U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

July 13, 2018

VIA ECF

The Honorable George J. Hazel
United States District Court
District of Maryland
6500 Cherrywood Lane
Greenbelt, MD 20770

Re: Kravitz *et al. v.* U.S. Dept. of Commerce *et al.* (No. 18-cv-01041)

Dear Judge Hazel:

Defendants write to respectfully submit that no discovery or additional administrative-record supplementation is appropriate in this case challenging an agency decision under the Administrative Procedure Act ("APA"), for two reasons. First, with certain limited exceptions not applicable here, review of claims challenging final agency action—including where, as here, constitutional claims overlap with APA claims—is limited to the administrative record produced by the agency. Plaintiffs have not shown that the current administrative record does not contain appropriate information to permit this Court to review the Secretary's decision. Second, no extra-record discovery should occur until the Court has resolved whether the Secretary's decision to reinstate a citizenship question on the 2020 Census is judicially reviewable, as the Supreme Court recently explained in *In re United States*, 138 S. Ct. 443, 445 (2017) (directing that "[t]he District Court should proceed to rule on the Government's threshold arguments" before addressing issues regarding completeness of the administrative record). Plaintiffs' request for "expert discovery" is also premature at this point in the litigation.

I. Discovery Is Inappropriate In An Action Challenging An Agency Decision.

Plaintiffs' requests to engage in discovery beyond the administrative record are premised on a fundamental misunderstanding of the nature and scope of judicial review in challenges to agency action under the APA. "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985). In keeping with the limited scope of such judicial review, challenges to agency decisions, such as this one, must be decided based only on the administrative record compiled by the agency. 5 U.S.C. § 706; *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (the reviewing court in an APA action should consider only the materials that were before the agency when it made its decision, and should not substitute its opinion for that of the agency); *Brandon v. Nat'l Credit Union Ass'n*, 115 F. Supp. 3d 678, 684 (E.D. Va. 2015) (referencing "this well-settled law that administrative review of agency action is on the administrative record"). If the agency's decision "is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded to [the agency] for further consideration" because "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, 142-43 (1973) (citation omitted).

It is for this reason that "discovery is typically not permitted" in APA cases. *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008); *Brandon*, 115 F. Supp. 3d at 684 ("In the normal course of

an APA case, there is no need for discovery[.]"). To allow wide-ranging discovery and the introduction of evidence that was never before agency decisionmakers is to invite the district court to conduct a prohibited de novo review of the issue before the agency. *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1052 (2d Cir. 1985); *see Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (if "a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision").

There are some limited exceptions to this record-review rule, such "(i) if it appears that the agency relied on documents or materials not included in the record or if the agency deliberately or negligently excluded documents that may have been adverse to its decision; (ii) if background information is needed to determine whether the agency considered all the relevant factors, or to permit explanation or clarification of technical terms or subject matter; or (iii) if the agency so failed to explain administrative action that it frustrates judicial review." *Brandon*, 115 F. Supp. 3d at 684. However, these exceptions apply "only in very limited circumstances" and the party seeking to admit extra-record evidence bears the burden of demonstrating that a relevant exception applies. *Id.*; *see also Save Strawberry Canyon v. U.S. Dep't of Energy*, 830 F. Supp. 2d 737, 759 (N.D. Cal. 2011). None of these exceptions applies here. In particular, Plaintiffs cannot demonstrate that discovery is necessary because the administrative record is inadequate or because there is evidence of bad faith. Nor does Plaintiffs' inclusion of a constitutional claim entitle them to discovery.

A. Plaintiffs Cannot Demonstrate That The Administrative Record Is Inadequate

"[T]here is a presumption that the agency properly designated the administrative record, and plaintiffs must show clear evidence to the contrary to obtain discovery." *Tafas*, 530 F. Supp. 2d at 795; *see also Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006) (explaining that plaintiffs seeking to challenge an administrative record "must put forth concrete evidence to show that the record was not properly designated"); *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487-88 (D.C. Cir. 2011). Merely "showing a theoretical possibility that other documents not in the record exist" is not enough to overcome the presumption that the agency properly designated the record. *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 371 (D.D.C. 2007).

Plaintiffs cannot show that there are any pertinent records that are not in the administrative record here. Defendants have already certified and filed a 1,300+ page administrative record that includes non-privileged documents that were directly or indirectly considered by the Secretary in deciding whether to reinstate a citizenship question on the census. Defendants also supplemented that record with an additional memorandum "to provide further background and context." *See* Not. of Filing Supp. Mem., ECF No. 26. Defendants are now gathering additional documents in response to a recent order in *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. July 5, 2018) [ECF No. 199],[1] and will be further supplementing the administrative record by July 23, 2018. Although Defendants believe the record already contains the nonprivileged materials directly or indirectly relied upon by the Secretary, as supplemented the record will be robust, amply will explain the decision, and will be entirely sufficient to decide this case should it survive Defendants' motion to dismiss.

