18-2857

United States Court of Appeals for the Second Circuit

In re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau,
Petitioners.

ANSWER TO PETITION FOR WRIT OF MANDAMUS BY PLAINTIFFS-RESPONDENTS NEW YORK IMMIGRATION COALITION, CASA DE MARYLAND, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, AND MAKE THE ROAD NEW YORK

Dale Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
Telephone: (212) 549-2693

Sarah Brannon
Davin Rosborough
Ceridwen Cherry
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005-2313
Telephone: (202) 675-2337

David J. Weiner
John A. Freedman
R. Stanton Jones
Elisabeth S. Theodore
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 942-5000

Christopher T. Dunn
Arthur N. Eisenberg
Perry M. Grossman
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
Telephone: (212) 607-3300 601

INTRODUCTION

Just two days after this Court denied Defendants' mandamus petition finding no abuse of discretion in the district court's decision to allowing extra-record based on Plaintiffs' strong showing of bad faith in connection with the decision to include the citizenship question on the 2020 Decennial Census, Defendants filed a second mandamus petition challenging another discovery order, raising essentially the same arguments that this Court has already rejected. Defendants now seek mandamus to stop a four-hour deposition of Secretary of Commerce Wilbur Ross. But they concede that the district court (Furman, J.) applied the proper legal standard and they do not seriously dispute the facts. Defendants instead take the remarkable position that, even though Secretary Ross made the decision to add the citizenship question to the census and personally was involved in most of the bad faith conduct that justified extra-record discovery in the first place, he has no relevant first-hand knowledge. Defendants' arguments ignore established precedent, are contrary to their own litigation position, and are squarely foreclosed by the record.

Plaintiffs have challenged Secretary Ross's decision to add a citizenship question to the 2020 Decennial Census. In denying Defendant's motion to dismiss, Judge Furman found that Plaintiffs had properly stated a claim that Defendants' conduct is arbitrary and capricious in violation of the Administrative Procedure

Act (APA) and violates the Due Process Clause because it was intended to disadvantage immigrant communities of color. Trial is set to begin on November 5.

The district court also: (1) found that the administrative record was incomplete, and ordered that it be supplemented; and (2) found that Plaintiffs had made a strong showing of bad faith, and ordered limited extra-record discovery on that basis. Add.96-101. This Court has affirmed those findings, ruling that the district court "applied controlling case law and made careful factual findings supporting its conclusion that the initial administrative record was incomplete and that limited extra-record discovery was warranted." Add.14. This Court further held that it "cannot say that the district court clearly abused its discretion in concluding that plaintiffs made a sufficient showing of "bad faith or improper behavior" to warrant limited extra-record discovery." *Id.*

Following partial supplementation of the administrative record and limited extra-record discovery (both of which remain ongoing), Judge Furman granted Plaintiffs' motion to compel Secretary Ross's deposition. Secretary Ross's personal involvement and first-hand knowledge about the decision to add a citizenship question to the census and the conduct that is well documented in the record:

- Secretary Ross made the decision to add the citizenship question in a March 26, 2018 decisional memo ("March 26 Memo") which stated that he began his

consideration "following receipt" of a December 12, 2017 request from DOJ, to facilitate enforcement of the Voting Rights Act ("VRA"). A supplemental memorandum on June 21, 2018 ("June 21 Memo"), however, stated that Ross actually began considering the issue "soon after my appointment as Secretary," after "other senior Administration officials had previously raised" adding such a question, and that Ross asked "whether the Department of Justice would support, and if so would request, inclusion of a citizenship question." Add.163. This sequence of events described in the June 21 Memo was "exactly opposite" of what Secretary Ross had previously represented in the March 26 Memo and in congressional testimony. Add.163.

- Secretary Ross overruled the judgment of senior Census Bureau career staff, deviated from established procedures for changing questions on the census, and decided to add the question before engaging in the administrative process. Add.85–86.

- Secretary Ross decided to add the citizenship question in response to learning that "undocumented residents (aliens)" are included for apportionment and redistricting purposes. Supp. Ad. 1–3. He discussed the matter with Kansas Secretary of State Kris Kobach at the direction of White House Senior Counselor Steve Bannon. Supp. Ad. 4-6, 109. He then instructed his staff to find an agency that could supply a public rationale for the decided outcome. Supp. Ad. 105, 127-31. After his staff settled on the Department of Justice, Secretary Ross discussed the matter with Attorney General Sessions. Supp. Ad. 30, 120-22, 115, 117. Following that discussion, Acting Assistant Attorney General (AAAG) John Gore then become personally involved for DOJ and spoke with senior Commerce Department leaders, and AAAG Gore than ghostwrote a letter to Commerce make the request. Supp. Ad. 111-18, 130-31, dated December 12, 2017. Secretary Ross then cited that letter to justify ignoring the warnings of the Census Bureau that adding a citizenship question is "very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from" other sources that "best meets DOJ's stated uses." Supp. Ad. 96.

In light of the foregoing, Defendants fail to establish that Judge Furman abused his discretion in order Secretary Ross's deposition. As Defendants concede, Judge Furman applied the proper legal standard in finding "extraordinary

circumstances" present. Add.2 (discussing *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199 (2d Cir. 2013)). Secretary Ross both has unique first-hand knowledge about the litigated matters and the information could not be obtained from other sources. Judge Furman also did not clearly err in finding that Secretary Ross's intent in adopting the citizenship question is relevant to Plaintiffs' claims given that they can prevail by proving that he relied on a pretextual justification or that he acted with discriminatory intent.

