of harm and the equities that may not be adequately addressed in the record. The APA's limitations on consideration of extra-record evidence also do not apply to "a court's enforcement and monitoring of compliance with its own orders."[114] After all, "[e]quity would not be achieved if a court decided simply to rubber-stamp an enjoined party's unsupported self-assessment of its compliance with a court order."[115]

IV. CONSTITUTIONAL CLAIMS

Litigants might also be able to introduce extra-record evidence in support of constitutional claims, even in cases involving the APA. The case law on this issue has

[112] *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002); *see also Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) ("We therefore consider the affidavits not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to this court's jurisdiction.").

[113] *Esch*, 876 F.2d at 991 (quotation omitted); *see, e.g.*, *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 247 (D.D.C. 2003) (otherwise, "defendants could easily defeat requests for relief in almost all cases"); *Conserve Sw. Utah v. Dep't of the Interior*, 2026 WL 569034, at *19 n.7 (D.D.C. 2026); *Assoc. Gen. Contractors of Am. v. Dep't of Lab.*, 2024 WL 3635540, at *9 (N.D. Tex. 2024); *U.S. Olympic & Paralympic Museum v. Small Bus. Admin.*, 2024 WL 3694462, at *3 (D.D.C. 2024); *Nat'l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 916 n.10 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999).

[114] *Nat'l L. Ctr. on Homelessness & Poverty*, 842 F. Supp. 2d at 131 (emphasis omitted).

[115] *Id.*; *see, e.g.*, *Escobar Molina v. U.S. Dep't of Homeland Sec.*, 811 F. Supp. 3d 1, 63 (D.D.C. 2025) (imposing reporting requirements as part of injunction); *Texas v. Biden*, 2021 WL 5399844, at *4 (N.D. Tex. 2021) (permitting discovery into whether agency complied with injunction requiring it to implement Migrant Protection Protocols "in good faith"); *NRDC v. EPA*, 2020 WL 2849624, at *4 (D.D.C. 2020) (permitting discovery into whether agency had "act[ed] diligently") (quotation omitted); *Abdi v. McAleenan*, 2019 WL 1915306, at *2 (W.D.N.Y. 2019) (permitting discovery and collecting additional cases); *cf. In re U.S. Dep't of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022) (agreeing that "agency acted in bad faith" by acting inconsistently with proposed settlement, thereby warranting discovery, but reversing order permitting deposition of Secretary of Education).

variously been described as "unsettled,"[116] a "morass,"[117] and "sparse and in some tension"[118]—although perhaps some disuniformity is to be expected given "the breadth and diversity of constitutional claims available to litigants challenging agency actions."[119] Thus, it is hard to distill clear principles concerning when extra-record evidence is appropriate. Litigants might take care to review pertinent in-circuit cases when determining whether to seek discovery or introduce extra-record evidence on constitutional claims.

The lack of clarity may be attributable to dueling first principles. On the one hand, in "making [a] determination[]" about whether an agency's action is "contrary to constitutional right, power, privilege, or immunity" under the APA, "the court shall review the whole record," as with any other claim.[120] As one court put it, "to allow broad ranging discovery under Rule 26, beyond the administrative record in every case where a plaintiff alleges a constitutional claim, would be inappropriate and render meaningless the APA's restriction of judicial review to the administrative record."[121]

On the other hand, litigants regularly introduce evidence and seek discovery concerning constitutional claims when challenging actions by other actors. It is a "foundational tenet of constitutional adjudication that 'where constitutional rights are in issue,' courts must ensure that 'the controlling legal principles [are] applied to the *actual facts of the case.*'"[122] The "intent of Congress in 5 U.S.C. § 706(2)(B)" may therefore have been "that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making."[123] Litigants might also seek to assert constitutional claims by way of nonstatutory

[116] *Baltimore v. Trump*, 429 F. Supp. 3d 128, 138 (D. Md. 2019) (collecting cases).

[117] *California v. Ross*, 358 F. Supp. 3d 965, 1047 (N.D. Cal. 2019).

[118] *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 41 (D.D.C. 2018).

