No. 18-557

IN THE
Supreme Court of the United States

IN RE DEPARTMENT OF COMMERCE, et al.,
Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR GOVERNMENT RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In a lawsuit challenging agency decision-making under the Administrative Procedure Act, it is well-established that courts may authorize limited discovery beyond the administrative record, including deposition testimony, when the agency fails to provide the whole administrative record on which it based its challenged decision, or when there is a strong showing of bad faith or improper conduct by the agency. Applying these settled principles to the extraordinary facts presented here, the district court authorized limited discovery beyond the administrative record to ensure that the U.S. Department of Commerce fully disclosed all the information it directly or indirectly considered in deciding to add a question about citizenship status to the decennial census questionnaire. The district court separately authorized a deposition of the Secretary of Commerce given his unique, first-hand knowledge about the agency's decision-making. The trial in the underlying lawsuit is nearly complete, and the district court's decision on the merits is forthcoming.

The questions presented are:

1. Whether the Court should issue an extraordinary writ of mandamus to preemptively dictate the scope of the district court's forthcoming review of the merits of respondents' claims challenging the addition of a citizenship question.

2. Whether the district court severely abused its discretion in authorizing a four-hour deposition of the Secretary of Commerce given the unique and extraordinary circumstances presented here.

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INTRODUCTION

The State of New York, eighteen other States, fourteen other governmental entities,[1] and the U.S. Conference of Mayors (respondents) oppose the petition for writ of mandamus or certiorari filed by the U.S. Department of Commerce, Secretary of Commerce Wilbur Ross, Jr., the Bureau of the Census, and Acting Bureau Director Ron S. Jarmin, challenging pretrial discovery orders of the U.S. District Court for the Southern District of New York (Furman, J.). The orders were entered in this ongoing lawsuit, by respondents and others, challenging petitioners' decision to modify the decennial census to include a question about citizenship status. Petitioners, who are defendants in the pending lawsuit, seek (1) to limit the district court to considering the administrative record submitted by petitioners in the court's forthcoming review of respondents' claims, and (2) to halt the Secretary's deposition. The Court should deny the petition in both respects.

The Court should decline to limit the scope of the district court's merits review, because that request is unpreserved, premature, and inappropriate. Petitioners did not ask the district court to decide this case based solely on the administrative record before seeking mandamus, and the district court has yet to decide on the proper scope of its review. Mandamus relief is unavailable for an argument that the district court has yet to decide.

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[1] The government respondents are identified in the petition at page II.

And the Court should decline to prohibit the Secretary's deposition. While the record in Administrative Procedure Act (APA) cases is ordinarily limited to the agency's proffered record and rationales, well-established exceptions to this rule authorize additional discovery, including depositions of high-level officials. Because there is thus no categorical barrier to the Secretary's deposition, the only question presented is whether the district court's factual findings are sufficient to support that deposition. That highly fact-specific question does not warrant this Court's extraordinary intervention in ongoing proceedings.

In any event, petitioners have failed to show that the district court abused its discretion in ordering the Secretary's deposition. The district court did not clearly err in identifying highly unusual circumstances that called into question the completeness of the information petitioners had provided and justified further inquiry. *First*, the Secretary publicly reversed himself on the justification for his decision: initially claiming that he was responding to a request from the Department of Justice (DOJ) for citizenship data, and later admitting that he had been driving this process all along, including by enlisting DOJ's request. *Second*, petitioners' initial administrative record was patently deficient, omitting almost all documents preceding DOJ's request. These unique circumstances, among others, amply supported the district court's order authorizing further inquiry into the agency's decision-making.

Moreover, the district court did not clearly abuse its discretion in concluding that this additional discovery should include deposition testimony from the Secretary. As the district court found, the

Secretary was personally involved to an extraordinary degree in the project to add a citizenship question. Despite respondents' efforts to obtain a comprehensive picture of the information he considered, significant gaps in the record remain that only the Secretary's testimony will fill.

For these reasons, certiorari is also inappropriate, and the Court should decline to grant petitioners' alternative request for such relief.

STATEMENT

A. Factual Background

1. The Constitution requires an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. This enumeration must count all residents, regardless of citizenship status. *Federation for Am. Immigration Reform v. Klutznick* (*FAIR*), 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). The enumeration affects the apportionment of representatives to Congress among the States, the allocation of electors to the Electoral College, the division of congressional districts within each State, the apportionment of state and local legislative seats, and the distribution of hundreds of billions of dollars of federal funding. *See* U.S. Const. art. I, § 2, cl. 3; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). (Second Am. Compl. (Compl.) ¶¶ 139-156 (GRA179-245).[2])

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[2] Citations to "GRA" correspond to the appendix attached to the Government Respondents' brief opposing petitioners' stay application, filed on October 11, 2018.

Congress has delegated the task of conducting the decennial enumeration to the Secretary of Commerce and the Census Bureau. The Secretary must obtain a total-population count that is "as accurate as possible, consistent with the Constitution" and the law. Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2481 (1997).

2. The Bureau conducts the required decennial enumeration principally by sending a short questionnaire to every household. Compl. ¶ 33. This questionnaire has not included any question related to citizenship status for more than sixty years. For nearly forty years, the Bureau has vigorously opposed adding any such question based on its concern that doing so "will inevitably jeopardize the overall accuracy of the population count" by depressing response rates from certain populations, including noncitizens and immigrants. *FAIR*, 486 F. Supp. at 568; *see New York v. Department of Commerce*, 315 F. Supp. 3d 766, 782-85 (S.D.N.Y. 2018).

Although the Bureau has requested citizenship information through other means, such requests have gone to many fewer individuals, most recently through a process separate from the decennial enumeration, and thus have not raised similarly serious concerns. Until 2000, the Bureau requested such information through a "long-form" census questionnaire—a list of questions sent each decade to just one of every six households. In 2005, the Bureau replaced the long-form questionnaire with the American Community Survey (ACS), a list of questions sent annually to one of every thirty-six households. Because the ACS and long-form questionnaire differ substantially from the decennial census, testing used for those requests for information "cannot be directly applied to a decennial census environment." U.S. Census Bureau, 2018 End-

To-End Census Test–Peak Operations 22-23 (Jan. 23, 2018).