STATEMENT OF FACTS

A. The U.S. Constitution's Actual Enumeration Requirement

The Constitution requires the federal government to conduct a Decennial Census to count the total number of "persons"—citizen and non-citizen—residing in each state. All states use this information to draw their congressional districts, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128–29 (2016), and many states and municipalities, including New York City, use the data to draw state or municipal legislative *districts*, *see, e.g.* Fla. Const. art. X § 8; Tex. Const. art. III, § 26. Because the one-person, one-person vote governs apportionment, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), when a local community is disproportionately undercounted in the Census, the community will be placed in a legislative district—congressional, state, or municipal—that has greater population, and hence less political power, than other districts in the same state or municipality.

Decennial Census data also plays an important role in the allocation of hundreds of billions of dollars in public funding each year. *See, e.g.*, Andrew Reamer and Rachel Carpenter, Counting for Dollars: The Role of the Decennial Census in the Distribution of Federal Funds, (The Brookings Institution, Mar. 9, 2010), *available at* https://brook.gs/2xjxEax.

B. Defendants' Addition of the Citizenship Question

For several decades, the Census Bureau has opposed inclusion of a question about citizenship status on the Decennial Census. 18-5025, Dkt.1 ¶¶ 81–90. This position reflects concern about the so-called "differential undercount"—the disproportionate undercounting of particular racial and ethnic groups, including racial and ethnic minorities. *Id*. ¶¶ 75, 78. The Census Bureau has determined that Latinos in particular are at a greater risk of not being counted; persons identifying as Hispanic were undercounted by substantial numbers in both the 1990 and 2010 Decennial Censuses. *Id*. ¶¶ 76–77.

Although the 1950 Census asked some respondents (*i.e.*, those who indicated in response to another question that they were not born in the United States) about citizenship status, no citizenship question at all appeared on the questionnaire sent to every household in any Decennial Census conducted from 1960 through 2010. *Id*. ¶ 82. Over the past 30 years, current and former Census Bureau officials appointed by presidents from both political parties have consistently concluded

that a citizenship question was likely to reduce response rates by non-citizens and hence the accuracy of counts for both citizens and non-citizens alike. *Id.* ¶¶ 84–90. To the extent there has been a need for citizenship data, the Census Bureau has collected that information through sample surveys. *Id.* ¶¶ 92–95. That includes the "long form" survey sent to 1 in 6 households during the 2000 Census, and the American Community Survey ("ACS"), an ongoing yearly survey of approximately 2% of households that began in 2000 and that is used to generate statistical estimates and which can be adjusted for an undercount. *Id.* ¶ 93.

On March 26, 2018, however, Secretary Ross abruptly instructed the Bureau to include a citizenship question on the 2020 Decennial Census. Add.184. Secretary Ross explained that his decision was in response to a December 12, 2017 letter from the Department of Justice ("DOJ Letter"), requesting the inclusion of the question to assist with enforcement of the VRA. Add.193. Signed by Arthur Gary, General Counsel of the Justice Management Division, the DOJ Letter did not explain the sudden need for citizenship information collected through the Decennial enumeration, or how citizenship information would aid in enforcement of the VRA. Add.193-95. Nor did the March 26 Memo. Moreover, in directing inclusion of the citizenship question, the March 26 Memo bypassed the normally rigorous processes and testing procedures, as well as the various Census Bureau scientific advisory panels, the Bureau typically employs before making changes to

the census questionnaire. 18-5025, Dkt. 1 ¶¶ 151–63. The March 26 Memo dismissed the need to test the citizenship question, and denied its novelty, by pointing to the ACS and, before that, the long-form Decennial Census. Add.186-89. At the same time, however, the Ross Memo conceded that "the Decennial Census has differed significantly in nature from the sample surveys" like the ACS. Add.186. Despite the absence of any supporting evidence, the Ross Memo nonetheless concluded that the "value of more complete citizenship data outweighed concerns regarding non-response" and rejected various other options, Add.190—including using administrative records to calculate citizenship data, which the Census Bureau had recommended, Supp. Ad. 96-104, based on the opinion of the Acting Director of the Census Bureau that these records would produce "higher quality data produced at lower cost." Supp. Ad. 151.

Secretary Ross has articulated this chain of events—with DOJ initiating his process of considering the addition of a citizenship question to the census—in sworn testimony to Congress. A few days before the March 26 Memo, at a March 20 hearing before the House Appropriations Committee, Secretary Ross insisted that, in considering adding a citizenship question to the census, he was "responding solely to the Department of Justice's request." March 20, 2018 Hearing, 2018 WLNR 8815056. At another hearing on March 22, 2018 before the House Ways and Means Committee he testified that the Department of Justice

"initiated the request" for a citizenship question. March 22, 2018 Hearing, 2018 WLNR 8951469. On May 10, 2018, Secretary Ross similarly testified before the Senate Appropriations Committee on June 1, 2018, that "[t]he Justice Department is the one who made the request of us." May 10, 2018 Hearing, 2018 WL 2179074.

Barely a month later, however, in the face of expected discovery in these cases, Secretary Ross changed his story. His June 21 Memo admitted that he actually began considering the citizenship question shortly after his appointment as Secretary of Commerce in February 2018—nearly ten months earlier than the date offered in the original memorandum. Add.192. Notwithstanding his testimony to Congress that he was "not aware of any discussions with the White House "about adding this citizenship question," Add.6 (citing testimony), Secretary Ross now admitted that he and his staff had discussed adding a citizenship question that had been proposed by other "senior Administration officials" and that he "inquired whether the Department of Justice would support, and if so request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." *Id*. In other words, rather than DOJ originating the request to include a citizenship question to enhance enforcement of the VRA, Secretary Ross asked DOJ to ask the Department of Commerce add the citizenship question.

