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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CITY OF SAN JOSE, a municipal corporation; and BLACK ALLIANCE FOR JUST IMMIGRATION, a California nonprofit corporation,

Plaintiffs,

Case No. 5:18-cv-2279

OPPOSITION TO DEFENDANTS' MEMORANDUM IN SUPPORT OF REVIEW ON THE ADMINISTRATIVE RECORD

vs.

WILBUR L. ROSS, JR., in his official capacity as Secretary of the U.S. Department of Commerce; U.S. DEPARTMENT OF COMMERCE; RON JARMIN, in his official capacity as Acting Director of the U.S. Census Bureau; U.S. CENSUS BUREAU,

Defendants.

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PRELIMINARY STATEMENT

In the ordinary Administrative Procedure Act case, "the focal point for judicial review should be the administrative record already in existence." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006).[1] This is no ordinary APA case. In their complaint, Plaintiffs allege that the Department of Commerce added the citizenship question as "a pretext for other unstated and ulterior purposes" (Compl. ¶ 115), and the limited Administrative Record ("AR") supports what that ulterior motive was. The White House, through its Chief Strategist, directed Kris Kobach, a leading advocate of anti-immigrant and voter suppression policies, to instruct Defendant Ross to include the citizenship question in the 2020 Decennial Census in order to reduce congressional representation in areas with high immigrant populations. These facts, as well as those set forth in Plaintiffs' Motion to Expand Discovery Beyond the Administrative Record ("Pl. Mot."), (Doc. 48), make the required strong preliminary showing of Defendants' bad faith to warrant extra-record discovery.

In addition, Defendants should not be permitted to delay this case through a discovery stay because the case must be fully resolved (including appeals) by June 2019, at which time the 2020 Census goes to print, and Defendants have not even attempted to meet the "heavy burden" required for such relief. Finally, production of a privilege log should be ordered. Privilege logs in APA cases are wholly appropriate in this district and have been previously ordered in APA cases before this Court even without the strong showing of bad faith present here.

ARGUMENT

I. Plaintiffs Need Not Make a "Strong Showing" of Bad Faith

Defendants contend that the bad-faith exception to the record-review rule only comes into play "if a plaintiff makes 'a strong showing of bad faith or improper behavior' by the agency." (Defendants' Memorandum ["Def. Mem."], Doc. 49, at 6 [citations omitted]). Not so. The requirement that a petitioner introduce a "strong showing" of bad faith applies only when "there are administrative findings that were made at the same time as the decision." *Citizens to Pres.*

[1] Plaintiffs include a constitutional claim in addition to their APA claim, and "discovery as to the non-APA claim is permissible." *Grill v. Quinn*, No. CIV S-10-0757 GEB GGH PS, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012).

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Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). When "there are no such formal findings [] it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." *Id*. The Ninth Circuit has recognized that when a petitioner alleges bad faith and is "unable to develop and present" the claim without further discovery, "petitioners should proceed with discovery to develop these claims, as we do not foreclose here any legal grounds for challenging the agency action." *Pub. Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982). Because the support will come from discovery itself, a party need make only a "strong preliminary showing[] of bad faith" to be granted discovery. *Nat'l Nutritional Foods Ass'n v. Food & Drug Admin., U.S. Dep't of Health, Educ. & Welfare*, 491 F.2d 1141, 1145 (2d Cir. 1974); *see also Stand Up for California! v. U.S. Dep't of Interior*, 17-cv-00058, 2018 WL 2433576, at *6 (D.D.C. May 30, 2018) (granting extra-record discovery when evidence in "combination in this case raises substantial suspicion").[2] Here, there was no hearing and no decision by an administrative law judge, and thus Plaintiffs need only make "strong preliminary showings of bad faith." *Nat'l Nutritional Foods*, 491 F.2d at 1145.

II. The Facts Here Demonstrate Not Only a Preliminary Showing of Bad Faith but Also a Strong Showing of Bad Faith

A single email can establish that discovery beyond the administrative record is appropriate. In *Otero v. Kelly*, 16-cv-090, 2017 WL 3081704, at *4 (D. Ariz. July 18, 2017), a person who had "believed in good faith she was a U.S. citizen" later learned she was not. *Id.* at 1. She then applied for citizenship status and her application was denied, purportedly because she had once traveled on a U.S. passport that (unbeknownst to her) had been improperly issued. When the United States Citizenship and Immigration Service (USCIS) produced the AR, it included a single email that "indicate[d] that a conversation regarding Otero and alleged fraud

[2] The cases cited by Defendants actually support Plaintiffs' position that a strong showing of bad faith is required only when there are administrative findings, rather than when (as here) a decision was issued by one agency head at the request of another agency. *See, e.g.*, *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1042 (N.D. Cal. 2007) (strong showing required when an administrative petition was processed by a National Marine Fisheries Service lab for "'formal review and clearance' in accordance with the 'the normal chain of review'"); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1254 (11th Cir. 2007) (applying strong showing standard when petitioners challenged agency's seven-year formal rulemaking process that resulted in two separate final rules).

