No. 18-557

IN THE
Supreme Court of the United States

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

On Petition for a Writ of Mandamus to the United States District Court for the Southern District of New York

BRIEF OF RESPONDENTS NEW YORK IMMIGRATION COALITION ET AL. IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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RULE 29.6 STATEMENT

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INTRODUCTION

Secretary Ross testified repeatedly to Congress and told the public in a decisional memo that he added a citizenship question to the Decennial Census "solely" because DOJ requested it for VRA enforcement—a request that he said DOJ "initiated"—and that he had not spoken to "anyone in the White House" in connection with adding the question. App. 15a-16a, 136-37a, 150a. It is undisputed that none of that was true. In fact, as the district court found, the truth was just the opposite. Secretary Ross did speak with the White House about adding the question well before DOJ was ever involved. He then ordered his aides at the Commerce Department to find a way to add the citizenship question, and they came up with the VRA rationale. And Secretary Ross then personally solicited DOJ to "request" addition of the question for purposes of the VRA. Acting Assistant Attorney General John Gore, who authored DOJ's request, has now admitted in his deposition not only that census-based citizenship data "is not necessary for DOJ's VRA enforcement efforts," but that he has no idea whether the question will even produce citizenship data that is "more precise"—i.e., *better*—than the data DOJ currently has through existing sources. Dkt. 491-2 at 233, 300.[1]

None of this is proper, normal, good faith administrative practice. Cabinet secretaries who have legitimate reasons of their own to take agency action do not normally order their aides to conjure up a justification on behalf of another agency, and then launder that justification through the other agency. And cabinet secretaries do not normally misrepresent

[1] Docket cites are to 18-cv-2921 unless otherwise specified.

facts to Congress and the public in an effort to obfuscate the true origins and reasons for their decisions.

The only question here is whether the district court abused its discretion in concluding that these extreme and unusual facts warranted discovery—not a ruling against Commerce on the merits, just discovery. There is no dispute that a preliminary showing of bad faith or improper behavior can support extra-record discovery. And for good reason: evidence of bad faith or improper behavior suggests that the administrative record will not tell the full story, such as by omitting the true basis for the agency's decision or by omitting unfavorable facts or evidence that might lead a court to find that a decision was arbitrary, capricious, or even unconstitutionally discriminatory.

The district court had ample reason to find that Plaintiffs had made a strong preliminary showing of bad faith on July 3 (when it ordered extra-record discovery) and on September 21 (when it ordered Secretary Ross's deposition). By July 3, Secretary Ross had already publicly changed his story about the genesis of the citizenship question, and the administrative record suggested his testimony about the White House was also false (a falsehood now confirmed through extra-record discovery). And the initial Administrative Record included a January 19 memo from the Census Bureau's chief scientist flatly contradicting Ross's March 26 statement that no evidence showed adding the question would depress minority response rates.

The evidence that has now come out through extra-record discovery confirms that the administrative record does not tell the full or even an accurate story. It shows that DOJ did not think it needed a citizen-

ship question for VRA enforcement until Commerce suggested it; that AAAG Gore authored the request even though he didn't think it was necessary and didn't know whether it would be helpful; and that Attorney General Sessions personally forbade DOJ officials from meeting with Census officials to discuss whether DOJ could obtain more accurate citizenship information through existing sources.

Discovery is over (save the potential Ross deposition), and trial ends tomorrow (November 14). It would be unprecedented for this Court to grant mandamus to tell the district court what evidence to consider in rendering a decision—when that decision and its evidentiary basis will be fully reviewable on appeal. And this Court should allow Secretary Ross's deposition to proceed. He is the decisionmaker (as Defendants admit) and it is his personal conduct—including his misrepresentations to Congress and the American public—that supports the district court's finding that plaintiffs made a strong preliminary showing of bad faith. If this showing does not warrant discovery and the deposition of a Cabinet secretary, nothing will.

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"—citizens and non-citizens—residing in each state. The Decennial Census plays a foundational role in the democratic process. All states use it to draw their congressional districts, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2016), and many states and municipalities use the data to draw state or municipal legislative districts. Because of

the one-person, one-vote rule, when a local community is disproportionately undercounted in the Census, the community will be placed in a congressional or legislative district 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.

B. The Census Bureau's Efforts to Prevent Undercounting of Minority Communities

The Census Bureau refers to the undercounting of particular racial and ethnic groups as a "differential undercount." Compl. ¶ 78 (18-cv-5025 Dkt. 1). Groups that have historically been the subject of a differential undercount include racial and ethnic minorities, immigrant populations, and non-English speakers. *Id*. ¶ 75. The Census Bureau has determined that Latinos in particular are at a greater risk of not being counted; Latinos were undercounted by substantial numbers in both the 1990 and 2010 Decennial Censuses. *Id.* ¶¶ 76-77.

C. Defendants' Addition of the Citizenship Question

The Census Bureau has for decades opposed inclusion of a question about citizenship status on the Decennial Census, for fear of exacerbating the differential undercount by depressing minority response rates. *Id*. ¶¶ 81-90. Although the 1950 Census asked respondents not born in the United States about citizenship status, a citizenship question did not appear 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 presi-

dents 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 citizens and non-citizens alike. *Id*. ¶¶ 84-90. The Census Bureau has instead collected citizenship information through sample surveys, including the now-discontinued census "long form"—which was previously sent to one in six households during the same year as the Decennial Census—and the American Community Survey ("ACS"), a yearly survey of approximately 2% of households that is used to generate statistical estimates that may be used to adjust for undercount. *Id*. ¶¶ 92-95.

