No. 18A-_____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

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

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PARTIES TO THE PROCEEDING

Applicants (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States Department of Commerce; Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce; the United States Census Bureau, an agency within the United States Department of Commerce; and Ron S. Jarmin, in his capacity as Director of the United States Census Bureau.

Respondent in this Court is the United States District Court for the Southern District of New York. Respondents also include the State of New York; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Illinois; the State of Iowa; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of North Carolina; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Vermont; the State of Washington; the City of Chicago, Illinois; the City of New York; the City of Philadelphia; the City of Providence; the City and County of San Francisco, California; the United States Conference of Mayors; the City of Seattle, Washington; the City of Pittsburgh; the County of Cameron; the State of Colorado; the City of Central Falls; the City of Columbus; the County of El Paso; the County of Monterey; and the County of Hidalgo (collectively plaintiffs in the district court in No. 18-cv-2921, and real

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

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Acting Director of the United States Census Bureau, respectfully applies to expand the stay previously entered in this case to include a stay of a trial in this matter, currently scheduled to begin on November 5, 2018, pending disposition of the government's concurrently filed petition for a writ of mandamus or, in the alternative, certiorari. The government respectfully requests an immediate administrative stay of trial pending the Court's consideration of this application. The government also respectfully requests expedited consideration of its petition.

STATEMENT

1. This application arises from a pair of consolidated cases challenging the decision by Secretary of Commerce Wilbur L. Ross, Jr. to reinstate to the decennial census a question asking about citizenship, as had been asked of at least a sample of the population on every decennial census from 1820 to 2000 (except in 1840). See 315 F. Supp. 3d 766, 776-777. Finding respondents to have made a "strong showing" that Secretary Ross acted in "bad faith" in reinstating the question, the district court in a series of orders permitted respondents to seek discovery outside the administrative record to probe the Secretary's mental processes, and eventually compelled the depositions of two high-level Executive Branch officials: Acting Assistant Attorney General (AAG) John M. Gore and Secretary Ross himself. See Pet. App. 9a-23a, 24a-27a, 93a-100a.

2. On October 22, 2018, this Court entered a stay of the district court's September 21 order compelling the deposition of Secretary Ross. 18A375 slip op. 1. The stay was to remain in effect "through October 29, 2018 at 4 p.m.," unless the government "file[d] 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.," in which case "the stay will remain

in effect until disposition of such petition by this Court."* Ibid. The Court denied the government's application to stay the district court's orders compelling the deposition of Acting AAG Gore and allowing discovery beyond the administrative record, but made clear that this denial "does not preclude the applicants from making arguments with respect to those orders." Ibid.

Justice Gorsuch, joined by Justice Thomas, would have taken "the next logical step and simply stay[ed] all extra-record discovery pending [this Court's] review." 18A375 slip op. 3. Among the reasons "weighing in favor of a more complete stay" was "the need to protect the very review [this Court] invite[s]." Ibid. Justice Gorsuch observed that "[o]ne would expect 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." Ibid.

3. On October 26, 2018, the district court denied the government's motion to stay the impending November 5 trial date. App., infra, 1a-15a.

a. The district court faulted the government because it had been "given the opportunity to file a summary judgment motion" in

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* The government is simultaneously filing a petition for a writ of mandamus or, in the alternative, certiorari by that deadline.

a September 30, 2018 order, but had "elected not to file such a motion." Id. at 1a; see also id. at 14a. The September 30 order -- entered in response to the government's motion to resolve the case on summary judgment, rather than at trial -- stated that "the [c]ourt remains firmly convinced that a trial will be necessary" and that "it seems quite clear from the existing record that there will be genuine disputes of material fact precluding entry of summary judgment." 18-cv-2921 Docket entry No. 363 (emphases added). Accordingly, the court said that although it would "not bar [the government] from making a motion for summary judgment," the government "would be far better off devoting [its] time and resources to preparing [its] pre-trial materials than to preparing summary judgment papers." Ibid. And the court reiterated that whether or not the parties filed summary judgment motions, the "November 5th trial date" would "remain in effect." Ibid. Given the court's direction that moving for summary judgment would be futile, the government instead devoted itself to preparing for trial.

b. In addition to faulting the government for not filing a summary judgment motion, the district court held that the government had not satisfied the traditional stay factors. See App., infra, 3a-15a.

i. The district court thought the government had not shown a likelihood of irreparable harm because it "remain[s] free to

argue at trial that the Court should disregard all evidence outside the administrative record." App., infra, 3a. The court said it had "directed the parties to differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record." Ibid. And the court said it "anticipates differentiating along similar lines in any findings of fact and conclusions of law that it enters." Ibid. The court also did not find irreparable the burdens of participating in a trial focusing on a Cabinet Secretary's mental processes, even if the trial were later reversed on appeal for having been improper. See id. at 4a-6a.

ii. The district court further held that the government had not shown a likelihood of success on the merits. The court acknowledged that this Court's "October 22, 2018 Order suggests that th[is] Court may rule that [the district court] erred in its September 21, 2018 Order authorizing a deposition of Secretary Ross," an outcome the district court deemed "regrettable." App., infra, 6a-7a & n.4. But because Secretary Ross has not yet been deposed, the court discounted the government's likelihood of success because a government victory "will have no effect on the existing record, which presently lacks Secretary Ross's deposition testimony." Id. at 7a. The court also predicted that this Court "is unlikely to disturb" the July 3 order authorizing extra-record discovery "in advance of [the district court's] consideration of

the merits" because discovery "will be complete when [the government] file[s] [its] petition with the Supreme Court." Id. at 8a. And the district court reiterated the reasons it gave in its July 3 order, id. at 10a-11a, concluding that "there is nothing unusual with [its] decision to allow extra-record discovery." Id. at 11a.

iii. Finally, the district court determined that staying the November 5 trial date would substantially injure the other parties and the public interest. App., infra, 11a-14a. Noting the Census Bureau's desire to begin printing the questionnaire in May 2019, the court concluded that "[a]waiting prophylactic guidance from the Supreme Court -- which may not come for months and may not come at all -- would make it difficult, if not impossible, to meet that goal." Id. at 12a. The district court also noted its "congested" trial calendar. Id. at 13a. The court concluded by remarking that "piecemeal appeals would undermine the independence of the district judge," and thus it would proceed with trial without waiting for this Court's resolution of the government's petition. Id. at 15a.

