No. 18-557

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is not a strong threshold showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

PARTIES TO THE PROCEEDING

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

Respondent in this Court is the United States District Court for the Southern District of New York. Respondents also include the State of New York; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Illinois; the State of Iowa; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of North Carolina; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Vermont; the State of Washington; the City of Chicago, Illinois; the City of New York; the City of Philadelphia; the City of Providence; the City and County of San Francisco, California; the United States Conference of Mayors; the City of Seattle, Washington; the City of Pittsburgh; the County of Cameron; the State of Colorado; the City of Central Falls; the City of Columbus; the County of El Paso; the County of Monterey; and the County of Hidalgo (collectively plaintiffs in the district court in No. 18-cv-2921, and real parties in interest in the court of appeals in Nos. 18-2652 and 18-2856). Respondents further include the New York Immigration Coalition; CASA de Maryland, Inc.; the American-Arab Anti-Discrimination Committee; ADC Research Institute; and Make the

Road New York (collectively plaintiffs in the district court in No. 18-cv-5025, and real parties in interest in the court of appeals in Nos. 18-2659 and 18-2857).

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-4a, 5a-8a) are not published in the Federal Reporter but are available at 2018 WL 6006885 and 2018 WL 6006904, respectively. The oral order of the district court (Pet. App. 28a-110a) is unreported. The written order of the district court (Pet. App. 24a-27a) is not published in the Federal Supplement but is available at 2018 WL 5260467. The opinion and order of the district court (Pet. App. 9a-23a) is not yet reported in the Federal Supplement but is available at 2018 WL 4539659.

JURISDICTION

The orders of the court of appeals were entered on September 25, 2018 and October 9, 2018. The petition for a writ of mandamus or, in the alternative, for a writ of certiorari was filed on October 29, 2018. The Court treated the petition as one for a writ of certiorari and

granted it on November 16, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. The Constitution requires that an "actual Enumeration" of the population be conducted every ten years to apportion Representatives in Congress among the States, and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. The Census Act, 13 U.S.C. 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," and "authorize[s] [him] to obtain such other census information as necessary." 13 U.S.C. 141(a). The United States Census Bureau assists the Secretary in the performance of this responsibility. See 13 U.S.C. 2, 4. The Act directs that the Secretary "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." 13 U.S.C. 5. Nothing in the Act directs the content of the questions that are to be included in the decennial census.

2. With the exception of 1840, decennial censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through 1950 specifically requested citizenship information. 315 F. Supp. 3d 766, 776-777.

Citizenship-related questions continued to be asked of some respondents after the 1950 Census. In 1960, the

Census Bureau asked 25% of the population for the respondent's birthplace and that of his or her parents. 315 F. Supp. 3d at 777-778. Between 1970 and 2000, the Census Bureau distributed a detailed "long form" questionnaire to a sample of the population (one in five households in 1970, one in six thereafter) in lieu of the "short form" questionnaire sent to the majority of households. See *id.* at 778. The long-form questionnaire included questions about the respondent's citizenship or birthplace, while the short form did not. *Ibid.*

Beginning in 2005, the Census Bureau began collecting the more extensive long-form data—including citizenship data—through the American Community Survey (ACS), which is sent yearly to about one in 38 households. 315 F. Supp. 3d at 778-779. Replacing the decennial long-form census with the yearly ACS enabled the 2010 census to be a "short-form-only" census. The 2020 census will also be a "short-form-only" census. The ACS will continue to be distributed each year, as usual, to collect additional data, and will continue to include a citizenship question.

Because the ACS collects information from only a small sample of the population, it cannot produce estimates down to the smallest geographic level, known as a "census block." See U.S. Census Bureau, *Geography*, www.census.gov/geo/reference/webatlas/blocks.html. Instead, the ACS produces estimates only for larger geographic areas, such as "census block *groups*" or "census tracts." See *ibid.* The finer level of granularity of "census block" data is possible only with the decennial census, which conducts a full count of the people in each State. See *ibid.* As in past years, the 2020 census questionnaire will pose a number of questions beyond the

total number of individuals residing at a location, including questions regarding sex, Hispanic origin, race, and relationship status. Individuals who receive the census questionnaire are required by law to answer fully and truthfully all of the questions. 13 U.S.C. 221.