On March 26, 2018, however, without any testing whatsoever, Secretary Ross abruptly instructed the Bureau to include a citizenship question on the 2020 Decennial Census. App. 136a-151a. Secretary Ross stated that his decision responded to a December 12, 2017 letter from the Department of Justice ("DOJ Letter"), requesting reinstatement of the question to produce citizenship data at the census block level to assist with enforcing the VRA. App. 136a. The DOJ Letter did not explain the sudden need for granular citizenship information from the Decennial Census, how such information would aid in enforcement of the VRA, or why citizenship data from Census Bureau sample surveys—on which DOJ has always relied for VRA enforcement—had become inadequate. App. 152a-157a.

In directing addition of the citizenship question, the Ross Memo bypassed the Census Bureau's "extensive testing, review, and evaluation" procedures, Compl. ¶ 155, as well as the Census Bureau scientific advisory panels the Bureau typically employs before making changes to the census questionnaire, Compl.

¶¶ 151-63. The Ross Memo stated that there was no need to test the effect of putting a citizenship question on the Decennial Census because it had previously appeared on Census Bureau sample surveys, which are sent to only a portion of the population. App. 138a. The Memo made no effort to reconcile that statement with its observation elsewhere that "the Decennial Census has differed significantly in nature from the sample surveys." App. 141a. It also did not address Census Bureau evidence that many respondents answered the citizenship question incorrectly, and that the question depressed overall response rates. Administrative Record ("AR") 1277, 1280, 1283-84. Without supporting evidence, the Ross Memo concluded that the "value of more complete" citizenship data "outweigh[s] … concerns" regarding non-response and rejected various other options to calculate citizenship data, including simply using administrative records to which the Census Bureau has access. App. 150a, 142a-144a. And the Memo did not disclose that the Census Bureau does not even know if citizenship data to be collected through the census can be used to produce more accurate block-level data, because of statutorily-mandated "disclosure avoidance procedures" that require the Bureau to obscure granular data before release to DOJ and the public, to avoid disclosure of confidential information. AR8912; Abowd Dep. 50-54, 65-68, 70-71, 100-101.[2]

At a March 20 hearing before the House Appropriations Committee, Secretary Ross stated that, in considering adding a citizenship question to the census, he was "responding solely to the Department of

[2] Dr. Abowd is the Census Bureau 30(b)(6)'s deponent.

Justice's request." App. 15a. He testified that he had not discussed the citizenship question with "anyone in the White House." App. 16a. At another hearing on March 22, 2018 before the House Ways and Means Committee, Secretary Ross testified that the DOJ "initiated the request" for a citizenship question. App. 15a.

In the face of expected discovery, Secretary Ross changed his story. At DOJ's urging, Dkt. 490-2 at 100-01, 247-49, Secretary Ross finally disclosed in a June 21, 2018 Supplemental Memo that he actually began considering the citizenship question shortly after his appointment as Secretary of Commerce in February 2017—nearly ten months earlier than the date he provided in the original memorandum. App. 134a. Secretary Ross admitted that other unnamed "senior Administration officials" had proposed adding the citizenship question and that he subsequently "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, Secretary Ross, and not DOJ, originated the idea of adding the citizenship question, Dkt. 490-2 at 250-52, and then Secretary Ross asked DOJ to ask Commerce to add the citizenship question based on a VRA rationale. As a consequence of extra-record discovery in this case, on October 11 Defendants finally acknowledged that the White House had in fact asked Secretary Ross to consider a citizenship question. Dkt. 379-1 at 3-4.

D. District Court Proceedings

1. Plaintiffs' complaint in this case (18-cv-5025) was filed on June 8, 2018 in the Southern District of New York, and was consolidated for trial with the

lawsuit filed by New York and other states (18-cv-2921). Plaintiffs are five organizations that serve immigrant communities likely to be affected by a differential undercount. The complaint alleges that the addition of the citizenship question to the 2020 Census is arbitrary and capricious in violation of the APA and constitutes intentional discrimination in violation of the Fifth Amendment.

2. Defendants produced an administrative record on June 8, 2018, but the record was incomplete. On July 3, 2018, the district court heard motions to supplement the administrative record and conduct discovery. App. 28a; Dkt. 199.

The district court found that Plaintiffs had rebutted the "presumption of regularity" that typically attaches to an agency's designation of the administrative record and ordered Defendants to complete the administrative record, with a privilege log, and to serve initial disclosures. App. 95a-98a, 103a.

The court also granted Plaintiffs' motion to permit limited extra-record discovery. App. 98a. Applying *National Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997), Judge Furman made four findings that supported his conclusion that Plaintiffs had made a "'strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith.'" App. 98a-100a. 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." App. 98a (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.'" App. 98a-99a (citing AR1277). Third, Defendants "deviated significantly from standard operating procedures in adding the citizenship question" and "added an entirely new question after substantially less consideration [than is typical] and without any testing at all." App. 99a. 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." App. 99a-100a.

The court strictly limited the scope of discovery. App. 100a-102a (limiting Plaintiffs to 10 depositions and authorizing discovery only from the Departments of Commerce and Justice). The court declined at that stage to authorize the deposition of Secretary Ross, stating that it would do so only if discovery and other depositions proved insufficient. *Id.* The court also refused to order discovery from third parties who communicated with Secretary Ross and other Commerce officials in connection with the citizenship question.

