No. 18-557

In the Supreme Court of the United States

IN RE UNITED STATES 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 THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should grant extraordinary mandamus relief to halt discovery in ongoing district court litigation regarding the 2020 Census and to prohibit the district court from considering information that petitioners have already produced.

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INTERESTS OF AMICUS CURIAE

The Constitution requires the federal government to make an "actual Enumeration" of "the whole number of persons in each State" every ten years. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. The decennial census must "count every person residing in a state on census day," regardless of citizenship status. *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980). Congress assigned the Secretary of Commerce responsibility for obtaining a census count that is "as accurate as possible." 13 U.S.C. § 141 note. California and its sister States rely on the Secretary properly discharging this responsibility because the census count directly affects the apportionment of federal and state representatives, presidential electors, and federal funding.

In March 2018, Commerce Secretary Wilbur Ross decided to add a citizenship question to the 2020 census questionnaire. Empirical evidence—including studies by the Census Bureau—indicates that this question would depress responses from non-citizens and from citizens with relatives who are non-citizens. That possibility is particularly worrisome to California, which has more non-citizen residents (over 5 million) and more foreign-born residents (over 10 million) than any other State.

Secretary Ross dismissed the concern that adding a citizenship question would lead to an inaccurate count. His March 2018 decision memorandum explained that he was acting in response to a December 2017 letter from the Department of Justice, which asked the Census Bureau to add the question in order to assist in DOJ's "enforcement of Section 2 of the Voting Rights Act." Pet. App. 152a. Three months later, however, he offered a materially different explanation.

He acknowledged that he had initiated the decisionmaking process long before December 2017, and that he had asked DOJ to make the request that he ultimately used to justify his decision. *Id.* at 134a.

The pending mandamus petition arises out of lawsuits filed by 17 States and other plaintiffs in the Southern District of New York in response to Secretary Ross's decision. Petitioners seek relief from pretrial discovery rulings by the district court. The first challenged order concluded that plaintiffs were entitled to limited extra-record discovery based on a strong showing of bad faith or improper behavior. A second order, issued following written discovery and the depositions of lower-level officials, compelled the deposition of Secretary Ross.

California filed its own suit challenging the Secretary's decision before the New York proceedings commenced. *See California v. Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018). Like the complaints in the New York cases, California's complaint alleges that the Secretary violated the Enumeration Clause and that his decision was arbitrary and capricious in violation of the Administrative Procedure Act. *See id.*, Dkt. 1 ¶¶ 33-34. The district court in the California action recently denied the defendants' motion to dismiss. *See id.*, Dkt. 75. It also authorized discovery going beyond the administrative record, subject to the same limitations imposed by the district court in the New York proceeding and with the understanding that California would coordinate its discovery with the New York plaintiffs. *See id.*, Dkt. 76. California thus has a direct stake in the outcome of this proceeding.

More generally, California has an interest in preserving legal principles that allow district courts to

fairly adjudicate challenges to federal actions. California is a plaintiff in a range of pending APA proceedings. Through its experience as an APA plaintiff, California understands that effective judicial review of agency actions depends on federal officials offering good faith explanations for their decisions and producing the complete record of materials considered by the agency decisionmaker. Petitioners are correct that the presumption of regularity is a "bedrock principle[] of administrative law." Pet. 31. But that presumption is not irrebuttable. Where federal officials appear to have deliberately obscured the true basis for their action, it is appropriate for a district court to order the production of additional information—including, in appropriate circumstances, by "requir[ing] the administrative officials who participated in the decision to give testimony explaining their action," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)—and to consider that information in reviewing the legality of the action.[1]

ARGUMENT

I. COURTS MAY TAKE ACTION WHEN AN INCOMPLETE RECORD OR BAD FAITH FRUSTRATES EFFECTIVE REVIEW OF AN AGENCY'S DECISION

The Administrative Procedure Act requires courts to "review the whole record" to determine whether an agency's action was lawful. 5 U.S.C. § 706. The "whole record" means "the full administrative record that was before the Secretary at the time he made his

[1] Consistent with Rule 37.2(a), California provided notice to counsel for all parties more than ten days before filing this brief.

decision." *Overton Park*, 401 U.S. at 420.[2] It "consists of all documents and materials directly or indirectly considered by the agency," *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)—including "evidence contrary to the agency's position," *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quoting *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981)).

