No. 18-2857

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau,
Petitioners.

MOTION TO STAY PRE-TRIAL AND TRIAL PROCEEDINGS PENDING THE SUPREME COURT'S DISPOSITION OF THE GOVERNMENT'S FORTHCOMING PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
GERARD SINZDAK
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Supreme Court Rule 23.3, the federal government respectfully asks this Court to issue a stay of the pretrial and trial proceedings in these cases challenging the decision of Secretary Ross to reinstate a citizenship question on the decennial census pending resolution of the government's forthcoming petition for a writ of mandamus or certiorari in the Supreme Court. The district court has scheduled trial to begin on November 5, 2018. In a recent order, the Supreme Court signaled that there is a fair prospect that it will grant the government relief from the district court's order permitting extra-record discovery in these cases. If the Court does so, judicial review of the merits of the Secretary's decision would be limited to the administrative record, and there should be no trial at all to inquire into the Secretary's subjective motives. Thus, absent a stay, the government will be required to expend substantial resources to prepare for and participate in a trial on the merits of the Secretary's decision that has a reasonable chance of proving to have been unnecessary and improper. At the same time, plaintiffs will not be unduly burdened by a stay of trial proceedings pending the Supreme Court's resolution of the government's petition for a writ of mandamus or certiorari, which the government will file by Monday, October 29, along with a motion for expedition. Indeed, trials in related cases challenging the Secretary's decision are not scheduled to begin until January. Although no trial on the merits of Secretary Ross's decision should be held, and the government should not be required to expend enormous resources to participate in a trial later determined to have been

improper, the fact that other plaintiffs and courts have established a much later trial schedule underscores the lack of any imminent harm to plaintiffs from a stay of trial proceedings occurring in late October and early November.

1. On October 22, 2018, the Supreme Court granted in part and denied in part the government's application for a stay of the depositions of Commerce Secretary Ross and Acting Assistant Attorney General Gore and of all extra-record discovery in these cases. *See* Att. 1. In particular, the Supreme Court granted the application as to the district court's September 21, 2018 order compelling the deposition of Secretary of Commerce Wilbur Ross, and extended the stay through October 29, 2018 at 4 p.m. The Supreme Court further explained that if the government files a petition for a writ of mandamus or certiorari with respect to the stayed order by October 29, 2018 at 4 p.m., the stay will remain in effect until disposition of the petition by the Supreme Court. The Supreme Court further denied the stay application as to the district court's July 3, 2018 and August 17, 2018 orders, which permitted extra-record discovery and compelled the deposition of Acting AAG Gore, but explained that "[t]he denial of the stay with respect to the remaining orders does not preclude the applicants from making arguments with respect to those orders."

In a separate opinion, Justice Gorsuch, joined by Justice Thomas, confirmed that "the Court signals that it is likely to grant the government's petition," as "[i]t stays Secretary Ross's deposition after weighing . . . the likelihood of review" and "it expressly invites the government to seek review of all of the district court's orders

allowing extra-record discovery, including those authorizing the depositions of other senior officials." Those Justices thus indicated they "would take the next logical step and simply stay all extra-record discovery pending our review." Justice Gorsuch explained that "[l]eveling an extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification," and the asserted reasons relied upon by the Court for extra-record discovery have "never been thought enough to justify a claim of bad faith and launch an inquisition into a cabinet secretary's motives." Justice Gorsuch noted that, with respect to likelihood of success on the merits, there was no reason to distinguish the Secretary's deposition from the depositions of other senior executive officials because "each stems from the same doubtful bad faith ruling, and each seeks to explore his motives." And with respect to the balance of harms, Justice Gorsuch emphasized that "other extra-record discovery also burdens a coordinate branch in most unusual ways," while observing that the "plaintiffs would suffer no hardship from being temporarily denied that which they very likely have no right to at all." Justice Gorsuch further explained that "[o]ne would expect that the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance," because "that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent."

On October 24, 2018, the government requested that the district court stay pretrial and trial proceedings in light of the Supreme Court's order. The district court

has not yet ruled on the government's request. However, at a hearing shortly after the government filed its request, the district court indicated that all pre-trial and trial deadlines would remain in place and, following the hearing, entered an order granting plaintiffs' motion to call live witnesses at trial, strongly suggesting that the court does not intend to grant the government's request for a stay of the trial. Att. 2 [ECF 401].

2. In accordance with the Supreme Court's order, the government respectfully requests that this Court stay the deadlines for the parties' pretrial submissions, as well as the upcoming trial, pending resolution of the government's forthcoming petition for mandamus or certiorari—the resolution of which will almost certainly impact the scope of judicial review of the Secretary's decision on the merits. *See* Gorsuch Op. at 3 ("Today, the Court signals that it is likely to grant the government's petition."). This Court considers four factors in deciding whether to grant a stay pending a petition for mandamus: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote omitted). The "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the applicant] will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (quoting *Mich. Coal of Radioactive Material Users,*

Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)). Each of the stay factors weighs in favor of granting a stay here.

a. The government is likely to succeed on the merits of its petition for mandamus or certiorari. In issuing its October 22 order granting in part and denying in part government's application for a stay, the Supreme Court necessarily concluded that the government has a fair prospect of obtaining relief from the Supreme Court for a writ of mandamus with respect to this Court's order authorizing the deposition of Secretary Ross. The Supreme Court will grant a stay pending the disposition of a petition for a writ of mandamus only 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 (201) (per curiam). A stay pending the disposition of a writ of certiorari is governed by similar standards. *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Thus, as Justice Gorsuch confirmed, this Court can only conclude that there is at least a fair prospect that the Supreme Court will quash the order authorizing the deposition of Secretary Ross.

As to the district court's July 3 order authorizing extra-record discovery, the Supreme Court expressly permitted the government to "mak[e] arguments" with respect to that order notwithstanding the denial of a stay, and, as noted above, Justices Gorsuch and Thomas observed that there was little reason to distinguish the district court's September 21 order concerning the deposition of Secretary Ross from

other extra-record discovery authorized by this Court's July 3 order. *See* Att. 1. Indeed, the district court's July 3 order was rooted in the asserted need to probe the Secretary's subjective decisionmaking process to examine whether his stated justification was "pretextual," which is essentially the same analysis supporting the order authorizing the Secretary's deposition. *See* Att. 3, at 83; Att. 4. And, in fact, the improper authorization of extra-record discovery was the principal basis upon which the government challenged the deposition of Secretary Ross in its Supreme Court stay application.