[119] *CASA, Inc.*, 2025 WL 3514378, at *16.

[120] 5 U.S.C. § 706; *see Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 n.9 (6th Cir. 2017) (citing § 706(2)(B) to indicate that "there is no general bar to reviewing constitutional claims on an administrative record").

[121] *Almaklani v. Trump*, 444 F. Supp. 3d 425, 434 (E.D.N.Y. 2020).

[122] *Baltimore*, 429 F. Supp. 3d at 139 (quoting *Pickering v. Bd. of Educ. of Twp. of High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 578 n.2 (1968) (Douglas, J., concurring) (emphasis added) (collecting cases)).

[123] *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979).

review, rather than § 706, in which case it is unclear why the APA's limitations should apply at all.[124]

Courts have often synthesized these principles by adopting "a flexible approach, tailored to the facts and claims of the case."[125] "Most courts decline to draw a bright line or categorical rule and instead examine the particular facts of the claims involved and the discovery requested," focusing on whether "the constitutional claims 'fundamentally overlap' with the APA claims" or instead "diverge in some meaningful way."[126]

To that end, courts have typically held that extra-record evidence is inappropriate where the nature of the constitutional claim "require[s] the reviewing court to apply substantially the same decision rules and consider substantially the same evidence as it would for APA arbitrary-and-capricious claims."[127] After all, if the "information necessary" to decide the claims "will, presumably, be found in the administrative record"[128] — meaning that "[t]he [c]ourt's evaluation of the agency's decision [would not be] aided" by additional evidence[129] — then there would seem to be little basis for permitting discovery beyond the record, even if the APA's limitations posed no bar. For example, one court held that, although "equal protection principles, not the APA, supply the governing legal framework for assessing whether plaintiff is entitled to discovery," the fact that the dispute arose in the more deferential context of "the entry of foreign nationals" meant that the court would have been limited to the

[124] *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 155 F.4th 1082, 1093 (9th Cir. 2025) ("Review of an *ultra vires* challenge would not be limited to an administrative record."); *California v. U.S. Dep't of Homeland Sec.*, 612 F. Supp. 3d 875, 895 (N.D. Cal. 2020) ("It follows, therefore, that if plaintiffs have a constitutional claim that exists outside of the APA, then the APA's administrative record requirement does not govern the availability of discovery."). *See generally* Governing for Impact, *Nonstatutory Review* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Nonstatutory-Review.pdf.

[125] *Baltimore*, 429 F. Supp. 3d at 138.

[126] *California*, 612 F. Supp. 3d at 896-97 (quoting *Ala.-Tombigbee Rivers Coal. v. Norton*, 2002 WL 227032, at *3-6 (N.D. Ala. 2002).

[127] *CASA, Inc.*, 2025 WL 3514378, at *17.

[128] *Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017).

[129] *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018), *aff'd*, 7 F.4th 1201 (D.C. Cir. 2021).

administrative record in resolving the equal protection claims anyway, making discovery unnecessary.[130]

In other contexts, the facts needed to assess a plaintiff's constitutional claims may not be found in the administrative record, warranting discovery. In another equal protection case, for example, the court noted that "if a facially neutral agency action is motivated by racial animus, that animus almost certainly will not be disclosed in the agency's contemporaneous explanation for that action"—meaning that "presumptively limiting discovery to the record can allow the racial motivations underlying racially motivated policymaking to remain concealed."[131] Decisions can also be found for various other constitutional claims, including the First Amendment[132] and due process,[133] among others.[134]

Faced with this unsettled morass, litigants might try several approaches. First, litigants might bring constitutional claims under nonstatutory review, rather than the APA, to blunt any argument that the APA's limitations should apply. Second, litigants might argue that the APA should not be interpreted to bar discovery over constitutional claims, given the background principle that constitutional claims

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[130] *Baltimore*, 429 F. Supp. 3d at 141-44.