C. District Court Proceedings

1. The Complaint in this case was filed on June 8, 2018, and was designated as a related action to the lawsuit filed by the State of New York and various other states, 18-CV-2921. Plaintiffs, five organizations that principally serve minority immigrant communities, allege that the addition of the citizenship question to the 2020 Census constitutes intentional discrimination in violation of the Fifth Amendment and is arbitrary and capricious in violation of the APA. Judge Furman denied Defendants' motion to dismiss these claims and they are scheduled for trial on November 5. Add.114; 18-2921, Dkt. 363.

2. On July 3, 2018, Judge Furman granted Plaintiffs' motions in part to supplement the administrative record and conduct extra-record discovery. Add.1-4; 18-5025, Dkt. 30. Judge Furman granted the motions in part and denied in part. Add.1–3. Applying *Nat'l Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)), Judge Furman made four findings that supported the conclusion that Plaintiffs had carried their burden of making a "'strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith.'" Add.85–88. First, the June 21 Memo "could be read to suggest that [Secretary Ross] had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale." Add.85 (citing *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233

(E.D.N.Y. 2006)). Second, Secretary Ross's decision overruled senior Census Bureau career staff who had advised him that "reinstating the citizenship question would be 'very costly' and 'harm the quality of the census count,'" supported a showing of bad faith. Add.85–86 (citing AR 1277). Third, Plaintiffs alleged that Defendants "deviated significantly from standard operating procedures in adding the citizenship question" and "added an entirely new question after substantially less consideration and without any testing at all." Add.86. Fourth, Plaintiffs made "at least a *prima facie* showing that Secretary Ross's stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act—was pretextual." Add.86. Discovery will close on October 12, 2018. Add.92.

4. On August 17, the district court granted Plaintiffs' motion to compel the deposition of AAAG Gore. Add.15-18. Judge Furman specifically found that Gore's testimony is "plainly 'relevant'" and, given Plaintiffs' claim that he "'ghostwrote'" the DOJ letter, that he "possesses relevant information that cannot be obtained from another source." Add.2.

5. On September 7, approximately two months after Judge Furman allowed discovery to begin, Defendants filed a petition for writ of mandamus with this Court to challenge his order permitting extra-record discovery and the deposition of AAAG Gore. Defendants argued that Judge Furman erred in allowing extra-

record discovery and the Gore deposition because judicial review of APA claims is limited to the administrative record and the decisionmaker's subjective intent is irrelevant as long as there is an objective rationale on the record. On September 25, the Court denied the petition. Add.13-14. First, citing *National Audubon*, the Court held that Judge Furman had "applied controlling case law and made careful factual findings" in ordering Defendants to supplement the administrative record and limited extra-record discovery. Add.14. The Court held that it "cannot say that the district court clearly abused its discretion in concluding that plaintiffs made a sufficient showing of 'bad faith or improper behavior' to warrant limited extra-record discovery." *Id*. Second, the Court found no abuse of discretion in the order compelling Gore's deposition "because he 'possesses relevant information that cannot be obtained from another source' related to plaintiffs' allegations that the Secretary used the December 2017 Department of Justice letter as a pretextual justification for adding the citizenship question." *Id*.

6. In a detailed order dated September 21, the Court granted Plaintiffs' motion to compel the deposition of Secretary Ross. Add.1. Judge Furman found that the *Lederman* standard "compel[s] the conclusion that a deposition of Secretary Ross is appropriate" because he "plainly has 'unique first-hand knowledge related to the litigated claims,'" Add.2 (quoting *Lederman*, 731 F.3d at 203), and because "Plaintiffs have demonstrated that taking a deposition of

Secretary Ross may be the only way to fill in critical blanks in the current record," Add.7; *see* Add.8. Secretary Ross's intent, including whether he relied on a pretextual justification for adding the citizenship question, is relevant to Plaintiffs' APA and discrimination claims, as Defendants had themselves recognized. Add.3-4. And given "the unusual circumstances presented here, the concededly the relevant inquiry into 'Commerce's intent could not possibly be conducted without the testimony of Secretary Ross himself." Add.4. This was so because "Secretary Ross was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree," and "Secretary Ross's three closest and most senior advisors who advised on the citizenship question … testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs' claims." Add.4, 7 (citing deposition testimony).

Independently, Judge Furman found that a deposition was warranted because Defendants and Secretary Ross had "placed the credibility of Secretary Ross squarely at issue," Add.6, because the record "casts grave doubt" on many of his statements, including congressional testimony, about how the decision to add the citizenship question came about. Add.6. Judge Furman also rejected Defendants' argument that Plaintiffs should have to first proceed by way of other discovery procedures—including interrogatories, requests for admission, and a Rule 30(b)(6) deposition—finding that they are not less burdensome and

Judge Furman limited the deposition to four hours but denied Defendants' request that it should be held only after all other discovery was completed. Add.12. Noting that Defendants did "not even attempt to establish that the circumstances warranting a stay are present" and rapidly approach October 12 discovery cutoff, Judge Furman denied Defendants' request to stay its order until the later of 14 days or resolution of Defendants' mandamus petition. Add.12.