3. In a March 2018 memorandum, Secretary Ross announced that he had decided to add a citizenship question to the 2020 census questionnaire sent to every household—contravening the Bureau's long-held opposition to such a question, and disregarding the conclusions of his own staff, including the Bureau's Chief Scientist, that adding the question would "harm[] the quality of the census count" by "reduc[ing] the self-response rate." (GRA75, GRA110.)

In that memorandum, the Secretary represented that he "began a thorough assessment" of whether to add a citizenship question (App. 137a) "[f]ollowing receipt" of a DOJ letter, dated December 12, 2017 (App. 136a; *see* App. 136a-151a). That letter requested block-level citizenship data to enforce the Voting Rights Act's (VRA's) prohibition against diluting the voting power of minority groups. (App. 152a-157a.) DOJ's request, the Secretary claimed, "initiated a comprehensive review process" by Commerce to give the Secretary "all facts and data relevant to the question." (App. 136a.) In testimony before Congress, the Secretary reiterated that DOJ had "initiated the request for inclusion of the citizenship question," *Hearing on Recent Trade Actions*, 115th Cong. p. 51 (Mar. 22, 2018) (2018 WLNR 8951469), and that Commerce was "responding *solely* to [DOJ's] request," *Hearing on F.Y. 2019 Dep't of Commerce Budget*, 115th Cong. video 36:20 (Mar. 20, 2018) (emphasis added) (2018 WLNR 8815056). And he stated that he was "not aware" of any discussions between himself and any White House officials about the citizenship question. *Id.* at 1:16:30.

These descriptions were false, as the Secretary later admitted. In June 2018, after this lawsuit began, the Secretary acknowledged in a supplemental decision memorandum that DOJ's letter had *not* initiated his consideration of adding a citizenship question. Rather, the Secretary began considering the question "[s]oon after [his] appointment as Secretary" in February 2017—almost a year before DOJ's letter. (App. 134a.) And DOJ had *not* submitted the December 2017 letter on its own initiative, as the Secretary's March 2018 memorandum suggested. Instead, the Secretary and his staff had approached DOJ to ask that it "request[] inclusion of a citizenship question." (App. 134a.) Moreover, as part of discovery in this proceeding, the Secretary recently acknowledged that he spoke to then–White House Chief Strategist Stephen Bannon in spring 2017 about the citizenship question (GRA267)—again contradicting what he told Congress.

As discovery has further revealed, even the June 2018 memorandum failed to describe accurately the Secretary's months-long efforts to manufacture a rationale to support his decision to add the citizenship question. Early in the Secretary's tenure, at Bannon's direction, the Secretary spoke with Kris Kobach, the Kansas Secretary of State, who urged the Secretary to add a citizenship question as an "essential" tool to resolve "the problem" of counting noncitizens for congressional apportionment.[3] (GRA23-24.) Although Kobach's email did not mention the VRA, the Secretary pressed his staff to add a citizenship question to the census and repeatedly intervened

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[3] No such problem exists. The Constitution requires that all inhabitants, including noncitizens, be counted for congressional apportionment. *See Evenwel*, 136 S. Ct. at 1128-29.

when they failed to move quickly. In May 2017, the Secretary asked his staff member Earl Comstock "why nothing [has] been done in response to my *months old* request that we include the citizenship question." (GRA18 (emphasis added).) Comstock replied that Commerce would "get that in place." He then reached out to both DOJ and the Department of Homeland Security to see if either agency would request the addition of a citizenship question, but both agencies declined. (GRA20, GRA35.) In August and September 2017, the Secretary again requested updates from his staff regarding the citizenship question. (GRA25-33.)

In late August 2017, after Commerce sought again to enlist DOJ to request the citizenship question, then–Attorney General Sessions discussed the issue with then—Acting Assistant Attorney General Gore, who became DOJ's point person on the matter. (Dep. of John Gore (Gore Dep.) 74-75, 91-112, S.D.N.Y. ECF:491-2.) Although DOJ had already declined to request such a question, Gore and the Secretary's Chief of Staff discussed the issue. An advisor to Sessions reassured the Secretary's Chief of Staff that DOJ "can do whatever you all need for us to do." (GRA41.) Gore then wrote the December 2017 DOJ letter. He has since acknowledged that none of the DOJ components with principal responsibility for enforcing the VRA requested the addition of a citizenship question; instead, he drafted the DOJ letter solely in response to the Secretary's request. (Gore Dep. 64-67, 94-95.)

Throughout this process, the Secretary and his staff never informed the Census Bureau about the Secretary's decision to add a citizenship question or his efforts to get another federal agency to request the question. (GRA174-176.) Unaware of these decisions

and conversations, the Bureau's professional staff responded to DOJ's December 2017 letter by inviting DOJ's technical experts to meet to discuss the best way to provide citizenship data. The Bureau had significant concerns that adding a citizenship question to the decennial census would *not* provide the accurate data DOJ wanted because the question would suppress response rates and thus produce inaccurate citizenship data. (GRA71-72, GRA75.) Sessions personally directed DOJ officials not to meet with the Bureau's staff. (GRA99, GRA168-171; *see* Gore Dep. 265-273.) The Secretary then forged ahead with adding the citizenship question over the strong objections of the Bureau's professional staff, who informed him that adding the question would both undermine the accuracy of the enumeration and fail to provide the accurate block-level citizenship data that DOJ claimed to need (GRA111-119).

B. This Lawsuit

1. Initial proceedings

Respondents here allege that the Secretary's decision to add a citizenship question was arbitrary and capricious and contrary to law, in violation of the APA; and unconstitutional under the Enumeration Clause. (Compl. ¶¶ 178-197.)

In June 2018, petitioners purported to file the complete administrative record of all materials the Secretary considered in deciding to add the citizenship question. But petitioners' administrative record contained scarcely *any* documents from before DOJ sent its December 2017 letter, even though the Secretary had been extensively considering the citizenship question long before DOJ's letter. Several

weeks later, the Secretary submitted his supplemental decision memorandum, admitting for the first time—in conflict with his initial explanation—that he had pursued a citizenship question for nearly a year before DOJ's letter. (App. 134a.)