Our system presumes that administrative officials will act in good faith in making and explaining their decisions, and will provide reviewing courts with the complete record of materials underlying those decisions. In light of that presumption of regularity, judicial review of agency action ordinarily focuses on whether the "contemporaneous explanation" offered by the agency is "sustainable on the administrative record made" by the agency. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam). But that ordinary approach is subject to exceptions.

When "it appears the agency has relied on documents or materials not included in the record" that it produced, the reviewing court may order the agency to produce the complete record. *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.). That authority follows naturally from "the rule that judicial review is based upon the full administrative record in existence at the time of the agency decision." *Id.* Courts need not ignore "credible allegations" that rebut the presumption of regularity by establishing that the record the agency proffered "for judicial review is incomplete." Administrative Conference of the United States Recommendation 2013-4:

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[2] *Cf. Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

The Administrative Record in Informal Rulemaking 11-12 (adopted June 14, 2013) (ACUS Recommendation).

Indeed, effective judicial review depends on production of the complete administrative record. For a court "to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). A review of "less than the full administrative record might allow a party to withhold evidence unfavorable to its case," *id.*, and to "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question," *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). That type of gamesmanship would frustrate judicial review by forcing courts to proceed based on "a fictional account of the actual decisionmaking process." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).[3]

On rare occasions, even when the administrative record is facially complete, a court may also supplement the record by authorizing focused discovery into the agency's decision. *See Overton Park*, 401 U.S. at 420. Supplementation is particularly appropriate in cases involving "a strong showing of bad faith or

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[3] *See, e.g.*, *In re United States*, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from grant of stay) ("A court deprived of a full administrative record could not consider . . . whether the decision was based on the consideration of irrelevant factors; whether it considered the relevant factors; whether the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'; or whether the decision was unlawful for some other reason.") (internal citations omitted).

improper behavior." *Id.*; *see, e.g.*, *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 497 (1st Cir. 2007). In appropriate circumstances, that extra-record discovery may include "requir[ing] the administrative officials who participated in the decision to give testimony explaining their action." *Overton Park*, 401 U.S. at 420; *see generally* ACUS Recommendation at 7 ("supplementation of the administrative record for judicial review may be appropriate where a strong showing has been made to overcome the presumption of regularity").

Overton Park imposes a demanding standard for obtaining extra-record discovery, but not an insuperable one. It recognizes that in the rare case involving credible allegations of bad faith behavior, even the complete administrative record is unlikely to contain all the information necessary for a court to effectively review the validity of the agency action. For example, agency officials are unlikely to document personal biases against parties, *see L-3 Commc'ns Integrated Systems, L.P. v. United States*, 91 Fed. Cl. 347, 354 (2010), or "to keep a written record of improper political contacts," *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997); *see also Beta Analytics Int'l, Inc. v. United States*, 61 Fed. Cl. 223, 226 (2004) (placing "evidence of bad faith . . . in an administrative record" would be "both sinister *and* stupid"). In such a case, extra-record discovery may be the only way for the court to understand the true nature of the agency's decision. *See Pub. Power Council*, 674 F.2d at 794 (Kennedy, J.) (courts may "admit certain testimony . . . or provide limited discovery when serious gaps would frustrate challenges to the agency's action").

The authority of reviewing courts to order completion or supplementation of administrative records is an important safeguard. It protects against any impulse on the part of agencies to insulate decisions from judicial review by obscuring the true rationale for their actions or by producing Potemkin records that hide the actual materials considered by agency decisionmakers. It provides the judicial branch with the tools needed to review the validity of agency action. And it serves the public's interest in understanding why the government decided to act and what evidence supported that decision.

II. THIS CASE HIGHLIGHTS WHY DISTRICT COURTS ARE AUTHORIZED TO PRESS FOR MORE INFORMATION IN APPROPRIATE CIRCUMSTANCES

This case illustrates the importance of these protections. Faced with an incomplete record and an explanation for adopting the citizenship question that was belied by subsequent disclosures, the district court properly required petitioners to complete and supplement the record in ways that will enable fair and effective review of plaintiffs' claims.

