No. 18-

Case Nos. 18-CV-5025 (JMF) (S.D.N.Y)

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.

PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
AND EMERGENCY MOTION FOR STAY
PENDING CONSIDERATION OF THIS PETITION

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INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the district court to quash the deposition of Secretary of Commerce Wilbur Ross in these cases challenging Secretary Ross's decision to reinstate a citizenship question on the decennial census. Because plaintiffs intend to depose Secretary Ross as early as October 3, and no later than October 11, 2018, we also ask this Court to issue an immediate administrative stay of the order compelling the deposition, pending this Court's consideration and, if necessary, the Supreme Court's review of this mandamus petition.

Judicial orders compelling the testimony of high-ranking government officials are justified only under "exceptional circumstances," *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2013), and no such circumstances exist here. Secretary Ross set forth his reasons for his eminently reasonable decision to reinstate a citizenship question in detailed memoranda, 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 record, without inquiry into Secretary Ross's deliberative process and any subjective reasons he might have had for favoring the reinstatement of a citizenship question.

The district court's reasons for concluding that this is the exceedingly rare case in which the compelled testimony of a cabinet-level Secretary is justified are flawed.

The district court concluded that "exceptional circumstances" justified Secretary Ross's deposition because his "intent and credibility" are central to plaintiffs' claims, and Secretary Ross is the only person who can testify to such matters. But none of the reasons the district court gave in support of those conclusions justify the compelled testimony of a cabinet-level Secretary. The district court first stated that Secretary Ross's deposition was justified because plaintiffs hope to 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. But the Supreme Court has made clear that such challenges to agency action (which are routinely raised in APA cases) are to be evaluated on the administrative record alone, not by probing the agency decisionmaker's mental processes.

Recognizing that this rationale would improperly permit depositions of high-ranking decisionmakers as a matter of course, the district court stated that Secretary Ross's testimony was uniquely vital in this case 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, however, exceptional, and the importance of the Secretary's decision in this case does not distinguish it from the many other decisions of national importance that Cabinet Secretaries make.

The district court also erred in suggesting that certain statements the Secretary made to the court and Congress undermined his credibility and necessitated his

deposition. Read in context, those statements do not conflict with the reasons Secretary Ross gave for reinstating a citizenship question, and nothing about those statements or the circumstances in which they were made suggest that the Secretary deliberately misled either the court or the legislature. Nor is Secretary Ross's deposition testimony necessary to fill in any purported blanks in the record, as the district court also suggested. The voluminous record already contains much of the information identified by the district court, and such information is, in any event, irrelevant to plaintiffs' claims.

Compounding its error, the district court failed to adequately consider whether the information plaintiffs hope to obtain from Secretary Ross could be obtained elsewhere. Plaintiffs have already received extensive materials through discovery, including documents and testimony from the Secretary's closest aides. Plaintiffs thus have substantial knowledge of the circumstances that led to Secretary Ross's decision to reinstate a citizenship question. Secretary Ross's testimony, much of which will likely be privileged, is unlikely to add anything of significance to plaintiffs' understanding of those events. Moreover, the government has offered to supply the information plaintiffs seek from Secretary Ross through interrogatories, requests for admission, or a Rule 30(b)(6) deposition of the Commerce Department. At a minimum, the court should have ordered the parties to undertake these alternatives before taking the extraordinary step of ordering a cabinet Secretary's deposition.

The government acknowledges that this Court recently denied its petition for writ of mandamus seeking to quash the deposition of Acting Assistant Attorney General John Gore, and, in so doing, concluded that the district court did not clearly abuse its discretion in determining that plaintiffs had made a sufficient showing of bad faith to warrant extra-record discovery. But the district court's conclusion that plaintiffs are entitled to limited extra-record discovery does not justify the compelled deposition of Commerce Secretary Ross. As noted, such an order requires exceptional circumstances unique to Secretary Ross, and such circumstances are not present here.

STATEMENT

A. Background

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 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 id.* §§ 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." *Id.* § 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, censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through 1950 specifically requested citizenship information. Add.121-23.

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. Add.123-24. Between 1970 and 2000, the Census Bureau distributed a detailed questionnaire, known as the "long-form questionnaire," to a sample of the population. Add.124-25. The long-form questionnaire included questions about the respondent's citizenship or birthplace. *Id.* The "short-form questionnaire," sent to the majority of households, did not ask for birthplace or citizenship status in those years. *Id.*

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 thirty-eight households. Add.124-25. 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 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 population 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.