[131] *Cook Cnty. v. Wolf*, 461 F. Supp. 3d 779, 795 (N.D. Ill. 2020) (quotation omitted); *see also CASA, Inc.*, 2025 WL 3514378, at *17 ("[E]xtra-record discovery on the equal protection claims is appropriate and even necessary because courts applying the *Arlington Heights* framework must conduct a searching inquiry to uncover evidence of illegitimate discriminatory motives."); *New York v. United States Dep't of Com.*, 345 F. Supp. 3d 444, 452 (S.D.N.Y. 2018) ("Indeed, it would be perverse — and risk undermining decades of equal protection jurisprudence — to suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'") (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

[132] *Compare Murthy v. Missouri*, 603 U.S. 43, 54 (2024) (noting that district court permitted "extensive discovery" on First Amendment claim), *with Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1237 (D.N.M. 2014) (holding that a "First Amendment retaliation claim … arises under the Constitution, but … is subject to the APA's procedural provisions, which generally limit the judicial review to the administrative record").

[133] *Compare Immigrant Defs. L. Ctr. v. Mayorkas*, 2024 WL 2103964, at *10 (C.D. Cal. 2024) (holding that Due Process claim was "not only coextensive with … APA claims and, therefore, discovery outside of the administrative record is appropriate"), *with Alabama-Tombigbee Rivers Coal.*, 2002 WL 227032, at *6 ("Plaintiffs' Fifth Amendment procedural due process claims … are based on factual allegations identical to those asserted in support of their APA/ESA claims.").

[134] *See, e.g.*, *Texas v. DHS*, 2023 WL 2842760, at *3 (S.D. Tex. Apr. 7, 2023) (permitting discovery on an *ultra vires* claim); *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349, 384 (D. Md. 2019) (permitting discovery into whether lack of funding for census violated the Enumeration Clause); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008) (denying discovery for challenge under the Patent Clause).

should be adjudicated based on the actual facts of the case. And third, litigants might argue in the alternative that, even if some constitutional claims are limited by the record rule, their constitutional claims are meaningfully distinct from their APA claims and are unlikely to be fully addressed by the administrative record, warranting the presentation of extra-record evidence. Again, litigants might be careful to review in-circuit precedent to determine which of these approaches are most viable.

V. SEEKING DISCOVERY

The prior sections of this Issue Brief have principally addressed situations where litigants wish to introduce information from outside the administrative record that is *already* in their possession. In some cases, however, litigants might need to seek discovery from the government to *obtain* the information with which to complete, supplement, or otherwise expand the record, particularly where they believe that the government might have concealed important facts. Although a complete discussion of the rules of federal civil discovery is beyond the scope of this Issue Brief, litigants might note several unique considerations that apply in cases challenging federal agency action.

In general, litigants might proceed carefully in seeking discovery — and prepare for a fight. The plaintiffs in *Department of Commerce* persuaded the district court to permit extra-record discovery, including, eventually, depositions, based on public statements by President Trump's campaign and advisors indicating that the agency's motive was political, the agency's "shifting chronology" of events, and its "extremely unusual decisionmaking process" — as well as by arguing that the agency's stated rationale simply did not hold up.[135] Yet the district court's order permitting discovery was followed by months of extensive motions practice concerning the scope of discovery, including multiple appeals.[136] And recall that the Supreme Court ultimately noted that the court's decision to order extra-record discovery was "premature," even if it was "ultimately justified in light of the expanded

[135] Letter Br. Re: Discovery Outside of the Admin. Record at 4, *New York v. Dep't of Com.*, No. 1:18-cv-2921 (S.D.N.Y. June 26, 2018), ECF No. 193.

[136] *See* Docket, *New York v. Dep't of Com.*, No. 1:18-cv-2921 (S.D.N.Y.).

administrative record."[137] Of course, discovery might also be the key to unlocking vital facts about the government's conduct, including facts that support other claims or cases — so litigants might think strategically about what discovery to seek and how to justify it.