Although the Supreme Court did not stay all extra-record discovery at this time, the Court appears to have based that decision on equitable factors rather than a conclusion that the government was unlikely to succeed on the merits of its challenge to the July 3 order authorizing extra-record discovery—as evidenced by the fact that the Court expressly permitted the government to raise its broader challenge to extra-record discovery in its forthcoming petition. Given the Supreme Court's disposition of the request for a stay of the September 21 order compelling Secretary Ross's deposition and the similarity of the issues to be presented in the government's petition, the government is sufficiently likely to succeed on that petition to warrant a stay of all further pretrial and trial proceedings pending its resolution, which will go to the heart of the case that will be presented at trial and indeed to whether there should be a trial at all.

b. The government will also be irreparably injured absent a stay. Without a stay, the government will be forced to expend enormous resources engaging in pretrial and trial activities that may ultimately prove to be unnecessary in whole or large part if the Supreme Court grants the government's petition, in which case any trial would have been improper and the district court's review of the Secretary's decision will be limited to the administrative record. Plaintiffs have indicated that they intend to call 28 witnesses at trial, Att. 5, and the more tangible costs of these proceedings should not be ignored. The Department of Justice alone has already devoted thousands of attorney hours and spent thousands of taxpayer dollars on litigation and travel expenses fees defending against plaintiffs' claims. The government conservatively estimates that the Department of Justice will devote 3,520 attorney hours to pretrial and trial preparation between now and the anticipated end of a two-week trial beginning on November 5, much of which would be unnecessary should the government prevail on its mandamus petition. The government's pretrial deadlines include: (1) by October 26, the government's pretrial memorandum and pretrial statement, an opposition to plaintiffs' motion to exclude parts of the government's expert's testimony, and a motion *in limine*; (2) by October 29, the government's deposition designations for use at trial, and the government's objections to plaintiffs' trial exhibits and deposition designations; and (3) by October 31, the government's response to plaintiffs' pre-trial memorandum and statement, and the government's list of affiants to be cross-examined at trial. On top of the cost of the

government's enormous expenditure of time is the substantial monetary expenditure on travel and hotel stays for approximately twelve attorneys and professional staff for a two-week trial in New York City, among other things.

The government, of course, recognizes the need to devote resources to defend its interests at trial and, in the ordinary course, does not seek extraordinary relief simply because it disagrees with a district court's case-management decisions. But the real-world costs that proceeding to trial would impose on the government, if the trial is permitted to proceed, would unavoidably distract the government, including the Commerce Department, "from the energetic performance of its constitutional duties" in a manner that warrants a stay. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 369 (2004).

Among the witnesses plaintiffs intend to call at trial are various high-level agency officials such as the second highest-ranking official at Commerce, Karen Dunn Kelley; the Deputy Chief of Staff and head of policy, Earl Comstock; and the former Chief of Staff, Wendy Teramoto. Proceeding with this trial would potentially subject these governmental witnesses to examination regarding their internal decisions and even their own personal thought processes, testimony which is at least in part protected by the deliberative process privilege and in any event irrelevant to judicial review of the agency action at issue, and whose pertinence will be at issue in the petition for a writ of mandamus or certiorari to be filed in the Supreme Court. The harm from requiring these witnesses' attendance, and the elicitation of this

unnecessary and immaterial testimony, cannot be undone once the trial takes place. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010).

c. In contrast to the obvious harms to the government, a temporary stay of the trial and pretrial activities will cause plaintiffs no substantial injury. In his separate opinion, Justice Gorsuch expressly recognized this lack of harm to plaintiffs from an order staying trial, stating that they "would suffer *no hardship* from being temporarily denied that which they very likely have no right to at all." (Emphasis added). There is no ongoing or imminent harm that would justify an urgent need for a trial before the forthcoming petition is resolved. Indeed, other district courts overseeing challenges to the Secretary's decision have scheduled trials to begin in January. *See State of California v. Ross*, No. 18-cv-1865 (N.D. Cal) (trial to begin Jan. 7); *Kravitz v. U.S. Dep't of Commerce*, No. 18-cv-1041 (D. Md.) (trial to begin Jan. 22). Although Secretary Ross's decision should be evaluated on the administrative record alone and no trial on the merits of that decision should be held at any time, the fact that other courts and plaintiffs are planning on a trial in January indicates that plaintiffs have no pressing need to begin a trial imminently. And given the significant waste of resources that will be expended (by the government and plaintiffs alike) if the Supreme Court ultimately rules that a trial on the merits is improper, plaintiffs cannot establish that they will be unduly burdened by a stay of the trial pending the Supreme Court's disposition of the government's petition.

d. The public interest also supports a stay. If the government's petition for a writ of mandamus or certiorari is successful, the scope of trial will be significantly altered. Indeed, if the Supreme Court ultimately concludes that the Court's order authorizing extra-record discovery was in error, the need for a trial might be obviated altogether. There is no need to further tax the resources of the judiciary and the parties by proceeding with a trial on evidence that the Supreme Court might well soon deem improper.

4. As noted above, the government will file its petition for a writ of mandamus or certiorari with the Supreme Court by Monday, October 29, 2018 at 4 p.m., along with a motion for expedition. If neither this Court nor the district court grants the government's request for a stay by that time, the government intends to seek a stay from the Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should grant this motion for a stay.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

/s/ Gerard Sinzdak
MARK B. STERN
GERARD SINZDAK
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

OCTOBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the word limit of Federal Rule of Appellate Procedure 27 because it contains 2,579 words. I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished automatically by the appellate CM/ECF system on all other counsel.

s/ Gerard Sinzdak
GERARD SINZDAK

ATTACHMENT 1

SUPREME COURT OF THE UNITED STATES

IN RE DEPARTMENT OF COMMERCE, ET AL.

ON APPLICATION FOR STAY

No. 18A375. Decided October 22, 2018

The application for stay presented to JUSTICE GINSBURG and by her referred to the Court is granted in part and denied in part. The application is granted as to the order of the United States District Court for the Southern District of New York dated September 21, 2018, which is stayed through October 29, 2018 at 4 p.m. The application is denied as to the orders of the United States District Court for the Southern District of New York dated July 3, 2018 and August 17, 2018.