7. On September 28, Defendants moved for Judge Furman to stay all proceedings until the later of 14 days or resolution of Defendants' mandamus petition. 18-2921, ECF 359. Judge Furman denied this request on September 30, noting that Defendants did "not even attempt to establish that the circumstances warranting a stay are present" and the parties were rapidly approaching the October 12 discovery cutoff. Supp. Ad. 149. Judge Furman further stated that he would not permit, "and doubts that either the Second Circuit or the Supreme Court would permit" Defendants to use their arguably timely challenge to the Orders authorizing depositions of Assistant Attorney General Gore and Secretary Ross to bootstrap an untimely — and almost moot — challenge to the July 3 Order authorizing extra-record discovery, particularly when only nine business days remain before the close of such discovery and much apparently remains to be done." *Id*. Judge Furman also noted that Defendants waited two months before

seeking the stay on extra-record discovery, and had previously represented to the Second Circuit that they were not seeking a stay of all discovery.

8. Secretary Ross's deposition is scheduled for October 11, a date that Defendants previously offered when the Secretary is available. The deposition has been administratively stayed pending resolution of this petition.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO THE EXTRAORDINARY REMEDY OF MANDAMUS

In denying Defendants' first mandamus petition, this Court recognized that that "[m]andamus is 'a drastic and extraordinary remedy reserved for really extraordinary causes.'" Add.13 (quoting *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013)). When a discovery order is at issue, as it is here, mandamus requires showing that there was "'a judicial usurpation of power or a clear abuse of discretion.'" Add.14 (quoting *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014)).

Like in their first petition, Defendants again provide no valid basis for granting mandamus with respect to Judge Furman's order compelling the deposition of Secretary Ross. There is no dispute that Judge Furman applied the proper legal standard or that Secretary Ross was personally involved in the decision to include the citizenship question. Defendants' challenge to Judge Furman's order turns almost entirely on the same arguments that this Court

considered, and rejected, in denying the first petition. Because Defendants are now procedurally foreclosed from raising these same issues under the law of the case doctrine, Judge Furman's order does not present any new or novel questions. Mandamus must be denied.

A. Judge Furman's Order Does Not Raise Any Issues That Justify Mandamus

Mandamus should be denied because Judge Furman's order compelling Secretary Ross' deposition does not amount to a judicial usurpation of power or a clear abuse of discretion. *See* Add.13. Defendants' petition amounts to little more than a dispute about the district court's application of an established legal standard—the *Lederman* test—to a particular set of facts, which is not a sufficient basis for mandamus relief. *In re W.R. Grace & Co.-Conn.*, 984 F.2d 587, 589 (2d Cir. 1993) (applicability of established doctrine in each new case does "present[] such a novel and important issue as to warrant mandamus review").

Defendants do not dispute that *Lederman* sets the standard for deciding whether to order the deposition of a senior government official like Secretary Ross. Pet.15. In *Lederman*, this Court held that a "high-ranking government official" may be deposed if there are "exceptional circumstances justifying the deposition." 731 F.3d at 203. The Court provided two examples of such "exceptional circumstances": "the official has unique first-hand knowledge related to the

litigated claims or . . . the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.*

Defendants also do not dispute that the district court applied *Lederman*. Add.2. Judge Furman issued a detailed order finding both of the types of "exceptional circumstances" identified by this Court in *Lederman*: (1) Secretary Ross possessed first-hand knowledge related to Plaintiffs' claims, and (2) Plaintiffs had no other way to obtain this information. Add.2-8. With respect to the first *Lederman* circumstance, Secretary Ross's first-hand knowledge, the Secretary did far more than just make the decision to include the citizenship question—he was intimately involved in multiple stages of the process, and displayed "an unusually strong personal interest in the matter," demanding to know "as early as May 2017—seven months before the DOJ request—why not action had been taken on his 'months old request that we include the citizenship question,'" and "personally lobb[ying] the Attorney General" on the matter, despite initially being told that DOJ "did not want to raise the question." Add.5.

With respect to the second *Lederman* circumstance, Plaintiffs' ability to obtain relevant information in the Secretary's knowledge from other sources, Judge Furman noted that "Secretary Ross's three closest and most senior advisors who advised on the citizenship question … testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs'

claims." Add.7 (citing deposition testimony). For example, on the important issue of identifying the "other senior Administration officials" Secretary Ross spoke with and who "raised" the citizenship question with him before he began considering it, Secretary Ross's Chief of Staff Wendy Teramoto testified that she had no idea who he was referring to and that to find out "[y]ou would have to ask Secretary Ross." Supp. Ad. 47.

The court further noted Plaintiffs had already tried to adduce this information through written discovery, "yet gaps in the record remain." Add.9. These "critical blanks" in the record, Add.7, include (1) details about Secretary Ross's conversations about the citizenship question with the Attorney General and third parties like Kansas Secretary of State Kris Kobach, Supp. Ad. 5-6; (2) the "other senior Administration officials" with whom Secretary Ross spoke, Supp. Ad. 192; and (3) the precise persons Secretary Ross spoke with about the citizenship question "in the critical months before DOJ's December 2017 letter," Add.8. These gaps are all well chronicled in the record. *See*, *e.g.*, Supp. Ad. 37, 39, 42-43, 49, 53, 66-67, 148. The district court did not clearly err in finding that Secretary Ross is the only person who can answer these questions. Add.8.