B. The Reinstatement of a Citizenship Question in the 2020 Census

On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire. Memorandum to Karen Dunn Kelley, from the Sec'y of Commerce (Mar. 26, 2018) ("Ross Memo") (Add.184-91). The Secretary's reasoning is set out in that memorandum and in a supplemental memorandum issued on June 21, 2018. *See* Add.184-192. 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. Add.192. 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." *Id.*

In a December 17, 2017 letter, the Department of Justice responded that citizenship data is important to the Department's enforcement of Section 2 of the Voting Rights Act and that the decennial census questionnaire would provide census-block-level citizenship voting age population ("CVAP") data that are not currently available from the ACS surveys (which provide data only at the larger census-block-group level). Letter from Arthur Gary, Department of Justice (Dec. 12, 2017) ("Gary Letter") (Add.193-95). Accordingly, the Department of Justice "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." Add.195.

After receiving the Department of Justice's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau," Add.184, 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. Add.185-87. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option as well. Add.187. Ultimately, the Secretary concluded that this fourth option, under which a citizenship question would be reinstated on the decennial census, would provide the Department of Justice with the most complete and accurate CVAP data. Add.188.

The Secretary also observed that, as detailed above, collection of citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. Add.185. The Secretary therefore found that "the citizenship question has been well tested." *Id.* He also confirmed with the Census Bureau that census-block-level citizenship data are not available from the ACS. *Id.*

The Secretary considered but rejected concerns that reinstating a citizenship question would negatively impact the response rate for non-citizens. Add.186-89. 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. Add.186. 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, limited empirical data exists on how reinstatement of a citizenship question might impact response rates. Add.186, 188. 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." Add.190. Thus, "while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide

definitive, empirical support for that belief." Add.187. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder outreach in an effort to mitigate the impact on response rates, if any, of including a citizenship question. Add.188. 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." Add.190.

C. Procedural Background

1. Plaintiffs in these cases are governmental entities (including states, cities, and counties) and non-profit organizations.[1] They claim 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. All of their claims rest on the speculative premise that reinstating a citizenship question will reduce the 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 be disproportionately minorities).

[1] Challenges to the Secretary's decision have also been brought in district courts in Maryland and California. *See Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041-GJH (D. Md.); *La Union del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md.); *California v. Ross*, No. 18-cv-1865 (N.D. Cal.); *City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal.).

2. Plaintiffs announced their intention to seek extra-record discovery before the administrative record had been filed. At a May 9, 2018 hearing, plaintiffs 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. Transcript, Dkt. No. 150, No. 18-cv-2921 (JMF), at 9-10.

At a July 3, 2018 hearing, the district court granted plaintiffs' request for extra-record discovery over the government's strong objections. Add.99-106. The court concluded that plaintiffs had made a sufficiently strong showing of bad faith to warrant extra-record discovery. Add.99. The court offered four reasons to support this determination. First, the court stated that 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 Department of Justice; that is, that the decision preceded the stated rationale." *Id.* Second, the court noted that the record submitted by the Department "reveals that Secretary Ross overruled senior Census Bureau staff," who recommended against adding a question. Add.99-100. Third, plaintiffs had alleged that 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. Add.100. And fourth, the court found that plaintiffs had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question—that it would aid the Department

of Justice in enforcing the Voting Rights Act—was "pretextual," given that the Department of Justice had not previously suggested that citizenship data collected through the decennial census was needed to enforce the VRA. Add.100-101.

3. Following that order, Defendants 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 the Department of Justice. Plaintiffs 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.

4. On July 26, the district court entered an order granting the government's motion to dismiss plaintiffs' Enumeration Clause claim. Add.159-73. The district court denied the government's motion to dismiss plaintiffs' APA and equal protection claims, concluding that plaintiffs had alleged sufficient facts to demonstrate standing at the motion to dismiss stage, Add.129-45; that plaintiffs' claims were not barred by the political question doctrine, Add.145-50; that the conduct of the census was not committed to the Secretary's discretion by law, Add.151-58; and that plaintiffs'

allegations, accepted as true, stated a plausible claim of intentional discrimination, Add.173-81.