Defendants have therefore endeavored in good faith to provide as complete, accurate, and comprehensive an administrative record as possible, and have responded promptly to add further materials to the record when questions were raised as to its sufficiency. Defendants' supplementation

[1] Defendants note that, in addition to ordering Defendants to supplement the administrative record, the New York court's July 5, 2018, order allowed plaintiffs to seek discovery. Defendants respectfully disagree with this decision for the reasons set forth herein.

of the administrative record cannot by itself be used to justify discovery. *See, e.g., TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002) (finding that neither the defendant's late addition of 70 pages to the record nor the apparent omission of three documents from the administrative record rendered the record suspect), *aff'd*, 433 F.3d 852 (D.C. Cir. 2006). Rather, Plaintiffs must identify documents that plausibly can be surmised to have been directly or indirectly considered by the decisionmaker but which are missing from the record as it now stands. Courts have consistently held that the administrative record before the court will include only those documents that "the agency decision-makers directly or indirectly considered." *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 308 (S.D.N.Y. 2012) (collecting cases); *State of N.Y. v. Shalala*, No. 93 Civ. 1330 (JFK), 1996 WL 87240, at *6 (S.D.N.Y. Feb. 29, 1996). Thus, "[t]o rebut the presumption [of regularity], the moving party cannot rely on mere speculation, but must introduce concrete evidence to 'prove that the documents were before the actual decisionmakers involved in the determination.'" *Midcoast Fishermen's Ass'n v. Gutierrez*, 592 F. Supp. 2d 40, 44 (D.D.C. 2008); *see also Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457 (D.C. Cir. 1994) (documents that "were neither prepared for nor provided to the [agency] or its staff" "were never part of the record in the first place."); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1456 (1st Cir. 1992) (affirming decision to exclude from administrative record documents that "were never seen" by agency whose decision was challenged). Defendants do not believe such a showing is possible. It is insufficient for Plaintiffs to suggest that the record is incomplete because its contents fall short of Plaintiffs' capacious imagining of what materials they think ought to be found in an administrative record.

Nor can Plaintiffs show that the administrative record reflects "such [a] failure to explain administrative action as to frustrate effective judicial review." *Camp*, 411 U.S. at 142-43. To the contrary, the Secretary's decision memo and the administrative record, even before supplementation, set forth his reasoning, the bases for that reasoning, and the evidence he considered in sufficient detail. Plaintiffs may disagree with the Secretary's rationale, but they cannot credibly claim that additional information is needed to understand it. If Plaintiffs believe that the record is inadequate to support the decision, then the next step is not to expand the basis for review to include documents not considered by the decisionmaker or to take testimony probing the minds of agency officials; it is instead for Plaintiffs to file a merits brief asking that the decision be set aside. *See id.* at 143.

That privileged materials such as deliberative memoranda and emails or attorney-client communications have not been included in the record is also insufficient to establish a gap or omission, as such documents do not form part of an administrative record in the first instance. *See Nat'l Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (affirming refusal to order production of deliberative intra-agency memoranda in record-review case); *see also In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 45 (D.C. Cir. 1986); *Town of Norfolk*, 968 F.2d at 1455-58; *Comprehensive Cmty*, 890 F. Supp. 2d at 312-13 ("[C]ourts have consistently recognized that, for the purpose of judicial review of agency action, deliberative materials antecedent to the agency's decision fall outside the administrative record."). "[E]xcluding deliberative materials from the administrative record[] has two distinct purposes. First, … it reflects that it is the agency's articulated justification for its decision that is at issue; the private motivates of agency officials are immaterial…. Second, [it] advances the functional goal of encouraging the free flow of ideas within agencies, with agency employees not inhibited by the prospect of judicial review of their notes and internal communications." *Comprehensive*

Cmty, 890 F. Supp. 2d at 312.[2]

B. Assertions of Pretext or Bad Faith Do Not Justify Discovery

Plaintiffs have also failed to make the "strong showing" of bad faith or improper behavior required to establish another one of the exceptions to the general prohibition on extra-record discovery. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). "[M]ere allegations of bad faith are inadequate to overcome the presumption that government officials have acted properly and in good faith. Instead, to obtain discovery beyond the administrative record on the basis of bad faith there must be a strong preliminary showing of impropriety." *Tafas*, 530 F. Supp. 2d at 797 (citations omitted)); *see also Saratoga Dev. Corp.*, 21 F.3d at 458. To overcome the presumption of good faith and regularity that is accorded to government officials, *Comprehensive Cmty.*, 890 F. Supp. 2d at 309, it is not enough merely to cast aspersions at the agency's motives. Rather, a "[p]laintiff must present 'well-nigh irrefragable proof' of bad faith or bias on the part of government officials." *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (citations omitted).