2. The district court's July 3 order allowing limited discovery and August 17 order authorizing Gore's deposition

On July 3, the district court authorized three categories of limited discovery, subject to strict limitations on both scope and duration. (App. 95a-103a.)

First, the court ordered petitioners to complete the deficient administrative record. (App. 95a-98a.)

Second, the court authorized limited expert discovery to aid the court in adjudicating complex issues that are "commonplace" in census-related challenges. (App. 102a-103a.)

Third, the court allowed certain additional discovery based on the irregularity of the record petitioners had produced and a strong showing of "bad faith or improper behavior." (App. 98a (quotation marks omitted).) The court found that the Secretary's admission that he had been pursuing the citizenship question long before DOJ's December 2017 letter showed that he "had provided false explanations of his reasons for, and the genesis of, the citizenship question" in both his initial decision memorandum and congressional testimony. (App. 124a; *see* App. 98a-99a.) The Secretary's misleading account was troubling for not only its falsity but also its strong suggestion that his stated rationale—to help DOJ enforce the VRA—was manufactured to cover a

decision that he had already made "before he reached out to [DOJ]." (App. 98a; *see* App. 123a-124a.) The court also noted the Bureau's failure to conduct its normal testing procedures; evidence that the Secretary had overruled objections of the Bureau's professional staff, who warned that the question would "'harm the quality of the census count'"; and other evidence that the VRA-enforcement rationale was pretext. (App. 98a-100a.)

After engaging in discovery under the July 3 order for more than two months, petitioners refused to allow respondents to depose Gore. On August 17, the district court granted respondents' motion to compel Gore's deposition. (App. 24a-27a.) In September 2018—with only one month of discovery remaining—petitioners for the first time sought mandamus relief from the Second Circuit to halt extra-record discovery and quash Gore's deposition. Petitioners represented that they were not challenging the order's requirement that petitioners "supplement the administrative record" or its authorization of "expert discovery on collateral matters." (Defs. Reply Br. (Reply) 17, No. 18-2652, *In re U.S. Dep't of Commerce* (2d Cir. Sept. 21, 2018), ECF:56.) Petitioners also declined to seek "retrospective relief" from discovery that was already complete. *Id.* The Second Circuit denied the petition. (App. 5a-8a.)

3. The decision on the motion to dismiss

Shortly after issuing its discovery order, the court denied petitioners' motion to dismiss in part and granted it in part. The court concluded that respondents had plausibly alleged standing, and that sufficient legal standards existed to review the Secretary's decision under the APA. 315 F. Supp. 3d

at 781-90, 793-98. The court thus allowed respondents' APA claims to proceed. *Id.* at 811. The court dismissed respondents' Enumeration Clause claim for failure to state a claim. *Id.*

4. The September 21 order authorizing the Secretary's deposition

Meanwhile, on September 21, the district court granted respondents' motion to compel the Secretary's deposition, finding that "exceptional circumstances" warranted the deposition. (App. 9a-11a (quotation marks omitted).)

First, the court found that the Secretary "has unique first-hand knowledge related" to respondents' claims because he was "personally and directly involved" in the "unusual process" leading to his decision. (App. 11a, 13a-14a (quotation marks omitted).) And the Secretary's decision would be arbitrary and capricious if his "stated rationale" for adding the citizenship question "was not his *actual* rationale." (App. 11a.)

Second, the court found that taking the Secretary's deposition was "the only way to fill in critical blanks in the current record." (App. 17a.) As the court explained, each of the Secretary's three most senior advisors had testified that the Secretary "was the only person who could provide" certain critical information. (App. 17a-18a.)

Third, the court found that other discovery routes would not yield the same information. Indeed, respondents had "already pursued several of these options, yet gaps in the record remain." (App. 19a.) And a short deposition of the Secretary would be more

efficient and less burdensome given the time pressure for census preparations. (App. 19a, 22a-23a.)

Finally, to prevent undue burdens on the Secretary, the district court limited the deposition to four hours and required that it take place at a location convenient for the Secretary. (App. 22a.)

Petitioners sought mandamus relief from the Second Circuit to overturn the district court's September 21 order. The Second Circuit denied the petition. (App. 3a.)

5. Petitioners' prior application to this Court

Petitioners then sought a stay of discovery from this Court, including the depositions of the Secretary and Gore. The Court stayed only the September 21 order authorizing the Secretary's deposition and declined to stay the July 3 order authorizing extra-record discovery and the August 17 order authorizing Gore's deposition. Slip Op. at 1, No. 18A375 (Oct. 22, 2018). Justice Gorsuch, joined by Justice Thomas, dissented in part, explaining that he would have stayed all three pretrial-discovery orders. *Id.* at 1-4.

The parties have now completed discovery, except for the Secretary's deposition.

6. Petitioners' requests to stay the trial

The day after this Court declined to stay any discovery except the Secretary's deposition, petitioners again asked the district court to stay all discovery and the forthcoming trial pending resolution of this mandamus petition. (Letter, S.D.N.Y. ECF:397.) The district court declined to issue any stay.

First, the court found that petitioners would not suffer irreparable harm from proceeding to trial and final judgment. Except for the Secretary's deposition, the discovery authorized by the July 3 and August 17 orders was already complete, and ordinary litigation costs do not constitute irreparable harm. (App. 113a-116a.)

Second, the district court rejected petitioners' request for a stay based on their argument that the court should limit its review of the merits to the administrative record alone. The court found this argument premature, unpreserved, and inappropriate because petitioners had "not yet even formally asked" the district court to decide "what evidence [it] may consider in ruling on the merits," and the court had accordingly not yet conclusively ruled on that question. (App. 127a-128a.) The court also noted the steps it would take to ensure that petitioners could later present its argument in post-trial briefing and on appeal, including by ordering "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." (App. 114a.) The district court stated its intention to make the same differentiation in its post-trial ruling, thus facilitating appellate review. (App. 114a.)

Petitioners then asked the Second Circuit to stay pretrial and trial proceedings. The Second Circuit denied petitioners' request on October 30. On November 2, this Court also denied petitioners' application for a stay. Order, No. 18A455.

