No. 18-557

In the Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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A. The Government's Right To Mandamus Relief Is Clear And Indisputable

1. Both the state and private respondents make one thing clear: their case hinges on convincing this Court that Secretary of Commerce Wilbur L. Ross, Jr. "reversed himself on the justification for his decision" to reinstate a citizenship question to the decennial census. Br. for Gov't Resps. in Opp. 2 (State Br.); see Br. for Resps. N.Y. Immigration Coal. in Opp. 1 (NYIC Br.). Respondents' briefs repeatedly stress that Secretary Ross told Congress he was responding "solely" to a request from the Department of Justice (DOJ) when in fact, they say, he had begun to consider adding a citizenship question months before DOJ sent its formal December 2017 request to the Department of Commerce. See State Br. 5-11, 24-36; NYIC Br. 1-2, 6-9, 11, 14-16, 18-21, 24-25, 27-29, 31. "This extraordinary reversal," respondents assert, "strongly supports the district court's bad-faith finding." State Br. 25; see NYIC Br. 15 ("This attempt at concealment is highly indicative of bad faith.").

But for all their accusations—including the unfounded charge that Secretary Ross committed perjury before Congress, NYIC Br. 15 ("he falsely testified under oath")—respondents consistently overlook that Secretary Ross, in his initial decisional memorandum and then in his testimony before Congress, was discussing the *formal* agency procedures that led to his decision to reinstate the citizenship question to the decennial census. Pet. App. 136a-151a. He was not discussing the *informal* discussions that preceded the formal process. Nor would an agency head ordinarily discuss those types of informal communications in a formal decisional memorandum. In light of the litigation, Secretary Ross chose to supply some details in a supplemental memorandum. *Id.* at 134a-135a. The supplemental memorandum was not an "extraordinary reversal" from the initial memorandum. State Br. 25. Rather, the two memoranda were addressing *different things*.

That simple point undercuts respondents' entire case, and they barely address it. The private respondents ignore it completely. And the state respondents simply assert in passing (State Br. 30) that "[n]othing in the Secretary's two decision memoranda * * * supports this distinction between 'formal' and 'informal' processes." But of course the Secretary had no reason to make the distinction explicit in his initial memorandum, and respondents cite no authority to suggest that Secretary Ross was under any legal obligation to preemptively disclose his informal discussions in a formal decisional memorandum—just as an agency need not disclose the informal deliberations that precede a notice of proposed rulemaking. And the supplemental memorandum expressly says it is "intended to provide further background and context regarding" his formal decisional

memorandum—*i.e.*, to describe the informal process leading up to the formal one. Pet. App. 134a.

Moreover, the Secretary's supposed misstatements to Congress are anything but that when viewed in context. For instance, in saying "[w]e are responding solely to the Department of Justice's request," Secretary Ross was *not* claiming that he had never previously considered reinstating the citizenship question, but was emphasizing that his formal response was to *DOJ*'s request, "not to any campaign request, not to any other political party request." 2018 WLNR 8815056.[1] Similarly, when Senator Leahy asked "why this sudden interest in [the citizenship question] when the department that's supposed to enforce violations [of the Voting Rights Act] doesn't see any problems," Secretary Ross reasonably answered, "Well, the Justice Department is the one who made the request of us." 2018 WL 2179074.[2] The Secretary in no way intimated that he had not considered the question or discussed it informally with others before DOJ's request.

The only way to view Secretary Ross's two memoranda as contradictory, or to view him as having testified falsely to Congress, is to start by assuming that Secretary Ross acted in bad faith, view all of his statements through that uncharitable lens, and thereby conclude (in circular fashion) that they are evidence of his

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[1] *Hearing to Consider FY2019 Budget Request for Department of Commerce Programs Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the House Comm. on Appropriations*, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8815056.