4. The Second Circuit declined to stay the trial in an unreasoned summary order. App., infra, 16a.

ARGUMENT

"One would expect that" this Court's staying Secretary Ross's deposition and "expressly invit[ing] the government to seek review of all of the district court's orders allowing extra-record discovery" "would prompt the district court to postpone the scheduled trial and await further guidance." 18A375 slip op. 3 (opinion of Gorsuch, J.). The district court instead has confirmed that, absent an expansion of the existing stay by this Court, next week's trial will move forward as planned -- even as this Court considers whether such a trial is legally improper. The government respectfully submits that delaying an extraordinary trial into the subjective motives of a Cabinet Secretary is warranted pending consideration of the government's simultaneously filed petition and further proceedings in this Court.

The government therefore respectfully requests that the Court expand its previously entered stay to delay the two-week trial, currently set to start on November 5, pending disposition of the government's petition for a writ of mandamus or, in the alternative, certiorari. The government also respectfully requests that consideration of its petition for a writ of mandamus or certiorari be expedited. All parties have an interest in speedy resolution of this case. The most efficient path forward is to stay the trial and resolve the question whether the district court must confine its review of the Secretary's decision to the

administrative record, while leaving sufficient time for the district court to conduct its review followed by prompt appellate review.

1. The district court's reasons for refusing to stay the trial pending proceedings in this Court are unpersuasive. At the outset, the district court faulted the government for not filing a summary judgment motion. According to the court, the government "w[as] given the opportunity to file a summary judgment motion arguing that the Court's review should be limited to the administrative record and that trial was therefore unnecessary. (See Docket No. 363)." App., infra, 1a. In the court's view, by "elect[ing] not to file such a motion," the government had "thereby conced[ed], as a procedural matter, that a trial is appropriate." Ibid.

The government did not file a summary judgment motion because the district court made plain that it would be a futile exercise. "Docket No. 363," a September 30 order, was entered in response to the government's motion to resolve the case on cross-motions for summary judgment based on the administrative record, rather than by trial. 18-cv-2921 D. Ct. Doc. 333 (Sept. 18, 2018). In its order, the court said it "remains firmly convinced that a trial will be necessary to resolve the claims in this case." 18-cv-2921 Docket entry No. 363 (emphasis added). The court added that "it seems quite clear from the existing record that there will be

genuine disputes of material fact precluding entry of summary judgment." Ibid. (emphasis added). The court therefore concluded that "it would be far more efficient * * * to proceed directly to trial" and that the government "would be far better off devoting [its] time and resources to preparing [its] pre-trial materials than to preparing summary judgment papers." Ibid. "That said," the court noted, it would "not bar Defendants from making a motion for summary judgment if they wish to spend their time and resources preparing one." Ibid.

The district court's September 30 order left little doubt that the court intended to proceed to trial, and thus the government's decision not to file a summary judgment motion -- during the same time it was seeking relief in the Second Circuit and in this Court -- was in no way a "conce[ssion], as a procedural matter, that a trial is appropriate." App., infra, 1a; cf. Cheney v. United States Dist. Court, 542 U.S. 367, 379 (2004) ("active litigation posture" belies a claim of "'sle[eping] upon [one's] rights'") (citation omitted). And at any rate, the district court reiterated that, whether or not the parties filed summary judgment motions, "[a]ll other dates and deadlines -- including the November 5th trial date -- remain in effect." 18-cv-2921 Docket entry No. 363. So it is unclear how or why the government's decision not to move for summary judgment would have affected the trial date or be grounds to deny a stay of the trial now.

2. The district court also erred in analyzing the stay factors.

A stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation, brackets, and internal quotation marks omitted).

a. The first factor for a stay pending the disposition of a petition for a writ of mandamus, and the first two factors for a stay pending the disposition of a petition for a writ of certiorari, are readily met here. This Court has already determined that the government has satisfied these factors, at least with respect to the deposition of Secretary Ross. 18A375 slip op. 1; see id. at 3 (opinion of Gorsuch, J.) ("Today, the Court signals that it is likely to grant the government's

petition."). And this Court "expressly invite[d] 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." Id. at 3 (opinion of Gorsuch, J.). Accordingly, and as further explained in the government's simultaneously filed petition, there is a fair prospect that this Court would grant the government's petition for a writ of mandamus or (equivalently) find that the court of appeals erred in denying the government's petitions for writs of mandamus.

The district court's contrary conclusion does not withstand scrutiny. The court acknowledged that this Court's order staying Secretary Ross's deposition meant the government had already shown a likelihood of success on the merits. App., infra, 6a-7a. Yet the district court gave that likelihood of success no weight because the court could simply hold the trial without the Secretary's testimony. Id. at 7a. But the order compelling Secretary Ross's deposition and the order authorizing extra-record discovery both "stem[] from the same doubtful bad faith ruling." 18A375 slip op. 3 (opinion of Gorsuch, J.). So this Court's ultimate ruling on the propriety of Secretary Ross's deposition is likely to bear on the propriety of extra-record discovery in general, and a likelihood of success on the former thus deserves at least some weight in evaluating the likelihood of success on the latter. That is all the more true given that this Court

"expressly invite[d] the government to seek review of all of the district court's orders allowing extra-record discovery." Ibid.