5. 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 Gore. Add.15-18. The court concluded that Acting AAG Gore's testimony was "plainly 'relevant'" to plaintiffs' 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." Add.16.

On September 7, the government filed a petition for writ of mandamus with this Court, asking this Court to quash Acting AAG Gore's deposition and to halt further discovery. *See* Petition for Writ of Mandamus, Case Nos. 18-2652 & 18-2659. This Court denied the government's petition. *See* Add.13-14. This Court explained that it could not "say that the district court clearly abused its discretion in concluding that plaintiffs made a sufficient showing of 'bad faith or improper behavior' to warrant limited extra-record discovery." Add.14. This Court 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." *Id.*

6. Meanwhile, plaintiffs moved for an order compelling the deposition of Secretary Ross, and, on September 21, the district court entered an order compelling

the deposition. Add.1-12. 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." Add.2. The court reasoned that exceptional circumstances were present because, in the court's view, "the intent and credibility of Secretary Ross" were "central" to plaintiffs' 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." Add.6-8.

In concluding that Secretary Ross's deposition was necessary, the district court rejected the government's contention that the information plaintiffs sought could be obtained from other sources, including a Rule 30(b)(6) deposition, interrogatories, or requests for admission. Add.9. The court found these alternatives to be unacceptable because they would not allow the plaintiffs to assess Secretary Ross's credibility or to ask him follow-up questions. *Id.* 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. *Id.*

ARGUMENT

I. The Court Should Exercise Its Mandamus Authority To Quash The Compelled Deposition Of Cabinet Secretary Ross

A. Mandamus Review Is Appropriate.

Although a writ of mandamus is an extraordinary remedy, it "has been used 'both at common law and in the federal courts . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.'" *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This Court has recognized that "mandamus provides a logical method by which to supervise the administration of justice within the Circuit" in cases in which "a discovery order present[s] an important question of law." *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987); *see also In re Nielsen*, No. 17-3345, Dkt. No. 171, at 1 (2d Cir. Dec. 17, 2017) (mandamus is appropriate where a petition raises "a discovery question … of extraordinary significance").

Recognizing the important considerations of inter-branch comity implicated when a plaintiff seeks to compel the testimony or presence of high-ranking officials, the courts of appeals have regularly exercised their mandamus authority to preclude such testimony. *See, e.g.*, *In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010) (issuing a writ of mandamus to preclude testimony of EPA Administrator); *In re McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015) (issuing writ of mandamus to preclude deposition of EPA Administrator); *In re United States*, 542 F. App'x 944 (Fed.

Cir. 2013) (issuing writ of mandamus to preclude deposition of the Chairman of the Federal Reserve Board); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (issuing writ of mandamus to preclude deposition of the Vice President's chief of staff); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (issuing writ of mandamus to preclude testimony of Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (issuing writ of mandamus to preclude testimony of three FDIC Board members); *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (issuing writ of mandamus to preclude testimony of the Commissioner of the FDA); *United States Board of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (issuing writ of mandamus to preclude deposition of members of the Board of Parole); *cf. Bacon v. HUD*, 757 F.2d 26 5, 269 (Fed. Cir. 1985) (affirming order precluding the Secretary of the Department of Housing and Urban Development's deposition).

B. The Court Should Quash the District Court's Order Compelling The Deposition of Commerce Secretary Ross

1. The district court committed clear error in compelling the deposition testimony of Commerce Secretary Ross. Depositions of high-ranking government officials are justified only under "exceptional circumstances." *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2013); *In re United States*, 624 F.3d at 1376 ("[A] district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding."). That strict limitation on the compelled testimony of high-ranking officials is necessary because such orders raise significant

"separation of powers concerns." *Id.* at 1372. As the Supreme Court long ago held, it is "not the function of [a] court to probe the mental processes" of agency decisionmakers. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*); *see also id.* (concluding that "the Secretary [of Agriculture] should never have been subjected to this examination"). The Court emphasized that the administrative decisionmaking and judicial processes are "collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *Id.* The threat to inter-branch comity is particularly acute where, as here, the district court orders a cabinet-level Secretary's deposition expressly to test the Secretary's credibility and to probe his deliberations with other high-ranking Executive Branch officials. *See* Add.5-7.

