No. 18-557

In the Supreme Court of the 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 *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS 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 no evidence 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*

Eagle Forum Education & Legal Defense Fund[1] ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has consistently defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community, EFELDF has supported efforts to ensure equality of voters

[1] *Amicus* files this brief with the written consent of all parties. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to the preparation or submission of this brief.

consistent with the written Constitution and validly enacted laws. For the foregoing reasons, *amicus* EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

In the consolidated actions before the United States District Court for the Southern District of New York, the various plaintiffs-respondents (collectively, "Plaintiffs") are entities that claim that the use of a citizenship question on the 2020 Census will injure them because their jurisdictions include large populations of illegal aliens, whom the citizenship question might discourage from responding to the Census. The defendants-petitioners (collectively, "Commerce") are the federal Department of Commerce, its Secretary Wilbur L. Ross, Jr., in his official capacity, the federal Census Bureau, and Ron S. Jarmin, its Director, in his official capacity.

Commerce plans to use the citizenship question in conducting the 2020 Census pursuant to the Constitution's Census Clause, U.S. CONST. art. I, §2, cl. 3, and the implementing legislation. As Commerce explains, the decennial Census has included birthplace and citizenship questions for most of the Nation's history, although the most recent few sought that information through smaller samples and surveys. Pet. at 2-3. Commerce supported the decision to reinstate a citizenship question on the full decennial Census with a memorandum by Secretary Ross, Pet. App. 136a-151a, which – in turn – relies on an extensive administrative record. With respect to reinstating the citizenship question, the record states

that the citizenship data would aid the Department of Justice in its enforcement of the Voting Rights Act.

Although judicial review under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), would normally proceed on the basis of the agency's administrative record, 5 U.S.C. §706, the district court granted Plaintiffs' motion for extra-record discovery – including depositions of Secretary Ross and other high-ranking officials – by orders dated July 3, 2018, August 17, 2018, and September 21, 2018. Before the petition that this Court granted, Commerce sought to stay those discovery orders and succeeded in staying Secretary Ross's deposition.

SUMMARY OF ARGUMENT

Plaintiffs lack an Article III case or controversy because their purported injury is not only too speculative for standing and ripeness, but also the result of illegal conduct, 13 U.S.C. §221(a), which breaks the causal link to Commerce's action (Section I). With respect to the standard of review, the APA's arbitrary-and-capricious test equates to the rational-basis test, except that the APA confines the former to the administrative record, whereas the latter weighs not only the government's basis for acting but also any basis on which it plausibly may have acted (Section II.A). In addition, because judicial review is confined on the administrative record, that review does not include a balancing of harms versus benefits or an inquiry into agency motives (Section II.B). Plaintiffs have made no showing of bad faith by Commerce (Sections III.A, III.B) or inappropriateness with the citizenship question itself (Section II.C), so the extra-

record information that Plaintiffs and the district court seek is irrelevant (Section III.C).

The additional stay factors also compel a stay: Commerce's harm of lost time is irreparable (Section III.A), the balance of equities tips to Commerce because of the agency's strong merits showing (Section III.B), and intrusive discovery for irrelevant information does not serve the public interest (Section III.C). In particular, amicus EFELDF respectfully submits that the pace of post-2016 district-court intervention to stymie the Executive Branch on insubstantial grounds – of which this litigation is but one example – warrants the Court's exercising its supervisory powers under 28 U.S.C. §2106 to remand to a different judge or, alternatively, announce the prospective need for appellate courts to remand to a different judge when district courts seek to enjoin the government for rationales that plainly deviate from or fail to meet controlling standards (Section III.D).

ARGUMENT

I. THE COURTS BELOW LACKED SUBJECT-MATTER JURISDICTION TO ENTERTAIN PLAINTIFFS' SUIT.

Before reaching the question of Commerce's likelihood of prevailing on the substantive merits, this Court first must establish federal jurisdiction, not only of this Court but also of the lower federal courts. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Although Plaintiffs lack an Article III case or controversy, this Court – like all federal courts – has jurisdiction to determine its jurisdiction. *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970). Indeed, under *Steel Company*, courts have an *obligation* – not the

mere discretionary power – to resolve threshold jurisdictional issues:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co., 523 U.S. at 95 (interior quotations, citations, and alterations omitted). That obligation compels dismissal for lack of an Article III case or controversy.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Similarly, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). Under both principles, a plaintiff must show that it "has sustained or is immediately in danger of sustaining

some direct injury" from the challenged action, and that injury must be "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (interior quotations omitted). For three independently fatal reasons, Plaintiffs cannot meet these threshold tests for having a suit in federal court.