Conversely, the district court thought this Court was "unlikely to disturb" its orders expanding discovery outside the administrative record "in advance of this Court's consideration of the merits" because discovery "will be complete when [the government] file[s] [its] petition with the Supreme Court." App., infra, 8a. In other words, the district court appeared to reason in circular fashion that its refusing to stay the trial meant this Court would not be able to review the government's challenges "in advance" of that trial, thereby justifying the district court's decision not to stay the trial. Taken together, the district court's rationales seem to mean that the government could never demonstrate a likelihood of success to the district court's satisfaction: if the discovery has not yet occurred, the likelihood of success is irrelevant because the court can simply hold a trial without it; if the discovery has occurred, the government's challenge is in effect moot.

The district court also reiterated its original justifications for issuing the discovery orders in the first place. App., infra, 9a. But in addition to the reasons set forth in the government's petition, the cases on which the district court relied (id. at 11a) simply highlight how extraordinary its rulings are. Public Power Council v. Johnson, 674 F.2d 791 (9th Cir. 1982), for

example, expressly said that the plaintiffs "ha[d] not met th[e] burden" to make a "strong showing" of bad faith to allow extra-record discovery, but tentatively allowed other limited discovery to expand the administrative record in light of the unique statute governing the court's review. Id. at 795 (citing the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 et seq.). And in Batalla Vidal v. Duke, No. 16-cv-4756, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017), the plaintiffs sought only documents the agency supposedly considered in making its decision -- not discovery to probe the mental processes of the decisionmaker, much less to "target cabinet-level officials." Id. at *4. Battala Vidal also involved a challenge to the DACA program -- and in a related lawsuit this Court halted a similar bid to expand the administrative record. See In re United States, 138 S. Ct. 443 (2017) (per curiam).

Finally, even assuming Tummino v. Von Eschenbach, 427 F. Supp. 2d 212 (E.D.N.Y. 2006), was correctly decided, the facts in that case underscore the weakness of respondents' showing of bad faith here. There, the FDA had delayed acting on a citizen petition for five years in an attempt to "evade[] judicial review," and a General Accounting Office report revealed that agency decisionmakers "were resting on improper concerns about * * * morality" rather than on statutorily permissible factors. Id. at 232-233. By contrast, respondents have made no plausible

allegations here (much less a strong showing) that the Secretary relied on an improper basis in his decisionmaking, let alone delayed making a decision so as to avoid judicial review.

b. There is also "a likelihood that irreparable harm will result from the denial of a stay" of the November 5 trial date. Perry, 558 U.S. at 190; see Conkright, 556 U.S. at 1402. Without a stay, there will be a full trial before the district court into the subjective motives of a sitting Cabinet Secretary, including whether the Secretary harbored secret racial animus in reinstating a citizenship question to the decennial census. The harms to the government from such a proceeding are self-evident, and if the district court determines that in its view the Secretary acted out of racial animus, that harm would not be fully (or even largely) remedied if this Court subsequently confined the district court's review to the administrative record.

The government also will be forced to expend enormous resources engaging in pretrial and trial activities that could ultimately prove to be unnecessary in whole or large part. For example, respondents have indicated that they intend to call 28 witnesses at trial, including ten expert witnesses, see 18-cv-2921 D. Ct. Doc. 386, at 1, 3 (Oct. 19, 2018), and the government conservatively estimated in the district court that it would devote more than 3000 attorney hours to pretrial and trial preparation between last Thursday and the end of the two-week trial starting

on November 5, see 18-cv-2921 D. Ct. Doc. 397, at 3-4 (Oct. 23, 2018).

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, especially one probing the mental processes of a Cabinet Secretary to determine whether he harbors secret racial animus, 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, 542 U.S. at 382.

By contrast, respondents would suffer little harm from a stay of the trial pending disposition of the government's petition in this Court. There is "no hardship from being temporarily denied that which they very likely have no right to at all." 18A375 slip op. 3 (opinion of Gorsuch, J.). More importantly, all parties agree that finalizing the decennial census questionnaire is somewhat time-sensitive. See App., infra, 12a. It would therefore be most efficient for the district court to hold a single proceeding to review the Secretary's decision, with a single round of appellate review. The most straightforward way to achieve that is to stay the trial pending this Court's definitive ruling on

whether the district court must confine its review to the administrative record.

The district court's proposed solution -- to hold two proceedings in parallel -- is the least efficient option of all and would impose substantial costs on the parties and the court system. The district court directed that the parties should "differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record." App., infra, 3a. And the court itself would "differentiat[e] along similar lines in any findings of fact and conclusions of law that it enters." Ibid. The court's solution is essentially for the parties to file two sets of briefs and the court to enter two sets of orders -- in effect, to hold two simultaneous sets of proceedings so that an appellate court can pick which one to review. Id. at 3a-4a.

Even assuming that it is realistic for the district court to disregard all of the improper extra-record evidence (and any conclusions based on that evidence) when trying to evaluate agency action solely on the administrative record, the court's proposal does nothing to change the enormous and irreparable costs that would be imposed on the government from a trial concerning Secretary Ross's mental processes. And it imposes additional costs on respondents and the federal court system too. Moreover, the district court's proposal would routinely justify straying outside

the administrative record to probe a decisionmaker's mental processes, on the ground that the parties can simply file multiple alternative arguments, the court can enter multiple alternative findings, and an appellate court can later sort out whether there was a strong showing of bad faith.