Requiring high-ranking officials to appear for depositions also threatens to "disrupt the functioning of the Executive Branch," *Cheney v. U.S.*, 542 U.S. at 386, as a practical matter. High-ranking government officials "have 'greater duties and time constraints than other witnesses.'" *Lederman*, 731 F.3d at 203 (quoting *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)); *In re FDIC*, 58 F.3d at 1060. 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." *Lederman*, 731 F.3d at 203.

2. The district court clearly erred in concluding that "exceptional circumstances" justifying Secretary Ross's deposition exist here. The district court's

"exceptional circumstances" finding was based on its conclusion that "the intent and credibility of Secretary Ross himself" are "central" to plaintiffs' claims. Add.6-7. Having reached that conclusion, the court determined that exceptional circumstances existed because Secretary Ross had "unique first-hand knowledge" about his intent in reinstating a citizenship question that plaintiffs could not "obtain[] through other, less burdensome or intrusive means" than the Secretary's deposition. Add.2-5.

The premise of the district court's order is fundamentally flawed: Neither Secretary Ross's subjective intent in reinstating a citizenship question nor a purported need to gauge his credibility provides a valid basis for an order compelling him to testify about his decisionmaking process. In agency review cases like this one, "[t]he APA specifically contemplates judicial review on the basis of the agency record." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The Supreme Court has emphasized that it is "not the function of the court to probe the mental processes" of the agency decisionmaker in conducting administrative review. *United States v. Morgan*, 304 U.S. 1, 18 (1938) (*Morgan I*). "Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." *Morgan II*, 313 U.S. at 422. "[A]gency officials should be judged by what they decided, not for matters they considered before making up their minds." *National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014).

For these reasons, "under the APA, discovery rights are significantly limited." *Sharkey v. Quarantillo*, 541 F.3d 75, 92 n.15 (2d Cir. 2008). Rather than permit wide-

ranging discovery, "the task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id.*; *see also Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2009) (refusing to consider interrogatories because the court "must uphold or set aside the agency's action on the grounds that the agency has articulated"). "The validity of the [decisionmaker's] action must . . . stand or fall on the propriety of [his] finding." *Camp v. Pitts*, 411 U.S. 138, 143 (1973). If the agency's action "is not sustainable on the administrative record made," then the administrative "decision must be vacated and the matter remanded to [the agency] for further consideration." *Id.*

In this case, Secretary Ross supplied a detailed explanation of his reasons for readopting a citizenship question, *see* Add.184-92, and has provided a voluminous record in support of his decision. The validity of Secretary Ross's decision to reinstate a citizenship question on the decennial census must be judged on that record—a limitation that cuts both ways. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). If the record demonstrates that Secretary Ross's decision was objectively reasonable, his decision must be affirmed without inquiry into his subjective motivations. *See Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion").

3. The district court's reasons for concluding that Secretary Ross's credibility and intent were at the heart of this case and that his compelled deposition was therefore permissible fall far short of establishing the requisite "exceptional circumstances." Quoting *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007), the district court concluded 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.'" Add.2. The court then concluded that, because Secretary Ross was the decisionmaker, his deposition would aid plaintiffs in making that showing. Add.4. But *National Association of 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 probe the mental processes of a cabinet-level Secretary through a deposition. To the contrary, *National Association of Home Builders* emphasized that courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." 551 U.S. at 658. Here, the path Secretary Ross took to his decision to reinstate a citizenship question can be readily discerned from his decision memorandum, his supplemental memorandum, and from the extensive administrative record.

Recognizing that its rationale would permit the deposition of high-ranking officials in almost every APA case, the district court determined that Secretary Ross's testimony was uniquely vital here because he was "personally and directly involved" in

the decision to reinstate a citizenship question "to an unusual degree." Add.4. The district court did not explain why Secretary Ross's direct participation in the decision to reinstate a citizenship question was "unusual." And, indeed, 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]," Add.11. For that reason, courts have rejected the notion that a decisionmaker's personal involvement in the decision qualifies as an exceptional circumstance. *In re United States*, 542 F. App'x 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 at 1061 (that three directors of the FDIC were the only "persons responsible for making the [challenged] decision" did not justify their deposition).