If the applicants file a petition for a writ of certiorari or a petition for a writ of mandamus with respect to the stayed order by or before October 29, 2018 at 4 p.m., the stay will remain in effect until disposition of such petition by this Court. Should the petition be denied, this stay shall terminate automatically. In the event the petition is granted, the stay shall terminate upon the sending down of the judgment of this Court. The denial of the stay with respect to the remaining orders does not preclude the applicants from making arguments with respect to those orders.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

To implement the constitutional requirement for an "actual Enumeration" of the people every 10 years, Art. I, §2, cl. 3, Congress has instructed the Secretary of Commerce to "take a decennial census . . . in such form and content as he may determine." 13 U. S. C. §141(a). Most censuses in our history have asked about citizenship, and Commerce Secretary Wilbur Ross recently decided to

reinstate a citizenship question in the 2020 census, citing a statement from the Department of Justice indicating that citizenship data would help it enforce the Voting Rights Act of 1965. Normally, judicial review of an agency action like this is limited to the record the agency has compiled to support its decision. But in the case before us the district court held that the plaintiffs—assorted States and interest groups—had made a "strong showing" that Secretary Ross acted in "bad faith" and were thus entitled to explore his subjective motivations through "extra-record discovery," including depositions of the Secretary, an Acting Assistant Attorney General, and other senior officials. In two weeks, the district court plans to hold a trial to probe the Secretary's mental processes.

This is all highly unusual, to say the least. Leveling an extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification. As evidence of bad faith here, the district court cited evidence that Secretary Ross was predisposed to reinstate the citizenship question when he took office; that the Justice Department hadn't expressed a desire for more detailed citizenship data until the Secretary solicited its views; that he overruled the objections of his agency's career staff; and that he declined to order more testing of the question given its long history. But there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape. Of course, some people may disagree with the policy and process. But until now, at least, this much has never been thought enough to justify a claim of bad faith and launch an inquisition into a cabinet secretary's motives.

Unsurprisingly, the government tells us that it intends to file a petition seeking review of the district court's bad faith determination and its orders allowing extra-record

discovery. Toward that end, it has asked us to stay temporarily all extra-record discovery until we may consider its petition for review.

Today, the Court signals that it is likely to grant the government's petition. It stays Secretary Ross's deposition after weighing, among other things, the likelihood of review and the injury that could occur without a stay. And it expressly invites the government to seek review of all of the district court's orders allowing extra-record discovery, including those authorizing the depositions of other senior officials.

Respectfully, I would take the next logical step and simply stay all extra-record discovery pending our review. When it comes to the likelihood of success, there's no reason to distinguish between Secretary Ross's deposition and those of other senior executive officials: each stems from the same doubtful bad faith ruling, and each seeks to explore his motives. As to the hardships, the Court apparently thinks the deposition of a cabinet secretary especially burdensome. But the other extra-record discovery also burdens a coordinate branch in most unusual ways. Meanwhile and by comparison, the plaintiffs would suffer no hardship from being temporarily denied that which they very likely have no right to at all.

There is another factor here, too, weighing in favor of a more complete stay: the need to protect the very review we invite. One would expect that the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance. After all, that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent. But because today's order technically leaves the plaintiffs able to pursue much of the extra-record discovery they seek, it's conceivable they might withdraw their request to depose Secretary Ross, try to persuade the trial court to proceed quickly to trial on the basis of the remain-

ing extra-record evidence they can assemble, and then oppose certiorari on the ground that their discovery dispute has become "moot." To ensure that the Court's offer of prompt review is not made meaningless by such maneuvers, I would have thought it simplest to grant the requested extra-record discovery stay in full. Of course, other, if more involved, means exist to ensure that this Court's review of the district court's bad faith finding is not frustrated. I only hope they are not required.

ATTACHMENT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

ORDER

JESSE M. FURMAN, United States District Judge:

It is hereby ORDERED that Plaintiffs' motion for leave to present live direct testimony at trial (Docket No. 386) is GRANTED in part and DENIED in part to the extent discussed, and for the reasons given, on the record at the conference held today, October 24, 2018. Specifically, the Court will permit the live direct testimony of Plaintiffs' expert witnesses (including the testimony of Dr. Salvo in its entirety), and of Dr. Abowd, (*see* Docket No. 393, at 2).

It is further ORDERED that discovery in this case is extended to **October 28, 2018** for the limited purpose of Plaintiffs' depositions of Mr. Gore, Mr. Langdon, Ms. Park-Su, and Mr. Neuman.

It is further ORDERED that any motion to compel Defendants to produce the two documents provided to Mr. Gore from the Department of Commerce (*see* Docket No. 399, at 1) shall be filed **by tomorrow, October 25, 2018, at 10:00 a.m.** Defendants shall file any response the same day **by 4:00 p.m.**

As discussed at the conference, the parties shall confer and propose extended deadlines for filing deposition designations and any objections to such designations via joint letter to be filed on ECF by **October 26, 2018.** The parties shall file any objections to proposed trial exhibits by **October 29, 2018, at 12:00 p.m.**

The Clerk is directed to terminate Docket No. 386.

SO ORDERED.

Dated: October 24, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

ATTACHMENT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STATE OF NEW YORK, et al.,

Plaintiffs,

v. 18 Civ. 2921 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Argument

Defendants.

----------x

NEW YORK IMMIGRATION COALITION,et al.,

Plaintiffs,

v. 18 Civ. 5025 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Argument

Defendants.

----------x

New York, N.Y.
July 3, 2018
9:30 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

That alone would warrant an order to complete the Administrative Record. But, compounding matters, the current record expressly references documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record. For example, Secretary Ross claims that "additional empirical evidence about the impact of sensitive questions on the survey response rates came from the Senior Vice-President of Data Science at Nielsen." That's page 1318 of the record. But the record contains no empirical evidence from Nielsen. Additionally, the record does not include documents relied upon by subordinates, upon whose advice Secretary Ross plainly relied in turn. For example, Secretary Ross's memo references "the department's review" of inclusion of the citizenship question, and advice of "Census Bureau staff." That's pages 1314, 1317, and 1319. Yet the record is nearly devoid of materials from key personnel at the Census Bureau or Department of Commerce -- apart from two memoranda from the Census Bureau's chief scientist which strongly recommend that the Secretary not add a citizenship question. Pages 1277 and 1308. The Administrative Record is supposed to include "materials that the agency decision-maker indirectly or constructively considered." Batalla Vidal v. Duke, 2017 WL 4737280 at page 5 (E.D.N.Y. October 19, 2017).

Here, for the reasons that I've stated, I conclude that the current Administrative Record does not include the

full scope of such materials. Accordingly, plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded.

Finally, I agree with the plaintiffs that there is a solid basis to permit discovery of extra-record evidence in this case. To the extent relevant here, a court may allow discovery beyond the record where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." National Audubon Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without intimating any view on the ultimate issues in this case, I conclude that plaintiffs have made such a showing here for several reasons.