The district court's remaining reasons for finding no irreparable harm are unconvincing. Its assurance (App., infra, 3a) that the government "remain[s] free to argue at trial that the [district court] should disregard all evidence outside the administrative record" is hard to understand given that the court expressly said it would consider both the administrative record and extra-record evidence in effectively parallel proceedings. The court has also consistently ruled against the government on this score -- including in its September 30 order, which essentially declared it fruitless to resist a trial with extra-record evidence, and its October 26 order, which reiterated the court's certainty that extra-record evidence is proper here. And although the court did not view (id. at 4a) "litigation expense" as an irreparable injury, the government's principal concern in that regard is the thousands of hours of attorney time and the attendant distractions from official duties that a trial would entail.

Finally, the district court stated that the government "asserted a new theory of harm" coming from the mere "scrutiny" of executive action. App., infra, 5a-6a. The government recognizes

that, as the district court explained, "the APA expressly invites such scrutiny." Id. at 5a. But the question here is whether the APA invites such scrutiny based on the "administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam). The irreparable injury to which the government has pointed is not judicial review of the Secretary's action in the ordinary course, but the extraordinary course of creating a new record -- and holding an impending two-week trial -- to probe the mental processes of a sitting Cabinet Secretary, in the absence of any evidence that the Secretary did not believe his stated rationale or had irreversibly prejudged the issue.

3. The government also respectfully requests that the Court expedite consideration of the simultaneously filed petition for a writ of mandamus or, in the alternative, certiorari. As discussed above, all parties recognize the need to finalize the decennial census questionnaire soon, and the most efficient path forward is to stay the trial pending resolution of whether the district court must evaluate the legality of Secretary Ross's decision based solely on the administrative record, or instead may conduct a trial with live testimony and extra-record evidence probing the Secretary's mental processes. Once this Court has definitively answered that question, the district court can properly perform its task just once.

The parties also would benefit from having sufficient time after this Court's answer for the district court to reach an ultimate decision on the merits followed by prompt appellate review. Accordingly, the government respectfully requests that the Court consider and resolve the government's petition for a writ of mandamus or, in the alternative, certiorari on an expedited basis. In the event the Court chooses to construe the petition as one for a writ of certiorari, the government respectfully requests that the Court forgo an additional round of duplicative briefing and the delay that would entail.

CONCLUSION

For the foregoing reasons, the Court should expand its previously entered stay to include a stay of the trial in this case, currently set to begin on November 5, 2018, pending disposition of the government's simultaneously filed petition for a writ of mandamus or, in the alternative, certiorari. The government also respectfully requests an immediate administrative stay pending consideration of this application, and that its petition be considered on an expedited basis.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018

APPENDIX

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, Plaintiffs bring claims under the Administrative Procedure Act ("APA") 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). In an oral ruling on July 3, 2018, the Court found that Plaintiffs had made a "strong showing" of pretext or bad faith on the part of agency decision-makers and, applying well-established precedent, thus authorized discovery beyond the administrative record. (Docket No. 207 ("July 3rd Tr."), at 76-89). Significantly, however, the Court did not rule, and has not yet ruled, on whether or to what extent any such extra-record materials can or should be considered in making a final ruling on Plaintiffs' claims. That is largely because the parties have not yet asked the Court to do so. Defendants were given the opportunity to file a summary judgment motion arguing that the Court's review should be limited to the administrative record and that trial was therefore unnecessary. (*See* Docket No. 363). But they elected not to file such a motion — thereby conceding, as a procedural matter, that a trial is appropriate. That trial is scheduled to begin in six business days, on November 5, 2018 — a date that the Court set, in no

small part, because Defendants themselves insist that resolution of Plaintiffs' claims "is a matter of some urgency" given the need to finalize the census preparations. (Docket No. 397 ("Gov't Stay Mot."), at 4).

Remarkably, despite the foregoing, Defendants now seek a stay of the trial and related pre-trial submissions (most of which are due today and therefore presumably done already) pending resolution of a forthcoming petition to the Supreme Court for writs of mandamus and certiorari. (*See id.*). Even more remarkably, although they filed their motion for a stay only three nights ago and this Court made clear less than two days ago that it would issue a written ruling in short order (Oct. 24, 2018 Pretrial Conf. Tr. ("Oct. 24th Tr.") 19), Defendants are already seeking the very same relief from the Second Circuit. (Docket No. 402). Their request is based primarily on an October 22, 2018 Order from the Supreme Court, denying Defendants' application to stay two of this Court's prior Orders (namely, its July 3, 2018 Order authorizing extra-record discovery, (*see* July 3rd Tr. 76-89) and its August 17, 2018 Order authorizing a deposition of Acting Assistant Attorney General John Gore (*see* Docket No. 261)) and staying, at least temporarily, a third Order (namely, the Court's September 21, 2018 Order authorizing a deposition of Secretary Ross, *see New York v. United States Dep't of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4539659 (S.D.N.Y. Sept. 21, 2018)). *See In re Dep't of Commerce*, No. 18A375, 2018 WL 5259090 (U.S. Oct. 22, 2018). "Any order granting the government's petition," Defendants argue, "would substantially affect the further proceedings in this Court, including whether extra-record discovery would be permissible or whether review would take place on the administrative record." (Gov't Stay Mot. 2).