Plaintiffs have not met that burden here. Although Defendants do not have the benefit of Plaintiffs' submissions and therefore cannot expressly respond to Plaintiffs' arguments, Plaintiffs' "bad faith" arguments may rest on three possible grounds—none of which warrant discovery outside the administrative record, and certainly not discovery into materials beyond those that were before the decisionmaker either directly or indirectly. First, it may be that Plaintiffs will argue that the stated rationale for the decision to add the citizenship question was pretextual because, *e.g.*, it is not supported by the articulated rationale of enforcing the Voting Rights Act, because the question was insufficiently tested, or because the decision ignored the advice of lower level staff. Compl. ¶¶ 9, 72, 82-104. Yet such allegations go to the merits inquiry, not to whether discovery is warranted. *See Comprehensive Cmty*, 890 F. Supp. at 315 ("[Plaintiff's] argument as to bad faith consist of merits arguments. … However, to establish bad faith requires a strong showing; this showing is not made out by the mere fact that a court may disagree with the agency on the merits or find error, procedural or substantive, by the agency decision-maker."); *Ali v. Pompeo*, 16-cv-3691-KAM-SJB, 2018 WL 2058152, at *6 (E.D.N.Y. May 2, 2018) ("[Plaintiff] is arguing about the merits of his APA claim; that the ultimate resolution of his case may be in his favor does not mean that the Court should order discovery.").

Second, it appears that Plaintiffs intend to point to statements from individuals outside Commerce or to statements regarding the subjective motivations of the President of the United States. *See, e.g.*, Compl. ¶¶ 82-89. However, such statements are irrelevant. The views of third parties outside the government cannot possibly be imputed to the Secretary—particularly when there is no indication that he was even aware of such comments, much less relied on them. For example, to the extent that Plaintiffs point to a document in the record showing an isolated, unsolicited communication from Kris Kobach transmitting his views to the Secretary, *see* A.R. 764, there is nothing in the record to suggest that the Secretary shared or adopted Mr. Kobach's views. Similarly, any subjective motivations of the President are irrelevant because the Secretary of Commerce, not the President, made the decision challenged here. Further, the "presumption of regularity," *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926), applies with the utmost force to the President himself.

In any event, the Secretary's "actual subjective motivation … is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior." *In re Subpoena Duces Tecum*, 156 F.3d at

---

[2] Defendants do not believe a privilege log is required but will provide one in view of the fact that they are preparing one to comply with the court's July 5, 2018, order in *New York v. U.S. Department of Commerce*.

1279-80 (emphasis added). Courts should not lightly endeavor to divine the subjective motivations of senior government officials in reviewing facially legitimate government action. *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 616-17 (2007) (Kennedy, J., concurring); *cf. Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Where, as here, there is a "contemporaneous explanation" for an agency's decision, its validity "must . . . stand or fall on the propriety of that finding." *Camp*, 411 U.S. at 143. Discovery probing the mental processes of decisionmakers is beside the point and should not be permitted. *See, e.g., United States v. Morgan*, 313 U.S. 409, 421-22 (1941) (criticizing decision to allow "the deposition of the Secretary," because "it was not the function of the court to probe the mental processes of the Secretary" in a record-review case); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) ("It is hardly necessary to say that when a decision has been made by the Secretary … courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."). "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Hgts. v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). Thus, "bare allegations of malice should not suffice to subject government officials … to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

C. Plaintiffs' Constitutional Claims Are Not A Basis For Discovery

The presence of an overlapping constitutional claim does not entitle Plaintiffs to take discovery probing the minds of agency decisionmakers because the APA and its strictures on judicial review govern all claims in this case. Any attempt by Plaintiffs to portray their constitutional claims as distinct from, and not subject to, the limitations imposed by the APA on judicial review should be rejected. This is because Congress did not carve out constitutional claims from the APA's strictures governing challenges to agency decisions. Indeed, the APA specifically provides for review of agency action that is "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. § 706(2)(B), and the APA provides the waiver of sovereign immunity for Plaintiffs' constitutional claims. All of Plaintiffs' claims challenge the same discrete, final agency action; reframing those claims to rely on subtly distinct theories "cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action." *Charlton Mem'l Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993); *see also Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 & n.9 (6th Cir. 2017) (rejecting argument that constitutional claim warranted extra-record discovery and explaining that constitutional claim "is properly reviewed on the administrative record" absent showing of bad faith), *cert. denied*, No. 17-955, 2018 WL 3013822 (June 18, 2018).