3. On September 7, 2018, well over two months after the district court ordered extra-record discovery and three weeks after the district court ordered AAAG Gore's deposition, Defendants sought mandamus in the Second Circuit. The Second Circuit denied the petition for mandamus. App. 5a-7a. The court held that the district court had "applied controlling case law and made careful factual findings" in ordering Defendants to supplement the administrative record and to provide limited extra-record discovery, including AAAG Gore's deposition, based on Plaintiffs' showing of bad faith. App. 6a-7a.

4. On September 21, the district court granted Plaintiffs' motion to compel the deposition of Secretary Ross. App. 9a. Applying the Second Circuit's "exceptional circumstances" test for the deposition of high-ranking officials, the district court found that "a deposition of Secretary Ross is appropriate" because he "plainly has 'unique first-hand knowledge related to the litigated claims,'" App. 11a (quoting *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013)), 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," App. 17a-18a. The district court noted that Defendants themselves "argued vigorously that '[t]he relevant question in these cases 'is whether Commerce's stated reasons for reinstating the citizenship question were pretextual,'" and thus had acknowledged "the centrality" of the "intent" of the "ultimate decisionmaker" at the Department of Commerce—Secretary Ross. App. 12a-13a.

The court concluded that Secretary Ross's intent, including whether he relied on a pretextual justification for adding the citizenship question, was highly relevant to Plaintiffs' APA and equal protection claims. App. 11a-14a. And given "the unusual circumstances presented here, the concededly relevant inquiry into 'Commerce's intent' could not possibly be conducted without the testimony of Secretary Ross himself." App. 13a. "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." App. 13a, 17a (citing deposition testimony).

Independently, the district court found that a deposition was warranted because Defendants and Secretary Ross had "placed the credibility of Secretary Ross squarely at issue," and 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. App. 15a-16a. The district court limited the deposition to four hours. App. 22a. The Second Circuit declined to quash the deposition. App. 3a.

5. Defendants then sought stays in this Court. On October 22, the Court declined to stay extra-record discovery or the AAAG Gore deposition, but stayed Secretary Ross's deposition pending a petition for mandamus. AAAG Gore was deposed on October 26. He testified, among other things, that citizenship data from the census was "not necessary" for VRA enforcement and that he does not even know whether such data would be any better than DOJ's existing data—directly contradicting the central finding of Secretary Ross' memo. Dkt. 491-2 at 233, 300. He also testified that the Attorney General forbade DOJ staff from meeting with Census Bureau personnel about alternative sources of data. *Id.* at 274, 284-88, 329.

The district court denied Defendants' request to stay trial pending the forthcoming petition for mandamus. Dkt. 485. The court observed that "Defendants remain free to argue at trial that the Court should disregard all evidence outside the administrative record and, if unsuccessful, can argue on appeal that the Court erred in considering extra-record evidence." Dkt. 485 at 3. The district court further not-

ed that the grounds for extra-record discovery had only grown "firmer" since its July 3 order, because the court subsequently permitted the equal protection claim to proceed. *Id.* at 10. "[I]t would be perverse—and risk undermining decades of equal protection jurisprudence—to suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'" *Id.*

Subsequently, this Court declined to stay the trial, which began November 5 and is scheduled to close November 14. Before trial began, the district court refused to permit live testimony from any of Commerce's senior officials and stated that its ruling will distinguish any findings based on extra-record discovery. App. 114a. Defendants now ask this Court to order the district court to (1) stop Secretary Ross's deposition; (2) not consider any extra-record discovery in its decision; and (3) limit its decision to the administrative record.

REASONS TO DENY MANDAMUS

This Court rarely intercedes in ongoing discovery disputes, and as the unanimous conclusions of all judges to consider these claims below indicate, there is no basis for such extraordinary intervention here. Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quotation omitted). The orders at issue in this case do not come close. The district court's carefully-explained decisions order limited extra-record discovery and the deposition of Secretary Ross, the most critical decisionmaker. There are no "exceptional cir-

cumstances amounting to a judicial usurpation of power," and no "clear abuse of discretion." *Id.* Defendants cannot show that their "right to issuance of the writ is "clear and indisputable," that issuing the writ is "appropriate under the circumstances," or that they have no other "adequate means" to obtain relief. *Id.* at 381. Trial concludes tomorrow and Defendants can fully pursue their objections to consideration of extra-record evidence on appeal from final judgment.

I. Defendants Have Not Demonstrated a Clear and Indisputable Right to Relief

A. The District Court Acted Well Within its Discretion in Ordering Limited Extra-Record Discovery Based on Plaintiffs' Strong Showing of Bad Faith

1. Where, as here, there is a "strong showing of bad faith or improper behavior" in an APA case, courts may go beyond the administrative record and may even "require the administrative officials who participated in the decision to give testimony explaining their action." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. 402, 415-16 (1971); *see also Nat'l Audubon*, 132 F.3d at 14. Defendants "do not dispute—and have never disputed—that 'bad faith' can justify extra-record discovery." App. 123a. Federal courts have recognized a diverse set of circumstances that may constitute bad faith and permit extra-record discovery in an APA case, including improper political influence, *ex parte* communications, unexplained omissions, and unexplained departures from prior administrative practice.[3] Indeed, Defendants

[3] *See*, *e.g.*, *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 54 (D.C. Cir. 1977) ("[W]here, as here, an agency justifies its actions by

themselves conceded that pretext alone would be grounds to vacate the decision to add a citizenship question. App. 12a.

