No. 18-557

IN THE

Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners

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QUESTION PRESENTED

Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. 701 et seq., a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is not a strong threshold showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

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Interest of Amicus Curiae[1]

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation's mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. The Foundation also seeks to ensure that voter qualification laws and election administration procedures are followed. Specifically, the Foundation seeks to ensure that the nation's voter rolls are accurate and current, working with election administrators nationwide and educating the public about the same. The Foundation's President and General Counsel, J. Christian Adams, served as an attorney in the Voting Section at the Department of Justice. Mr. Adams has been involved in multiple enforcement actions under the Voting Rights Act and has brought numerous election cases relying on Census population data. Additionally, one of the members of the Foundation's Board of Directors, Hans von Spakovsky, served as counsel to the assistant attorney general for civil rights at the Department of Justice, where he provided expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002, as well as a commissioner on the Federal Election Commission. The Foundation believes that this brief—drawing from the expertise

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were notified and have consented to the filing of this brief.

of the Foundation's counsel and the Foundation's experience itself—will aid in the Court's consideration of the lower court's decision authorizing extra-record discovery.

SUMMARY OF ARGUMENT

Collecting robust citizenship data on the Decennial Census will help enforce the Voting Rights Act. The U.S. Department of Justice ("DOJ") requested that the Census Bureau resume its practice of gathering citizenship data, stating that such "data is critical to the Department [of Justice]'s enforcement of Section 2 of the Voting Rights Act." Petition Appendix ("App.") 152a. The DOJ, as a statutorily designated enforcer of the Voting Rights Act, understands the importance of "a reliable calculation of the citizen voting age population in localities where voting rights violations are alleged or suspected." App. 152a-53a. The Secretary of Commerce ("Secretary") then reinstated the citizenship question.

This simple reinstatement triggered six separate attacks on the Census Bureau in courtrooms on both coasts. In the months following the reinstatement, three different district courts have been tasked with ruling on the validity of the same decision by the Secretary. The two cases that are implicated in this matter have become the center of the factual disputes, with the U.S. District Court for the Southern District of New York swiftly issuing rulings early on to which the other litigants and courts assented. The Foundation seeks to bring to the Court's attention serious constitutional concerns with the underlying ruling that threaten to permeate all pending litigation on this matter, and likely other matters in the future.

In authorizing extra-record discovery, the district court determined that "plaintiffs have 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." App. 99a. Specifically, the court determined that "Secretary Ross overruled senior Census Bureau career staff," in reinstating the citizenship question. App. 98a. The U.S. Court of Appeals for the Second Circuit's denial of the Petitioners' writs of mandamus should be reversed for four additional reasons not raised in Petitioners' brief.

First, the district court's justification for authorizing extra-record discovery presents important constitutional questions regarding the power of the Executive under Article II of the Constitution.

Second, citizenship data from the 1950 Decennial Census—the last Census in which such data was requested of all participants—was central to the finding of a violation of the right to vote in a recent case concerning the U.S. territory of Guam. In *Davis v. Guam*, the district court relied heavily on Census data showing which inhabitants of the territory were U.S. citizens and which ones were non-U.S. citizens, data that was collected by the 1950 Census. *Davis v. Guam*, No. 11-00035, 2017 U.S. Dist. LEXIS 34240, at *15 (D. Guam Mar. 8, 2017). Because citizenship data was available for analysis, the court was able to ascertain that a Guam law restricting the right to vote in a particular election to only "Native Inhabitants of Guam" was a race-based restriction in violation of the Fifteenth Amendment to the Constitution. *Id*. at *37.

Third, the Civil Rights Division of the Department of Justice relies on citizenship data in cases it has brought to enforce the Voting Rights Act. This past reliance does not support Respondents' position that data from the Decennial Census is unnecessary to the enforcement of the Act. Rather, these cases demonstrate that the DOJ empirically relies on citizenship data and therefore is best suited to improve upon that reliance. The DOJ has determined that obtaining more robust citizenship data will allow those officials charged with enforcing the Voting Rights Act to enjoy more precise citizen population data, particularly in small jurisdictions, and thus enhance enforcement of civil rights laws. Such a decision is not "pretext"; it is progress, which should be encouraged, not deterred.

Finally, the reinstatement of the citizenship question on the 2020 Census enriches the ability of private citizens to enforce federal law. As part of its mission, the Foundation strives to ensure that voter rolls are being lawfully maintained nationwide. The Foundation relies upon citizenship data in its analysis of the nation's rolls. Robust citizenship data—including data from smaller jurisdictions—from the Decennial Census will aid the Foundation and others in this important task.