First, it remains entirely speculative whether illegal aliens will not only decline to respond to the Census but also will elude the Census Bureau's efforts to follow up with those who fail to respond. To have standing "to challenge the operation of the … census-taking machinery … [a plaintiff] must show at least a substantial likelihood that the relief which he seeks will result in some benefit to himself." *Sharrow v. Brown*, 447 F.2d 94, 96-97 (2d Cir. 1971). Insofar as federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), that alone would suffice to vacate the district court's order for lack of Article III standing.

Second, even if the challenged Census question could provide Plaintiffs with a sufficiently concrete injury, it would remain entirely uncertain whether Commerce will, in fact, ask the question on the 2020 census. With the Democratic Party's having taken a majority in the House of Representatives in the 2018 elections, it remains entirely possible that Democrats would defund the Census question on citizenship. *See* Tara Bahrampour, "*How Democrats would work to kill the census citizenship question if they win the*

midterms," WASH. POST (Oct. 11, 2018) (available at https://wapo.st/2pKNpUG) (last visited Dec. 20, 2018). Under the circumstances, it is unclear that Plaintiffs have a ripe claim for relief.

Third, and more fundamentally than Plaintiffs' evidentiary failure to show the required actual and imminent injury, *Lyons*, 461 U.S. at 102, Plaintiffs' entire premise rests on the claim that illegal aliens will elude responding to the Census, in violation of federal law. 13 U.S.C. §221(a). The offense by third-party illegal aliens breaks the causal chain in Plaintiffs' theory of injury: "a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Plaintiffs cannot rest their standing on third parties' unlawful actions or inactions.

Given that we deal here with *noncitizens*, "[t]o afford controlling weight to such impressions… is essentially to subject a duly enacted statute to an international heckler's veto." *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting). Although *amicus* EFELDF does not agree with all of the rights that this Court has afforded illegal aliens under the Equal Protection Clause or otherwise, this Court has never held that illegal aliens have a "heckler's veto" over the United States' ability to collect required citizen-related information in the Census. *See* U.S. CONST. art. I, §2, cl. 3; *cf. Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997). This Court should

not read the Constitution or federal law to create an implied right for illegal aliens to come here illegally, to thwart the Census illegally, and thereby to support injunctive relief against the federal sovereign.

II. THE ARBITRARY-AND-CAPRICIOUS TEST IS THE STANDARD OF REVIEW FOR THE AGENCY ACTION HERE.

No statute or constitutional provision directly precludes Commerce's use of a citizenship question on the Census, so Plaintiffs cannot prevail in finding Commerce's action *ultra vires* unless the citizenship question is either arbitrary and capricious, 5 U.S.C. §706(2)(A), or unconstitutional as applied. Either way, because the citizenship question neither implicates a fundamental right nor discriminates on the basis of a protected status, see Section II.C, *infra*, the rational-basis test applies, either directly to constitutional claims or via the APA through its administrative-law cousin, the arbitrary-and-capricious test.

A. The arbitrary-and-capricious test equates to rational-basis review for constitutional issues.

Leaving aside the possibility that APA arbitrary-and-capricious review requires *less* than a rational basis, this Court has already held that it requires *no more*: "we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974). Congress ratified this view by amending the APA in 1976, while leaving that issue unchanged. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an

administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). So, while "[t]he standard of review – rational basis or arbitrary and capricious – is determined by statute," *Chemung Cty. v. Dole*, 781 F.2d 963, 971 (2d Cir. 1986) (*citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)), remarkably little hangs on which test applies.

Given that the APA's arbitrary-and-capricious test requires no more than the rational-basis test as far as stringency is concerned, *Bowman Transp.*, 419 U.S. at 290, the only real difference is the one set by the APA's (and administrative law's) focus on the administrative record on which the agency acted. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (reviewing courts limit agencies to the "the basis articulated by the agency itself" in the record) ("*MVMA*"); *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947) (same, pre-APA). Because Commerce's record includes a rational basis for the citizenship question, that should end the inquiry.

B. Rational-basis review does not include a balancing test of benefits versus imagined harms or an inquiry into agency motives.

The arbitrary-and-capricious and rational-basis tests do not weigh benefits versus harms. Unlike heightened scrutiny, this tier of review does not require narrowly tailoring policies to legitimate purposes: "[rational basis review] is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993), and a policy "does not

offend the Constitution simply because the classification is not made with mathematical nicety or because *in practice it results in some inequality*." *Id.* at 316 n.7 (interior quotations omitted, emphasis added). In the absence of an express mandate in an underlying substantive statute, the APA does not require agencies to balance benefits versus harms (*e.g.*, the value for enforcing the Voting Rights Act versus the alleged negative effect that asking about citizenship might have on response rates):

> Nor does [the petitioner] cite to any authority —and we are aware of none —for the proposition that the APA's arbitrary and capricious standard alone requires an agency to engage in cost-benefit analysis.