2. Defendants cannot show that the district court clearly and indisputably erred in applying the bad faith standard. The district court pointed to a constellation of factors that fully supported its finding that Plaintiffs made a "strong showing" of bad faith. App. 98a-100a. They include: (1) the suggestion in the Supplemental Memo that Secretary Ross decided to add the citizenship before he received the DOJ Letter that he originally identified as the basis of his decision, and the fact that Secretary Ross reached out to DOJ to secure that letter, rather than vice versa, as he had testified; (2) evidence in the administrative record that Secretary Ross overruled senior career staff in the Census Bureau; (3) the Commerce Department's significant deviation from

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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) (invalidating agency decision as arbitrary and capricious where action was pretext for ulterior motive); *Parcel 49C Ltd P'ship v. United States*, 31 F.3d 1147, 1150-51 (Fed. Cir. 1994) (same); *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 541-42 (D.C. Cir. 1978); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245-46 (D.C Cir. 1971); *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 166 (E.D.N.Y. 2009); *Tummino*, 427 F. Supp. 2d at 231; *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).

established procedures for adding a question to the census; and (4) Plaintiffs' "prima facie showing" that Secretary Ross's stated justification for adding the citizenship question, namely to enhance enforcement of the VRA, was pretextual. *Id*. As the district court later explained, 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. App. 11a (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

Defendants maintain 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 not had informal discussions with other agencies or government officials before he received DOJ's formal request." Pet. 23. Secretary Ross's memorandum and congressional testimony *do* so state: he falsely testified under oath that he acted "solely" in response to DOJ's request and that he never spoke with the White House. App. 15a-16a, 136-37a, 150a. Moreover, Secretary Ross described the decisionmaking process as *beginning* with the DOJ request to include the citizenship question based on a VRA rationale, without disclosing that he was the one who told DOJ to make that request in the first instance. The district court correctly observed that the actual sequence of events was "exactly [the] opposite" of the description Secretary Ross initially provided. Dkt. 215 at 64.

This attempt at concealment is highly indicative of bad faith. Secretary Ross's misrepresentations, omissions, and affirmative effort to hide his own role in the process are strong evidence that he had other

reasons to add the citizenship question—reasons which, had they been benign, we could reasonably expect him to have publicly announced. Defendants make no real effort to address any of this evidence.

These misrepresentations and omissions aside, Defendants' underlying conduct demonstrates a departure from regular agency processes that supports Plaintiffs' preliminary showing of bad faith. Secretary Ross laundered his request through DOJ to make it seem like DOJ had originated the request. GRA35, 55; Dkt. 490-2 at 154.[4] This attempt to skirt normal procedure—by having one cabinet secretary covertly ask another cabinet secretary to have his department make the request—further supported the district court's conclusion that it was unlikely the administrative record would explain the real reason for Secretary Ross's decision. Indeed, evidence confirms that citizenship information is "not necessary" for VRA enforcement, Dkt. 491-2 at 233, 300; that adding the citizenship question would decrease response rates without producing accurate citizenship data, GRA75-76; that Commerce added the question without the ordinary testing, Dkt. 349-9 at 10 (Abowd Dep.); and that the Census Bureau might not even be able to provide data based on the question to DOJ at the block level, which was the purported reason for the DOJ request, AR8912; Abowd Dep. 50-54, 65-68, 70-71, 100-101.

This extraordinary sequence of events highlights that there is no real danger that allowing extra-

[4] "GRA" refers to the appendix filed by the government respondents (New York et al.) in No. 18A375, in opposition to Defendants' stay request, and available at goo.gl/m6U4Sa.

record discovery here will open the discovery floodgates in APA cases.

3. Defendants "badly mischaracterize the basis for the Court's finding of potential bad faith," which "relied on several considerations that, *taken together*, provided a 'strong showing … of bad faith.'" GRA254 (Sept. 7 order) (emphasis added); *see also* App. 111a-129a. While Defendants (unsuccessfully) nitpick the court's individual findings, such disagreements with the court's preliminary factfinding do not amount to the sort of exceptional circumstances or clear abuse of discretion that would justify mandamus.

a. Defendants argue that the district court improperly "assumed the truth" of Plaintiffs' allegations. Pet. 17. But the extra-record discovery rule cannot require litigants to provide the evidence they would obtain in discovery as a prerequisite to obtaining discovery. *Overton Park* requires only a "strong showing of bad faith or improper behavior" before extra-record discovery may be allowed, not definitive proof. 401 U.S. at 420. Regardless, the district court's finding rested on Defendants' own statements, uncontested *documents*, or historical facts. These include Secretary Ross's misleading Congressional testimony and memoranda and admission that he asked DOJ to request the addition of the citizenship question, portions of the administrative record showing that Defendants deviated from standard operating procedure, and historical facts concerning enforcement of the VRA that supported Plaintiffs' allegations that Defendants' VRA-enforcement rationale was pretextual. App. 98a-101a. Combined with Defendants' departures from established agency practice, those documents and facts support the district

court's finding that Plaintiffs made a "strong showing" of bad faith—*i.e.*, one that overcomes any "presumption of regularity." Pet. 24.