Beyond these circumstances, Judge Furman further explained that Secretary Ross's testimony is also warranted because, under the unusual facts of this case, Secretary Ross's "intent and credibility are not merely relevant, but central, to

Plaintiffs' claims in this case." Add.4-5. Secretary Ross was front and center in almost all of the conduct that established a preliminary showing of bad faith that Judge Furman had held justified a departure from the record rule. Among other things, Secretary Ross

- issued the Ross Memorandum, which contained a misleading account for the origin of the decision to include the citizenship question;
- gave misleading testimony to Congress on three separate occasions about sequence of events leading to his decision to add the citizenship question to the Census—by claiming that DOJ's request "initiated" the Commerce Department's decision-making process, which was supposedly a response "solely" to DOJ's request, when, in fact Secretary Ross and his staff affirmatively reached out to DOJ first, and inquired whether DOJ "would request[] inclusion of a citizenship question, Add.6; and
- discussed the citizenship question with as yet unidentified "senior Administration officials" before soliciting the Department of Justice to ask him to include the question on the census—despite testifying in Congress that he was "not aware" of any discussions with White House officials regarding the citizenship question, *id.*

The record provides additional support for Judge Furman's findings. For example, in his original order finding that Plaintiffs made a strong preliminary showing of bad faith, Judge Furman highlighted that Secretary Ross overruled the views of senior career personnel in the Census Bureau who advised against including the citizenship question as a way to obtain citizenship data at the census block level, Add.99, and ignored established Census Bureau procedure in ordering the addition of the citizenship question without prior testing, Add.100. Judge Furman also found has found that Plaintiffs have plausibly alleged that Secretary

Ross's justification for including the citizenship question—VRA enforcement—may be pretextual. *Id.*

While Defendants take issue with Judge Furman's characterization of Secretary Ross's public statements as to the sequence of events leading to his decision to add the citizenship question, they fall far short of establishing that Judge Furman's findings of bad faith based in part on those statements amounted to an abuse of discretion. And they do not seriously dispute that Secretary Ross was personally involved in the conduct that underlying Plaintiffs' showing of bad faith, or that he alone knows the information sought by Plaintiffs regarding that conduct. Ultimately, Defendants' disagreement with Judge Furman's application of the well-established *Lederman* test does not constitute grounds for mandamus. *See In re Long Island Lighting Co.*, 129 F.3d 268, 271 (2d Cir. 1997) (quoting *In re W.R. Grace & Co.*, 984 F.2d 587, 589 (2d Cir.1993)).

As Judge Furman recognized, federal courts have often applied *Lederman* or comparable tests in ordering depositions of senior government officials. Add.9-10 (noting that "courts have not hesitated to take testimony from federal agency heads (whether voluntarily or, necessary, by order) where, as here, the circumstances warranted them"). These cases reflect that Judge Furman's order is not nearly as novel as Defendants would have the court believe. *Id.* Moreover, the bad faith element in this case, and Secretary Ross's role in it, distinguishes this case from

the ones Defendants rely upon that declined to compel the testimony of senior government officials. *See* Pet.14-15. As a result, there is little risk that compelling Secretary Ross's deposition under the unique facts of this case will open the door to depositions of every senior government official who happens to take part in an important agency decision.

B. Defendants' Argument That Secretary Ross Should Not Be Deposed Because Plaintiffs Are Limited to the Administrative Record Is Barred By The Law Of The Case And Is Wrong Under The APA

Defendants principally raise a single argument against Judge Furman's order allowing Plaintiffs to depose Secretary Ross—because judicial review in APA cases is limited to the administrative record, Judge Furman erred in finding that Secretary Ross's intent in including the citizenship question, and his credibility, provide a valid basis for ordering his deposition. Pet.17. This argument fails for multiple reasons.

1. To begin, the law of the case doctrine forecloses Defendants' argument that Secretary Ross's intent is irrelevant or that the record rule in any way bars his testimony. *See United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (noting that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case"). Indeed, this Court already recognized that Secretary Ross's subjective intent *is* a relevant topic of discovery. In denying Defendants' first mandamus petition, this Court held that Judge Furman

did not clearly abuse his discretion in allowing AAAG Gore's deposition based on his personal knowledge of information "related to plaintiffs' allegations that the Secretary used the December 2017 Department of Justice letter as a pretextual justification for adding the citizenship question." Add.14. If AAAG Gore's testimony is relevant to Plaintiffs' allegations that Secretary Ross's justification for including the citizenship question was pretextual, then it follows that Secretary Ross's testimony on the same topic is relevant too.

The law of the case doctrine also forecloses Defendants' record rule argument. Pet.17-19. Defendants previously conceded that extra-record discovery is permissible in APA cases when there is a strong preliminary showing of bad faith. Add.225. This rule is well established in the Supreme Court and Second Circuit. *See, e.g. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971); *Nat'l Audubon Society*, 132 F.3d at 14. Judge Furman found that Plaintiffs had made such a showing, *see infra*, *see also* Add.99-101, Add.9, and this Court refused to grant mandamus as to that very finding, Add.14. Defendants do not point to any change in the law or facts that occurred in the 48 hours between when this Court issued the order denying the first mandamus petition and their filing of the second petition that would justify revisiting this ruling.

2. Even apart from the law of the case, Defendants' argument that Secretary Ross's intent is irrelevant is wrong as a matter of APA law. Defendants previously

admitted that pretext, which involves intent, is "[t]he relevant question" in this case," Add.4, and that a finding of pretext would constitute ground to vacate an agency's decision, 18-2921, Dkt. 150 at 15. Federal courts likewise agree that an administrative decision that rests on a pretextual justification is arbitrary and capricious.[1] Testimony from Secretary Ross is plainly relevant to determining if the VRA justification he offered for including the citizenship question is pretextual. Add.101.