First, Secretary Ross's supplemental memorandum of June 21, which I've already discussed, 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. See, for example, Tummino v. von Eschenbach, 427 F.Supp. 2d 212, 233 (E.D.N.Y. 2006) authorizing extra-record discovery where there was evidence that the agency decision-makers had made a decision and, only thereafter took steps "to find acceptable rationales for the decision." Second, the Administrative Record reveals that Secretary Ross overruled senior Census Bureau career staff, who had concluded -- and this is at page

1277 of the record -- that reinstating the citizenship question would be "very costly" and "harm the quality of the census count." Once again, see Tummino, 427 F.Supp. 2d at 231-32, holding that the plaintiffs had made a sufficient showing of bad faith where "senior level personnel overruled the professional staff." Third, plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question. Specifically, plaintiffs allege that, before adopting changes to the questionnaire, the Census Bureau typically spends considerable resources and time -- in some instances up to ten years -- testing the proposed changes. See the amended complaint which is docket no. 85 in the states' case at paragraph 59. Here, by defendants' own admission -- see the amended complaint at paragraph 62 and page 1313 of the Administrative Record -- defendants added an entirely new question after substantially less consideration and without any testing at all. Yet again Tummino is instructive. See 427 F.Supp. 2d at 233, citing an "unusual" decision-making process as a basis for extra-record discovery.

Finally, plaintiffs have 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. To my knowledge, the Department of Justice and

civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims. See the states case docket no. 187-1 at 14; see also paragraph 97 of the amended complaint. On top of that, plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act casts further doubt on the stated rationale. See paragraph 184 of the complaint which is docket no. 1 in the Immigration Coalition case. Defendants may well be right that those allegations are "meaningless absent a comparison of the frequency with which past actions have been brought or data on the number of investigations currently being undertaken," and that plaintiffs may fail "to recognize the possibility that the DOJ's voting-rights investigations might be hindered by a lack of citizenship data." That is page 5 of the government's letter which is docket no. 194 in the states case. But those arguments merely point to and underscore the need to look beyond the Administrative Record.

To be clear, I am not today making a finding that Secretary Ross's stated rationale was pretextual -- whether it was or wasn't is a question that I may have to answer if or when I reach the ultimate merits of the issues in these cases. Instead, the question at this stage is merely whether --

assuming the truth of the allegations in their complaints -- plaintiffs have made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith. See, for example, Ali v. Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For the reasons I've just summarized, I conclude that the plaintiffs have done so.

That brings me to the question of scope. On that score, I am mindful that discovery in an APA action, when permitted, "should not transform the litigation into one involving all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency under Section 706." That is from Ali v. Pompeo at page 4, citing cases. I recognize, of course, that plaintiffs argue that they are independently entitled to discovery in connection with their constitutional claims. I'm inclined to disagree given that the APA itself provides for judicial review of agency action that is "contrary to" the Constitution. See, for example, Chang v. USCIS, 254 F.Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if plaintiffs are correct on that score, it is well within my authority under Rule 26 to limit the scope of discovery.

Mindful of those admonitions, not to mention the separation of powers principles at stake here, I am not

inclined to allows as much or as broad discovery as the plaintiffs seek, at least in the first instance. First, absent agreement of defendants or leave of Court, of me, I will limit plaintiffs to ten fact depositions. To the extent that plaintiffs seek to take more than that, they will have to make a detailed showing in the form of a letter motion, after conferring with defendants, that the additional deposition or depositions are necessary. Second, again absent agreement of the defendants or leave of Court, I will limit discovery to the Departments of Commerce and Justice. As defendants' own arguments make clear, materials from the Department of Justice are likely to shed light on the motivations for Secretary Ross's decision -- and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision. At this stage, however, I am not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that that influence would be evidenced in Commerce Department materials and witnesses themselves. Further, to the extent that plaintiffs would seek discovery from the White House, including from current and former White House officials, it would create "possible separation of powers issues." That is from page 4 of the slip opinion in the Nielsen order. Third, although I suspect there will be a strong case for allowing a

deposition of Secretary Ross himself, I will defer that question to another day. For one thing, I think it should be the subject of briefing in and of itself. It raises a number of thorny issues. For another, I'm inclined to think that plaintiffs should take other depositions before deciding whether they need or want to go down that road and bite off that issue recognizing, among other things, that defendants have raised the specter of appellate review in the event that I did allow it. At the same time, I want to make sure that I have enough time to decide the issue and to allow for the possibility of appellate review without interfering with an expeditious schedule. So on that issue I'd like you to meet and confer with one another and discuss a timeline and a way of raising the issue, that is to say, when it is both ripe but also timely and would allow for an orderly resolution.

So with those limitations, I will allow plaintiffs to engage in discovery beyond the record. Further, I will allow for expert discovery. Expert testimony would seem to be commonplace in cases of this sort. See, for example, Cuomo v. Baldrige, 674 F.Supp. 1089 (S.D.N.Y. 1987). And as I indicated in my colloquy with Ms. Vargas, I do not read Sierra v. United States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985), to "prohibit" expert discovery as defendants suggestion. That case, in my view, speaks the deference that a court ultimately owes the agency's own expert analyses, but it does not speak to

ATTACHMENT 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In these consolidated cases, familiarity with which is assumed, Plaintiffs bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). Now pending is a question that has loomed large since July 3, 2018, when the Court authorized extra-record discovery on the ground that Plaintiffs had "made a strong preliminary or *prima facie* showing that they will find material beyond the Administrative Record indicative of bad faith." (Docket No. 205 ("July 3rd Tr."), at 85). That question, which is the subject of competing letter briefs, is whether Secretary Ross himself must sit for a deposition. (*See* Docket No. 314 ("Pls.' Letter"); Docket No. 320 ("Defs.' Letter"); Docket No. 325 ("Pls.' Reply")). Applying well-established principles to the unusual facts of these cases, the Court concludes that the question is not a close one: Secretary Ross must sit for a deposition because, among other things, his intent and credibility are directly at issue in these cases.