Since the July 3 oral order, the district court has re-confirmed its finding that Plaintiffs made a strong showing of bad faith in four written orders—orders granting the AAAG Gore and Secretary Ross depositions and twice declining to issue stays. The court noted that "if anything, the basis for that conclusion [that plaintiffs made a strong showing of bad faith] appears even stronger today" in light of discovery. App. 19a. As the district court explained, its finding was not based on Secretary Ross's uncontested right to change policy, or the fact that he was interested in a citizenship question when he took office. App. 123a. Rather, "the Court's conclusion was based on a combination of circumstances that were, taken together, most exceptional," the "[m]ost significant" of which was its finding "reason to believe that Secretary Ross had provided false explanations of his reasons for, and genesis of, the citizenship question." App. 123a-24a.

b. Defendants next argue that the district court was required to find that "the Secretary 'act[ed] with an 'unalterably closed mind' or was 'unwilling or unable' to rationally consider arguments.'" Pet. 20 (quoting *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015)). But the unalterably closed mind standard is used only to determine whether a decisionmaker must be disqualified from the rulemaking process. *See Mississippi Comm'n*, 790 F.3d at 183. Defendants cite no case that requires showing that the decisionmaker had an

"unalterably closed mind" before a party can obtain extra-record discovery in an APA case.

Defendants also argue that it is not "bad faith or improper bias" if the decisionmaker has "additional subjective motives" as long as he "sincerely believes the stated grounds on which he ultimately bases his decision, and does not … act on a legally forbidden basis." Pet. 18 (citing *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185 (10th Cir. 2014)). But Secretary Ross told Congress that his "sole[]" reason was DOJ's VRA rationale. App. 15a. Besides, *hiding* the true genesis of the stated reason is strong evidence of bad faith—such as an effort to conceal a "legally forbidden" motivation, or an effort to conceal that the stated reason was impermissibly arbitrary. And 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. App. 11a (quoting *Burlington*, 371 U.S. at 168). The government's argument that a decisionmaker might have more than one legitimate reason to take agency action (Pet. 18) does not mean the decisionmaker can offer a *pretextual* reason.

The government acknowledged as much below (App. 12a), and *Jagers* is not to the contrary. It simply held that additional legally permissible reasons for agency action would not invalidate agency action that was supported by "objective scientific evidence." 758 F.3d at 1185. It has nothing to do with what sort of evidence supports looking behind the administrative record (including to investigate the "evidence" on which the agency relied). *Jagers* also expressly distinguished evidence of "external political pressures from a separate branch of government,"

id.—precisely what Secretary Ross tried to conceal from Congress when he falsely denied speaking to the White House about the citizenship question.

Nor did the district court clearly err in finding that Plaintiffs had made a showing of prejudgment. Defendants ignore evidence in the Administrative Record that Secretary Ross decided to add the question well before DOJ expressed any interest in doing so—starting with Secretary Ross's concession in the June 21 supplemental memorandum that *he* requested that DOJ make the request after discussing the citizenship question with "other senior Administration officials." App. 17a, 134a.

As a key senior staff member admitted, "the initial impetus for putting the citizenship question on the 2020 census was not DOJ's idea," it came from Secretary Ross. Dkt. 490-2 at 337. In May 2017, Secretary Ross admonished his senior staff that he was "mystified" why nothing had been done on his "months old request that we include the citizenship question" on the census. GRA18. "At that point in time, the Department of Justice had made no request to Commerce for the addition of a citizenship question …." Dkt. 490-2 at 250-51. Secretary Ross then repeatedly asked his staff about their progress on getting a citizenship question in place. Dkt. 490-2 at 337-38. In September 2017, his staff contemplated having Commerce add the question even if DOJ would not make the request. GRA38. In late November 2017, when Justice still hadn't made its request, Secretary Ross complained to his staff that "[w]e are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." GRA59. Had

DOJ's needs been the driver of the citizenship question, and not mere pretext, these concerns would be inexplicable.

c. The district court properly considered the fact that Secretary Ross overruled the senior Census Bureau career staff's recommendation against adding a citizenship question. The "mere fact" of the overruling was not dispositive, Pet. 21; rather, Secretary Ross's explanation for the overruling made no sense on its face. The Census Bureau's chief scientist, Dr. John Abowd, opined that adding the citizenship question *will undermine* the quality of the very citizenship data DOJ purportedly needed for VRA enforcement, and recommended collecting that data through different means, primarily administrative records. GRA75-76. Secretary Ross rejected that option based on the fact that such records are not available for a small segment of the population—but he ignored the Census Bureau's advice that the Bureau could still determine the citizenship status for this subset of individuals with *greater accuracy* than any data collected through census. GRA75-76.

This is nothing like *Wisconsin v. City of New York*, 517 U.S. 1 (1996), which did not involve the APA, much less the bad faith standard for allowing extra-record discovery. And there, Census Bureau personnel acknowledged that the Secretary's position was reasonable and supportable. *Id*. at 24. Here, Census Bureau staff and statisticians were unanimous that adding a citizenship question will decrease the accuracy of the actual enumeration and is a highly flawed way to obtain the information DOJ purportedly desires for VRA enforcement purposes. GRA75-83. The technical evidence in the adminis-

trative record and the evidence produced in discovery all point to the same conclusion—adding a citizenship question to the census is a bad way to collect block level data.