[2] *Hearing on the FY2019 Funding Request for the Department of Commerce Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the Senate Comm. on Appropriations*, 115th Cong., 2d Sess. (2018), available at 2018 WL 2179074.

bad faith. See Pet. 19-25. That is precisely what the district court did. It is precisely what respondents do throughout their briefs. And is it precisely what courts may *not* do under the presumption of regularity that attaches to executive action. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). That presumption, applied fairly, reveals no inconsistency in Secretary Ross's memoranda or in his testimony to Congress. Pet. 23-25.

2. Even if Secretary Ross had been predisposed to reinstate the question and had solicited DOJ's formal request post hoc, it still would not constitute bad faith. That is because respondents have not shown that the Secretary disbelieved his stated reasons for reinstating the question, irreversibly prejudged the issue, or acted on an otherwise legally forbidden basis.

a. Despite repeated assertions (State Br. 6, 9-10, 25, 31) that Secretary Ross "manufactured" the DOJ rationale, respondents do not actually argue that Secretary Ross *disbelieved* the DOJ rationale. Nor do they argue that Secretary Ross irreversibly prejudged the issue by "act[ing] with an 'unalterably closed mind'" or by being "'unwilling or unable' to rationally consider arguments." *Mississippi Comm'n on Envtl. Quality* v. *EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam) (citation omitted). The state respondents do not address this point at all, and the private respondents merely protest (NYIC Br. 18-19) that the "unalterably closed mind" standard applies only to disqualifying an agency decisionmaker, not to finding bad faith. But if there is not a strong showing of the type of prejudgment that would warrant disqualifying an agency decisionmaker, there is not a "strong showing of bad faith," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420

(1971), that would justify extra-record discovery to probe the decisionmaker's mental processes either.

Moreover, respondents themselves repeatedly point out that Secretary Ross asked his staff "why nothing ha[d] been done" about his "months old" request to reinstate the citizenship question to the decennial census. State Br. 7 (citation and emphasis omitted); see *id.* at 6, 35; NYIC Br. 7, 20, 27, 31. That "nothing" happened until *after* DOJ sent its formal request belies any claim that Secretary Ross had prejudged the issue or disbelieved DOJ's rationale; if he had, he would have simply exercised his authority to reinstate the citizenship question long before then. Instead, he consulted other agencies, solicited formal requests, and launched a formal decisionmaking process only *after* receiving DOJ's eventual formal request. That is the opposite of prejudgment.

b. Respondents do not meaningfully defend the district court's remaining two rationales for finding bad faith: that Secretary Ross "overruled senior Census Bureau career staff" and that he "deviated significantly from standard operating procedures in adding the citizenship question" by not "testing" it first. Pet. App. 98a-99a.

As the government pointed out (Pet. 21), "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." *Wisconsin* v. *City of New York*, 517 U.S. 1, 23 (1996). Respondents assert that Census Bureau staff thought reinstating the question to the decennial census would negatively affect accuracy and that DOJ did not really need it for enforcing the Voting Rights Act. State Br. 4-5, 7-8, 28-29; NYIC Br. 1-6, 21-24. But these are arguments on the *merits* of the reinstatement decision. They do not demonstrate bad faith on Secretary Ross's part, especially when he

explained in great detail why he disagreed with the career staff's proposals. Pet. App. 136a-151a. At all events, "Congress has delegated its constitutional authority over the census" to the Secretary, who is thus perfectly entitled to overrule his subordinates. *Wisconsin*, 517 U.S. at 23.

As the government also pointed out (Pet. 21-22), Secretary Ross explained in his decisional memorandum that there was no need for additional testing because the citizenship question "has already undergone" testing. Pet. App. 148a. The state respondents ignore this point completely, and the private respondents offer (NYIC Br. 22) only a single sentence claiming that "the question was not performing well"—which is an argument that the question was testing poorly, not that it was untested.