The Supreme Court has itself recognized that where, as here, there is a "strong showing of bad faith or improper behavior" in an APA case, courts may "require the administrative officials who participated in the decision to give testimony explaining their action." *Citizens to Preserve Overton Park*, 401 U.S. at 415-16. Lower courts have similarly recognized that, under some circumstances, a decisionmaker's intent *is* relevant in an APA action; and further, that where intent is relevant, judicial review is not limited to the administrative record. This

[1] *See, e.g.*, *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977) ("[W]here, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary") (internal citations omitted); *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854 (10th Cir. 1994) (invalidting agency decision as arbitrary and capricious where action was pretext for ulterior motive); *Parcel 49C Ltd Partnership v. United States*, 31 F.3d 1147 (Fed. Cir. 1994) (same).

includes cases involving bad faith, improper political influence, and *ex parte* communications. *See, e.g.*, *U.S. Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, (D.C. Cir. 1978); *D.C. Fed'n of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C Cir. 1971); *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 166 (E.D.N.Y. 2009); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006); *Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *4–6 (D. Conn. Nov. 3, 2006); *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1280–81 (W.D. Wis. 1997).

These cases reflect a common rationale. When factors like improper political influence, pretext, bad faith, and improper political influence are vital to an agency's decision, it "necessarily calls into question whether the justifications put forth by the agency in its decision were in fact its motivating force." *U.S. Lines*, 584 F.2d at 542. This was Judge Furman's precise reasoning in compelling Secretary Ross's deposition. Add.2-3. If "the stated rationale for Secretary Ross's decision was not his *actual* rationale" then he did not "'disclose the basis of [his]' decision," as the APA requires. Add.3 (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

Given Judge Furman's finding that Plaintiffs had made a strong preliminary showing of bad faith, *see infra*, that justified extra-record discovery, it necessarily follows that testimony from the person whose conduct and decisions were at the

center of that conduct should be relevant. And while Secretary Ross is a high-ranking executive branch official, Judge Furman did not abuse his discretion in permitting that testimony where, as here, he applied the *Lederman* exceptional circumstances standard. Add.1.

3. Judge Furman also did not clearly abuse his discretion in holding that Secretary Ross's personal knowledge and subjective intent are relevant to NYIC Plaintiffs' discrimination claim. Add.3, 8. Defendants argue that Judge Furman previously "rejected the argument" that the discrimination claim provides "grounds for extra record discovery." Pet.26. But he made no such ruling. Judge Furman merely stated that he was "inclined to disagree" with Plaintiffs' argument. Add.102. Regardless, because Judge Furman found extra-record discovery permissible based on Plaintiffs' preliminary showing of bad faith, the only question is whether testimony about Secretary Ross's intent falls within the proper scope of discovery.

This is not a close call. To prove their discrimination claim, "Plaintiffs must show that an 'invidious discriminatory purpose' was a motivating factor' in Secretary Ross's decision." Add.3 (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)). Plaintiffs may seek to show "the stated reason for Secretary Ross's decision was not the real one" and that "he was dissembling to cover up a discriminatory purpose." *Id*. (internal

quotations omitted). Secretary Ross is thus one of the most important witnesses, if not the most important witness, on the question of his own intent. Add.7.

Permitting Plaintiffs to depose Secretary Ross with respect to their discrimination claim is also perfectly consistent with precedent. The Supreme Court has recognized that discovery from a governmental decisionmaker may be necessary to resolve constitutional discrimination claims. *Webster v. Doe*, 486 U.S. 592, 604 (1988); *cf. Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) (noting that "courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making"). Defendants even admit that when a "plaintiff alleges that an agency decisionmaker acted with discriminatory animus," the Supreme Court permits compelling the testimony of "high-ranking officials" in "'extraordinary circumstances.'" Pet.26 (quoting *Village of Arlington Heights*, 429 U.S. at 268 (1977)). That perfectly describes this case. Judge Furman found that Plaintiffs here made a showing of "extraordinary circumstances" here. Add.1. Defendants' own argument thus highlights that Secretary Ross's testimony is relevant and that his deposition should be permitted.

Defendants' contention that Plaintiffs may not conduct discovery with respect to their discrimination claim because they also brought an APA claim makes no sense in the context of this case. This Court already held that Judge Furman's finding that Plaintiffs made a preliminary showing of bad faith to justify

extra-record discovery was not a clear abuse of discretion. So even if a constitutional claim might not normally constitute an independent basis for extra-record discovery in an APA action, that would have no bearing here, because extra-record discovery has already been found permissible based on Plaintiffs' preliminary showing of bad faith. Otherwise, Plaintiffs would be worse off in trying to prove their discrimination claim, merely because they also have an APA claim. In fact, in the one APA case Defendants cite denying discovery on a discrimination claim, (Pet.26 (citing *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 & n.1 (6th Cir. 2017)), the court limited the plaintiff to the administrative record because he had not made a strong showing of bad faith. Where, as here, Plaintiffs have made a showing of bad faith, there is no justification for limiting their discrimination claim to the administrative record and prohibiting relevant discovery.

Holding that Plaintiffs cannot depose Secretary Ross notwithstanding their discrimination claim would lead to untenable results. It would mean that plaintiffs that bring discrimination claims in addition to APA are in a far worse position than those who do not bring an APA claim. Without the APA claim, the plaintiff would be entitled to discovery and could depose the decisionmaker. Defendants, however, would put plaintiffs with discrimination and APA claims in an impossible situation where they have no real chance to prove discriminatory intent.