Village of Barrington v. Surface Transp. Bd., 636 F.3d 650, 670-71 (D.C. Cir. 2011) (Tatel, J.). Similarly, the Court has long rejected inquiring into legislative or executive motives, Pet. at 21 (collecting cases), which explains why Congress codified administrative review to rely *on the record* before an agency. 5 U.S.C. §706.

C. The citizenship question is entirely justified and thus raises no heightened review.

To the extent that Plaintiffs rely on constitutional grounds to review the citizenship question,[2] Plaintiffs cannot raise the level of scrutiny. Equal-protection and due-process analysis under the Fifth Amendment involve sliding scales of scrutiny, based on whether a fundamental right or protected class is implicated. In

[2] APA limits on justiciability do not preclude constitutional review. *Webster v. Doe,* 486 U.S. 592, 603-04 (1988).

Plaintiffs' case, the discrimination – *if there is any* – would fall under the rational-basis test because no fundamental right or protected class suffers from the citizenship question. Moreover, any disparate impact that correlates with factors such as alienage is not actionable. A "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its *adverse* effects upon an identifiable group." *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added). Plaintiffs cannot show that discriminatory purpose.

While constitutional claims might get Plaintiffs past the APA's limits on judicial review, they make Plaintiffs worse off, overall. With the APA, Plaintiffs can at least preclude Commerce from relying on extra-record materials under the *Chenery-MVMA* line of cases. With constitutional review, Plaintiffs get the same basic level of scrutiny, *see* Section II.A, *supra*, but Commerce should be able to support its action with any conceivable basis on which Commerce hypothetically *may have* acted. *Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992). That is not a trade that helps Plaintiffs.

Substantively, Plaintiffs cannot invalidate the citizenship question: the question is wholly justified and rational. As petitioners explain, the data are needed to enforce the Voting Rights Act, Pet. at 4-5, which easily satisfies the rational-basis level of review. To prevail under this standard of review, Plaintiffs must do much more than put together "impressive supporting evidence … [on] the probable

consequences" vis-à-vis the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Clover Leaf Creamery*, 449 U.S. at 463-64 (emphasis in original); *Beach Comm.,* 508 U.S. at 315 ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). As applied here, Plaintiffs would to prove that the citizenship data are *irrelevant* to enforcing the Voting Rights Act, something that they do not even attempt to do. The district judge had no basis in the record to second guess Commerce.[3]

In sum, the citizenship question does not discriminate. At best, Plaintiffs seek to litigate a disparate-impact claim, which this Court long has rejected. But even if Commerce's citizenship question discriminated based on some criterion, the Voting Rights Act rationale would nonetheless satisfy the rational-basis test.

III. THE DISTRICT COURT LACKED A BASIS TO GO OUTSIDE THE ADMINISTRATIVE RECORD.

Plaintiffs did not establish the bad faith required for high-level depositions in this context, and the Secretary's personal mental processes are irrelevant.

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[3] Instead of attempting to negative Commerce's stated rationale, Plaintiffs and the district judge essentially assert that their preferred policies are better than the policy goals that Commerce rationally advances. Judicial review under the rational-basis test does not afford them that privilege. *See* Sections II.B, *supra*, III.B, *infra*.

A. Neither Plaintiffs nor the lower courts meet the high bar for discovery of a Cabinet secretary or other high government official.

As Commerce's petition ably demonstrates, deposing high-ranking officials to go outside the administrative record requires "a strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S. at 420, which Plaintiffs failed to make. Pet. at 21-37. *Amicus* EFELDF does not seek to repeat arguments that Commerce ably makes. S.Ct. R. 37.1. Instead, *amicus* EFELDF focuses on arguments that supplement Commerce's arguments and that this Court can consider as fairly included here.

B. The district court had no basis to go outside the administrative record.

Assuming *arguendo* that an agency action is not *ultra vires*, a court must uphold the agency action if a rational basis in the record supports the action (*i.e.*, if the action is neither arbitrary nor capricious). In making that determination, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," *Camp v. Pitts*, 411 U.S. 138, 142 (1973), unless the plaintiff or petitioner meets the high bar of the *Overton Park* bad-faith showing. *See* Section III.A, *supra*. Under the circumstances, *any* extra-record evidence is – by definition – irrelevant.

While the petition here deals with extra-record deposition testimony, the relevance issue applies to *any* extra-record evidence. As such, *how* the Court rules could be as important as *what* the Court rules.