Extra-record discovery would be particularly inappropriate here because Plaintiffs' constitutional claims fundamentally overlap with their APA claims. *See, e.g., Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017); *Alabama-Tombigbee Rivers Coal. v. Norton*, No. CIV.A.CV-01-S-0194-S, 2002 WL 227032, at *3-6 (N.D. Ala. Jan. 29, 2012). Indeed, Plaintiffs' constitutional challenges duplicate their APA claims: under both theories, Plaintiffs allege that the Secretary's decision to reinstate a citizenship question will diminish census response rates, resulting in an undercount of the population. Permitting discovery for such overlapping constitutional and APA challenges would "incentivize every unsuccessful party to agency action to allege . . . constitutional violations to trade in the APA's restrictive procedures for the more even-handed ones of the Federal Rules of Civil Procedure." *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 61 F. Supp. 3d 1013, 1238 (D.N.M. 2014).

II. No Discovery Should Take Place Before Resolution Of Threshold Arguments In Defendants' Motion To Dismiss.

In the event the Court rules that extra-record discovery is permissible in this case, such

discovery should nonetheless be stayed pending the Court's resolution of the threshold arguments in Defendants' motion to dismiss. That motion presents substantial threshold arguments under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), including that (1) Plaintiffs lack standing to bring this action, (2) Plaintiffs' case is barred by the political question doctrine, (3) judicial consideration of Plaintiffs' APA claim is barred because the Secretary's decision is committed to agency discretion, and (4) Plaintiffs fail to state a claim under the Enumeration Clause. An analogous situation recently arose in a case involving a request to expand the administrative record and obtain burdensome discovery before the Court had ruled on the justiciability of a decision by the Acting Secretary of the Department of Homeland Security. There, the Supreme Court granted a writ of mandamus and overturned an order to supplement the administrative record, concluding that the District Court should have "first resolved the Government's threshold arguments" because "[e]ither of those arguments, if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *In re United States*, 138 S. Ct. at 445. This Court likewise should resolve Defendants' motion to dismiss—raising similar justiciability issues—before authorizing any extra-record discovery.

III. Plaintiffs' Request For Expert Discovery Is Premature.

Plaintiffs also press for a schedule for "expert discovery," by which they appear to be seeking a preliminary opinion from the Court that expert testimony will ultimately be *appropriate* or *admissible* in this case.[3] That request is premature. The appropriateness and admissibility of expert testimony cannot be decided in the abstract. Whether expert testimony is appropriate or admissible will depend on the particular claim for which that testimony is offered, but Defendants' motion to dismiss is still pending and the Court has not decided which (if any) of Plaintiffs' claims can proceed. Plaintiffs also have not identified any information about their anticipated experts that would allow the Court to evaluate whether their testimony might be appropriate or admissible—such as areas of expertise or qualifications, let alone methodologies or opinions. Once the Court has decided which claims can proceed and Plaintiffs have provided their expert reports, Plaintiffs will have a full opportunity to be heard on this issue, either on evidentiary objections at summary judgment or on motions in limine before trial. Until then, Plaintiffs effectively seek an advisory opinion. Their request should be denied as premature.

If not denied as premature, Plaintiffs' request for a preliminary opinion that expert testimony is appropriate and admissible should be denied on the merits. On a claim challenging federal agency action under the Administrative Procedure Act, judicial review "is typically limited to the administrative record that was available to the agency at the time of its decision." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 201 (4th Cir. 2009). Even in cases where consideration of extra-record evidence is appropriate, courts are not free "to simply substitute the judgment of plaintiff's experts for that of the agency's experts." *Id.*; *see also Webb v. Gorsuch*, 699 F.2d 157, 160 (4th Cir. 1983) ("When there is conflicting expert opinion, it is for the administrative agency and not the courts to resolve the conflict.").

Defendants thank the Court for consideration of the issues raised in this letter.

---

[3] Plaintiffs apparently believe that Judge Furman has ruled that expert testimony will be appropriate and admissible. That is incorrect. Judge Furman merely entered a schedule for designating experts under Rule 26(a)(2)(D). *See* Order, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. July 5, 2018) [ECF No. 199]. This means that, *if* a party intends to offer expert testimony, the party must disclose its experts' reports in accordance with that schedule; otherwise, the expert testimony will be excluded as untimely disclosed. Judge Furman has not decided—and the parties have not briefed—whether expert testimony is appropriate or admissible.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Branch Director

s/ Carol Federighi

KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel.: (202) 514-1903