No. 18A-350

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

APPLICATION FOR A STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States Department of Commerce; Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce; the United States Census Bureau, an agency within the United States Department of Commerce; and Ron S. Jarmin, in his capacity performing the non-exclusive functions and duties of the Director of the United States Census Bureau (referred to as the "Acting Director" in this brief).

Respondent in this Court is the United States District Court for the Southern District of New York. Respondents also include the State of New York; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Illinois; the State of Iowa; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of North Carolina; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Vermont; the State of Washington; the City of Chicago, Illinois; the City of New York; the City of Philadelphia; the City of Providence; the City and County of San Francisco, California; the United States Conference of Mayors; the City of Seattle, Washington; the City of Pittsburgh; the County of Cameron; the State of Colorado; the City of Central Falls; the City of Columbus; the County of El Paso; the County of Monterey; and the County of Hidalgo (collectively

plaintiffs in the district court in No. 18-cv-2921, and real parties in interest in the court of appeals in Nos. 18-2652 and 18-2856). Respondents further include the New York Immigration Coalition; Casa de Maryland, Inc.; the American-Arab Anti-Discrimination Committee; ADC Research Institute; and Make the Road New York (collectively plaintiffs in the district court in No. 18-cv-5025, and real parties in interest in the court of appeals in Nos. 18-2659 and 18-2857).

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Acting Director of the United States Census Bureau, respectfully applies for a stay of written orders and an oral ruling entered by the United States District Court for the Southern District of New York on September 21, 2018 (App., infra, 5a-16a), August 17, 2018 (id. at 17a-19a), and July 3, 2018 (id. at 95a-107a). Together, these orders specifically compel the depositions of two high-ranking Executive Branch officials -- the Secretary of Commerce, Wilbur L. Ross, Jr., and the Acting Assistant Attorney General (AAG) of the Justice Department's Civil Rights Division, John M. Gore -- and more generally expand discovery beyond the administrative record in this suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq.

This application arises from a pair of consolidated cases challenging the decision by Secretary Ross to reinstate a citizenship question on the decennial census. Questions seeking citizenship or birthplace information were part of every decennial census from 1820 to 1950 (except in 1840); and from 1960 through 2000 the decennial census continued to elicit such information from a sample of the population. Since 2005, the Census Bureau has included questions about citizenship and birthplace in detailed annual surveys sent to samples of the population. Respondents here challenge Secretary Ross's decision to reinstate a citizenship question on the 2020 decennial census, alleging that adding the question might cause an undercount because, among other things, some households containing individuals who are unlawfully present will be deterred from responding (despite their legal duty to respond). Therefore, respondents claim, the Secretary's decision was arbitrary and capricious, and violates various regulatory, statutory, and constitutional provisions.

The immediate dispute here is about whether respondents are entitled to probe Secretary Ross's mental state -- his subjective motivations -- when he decided to reinstate the citizenship question. Secretary Ross consulted with many parties, including Census Bureau, Commerce Department, and Justice Department officials, before announcing his decision, and he set forth his reasons in a detailed memorandum backed by a voluminous

administrative record. See App., infra, 117a-124a. Those reasons include the Justice Department's view that citizenship data from the decennial census would be helpful to its enforcement duties under the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 et seq. App., infra, 125a-127a. Not content to evaluate the legality of the Secretary's order based on the administrative record, respondents assert that Secretary Ross's stated reasons are pretextual, and that his decision was driven by secret motives, including animus against racial minorities. They seek -- and the district court agreed to compel -- wide-ranging discovery to probe the Secretary's mental state, including by deposing him and other high-ranking government officials.

This Court has long recognized that an agency decisionmaker's mental state is generally irrelevant to evaluating the legality of agency action. See Morgan v. United States, 304 U.S. 1, 18 (1938). So too has this Court recognized that compelling the testimony of a high-ranking government official -- especially a member of the President's Cabinet -- is rarely if ever justified. See United States v. Morgan, 313 U.S. 409, 422 (1941). Secretary Ross set forth the reasons supporting his decision to reinstate a citizenship question in a detailed memorandum, and the government has provided an extensive administrative record in support of that determination. The validity of the Secretary's decision is properly judged on that objective "administrative record already

in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam).

The district court nevertheless concluded that compelling a Cabinet Secretary's and Acting AAG's testimony was justified because respondents made a "strong showing of bad faith" on the part of Secretary Ross. App., infra, 13a (citation omitted). Yet the district court's stated reasons -- that Secretary Ross might have subjectively desired to reinstate the question before soliciting the views of the Justice Department; that he overruled subordinates who opposed reintroducing the citizenship question; that the citizenship question was not "well tested"; and that the Justice Department had not previously requested citizenship data for its VRA enforcement duties -- all are legally immaterial, and some are factually incorrect as well.

Nor does the district court's finding that "exceptional circumstances" warrant Secretary Ross's deposition survive scrutiny. App., infra, 12a. The court thought Secretary Ross's testimony uniquely vital because he was personally involved in the decision to reinstate a citizenship question and the decision is of great importance to the public. The Secretary's personal involvement in a significant policy decision is not exceptional, and the importance of the Secretary's decision in this case does not distinguish it from many other decisions of national importance that Cabinet Secretaries make.