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may have occurred prior to the decisions issued in this case." *Id.* at *4. Acknowledging that Otero's allegation of bad faith was "speculative," the district court nevertheless held that the "Oteros have pointed to specific facts justifying their [discovery] requests," and that they had therefore made a "strong showing of bad faith or improper behavior." *Id.*

Likewise here, there is an email that provides "specific facts" justifying Plaintiffs' request for discovery. The email suggests that, months before the request for a citizenship question surfaced from the Department of Justice ("DOJ"), White House Chief Strategist Steve Bannon directed a key administration ally to demand that the Secretary of Commerce include the question in the Census for facially unlawful reasons. This email was sent three months after the Census Bureau, operating independently of political influence, had certified to Congress that it would not add to the five categories of questions contemplated for the Census that had been utilized for decades. This email alone—even without the stridently anti-immigrant rhetoric that surrounded the President's campaign, the inexplicable about-face of the Department of Commerce on the citizenship question, and the fact that Defendant Ross ignored every independent authority he consulted on the subject (including his own scientific experts)— just as in *Otero*, makes a strong showing of bad faith, thus warranting extra-record discovery. *Id.*[3]

Remarkably, Defendants did not produce this email as part of the AR. The only reason Plaintiffs are aware that Kris Kobach emailed Secretary Ross on July 14, 2017, to demand a citizenship question on the Census is that Kobach forwarded a copy of that email to Wendy Teramoto, Ross's Chief of Staff, on July 21, 2017, after "meeting [Teramoto] on the phone this afternoon." (AR00763). Three days later, Teramoto again offered to speak with Kobach on the phone, and then suggested instead he speak (again) with Secretary Ross the next day. (AR00763). There are no documents in the AR regarding Kobach and Ross's "telephone discussion from a few months ago." (AR00764). There are no documents regarding his telephone conversation with Ross on July 25. And most significantly, the original email from Kobach to Ross on July 14 was not produced.

Because the original email was not produced, the AR does not include any response from

[3] *See* Pl. Mot., Doc. 48, at 2-6.

Ross to Kobach, which would have been expected given the extraordinary nature of the email. Any department secretary receiving such a communication who intended to carry out his duties in good faith would likely have responded, since political influence from the White House can serve as grounds to vacate an administrative decision. *See Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1282 (W.D. Wis. 1997) ("[I]f the officials were directed specifically not to approve plaintiffs' application because of these political factors, the department's decision would have to be vacated").

Two likely conclusions can be drawn from the fact that the AR does not include a plainly significant email, or any record of the meetings with Kobach. Either the original email was not maintained (in violation of the Federal Records Act, *see* 44 U.S.C. § 3101) or Defendants excluded it, despite the fact that it was "considered by agency decision-makers" during the administrative process. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Failure to either preserve or produce this email thread itself provides evidence of "bad faith or improper behavior" sufficient to merit additional discovery. *Overton Park*, 401 U.S at 420.[4]

Defendants cannot credibly argue that they withheld the original email from Kobach to Ross to avoid providing duplicate documents. After all, much of the AR it has provided consists of duplicate documents. For example, the record includes over 280 near-identical form letters sent by Defendant Ross or Defendant Jarmin in response to letters from Congress, the public, or advocates regarding the citizenship question. The AR includes every copy of each such letter, even those sent in response to a single inquiry. (*See, e.g.*, AR000920-001044, containing 124 identical responses to a single letter). The record likewise contains hundreds of pages of information such as prior Census and ACS materials (AR000001-53; AR000485-523), reports on past censuses that are available on the agency's website or were published in the Federal Register (AR000054-270), and 67 pages tabulating news coverage of the agency's decision (AR000666-733).[5] When the duplicate, publicly available, and irrelevant material is removed, the AR here is

[4] As noted in their original motion, in addition to relevant document discovery, Plaintiffs seek to depose, among others, Ross, Jarmin, Abowd, Bannon, and Kobach, along with a number of the experts who spoke to Ross, including, but not limited to, Pierce, Groves, and Habermann. (Pl. Mot., Doc. 48, at 6).

