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16 **UNITED STATES DISTRICT COURT**
17 **EASTERN DISTRICT OF WASHINGTON**
18 **AT RICHLAND**

19 STATE OF WASHINGTON, *et al.*,

20 Plaintiffs,

21 v.

22 UNITED STATES DEPARTMENT OF
23 HOMELAND SECURITY, *et al.*,

24 Defendants

25 No. 4:19-cv-5210-RMP

26 **RESPONSE TO NOTICE OF**
27 **SUPPLEMENTAL AUTHORITY**

28 **RESP. TO NOTICE OF SUPPL. AUTHORITY**

29 U.S. DEPARTMENT OF JUSTICE
30 1100 L St. NW, Washington, DC, 20003
31 (202) 353-0533

1 Defendants hereby respond to Plaintiffs' Notice of Supplemental Authority in
 2 Support of Plaintiffs' Motion to Compel, in which Plaintiffs attach the opinion in *New*
 3 *York v. United States Immigration & Customs Enf't*, No. 19-cv-8876 (S.D.N.Y. Feb. 9,
 4 2020). ECF No. 202. The *New York* decision confirms the critical point that deliberative
 5 materials "are not part of the administrative record." Op. at 4. From that, it logically
 6 follows that such materials do not need to be logged as withheld from the administrative
 7 record because they are not part of the record to begin with. *See, e.g., Oceana, Inc. v.*
 8 *Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019); *Asse Int'l, Inc. v. Kerry*, 2018 U.S. Dist. LEXIS
 9 115514, at *8 (C.D. Cal. Jan. 3, 2018); *San Luis & Delta-Mendota Water Auth. v. Jewell*,
 10 No. 15-1290, 2016 U.S. Dist. LEXIS 82204, at *54-56 (E.D. Cal. June 23, 2016);
 11 *California v. Dep't of Labor*, No. 13-2069, 2014 U.S. Dist. LEXIS 57520, at *36-37 (E.D.
 12 Cal. Apr. 24, 2014); *Sierra Pac. Indus. v. Dep't of Agric.*, No. 11-1250, 2011 U.S. Dist.
 13 LEXIS 147424, at *8-10 (E.D. Cal. Dec. 22, 2011); *Stand Up for California! v. Dep't of*
 14 *Interior*, 71 F. Supp. 3d 109, 122 (D.D.C. 2014); *Tafas v. Dudas*, 530 F. Supp. 2d 786,
 15 801 (E.D. Va. 2008); *Great Am. Ins. Co. v. United States*, No. 12-9718, 2013 U.S. Dist.
 16 LEXIS 119789, at *21-26 (N.D. Ill. Aug. 23, 2013).

18 Departing from the majority view, the court in *New York* required a privilege log
 19 because it believed that courts should "have a role in reviewing whether [the deliberative
 20 process] privilege was properly invoked and applied to particular documents[.]" Op. at
 21 4. But that ruling is inconsistent with the presumption of regularity that applies to an
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1 agency's certified administrative record. *See, e.g., Cook Inletkeeper v. EPA*, 400 F.
2 App'x 239, 240 (9th Cir. 2010) ("We assume that an 'agency properly designated the
3 Administrative Record absent clear evidence to the contrary.'"). It is always the case that
4 agencies must decide which materials should be included in an administrative record. For
5 instance, agencies must determine whether a given document was considered, directly or
6 indirectly, by the decisionmaker. Courts do not ordinarily review those determinations;
7 rather, they defer to the agency unless the plaintiff presents strong evidence to rebut the
8 presumption of regularity. *See Winnemem Wintu Tribe v. U.S. Forest Serv.*, No. 09-1072,
9 2014 U.S. Dist. LEXIS 101467, at *27 (E.D. Cal. July 24, 2014). The court in *New York*
10 gave no reason why a different standard should apply – and court oversight should
11 become necessary – when an agency determines that a document is not part of an
12 administrative record because it relates to the agency's deliberative process.
13

14 Finally, the *New York* court based its conclusion in part on the fact that the
15 administrative record in that case was "very brief, only 170 pages in length, which [led]
16 the Court to believe that there are correspondingly few deliberative documents that would
17 need to be listed on a privilege log, and that the burden would consequently be small."
18 Op. at 8. Here, that consideration weighs heavily against requiring a privilege log.
19 Unlike in *New York*, the scope of the rulemaking at issue here – involving a rule spanning
20 hundreds of pages and responding to over 266,000 public comments – necessarily
21 produced an immense volume of deliberative materials.
22

1 Dated: February 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Joshua Kolsky

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