Compounding its error, the district court did not adequately consider whether the information respondents hope to obtain from Secretary Ross could be obtained elsewhere. Respondents already have received extensive materials through discovery, including documents and testimony from the Secretary's closest aides. And Secretary Ross's testimony, much of which likely will be privileged, is unlikely to add anything material to respondents' understanding of those events. Moreover, to the extent extra-record discovery is appropriate, the government offered to supply the information respondents seek from Secretary Ross through interrogatories, requests for admission, or a deposition of the Commerce Department under Federal Rule of Civil Procedure 30(b)(6). See App., infra, 13a. At a minimum, the court should have ordered the parties to undertake these alternatives before it took the extraordinary and disfavored step of ordering a Cabinet Secretary's deposition.

Similar infirmities beset the district court's order compelling Acting AAG Gore's deposition. Neither respondents nor the district court explained how Acting AAG Gore could provide information about Secretary Ross's mental state or alleged hidden animus. And of course Acting AAG Gore's testimony on these topics would likely be privileged as well.

The standards for granting a stay are thus readily met in this case. The district court's orders mandating discovery outside

the administrative record, including by compelling the depositions of Secretary Ross and Acting AAG Gore, were in excess of the court's authority under the APA and violate fundamental principles of administrative law. As with similar administrative-record-related orders this Court has recently considered, the orders here "constitute[] 'a clear abuse of discretion'" and present a "classic case [for] mandamus relief." In re United States, 875 F.3d 1200, 1211, 1213 (9th Cir.) (Watford, J., dissenting) (citation omitted), vacated and remanded, 138 S. Ct. 443 (2017) (per curiam).

The balance of harms weighs strongly in favor of an immediate stay. Respondents have stated their intent to depose Acting AAG Gore and Secretary Ross on October 10 and 11, respectively. Absent a stay, these high-level Executive Branch officials will be forced to prepare for and attend these depositions, and those harms cannot be undone by an eventual victory on the merits. By contrast, respondents have no pressing need to depose these officials immediately. To be sure, the district court has set a trial date of November 5, and the government also desires an expeditious resolution of the ultimate legality of Secretary Ross's order in time to finalize the 2020 decennial census questionnaire. But inquiry into Secretary Ross's mental state -- or, for that matter, a trial -- is unnecessary to resolve that question under bedrock principles of administrative law. Rather, the district court must decide this challenge on "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) (per curiam).

In light of the looming depositions and the government's clear right to relief, the government seeks an immediate stay of all three orders pending completion of all further proceedings in this Court. The Second Circuit already has denied mandamus relief to quash Acting AAG Gore's deposition and to halt further discovery, and on October 2 denied the government's request to stay those orders. App., infra, 3a-4a, 129a. The Second Circuit has temporarily stayed Secretary Ross's deposition until at least October 9, when it will consider the government's mandamus petition to quash that deposition. Id. at 1a-2a. If the Second Circuit denies mandamus relief and lifts the stay on or after that date, however, it would leave little or no time for the parties and this Court to act before Secretary Ross's October 11 deposition. To avoid a needlessly rushed schedule, the government in this application seeks a stay of Secretary Ross's deposition as well.

After the Second Circuit resolves the dispute over Secretary Ross's deposition, the government intends to file a petition for a writ of mandamus or certiorari in this Court. The forthcoming petition will challenge, at a minimum, the orders compelling Acting AAG Gore's deposition and the extra-record discovery into Secretary Ross's mental state; and if the Second Circuit ultimately

declines to quash the order compelling Secretary Ross's deposition, the government's forthcoming petition will challenge that order too.

In the alternative, the Court could construe this application either as a petition for a writ of mandamus to the district court or as a petition for a writ of certiorari to the Second Circuit. (In the case of Secretary Ross's deposition, which the Second Circuit will consider on October 9, the Court could construe this application as a petition for a writ of mandamus or certiorari before judgment.) Either way, the government respectfully requests an immediate administrative stay of all three discovery orders while the Court considers this application.

STATEMENT

1. The Constitution requires that an "actual Enumeration" of the population be conducted every ten years in order to allocate representatives in Congress among the States, and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. Art. I § 2, Cl. 3. The Census Act, 13 U.S.C. 1 et seq., delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," and "authorize[s] [him] to obtain such other census information as necessary." 13 U.S.C. 141(a). The Census Bureau assists the Secretary in the performance of this responsibility. See 13 U.S.C. 2, 4. The Act directs that the

Secretary "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." 13 U.S.C. 5. Nothing in the Act directs the content of the questions that are to be included on the decennial census.

2. With the exception of 1840, decennial censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through 1950 specifically requested citizenship information. 18-cv-2921 Docket entry No. 215, at 8-10 (S.D.N.Y. July 26, 2018) (MTD Order).

Citizenship-related questions continued to be asked of some respondents after the 1950 Census. In 1960, the Census Bureau asked 25% of the population for the respondent's birthplace and that of his or her parents. Id. at 10-11. Between 1970 and 2000, the Census Bureau distributed a detailed questionnaire, known as the "long-form questionnaire," to a sample of the population (one in five households in 1970, one in six thereafter) in lieu of the "short-form questionnaire" sent to the majority of households. Id. at 11-12. The long-form questionnaire included questions about the respondent's citizenship or birthplace, while the short form did not. Ibid.

Beginning in 2005, the Census Bureau began collecting the more extensive long-form data -- including citizenship data -- through the American Community Survey (ACS), which is sent yearly

to about one in 38 households. Ibid. The replacement of the long-form questionnaire with the yearly ACS enabled the 2010 census to be a "short-form-only" census. The 2020 census will also be a "short-form-only" census. The ACS will continue to be distributed each year, as usual, to collect additional data, and will continue to include a citizenship question.