[5] To the extent that Ross relied on this media coverage in making his decision, as suggested by its

slight, further indicating that extra-record discovery is appropriate.

III. Staying a Decision on Discovery Would Inordinately Delay This Matter

"The mere filing of a motion to dismiss is not ordinarily sufficient to stop the discovery process, derail a case schedule, and delay proceedings." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 16-cv-06370 (EJD), 2018 WL 1569811, at *2 (N.D. Cal. Feb. 16, 2018). In this district, a party seeking a stay of discovery carries a "heavy burden" and "must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (denying motion to stay discovery pending motion to dismiss). Defendants have failed to make any such showing here. Staying discovery during the pendency of a motion to dismiss is "directly at odds with the need for expeditious resolution of litigation," and such a stay is typically only appropriate when the complaint is "utterly frivolous," something Defendants here have not even alleged. *Id.*

Defendants rely on a single case to argue that this Court should defer any decision on discovery until it has resolved Defendants' not-yet-filed motion to dismiss. *See In re United States*, 138 S. Ct. 443, 445 (2017). But *In re United States* itself shows why resolving the discovery motion is so critical here. There, Plaintiffs filed a motion on October 9, 2017, to complete the record, but Defendants sought a stay first at the Ninth Circuit and then the Supreme Court, which "made it impossible to send a final judgment to our court of appeals by March 5," factoring into the court's decision to enjoin the government. *Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1047 (N.D. Cal. 2018). The parties here do not have three months to spare. Printing of Census forms is scheduled to begin in less than a year, so this case must be resolved (including all appeals) long before then.[6] Defendants have not shown "why discovery in this case is any more burdensome than it is on parties to other civil litigations," and therefore discovery should not be stayed. *Optronic*, 2018 WL 1569811, at *2.

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inclusion in the record, that fact speaks to the arbitrary and capricious nature of the decision itself. *See Tennessee Valley Ham Co. v. Bergland*, 493 F. Supp. 1007, 1020 (W.D. Tenn. 1980) (holding agency action to be arbitrary and capricious when record showed that the agency "felt compelled by Congressional and media pressure").

[6] U.S. Census Bureau, *2020 Census Operational Plan*—Version 3.0 at 89, *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf.

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IV. Defendants Are Wrong That Plaintiffs Are Not Entitled to a Privilege Log

Arthur Gary, the author of DOJ's request to Ross, admitted on December 29, 2017, that he wrote the request for a citizenship question "on behalf of the Department at the request of leadership, working with John."[7] "John" is likely John Gore, now head of the DOJ's Civil Rights Division, and (like Kobach) a longtime advocate for election plans that have been struck down by courts for racial bias. *See, e.g.*, *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016). A privilege log is necessary, *inter alia*, to review contacts between Gore and Gary, and between either of them and Ross, as part of the review of whether Defendants acted in bad faith.

In any even privilege logs in APA actions are routine in this district. While "purely internal deliberative materials may be protected from inclusion in the administrative record," to withhold such documents, "Defendants must make a specific showing establishing the application of a privilege for each document that it contends that it may withhold based on privilege." *Gill v. Dep't of Justice*, 14-cv-03120 (RS)(KAW), 2015 WL 9258075, at *7 (N.D. Cal. Dec. 18, 2015). Defendants have not done so here. Instead, Defendants cite for support nonbinding authority from out of this circuit and district.[8] In the only Ninth Circuit case Defendants cite, a privilege log was not necessary because there was no "clear evidence that the EPA did consider those documents" at all. *Cook Inletkeeper v. U.S. E.P.A.*, 400 Fed. Appx. 239, 240 (9th Cir. 2010). As Defendants tacitly acknowledge with a single "*but see*" citation, in this district Defendants in APA cases "shall provide a privilege log that describes the document, identifies the basis for its withholding, and substantiates any claimed deliberative process privilege." *Ctr. for Food Safety v. Vilsack*, 15-cv-01590 (HSG)(KAW), 2017 WL 1709318, at *5 (N.D. Cal. May 3, 2017).

CONCLUSION

For the reasons stated above as well as those set forth in Plaintiffs' Motion, Plaintiffs respectfully request that the Court issue an order (1) confirming Plaintiffs' right to take immediate discovery outside the administrative record, and (2) ordering Defendants to produce a privilege log in connection with the administrative record and all future document productions.

[7] *See* https://assets.documentcloud.org/documents/4403719/JMD-Response-Documents.pdf.
[8] *See* Def. Mem., Doc. 49, at 9-10.

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Respectfully submitted,

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