The court likewise erred in concluding that Secretary Ross's testimony was needed "to fill critical blanks in the current record." Add.7. The district court identified those "blanks" as "the substance and details of Secretary Ross's early conversations regarding the citizenship question with the Attorney General [and] with interested third parties such as Kansas Secretary of State Kris Kobach," and the identity of "other senior Administration officials" with whom Secretary Ross discussed the reinstatement of a citizenship question. Add.7-8. But such information

has no bearing on the validity of Secretary Ross's decision to reinstitute a citizenship question.

It is neither improper nor out of the ordinary for an agency decisionmaker to discuss important policy decisions with interested stakeholders, both inside and outside the government. *In re FDIC*, 58 F.3d at 1062 ("[T]he fact that agency heads considered the preferences (even political ones) of other government officials concerning how [their] discretion should be exercised does not establish the required degree of bad faith or improper behavior."); *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981). As discussed above, 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 may 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 the Department of Justice. *See, e.g.*, Dkt. No. 314-1 (email from Secretary Kobach, appearing on page 764 of the Administrative Record); Add.193 (Gary Letter); *see also* AR 763-1276 (additional stakeholder communications). And to the extent plaintiffs seek information about the Secretary's deliberations with other government officials, those discussions are likely privileged, rendering the Secretary's deposition both improper and futile.

There is likewise no 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 this case." Add.6. The district court was troubled by the Secretary's statement in his March 2018 decision memorandum that he "'*set out* to take a hard look' at adding the citizenship question '*[f]ollowing receipt*'" of the Gary Letter, given that the Secretary's supplemental memorandum and other evidence indicated that he had begun considering the citizenship question issue before receiving the Gary Letter. *Id.* But the Secretary's March decision memorandum states only that he set out to take "a hard look at [the Department of Justice's] *request*" following receipt of that request. Add.184. It does not state that he had not previously considered whether to reinstate a citizenship question. Nor does it state that the Secretary had no discussions with other agencies or government officials before he received the Department of Justice's formal request.[2] And it would not have made sense for the Secretary to take a formal "hard look" at the Department of Justice's request before receiving that request. The Secretary's March 2018 decision

[2] Nor would it be reasonable to draw these inferences. Before a formal letter like DOJ's request is sent, it is fully expected that there will have been discussions between the agencies. The mere fact that Secretary Ross's memo began its recitation of the procedural history with his receipt of the Department of Justice's formal request, and omitted the informal intra- and inter-agency deliberation and consultation that preceded the formal request, is neither misleading nor improper. And the fact that the Secretary provided additional information about that informal process in his supplemental memorandum does not constitute a shift in the explanation for his decision or otherwise count against his good faith.

memorandum is thus consistent with the information provided in his supplemental memorandum and the administrative record.

The district court's analysis of Secretary Ross's comments to Congress similarly misses the mark. The Secretary's statement that, in reinstituting a citizenship question, he was "responding *solely* to the Department of Justice's request," was in answer to a question that asked whether he was responding to the Department's request or to the requests of other third parties. March 20 Hearing, 2018 WLNR 8815056. The statement thus in no way suggested that the Secretary had not considered the citizenship question issue before receiving the Department's request. And while the Secretary may have used imprecise language when he stated that the Department of Justice "initiated the request for inclusion of the citizenship question," he made that statement as part of a response to a broad question about whether the Commerce Department planned to reinstate a citizenship question to the census notwithstanding the concerns of certain stakeholders. March 22 Hearing, 2018 WLNR 8951469. It was not made in response to a question about the specific timeline or details of the Secretary's decisionmaking process. Read in context, nothing about that statement indicates that Secretary Ross intended to mislead Congress into thinking that he had not considered whether to reinstate a citizenship question until the Department of Justice formally requested it. The district court also found it "significant" that the Secretary testified that he was not aware of any discussions about reinstating a citizenship question between himself and "anyone in

the White House," whereas evidence in the record suggested that the Secretary discussed the issue with White House adviser Steve Bannon. Add.6. But the evidence cited by the district court suggests only that Steve Bannon had asked the Secretary (through the Secretary's staff) to speak with an unnamed third party "about the Census." *See* Dkt. No. 314-1. It does not indicate that the Secretary spoke with Mr. Bannon about a citizenship question or the census more generally.[3]