Because the ACS collects information from only a small sample of the population, it produces annual estimates only for "census tracts" and "census-block groups." The decennial census attempts a full count of the people in each State and produces population counts as well as counts of other, limited information down to the smallest geographic level, known as the "census block." As in past years, the 2020 census questionnaire will pose a number of questions beyond the total number of individuals residing at a location, including questions regarding sex, Hispanic origin, race, and relationship status.

3. On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire. App., infra, 117a-124a. The Secretary's reasoning and the procedural background are set out in that memorandum and in a supplemental memorandum issued on June 21, 2018. See id. at 116a. The Secretary explained that, "[s]oon after [his] appointment," he "began considering various fundamental issues" regarding the 2020 Census, including whether to reinstate a

citizenship question. Ibid. As part of the Secretary's deliberative process, he and his staff "consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for the enforcement of [the] Voting Rights Act." Ibid.

In a December 12, 2017 letter (Gary Letter), DOJ responded that citizenship data is important to the Department's enforcement of Section 2 of the VRA for several reasons, including that the decennial census questionnaire would provide more granular citizenship voting age population (CVAP) data than the ACS surveys can. App., infra, at 125a-127a. Accordingly, DOJ "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." Id. at 127a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau," App., infra, 117a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau initially presented three alternatives. Id. at 118a-120a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option too. Id. at 120a. Ultimately, the Secretary concluded that this fourth option, reinstating a citizenship question on the decennial census, would

provide DOJ with the most complete and accurate CVAP data. Id. at 121a.

The Secretary also observed that collecting citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. App., infra, 118a. The Secretary therefore found, and the Census Bureau confirmed, that "the citizenship question has been well tested." Ibid. He further confirmed with the Census Bureau that census-block-level citizenship data are not available from the ACS. Ibid.

The Secretary considered but rejected concerns that reinstating a citizenship question would negatively impact the response rate for non-citizens. App., infra, 119a-122a. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up * * * operations," he concluded that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially" as a result of reinstatement of a citizenship question. Id. at 119a. Based on his discussions with outside parties, Census Bureau leadership, and others within the Commerce Department, the Secretary determined that, to the best of everyone's knowledge, there is limited empirical data on how reinstating a citizenship question might affect response rates. Id. at 119a, 121a.

The Secretary also emphasized that "[c]ompleting and returning decennial census questionnaires is required by Federal law," meaning that concerns regarding a reduction in response rates were premised on speculation that some will "violat[e] [a] legal duty to respond." App., infra, 123a. So despite the hypothesis "that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." Id. at 120a. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder outreach in an effort to mitigate any impact on response rates of including a citizenship question. Id. at 121a. In light of these considerations, the Secretary concluded that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns." Id. at 123a.

4. Plaintiffs below (respondents in this Court) are governmental entities (including States, cities, and counties) and non-profit organizations. The operative complaints allege that the Secretary's action violates the Enumeration Clause; is arbitrary and capricious under the Administrative Procedure Act; and denies equal protection by discriminating against racial minorities. See 18-cv-5025 Compl. ¶¶ 193-212 (S.D.N.Y. June 6, 2018); 18-cv-2921 Second Am. Compl. ¶¶ 178-197 (S.D.N.Y. July 25,

2018).[1] All of the claims rest on the speculative premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, 13 U.S.C. 221, some households containing at least one noncitizen may be deterred from doing so (and those households will disproportionately contain racial minorities). Respondents maintain that Secretary Ross's stated reasons in his memorandum are pretextual, and that his decision was driven by secret reasons, including animus against minorities.

Respondents announced their intention to seek extra-record discovery before the administrative record had been filed. At a May 9, 2018 hearing, respondents asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery, was thus justified, "prefatory to" the government's production of the administrative record. 18-cv-2921 Docket entry No. 150, at 9.

5. At a July 3 hearing, the district court granted respondents' request for extra-record discovery over the government's strong objections. App., infra, 95a-104a. The court

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[1] Challenges to the Secretary's decision have also been brought in district courts in Maryland and California. See Kravitz v. United States Dep't of Commerce, No. 18-cv-1041-GJH (D. Md. filed Apr. 11, 2018); La Union del Pueblo Entero v. Ross, No. 18-cv-1570 (D. Md. filed May 31, 2018); California v. Ross, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); City of San Jose v. Ross, No. 18-cv-2279 (N.D. Cal. filed Mar. 17, 2018).

concluded that respondents had made a sufficiently strong showing of bad faith to warrant extra-record discovery. Id. at 101a. The court offered four reasons to support this determination. First, the Secretary's supplemental memorandum "could be read to suggest that the Secretary 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." Ibid. Second, the record submitted by the Department "reveals that Secretary Ross overruled senior Census Bureau career staff," who recommended against adding a question. Ibid. Third, the Secretary used an abbreviated decisionmaking process in deciding to reinstate a citizenship question, as compared to other instances in which questions had been added to the census. Id. at 102a. Fourth, respondents had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question -- that it would aid DOJ in enforcing the VRA -- was "pretextual" because DOJ had not previously suggested that citizenship data collected through the decennial census was needed to enforce the VRA. Id. at 102a-103a.