ARGUMENT

This case concerns two of six challenges to the Secretary's reinstatement of the citizenship question. These two challenges set the tone for discovery matters in the similar litigation across the nation. The Respondents vigorously sought and obtained extra-record evidence early in the litigation. Petitioners' Br. at 8-9. Once achieved, the litigants in the other cases

obtained extra-record discovery as well. *See* Order Granting Request to Conduct Discovery Outside the Administrative Record, *California v. Ross*, No. 18-cv-01865 (N.D. Cal. Aug. 17, 2018), ECF No. 76 at 1-2 ("Discovery shall be subject to the limitations set out in Judge Furman's July 5, 2018, discovery order issued in the New York action… Plaintiffs represent that discovery will be taken in accordance with coordinated procedures established by counsel among the several census challenge cases proceeding in other districts…").

The decision to authorize extra-record discovery was incorrect and the U.S. Court of Appeals for the Second Circuit's denial of the Petitioners' writs of mandamus should be reversed for the following reasons.

I. Disagreement Between Executive Branch Officials and Career Bureaucrats Cannot Support a Finding of Discriminatory Intent without Raising Serious Constitutional Concerns.

The district court encroached on the Constitution and this Court's precedent when it found that the Secretary's disagreement with career bureaucrats over the reinstatement of the citizenship question was evidence of bad faith. This encroachment threatens to render the policies of the duly elected Executive subservient to the wishes of career bureaucrats.

One of the district court's stated justifications for extra-record discovery was that "Secretary Ross overruled senior Census Bureau career staff." App. 98a. In its opinion on the Petitioners' motion to dismiss, below, the district court found that the organizational

Respondents' "Complaint pleads facts that show '[d]epartures from the normal procedural sequence'" under *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). *New York v. United States DOC*, 315 F. Supp. 3d 766, 808 (S.D.N.Y. 2018).

In *Arlington Heights*, this Court explained that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. This Court set forth examples "of proper inquiry in determining whether racially discriminatory intent existed." *Id*. at 268. One such area of inquiry is whether there are "[d]epartures from the normal procedural sequence." *Id*. at 267-68.

In its opinion on the Petitioners' motion to dismiss, the district court found allegations of the Secretary "overruling career staff" as rising to the level of a departure from the normal procedural sequence under *Arlington Heights*. *New York v. United States DOC*, 315 F. Supp. 3d at 808. The district court intruded on the powers of the Executive by using the *Arlington Heights* analysis to impair powers and prerogatives which are wholly the Executive's to exercise.

The Respondents highlighted the roles of career and political appointees in their recently filed proposed findings of fact.

> 404. Mr. Gore was and is a political appointee, not career Civil Rights Division staff. Gore Dep. at 14, 18–19.
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> …

> 464. Mr. Gore has no recollection of receiving any input or edits from career DOJ Civil Rights Division staff on the letter requesting a citizenship question other than the first round of edits from Herren. *Id.* at 152-53.
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> 485. The only career staffer in the Civil Rights Division that provided input at any stage of drafting was Mr. Herren in early November. Gore Dep. at 151–153.
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> …

Plaintiffs' Joint Proposed Post-Trial Findings of Fact, 18-cv-02921, Doc. 545 at 59, 65, 68 (Nov. 21, 2018).

Respondents also highlight the involvement of career and political appointees in their proposed findings of law.

> 556. The request for a citizenship question was ultimately drafted by a political appointee, John Gore, and edited by other political appointees with no voting rights experience, with only minimal input from career Civil Rights Division staff—on only one occasion to the first draft of the letter. PFOF § III.E; see also Gore Dep. at 126-27.

Plaintiffs' Joint Proposed Post-Trial Conclusions of Law, 18-cv-02921, Doc. 545-1 at 124 (Nov. 21, 2018).

There are serious constitutional concerns with finding that a lack of deference to career bureaucrats signifies discriminatory intent. Such a twisted use of *Arlington Heights* would elevate Mr. Herren—a career civil servant, as well as other career civil servants—as having a power to interfere and frustrate

Executive policy in a way the Constitution simply does not envision.

Article II, § 1, cl. 1, of the Constitution of the United States makes plain that "executive Power shall be vested in a President of the United States of America." As the Supreme Court has stated, "The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known." *Printz v. United States*, 521 U.S. 898, 922-23 (1997) (citing The Federalist No. 70 (A. Hamilton); 2 Documentary History of the Ratification of the Constitution 495 (M. Jensen ed. 1976) (statement of James Wilson), and Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541 (1994)). The unitary Executive is essential for individual liberty. "The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas 'one of the weightiest objections to a plurality in the executive … is that it tends to conceal faults and destroy responsibility.'" *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, dissenting) (quoting Federalist No. 70 at 427) (emphasis in original).