7. The current status of trial

Trial began on November 5 and is likely to conclude by November 14. Much of the trial consists of documentary submissions, including the administrative record, witness affidavits, and excerpts of deposition transcripts. The live testimony consists largely of expert testimony addressing respondents' standing and complex issues that often arise in census-related disputes. For example, experts have testified about the negative effects that the citizenship question will have on the accuracy of the enumeration and, ultimately, on respondents' representational and financial interests. Experts have further testified about why petitioners' purported efforts to mitigate the harmful effects of the citizenship question are unlikely to succeed.

ARGUMENT

PETITIONERS DO NOT SATISFY THE STRINGENT REQUIREMENTS FOR A WRIT OF MANDAMUS

Mandamus is "a drastic and extraordinary remedy" reserved for "really extraordinary causes." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quotation marks omitted). To obtain such relief, petitioners must establish that (a) they have "no other adequate means to attain" relief; (b) "the writ is appropriate under the circumstances"; and (c) they have a "clear and indisputable" right to relief. *Id.* at 380-81 (quotation marks omitted). Petitioners fail to satisfy these demanding standards here.

A. This Court Should Reject Petitioners' Request to Constrain the Scope of the District Court's Forthcoming Review of Respondents' Claims.

In addition to asking this Court to quash the Secretary's deposition, petitioners seek a writ of mandamus ordering the district court to (1) limit its forthcoming review of the merits of respondents' claims to the administrative record, and (2) exclude from consideration all extra-record discovery already produced, including Gore's deposition testimony. Regardless of how this Court resolves the question of the Secretary's deposition, it should reject petitioners' extraordinary request to constrain preemptively the district court's review of the merits.

1. Petitioners' request to constrain the district court's review is unpreserved, premature, and otherwise improper as a basis for mandamus relief.

As an initial matter, mandamus to limit the scope of the trial court's review is unavailable because petitioners failed to make any such request below. Before seeking mandamus from this Court, petitioners neither asked the district court to confine its review to the administrative record nor sought mandamus from the Second Circuit to restrict the district court's merits review. (App. 112a.) Indeed, petitioners represented to the Second Circuit that they were not seeking any "retrospective relief" related to discovery already produced. Reply 17. Equity counsels against granting mandamus to provide relief that petitioners did not request below. *See Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 405 n.9 (1976).

Mandamus is also unavailable because petitioners have "other adequate means to attain" the limitations on the district court's review that they seek, *Cheney*, 542 U.S. at 380. At the district court's invitation, petitioners have submitted a pretrial brief and a motion in limine asking the court to limit its review to the administrative record based on the same arguments asserted in their mandamus petition here. (Defs.' Pretrial Mem. 21-23, S.D.N.Y. ECF:412; Defs.' Mot. in Limine 2-4, S.D.N.Y. ECF:408.) And the district court has made clear that it intends to address the scope of its review in the first instance before issuing its final judgment. (App. 111a-112a, 127a-128a.)

Petitioners thus ask this Court to be the *first* court to decide the proper scope of the district court's merits review. But this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And there are good reasons to wait for the district court's initial ruling on the proper scope of its review. For instance, the court has yet to resolve whether certain expert testimony is part of extra-record discovery or instead the result of the district court's separate rulings—which petitioners do not challenge here—permitting expert discovery on complex questions that arise in census-related disputes. (App. 102a.) Moreover, petitioners have sought to exclude certain extra-record evidence on grounds unrelated to the district court's bad-faith finding—including contending that certain experts' opinions improperly "second-guess the Secretary's decision"—and the district court may thus still limit the scope of the record before it. (Mot. in Limine 5-12.)

In addition, the district court's forthcoming ruling on the scope of its review will benefit from the

substantially more complete and up-to-date information now available to the court. When the court issued its initial July 3 discovery order, the full administrative record was not yet available because petitioners had omitted tens of thousands of pages that they now acknowledge should have been produced in the first instance. It thus makes perfect sense for the district court to consider the full administrative record in making a final determination whether to confine its review to that record or instead to consider additional evidence produced through discovery. Until the district court has decided which evidence it will consider, the scope-of-review dispute will not be squarely presented for this Court's review.

Petitioners concede that they can raise their scope-of-review objections on appeal from final judgment, yet argue that they are entitled to immediate mandamus relief to limit the district court's review because they will otherwise suffer the "irreversible burdens" of preparing for and participating in a trial. Pet. 31. But mandamus will not relieve petitioners from those burdens because the trial is nearly complete. In any event, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" or entitle petitioners to mandamus. *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

The possibility that an appellate court might disagree with the district court's forthcoming scope-of-review decision does not alter the result. *See* Pet. 31-32. The final-judgment rule is not a matter of convenience, to be discarded whenever the federal government thinks it would be more efficient to obtain this Court's review first. Rather, the rule preserves trial judges' independence—protecting against the

harassment and costs of successive appeals, and promoting efficient judicial administration. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Petitioners cannot avoid that rule by using mandamus "as a substitute for appeal." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

Moreover, the district court has already taken prudent steps to ensure that petitioners may later seek prompt and efficient appellate review of the district court's final judgment, including any ruling on the scope of its review. For example, the court directed the parties to submit trial briefs that differentiate between "arguments based solely on the administrative record and arguments based on materials outside the record" and intends to draw such a line in its final decision as well. (App. 114a.) Accordingly, if the district court reviews extra-record evidence, an appellate court that disagrees with such review can determine whether the district court's final judgment nonetheless stands based on the administrative record alone.[4]

2. Petitioners' threshold objections to the Secretary's deposition provide no basis to limit the scope of the district court's review.