In other circumstances, the Court might well agree — albeit, only as an exercise of its discretion over case management — that the Supreme Court's Order warrants hitting the pause button and postponing trial, as the Supreme Court's resolution of Defendants' forthcoming

petition could bear on this Court's analysis of the merits. But Defendants' own "urgen[t]" need for finality calls for sticking with the trial date. (Gov't Stay Mot. 4). And, in light of the all-too-familiar factors relevant to the question whether a stay should be granted pending mandamus, *see New York v. United States Dep't of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4279467, at *1 (S.D.N.Y. Sept. 7, 2018), Defendants are certainly not entitled to a stay.

A. Defendants Fail to Show the Likelihood of Irreparable Harm

First and foremost, Defendants fall far short of establishing a "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Significantly, Defendants do not claim harm here from the Court's decision to allow extra-record discovery, and for good reason: Putting aside the possible deposition of Secretary Ross, discovery will end before Defendants file their petition with the Supreme Court. (Docket No. 401).[1] Nor do they claim that, absent a stay, the argument they seek to press before the Supreme Court — that Plaintiffs' claims should be resolved on the administrative record alone — would become moot. That too is for good reason, as Defendants remain free to argue at trial that the Court should disregard all evidence outside the administrative record and, if unsuccessful, can argue on appeal that the Court erred in considering extra-record evidence. Moreover, the Court has directed the parties to differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record. (Oct. 24th Tr. 16). The Court anticipates differentiating along similar lines in any findings of fact and conclusions of law that it enters. It follows that, if the Court rules against Defendants on the basis of extra-record materials and a higher court holds that the Court

[1] Defendants clarified on the record at the conference held on October 24, 2018, that — despite language in their letter motion to the contrary (*see* Gov't Stay Mot. 2 (asking the Court to "stay all extra-record discovery")) — they are *not* actually seeking a stay of extra-record discovery. (Oct. 24th Tr. 18-19).

should not have considered those materials, Defendants would be able to get complete relief. Put simply, a stay is not necessary "to protect" Supreme Court review. *In re Dep't of Commerce*, 2018 WL 5259090 at *2 (Gorsuch, J., concurring in part and dissenting in part). The Supreme Court can conduct that review, as in the usual case, after final judgment.

So what do Defendants cite as their irreparable harm in the absence of a stay? They complain that, without a stay, they "will be forced to expend enormous resources engaging in pretrial and trial activities that may ultimately prove to be unnecessary." (Gov't Stay Mot. 3).[2] But it is black-letter law that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see New York*, 2018 WL 4279467, at *2 (collecting cases). Throughout the nation, litigants in federal district courts understand that, with certain well-established and narrow exceptions not applicable here, *see, e.g.*, *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 905 n.5 (2015) (discussing the "narrow scope" of the collateral-order doctrine), everything that happens in those courts — up to and including trial — "retains its interlocutory character as simply a step along the route to final judgment," *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). In other words, spending resources on trial first and seeking appellate review later is the overwhelming norm, not the exception — "even though the entry of an erroneous order may require additional expense and effort on the

[2] Defendants complain that one of the costs of going to trial 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." (Gov't Stay Mot. 4). That is an extraordinary complaint separate and apart from the fact that such costs do not constitute irreparable harm for the reasons discussed in the text. There are dozens of highly qualified lawyers and professional staff in the Civil Division of the United States Attorney's Office for the Southern District of New York — the office that normally represents the Government in this District. The Court can only speculate why the lawyers from that Office withdrew from their representation of Defendants in these cases. (*See* Docket Nos. 227, 233). Whatever the reasons for that withdrawal, however, a party should not be heard to complain about harms of its own creation.

part of both litigants and the district court." *Parkinson v. Apr. Indus., Inc.*, 520 F.2d 650, 654 n.3 (2d Cir. 1975). Far from a nationwide epidemic of irreparable harm, that is precisely how the federal court system is supposed to work. *See, e.g.*, *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-04 (1999) (describing the "several salutatory purposes" of the "final judgment rule").[3]

When pressed on that point at oral argument, Defendants asserted a new theory of harm not advanced in their written motion: some sort of dignitary harm flowing from the Court's "scrutiny" of "an executive branch agency." (Oct. 24th Tr. 12-14). But that novel theory of harm fails for several reasons. First, the decisions of executive branch agencies are not immune from scrutiny by the federal courts; indeed, the APA expressly invites such scrutiny. *See* 5 U.S.C §§ 702, 705; *Sackett v. EPA*, 566 U.S. 120, 128 (2012); *see also, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (discussing the "'strong presumption' favoring judicial review of administrative action" and collecting cases); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835) (Marshall, C.J.) ("It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the citizen] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist . . . ."). Second, whether these cases proceed to trial or not, there is no dispute that Defendants' decision to add a citizenship question to the 2020 census will be subject to "scrutiny" by this Court and others; the only disputes between the parties concern the scope of

[3] Defendants also cite the prospect of three current or former "high-level agency officials" being called as witnesses at trial as a form of potentially irreparable harm. (Gov't Stay Mot. 4). That argument is moot, however, as the witnesses are not subject to subpoena, and the Court yesterday denied Plaintiffs' motion seeking leave to present their testimony by live video transmission or to conduct *de bene esse* depositions. (Docket No. 403).

evidence the Court may consider in applying that scrutiny and the degree of deference owed by the Court to Defendants' decision.