The Second Circuit established the standards relevant to the present dispute in *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013). In that case, the Circuit observed that courts had long held "that a high-ranking government official should not — absent exceptional circumstances — be deposed or called to testify regarding the reasons for taking official action, 'including the manner and extent of his study of the record and his consultation with subordinates.'" *Id.* at 203 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)). "High-ranking government officials," the Court explained, "are generally shielded from depositions because they have greater duties and time constraints than other witnesses. If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation." *Id.* (internal quotation marks and citation omitted). Joining several other courts of appeals, the Circuit thus held that "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition." *Id.* The Court then proffered two *alternative* examples of showings that would satisfy the "exceptional circumstances" standard: "that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.* (emphasis added).[1]

Those standards compel the conclusion that a deposition of Secretary Ross is appropriate. First, Secretary Ross plainly has "unique first-hand knowledge related to the litigated claims." 731 F.3d at 203. To prevail on their claims under the APA, 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." *Nat'l Ass'n*

[1] Defendants argue that where, as here, the high-ranking official in question is a member of the President's Cabinet, the "hurdle is exceptionally high." (Defs.' Letter at 1). That argument, however, finds no support in *Lederman*. In any event, even if an "exceptionally high" standard did apply here, the result would be the same given the Court's findings below.

of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As Defendants themselves have conceded (*see* Docket No. 150, at 15), one way Plaintiffs can do so is by showing that the stated rationale for Secretary Ross's decision was not his *actual* rationale. Indeed, the Supreme Court has long held that the APA requires an agency decisionmaker to "disclose the basis of its" decision, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (internal quotation marks omitted), a requirement that would be for naught if the agency could conceal the *actual* basis for its decision, *see also FTC v. Sperry & Hutchinson Co*, 405 U.S. 233, 248-49 (1972). To prevail on their other claim — under the Due Process clause — Plaintiffs must show that an "invidious discriminatory purpose" was a "motivating factor" in Secretary Ross's decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). That analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he specific sequence of events leading up the challenged decision," the "administrative history [including] . . . contemporary statements by members of the decisionmaking body," and even direct testimony from decisionmakers "concerning the purpose of the official action." *Id.* at 266-68. If that evidence establishes that the stated reason for Secretary Ross's decision was not the real one, a reasonable factfinder may be able to infer from that and other evidence that he was "dissembling to cover up a discriminatory purpose." *New York*, 315 F. Supp. 3d at 809 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).

Notably, in litigating earlier discovery disputes, Defendants all but admitted that Plaintiffs' claims turn on the intent of Secretary Ross himself. For instance, in litigating the propriety of Defendants' invocation of the deliberative process privilege, Defendants contended that Plaintiffs should not receive materials prepared by Secretary Ross's subordinates because

such materials would not shed light on Plaintiffs' "claims that the ultimate decisionmaker's decision" — that is, *Secretary Ross's* decision — "was based on pretext." (Docket No. 315, at 3). And in seeking to preclude a deposition of the Acting Assistant Attorney General for Civil Rights — the purported ghostwriter of the DOJ letter — Defendants argued vigorously that "[t]he relevant question" in these cases "is whether *Commerce's* stated reasons for reinstating the citizenship question were pretextual." (Docket No. 255, at 2 (emphasis in original)). As Defendants put it: "*Commerce* was the decision-maker, not DOJ. . . . [T]herefore, *Commerce's* intent is at issue not DOJ's." (*Id.* (emphases added)). In a footnote, Defendants went even further, asserting that "[t]he sole inquiry should be whether *Commerce* actually believed the articulated basis for adopting the policy." (*Id.* at 2 n.1 (emphasis added)). Undoubtedly, Defendants deliberately substituted the word "Commerce" for "Secretary Ross" knowing full well that Plaintiffs' request to depose him was coming down the pike. But given that Secretary Ross himself "was the decision-maker" and that it was he who "articulated" the "basis for adopting the policy," the significance of Defendants' own prior concessions about the centrality of the "decision-maker's" intent cannot be understated.

Indeed, in 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. Critically, that is not the case merely because Secretary Ross made the decision that Plaintiffs are challenging — indeed, that could justify the deposition of a high-ranking government official in almost every APA case, contrary to the teachings of *Lederman*. Instead, it is the case because Secretary Ross was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree. *See, e.g.*, *United States v. City of New York*, No. 07-CV-2067 (NGG) (RLM), 2009 WL 2423307, at *2-3 (E.D.N.Y. Aug. 5, 2009) (authorizing the Mayor's deposition where his congressional testimony "suggest[ed] his direct

involvement in the events at issue"). By his own admission, Secretary Ross "began considering . . . whether to reinstate a citizenship question" shortly after his appointment in February 2017 and well before December 12, 2017, when the Department of Justice ("DOJ") made a formal request to do so. (Docket No. 189-1). In connection with that early consideration, Secretary Ross consulted with various "other governmental officials" — although precisely with whom and when remains less than crystal clear. (*Id.*; *see also* Docket Nos. 313, 319). Additionally, Secretary Ross manifested an unusually strong personal interest in the matter, demanding 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." (Docket No. 212, at 3699).[2] And he personally lobbied the Attorney General to submit the request that he "then later relied on to justify his decision," *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4279467, at *4 (S.D.N.Y. Sept. 7, 2018) (*see also* Docket Nos. 314-4, 314-5), and he did so despite being told that DOJ "did not want to raise the question," (Docket No. 325-1). Finally, as the Court has noted elsewhere, *see New York*, 315 F. Supp. 3d at 808, he did all this — and ultimately mandated the addition of the citizenship question — over the strong and continuing opposition of subject-matter experts at the Census Bureau. (*See* Docket No. 325-2, at 5; Docket No. 173, at 1277-85, 1308-12).[3]

The foregoing record is enough to justify the relief Plaintiffs seek, but a deposition is also warranted because Defendants — and Secretary Ross himself — have placed the credibility of

[2] Docket No. 212 is Defendants' notice of the filing of supplemental materials. Given the volume of those materials, Defendants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip.

[3] Docket No. 173 is Defendants' filing of (the first part of) the Administrative Record. Given the volume of those materials, Defendants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20[CERTIFICATION-INDEX-DOCUMENTS]%206.8.18.pdf.

Secretary Ross squarely at issue in these cases. In his March 2018 decision memorandum, for example, Secretary Ross stated that he "*set out* to take a hard look" at adding the citizenship question "[*f*]*ollowing receipt*" of the December 2017 request from DOJ. (A.R. 1313 (emphases added)). Additionally, in sworn testimony before the House of Representatives, Secretary Ross claimed that DOJ had "*initiated* the request for inclusion of the citizenship question," *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (2018), at 2018 WLNR 8951469, and that he was "responding *solely* to the Department of Justice's request," *Hearing on F.Y. 2019 Dep't of Commerce Budget: Hearing Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 9 (2018), at 2018 WLNR 8815056 ("*Mar. 20, 2018 Hearing*") (emphases added). The record developed thus far, however, casts grave doubt on those claims. (*See, e.g.*, Docket No. 189-1 (conceding that Secretary Ross and his staff "inquired whether the Department of Justice . . . would support, *and if so would request*, inclusion of a citizenship question" (emphasis added)); *see* July 3rd Tr. 79-80, 82-83). *See also New York*, 315 F. Supp. 3d at 808-09. Equally significant, Secretary Ross testified under oath that he was "not aware" of any discussions between him and "anyone in the White House" regarding the addition of the citizenship question. *Mar. 20, 2018 Hearing* at 21 ("Q: Has the President or anyone in the White House discussed with you or anyone on your team about adding this citizenship question? A: I'm not aware of any such."). But there is now reason to believe that Steve Bannon, then a senior advisor in the White House, was among the "other government officials" whom Secretary Ross consulted about the citizenship question. (*See* Docket Nos. 314-1, 314-3).