d. Defendants make a similarly flawed attack on the district court's finding that they "deviated significantly from standard operating procedures in adding the citizenship question" by failing to conduct any testing. Pet. 21-22 (quoting App. 99a). Defendants point to Secretary Ross's explanation that a citizenship question had previously appeared on sample surveys but ignore his concession that "the Decennial Census has differed significantly in nature from the sample surveys." App. 141a. They also ignore the evidence in the administrative record that the question was not performing well on those surveys—with over 30 percent of some populations answering it incorrectly. AR1283-1284.

e. Defendants also fall short in challenging the district court's finding that Plaintiffs made a prima facie showing that Secretary Ross offered a pretextual justification—VRA enforcement—to support adding the citizenship question. Pet. 22. Defendants insist that DOJ relied on citizenship data from the decennial census in VRA enforcement between 1970 and 2000, but they admit that this data came "from the long-form questionnaire," *id*., which was not sent to every household; it was survey sample data, and thus materially identical to the statistical estimates on which DOJ currently relies. The type of data that Commerce plans to collect now—census responses about the citizenship status of every member of every household in the United States—has *never* been collected while the VRA has been in effect. Moreover,

until Secretary Ross and his senior aides planted the seed, DOJ had never before cited a VRA-related need for citizenship data from the Decennial Census; never asserted that it had failed to bring or win a VRA case because of the absence of citizenship data from the Decennial Census; and never claimed that it had been hampered in any way by relying on citizenship estimates obtained from sample surveys. And AAAG Gore has now testified that this data is not necessary to enforce the VRA. Dkt. 491-2 at 233, 300.

The administrative record contains still more evidence of pretext. It is undisputed that adding a citizenship question is a costly and unreliable tool for obtaining the block level data DOJ purportedly needed. GRA76. Dr. Abowd explained that this information could be obtained at relatively little cost through existing administrative records. But 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 administrative sources." GRA75. And in comparing the two alternatives, Dr. Abowd explained that a citizenship question will "improv[e]" block-level data "but with serious quality issues remaining," while using administrative records presents the "[b]est option for block-level citizenship data" with "quality much improved." GRA76. That Secretary Ross nevertheless went ahead with his decision to add the citizenship question even though all of the evidence in the administrative record established that it was not a reliable way to produce the data DOJ purportedly wanted strongly suggests that he made the decision for other reasons.

The extra-record discovery reinforces the district court's pretext finding. Citing a May 2, 2017 email from the administrative record, Defendants insist that "Commerce officials sincerely believed 'that DOJ has a legitimate need for the [citizenship] question to be included.'" Pet. 22 (quoting App. 158a). This perfectly illustrates the need for extra-record discovery. Earl Comstock, a senior Commerce aide, testified at his deposition that when he sent that email, he had not yet spoken with anyone in DOJ about the citizenship question and could not possibly have known whether "DOJ has a legitimate need" for adding the question. Dkt. 490-2 at 157. Anyway, the email actually said that Commerce "need[ed] to work with Justice to *get them* to request" a citizenship question, and that Mr. Comstock had located "court cases" that Mr. Comstock believed could "*illustrate* that DoJ has a legitimate need." App. 158a (emphasis added).

In fact, Mr. Comstock all but admitted that the VRA justification was pretextual. He testified that he believed it was his job to come up with a "legal rationale" to support adding the citizenship question. Dkt. 490-2 at 266. After Secretary Ross decided to add the question, Comstock came up with the VRA justification and then set about to find an agency that would make the request. Dkt. 490-2 at 153-55, 265-66. After Commerce struck out with DHS, *see* GRA38, Secretary Ross eventually spoke with Attorney General Sessions and DOJ agreed to make the request. GRA21, 39-44, 55, 59, 267; App. 158a. Despite not knowing if the Decennial Census citizenship data was better than existing citizenship information to which DOJ already had access, and despite admitting that the information was not necessary to

enforce the VRA, *supra* at 11, AAAG Gore then ghostwrote DOJ's request, which did not disclose that the Department of Commerce had actually solicited the request in the first place. App. 152a. AAAG Gore testified that Attorney General Sessions then instructed him to refuse a meeting invitation by Census Bureau personnel to discuss alternative ways the Bureau could provide DOJ with citizenship information. Dkt. 491-2 at 274, 284-88, 329. Secretary Ross 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 DOJ purportedly needed. *Supra* at 23. Defendants cannot deflect responsibility for the citizenship question's addition by pointing to DOJ.

f. The APA aside, extra-record discovery is independently justified because the organizational Plaintiffs bring a claim for unconstitutional discrimination on the basis of race and national origin. Dkt. 485 at 10 (stay order); App. 18a. "Having survived Defendants' motion to dismiss that claim, Plaintiffs were surely entitled to seek evidence to support their claim through at least limited discovery, including discovery probative of the decisionmakers' true 'intent' and 'purpose.'" Dkt. 485 at 10. "Indeed, it would be perverse—and risk undermining decades of equal protection jurisprudence—to suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'" *Id.* This Court has

recognized that discovery from governmental decisionmakers may be necessary to resolve constitutional discrimination claims. *Webster v. Doe*, 486 U.S. 592, 604 (1988). Defendants admitted to the Second Circuit that, when a "plaintiff alleges that an agency decisionmaker acted with discriminatory animus," this Court permits compelling the testimony of "high-ranking officials" in "'extraordinary circumstances.'" Pet. 26, No. 18-2857 (2d Cir.). That perfectly describes this case.