Following that order, the government supplemented the administrative record with over 12,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary. The government also produced additional documents in response to discovery requests, including nearly 11,000 pages from

the Department of Commerce and over 14,000 pages from DOJ. Respondents have also deposed several senior Census Bureau and Commerce Department officials, including the Acting Director of the Census Bureau and the Chief of Staff to the Secretary. Although the government strongly objected to the bad-faith finding and subsequent discovery, it initially chose to comply rather than seek the extraordinary relief of mandamus.

6. On July 26, the district court granted the government's motion to dismiss respondents' Enumeration Clause claims. See MTD Order. The district court denied the motion to dismiss respondents' APA and equal protection claims, concluding that respondents had alleged sufficient facts to demonstrate standing at the motion to dismiss stage, id. at 16-32; that respondents' claims were not barred by the political question doctrine, id. at 32-37; that the conduct of the census was not committed to the Secretary's discretion by law, id. at 38-45; and that respondents' allegations, accepted as true, stated a plausible claim of intentional discrimination, id. at 60-68.

7. On August 17, the district court entered an order compelling the deposition testimony of the Acting Assistant Attorney General for the Department of Justice's Civil Rights Division, John M. Gore. App., infra, 17a-19a. The court concluded that Acting AAG Gore's testimony was "plainly 'relevant'" to respondents' case in light of his "apparent role" in drafting the

Gary Letter, and concluded that he "possesses relevant information that cannot be obtained from another source." Id. at 18a. On August 31, the government moved to stay discovery, including Acting AAG Gore's deposition, pending a mandamus petition in the Second Circuit. 18-cv-2921 Docket entry No. 292. On September 4, the district court denied an administrative stay, and three days later denied a stay altogether. 18-cv-2921 Docket entry Nos. 297, 308.

On September 7, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, asking to quash Acting AAG Gore's deposition. See 18-2652 Pet. for Writ of Mandamus. The government also sought to halt further extra-record discovery because that discovery also was based on the same erroneous bad-faith finding. On September 25, the court of appeals denied the petition, explaining that it could not "say that the district court clearly abused its discretion in concluding that respondents made a sufficient showing of 'bad faith or improper behavior' to warrant limited extra-record discovery." App., infra, 4a. The Second Circuit also found no clear abuse of discretion in the district court's determination that Acting AAG Gore's deposition was warranted because he possessed unique information "related to plaintiffs' allegations that the Secretary used the December 2017 Department of Justice letter as a pretextual legal justification for adding the citizenship question." Ibid.

8. Meanwhile, respondents moved for an order compelling the deposition of Secretary Ross, and, on September 21, the district court entered an order compelling the deposition and denying a stay pending mandamus. App., infra, 5a-16a. The court recognized that court-ordered depositions of high-ranking government officials are highly disfavored, but nonetheless concluded that "exceptional circumstances" existed that "compel[led] the conclusion that a deposition of Secretary Ross is appropriate." Id. at 6a. The court reasoned that exceptional circumstances were present because, in the court's view, "the intent and credibility of Secretary Ross" were "central" to respondents' claims, and Secretary Ross has "'unique first-hand knowledge'" about his reasons for reinstating a citizenship question that cannot "'be obtained through other, less burdensome or intrusive means.'" Id. at 10a-12a (citation omitted).

In concluding that Secretary Ross's deposition was necessary, the district court rejected the government's contention that the information respondents sought could be obtained from other sources, including a Rule 30(b)(6) deposition, interrogatories, or requests for admission. App., infra, 13a. The court found these alternatives unacceptable because they would not allow respondents to assess Secretary Ross's credibility or to ask him follow-up questions. Ibid. The court also believed that a deposition would be a more efficient use of the Secretary's time, because additional

interrogatories, depositions, or requests for admissions would also burden the Secretary. Ibid.

On September 27, the government filed a petition for writ of mandamus (and request for an interim stay) with the Second Circuit, asking to quash Secretary Ross's deposition. See 18-2856 Pet. for Writ of Mandamus. The government also sought a stay to preclude the depositions of Secretary Ross and Acting AAG Gore and to preclude further extra-record discovery pending this Court's review. On September 28, the Second Circuit temporarily stayed Secretary Ross's deposition until at least October 9, when it will consider the mandamus petition. App., infra, 2a. On October 2, the Second Circuit declined to stay Acting AAG Gore's deposition or other discovery. Id. at 129a.

9. Although the district court had denied the government's earlier stay request, the government once again moved for a stay pending review in this Court, in an abundance of caution under this Court's Rule 23.3. The court denied that motion on September 30, and reconfirmed a trial date of November 5, 2018.

ARGUMENT

The government respectfully requests that this Court grant a stay of the district court's orders pending completion of further proceedings in this Court. The government intends to file a petition for a writ of mandamus or certiorari challenging all three orders once the Second Circuit resolves the dispute over Secretary

Ross's deposition. In the alternative, the government asks that this application be construed as a petition for a writ of mandamus (or, in the alternative, certiorari) to direct the district court to quash the depositions of Secretary Ross and Acting AAG Gore and to halt discovery beyond the administrative record. The district court should be directed to confine its review of Secretary Ross's decision to the administrative record. The government also requests an immediate administrative stay, including of the order compelling Secretary Ross's deposition, while the Court considers this application.[2]

A stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the

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[2] Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to enter a stay pending proceedings in a court of appeals. See, e.g., Trump v. International Refugee Assistance Project, 138 S. Ct. 542 (2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation, brackets, and internal quotation marks omitted). All of these requirements are met here.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WOULD GRANT CERTIORARI

As explained more fully below, the district court's orders allow respondents to go beyond the administrative record to probe the Secretary's mental state in this APA challenge, contrary to this Court's precedents and bedrock principles of judicial review of agency action. The court's orders compelling the deposition of a Cabinet Secretary and an Assistant Attorney General also raise serious separation-of-powers issues. The court thus resolved "important federal question[s] in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), and "has so far departed from the accepted and usual course of judicial proceedings * * * to call for an exercise of this Court's supervisory power," Sup. Ct. R. 10(a). This Court recently granted certiorari in similar circumstances. See, e.g., In re United States, 138 S. Ct. 443, 445 (2017) (per curiam) (granting certiorari and vacating the court of appeals' judgment denying mandamus relief to halt discovery to supplement the administrative record). The issue here is all the more pressing because it implicates foundational tenets of separation of powers.