Petitioners appear to believe that they are entitled to sweeping constraints on the district court's *post-trial* review of respondents' claims because their objections to the district court's July 3 *pretrial*

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[4] Contrary to petitioners' contention (Pet. 31-32 n.8), the district court is not conducting "two proceedings." The court simply directed the parties to make arguments in the alternative to create a thorough appellate record and decrease the risk of lengthy proceedings on remand.

discovery order finding bad faith are based, in part, on their view of the appropriate scope of review in APA cases. But the district court's July 3 order found only that respondents had made a "preliminary or prima facie showing" of bad faith on the limited evidence then in the record (App. 100a), and did not make any final determination of the appropriate scope of review—a question that the district court has since confirmed it will decide later (App. 111a-114a). The district court acted well within its discretion in deferring this question. Civil discovery is "not limited to matters that will be admissible at trial," *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984), and courts routinely authorize discovery of information that they may ultimately decline to consider in their merits review.

Because the district court's bad-faith finding was thus only a preliminary determination, this Court should reject petitioners' attempt to bootstrap this Court's review of that determination to restrict the district court's forthcoming review of the merits. As discussed above, doing so would interfere with the district court's careful and ongoing consideration of the very scope-of-review question that petitioners ask this Court to preemptively decide, when the district court (unlike this Court) will have the benefit of the full administrative record, the evidence produced at trial, and the parties' forthcoming briefing on this precise issue.

Moreover, this Court can address any concerns about the burdens imposed by the Secretary's deposition—the only remaining discovery dispute—without resolving the scope of the district court's review of the merits. Many of petitioners' arguments are specific to the Secretary's deposition; for example,

petitioners repeatedly criticize the deposition as an improper attempt to discern the Secretary's personal views or "subjective mental processes" (Pet. 14). This Court can address those arguments without calling into question the relevance of the other evidence already produced. This Court can also address any unique concerns raised by the deposition of a cabinet secretary by resolving whether the district court clearly erred in finding that the Secretary's unique, first-hand knowledge outweighed any burdens from a deposition. See *infra* at 32-36.

Focusing on the unique concerns raised by the Secretary's particular position accords with this Court's prior rulings here. In response to petitioners' multiple interlocutory applications, this Court stayed only the Secretary's deposition and otherwise allowed discovery to proceed on all other extra-record evidence, including Gore's deposition. And the Court did so even though petitioners have persistently argued that their objections to the district court's July 3 bad-faith ruling require halting *all* extra-record discovery (and trial), not just the Secretary's deposition. This Court's narrow disposition of petitioners' stay applications is consistent with the view that any concerns about the Secretary's deposition arise from his uniquely high position as a cabinet secretary, and not from the mere fact that the district court allowed discovery beyond the administrative record proffered by petitioners. This Court should thus reject petitioners' attempt to leverage a dispute over a single official's deposition into an extraordinary and sweeping order preemptively constraining the district court's review of the merits.

B. The District Court Did Not Clearly Abuse Its Discretion in Authorizing the Secretary's Deposition.

Petitioners also have not shown that the district court clearly and indisputably erred in ruling that respondents made a sufficiently strong showing of bad faith and exceptional circumstances to warrant the Secretary's deposition.

1. This Court should not disturb the district court's preliminary finding of bad faith.

a. Petitioners principally argue that the district court clearly erred in allowing *any* extra-record discovery, including the Secretary's deposition, because the record in APA cases is limited to "the reasons the Secretary gave" for his decision and to the administrative record he elected to produce to support that rationale. Pet. 29-30. But as petitioners acknowledge (Pet. 14), this Court has long held that this default "record rule" does not apply when there has been "a strong showing of bad faith or improper behavior," or when "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). These circumstances warrant additional discovery—including potentially requiring "the administrative officials who participated in the decision to give testimony explaining their action," *id.*—precisely because such circumstances raise serious doubts about the accuracy and comprehensiveness of the agency's public justification and account of its decision-making, as well as questions about the validity of the agency's determination. *See Woods Petroleum Corp. v. United States Dep't of Interior*, 18

F.3d 854, 859-60 (10th Cir. 1994) (setting aside agency action because "sole reason" for action was "to provide a pretext" for agency's "ulterior motive"), *adhered to on reh'g en banc*, 47 F.3d 1032 (10th Cir. 1995).

Far from being a "novel theory," as petitioners contend (Pet. 13), these exceptions to the "record rule" are bedrock principles of administrative law, and the district court did not clearly err in relying on them here. As this Court has repeatedly recognized, the courts' responsibility under the APA is to conduct a probing review of the actual process that led to the challenged decision. The agency's administrative record will ordinarily provide a sufficiently comprehensive account of the agency's reasoning to conduct this review. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). But when "a strong showing of bad faith or improper behavior" calls into question whether the agency's stated rationale is pretextual or whether its administrative record is accurate, "effective judicial review" is impossible without further inquiry. *Overton Park*, 401 U.S. at 420; *see Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) ("[F]or the courts to determine whether the agency has" properly exercised its statutory duties, the agency "must disclose the basis of its order." (quotation marks omitted)). As the district court correctly explained, "once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency" and has "no reason . . . to presume" that the administrative record faithfully reflects the agency's actual decision-making. (App. 122a (quotation marks omitted).) Thus, when the court has reason to suspect that the agency has tendered "a fictional account of the actual decisionmaking process," *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (per curiam), it

may order discovery to determine how the agency actually reached its decision.

Relatedly, discovery beyond the administrative record may be appropriate "when it appears [that] the agency has relied on documents or materials not included in the record." *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (quotation marks omitted). In such circumstances, a court must permit "limited discovery to explore whether some portions" of the whole record required by the APA were not supplied. *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *see* 5 U.S.C. § 706. As petitioners concede, that discovery must disclose all information "'directly or indirectly'" considered by the agency, including "'evidence contrary to the agency's position.'" Pet. 17 (quoting *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). Discovery is needed in such circumstances because the agency's failure to be forthright in the administrative record raises serious questions about the reliability and regularity of its processes. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

Contrary to petitioners' repeated assertions, allowing additional discovery based on bad faith or a deficient administrative record does not constitute an illegitimate inquiry into the decision-maker's "subjective mental processes" (Pet. 17-19) or "secret motives" (Pet. 13). Rather, such discovery is directed at the same purpose that the administrative record serves—revealing the complete picture of the processes, information, and rationales that led to the agency's decision. Additional discovery is warranted only when a court has reason to believe that these objective facts are absent from the administrative

record the agency initially produced in a particular case. Such discovery is thus not an intrusive and irrelevant "inquiry into the mental processes of administrative decisionmakers," but rather constitutes a legitimate attempt to discern the true basis for an agency's determination—the essential predicate for meaningful judicial review of any administrative action. *Overton Park*, 401 U.S. at 420.