The district court also erred in relying on the importance of the Secretary's decision to reinstate a citizenship question as a justification for his deposition. Add.11. The Secretary of Commerce makes decisions of great importance to the public in a number of areas, including domestic manufacturing and commerce, international trade, intellectual property, telecommunications policy, scientific standards, and the climate. *See* 15 U.S.C. §§ 1501 et seq. In addition to the Census Bureau, the Secretary of Commerce oversees, among other federal entities, the National Oceanic and Atmospheric Administration, the National Institute of Standards and Technology, and the United States Patent and Trademark Office. If the importance of Secretary Ross's decisions justified his deposition, he (and all other Cabinet Secretaries) would be routinely subject to such depositions. *See In re United*

[3] Plaintiffs also argued below that Secretary Ross misleadingly testified that "the Justice Department is the one who made the request of us." May 10 Hearing, 2018 WL 2179074. But Secretary Ross made that statement simply to clarify that the Department of Justice had, in fact, informed the Commerce Department that citizenship data would be useful in enforcing the VRA, a point on which the questioner appeared confused.

States, 624 F.3d at 1371 (rejecting claim that the "national importance" of the decision being challenged supported the compelled testimony of the high-ranking official who reached that decision).

Although the district court opined that "courts have not hesitated to take testimony from federal agency heads," the limited authority the court cited for that proposition does not support the court's order. Add.10. Although the Secretary of the Interior testified in *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), there is no indication that he was ordered to do so. In *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754, 760 n.12 (D.D.C. 1970), the court ordered the Secretary of Transportation to testify only because the relevant decisions "were not committed to writing at the time they were made" and thus "it was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions." Even so, the court limited the questions to "the actions [the Secretary] took, and the materials which he considered" and did not permit inquiry into "his mental process in considering th[o]se materials." *Id.* Here, by contrast, the Secretary's decision and its basis are set forth in detail in the written record. Similarly, the district court in *American Broadcasting Companies v. USIA*, 599 F. Supp. 765, 769 (D.D.C. 1994), permitted the plaintiffs to depose an agency head "with respect to facts" that only the agency head knew, but did not authorize the plaintiffs to ask questions about his "deliberative thought process" or "why his or his agency's statutory discretion was exercised in a particular manner."

The court in *Union Savings Bank v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962), allowed the deposition of the Comptroller of Currency in light of the plaintiffs' allegations that he took certain actions as a personal favor to a friend, but limited the deposition to questions about "the procedural action taken by the [Comptroller]," and "not the workings of [the Comptroller's] mind." No such allegations exist here, and the district court's order is not similarly limited.

The district court likewise erred in concluding that plaintiffs' equal protection claim provided an independent basis for compelling Secretary Ross's deposition. Add.8. The district court previously rejected the argument that plaintiffs' equal protection claim supplied grounds for extra-record discovery, correctly reasoning that "the APA itself provides for judicial review of agency action that is 'contrary to' the Constitution." Add.102; *see* 5 U.S.C. § 706(2)(B); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 & n.9 (6th Cir. 2017). Moreover, as the Supreme Court has made clear, in cases in which a plaintiff alleges that an agency decisionmaker acted with discriminatory animus, the compelled testimony of high-ranking officials is permissible only (as in all cases) in "extraordinary instances." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). Although plaintiffs have now had the benefit of extensive discovery, neither they nor the district court have identified any creditable evidence in support of their claim that Secretary Ross acted with discriminatory animus, let alone evidence that would constitute the strong

showing needed to support the extraordinary step of allowing plaintiffs to depose the Secretary.

4. Even if Secretary Ross's subjective motivations for deciding to reinstate a citizenship question (assuming he had additional motives) were relevant to plaintiffs' case, his deposition would not be warranted because the information plaintiffs seek from Secretary Ross can be obtained from other sources. *See In re Cheney*, 544 F.3d at 314 ("The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere."). Plaintiffs have to date received thousands of pages of materials from the Commerce Department, including materials reviewed and created by the Secretary's most senior advisers. They have also deposed a number of senior Census Bureau and Commerce Department officials. Plaintiffs are now well aware of the circumstances that led to Secretary Ross's decision to reinstate a citizenship question. Secretary Ross's deposition is unlikely to add any significant details to plaintiffs' understanding, all the more so because much of his testimony will likely be privileged.