For example, in two related cases, district judges have ordered full trials on these administrative-law issues. *California v. Ross*, Nos. 18-cv-01865-RS, 18-cv-02279-RS (N.D. Cal. Dec. 14, 2018) (setting trial for census citizenship question); *Kravitz v. U.S. Dep't of Commerce*, Nos. GJH-18-1041 & GJH-18-1570, at 1 (D. Md. Dec. 19, 2018) ("The parties will be permitted to present evidence outside of the administrative record at trial; The defense will be permitted to argue at the close of trial that such evidence should not be considered in the Court's final decision[.]"). That is not how judicial review of agency action works under the APA, and the APA reflects the extent to which the sovereign has waived immunity even to allow judicial review. 5 U.S.C. §703. That waiver does not extend to these political – and politically motivated – battles. *Amicus* EFELDF urges the Court to address the broader issue of relevance of extra-record material when addressing whether the district judge here properly authorized Secretary Ross's deposition.

In any APA action for judicial review of agency action, the question is most decidedly not a judge's view of the wisdom of the agency's choice of actions from among the slate of possible rational action:

> Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978). Commerce has identified a rational basis for its action, *see* Section II.C, *supra*, which is all that APA review requires

here. *See* section II.A, *supra*. This Court should forcefully reject these instances of judicial usurpation of executive power under the guise of judicial review.

C. The deponents' internal mental processes would be irrelevant.

"It was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions," *Morgan v. U.S.*, 304 U.S. 1, 18 (1938); *accord U.S. v. Morgan*, 313 U.S. 409, 422 (1941), because the administrative record here suffices. 5 U.S.C. §706 ("the court shall review the whole record or those parts of it cited by a party"); *MVMA*, 463 U.S. at 50; *Chenery,* 332 U.S. at 196. Because Plaintiffs have not shown that their discovery would likely lead to relevant information, that discovery should be denied.

Indeed, even if discovery established that Secretary Ross had initially intended to adopt the citizenship question – for whatever reason, before his conferring with other governmental stakeholders – that would not invalidate his eventual decision to adopt the question for the reasons stated in the administrative record. Neither the APA nor Article III give judges the power that the district court claimed here. With the APA, Congress confined review to the record. 5 U.S.C. §706 (quoted, *supra*). More importantly, "treat[ing an] Act as merely a ruse … to evade constitutional safeguards" "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Communist Party of U.S. v.*

Subversive Activities Control Bd., 367 U.S. 1, 85 (1961). In *Subversive Activities Control Board*, the initial bills would have targeted the Communist Party by name and effectively outlawed it, but – in response to constitutional questions raised against that approach – Congress amended the bill to target certain activities, *id.*, which the Court upheld without regard to the alleged constitutional defects of the bills as first envisioned by the drafters.

During the Cold War, when presented with the argument that regulating the Communist Party one way would violate the Constitution, the Government changed the bill's focus to achieve a desired end lawfully. The Court simply did not inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly, here, Commerce has every right to conduct the Census to gather information that it has gathered for most of this Nation's history, without regard to whatever Plaintiffs or the district judge might think motivated the Secretary. It is enough that the proposed Census question is both lawful and supported by the record before the agency.

D. This Court should rebuke the district court's unprecedented intrusion into the workings of the Executive Branch.

While the district judge has injected himself into this litigation as a judicial challenger to Commerce's action, the case began as – and remains – litigation by Plaintiffs against the federal government over the

Census: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). Using a writ of mandamus can "ha[ve] the unfortunate consequence of making a district court judge a litigant," *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980), but here it would not be this Court's or Commerce's doing: the district judge made himself a virtual litigant here on his own.

Under 28 U.C.S. §2106, federal appellate courts have the authority to remand a case to a different judge, *Liteky v. U.S.,* 510 U.S. 540, 554 (1994); *U.S. v. Microsoft Corp.,* 253 F.3d 34, 108 (D.C. Cir. 2001), even without a motion by the affected party to recuse the judge under 28 U.S.C. §455(a). While that relief would be appropriate here, an alternate course could be to announce, *prospectively*, that unexplained departures from precedent will occasion remand to a different judge: "If the challenged … practice continues and is not addressed by the Court of Appeals, future review may be warranted." *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting denial of the petition for writ of *certiorari*). For example, in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689 (1979), this Court followed prior precedent regarding implied rights of action while announcing the end to that practice. A prospective announcement here might incentivize lower-court judges to dispense their power more judiciously.

CONCLUSION

This Court should remand with instructions to dismiss the consolidated actions for lack of Article III jurisdiction and, in so doing, the Court should remand the case to a different district judge.

December 20, 2018 Respectfully submitted,

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