b. Because well-established law authorizes discovery beyond the administrative record (including testimony by agency officials) under appropriate circumstances, the only question here is whether the district court clearly abused its discretion in finding that such circumstances existed here. (*See* App. 3a, 7a, 93a-100a.) Petitioners have not identified any severe abuse of discretion in the district court's "careful factual findings" (App. 6a) that would warrant the extraordinary remedy of mandamus to exclude all extra-record discovery or quash the Secretary's deposition. To the contrary, the district court reasonably found that extraordinary circumstances unique to this case provided a sufficiently strong showing of bad faith or improper conduct by petitioners to call into serious question whether their administrative record and proffered rationale for adding the citizenship question—DOJ's purported need for citizenship data to enforce the VRA—reflected their actual reasoning.

First, in announcing his determination, the Secretary initially gave an explanation to the public and to Congress that he later reversed in material ways, raising substantial questions about the accuracy of his statements. When the Secretary announced his decision in March 2018, he stated that he "initiated" his consideration of the citizenship question *after*

receiving DOJ's December 2017 letter. (App. 136a-137a.) And he provided this same explanation in congressional testimony, repeatedly identifying DOJ's December 2017 letter as the sole factor that triggered Commerce's decision-making. But as the Secretary's June 2018 supplemental decision memorandum later revealed, this account was false. In fact, the Secretary, not DOJ, initiated the process to add a citizenship question, long before the Secretary was aware of any purported need for citizenship data to enforce the VRA. And it was the Secretary and his staff who worked with DOJ to obtain a letter that would make it appear as though DOJ had independently initiated a request for citizenship data. (*See* App. 134a.)

This extraordinary reversal strongly supports the district court's bad-faith finding. The initially concealed fact of the Secretary's earlier efforts to add a citizenship question raised substantial doubt whether the Secretary decided to add the question only in March 2018, as he claimed, or had actually reached this decision much earlier. Moreover, the disclosure of the Secretary's active role in soliciting and crafting DOJ's December 2017 letter called into question whether his public reliance on the letter was pretextual—manufactured as a post hoc explanation for a decision he had already made for other, still-unacknowledged reasons. *See, e.g.*, *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231-33 (E.D.N.Y. 2006); *New York v. Salazar*, 701 F. Supp. 2d 224, 242 (N.D.N.Y. 2010), *aff'd*, 2011 WL 1938232 (N.D.N.Y. 2011).

Second, the Secretary's belated revelation of a nearly yearlong decision-making process, referred to nowhere in his initial public announcement, triggered significant concerns that petitioners had not provided

all information that the Secretary "directly or indirectly considered" (Pet. 17 (emphasis omitted)). These concerns about the accuracy and completeness of the Secretary's explanations were compounded by petitioners' failure to provide the whole record on which the Secretary based his decision. Petitioners invoke (Pet. 27) the "extensive administrative record" as a basis to preclude the district court from considering any extra-record evidence and to quash the Secretary's deposition. But that "extensive administrative record" was produced over petitioners' objection, and solely as a result of the July 3 order that petitioners challenge here. Petitioners' initial administrative record was patently deficient, omitting nearly *all* materials predating DOJ's December 2017 letter, despite the Secretary's concession that he had been considering a citizenship question for nearly a year before that letter. The conceded deficiency of that initial record thus confirmed the district court's serious doubts about whether petitioners were providing the court with all information on which the Secretary relied.

The discovery that has proceeded under the district court's July 3 order has demonstrated that the purpose of this discovery has been to elucidate the full scope of the processes, information, and rationales that led Commerce to add the citizenship question, rather than to discern the Secretary's personal beliefs or "subjective mental processes" (Pet. 14). Indeed, as petitioners acknowledged in a recent trial filing, the deposition testimony has "focus[ed] *almost exclusively* on the *decision-making process* undertaken by" the Secretary. (Mot. in Limine 5 (emphasis added).)

For example, discovery has provided further information about the interactions between Commerce

and DOJ that led to DOJ's 2017 letter—interactions not fully explained by the administrative record—by confirming that these interactions were initiated solely by Commerce and not by anyone at DOJ, let alone anyone at DOJ who works on VRA enforcement. (Gore Dep. 64-67, 94-95; Dep. of Earl Comstock 167, S.D.N.Y. ECF:490-2.) Gore testified that he drafted DOJ's December 2017 letter after receiving information from Commerce officials who lacked experience with VRA enforcement, and without knowing whether a citizenship question would provide citizenship data more accurate than the data DOJ already uses for VRA enforcement. (Gore Dep. 118-19, 123-24, 228, 233-34.) And the Under Secretary of Commerce for Economic Affairs testified that she did not know whether Commerce or the Bureau did anything to validate DOJ's purported reason for requesting a citizenship question. (Dep. of Karen Dunn Kelley 285, S.D.N.Y. ECF:493-2.)

Discovery also provided previously undisclosed details about the Bureau's process for discussing data requests with the requesting agency. As testimony from both the Bureau's Acting Director and Chief Scientist have made clear, meetings between the Bureau and requesting agencies are routine and critical to identify the best means of providing requested data. (Dep. of Ron Jarmin 32-38, 58-62, 64-69, 88, 101-108, S.D.N.Y. ECF:511-2; Dep. of John Abowd 96-99, S.D.N.Y. ECF:502-2.) But as Gore's testimony disclosed, then–Attorney General Sessions directed DOJ officials not to meet with the Bureau's experts to discuss better, alternative means to obtain the citizenship data DOJ purported to need. (Gore Dep. 260-274.)

Given these circumstances, the district court did not clearly abuse its discretion in authorizing limited discovery to uncover the same type of information about agency decision-making that the administrative record is supposed to provide: when the Secretary reached his decision, what information he relied on in making that determination, and the actual reason he decided to add the citizenship question.

c. The district court also did not plainly err in identifying additional factors that, taken together, further confirmed the serious questions about whether the Secretary had invoked DOJ's December 2017 letter as a pretext for adding the citizenship question.