Judge Furman thus properly took Plaintiffs' discrimination claim into account in defining the proper scope of discovery.

Finally, Defendants argue that there is no "creditable evidence" to support Plaintiffs' claim that "Secretary Ross acted with discriminatory animus." Pet.26. Not so. The citizenship question's originated from concern about "the problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." Supp. Ad. 5, *id*. 1-4; *see also* Add. 173-81; 18-5025, Dtk. 1 ¶ 98-192.

The record is replete with evidence that the VRA justification was pretextual, which itself is highly probative of discriminatory intent. Secretary Ross's closest advisors believed it was their job to come up with a legal rationale to support adding the citizenship question. Supp. Ad. 130. After settling on the purported need to aid in VRA enforcement, they searched for an agency that would make the request due to a belief that the Census Bureau could not act on its own. Supp. Ad. 136-46. Secretary Ross eventually spoke with Attorney General Sessions and the Department of Justice agreed to make the request. Supp. Ad. 30, 115, 117, 120-23. AAAG Gore then ghostwrote the Department of Justice's request, which did not disclose that the Department of Commerce had actually solicited the request in the first place. Supp. Ad. 111-18, 130-31. Secretary Ross then plowed ahead with the decision even though the Census Bureau's experts

agreed that there were far better and less costly ways to obtain the same information and believed that a citizenship question was not necessary to obtain the information the Department of Justice purportedly needed. Supp. Ad. 93-106.

C. Defendants' Remaining Arguments Are Unsustainable

Defendants close with a hodgepodge of misguided and meritless arguments that the Court should reject.

1. Defendants challenge Judge Furman's finding that a deposition of Secretary Ross is particularly warranted "because he was 'personally and directly involved' in the decision to include a citizenship question 'to an unusual degree.'" Pet.19-20 (quoting Add.4). Defendants argue that his reasoning would open the door to deposing decisionmakers in every case. But Defendants misstate Judge Furman's ruling. What they describe is actually the opposite of his holding. He took pains to emphasize the "*unusual* circumstances presented here" and that he was *not* holding that Plaintiffs could depose Secretary Ross "merely because [he] made the decision that Plaintiffs are challenging." Add.4 (emphasis added).

Rather, Judge Furman held that the "concededly relevant inquiry into 'Commerce's intent' could not possibly be conducted" without Secretary Ross's testimony because "[he] was personally and directly involved in the decision, *and the unusual process leading to it*, to an unusual degree." Add.4 (emphasis added). In other words, Secretary Ross's deposition is justified by his personal

involvement in the unusual conduct that formed the basis for Plaintiffs' strong preliminary showing of bad faith. This includes the facts that he *personally* began considering adding the citizenship question well before the DOJ memo; he consulted with still-unknown "government officials" about the citizenship question; he "manifested an unusually strong personal interest in the matter," including demanding to know why no action had been taken on his "request that we include the citizenship question" seven months before the DOJ Memo; he personally lobbied the Attorney General to request inclusion of the citizenship question, and then subsequently used that request to justify the decision; and he "ultimately mandated addition of the citizenship question over the strong and continuing opposition of subject-matter experts at the Census Bureau." Add.5. Defendants' portrayal of Judge Furman's finding thus has little to do with what he actually held.

2. Defendants argue that Judge Furman got it wrong in questioning the accuracy of Secretary Ross's memoranda and congressional testimony, and in concluding that they "placed his credibility 'squarely at issue in this case.'" Pet.22 (quoting Add.6). Yet in making this argument, Defendants simply provide their own spin on the facts without attempting to show how or why Judge Furman committed clear error. Mandamus is not a mechanism for quibbling with the district court's interpretation of facts. *See, e.g.*, *Linde v. Arab Bank, PLC*, 706 F.3d

92, (2d Cir. 2013). And given that Defendants never raised this argument below, this Court should not be the first to address them. *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006).

Regardless, Defendants miss the point. Their principal argument is that Secretary Ross never stated in his memorandum or congressional testimony that "he had not previously considered whether to reinstate a citizenship question" or that he "had no discussions with other agencies or government officials before he received the Department of Justice's formal request." Pet.22. But Secretary Ross's omissions are the point. A key reason why the Ross' Memorandum and congressional testimony are misleading is that Secretary Ross described the decisionmaking process as *beginning* with the Department of Justice request to include the citizenship question based on a VRA rationale, without disclosing that he was the one who told the Department of Justice make that request in the first instance.

Judge Furman found that the actual sequence of events was "exactly [the] opposite" of the description Secretary Ross initially provided. Add.177. While inter-agency discussions are not uncommon, it is another thing entirely for a Cabinet Secretary to request that another Department submit a request that would form the legal basis for an action by the Cabinet Secretary's own agency—and to do so without disclosing that chain of events to the public or Congress.

Defendants' suggestion that the agency conduct here is "neither misleading nor improper" is, unsurprisingly, unsupported by anything other than their say-so. Pet.22 n.2.

Moreover, Defendants still ignore Secretary Ross's issuance of the June 21 Memo. Add.192. This brief memorandum acknowledges and represents an untimely effort to clean up the false narrative that Secretary Ross perpetuated in the original Memorandum and congressional testimony that the Department of Justice had birthed the idea to add the citizenship question to aid in enforcement of the VRA. Secretary Ross had no other reason to issue the June 21 Memo. This is compounded by its curious timing, only weeks after the census lawsuits were filed and the first discussions with the district court about extra-record discovery.