And third, although trials in APA cases are — as Defendants emphasize — "unusual" (Oct. 24th Tr. 13), they are far from unprecedented. Courts have subjected executive agencies to trials in APA cases where, as here, there are colorable claims of bad faith or pretext, *see, e.g.*, *Buffalo Cent. Terminal v. United States*, 886 F. Supp. 1031, 1045-48 (W.D.N.Y. 1995), or competing expert testimony, *see, e.g.*, *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1090, 1093 (S.D.N.Y. 1987). In fact, it is not even unprecedented for courts to hold trials to resolve APA challenges to the administration of the census! *See, e.g.*, *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993), *vacated*, 34 F.3d 1114 (2d Cir. 1994), *rev'd sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Cuomo*, 674 F. Supp. at 1091; *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded for a new trial*, 653 F.2d 732 (2d Cir. 1981). Notably, Defendants cannot cite a single other instance in which the Government has sought the writ of mandamus, a form of extraordinary relief, to halt such "scrutiny." (Oct. 24th Tr. 13-14). It is the Government's conduct in this case, not the Court's review, that is "highly unusual, to say the least." *In re Dep't of Commerce*, 2018 WL 5259090, at *1 (Gorsuch, J., concurring in part and dissenting in part).

B. Defendants Fail to Show a Likelihood of Success on the Merits of Any Question that Would Justify a Stay of Trial

Defendants' failure to show the likelihood of irreparable harm is, by itself, fatal to their stay application, but they also fail to show that a likelihood of success on the merits warrants a stay of trial. *See Hollingsworth*, 558 U.S. at 190. To be sure, the Supreme Court's October 22, 2018 Order suggests that that Court may rule that this Court erred in its September 21, 2018

Order authorizing a deposition of Secretary Ross.[4] But that prospect alone does not warrant delaying the trial at Defendants' request. If the Supreme Court vacates this Court's September 21, 2018 Order before, during, or after trial, it will have no effect on the existing record, which presently lacks Secretary Ross's deposition testimony. And, however unlikely it may be, *but compare, e.g.*, *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1303 (1991) (Scalia, J.) (in chambers) (granting a stay pending a petition for certiorari based in part on the prediction that "a grant of certiorari" was "probable"), *with Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 502 U.S. 981 (1991) (mem.) (denying certiorari), if the Supreme Court allows a deposition of Secretary Ross before this Court enters final judgment, the transcript of that deposition can presumably be added to the trial record. In any event, it is Plaintiffs who bear the burden of proof in these cases, *see, e.g.*, *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005), and Plaintiffs who seek to secure Secretary Ross's deposition to meet that burden. Despite that, Plaintiffs are content to take their chances and proceed to trial knowing that, even if the Supreme Court ultimately lifts the stay and allows a deposition of Secretary Ross, it may be too late for them to benefit in these cases. Thus, while the likelihood of success on the merits of Defendants' challenge to this Court's September 21, 2018 Order justifies the already existing stay of *that* Order, it does not justify a stay of *trial*.

Perhaps recognizing that, Defendants confidently predict that the Supreme Court is likely to opine that this Court erred in authorizing extra-record discovery in the first place. (Gov't Stay Mot. 2-3). But they base that prediction almost exclusively on the *dissent* from the Supreme

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[4] In the Court's view, that result would be regrettable, as Secretary Ross's testimony is essential to fill gaps in, and clarify, the existing record. *See New York*, 2018 WL 4539659, at *2-3. In fact, one might have thought that Secretary Ross himself would have been *eager* to testify, if only to clear up the record. Given that, and given the importance of the census, "there is something surprising, if not unsettling, about Defendants' aggressive efforts to shield Secretary Ross from having to answer questions about his conduct." *Id.* at *5.

Court's Order. (*See id.* at 1-3). It should go without saying that the dissent did not carry the day in the Supreme Court; instead, it represents the views of only two Justices. More to the point, there is nothing in the Supreme Court's Order itself that supports Defendants' confident prediction. Admittedly, the Supreme Court's Order states that "[t]he denial of the stay with respect to" the July 3, 2018 Order "*does not preclude* the applicants from making arguments with respect to" that Order. *In re Dep't of Commerce*, 2018 WL 5259090 at *1 (emphasis added). But it is rather aggressive to read that language as an "invit[ation]," as Defendants do. (Gov't Stay Mot. 3). After all, if one person says to another "you are not precluded from attending my party," the latter would be hard pressed to describe the expression as an "invitation."[5] In any event, even if the Supreme Court's language could reasonably be read as an invitation, it is rank speculation to infer from that invitation that the Supreme Court is likely to hold, in the present interlocutory posture no less, that this Court erred in authorizing extra-record discovery.

In fact, for several reasons, the Court concludes that the Supreme Court is *unlikely* to disturb the July 3, 2018 Order in advance of this Court's consideration of the merits. First, that Order pertained to discovery, which — apart from the possible deposition of Secretary Ross — will be complete when Defendants file their petition with the Supreme Court. (*See* Docket No. 401).[6] Second, Defendants' suggestion that this Court's July 3, 2018 Order somehow licensed a burdensome intrusion into the workings of the Executive Branch is overblown. The Court was

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[5] The language at issue is more reasonably construed as a reaffirmation of the uncontroversial proposition that "[a] denial of a stay is not a decision on the merits of the underlying legal issues." *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam). Because Defendants invited the Supreme Court to treat their stay application as a petition for mandamus (or certiorari), *see* Renewed App. for Stay 40, No. 18A375 (U.S. Oct. 9, 2018), the Supreme Court had good reason to clarify that its disposition of the stay application did not extend to those alternative requests.

[6] The deposition of Mr. Gore is taking place today and, thus, will be over before Defendants seek, let alone obtain, Supreme Court review. (*See* Docket No. 398, at 1).

careful to observe "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" and should instead be limited to what is "necessary to effectuate the Court's judicial review." (July 3rd Tr. 85 (internal quotation marks omitted)). On that basis, the Court sharply curtailed the discovery Plaintiffs could conduct. (*See id.* at 85-87 (limiting Plaintiffs to ten depositions and limiting discovery, absent agreement or leave of Court, to the Departments of Commerce and Justice)).[7] Moreover, Defendants' cries of intrusion and burden ring hollow in light of their own conduct. Rather than seek immediate review of the Court's July 3, 2018 Order authorizing extra-record discovery, they waited *nearly two full months* — until extra-record discovery was substantially complete — before seeking a stay and any form of appellate review. *See New York*, 2018 WL 4279467, at *2.