B. The District Court did not Clearly and Indisputably Err in Ordering the Deposition of Secretary Ross

Given the unusual centrality of Secretary Ross's motives to the APA and unconstitutional discrimination challenge at issue here, the district court did not "clearly and indisputably" err in compelling his deposition.

a. Defendants do not argue that the district court applied the wrong standard. Under the Second Circuit's decision in *Lederman*—and consistent with the standard that other courts of appeals have applied—a court may find "exceptional circumstances" and order a deposition of a high-ranking government official, if, for example, "the official has unique firsthand knowledge related to the litigated claims *or* [] the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman*, 731 F.3d at 203. Defendants concede that *Lederman* comports with this Court's precedents, including *United States v. Morgan*, 313 U.S. 409, 421-22 (1941). Still, Defendants ask this Court to use mandamus to police the court's application of the law to the facts. The Court should not do so.

Applying *Lederman*, the district court concluded that Secretary Ross had "unique first-hand knowledge" with respect to the APA claims and to the discrimination claims, which turn on whether the Secretary's stated rationale for adding the citizenship question was his actual rationale, and on whether the decision was made with discriminatory intent. App. 10a-11a. The court observed that Defendants themselves argued that "the relevant question" in these cases "is whether Commerce's stated reasons for reinstating the citizenship question were pretextual" and whether "Commerce actually believed the articulated basis for adopting the policy." App. 12a-13a (quoting DOJ). The court made factual findings that Secretary Ross did far more than just make the decision to include the citizenship question. He "was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree." App. 13a. He displayed "an unusually strong personal interest in the matter." App. 14a. Citing an email from the Secretary, the district court observed that the Secretary "demand[ed] to know as early as May 2017—seven months before the DOJ request—why no action had been taken on his 'months old request that we include the citizenship question,'" and "personally lobbied the Attorney General" to request the addition of the citizenship question, after being told that DOJ "did not want to raise the question." App. 14a. And the district court found that Secretary Ross's inconsistent statements before Congress and in his initial and supplemental memoranda placed his intent and credibility "squarely at issue." App. 15a.

The district court noted that three senior Commerce Department officials testified repeatedly in depositions that the Secretary "was the only person who could provide certain information central to Plaintiffs' claims," repeatedly answering questions with the statement, "You would have to ask [Secretary Ross]." App. 17a-18a. For example, which particular "other senior Administration officials" Secretary Ross spoke to about the citizenship question before he approached DOJ—and what they said—will directly bear on whether the VRA rationale was the Secretary's actual rationale. But, the district court noted, "[n]o witness has been able to identify to whom Secretary Ross was referring." App. 17a. The district court accordingly concluded that it is "plain" that "exceptional circumstances are present here, both because Secretary Ross has 'unique first-hand knowledge related to the litigated claims' *and* because 'the necessary information cannot be obtained through other, less burdensome or intrusive means.'" App. 18a (quoting *Lederman*, 731 F.3d at 203).

Nothing about this decision justifies mandamus. Where 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." *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. As noted, this includes cases involving bad faith, improper political influence, and *ex parte* communications. *See supra* n.3 (citing cases). Given the

district court's July 3 finding that Plaintiffs had made a strong preliminary showing of bad faith justifying extra-record discovery, it necessarily follows that testimony from the person whose conduct and decisions were the center of that conduct is essential to determining if the VRA justification he offered is pretextual.

b. Defendants argue that in an APA case the court should not probe the Secretary's "mental processes," and that an agency head's motives and intent can *never* be the basis for judicial review. Pet. 25-26 (quoting *Morgan II*, 313 U.S. at 422). But *Morgan II* just held that cabinet secretaries should be deposed rarely. *Overton Park* explained that district courts can compel testimony of the "administrative officials who participated in the decision"—including cabinet secretaries—so long as there is a strong showing of bad faith. 401 U.S. at 420. And Defendants attack a strawman in arguing that *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), creates no "exception" to *Morgan II*. Pet. 26-27. The district court did not say that it did. Rather, after having applied the bad faith exception this Court recognized in *Overton Park*, the court cited *NAHB*'s description of the APA standard of review simply for purposes of explaining why Ross's rationale was highly relevant. App. 9a-11a.

"[C]ourts have not hesitated to take testimony from federal agency heads … where, as here, the circumstances warranted them." App. 20a (citing examples). This would not even be the first census case in which a Secretary of Commerce was deposed. GRA262. But there is little risk that compelling a

four-hour deposition of Secretary Ross 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. The bad faith element in this case distinguishes the other cases on which Defendants rely (Pet. 28-29). There is no reason to believe that cabinet secretaries regularly (or ever) are personally involved in evading their own agency's procedures by soliciting another cabinet head to request action and then seeking to obscure what really happened from Congress and the public.

Defendants cite separation of powers concerns, but it is settled that courts can compel executive branch officials to testify. *Clinton v. Jones*, 520 U.S. 681, 702 (1997). This case involves no special considerations applicable to the "President or the Vice President." *Cheney*, 542 U.S. at 382. Moreover, where the testimony of the ultimate decisionmaker is essential so that courts can discharge their duty to evaluate whether the stated rationale for the agency's decision was its actual rationale, separation of powers concerns favor compelling that testimony. So does the public interest. App. 21a-22a.

c. Defendants' failure to challenge the district court's alternative, non-APA justification for the Ross deposition is reason alone to deny mandamus. App. 11a-12a (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)); *see* App. 18a. As the court explained, to prove their discrimination claim, "Plaintiffs must show that an 'invidious discriminatory purpose' was a motivating factor' in Secretary Ross's decision." App. 11a-12a. 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 the most important witness on the question of his own intent, justifying his deposition.

d. Defendants argue that the district court's focus on Secretary Ross's personal participation would open the door to deposing decisionmakers in every case. Pet. 23, 29. But the court took pains to emphasize that it was *not* holding that Plaintiffs could depose Secretary Ross "merely because [he] made the decision that Plaintiffs are challenging." App. 13a (emphasis added). Rather, the district court 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*." App. 13a (emphasis added). This includes the fact 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." App. 13a-14a.