3. a. Respondents defend the order compelling Secretary Ross's deposition on the ground that three Department of Commerce officials testified that only Secretary Ross knew the identities of people he spoke to in informal discussions about reinstating the citizenship question to the decennial census. State Br. 35-36; NYIC Br. 28. But left unexplained is why those conversations are relevant to respondents' claims here. It is entirely improper to impute any biases or rationales held by third parties to Secretary Ross for purposes of establishing the Secretary's bad faith. Pet. 29-30. So it does not matter if Secretary Ross is the only person who knows about those conversations; he is the only one who knows about his own mental processes, too—but that is insufficient to compel his deposition.

Respondents cite the D.C. Circuit's decision in *HBO, Inc.* v. *FCC*, 567 F.2d 9 (per curiam), cert. denied, 434 U.S. 829 (1977), which set aside on-the-record agency action

because of ex parte contacts with the decisionmakers. See State Br. 22; NYIC Br. 13 n.3. But shortly after deciding *HBO*, the D.C. Circuit clarified that *HBO* and the case on which it relied, *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959), were limited to situations involving "competing claims to a valuable privilege," such as television licenses. *Action for Children's Television* v. *FCC*, 564 F.2d 458, 476-477 (1977). And a few years later the D.C. Circuit made clear that agency officials are generally free to meet with White House and other government officials, legislators, and even industry advocates as long as applicable statutory disclosure requirements are satisfied. *Sierra Club* v. *Costle*, 657 F.2d 298, 402 (1981). Secretary Ross's decision to reinstate the citizenship question does not involve on-the-record decisionmaking; does not involve competing claims to a valuable privilege; and is not subject to statutory prohibitions on ex parte communications or any other disclosure requirements regarding informal third-party meetings. *HBO* thus offers no support for respondents.

b. Respondents also are mistaken that "'courts have not hesitated to take testimony' from cabinet members, federal agency heads, and even the president." State Br. 32-33 (quoting Pet. App. 20a); see NYIC Br. 30. In two of the three cases they cite, see State Br. 32-33, the Cabinet Secretaries appear to have *voluntarily* testified. See 18-2856 C.A. Doc. 45, at 3 (Oct. 6, 2018) (noting "a prior agreement" regarding Secretary Klutznick's deposition); Bill Miller, *In Court, Babbitt Vows to Overhaul Indian Trust Fund System*, Wash. Post, July 10, 1999, at A11 (describing Secretary Babbitt as "the final *government* witness") (emphasis added). And the third—*Clinton* v. *Jones*, 520 U.S. 681 (1997)—involved

the entirely inapposite question whether a civil trial unrelated to the President's official duties could go forward during the presidency. *Id.* at 694-695. The question here is whether plaintiffs bringing a suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge official agency action can compel the deposition of a Cabinet Secretary to probe his mental processes. As this Court held in *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941), the answer is no.

4. In two paragraphs, private respondents assert (NYIC Br. 25-26, 30-31) that their equal-protection claims warrant extra-record discovery into Secretary Ross's mental processes even if their APA claims do not. But the APA governs their equal-protection claims too, as the government has repeatedly explained. Pet. 17 n.3; 18A375 Renewed Stay Appl. 24 n.2; 18A350 Stay Appl. 23 n.3. The private respondents do not address this point.

Despite initially agreeing with the government that the APA governs the private respondents' equal-protection claims, Pet. App. 101a, the district court recently "amended" its October 26, 2018 order denying a stay of trial (*id.* at 111a-129a) to backtrack from that conclusion. 18-cv-2921 D. Ct. Doc. 485 (Nov. 5, 2018). In its amended order, the court determined that a "plausible" constitutional claim "can evade the APA record rule," as long as the court "avoid[s] undue intrusion on the governmental decisionmaking process." *Id.* at 10 n.9. Citing *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the court found that respondents were thus entitled to discovery "probative of the decisionmakers' true 'intent' and 'purpose.'" 18-cv-2921 D. Ct. Doc. 485, at 10.