Finally, the Court's decision to authorize extra-record discovery was, and remains, well founded. For starters, although judicial review of agency action is generally limited to the administrative record, *see, e.g.*, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), it is well established that "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper

[7] True to its word, the Court strictly policed what Defendants were required to disclose during discovery. (*See, e.g.*, Oct. 24th Tr. 21-23, 30-39 (denying or effectively denying several of Plaintiffs' open discovery demands); Docket No. 403 (denying Plaintiffs' motion to take *de bene esse* depositions or reopen depositions to address newly disclosed documents); Docket No. 369 (partially denying, on deliberative-process-privilege grounds, Plaintiffs' motion to compel production of documents); Docket No. 361 (partially denying, on attorney-client-privilege grounds, Plaintiffs' motion to compel documents); Docket No. 366, at 17 (denying Plaintiffs' motions to compel interrogatory responses); Docket No. 323 (memorializing a ruling from the bench partially denying Plaintiffs' motion to compel production of documents and to respond to interrogatories); Docket No. 303 (denying Plaintiffs' motion for leave to seek third-party discovery from Kris Kobach); Docket No. 261, at 3 (denying Plaintiffs' motion to compel documents "erroneously withheld" from the administrative record); Docket No. 204 (denying Plaintiffs' motion to shorten Defendants' time to respond to discovery requests and for additional deposition time)).

behavior on the part of agency decisionmakers," *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). The "bad faith" exception "is logical because once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency. There is no reason, then, to presume that the record is complete, and justice is served only by going beyond the record to ascertain the true range of information before the agency." James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 Envtl. L. 1301, 1308 (2008). More importantly, the exception was spawned by the Supreme Court itself, *see Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 105 (1977), and has been adopted by every Court of Appeals in the country, *see* Saul, 38 Envtl. L. at 1308-09 & n.57. Indeed, Defendants do not dispute — and have never disputed — that "bad faith" can justify extra-record discovery. (*See, e.g.*, Docket No. 194, at 4 (conceding that there is a "bad faith" exception to the "record rule")). And nothing in the Supreme Court's October 22, 2018 Order casts doubt on the well-established exception.

Notably, even the Justices who dissented from the Supreme Court's Order seem to accept that there is a "bad faith" exception to the record rule. *See In re Dep't of Commerce*, 2018 WL 5259090 at *1-2 (Gorsuch, J., concurring in part and dissenting in part). Instead, they take issue with this Court's conclusion that Plaintiffs made a sufficient preliminary showing to trigger that exception. *See id.* The Court respectfully disagrees. This Court's conclusion that Plaintiffs had made such a showing was not based on a finding that Secretary Ross "c[ame] to office inclined to favor a different policy direction, solicit[ed] support from other agencies to bolster his views, disagree[d] with staff, or cut[] through red tape." *Id.* at *1. Such circumstances, even taken together, would not be exceptional. Instead, the Court's conclusion was based on a combination of circumstances that were, taken together, most exceptional: (1) Secretary Ross's own

admission that he had "already decided to add the citizenship question before he reached out to the Justice Department" to request the question; (2) evidence that he had "overruled senior Census Bureau career staff, who had concluded . . . that reinstating the citizenship question would be very costly and harm the quality of the census count"; (3) indications that the Census Bureau had "*deviated significantly* from standard operating procedures in adding the citizenship question"; and (4) Plaintiffs' *prima facie* showing that Secretary Ross's stated justification was pre-textual. (July 3rd Tr. 82-83 (emphasis added) (internal quotation marks and brackets omitted)). Most significant, the Court found reason to believe that Secretary Ross had provided false explanations of his reasons for, and the genesis of, the citizenship question — in both his decision memorandum and in testimony under oath before Congress. (July 3rd Tr. 79-80).

If those circumstances, taken together, are not sufficient to make a preliminary finding of bad faith that would warrant extra-record investigation, it is hard to know what circumstances would — short of an agency head's outright confession that his reasons were pretextual (in which case, of course, there would be no need for discovery). In fact, circumstances far short of those present in these cases have been found by other courts to justify discovery beyond the administrative record. *See, e.g.*, *Pub. Power Council v. Johnson*, 674 F.2d 791, 794-95 (9th Cir. 1982); *Batalla Vidal v. Duke*, No. 16-CV-4756 (NGG), 2017 WL 4737280, at *3-5 (E.D.N.Y. Oct. 19, 2017); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231-33 (E.D.N.Y. 2006). Thus, there is nothing unusual with this Court's decision to allow extra-record discovery and — in light of Defendants' election not to move for summary judgment — to adjudicate Plaintiffs' claims of bad faith and pretext through a trial.