II. THERE IS A FAIR PROSPECT THAT THE COURT WOULD GRANT MANDAMUS RELIEF DIRECTLY OR REVERSE THE LOWER COURT'S JUDGMENT DENYING MANDAMUS RELIEF

The traditional use of mandamus has been "to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004) (brackets and citation omitted). Moreover, mandamus may also be justified by errors "amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion." Ibid. (citation omitted). A court may issue a writ of mandamus when (1) the petitioner's "right to issuance of the writ is 'clear and indisputable'"; (2) "no other adequate means [exist] to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." Perry, 558 U.S. at 190 (quoting Cheney, 542 U.S. at 380-381) (brackets in original). Each of those prerequisites for mandamus relief is met here.

A. The Government's Right To Mandamus Relief Is Clear And Indisputable

1. The district court erred at the threshold by allowing discovery beyond the administrative record to probe the Secretary's mental state. "This Court has recognized, ever since Fletcher v. Peck, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977). In part for that

reason, "[t]he APA specifically contemplates judicial review" only on the basis of "the record the agency presents to the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); see Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam). This Court has "made it abundantly clear" that APA review focuses on the "contemporaneous explanation of the agency decision" that the agency rests upon. Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519, 549 (1978) (citing Camp, 411 U.S. at 143).

Accordingly, courts must "confin[e] * * * review to a judgment upon the validity of the grounds upon which the [agency] itself based its action." SEC v. Chenery Corp. 318 U.S. 80, 88 (1943). The agency decision must be upheld if the record reveals a "rational" basis supporting it. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). Conversely, if the record supplied by the agency is inadequate to support the agency's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power & Light Co., 470 U.S. at 744. Either way, "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, 411 U.S. at 142.[3]

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[3] As the district court recognized, respondents cannot evade these principles by pointing to their constitutional claims because the APA governs those claims too. App., infra, 104a; see

2. The Court has recognized a narrow exception: if there is "a strong showing of bad faith or improper behavior." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). Respondents did not make this "strong showing" here. In nevertheless allowing extra-record discovery into the Secretary's mental state, the district court made two critical errors.

a. The district court improperly "assum[ed] the truth of the allegations in [respondents'] complaints," App., infra, 104a, and drew disputed inferences in respondents' favor. That approach is deeply misguided. It is inconsistent with the requirement that plaintiffs make a "strong showing" -- not just an allegation that passes some minimum threshold of plausibility -- before taking the extraordinary step of piercing the administrative record to examine a decisionmaker's mental processes. See Overton Park, 401 U.S. at 420. It is also inconsistent with the presumption of regularity, which requires courts to presume that executive officers act in good faith. See United States v. Armstrong, 517 U.S. 456, 464 (1996); cf. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). And it is inconsistent with principles of inter-branch comity, which caution against imputing bad faith to officials of a coordinate branch -- particularly a Senate-

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5 U.S.C. 706(2)(B) (providing cause of action to "set aside agency action" "contrary to constitutional right"); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009).

confirmed, Cabinet-level constitutional officer. See Cheney, 542 U.S. at 381.

b. The district court also fundamentally misunderstood what "bad faith" requires in this context. It is not bad faith for an agency decisionmaker to favor a particular outcome before fully considering and deciding an issue. Were that enough to constitute "bad faith," extra-record review would be the rule rather than the rare exception. As long as the decisionmaker sincerely believes the ground on which he ultimately bases his decision, and does not act on a legally forbidden basis, additional subjective reasons do not constitute bad faith or improper bias. See Jagers v. Federal Crop Ins. Corp., 758 F.3d 1179, 1185 (10th Cir. 2014) ("subjective hope" that factfinding would support a desired outcome does not "demonstrate improper bias on the part of agency decisionmakers"). The court relied on four findings, none of which, individually or together, constitutes a "strong showing" of bad faith to entitle respondents to probe the Secretary's mental state.

i. The district court concluded that Secretary Ross's supplemental memorandum "could be read to suggest" that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department. App., infra, 101a. But the memorandum, fairly read, says only that the Secretary "thought reinstating a citizenship question could be warranted," and so reached out to DOJ and other officials to ask

if they would support it. App., infra, 116a (emphases added). That does not indicate prejudgment; it simply shows that the Secretary was leaning in favor of adding the question at the time. As the D.C. Circuit has explained in a related context, it "would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future actions." Air Transport Ass'n of Am., Inc. v. National Meditation Bd., 663 F.3d 476, 488 (2011) (citation omitted); see Jagers, 758 F.3d at 1185.