At the core, "[i]t is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are." *Morrison*, 487 U.S. at 709 (Scalia, dissenting). The Secretary's decision to reinstate the citizen question is thus not a "[d]eparture[] from the normal procedural sequence," *Arlington Heights,* 429 U.S. at 267-68; rather, it is consistent with the framework provided by the U.S. Constitu-

tion. Disagreements between the Secretary and career bureaucrats should never support a finding of discriminatory intent and, therefore, cannot be a justification for extra-record discovery. *See also Wisconsin v. City of N.Y.*, 517 U.S. 1, 23, 116 S. Ct. 1091, 1103 (1996) ("Regardless of the Secretary's statistical expertise, it is he to whom Congress has delegated its constitutional authority over the census.…the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision.")

II. The Citizenship Data from the 1950 Census Helped Court Find Violation of the Right to Vote.

In allowing extra-record discovery, the district court stated that, to its knowledge, "the Department of Justice and civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims." App. 99a. In addition to failing to note multiple Department of Justice complaints enforcing Section 2, as discussed in Part III, *infra*, the district court did not consider that census citizenship data derived from the 1950 Census was essential to the decision of the United States District Court for the District of Guam in *Davis v. Guam* (hereinafter, "*Davis*").

In *Davis*, the court confronted a Guam law establishing a "Political Status Plebiscite" that would allow those on the island to vote in a referendum regarding the territory's future status with the United States

only if they were a "native inhabitant of Guam." *Davis*, 2017 U.S. Dist. LEXIS 34240, at *3. The plaintiff was denied the right to register to vote in the plebiscite because he did not satisfy this condition to register to vote. *Id*. Eligibility to vote was anchored to 1950. An eligible "Native Inhabitant of Guam" means "'those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons.'" *Id*. (quoting 3 Guam Code Ann. § 21001(e)). Those who were on Guam in 1950 and became citizens by virtue of the 1950 Organic Act, and their blood descendants, were eligible to vote in the status plebiscite. Thus, the composition of citizens as compared to non-citizens on Guam in 1950 became highly relevant. Thankfully, the 1950 Census included a citizenship question.

Using citizenship data derived from the 1950 Census, the district court found that Guam's law violated the Fifteenth Amendment to the U.S. Constitution, because "Native Inhabitants of Guam" was a race-based classification. *Id*. at *12-28. Of the 26,142 non-U.S. citizens in Guam in 1950, the vast majority, or 25,788, were of Chamorro descent. *Id*. at *15. As a result of the court's analysis of the 1950 Census citizenship data, it determined that "the use of 'Native Inhabitants of Guam' as a requirement to register and vote in the Plebiscite is race-based and that the Guam Legislature has used ancestry as a racial definition and for a racial purpose." *Id*. at *18-19. Put simply, almost everyone who became a citizen by virtue of the 1950 Organic Act was of the Chamorro race, and therefore a law which anchors voting eligibility to that event violated the Constitution.

An appeal of the summary judgment finding in the plaintiff's favor is pending in the Ninth Circuit. No. 17-15719. On appeal, the United States filed an *amicus curiae* brief supporting the plaintiff-appellee and requesting that the district court decision be affirmed. The United States relies on the citizenship data collected in the 1950 Census to support its position. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance, No. 17-15719 at 4, 12-13, 18 (9th Cir., filed Nov. 28, 2017), *available at* https://www.cir-usa.org/legal_docs/davis_v_guam_doj_amicus.pdf.

The citizenship data collected during the 1950 Census was essential to the determination that Guam's plebiscite law unconstitutionally imposed a race-based restriction in violation of the Fifteenth Amendment. This case undermines a core assumption of the district court and supports the DOJ's determination that the collection of citizenship data is critical to the enforcement of federal law.

III. Enforcement of Section 2 of the Voting Rights Act Requires Citizenship Data.

In their Opposition to the Petition for Writ of Mandamus, Respondents call into question whether collecting data on the decennial Census will assist the DOJ in their enforcement of the Voting Rights Act. *See* Br. for Resps. N.Y. Immigration Coal. (NYIC) in Opp. 16.