C. Issuance of a Stay Would Injure Plaintiffs and Harm the Public Interest

In short, Defendants fail to carry their burden on either of the first two, and "most critical," factors in the analysis of whether a stay is warranted. *Nken v. Holder*, 556 U.S. 418,

434 (2009). The Court could stop there, *see id.* at 435, but the third and fourth factors — "whether issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies," *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) — also weigh heavily against a stay. As noted, Defendants have repeatedly insisted, and insist even now, that the resolution of Plaintiffs' claims "is a matter of some urgency." (Gov't Stay Mot. 4; *see* Docket No. 103, at 4-5 (noting that "the Census Bureau has indicated in its public planning documents that it intends to start printing the physical 2020 Census questionnaire by May 2019" and that Ron Jarmin, Acting Director of the Census Bureau and a Defendant here, "testified under oath before Congress . . . that the Census Bureau would like to 'have everything settled for the questionnaire this fall'" and "wants to resolve this issue 'very quickly'")). Awaiting prophylactic guidance from the Supreme Court — which may not come for months and may not come at all — would make it difficult, if not impossible, to meet that goal.[8] More broadly, as the Court has noted previously, "there is a strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner — and, relatedly, that it is conducted in a manner that 'bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.'" *New York*, 2018 WL 4279467, at *3 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)). Those interests weigh heavily against any delay and in favor of making an adequate record for this Court to render an initial decision — and for higher courts

[8] Thus, Defendants are wrong in arguing, based on the dissent from the Supreme Court's October 22, 2018 Order, that Plaintiffs "'would suffer no hardship from being temporarily denied that which they very likely have no right to at all.'" (Gov't Stay Mot. 4 (quoting *In re Dep't of Commerce*, 2018 WL 5259090, at *2 (Gorsuch, J., concurring in part and dissenting in part)). Plaintiffs' hardship is the risk that the census forms are printed before they have an opportunity to fully adjudicate their claims.

to then review that decision without any risk that those courts would conclude that a remand to develop the record would be in order.

In their pending motion before the Second Circuit, Defendants contend that a stay of trial would not prevent resolution of Plaintiffs' claims before the census questionnaires have to be printed. (Motion for Stay ("2d Cir. Stay Mot."), at 9, Docket No. 68, No. 18-2856 (2d Cir. Oct. 25, 2018); *see also* Oct. 24th Tr. 11-12). The Court does not share their confidence. There is no telling when the Supreme Court will issue a decision on Defendants' forthcoming petition. It could do so in days; or it could take months. If the Supreme Court's decision does not affect this Court's plan to proceed with a trial, the Court would then have to reschedule trial — no small task given the upcoming holidays, the parties' schedules (including two trials in parallel cases pending in other districts scheduled in January), and the Court's own congested calendar.[9] If the Supreme Court's decision makes clear that Plaintiffs' claims should be resolved by summary judgment rather than trial, the parties will need to prepare extensive motion papers. In either case, it will take time for this Court to issue a written ruling and enter final judgment. And whatever this Court decides, the losing parties will almost certainly appeal to the Second Circuit and, in turn, to the Supreme Court. It would be hard enough for that normally lengthy process to run its course by next May or June — when the census questionnaires are apparently scheduled to be printed (*see* Docket No. 103, at 4-5; Oct. 24th Tr. 11) — if these cases proceed to trial on

[9] At present, the Court has two other trials scheduled for December and another two trials scheduled for January. Moreover, the second one in January is a bellwether trial in the *General Motors LLC Ignition Switch Litigation*, which is slated to last several weeks, would be difficult to reschedule, and which will likely involve dozens of pretrial motions. Thus, the fact that the *other* district courts overseeing challenges to Secretary Ross's decision "have scheduled trials to begin in January," as Defendants note in their motion to the Second Circuit (2d Cir. Stay Mot. 9), says nothing about this Court's ability to render a timely decision.

November 5, 2018. Granting a stay of indefinite duration could make a timely final decision next to impossible.

* * * *

In short, as prudent as it might be under other circumstances to await further guidance from the Supreme Court, there are good reasons not to do so here and instead to proceed to trial as scheduled. Time is of the essence. At bottom, Defendants are seeking a preemptive ruling from the Supreme Court on a decision that this Court has not yet even made — namely, what evidence the Court may consider in ruling on the merits — thereby seeking to disrupt "the appropriate relationship between the respective courts." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Making matters worse, Defendants have not yet even formally asked the Court to make a decision on that issue. They elected not to do so in the form of a summary judgment motion, and thus conceded, as a procedural matter, that trial is appropriate. And, perhaps most importantly, Defendants suffer no substantive, cognizable harm whatsoever in proceeding to trial as scheduled. They can make, and thus preserve, any argument they want about the scope of what this Court may consider in rendering a decision. And if they are unsuccessful before this Court, they can seek review of this Court's final judgment from the Second Circuit and, if necessary, the Supreme Court — as they could in any other case.

Put simply, the pending challenge to this Court's Order authorizing a deposition of Secretary Ross notwithstanding, Defendants provide no basis to deviate from the well-established and well-justified procedures that have generally been applied in federal courts for generations — whereby district courts decide cases in the first instance, followed by an appeal by the losing party, on a full record, to the court of appeals and, thereafter, a petition to the Supreme Court. Defendants may yet have their day to argue the merits in the Supreme Court. But for many salutary reasons, that day should not come before this Court has decided the merits in the

first instance. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) ("[The final judgment rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration." (internal quotation marks and citation omitted)).

Accordingly, Defendants' motion for a stay of trial and associated deadlines is DENIED. The Clerk of Court is directed to terminate Docket No. 397.

SO ORDERED.

Dated: October 26, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

S.D.N.Y.-N.Y.C.
18-cv-2921
18-cv-5025
Furman, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of October, two thousand eighteen.

Present:

John M. Walker, Jr.,
Raymond J. Lohier, Jr.,
Circuit Judges,
William H. Pauley III,*
District Judge.

In Re: United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

18-2856
18-2857

Movants.

Movants have filed a motion for a stay of pretrial and trial proceedings in two consolidated district court cases pending resolution of their forthcoming petition for a writ of mandamus or certiorari in the Supreme Court. Upon due consideration, it is hereby ORDERED that the motions for a stay are DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

* Judge William H. Pauley III, of the United States District Court for the Southern District of New York, sitting by designation.