1. The Secretary of Commerce formally announced his decision to add a citizenship question to the 2020 Census in a March 2018 memorandum. *See* Pet. App. 136a-151a. He explained that the decision was "in response to" a December 2017 letter from the Department of Justice, which "requested that the Census Bureau reinstate a citizenship question on the decennial census." *Id.* at 150a, 136a. The DOJ letter asserted that this question was necessary because citizenship data "is critical to the Department's enforcement of Section 2 of the Voting Rights Act." *Id.* at 152a. The Secretary's subsequent decision memorandum explained that, "[f]ollowing receipt" of that letter,

he "set out to take a hard look at the request." *Id.* at 136a. He concluded that adding "a citizenship question [to] the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request." *Id.* at 150a.

After these lawsuits were filed, petitioners produced a 1,320-page administrative record. *See* D.Ct. Dkt. 173.[4] Two weeks later, they "supplemented" the administrative record with a two paragraph memorandum in which the Secretary acknowledged—for the first time—that the December 2017 DOJ letter did not prompt his consideration of the citizenship question. *See* Pet. App. 134a-135a. He explained that he actually began considering the citizenship question "[s]oon after [his] appointment" in early 2017; that he "thought reinstating a citizenship question could be warranted" from the beginning; and that he later "inquired whether [DOJ] would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." *Id.* at 134a.

2. As the district court explained, the administrative record initially proffered by petitioners was incomplete on its face. It contained hardly any documents pre-dating the December 2017 DOJ letter, despite the Secretary's belated admission that the decisionmaking process began soon after he took office in February 2017. *See* Pet. App. 97a. The proffered record also "expressly reference[d] documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record." *Id.* And it excluded documents relied on by the

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[4] Citations to "D.Ct. Dkt." are to the docket in *New York v. United States Department of Commerce*, No. 18-cv-2921 (S.D.N.Y.).

Secretary's senior advisers, including most of the materials reviewed by "key personnel at the Census Bureau." *Id.*

After the district court ordered petitioners to complete the administrative record, *see* D.Ct. Dkt. 199, they produced "over 12,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary," Pet. 8. That complete record—which is nearly ten-times the size of the one petitioners had initially proffered—is proving essential to the district court's review of the claims before it.[5]

For example, the district court recently pointed to two documents from the completed administrative record that "suggest that Secretary Ross's sole proffered rationale for the decision . . . may have been pretextual." D.Ct. Dkt. 215 at 63. Those documents involve a May 2017 email exchange in which the Secretary stated that he was "mystified why nothing have [*sic*] been done in response to my months old request that we include the citizenship question," and his subordinate responded that "[w]e need to work with Justice to get them to request that citizenship be added back as a census question." *Id.* at 64-65. As the district court noted, "evidence of pretext . . . may well suffice to prove a violation of the APA." *Id.* at 65 n.24.

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[5] Petitioners have told this Court that they "do[] not here challenge the district court's order[] about the scope of the administrative record." Stay Reply 9 n.2. Before the district court issued that order, however, they insisted that the much smaller record they initially produced included "all of the non-privileged documents that were directly or indirectly considered by the Secretary in deciding whether to reinstate a citizenship question on the decennial census." D.Ct. Dkt. 194 at 2.

Had the district court not ordered completion of the record, it never would have seen those documents.

As this case demonstrates, when federal agencies produce incomplete administrative records, they frustrate judicial review and impose unnecessary costs on the judicial branch.[6] Instead of adjudicating pressing merits issues, courts must devote time and attention to ordering agencies to comply with their statutory obligation to produce the complete record. The resulting delay is especially problematic in time-sensitive cases like this one, where the impending decennial census requires a prompt and final resolution of the proceedings.