Respondents' argument downplays the significant experience that the DOJ has with the data presently

available to it when initiating a case pursuant to Section 2 of the Voting Rights Act.[2] In such a case, there are three so-called "preconditions" that the United States must show are present. *See Thornburgh v. Gingles*, 478 U.S. 30 (1986). The first *Gingles* precondition is that the minority group "is sufficiently large and geographically compact to constitute a majority in a single member district." *Id*. at 50-51. To establish this precondition, the United States has historically used citizen voting age populations, or "CVAP."

CVAP, while reliable, is an estimation based on ongoing surveying conducted every year by the Census Bureau's American Community Survey (ACS). *See* Citizen Voting Age Population (CVAP) Special Tabulation from the 2012-2016 5-Year American Community Survey (ACS), *available at* https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_2012-2016_ACS_documentation.pdf. Additionally, CVAP data is not available for all jurisdictions. The DOJ correctly noted that more robust citizenship data will allow it to better enforce federal law. App. 152a-157a. This is hardly a pretext for discrimination.

The DOJ is aware that citizenship data is not captured for smaller jurisdictions in the same way it is for larger jurisdictions. A rare Voting Rights Act case brought against a smaller jurisdiction was against

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[2] All cases brought under Section 2 of the Voting Rights Act, with the complaints and other documents linked, are listed at the DOJ website under "Cases Raising Claims Under Section 2 of the Voting Rights Act," https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0.

Lake Park, a small town in Palm Beach County, Florida. Complaint, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009). In the 2000 Census, 48 percent of Lake Park residents were black, but in 2009 not a single black candidate for town council had ever won a seat in the at-large voting plan. A large non-citizen Haitian population, however, made it less than clear what the precise black citizenship population was in Lake Park. The DOJ could not turn to the Decennial Census for precise citizenship data because precise citizenship data were not collected in the 2000 Census. While it is true that the United States alleged in the Lake Park complaint a sufficiently large black citizenship population to justify bringing the case, the extraordinarily large black population (more than 40%) made that an easier assertion to make. *See* Complaint at ¶ 8, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009).

In larger jurisdictions, the DOJ has consistently relied on CVAP data to enforce the Voting Rights Act. *See* Complaint at ¶ 6, *United States v. Euclid City School District Board of Education, OH*, No. 1:08-cv-02832 (N.D. Ohio 2008); Complaint at ¶ 12, *United States v. The School Board of Osceola County*, No. 6:08-cv-00582 (M.D. Fla. 2008); Complaint at ¶ 12, *United States v. Georgetown County School District, et. al.*, No. 2:08-cv-00889 (D.S.C. 2008); Complaint at ¶ 21, *United States v. City of Boston, MA*, No. 05-11598 (D. Mass. 2005); Complaint at ¶ 17, *United States v. Osceola County*, No. 6:05-cv-1053 (M.D. Fla 2005); Complaint at ¶ 16, *United States v. Alamosa County*, No. 01-B-2275 (D. Colo. 2001); and Complaint ¶ 15, *United States v. Charleston County*, No. 2-01-0155 (D.S.C. 2001).

While in the past the DOJ used the ACS to estimate the citizen population, seeking more precise and unimpeachable data would aid enforcement of the law. The justification for including the citizenship question is hardly a pretext for an impermissible intent. Rather, the purpose is to allow an enforcement agency to better enforce the law, a goal that should be encouraged, not deterred.

IV. Citizenship Data Will Assist in the Private Enforcement of Federal Law.

Robust citizenship data from the 2020 Census will aid in the private enforcement of federal law. For example, the National Voter Registration Act ("NVRA"), in part, requires that election officials conduct reasonable list maintenance and make available for public inspection records relating to their list maintenance. 52 U.S.C. § 20507(a)(4) and (i). The NVRA also authorizes private parties to enforce its provisions. 52 U.S.C. § 20510. The Foundation has utilized this private right of action in order to advance its mission of ensuring that voter rolls are current and accurate. In so doing, the Foundation relies on available Census data to determine which jurisdictions may be failing to comply with federal law. *See*, *e.g.*, Press Release, 248 Counties Have More Registered Voters Than Live Adults (Sept. 25, 2017), *available at* https://publicinterestlegal.org/blog/248-counties-registered-voters-live-adults/. The Foundation then works with election officials to correct the violations of law or, if needed, files a complaint in federal court to enforce the law. *See*, *e.g.*, Complaint, *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-00981 (S.D. Tex.).

CONCLUSION

Robust citizenship data from Decennial Censuses has aided in the enforcement of federal law in the past and will do so again. The determination to gather such data during the 2020 Census is logical, appropriate, and in accordance with law. For these reasons, the denial of the Petitioners' writs of mandamus should be reversed.

Respectfully submitted,

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