In short, it is indisputable — and in other (perhaps less guarded) moments, Defendants themselves have not disputed — that the intent and credibility of Secretary Ross himself are not

merely relevant, but central, to Plaintiffs claims in this case. It nearly goes without saying that Plaintiffs cannot meaningfully probe or test, and the Court cannot meaningfully evaluate, Secretary Ross's intent and credibility without granting Plaintiffs an opportunity to confront and cross-examine him. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). Indeed, the Supreme Court and the Second Circuit have observed in other contexts that "where motive and intent play leading roles" and "the proof is largely in [Defendants'] hands," as are the case here, it is critical that the relevant witnesses be "present and subject to cross-examination" so "that their credibility and the weight to be given their testimony can be appraised." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *see DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002) ("Live testimony is especially important . . . where the factfinder's evaluation of witnesses' credibility is central to the resolution of the issues."); *cf. Goldberg*, 397 U.S. at 269 ("[W]here credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.").

Separate and apart from that, Plaintiffs have demonstrated that taking a deposition of Secretary Ross may be the only way to fill in critical blanks in the current record. Notably, Secretary Ross's three closest and most senior advisors who advised on the citizenship question — his Chief of Staff, the Acting Deputy Secretary, and the Policy Director/Deputy Chief of Staff — testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs claims. (*See, e.g.*, Pls.' Letter, Ex. 6, at 85 ("You would have to ask [Secretary Ross]."), 101 (same), 209 (same), 210 (same); *id.* Ex. 8, at 111-13 (same)). Among other things, no witness has been able to — or presumably could — testify to the substance and details of Secretary Ross's early conversations regarding the citizenship question with the Attorney General or with interested third parties such as Kansas Secretary of State Kris

Kobach. (*See* Pls.' Letter, Ex. 6, at 82-86, 119-20, 167-68; *id.* Ex. 7 at 57-58; *id.* Ex. 8 at 205-07). No witness has been able to identify to whom Secretary Ross was referring when he admitted that "other senior Administration officials . . . raised" the idea of the citizenship question before he began considering it. (*See* Pls.' Letter, Ex. 6 at 101; *id.* Ex. 7 at 71-73; *id.* Ex. 8 at 111-13). And despite an allegedly diligent investigation — including "consultation" of an unknown nature and extent with Secretary Ross himself (Sept. 14, 2018 Conf. Tr. 16) — Defendants have not been able to identify precisely to whom Secretary Ross spoke about the citizenship question, let alone when, in the critical months before DOJ's December 2017 letter, (*see id.*). At a minimum, Plaintiffs are entitled to make good-faith efforts to refresh Secretary Ross's recollections of these critical facts and to test the credibility of any claimed lack of memory in a deposition. Indeed, there is no other way they could do so.

In sum, for the foregoing reasons, 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." *Lederman*, 731 F.3d at 203. In arguing otherwise, Defendants contend that this Court's review of Secretary Ross's decision must be limited to the administrative record. (Defs.' Letter 2). But that assertion ignores Plaintiffs' due process claim, in which they plausibly allege that an invidious discriminatory purpose was a motivating factor in the challenged decision. *See New York*, 315 F. Supp. 3d at 808-11. Evaluation of that claim requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including, in appropriate circumstances, "the testimony of decisionmakers." *Id.* at 807, 808 (internal quotation marks omitted). Defendants' assertion also overlooks that the testimony of decisionmakers can be required even under the APA. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), for example, the Supreme Court made clear

that the APA requires a "thorough, probing, in-depth review" of agency action, including a "searching and careful" inquiry into the facts. *Id.* at 415-16. And where there is "a strong showing of bad faith or improper behavior," that permits a court to "require the administrative officials who participated in the decision to give testimony explaining their action." *Id.* As the Court held on July 3rd, that is the case here. (*See* July 3rd Tr. 82-84). "If anything, the basis for that conclusion appears even stronger today." *New York*, 2018 WL 4279467, at *3.

Defendants also contend that the information Plaintiffs seek can be obtained from other sources, such as a Rule 30(b)(6) deposition of the Department of Commerce, interrogatories, or requests for admission. (Defs.' Letter 3). But that contention is unpersuasive for several reasons. First, none of those means are adequate to test or evaluate Secretary Ross's credibility. Second, none allows Plaintiffs the opportunity to try to refresh Secretary Ross's recollection if that proves to be necessary (as seems likely, *see* Sept. 14, 2018 Conf. Tr. 16) or to ask follow-up questions. *See Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (authorizing the deposition of a high-ranking official, in lieu of further written discovery, in part because a deposition "has the advantage of allowing for immediate follow-up questions by plaintiffs' counsel"). Third, Plaintiffs have already pursued several of these options, yet gaps in the record remain. (*See* Docket Nos. 313, 319; Sept. 14, 2018 Conf. Tr. 14-16). And finally, to adequately respond to additional interrogatories, prepare a Rule 30(b)(6) witness, or respond to requests for admission, Defendants would have to burden Secretary Ross anyway. "Ordering a deposition at this time is a more efficient means" of resolving Plaintiffs' claims "than burdening the parties and the [Secretary] with further rounds of interrogatories, and, possibly, further court rulings and appeals." *City of New York*, 2009 WL 2423307, at *3.