When seeking discovery to supplement the administrative record, for instance, a party generally must make "a significant showing — variously described as a strong, substantial, or prima facie showing — that it will find material in the agency's possession indicative of bad faith or an incomplete record."[138] And regardless of the applicable record rule exception, any discovery is likely to be "limited" to the exception for which information is sought.[139] For instance, a court that permits discovery into whether the agency has in fact taken action might nonetheless prohibit discovery that seeks to probe the agency's reasons or decisionmaking process. A court might also refrain from authorizing discovery until it "confirms that it has subject-matter jurisdiction, except if such discovery is relevant to the jurisdictional question itself."[140]

Even where discovery is permitted, courts often impose limitations on the scope, amount, and form of discovery. "[T]he discovery should not transform the litigation into one involving all the liberal discovery available under the Federal Rules"[141] — it "instead must be more targeted, both in scope and in focus, to center on testing" the matters in dispute.[142] In one case, for example, the district court slashed the number of depositions and interrogatories permitted by the federal rules and imposed limits on other forms of discovery.[143] In another, the court required the plaintiffs to propose specific discovery requests and made alterations to ensure that the requests were properly scoped.[144] Litigants might also note that seeking to depose a cabinet

[137] *Dep't of Com.*, 588 U.S. at 781.

[138] *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (quotation omitted); *see also Kentucky Heartwood, Inc. v. U.S. Forest Serv.*, 349 F.R.D. 272, 284-85 (E.D. Ky. 2025) (explaining that, in "the context of an APA case," "a plaintiff must generally show that … additional discovery, if requested, is permissible under the traditional supplementation standard for such cases") (collecting cases).

[139] *Air Transp. Ass'n*, 663 F.3d at 487-88; *see* Fed. R. Civ. P. 26(b).

[140] *Comey v. U.S. Dep't of Just.*, 2025 WL 3496323, at *1 (S.D.N.Y. 2025) (collecting cases).

[141] *Al-Saidi v. Noem*, 2025 WL 959094, at *2 (S.D.N.Y. 2025) (quotation omitted).

[142] *Cherokee Nation v. Dep't of Interior*, 2021 WL 3931870, at *3 (D.D.C. 2021).

[143] *Nat'l Urb. League v. Ross*, 508 F. Supp. 3d 663, 705-06 (N.D. Cal. 2020).

[144] *See AFL-CIO v. Dep't of Lab.*, 349 F.R.D. 243, 250-52 (D.D.C. 2025).

secretary or other high-ranking officials requires a more demanding showing, and is rarely successful.[145]

As noted above, discovery against the government also implicates certain privileges, which might make it more difficult to seek certain categories of records. But those privileges are often qualified. Even where the deliberative process privilege applies, for instance, courts consider whether the litigant's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure."[146] "Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions."[147] Where government officials have potentially acted in bad faith, discovery into deliberative materials might be the only practical method of determining whether the agency acted unlawfully.

Cognizant of these hurdles, litigants might consider sequencing their efforts to obtain information from the government.[148] Litigants might begin by cataloguing relevant public information and statements about an agency's decision, including by means of Freedom of Information Act requests (though be prepared to wait). They might then seek to expedite the production of the administrative record. After examining it carefully to identify any omissions or discrepancies, they might pursue motions to complete or supplement the record, as appropriate. If additional information remains necessary, litigants might consider starting with targeted, document-based discovery, before proceeding to depositions, working up the organizational chart. Proceeding in this fashion might allow litigants to make the strongest possible case for their efforts to obtain information and demonstrate to the court that they have exercised appropriate restraint in imposing burdens upon the government — recognizing, of course, that the need to obtain relief might counsel in favor of moving more quickly.

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[145] *In re U.S. Dep't of Educ.*, 25 F.4th at 700; *see Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 391 (2004) (discussing the separation-of-powers concerns posed by discovery directed at the White House).

[146] *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

[147] Id.

[148] *See Authors Guild*, 2025 WL 3678097, at *14 ("*Department of Commerce* recognizes a sequencing principle....").

VI. CONCLUSION

This Issue Brief has attempted to provide those litigating against the federal government a sense of the complex rules that govern the production of the administrative record and any efforts by litigants to go beyond the record in introducing and obtaining additional information about the government's actions. Although going beyond the record might be challenging, the Trump administration's demonstrated lack of candor might give litigants reason—and, indeed, as many courts have found, justification—to do so.