3. On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire and setting forth his reasons for doing so. Pet. App. 136a-151a. The Secretary issued the memorandum in response to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). *Id.* at 152a-157a.

The Gary Letter stated that citizenship data is "critical" to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. V 2017), and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data" for at least four reasons. Pet. App. 152a-153a; see *id.* at 155a-156a. First, DOJ "already use[s] the total population data from the census" in redistricting efforts, so using estimated citizenship data from the ACS surveys "means relying on two different data sets, the scope and level of detail of which vary quite significantly." *Id.* at 155a. Second, ACS estimates "do not align in time with the decennial census data." *Id.* at 156a. Third, ACS estimates are just that—estimates, and "the margin of error increases as the sample size * * * decreases." *Ibid.* Fourth, the decennial census questionnaire would provide more granular citizenship voting age population (CVAP) data than the ACS surveys—down to the smallest "census block" level, instead of the "census block group" level. *Ibid.* "Having all of the relevant population and citizenship data available in one data set * * * would greatly assist the redistricting process." *Ibid.*

For these reasons, DOJ "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." *Id.* at 157a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau," Pet. App. 136a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau initially presented three alternatives: do nothing; reinstate the citizenship question to the decennial census; or rely on federal administrative records to estimate citizenship data in lieu of reinstating the citizenship question. *Id.* at 139a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option: reinstating a citizenship question to the decennial census while also using federal and state administrative records. *Id.* at 143a. Past studies had shown that "using administrative records could be more accurate than self-responses." *Id.* at 142a-143a. Yet the use of such records to enhance census data "is still evolving," and the Census Bureau "does not yet have a complete administrative records data set for the entire population." *Id.* at 143a. Therefore, the Secretary concluded that his proposed fourth option—a combination of the second and third options the Census Bureau had presented to him—"will provide DOJ with the most complete and accurate CVAP data in response to its request." *Id.* at 144a.

The Secretary also observed that collecting citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. Pet. App. 138a. The Secretary therefore found that "the citizenship question has been well tested." *Ibid.* He further confirmed with the Census Bureau

that census-block-level citizenship data is not available from the ACS. *Ibid.*

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for noncitizens. Pet. App. 140a-142a, 144a-147a. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up * * * operations," *id.* at 140a, he concluded from his discussions with Department of Commerce personnel, Census Bureau leadership, and outside parties that, to the best of everyone's knowledge, there was an insufficient empirical basis to conclude that reinstating a citizenship question would, in fact, materially affect response rates. *Id.* at 140a-142a, 145a. For example, the self-response rates to the ACS surveys, which include more than 45 questions (including ones about citizenship and country of birth), are only "3.1 percentage points less than the self-response rates for the 2010 decennial census" (which had only eight questions)—and the Census Bureau "attributed this difference to the greater outreach and follow-up associated with" the decennial census, not to the questions themselves. *Id.* at 141a. Also, the nonresponse rates to the citizenship question in particular "were comparable to nonresponse rates for other questions on the 2013 and 2016 ACS" in each applicable demographic group. *Ibid.*

Based on this data and his consultations, the Secretary determined that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially" as a result of reinstating a citizenship question. Pet. App. 140a. So despite the hypothesis "that adding a citizenship question could reduce response rates, the Census Bureau's

analysis did not provide definitive, empirical support for that belief." *Id.* at 142a. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder outreach in an effort to mitigate any impact on response rates of including a citizenship question. *Id.* at 147a.

The Secretary also emphasized that "[c]ompleting and returning decennial census questionnaires is required by Federal law," meaning that concerns regarding a reduction in response rates were premised on speculation that some will "violat[e] [a] legal duty to respond." Pet. App. 150a. In light of these considerations, the Secretary concluded that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns." *Ibid.*

A few months later, in light of this and other litigation, Secretary Ross issued a supplemental memorandum to clarify the informal procedures that led to the Gary Letter and his initial memorandum. Pet. App. 134a-135a. The Secretary explained that, "[s]oon after [his] appointment," he "began considering various fundamental issues" regarding the 2020 Census, including "whether to reinstate a citizenship question." *Id.* at 134a. As part of the Secretary's deliberative process, he and his staff "consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for the enforcement of the Voting Rights Act." *Ibid.* The result was the Gary Letter, which then triggered the Department of Commerce's formal "hard look at the request" from DOJ that the citizenship question be reinstated to the decennial census. *Id.* at 136a.