3. The Court should reject Defendants' perfunctory argument that Judge Furman "should have deferred" to their offer to "provide the information plaintiffs seek from Secretary Ross through" other discovery devices. Pet.27. First, *Lederman* does not require resort to "other discovery" procedures before permitting the deposition of a senior government official. Rather, *Lederman* holds that extraordinary circumstances to justify a deposition may be found where "an official has unique first-hand knowledge related to the litigated claims *or* that the necessary information cannot be obtained through other, less burdensome or intrusive means." 731 F.3d at 203 (emphasis added). Because Judge Furman

properly found extraordinary circumstances to permit a deposition of Secretary Ross under the first factor, there is no need to consider the second factor.[2]

Second, Defendants ignore Judge Furman's point-by-point explanation for not requiring Plaintiffs to rely on interrogatories, requests for admission, or a Rule 30(b)(6) deposition. Add.9. A deposition is the only adequate way to "test or evaluate Secretary Ross's credibility" and, if necessary, to "refresh Secretary Ross's recollection." *Id*. Plus, interrogatories, requests for admission, and a Rule 30(b)(6) deposition would still "burden Secretary Ross anyway," *id*., making a deposition both "'more efficient'" and less burdensome for Secretary Ross, the parties and the district court. *Id*. Defendants have waived any argument that Judge Furman's reasoning was a clear abuse of discretion. *Harte v. Woods Hole Oceanographic Inst.*, 495 F. App'x 171, 173 n.1 (2d Cir. 2012).

Third, Defendants' conduct in discovery belies their claim that Judge Furman should have deferred to their offer to provide information sought from Secretary Ross through other discovery devices. Pet.27. Defendants have consistently delayed responding to basic discovery requests, forcing an almost constant stream of motions practice and leading Judge Furman to recently

[2] In *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008), the court granted mandamus to block the deposition of the Vice President's chief of staff, not because the plaintiff had failed to seek the information from other sources, but because he had "no apparent involvement in th[e] litigation." That concern is not present here.

admonish Defendants about delays. 18-2921, Dkt. 362 at 1 (noting that "Defendants shall comply with their discovery obligations completely *and* expeditiously" and that "the Court will not look kindly on any delay, and — absent relief from a higher court — will not extend discovery beyond October 12th given the November 5th trial date"). Given the November 5 trial date, and the Census Bureau's self-professed desire to resolve the citizenship question this fall, 18-2921, Dkt. 308 at 7-8, Defendants have no basis to argue that Judge Furman should have required Plaintiffs to undertake still more discovery.

4. Finally, Defendants cannot use the Petition to bootstrap a challenge to jurisdiction. Pet.30. Defendants claim that there are "significant doubts" about standing and justiciability, *id.*, but "it long has been clear that mandamus will not lie to review a claim of mere error in a lower court's jurisdictional determination." *In re Zyprexa Prod. Liab. Litig.*, 594 F.3d 113, 122 (2d Cir. 2010); *see id.* at 122 n.27 (collecting cases). Defendants' argument is just one of "mere error." They just repeat in perfunctory form the same arguments they raised in their motion to dismiss. 18-5025, Dkt. 38. But Defendants do not once acknowledge Judge Furman's detailed analysis rejecting those arguments, make no attempt to show why Judge Furman was wrong, and ignore the precedent rejecting their arguments.

Indeed, reading the Petition, one would never even know that Judge Furman issued a lengthy ruling that addressed Defendants' standing and non-justiciability

arguments. Add.128-159 (citing cases). As Judge Furman explained, Plaintiffs plausibly alleged facts to establish all elements of standing, including injury-in-fact and traceability. Add.130-145. Defendants are free to challenge standing at trial and Defendants are now deposing individual members of NYIC Plaintiffs' organizations. Judge Furman also properly rejected Defendants' political question and non-reviewability arguments. Add.145-159. The Supreme Court and Second Circuit have consistently found census-related claims, like Plaintiffs' here, to be justiciable. Add.145-159. Although Defendants cite one case that found census claims to be non-justiciable, (Pet.31 (citing *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992)), they neglect to note that it is an outlier and inconsistent with Supreme Court and Circuit precedent, *see* Add.146-47. The Court should not countenance Defendants' barely there jurisdictional argument.

CONCLUSION

Like their first mandamus petition, Defendants fail to demonstrate that Judge Furman clearly abused his discretion in finding "unusual circumstances" and ordering the deposition of Secretary Ross. The Petition should be denied.

DATED: October 4, 2018

Respectfully submitted,

/s/ David J. Weiner

David J. Weiner
John A. Freedman
R. Stanton Jones
Elisabeth S. Theodore
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 942-5000

Christopher T. Dunn
Arthur N. Eisenberg
Perry M. Grossman
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
Telephone: (212) 607-3300 601

Dale Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
Telephone: (212) 549-2693

Sarah Brannon
Davin Rosborough
Ceridwen Cherry
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005-2313
Telephone: (202) 675-2337

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 7,993 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 12-point New Times Roman font.

Dated: October 4, 2018

/s/ David J. Weiner
David J. Weiner

Attorney for Plaintiffs-Respondents New York Immigration Coalition, CASA de Maryland, American-Arab Anti-Discrimination Committee, ADC Research Institute, and Make the Road New York

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. All counsel in this case are participants in the district court's CM/ECF system.

/s/ David J. Weiner
David J. Weiner