Two final points warrant emphasis. First, the Court's conclusion that Plaintiffs are entitled to depose Secretary Ross is not quite as unprecedented as Defendants suggest. To be

sure, depositions of agency heads are rare — and for good reasons. But courts have not hesitated to take testimony from federal agency heads (whether voluntarily or, if necessary, by order) where, as here, the circumstances warranted them. *See, e.g.*, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 & n.1 (D.D.C. 1999) (reaching a decision after a trial at which the Secretary of the Interior testified — shortly after being held in civil contempt for violating the Court's discovery order); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 316 F. Supp. 754, 760 nn.12 & 36 (D.D.C. 1970) (deposition and trial testimony required from the Secretary of Transportation), *rev'd on other grounds sub nom. D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 768-69 (D.D.C. 1984) (requiring a deposition of the head of the United States Information Agency); *Union Sav. Bank of Patchogue, N.Y. v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962) (compelling a deposition of the Comptroller of the Currency); *see also Volpe*, 459 F.2d at 1237-38 (approving of the district court's decision to require the Secretary's testimony).

Courts have also permitted testimony from former agency heads about the reasons for official actions taken while they were still in office. *See, e.g.*, *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428, 431 (2015) (Secretary of the Treasury and Chair of the Federal Reserve), *vacated in part on other grounds*, 856 F.3d 953 (Fed. Cir. 2017); *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 372 (1996) (Secretary of Defense). And, contrary to Defendants' suggestion that authorizing a deposition of Secretary Ross "would have serious repercussions for the relationship between two coequal branches of government" (Defs.' Letter 1 (internal quotation marks omitted)), the Supreme Court has made clear that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions," do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997).

If separation-of-powers principles do not call for a federal court to refrain from exercising "its traditional Article III jurisdiction" even where exercising that jurisdiction may "significantly burden the time and attention" of *the President*, *see id.* at 703, they surely do not call for refraining from the exercise of this Court's jurisdiction here.[4]

Second, in the final analysis, there is something surprising, if not unsettling, about Defendants' aggressive efforts to shield Secretary Ross from having to answer questions about his conduct in adding the citizenship question to the census questionnaire. At bottom, limitations on depositions of high-ranking officials are rooted in the notion that it would be contrary to the public interest to allow litigants to interfere too easily with their important duties. *See Lederman*, 731 F.3d at 203. The fair and orderly administration of the census, however, is arguably the Secretary of Commerce's most important duty, and it is critically important that the public have "confidence in the integrity of the process" underlying "this mainstay of our democracy." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment). In light of that, and the unusual circumstances presented in these cases, the public interest weighs heavily in favor of both transparency and ensuring the development of a comprehensive record to evaluate the propriety of Secretary Ross's decision. In short, the public interest weighs heavily in favor of granting Plaintiffs' application for an order requiring Secretary Ross to sit for a deposition.

---

[4] It bears mentioning that Secretary Ross has testified several times on the subject of this litigation before Congress — a co-equal branch not only of the Executive, but also of the Judiciary. (*See* Pls.' Reply 3 n.6). Although congressional testimony, and preparation for the same, undoubtedly impose serious burdens on Executive Branch officials, even high-ranking Executive Branch officials must comply with subpoenas to testify before Congress. *See Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 106-07 (D.D.C. 2008). The obligation to give testimony in proceedings pending before an Article III court, where necessary, is of no lesser importance.

That said, mindful of the burdens that a deposition will impose on Secretary Ross and the scope of the existing record (including the fact that Secretary Ross has already testified before Congress about his decision to add the citizenship question), the Court limits the deposition to four hours in length, *see, e.g.*, *Arista Records LLC v. Lime Grp. LLC*, No. 06-CV-5936 (GEL), 2008 WL 1752254, at *1 (S.D.N.Y. Apr. 16, 2008) ("A district court has broad discretion to set the length of depositions appropriate to the circumstances of the case."), and mandates that it be conducted at the Department of Commerce or another location convenient for Secretary Ross. The Court, however, rejects Defendants' contention that the deposition "should be held only after all other discovery is concluded," (Defs.' Letter 3), in no small part because the smaller the window, the harder it will undoubtedly be to schedule the deposition. Finally, the Court declines Defendants' request to "stay its order for 14 days or until Defendants' anticipated mandamus petition is resolved, whichever is later." (*Id.*). Putting aside the fact that Defendants do not even attempt to establish that the circumstances warranting a stay are present, *see New York*, 2018 WL 4279467, at *1 (discussing the standards for a stay pending a mandamus petition), the October 12, 2018 discovery deadline is rapidly approaching and Defendants themselves have acknowledged that time is of the essence, *see id.* at *3. Moreover, the deposition will not take place immediately; instead, Plaintiffs will need to notice it and counsel will presumably need to confer about scheduling and other logistics. In the meantime, Defendants will have ample time to seek mandamus review and a stay pending such review from the Circuit.

The Clerk of Court is directed to terminate Docket No. 314.

SO ORDERED.

Dated: September 21, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

ATTACHMENT 5

October 19, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' Motion to Present Live Direct Testimony in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Pursuant to the Court's October 18 Order and Rule 5(E) of this Court's Individual Rules and Practices, Plaintiffs move for leave from the Court's Scheduling Order of September 17, 2018 (Docket No. 323, ¶ 2) to present direct testimony in person rather than by affidavit from a small number of witnesses at trial. As set forth below, Plaintiffs' request is to present live direct testimony from six witnesses – fact testimony from witnesses representing three (of the 39) Plaintiffs, and four (of the ten) expert witnesses (with one witness presenting both fact and expert testimony). The balance of Plaintiffs' direct testimony, from approximately 22 witnesses, will be presented by affidavit in accordance with the Court's standard practice for bench trials.

First, the issues presented by this case are complex, and Plaintiffs believe that direct oral testimony from a few select witnesses will provide the Court with a useful framework for trial: these witnesses can explain key technical concepts about Census operations, explain how the addition of a citizenship question will impact those operations, and identify how this change will harm the Plaintiffs.

Second, the Federal Rules of Civil Procedure recognize the inherent value to presenting direct testimony live. Rule 43(a) provides that "[a]t trial, the witnesses' testimony must be taken in open court . . . ." While Plaintiffs recognize that Rule 611(a) of the Federal Rules of Evidence permits the Court to control the mode and order of examining witnesses, and do not contend that Rule 43(a) requires that direct testimony be live in this case, Plaintiffs submit that allowing testimony from a limited number of the Plaintiffs' fact witnesses and key experts will allow the public to see and learn about essential elements of the case. This point applies with additional force here given the critical importance of the Census to the proper operation and structuring of our representative democracy, and to the faith of the public in that democracy. *See* Order of Sept. 7, 2018, at 8 (Docket No. 308) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)). These considerations are underscored by the fact that this case is brought by eighteen states, the District of Columbia, nine cities, five counties, the U.S. Conference of Mayors, and five other non-governmental organizations for the protection of their residents and members.

The witnesses in question are identified below.