Defendants next argue that the identity of the senior administration officials with whom Secretary Ross consulted "ha[s] no bearing on the legality of his decision" because consultation "'does not establish the required degree of bad faith.'" Pet. 29 (quotations omitted). But the former proposition does not follow from the latter. The district court did not hold that the fact of the Secretary's consultations *established* bad faith. The court merely held that the nature of these consultations was important in evaluating whether the Secretary's reliance on DOJ's purported VRA rationale was pretextual. Moreover, Defendants put these consultations at issue by highlighting them in the Supplemental Memorandum. Defendants also say the administrative record "reflect[s] the substantive views of the stakeholders who communicated with Secretary Ross"—but they mean only DOJ and Kansas Secretary of State Kris Kobach, not the "other government officials" with whom the Secretary consulted. Pet. 30.

e. Defendants argue that the district court refused to consider alternatives to a deposition. Pet. 27-28. But the district court offered a point-by-point explanation for not requiring Plaintiffs to rely on interrogatories, requests for admission, or a Rule 30(b)(6) deposition. App. 19a. The court not only explained why those alternatives would be insufficient; it observed that plaintiffs had *already tried* those options and they hadn't worked. *Id.* The fact that it took three versions of the same interrogatory response before Secretary Ross suddenly "recall[ed]" on October 10 that Steven Bannon asked him to discuss the citizenship question with Kris Kobach, GRA267, only confirms the district court's conclusions about

the need for extra-record discovery and depositions. As the district court held, a deposition is the only adequate way to "test or evaluate Secretary Ross's credibility" and, if necessary, to "refresh Secretary Ross's recollection." App. 19a.

II. Defendants Have Other Adequate Means to Obtain Relief, and Mandamus is Inappropriate

The Court should deny mandamus because it is not necessary or appropriate under the circumstances of this case, and because Defendants have other adequate means to obtain relief. 28 U.S.C. § 1651(a); *Cheney*, 542 U.S. at 381.

A. Defendants plainly fail to satisfy these standards with respect to extra-record discovery generally. All discovery (save the potential Ross deposition) has been taken, and trial will be over tomorrow. Defendants seek an order directing the district court to "exclude [extra-record discovery] from its consideration" and "confine its review … to the administrative record." Pet. 33. But since Defendants are "free to seek review of the propriety" of the district court's consideration of extra-record discovery "on direct appeal after a final judgment," it "cannot be said that [they] 'ha[ve] no other adequate means to seek the relief [they] desire[]." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). If this Court ultimately agrees that the district court erred in granting extra-record discovery, the Court can simply decline to consider those documents in assessing the merits of the claims here. The district court plans to distinguish in its proposed findings between findings based on materials outside the administrative record, App. 114a, so Defendants are simply wrong in arguing that the "judgment would have to be vacated" for a

"redo" if this Court ultimately holds that extra-record discovery was unwarranted. Pet. 31.

Evidentiary questions have always been reviewable after final judgment. Tellingly, Defendants cannot point to a single case where this or any other court used mandamus to instruct a district court in advance what evidence it could use in rendering a decision in an ongoing trial. This Court will be better equipped to decide these issues in the context of an actual decision. That is especially so given that much of the extra-record discovery that is being adduced at trial concerns plaintiffs' standing, expert testimony about the VRA, background information about census issues, or other issues that have nothing to do with Secretary Ross's "mental processes." Defendants' blunt request for an order directing the district court to "confine its review … to the administrative record," Pet. 33, makes no sense and highlights why mandamus is an inappropriate tool here.

Defendants' only "appropriateness" argument is that mandamus would avoid a "wasteful trial" (Pet. 32). But trial ends tomorrow and the district court is considering testimony from AAAG Gore and other agency fact witnesses through deposition designations, just as the parties will supplement the trial record with Secretary Ross's deposition if it goes forward. Moreover, the fact that "Defendants waited *nearly two full months*" to seek a stay or mandamus of the court's ruling on extra-record discovery compels the conclusion that mandamus is not appropriate. App. 122a; *Ex parte Am. Steel Barrel Co.*, 230 U.S. 35, 46 (1913) ("long delay in asking the extraordinary remedy of mandamus" "fully justif[ies]" denial).

B. Nor is mandamus necessary or appropriate with respect to Secretary Ross. As with extra-record discovery generally, Defendants could seek exclusion of his testimony on direct review. And a single four-hour deposition will hardly prevent the Department of Commerce from "discharg[ing] its constitutional responsibilities." Pet. 32. Indeed, Secretary Ross has testified before Congress three times about his decision to add the citizenship question to the census. Defendants cite *Cheney*, but that case involved "special considerations applicable the President and the Vice President," and even then the Court did not grant mandamus. 542 U.S. at 391-92. It should not do so here either.

CONCLUSION

The petition for mandamus should be denied.

Respectfully submitted,

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