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[6] For example, in response to suits challenging the termination of the Deferred Action for Childhood Arrivals program, the federal government proffered an administrative record with just "256 pages of documents," of which "[n]early 200 pages consist of published opinions from various federal courts." *In re United States*, 138 S. Ct. 443, 444 (2017) (per curiam). Although this Court has not ruled on the adequacy of that record, *see id.* at 445, multiple lower courts have found it to be incomplete, *see, e.g.*, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 2017 WL 4642324, at *5 (N.D. Cal. Oct. 17, 2017). In this case, the federal government has (belatedly) embraced a legal standard governing the scope of the administrative record that it resisted in the DACA litigation. It now acknowledges that "[t]he administrative record is hardly sparse" and "comprises 'all documents and materials directly or *indirectly* considered by the agency decisionmakers and includes evidence contrary to the agency's position.'" Pet. 17 (quoting *Thompson*, 885 F.2d at 555). *But see* Pet. 23-24, *In re United States*, No. 17-801 (U.S. filed Dec. 1, 2017) (arguing that "the agency's action simply must 'stand or fall' on . . . the record that the agency has compiled" and criticizing the court of appeals for adhering to *Thompson*'s "directly or indirectly considered" standard).

3. This case further illustrates why, even when a court has received the complete administrative record, it is also sometimes necessary for the court to order extra-record discovery before ruling on the validity of agency action. *See Overton Park*, 401 U.S. at 420. In the March 2018 memorandum (and in sworn testimony to Congress), the Secretary gave a misleading explanation for an important decision with lasting implications for the Nation and the States.[7] He now acknowledges that he manufactured the DOJ request to provide a basis for adding the citizenship question. *See* Pet. App. 134a.

The balance of the current record adds to the showing of improper behavior. Among other things, it suggests that the Secretary pre-judged the decision long before he received anything from DOJ; that (contrary to his congressional testimony) he consulted with White House Chief Strategist Stephen Bannon about the effort to add the citizenship question; that he abandoned regular procedures regarding the census questionnaire; that he ignored the advice of internal experts; and that he coordinated with his subordinates

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[7] *See* Pet. App. 136a-151a; *Hearing on the Fiscal Year 2019 Funding Request for the Commerce Department: Hr'g Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the S. Comm. on Appropriations*, 115th Cong. (May 8, 2018) (unofficial transcript 2018 WL 2179074) ("May 8 Senate Hearing") ("Well, the Justice Department is the one who made the request of us."); *Recent Trade Actions: Hr'g Before the H. Ways & Means Comm.*, 115th Cong. (March 22, 2018) (unofficial transcript 2018 WLNR 8951469) ("March 22 House Hearing") ("The Department of Justice, as you know, initiated the request for inclusion of the citizenship question.").

on a plan "to work with Justice to get them to request" the citizenship question.[8]

Under these circumstances, the district court acted within its discretion in finding a showing of bad faith sufficient to warrant limited extra-record discovery. To be sure, the district court has been careful not to pre-judge the question whether Secretary Ross's stated rationale was pretextual. *See* Pet. App. 100a.[9] And that is the point. The circumstances here make it impossible for the court to effectively judge the validity of the agency's action without first receiving additional information that is not available in the administrative record. *See supra* 5-7.

4. Finally, this case illustrates the importance of preserving judicial authority to compel the depositions of senior officials in APA cases involving bad faith or improper behavior. *See Overton Park*, 401 U.S. at 420. As a government itself, California is mindful of the need to protect senior government officials from unwarranted discovery. "The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere." *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam); *cf. Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013); *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). We routinely represent state officers as

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[8] Pet. App. 96a-99a; N.Y. Immigration Coal. Stay Resp. App'x 21A-22A, 26A-27A, 39A.

[9] Indeed, the court has reserved judgment on whether and to what extent it will rely on extra-record materials in ruling on the legality of the Secretary's decision. *See* Pet. App. 127a-128a; *infra* 18.

defendants in civil litigation, and we often resist depositions of those officials, including in circumstances where the information sought by plaintiffs is available from other sources.