Steven Choi is the Executive Director for Plaintiff New York Immigration Coalition ("NYIC"). NYIC is the umbrella policy and advocacy organization for nearly 200 groups in New York

State, representing the collective interests of New York's diverse immigrant communities. Mr. Choi will testify regarding NYIC's extensive education and outreach efforts regarding the Census, including its leadership of the New York Counts 2020 coalition, which is the leading organization conducting outreach to immigrant communities to participate in the 2020 Census. Mr. Choi will describe these efforts, as well as the challenges and costs associated due to the heightened fear generated by the citizenship question among immigrant communities of color. Mr. Choi will be able to provide the court with information about how fear of answering the citizenship question among immigrant communities of color has affected NYIC, its member organizations, and the communities they serve. Mr. Choi's testimony will establish Plaintiffs' standing, an issue which the Defendants have contested.

Javier Valdes is the co-Executive Director of Plaintiff Make the Road New York ("MRNY"). MRNY is a non-governmental organization dedicated to empowering immigrant and working-class communities with approximately 22,000 members in the New York metropolitan area. Mr. Valdes will testify about MRNY's membership and the importance of a complete and accurate 2020 Decennial Census to MRNY's members in terms of the allocation of federal resources and political representation. Mr. Valdes will also testify to the heightened climate of fear created by the Trump Administration among the immigrant communities that MRNY serves, and the incremental challenges and costs generated by the addition of a citizenship question to the 2020 Decennial Census for MRNY and its members. Mr. Valdes will also testify concerning the additional resources that MRNY has already been required to divert from other organizational priorities to its Census education and outreach efforts to address concerns from its members and the local community arising from fear of the citizenship question. Mr. Valdes' testimony will establish Plaintiffs' standing, an issue which the Defendants have contested.

Dr. Sunshine Hillygus is a Professor of Political Science and Public Policy at Duke University. Dr. Hillygus is an expert on survey methodology and on Census Bureau surveys, including the Decennial Census, having served for six years on the Department of Commerce's Census Scientific Advisory Committee (CSAC). Among her publications is *The Hard Count: The political and social challenges of census mobilization*, a leading study of the challenges the Census Bureau has faced in enumerating immigrants, racial and ethnic minorities, and other "hard-to-count" populations. Dr. Hillygus will present testimony about foundational concepts of survey design (including the importance of pre-testing) and survey response, including respondent sensitivity, respondent confidentiality, non-response, and non-response follow-up. She will also provide an overview of the available evidence from the Census Bureau, other public survey organizations, and academia regarding the differential impact the addition of a citizenship question is expected to have on response rates of noncitizen households and Hispanics. She will additionally testify regarding the sufficiency of the Census Bureau's testing of the citizenship question; (ii) whether the Census Bureau's follow-up procedures to enumerate households that fail or decline to participate in the Decennial Census will cure the undercount for hard-to-count populations; and (iii) accuracy and confidentiality challenges of the potential use of citizenship data. Because she can explain key foundational concepts, Plaintiffs believe trial presentation will be clearer if Dr. Hillygus can present her direct testimony before cross-examination.

Dr. Matthew A. Barreto is a professor of Political Science and Chicana/o Studies at the University of California, Los Angeles. Dr. Barreto is an expert in public opinion polling and

survey methodology, and will present testimony about the survey he designed and conducted, including analysis on the expected impact the addition of a citizenship question will have on response rates of racial and ethnic minorities to the 2020 Census. Because Dr. Barreto's survey design and related analysis are technical, Plaintiffs believe the evidentiary record will be clearer if Dr. Barreto can explain his survey, the methodology underlying it, and how it compares to other quantitative research relied on by the Census Bureau prior to cross-examination. Dr. Barreto is also a rebuttal expert on the sufficiency of the Census Bureau's follow-up plans to enumerate households that fail or decline to participate in the Decennial Census, and whether those measures will cure the differential undercount for racial and ethnic minority populations.

Dr. Joseph Salvo is the Director of the Population Division at the New York City Department of City Planning. He is the City's chief demographer and has been directly involved in census preparations and follow-up operations for almost 40 years. Dr. Salvo will testify about the Census Bureau's non-response follow-up operations, the analysis he conducted of the 2010 Decennial Census, the sufficiency of the Census Bureau's follow-up plans to enumerate households that fail or decline to participate in the Decennial Census, and the resulting differential undercount of certain populations and neighborhoods. Although Dr. Salvo will be presenting a practical application of concepts presented by other experts, because his underlying analysis is technical, Plaintiffs believe the evidentiary record will be clearer if Dr. Salvo can present these issues prior to cross-examination. Dr. Salvo will also provide fact testimony regarding the additional efforts that Plaintiff New York City is implementing in an effort to mitigate the potential damage caused by the citizenship question on response rates.

Dr. Lisa Handley is a political scientist who is an independent consultant on voting rights and redistricting. Her clients include the United States Department of Justice, as well as various state and local governments. She has been retained by the U.S. Department of Justice as a testifying expert in five of the ten Voting Rights Act Section 2 cases the Department has filed since 2006. Dr. Handley will present testimony on the use of existing data to enforce the Voting Rights Act, the lack of need or utility to collect citizenship data through the Decennial Census, and the implications of data privacy requirements for the utility of Decennial Census data for Voting Rights Act enforcement. Because the use and consideration of data for redistricting purposes is technical, Plaintiffs believe the evidentiary record will be clearer if Dr. Handley can present these issues prior to cross-examination.

For the foregoing reasons, Plaintiffs request that they be permitted to present the direct testimony of the foregoing six witnesses live.

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General of the State of New York

By: */s/ Elena Goldsten*
Elena Goldstein, *Senior Trial Counsel*
Matthew Colangelo
Executive Deputy Attorney General
Ajay Saini, *Assistant Attorney General*

Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6201
elena.goldstein@ag.ny.gov

Attorney for the *State of New York* Plaintiffs

ARNOLD & PORTER KAYE SCHOLER LLP
AMERICAN CIVIL LIBERTIES UNION

By: */s/ John A. Freedman*

Dale Ho
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 549-2693
dho@aclu.org

Andrew Bauer
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-7669
Andrew.Bauer@arnoldporter.com

Sarah Brannon*
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005-2313
202-675-2337
sbrannon@aclu.org
** Not admitted in the District of Columbia; practice limited pursuant to D.C. App. R. 49(c)(3).*

John A. Freedman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001-3743
(202) 942-5000
John.Freedman@arnoldporter.com

Perry M. Grossman
New York Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 607-3300 601
pgrossman@nyclu.org

Attorneys for the *NYIC* Plaintiffs