The district court's belated attempt to shore up its original order authorizing extra-record discovery into

Secretary Ross's mental processes is unconvincing. Even *Arlington Heights* cautioned against roaming outside the "legislative or administrative history" to depose high-level governmental officials, and expressly noted that a decisionmaker's "testimony frequently will be barred by privilege." 429 U.S. at 268; see *id.* at 268 n.18. Overreading *Arlington Heights*, as the district court has done, would greatly expand the narrow exception to the record rule for "strong showing[s] of bad faith" and make extra-record discovery routine rather than rare, simply by virtue of the plaintiff's alleging an equal-protection or due-process claim. *Overton Park*, 401 U.S. at 420.

Respondents also cite (NYIC Br. 25-26) *Webster* v. *Doe*, 486 U.S. 592 (1988), for the proposition that "discovery from governmental decisionmakers may be necessary to resolve constitutional discrimination claims." But *Webster* involved the question whether judicial review was available at all—not whether discovery into an agency decisionmaker's mental processes is permissible in an APA challenge to run-of-the-mill agency action. *Id.* at 603-604.

B. Mandamus Is Appropriate Under The Circumstances, And No Other Adequate Means Exist To Attain Relief

As the government explained (Pet. 30-32), mandamus relief is appropriate here precisely because there are no other adequate means for the government to obtain relief, especially with respect to Secretary Ross's deposition. See, *e.g.*, *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.), cert. denied, 135 S. Ct. 1163 (2015); *In re Justices of Supreme Court of P.R.*, 695 F.2d 17, 20-25 (1st Cir. 1982) (Breyer, J.).

The state respondents argue (State Br. 15) that mandamus is inappropriate because the government's challenge to extra-record discovery into Secretary Ross's mental processes is, paradoxically, both "premature" and "unpreserved." In fact it is neither. It can hardly be premature: respondents have completed nearly all discovery into Secretary Ross's mental state—and already would have deposed Secretary Ross but for this Court's stay pending the disposition of this petition for a writ of mandamus. Nor is it unpreserved: the government clearly opposed respondents' bid for extra-record discovery. See 18-cv-2921 D. Ct. Doc. 194 (June 26, 2018). To be sure, the government initially complied with the district court's July 3, 2018 order rather than immediately seek the extraordinary relief of mandamus. But that does not make the original objection an "unpreserved" one.

The state respondents also assert (State Br. 19) that the district court's pretrial bad-faith determination was "preliminary" and so, even if infirm, should not limit the scope of trial evidence now. Yet that pretrial bad-faith determination was the very basis for the court's July 3 order compelling extra-record discovery into Secretary Ross's mental processes—an order that required the discovery to be both "relevant" and "'reasonably calculated to lead to the discovery of admissible evidence.'" *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 29-30 (1984) (citation omitted). There's no question the court will consider the extra-record evidence at trial, which is set to conclude this week. Pet. App. 114a. The government objected and then sought mandamus relief to halt the discovery while it was ongoing; no more was needed to preserve the argument to exclude the resulting evidence from trial now.

At any rate, "preliminary" or not, the district court's July 3 order, no less than its order compelling Secretary Ross's deposition, is properly before this Court, as the Court itself recognized in its order staying the deposition. 18A375 slip op. 1. That is because "each stems from the same doubtful bad faith ruling, and each seeks to explore [the Secretary's] motives." *Id.* at 3 (opinion of Gorsuch, J.). Even the private respondents agree: "Given the district court's July 3 finding * * * , *it necessarily follows* that testimony from [Secretary Ross] is essential." NYIC Br. 28-29 (emphasis added).

Finally, respondents assert that mandamus is inappropriate because a deposition would not unduly burden Secretary Ross. State Br. 36; NYIC Br. 35. Private respondents seem to suggest (NYIC Br. 35) that because Secretary Ross "has testified before Congress three times about his decision to add the citizenship question," being deposed is a minimal additional burden. But appearing before a coordinate Branch of government is hardly comparable to being deposed by plaintiffs' lawyers. If anything, Congress's demonstrated attention to this important and controversial matter simply underscores the audacity of respondents' intrusive attempt to second-guess the Secretary's motives.

Respectfully submitted.

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NOVEMBER 2018