For example, the court noted that the Secretary decided to add a citizenship question without employing the rigorous process that the Bureau uses for even minor alterations of the census questionnaire, and over the strong and continuing objections of the Bureau's experts. (App. 99a.) That process was a drastic departure from the well-established procedures the Bureau typically follows. *See Tummino*, 427 F. Supp. 2d at 233; *Inforeliance Corp. v. United States*, 118 Fed. Cl. 744, 747-48 (2014).

The district court also had reasonable grounds to question the genuineness of DOJ's assertion in its December 2017 letter that adding the citizenship question would assist VRA enforcement. *First*, that assertion originated with the Secretary and not with DOJ staff or leadership independently. *Second*, DOJ officials refused to meet with the Bureau's experts to discuss their concerns that adding a citizenship question would not produce accurate citizenship data and that there were better, alternative means to obtain such data. (GRA71-72, GRA99, GRA168-171.)

Both facts suggest that DOJ officials with relevant expertise did not in fact believe that the question would provide accurate citizenship data for VRA enforcement. Contrary to petitioners' arguments (Pet. 22), the questionable nature of DOJ's request bears on the Secretary's decision-making, given the Secretary's direct role in inducing that letter and his subsequent reliance on that letter as the sole justification for adding a citizenship question.

d. To counter the district court's finding that the Secretary appeared to mislead the public and Congress in his initial justification for adding a citizenship question, petitioners assert that the Secretary merely *omitted* relevant information from his March 2018 decision memorandum, and parse that memorandum and the congressional testimony to assert that his "admittedly imprecise" language should not be interpreted as intentionally misleading. Pet. 23-24. But petitioners' strained reading of the Secretary's words is not plausible—and comes nowhere close to showing that the district court clearly abused its discretion in reaching a contrary conclusion about the truthfulness of the Secretary's public statements. For example, when questioned on the VRA-enforcement rationale, the Secretary emphasized that "the Justice Department is the one *who made the request of us*," masking his own active role in DOJ's request. *Hearing on the F.Y. 2019 Funding Request for the Commerce Dep't*, 115th Cong. video 1:35:20 (May 10, 2018) (emphasis added) (2018 WL 2179074).

What such statements did (and were intended to) convey was that the Secretary was merely deferring to DOJ's independent judgment about the need for citizenship data in an area of DOJ expertise—a façade that allowed the Secretary to disguise his own role in

instigating DOJ's letter and pushing for a citizenship question. Petitioners miss the mark in asserting (Pet. 20-21) that the Secretary properly omitted information about a purportedly "informal" process that occurred before DOJ's December 2017 letter while disclosing a "formal" process that occurred after that letter. Nothing in the Secretary's two decision memoranda or in the underlying statutes and regulations supports this distinction between "formal" and "informal" processes. In any event, as the supplemented administrative record and additional discovery make clear, there was nothing "informal" about the pre-December 2017 process. The Secretary may not conceal his decision-making by unilaterally labeling it "informal"—particularly when this process indisputably generated information that he relied on in reaching his decision. Put simply, the Secretary's strategic omission of his pre-December 2017 process *did* make his statements deeply misleading.

Nearly all of petitioners' other objections to the Secretary's deposition presume the regularity of the administrative process and rationale that the Secretary selectively provided and ignore the actual and extraordinary circumstances found by the district court. For instance, petitioners incorrectly characterize this case as one where the Secretary simply "favor[ed] a particular outcome *before* fully considering and deciding an issue" (Pet. 18), and then came to "sincerely believe[]" his stated rationale after ordinary consultations with government officials (Pet. 15).

But the district court did not clearly err in finding these characterizations inconsistent with the record. The evidence shows that the Secretary had decided to pursue the citizenship question long before he was even aware of DOJ's purported need for citizenship

data to enforce the VRA. The evidence also shows that the Secretary did not merely solicit input from other government officials, but rather collaborated with them to manufacture a cover rationale for a decision he had already made based on other, still-unacknowledged reasons. The Secretary then falsely told the public and Congress that his decision-making had responded solely to DOJ's manufactured letter, and petitioners failed to disclose the administrative records that reflected the truth. If these circumstances, "taken together, are not sufficient to make a preliminary finding of bad faith" warranting extra-record discovery, "it is hard to know what circumstances would." (App. 124a.) At minimum, the deep uncertainty about when, how, and even whether the Secretary came to adopt his stated rationale supported the narrow discovery that the district court carefully managed.

Petitioners further obfuscate the issues by asserting (Pet. 18-19) that the district court "conflat[ed] 'pretext' with 'bad faith.'" As petitioners acknowledge, bad faith may be shown where a decision-maker did not "sincerely believe[] the stated grounds" for a decision. Pet. 18. But if the Secretary did not believe his stated rationale for adding the citizenship question and instead provided a manufactured reason, as the district court had strong reason to suspect, then his given reason *was* pretextual and constitutes "bad faith" under petitioners' understanding of that term. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("pretext" is a "false" reason given to mask a "real reason").

Petitioners' arguments simply beg the question at the heart of this dispute by assuming the accuracy and completeness of the Secretary's public justification for

adding the citizenship question and insisting on that basis that any exploration of information that they did not choose to provide is categorically barred. But the well-established exceptions to the default record rule identify the circumstances when that presumption of regularity may be rebutted and additional discovery would be not only permissible but essential for effective judicial review of the agency's actions. Because the district court did not clearly err in finding that the unusual circumstances of this case satisfied these exceptions, petitioners cannot satisfy the stringent requirements for mandamus.