Relatedly, the district court should have deferred to the government's offer to provide the information plaintiffs seek from Secretary Ross through interrogatories, requests for admission, or a Rule 30(b)(6) deposition. At the very least, the district court should have ordered the parties to undertake these alternate measures before compelling Secretary Ross's testimony.

5. Quashing Secretary Ross's deposition is appropriate here for the additional reason that the district court clearly erred at the threshold in concluding that extra-record discovery of any kind was warranted. Add.9; Add.99. The government acknowledges that this Court already concluded that the district court did not clearly abuse its discretion in finding that plaintiffs have made a sufficient showing of bad faith to warrant limited extra-record discovery. Add.14. The government respectfully disagrees with that conclusion and reiterates, for purposes of preserving the argument with respect to Secretary Ross's deposition, that the district court clearly erred in concluding that the plaintiffs had made the requisite strong showing of bad faith to warrant extra-record discovery.[4]

But even assuming the district court did not clearly abuse its discretion in concluding that plaintiffs made a threshold showing of bad faith, compelling the deposition testimony of Secretary Ross was not warranted. At the heart of the district

[4] As the government explained in its mandamus petition seeking to quash Acting AAG Gore's deposition (which the government incorporates by reference, *see* Add.225-30), the type of "bad faith" necessary to authorize extra-record discovery under the APA requires a strong demonstration that the Commerce Secretary did not actually believe his stated rationale for reinstating a citizenship question. Add.225-30. The district court neither articulated that legal standard nor made such a factual finding. *Id.* Instead, the district court mistakenly concluded that there was evidence supporting a finding that Secretary Ross acted in "bad faith" merely because that evidence indicated that the Secretary desired to reinstate a citizenship question even before consulting with the Department of Justice. That an agency decisionmaker was already predisposed to adopt a particular position before investigating whether that position was legally and practically justified is neither uncommon nor improper, and does not establish that the decisionmaker acted in bad faith.

court's bad faith determination was its view that the evidence suggested that the Secretary's justification for reinstating a citizenship question—*i.e.*, that it would be useful to the Department of Justice in enforcing the Voting Rights Act—might be "pretextual," because the Department of Justice had not previously suggested that citizenship data collected through the decennial census was needed to enforce the VRA. Add.100-101.

Plaintiffs do not need to question Secretary Ross, however, to evaluate the reasonableness of Secretary Ross's reliance on the Department of Justice's stated rationale for requesting that a citizenship question be added to the census. That evaluation can be made on the existing record. And, even if it could not, plaintiffs can obtain the relevant information elsewhere. Indeed, plaintiffs already have introduced expert testimony that purports to explain the reasons that citizenship data are not necessary to enforce the VRA. And, absent relief from the Supreme Court, plaintiffs will depose Acting AAG Gore, who was the Commerce Department's main contact at the Department of Justice with respect to the citizenship question and Gary Letter. Acting AAG Gore is presumably at least as qualified as Secretary Ross to explain the bases for the Department of Justice's stated rationale.

For similar reasons, this Court's conclusion that the district court did not abuse its discretion in concluding that exceptional circumstances justified the deposition of Acting AAG Gore does not mean that such circumstances exist with respect to Secretary Ross. Add.14. The district court concluded that exceptional circumstances

existed with respect to Acting AAG Gore's deposition because, "given his apparent authorship of the December 2017 Department of Justice letter," he possessed unique information about the Department of Justice's views on the usefulness of citizenship data to the enforcement of the VRA. *Id.* Secretary Ross does not possess unique knowledge regarding the reasonableness of the Department of Justice's views. Thus, the exceptional circumstances that were deemed to justify AAG Gore's deposition are inapplicable to Secretary Ross.

6. Halting Secretary Ross's deposition is also appropriate here in light of the significant doubts that exist as to whether plaintiffs' claims are justiciable. *See U.S. Board of Parole*, 487 F.2d at 29 (mandamus relief is appropriate to quash the depositions of high-ranking officials where a plaintiffs' compliant rests on a "tenuous jurisdictional basis"). Plaintiffs' standing depends on a "highly attenuated chain of possibilities" that does not satisfy Article III requirements. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Their asserted injuries rest on the conjecture that large numbers of individuals will violate federal law and refuse to return their census questionnaires, and on the further proposition that these same individuals would have returned their questionnaires had a citizenship question not been included. Plaintiffs must additionally establish that the extensive procedures the Census Bureau has in place to obtain information from those households that do not initially respond—including six follow-up mailings, up to six personal visits, and data from administrative records—will fail to an extent significant enough to materially affect

the census count. And even if plaintiffs could somehow establish that a substantial proportion of the population will violate federal law, any resulting injury would be traceable to those unlawful actions and not to the Secretary's actions.