Rather, to make a strong showing of prejudgment, respondents should have to show that the Secretary "act[ed] with an 'unalterably closed mind'" or was "'unwilling or unable' to rationally consider arguments." Mississippi Comm'n on Envtl. Quality v. EPA., 790 F.3d 138, 183 (D.C. Cir. 2015) (citation omitted). The district court did not apply that test. Had it done so, it could not have found prejudgment here. Nothing in Secretary Ross's memoranda (or any other document) suggests that Secretary Ross would have asserted the VRA-enforcement rationale had DOJ disagreed or, conversely, that DOJ's request made the Secretary's decision a fait accompli. To the contrary, after the Secretary received the Gary Letter, he "initiated a comprehensive review process led by the Census Bureau." App., infra, 117a. There is no basis to conclude that this process was somehow a sham

or that Secretary Ross had an unalterably closed mind and could not or would not consider new evidence and arguments.

ii. The district court also relied on the fact that "Secretary Ross overruled senior Census Bureau career staff," who recommended against reintroducing a citizenship question. App., infra, 101a-102a. But "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." Wisconsin v. City of New York, 517 U.S. 1, 23 (1996). That is particularly true where, as here, the Secretary explained why he disagreed with the proposals favored by the staff. Besides, the ultimate issue is one of policy -- whether the benefits of reinstating the question outweigh the potential costs -- and it is the Secretary, not his staff, "to whom Congress has delegated its constitutional authority over the census." Ibid. It was thus clear legal error to treat overruling career staff as an indicium of bad faith.

iii. The district court further concluded that "plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question" because they did not conduct "any testing at all." App., infra, 102a. But, as Secretary Ross explained, the citizenship question "has already undergone the * * * testing required for new questions" because the question "is already included on the ACS." Id. at 123a. Therefore, "the citizenship question has been well

tested." Id. at 118a (emphasis added). The court's crediting respondents' allegations was thus clearly erroneous.

iv. Finally, the district court concluded that respondents had made "a prima facie showing" of pretext because DOJ had never previously "suggested that citizenship data collected as part of the decennial census * * * would be helpful let alone necessary to litigating [VRA] claims." App., infra, 102a-103a. But from 1970 to 2000 DOJ did rely on such data from the decennial census (from the long-form questionnaire) to enforce the VRA. Id. at 126a. And the court never engaged with the reasons set forth in the Gary Letter for why census citizenship data would be more appropriate for VRA enforcement than ACS data. Contemporaneous emails produced in response to the district court's discovery order only reinforce the conclusion that Commerce officials sincerely believed "that DOJ has a legitimate need for the question to be included." Id. at 128a.

The bare fact that respondents alleged that "the current Department of Justice has shown little interest in enforcing the [VRA]," App., infra, 103a, neither establishes a prima facie case of Secretary Ross's pretext nor calls into question DOJ's commitment to enforce the VRA. Cf. Armstrong, 517 U.S. at 464 (presumption of good faith applies to Executive Branch officials). As DOJ explained in the Gary Letter, citizenship data is useful in enforcing Section 2 of the VRA, which prohibits "vote dilution" by

state and local officials engaged in redistricting. App., infra, 125a. Because redistricting cycles are tied to the census and the next cycle of redistricting will not begin until after the census is taken, there is little Section 2 enforcement to be undertaken at this time. Besides, DOJ's conclusion that citizenship data would be useful in enforcing Section 2 remains true regardless of whether the current administration will have the opportunity to use the information collected.

3. Beyond improperly finding that respondents had made a "strong showing of bad faith," Overton Park, 401 U.S. at 420 -- thereby opening the doors to discovery into Secretary Ross's mental state -- the district court exacerbated its error by compelling the deposition of Secretary Ross himself.

a. "[A] district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding." In re USA, 624 F.3d 1368, 1376 (11th Cir. 2010). So said this Court in United States v. Morgan, 313 U.S. 409, 421-422 (1941) (Morgan II). Instead, as this Court and lower courts applying Morgan II and its predecessor, Morgan v. United States, 304 U.S. 1 (1938) (Morgan I), have recognized, compelling the testimony of high-ranking government officials is justified only in "extraordinary instances." Arlington Heights, 429 U.S. at 268; accord, e.g., Lederman v. New York City Dep't of Parks & Recreation, 731 F.3d 199, 203 (2d Cir. 2013), cert. denied, 571

U.S. 1237 (2014); In re United States, 624 F.3d at 1376; Bogan v. City of Boston, 489 F.3d 417, 423 (1st Cir. 2007); Simplex Time Recorder Co. v. Sec'y of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985); In re USA, 542 Fed. Appx. 944, 948 (Fed. Cir. 2013). That strict limitation on the compelled testimony of high-ranking officials is necessary because such orders raise significant "separation of powers concerns." In re USA, 624 F.3d at 1372; see Arlington Heights, 429 U.S. at 268 & n.18. As Morgan II emphasized, administrative decisionmaking and judicial processes are "collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." 313 U.S. at 422. "Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." Ibid. (citation omitted).