But a corollary of the principle that high-ranking officials should not be deposed absent "exceptional circumstances," *Lederman*, 732 F.3d at 203, is that sometimes such circumstances warrant their depositions. Courts have allowed the deposition or trial testimony of federal officials at the cabinet level and above. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 704-706 (1997); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 53 (D.D.C. 1999). And this particular dispute falls into a recognized category of cases in which senior officials may be deposed: where evidence of improper behavior renders their testimony necessary to the fair adjudication of an APA claim. *See Overton Park*, 401 U.S. at 420; *supra* 5-6.

The district court here wisely deferred the question whether Secretary Ross should be deposed pending written discovery and the depositions of lower-level officials. *See* Pet. App. 102a. But that discovery only confirmed that the information needed to review plaintiffs' APA claims is not available from any source other than the Secretary. The shifting and highly personalized explanations that Secretary Ross has offered for his agency's decision to adopt the citizenship question put his intent and credibility squarely at issue. *See id.* at 15a-16a. His "three closest and most senior advisors . . . testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs' claims." *Id.* at 17a. And petitioners' written discovery responses have only

muddied the waters further. *See id.* at 19a.[10] After carefully reviewing the results of existing discovery, the district court acted within its discretion when it authorized a four-hour deposition of Secretary Ross at a place of his choosing. *See id.* at 22a.

It is no response for petitioners to argue that the deposition would improperly "open[] the doors to discovery into Secretary Ross's mental processes." Pet. 25. *Overton Park* recognized that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," 401 U.S. at 420, consistent with the presumption of regularity that normally applies in APA proceedings. It also recognized that in certain cases, involving irregular conduct that calls into doubt the veracity of the agency's purported rationale, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves" to understand the actual basis for the agency's decision. *Id.*

Nor are petitioners' complaints about the burdens of deposition persuasive here. We recognize that preparing for and attending a four-hour deposition is not a trivial intrusion on the schedule of a cabinet secretary. But this is not a case in which an agency head merely rubber-stamped a decision memorandum prepared by subordinates, and would need to educate himself in order to provide informed testimony about the decision. By his own account, Secretary Ross was

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[10] For example, petitioners served a supplemental interrogatory response on August 30 stating that they "cannot confirm" that Secretary Ross discussed the citizenship question with Stephen Bannon, N.Y. Immigration Coal. Stay Resp. App'x 22A, followed by a second supplemental response on October 11 acknowledging that Ross now "recalls" discussing the issue with Bannon "in the Spring of 2017," *id.* at 27A.

personally and centrally involved in this decisionmaking process from the start. *See* Pet. App. 134a-135a. He is the only person in a position to provide essential information about why the Department of Commerce decided to add the citizenship question. And he has already invested the hours necessary to prepare for and attend three separate congressional hearings that involved questioning on the subject (not to mention multiple interviews with media outlets).[11] On these facts, it was not unreasonable to require him to spare a few more hours for the judicial branch.

III. MANDAMUS RELIEF IS NOT APPROPRIATE

To obtain mandamus relief from this Court, a petitioner "must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. Mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). Among other things, petitioners must show that they have a "clear and indisputable" right to mandamus relief, and the Court "must be satisfied

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[11] *See* May 8 Senate Hearing; March 22 House Hearing; *Hearing on Fiscal Year 2019 Dep't of Commerce Budget: Hr'g Before the Subcomm. on Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. (Mar. 20, 2018) (unofficial transcript 2018 WLNR 8815056); *see, e.g.*, *Commerce Secretary Wilbur Ross at National Press Club* 55:35-59:34, C-SPAN (May 14, 2018), https://www.c-span.org/video/?445463-1/commerce-secretary-ross-administration-alternative-remedies-zteban; *We're in trade discussions with the EU: Wilbur Ross* 4:02-5:30, Fox Business (Mar. 27, 2018), https://video.foxbusiness.com/v/5758978018001/?#sp=show-clips.

that the writ is appropriate under the circumstances." *Id.* at 381 (internal quotation marks omitted). That demanding standard applies to all mandamus petitions, including those filed by the federal government in high-profile cases. *See, e.g.*, *id.*

Courts of appeals are typically reluctant to use their extraordinary mandamus powers to police record and discovery disputes prior to a final judgment. *See, e.g.*, *In re Shalala*, 996 F.2d 962, 964-965 (8th Cir. 1993). There is good reason for that reluctance. The use of mandamus to intervene in pretrial disputes has "the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation." *Id.* at 964 (quoting *In re Burlington N., Inc.*, 679 F.2d 762, 767 (8th Cir. 1982)).