Significant doubt also exists as to whether plaintiffs' claims are otherwise justiciable. The Constitution commits determinations about the content of the census to Congress, not the courts, and no judicially manageable standards exist which a court might use to evaluate Congress's and the Secretary's decisions regarding the content of the census. *See Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992). Nothing in the Constitution, the Census Act, or the APA bars the Commerce Department from asking a completely reasonable question on the census—one that has been asked for most of the Nation's history—based on the speculative fear that some households containing at least one non-citizen will break the law by not complying with their duty to answer the census.

II. This Court Should Stay Secretary Ross's Deposition Pending Review Of This Petition By This Court And, If Necessary, The Supreme Court.

Discovery in these cases is currently scheduled to close on October 12, 2018, and plaintiffs intend to depose Secretary Ross by that date. Accordingly, the government asks that this Court issue an immediate administrative stay of his deposition pending its consideration of the mandamus petition, and, if necessary, the Supreme Court's review of the petition. Absent a stay, the deposition will occur and the injury will be irremediable. Plaintiffs face no imminent harm from the Secretary's

decision to reinstate a citizenship question on the 2020 Census, and the deposition of Secretary Ross can be conducted expeditiously should this Court deny the government's petition.

The government also requests that this Court issue a stay of all further discovery in these cases and of the deposition of Acting AAG Gore pending review by the Supreme Court. The government requests this relief, notwithstanding this Court's recent denial of the government's petition for the writ of mandamus that sought an order halting discovery and quashing Acting AAG Gore's deposition, to comply with Supreme Court Rule 23.3.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of mandamus, and it should issue a stay to preclude the depositions of Commerce Secretary Ross and Acting AAG Gore and to halt further discovery in these matters, pending the Court's consideration of the petition and any review by the Supreme Court.

Respectfully submitted,

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SEPTEMBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 7,798 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). 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/ Mark B. Stern
MARK B. STERN

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018, I electronically filed the foregoing with the Clerk of the Court by emailing the petition to newcases@ca2.uscourts.gov. The petition was served on the district court judge, Hon. Jesse Furman, via electronic mail sent to Furman_NYSDChambers@nysd.uscourts.gov.

Service in compliance with Federal Rule of Appellate Procedure 21(a)(1) was accomplished by e-mail to the following recipients: Steven.Wu@ag.ny.gov; laura.clinton@atg.wa.gov; brittany.feitelberg@sfcityatty.org; erin.kuka@sfcityatty.org; Judith.Vale@ag.ny.gov; cdunn@nyclu.org; dale.ho@aclu.org; elisabeth.theodore@apks.com; david.weiner@apks.com;Sania.Khan@ag.Ny.Gov; Ajay.Saini@ag.Ny.Gov; Elena.Goldstein@ag.Ny.Gov; Elizabeth.Morgan@ag.Ny.Gov; Laura.Wood@ag.Ny.Gov; Matthew.Colangelo@ag.Ny.Gov; Lourdes.Rosado@ag.Ny.Gov; Mark.Kohler@ct.Gov; David.Lyons@state.De.Us; Valerie.Nannery@dc.Gov; Mmartin@atg.State.Il.Us; Nathan.Blake@ag.Iowa.Gov; Jgrimm@oag.State.Md.Us; Jonathan.Miller@state.Ma.Us; Ann.Lynch@state.Ma.Us; Mercy.Cover@massmail.State.Ma.Us; Jacob.Campion@ag.State.Mn.Us; Rachel.Apter@njoag.Gov; Tmaestas@nmag.Gov; Rpark@ncdoj.Gov; Scott.Kaplan@doj.State.Or.Us; Mfischer@attorneygeneral.Gov; Aroach@riag.Ri.Gov; Mmcguire@oag.State.Va.Us; Benjamin.Battles@vermont.Gov; Julio.Thompson@vermont.Gov; Andrew.Worseck@cityofchicago.Org;

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