As a practical matter, requiring high-ranking officials to appear for depositions also threatens to "disrupt the functioning of the Executive Branch." Cheney, 542 U.S. at 386. High-ranking government officials "have 'greater duties and time constraints than other witnesses.'" Lederman, 731 F.3d at 203 (citation omitted). As a result, "[i]f courts did not limit the[] depositions [of high-ranking officials], such officials would spend 'an inordinate amount of time tending to pending litigation.'" Ibid. (citation omitted). The threat to inter-branch comity is particularly acute where, as here, the district

court orders a Cabinet Secretary's deposition expressly to test the Secretary's credibility and to probe his deliberations with other Executive Branch officials. See App., infra, 8a-12a; see also 18-cv-2921 Docket entry No. 363 (S.D.N.Y. Sept. 30, 2018) ("[T]he Court remains firmly convinced that * * * there is a need to make credibility determinations[.]").

b. The district court clearly erred in concluding that "exceptional circumstances" justify Secretary Ross's deposition. App., infra, 12a. The district court's "exceptional circumstances" finding was based on its conclusion that "the intent and credibility of Secretary Ross himself" are "central" to respondents' claims. Id. at 10a-11a. That conclusion was erroneous for the reasons above: in a challenge to an agency decision, it is "not the function of the court to probe the mental processes of the Secretary." Morgan II, 313 U.S. at 422 (quoting Morgan I, 304 U.S. at 18); see pp. 29-31, supra.

The district court purported to find an exception to this rule in National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). The court reasoned that, to prevail on their APA claims, "Plaintiffs must show that Secretary Ross 'relied on factors which Congress had not intended [him] to consider, . . . [or] offered an explanation for [his] decision that runs counter to the evidence before the agency.'" App., infra, 6a (quoting Home Builders, 551 U.S. at 658) (brackets and

ellipsis in original). The court then concluded that, because Secretary Ross was the decisionmaker, his deposition would aid respondents in making that showing. Id. at 8a. But Home Builders does not suggest that plaintiffs may look beyond the administrative record to prove their APA claims, let alone that plaintiffs should be permitted to depose a Cabinet Secretary to probe his mental processes. To the contrary, the Court emphasized that courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." 551 U.S. at 658 (citation omitted). Here, the path Secretary Ross took to his decision to reinstate a citizenship question can readily be discerned from his decision memorandum, his supplemental memorandum, and from the extensive administrative record.

c. Nor did the district court properly evaluate whether respondents could obtain the information they sought by other means. "The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere." In re Cheney, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam). To date, the Commerce Department has given respondents thousands of pages of materials, including materials reviewed and created by the Secretary's most senior advisers. And respondents have deposed a number of senior Census Bureau and Commerce Department officials. Respondents are now well aware of the circumstances that led to the decision to reinstate a

citizenship question. Secretary Ross's deposition is unlikely to add any material details, all the more so because much of his testimony will likely be privileged.

The district court barely paused to consider whether these materials satisfied respondents' informational demands. Nor did the court ask whether "the Secretary can prepare formal findings * * * that will provide an adequate explanation for his action" as an alternative to direct testimony. Overton Park, 401 U.S. at 420. The court refused to consider any alternative to deposing the Secretary -- such as interrogatories, requests for admission, or a Rule 30(b)(6) deposition, all of which the government offered -- because none would allow respondents to probe the Secretary's credibility or ask follow-up questions. See App., infra, 13a.

d. Instead, the district court jumped straight to ordering a deposition on the ground that Secretary Ross had "unique first-hand knowledge" about his intent in reinstating a citizenship question. App., infra, 6a. But none of the court's rationales withstands scrutiny.

i. The district court asserted that Secretary Ross was "personally and directly involved" in the decision to reinstate a citizenship question "to an unusual degree." App., infra, 8a. Yet the court did not explain how Secretary Ross's direct participation in the decision to reinstate a citizenship question was "unusual." It is not at all exceptional for an agency head to

participate actively in an agency's consideration of a significant policy decision -- particularly one that concerns, as the district court described it, one of the agency head's "most important dut[ies]," Id. at 15a. Nor is it "unusual" that Secretary Ross informally consulted with staff and the Justice Department before DOJ sent its formal request. For these reasons, courts have rejected the notion that a decisionmaker's personal involvement in the decision qualifies as an exceptional circumstance in this context. In re USA, 542 Fed. Appx. at 946 (rejecting plaintiffs' assertion that a high-ranking official's "personal involvement in the decision-making process" provided a basis for deposing that official); In re FDIC, 58 F.3d 1055, 1061 (5th Cir. 1995) (that three directors of the FDIC were the only "persons responsible for making the [challenged] decision" did not justify their depositions).

ii. The district court likewise erred in concluding that Secretary Ross's testimony was needed "to fill critical blanks in the current record." App., infra, 11a. The court identified those "blanks" as "the substance and details of Secretary Ross's early conversations" with "the Attorney General," "interested third parties such as Kansas Secretary of State Kris Kobach," and "other senior Administration officials." Id. at 11a-12a. But the details of Secretary Ross's consultations with other people have no bearing on the legality of his decision to reinstate the citizenship

question. "[T]he fact that agency heads considered the preferences (even political ones) of other government officials concerning how th[eir] discretion should be exercised does not establish the required degree of bad faith or improper behavior." In re FDIC, 58 F.3d at 1062; see Sierra Club v. Costle, 657 F.2d 298, 408-409 (D.C. Cir. 1981). The proper focus of a court's review of Secretary Ross's decision is on the reasons the Secretary gave for making that decision. That some stakeholders might have had differing reasons for supporting the reinstatement of a citizenship question that they shared with the Secretary is of no consequence. In any event, the administrative record reflects the substantive views of the stakeholders who communicated with Secretary Ross and the Commerce Department, including Secretary Kobach and DOJ. See, e.g., App., infra, 125a-127a (Gary Letter); Administrative Record 763-764 (emails from Secretary Kobach); id. at 765-1276 (additional communications).[4] And to the extent respondents seek information about the Secretary's deliberations with other government officials, those discussions likely are privileged, rendering the Secretary's deposition both improper and futile. See Arlington Heights, 429 U.S. at 268 (decisionmaker's testimony "frequently will be barred by privilege").