This Court, too, has followed a "long-settled practice" of leaving "these sorts of burden and discovery-related procedural disputes to the district courts, with occasional court of appeals intervention." *In re United States*, 138 S. Ct. 371, 375 (2017) (Breyer, J., dissenting from grant of stay). That practice is founded on the view that examining "whether a particular discovery order is overly burdensome typically requires a deep understanding of the overall factual context and procedural history of an individual case," leaving this Court "poorly positioned to second-guess district courts' determinations" in the context of a fast-moving mandamus proceeding. *Id.* This Court's intervention in interlocutory record and discovery disputes also increases the chance that it "will be asked to address run-of-the-mill discovery disputes in many other matters," especially "when the Government is involved." *Id.* at 375-376; *cf. Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) ("It is, of course, well settled that the

writ is not to be used as a substitute for appeal, even though hardship may result from delay and perhaps unnecessary trial.") (internal citations omitted).[12]

On rare occasions, a ruling by a district court on such an issue might be so extraordinary that mandamus is appropriate under the circumstances. But this is far from that case. The district court's orders allowing focused extra-record discovery and compelling the deposition of Secretary Ross were within its discretion. *See supra* 11-15. They certainly do not constitute clear or indisputable error of the type required for mandamus relief. *See Cheney*, 542 U.S. at 381. Indeed, six federal judges have now concluded that the district court "did not clearly abuse its discretion in authorizing extra-record discovery based on a preliminary showing of 'bad faith or improper behavior.'" *In re Dep't of Commerce*, No. 18-2856, Dkt. 55 at 2 (2d Cir. Oct. 9, 2018) (denying mandamus regarding extra-record discovery generally and Ross deposition); *see* Stay App'x 3a-4a (separate Second Circuit panel denying mandamus regarding extra-record discovery generally and deposition of Acting Assistant Attorney General Gore).

Mandamus is particularly inappropriate at this juncture. Other than the deposition of Secretary Ross,

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[12] In the rare circumstances in which this Court has found it appropriate to intervene in discovery disputes, it typically has avoided exercising its mandamus powers. In *In re United States*, for example, the Court did not grant mandamus, but instead granted certiorari, vacated the order of the court of appeals, and remanded with guidance on how the lower courts should proceed. *See* 138 S. Ct. at 444-445; *cf. Cheney*, 542 U.S. at 391 (remanding for the court of appeals to determine whether a writ of mandamus should issue). As discussed below, certiorari would not be appropriate under the present circumstances. *See infra* 18 n.13.

the extra-record discovery has already occurred. *See* Pet. 32. Petitioners cannot credibly contend that mandamus relief is necessary to protect them from the burdens of responding to discovery in the past. Moreover, the trial has already commenced and is currently scheduled to conclude before the deadline for petitioners' reply brief in this Court. The district court has expressly reserved judgment on whether it will consider any of the extra-record evidence in ruling on the merits, Pet. App. 127a-128a, and has encouraged petitioners to make "any argument they want about the scope of what [the court] may consider in rendering a decision," *id.* at 128a. Indeed, it has indicated "that any findings of fact and conclusions of law that it enters" will "differentiate" between matters decided "based solely on the administrative record" and those "based on materials outside the record." *Id.* at 114a. If the district court ultimately rules against petitioners based on matters outside the record, the stage will be set for prompt appellate review of petitioners' arguments about the proper scope of the record. There is no reason for the appellate courts to address those arguments before the district court has finally resolved them—and certainly no exceptional circumstances warranting the "'drastic and extraordinary' remedy" of mandamus." *Cheney*, 542 U.S. at 380.[13]

[13] Nor is this case a suitable candidate for certiorari. The parties (and the courts below) agree on the legal standards governing extra-record discovery and the deposition of senior government officials. Petitioners simply disagree with how the district court applied those standards to the particular—and highly unusual—facts of this case.

CONCLUSION

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

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