2. Exceptional circumstances warrant the Secretary's deposition.

Petitioners also failed to show that the district court clearly and indisputably erred in separately finding, on September 21, that exceptional circumstances warranted the Secretary's deposition.

a. The district court relied on well-accepted principles about when testimony from a high-ranking official is warranted. As petitioners concede (Pet. 25-26), the standards set forth by the Second Circuit in *Lederman v. New York City Department of Parks and Recreation*, which the district court applied here, reflect a broad consensus that a court may order a high-level official's deposition when "exceptional circumstances" warrant it—including when "the official has unique first-hand knowledge related to the litigated claims" or "the necessary information cannot be obtained through other, less burdensome" means. 731 F.3d 199, 203 (2d Cir. 2013), *cert. denied*, 571 U.S. 1237 (2014); *accord Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). Where such exceptional circumstances are present, "courts have not hesitated

to take testimony" from cabinet members, federal agency heads, and even the president (App. 20a). *See Clinton v. Jones*, 520 U.S. 681, 705-06 (1997) (President); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 33 (D.D.C.) (Secretary of the Interior), *aff'd*, 240 F.3d 1081 (D.C. Cir. 1999). Indeed, the Secretary of Commerce was deposed during an earlier census-related lawsuit, *Carey v. Klutznick*, challenging an alleged undercount by the Bureau. (GRA260-264.)

This significant but attainable threshold for allowing the deposition of a high-level official disposes of the general separation-of-powers principles on which petitioners rely. (Pet. 25-27.) When exceptional circumstances exist, inter-branch comity does not bar the courts from authorizing depositions of high-level officials to elicit their unique, personal knowledge about matters directly relevant to a litigated issue. Indeed, not even a sitting president is immune from giving testimony in a civil lawsuit if the circumstances require such testimony. *See Jones*, 520 U.S. at 704-06.

b. Petitioners have not shown that the district court clearly erred in finding that exceptional circumstances warrant the Secretary's deposition under the unique circumstances here. Three months of discovery has shown that only the Secretary can provide information about critical questions relevant to respondents' claims.

i. *Unique First-Hand Knowledge*: As the district court observed, the Secretary was "personally and directly involved" in nearly every aspect of the "unusual process" that led to his decision to add the citizenship question. (App. 13a.) For example, the Secretary spoke directly with then–White House Chief Strategist Stephen Bannon and Kansas Secretary of

State Kris Kobach (GRA16, GRA23-24); repeatedly and personally urged his staff to pursue the citizenship question (GRA13-15, GRA18, GRA20-22, GRA25-34); and personally called then–Attorney General Sessions when his staff's initial efforts with DOJ had failed (GRA43-44).

Petitioners do not seriously dispute the Secretary's direct and personal involvement in the decision to add a citizenship question. But they argue (Pet. 28) that the Secretary's personal involvement, including his direct conversations with various officials and outside stakeholders, was not "unusual" because high-level officials are often personally involved in important decisions and frequently consult with others. This argument mischaracterizes the district court's reasoning. What the district court found distinctive was the Secretary's personal involvement in "the *unusual process*" leading to the decision to add a citizenship question (App. 13a (emphasis added))—the same process that raised serious questions whether the Secretary's stated reliance on DOJ's December 2017 letter was pretextual. The district court did not clearly abuse its discretion in relying on the Secretary's central, personal, and indispensable role in the key events underlying respondents' claims as a basis for ordering his deposition.

ii. *No Other Means to Obtain the Same Information*: The district court properly concluded that the critical information that the Secretary possesses "'cannot be obtained through other, less burdensome or intrusive means.'" (App. 18a (quoting *Lederman*, 731 F.3d at 203).) The court did not "jump[] straight to ordering" the Secretary's deposition (Pet. 28), but rather declined to authorize the

deposition at the outset of discovery while respondents first attempted other discovery mechanisms. Since then, respondents have sought to obtain the information they need without testimony from the Secretary, including through interrogatories, requests for admission, depositions of the Secretary's senior advisors, and Gore's deposition. Although this discovery has yielded information confirming the arbitrariness of petitioners' decision-making, "critical blanks in the current record" remain that only a deposition of the Secretary will fill (App. 17a).

Indeed, all three of the Secretary's senior advisors "testified repeatedly that Secretary Ross was the only person who could provide certain information" concerning the material that he directly or indirectly considered or the actual rationale for his final determination. (App. 17a.) For example, the Secretary's advisors could not provide any details about the Secretary's pre-December 2017 conversations with other officials and third parties, such as Kris Kobach and then–Attorney General Sessions, even though the Secretary has now admitted that his decision-making about the citizenship question long predated DOJ's December 2017 letter (GRA24, GRA44, GRA123-124, GRA134-141, GRA147, GRA163-166). Contrary to petitioners' unsubstantiated assertion (Pet. 29), the contents of these conversations bear directly on the Secretary's decision-making and respondents' legal claims because the conversations provided the Secretary with information about the citizenship question during the key pre-December 2017 time period. Moreover, all three of the Secretary's senior advisors have insisted that they lack any information about the Secretary's reasons for pursuing the addition of a citizenship question for months before

DOJ's letter and before he was aware of any purported VRA-enforcement rationale. (*E.g.*, GRA132-133.) As Comstock said during his deposition, "You'd have to . . . ask [the Secretary]." (GRA128.) The Secretary's advisors have thus suggested that the Secretary's deposition is the only means by which the district court can obtain critical facts about the decision-making and rationale for adding the citizenship question.

Contrary to petitioners' contention (Pet. 27-28), the district court did not clearly err in declining to require respondents to continue pursuing other discovery mechanisms before taking the deposition of the Secretary. Respondents have already pursued several of petitioners' suggested options, such as interrogatories and depositions, "yet gaps in the record remain." (App. 19a.) A deposition is also the quickest and most efficient way to fill the gaps in the record, since depositions allow for "immediate follow-up questions" and objections rather than protracted written exchanges. *Fish v. Kobach*, 320 F.R.D. 566, 579, *review denied*, 267 F. Supp. 3d 1297 (D. Kan. 2017).

iii. *No Undue Burden*: Finally, petitioners have failed to establish that making the Secretary available for a mere four hours of deposition testimony would impose any undue burden on the Secretary or Commerce. Before this Court's stay, petitioners had provided a date on which the Secretary was available. While the Secretary is a cabinet member with important responsibilities, the district court appropriately respected his position by imposing numerous limitations on the deposition, such as restricting its duration to only four hours and requiring that it take place at a location convenient for the Secretary.

CONCLUSION

The petition for a writ of mandamus or certiorari should be denied.

Respectfully submitted,

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