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[4] The administrative record is available at www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf.

iii. Nor is there any legitimate basis for the district court's conclusion that statements Secretary Ross made in his decision memoranda and in sworn testimony to Congress placed his credibility "squarely at issue in these cases." App., infra, 10a. The court was troubled by statements that, in its view, suggested the Secretary had never considered the citizenship question until DOJ sent the Gary Letter. Ibid. But none of the statements in fact says that, and the court's uncharitable inferences to the contrary ignore the context of these statements and violate the presumption of regularity. Armstrong, 517 U.S. at 464. For example, the Secretary in his March 2018 memorandum did not say he "'set out to take a hard look' at adding the citizenship question 'following receipt'" of the Gary Letter, App., infra, 10a (emphasis modified, citation and brackets omitted); the Secretary actually said he "set out to take a hard look at the request" following receipt of DOJ's request, id. at 117a (emphasis added). The Secretary never said that he had not previously considered whether to reinstate a citizenship question, or that he had not had discussions with other agencies or government officials before he received DOJ's formal request. Nor would it have made sense for the Secretary to take a formal "hard look" at DOJ's request before receiving that request.

Similarly, the Secretary's March 20 statement to Congress that he was "'responding solely to the Department of Justice's

request,'" App., infra, 10a (quoting March 20 testimony, available at 2018 WLNR 8815056), was actually in answer to a question asking whether he was also responding to requests from third parties, see 2018 WLNR 8815056. And the Secretary's admittedly imprecise March 22 statement that DOJ "'initiated the request for inclusion of the citizenship question,'" App., infra, 10a (quoting March 22 testimony, available at 2018 WLNR 8951469), was in response to a question about whether Commerce planned to include a citizenship question on the 2020 census, not a question about the Secretary's decision-making process. And the statement was immediately followed by an acknowledgment that he had been communicating with "quite a lot of parties on both sides of the question" and that he "ha[d] not made a final decision, as yet" on this "very important and very complicated question," 2018 WLNR 8951469. Only by ignoring the context of these statements and eliding the presumption of regularity could the court find that the Secretary's credibility was "squarely at issue." App., infra, 10a.

4. For largely the same reasons, the district court also erred in compelling the deposition of Acting AAG Gore. See App., infra, 17a-19a. The court concluded that deposing Acting AAG Gore was justified in light of his "apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census." Id. at 18a. For this reason, the court stated, his testimony was "plainly

'relevant,' within the broad definition of that term for purposes of discovery." Ibid. But were that the rule, compelling the testimony of a high-ranking official would be routine, not exceptional -- in contravention of this Court's decisions in Morgan II and other cases. See pp. 29-31, supra.

Moreover, deposing Acting AAG Gore would achieve no legitimate purpose. After all, respondents' stated purpose of the extra-record discovery is to probe Secretary Ross's mental state, not Acting AAG Gore's. There has been no plausible suggestion that DOJ acted in bad faith; nor have respondents provided any basis to believe that the reasons DOJ gave for reinstating the citizenship question in the Gary Letter did not represent DOJ's views. For that reason, there is no basis for the district court and Second Circuit's assertion that deposing Acting AAG Gore would yield information about DOJ's position "that cannot be obtained from another source," App., infra, 4a (quoting id. at 18a). And Acting AAG Gore's testimony on such topics is likely to be protected by privilege, rendering a deposition focused on these topics improper and futile. Arlington Heights, 429 U.S. at 268.

B. No Other Adequate Means Exist To Attain Relief

Absent review on mandamus, the district court's orders will be effectively unreviewable on appeal from final judgment. Secretary Ross's deposition is set for October 11, 2018, and Acting AAG Gore's for October 10. If the Second Circuit denies mandamus

relief and refuses to stay the district court's orders, the government indisputably has "no other adequate means" of protecting its interests aside from this petition. Perry, 558 U.S. at 190 (citation omitted).

C. Mandamus Is Appropriate Under The Circumstances

As this Court has recognized, "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." Cheney, 542 U.S. at 382. Here, high-ranking officials in two agencies -- including a Cabinet Secretary -- will be forced to prepare for and attend depositions, which will indisputably "interfer[e] with" their "ability to discharge [their] constitutional responsibilities." Ibid. And document discovery -- especially into the Secretary's mental state -- also is intrusive and disruptive to an agency's functioning. Cf. In re United States, 138 S. Ct. at 445.

III. THERE IS A LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM THE DENIAL OF A STAY

In contrast to the harms to the government articulated above, which are plainly irreparable, respondents will suffer relatively little harm from an immediate stay. Unlike the impending depositions next week, trial is still more than a month away. And under the bedrock principles of administrative law discussed above, respondents can and must litigate their APA claims on "the

administrative record already in existence, not some new record made initially in the reviewing court." Camp, 411 U.S. at 142.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's orders to the extent they compel (1) the deposition of Commerce Secretary Ross; (2) the deposition of Acting AAG Gore; and (3) discovery beyond the administrative record. The stay should remain in effect pending the completion of further proceedings in this Court over the government's forthcoming petition for a writ of mandamus or certiorari. Alternatively, the government requests the Court to construe this application as that petition for a writ of mandamus or certiorari. The government further requests an immediate administrative stay pending the Court's consideration of this application.

Respectfully submitted.

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