4. a. Respondents (plaintiffs below) are governmental entities (including States, cities, and counties) and non-profit organizations. The operative complaints allege that the Secretary's action violates the Enumeration Clause; is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; and denies equal protection by discriminating against racial minorities. See 18-cv-5025 Compl. ¶¶ 193-212; 18-cv-2921 Second Am. Compl. ¶¶ 178-197.[1] All of the claims rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, some households containing at least one noncitizen may be deterred from doing so (and those households will disproportionately contain racial minorities). Respondents maintain that Secretary Ross's stated reasons in his memorandum are pretextual, and that his decision was driven by secret reasons, including animus against minorities.

Respondents announced their intention to seek extra-record discovery before the administrative record had been filed. At a May 9, 2018 hearing, respondents asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery,

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[1] Challenges to the Secretary's decision also have been brought in district courts in California and Maryland. See *California* v. *Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); *Kravitz* v. *United States Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *City of San Jose* v. *Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *La Union Del Pueblo Entero* v. *Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018).

was thus justified, "prefatory to" the government's production of the administrative record. 18-cv-2921 D. Ct. Doc. 150, at 9.

b. At a July 3, 2018 hearing, the district court granted respondents' request for extra-record discovery over the government's objections. Pet. App. 93a-100a. The court concluded that respondents had made a sufficiently "strong showing of bad faith" under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), to warrant extra-record discovery. *Id.* at 420; see Pet. App. 98a. The court offered four reasons to support this determination. First, the Secretary's supplemental memorandum "could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale." Pet. App. 98a. Second, the record submitted by the Department of Commerce "reveals that Secretary Ross overruled senior Census Bureau career staff," who recommended against adding a question. *Id.* at 98a-99a. Third, the Secretary used an abbreviated decisionmaking process in deciding to reinstate a citizenship question, as compared to other instances in which questions had been added to the census. *Id.* at 99a. Fourth, respondents had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question—that it would aid DOJ in enforcing the VRA—was "pretextual" because DOJ had not previously suggested that citizenship data collected through the decennial census was needed to enforce the VRA. *Id.* at 99a-100a.

Following that order, the government supplemented the administrative record with over 12,000 pages of doc-

uments, including materials reviewed and created by direct advisors to the Secretary, and even including materials created by indirect advisors that were shared with the direct advisors. The government also produced additional documents in response to discovery requests, including nearly 11,000 pages from the Department of Commerce and more than 14,000 pages from DOJ. This Office is informed that those totals have since risen to more than 21,000 pages from the Department of Commerce and more than 128,000 pages from DOJ. Respondents also deposed several senior Census Bureau and Department of Commerce officials, including the Acting Director of the Census Bureau and the Chief of Staff to the Secretary. Although the government strongly objected to the bad-faith finding and subsequent discovery, it initially chose to comply rather than seek the extraordinary relief of mandamus.

c. On July 26, 2018, the district court dismissed respondents' Enumeration Clause claims. See 315 F. Supp. 3d at 799-806. The court did not dismiss respondents' APA and equal protection claims, concluding that respondents had alleged sufficient facts to demonstrate standing at the motion-to-dismiss stage, *id.* at 781-790; that respondents' claims were not barred by the political question doctrine, *id.* at 790-793; that the content of the census questionnaire was not committed to the Secretary's discretion by law, *id.* at 793-799; and that respondents' allegations, accepted as true, stated a plausible claim of intentional discrimination, *id.* at 806-811.

d. On August 17, 2018, the district court entered an order compelling the deposition testimony of then-Acting Assistant Attorney General (AAG) for DOJ's Civil Rights

Division, John M. Gore.[2] Pet. App. 24a-27a. The court concluded that Acting AAG Gore's testimony was "plainly 'relevant'" to respondents' case in light of his "apparent role" in drafting the Gary Letter, and concluded that he "possesses relevant information that cannot be obtained from another source." *Id.* at 25a.

On September 7, 2018, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, seeking to quash Acting AAG Gore's deposition. See 18-2652 C.A. Pet. for Writ of Mandamus. The government also sought to halt further extra-record discovery because that discovery was based on the same bad-faith finding underlying the deposition order. On September 25, the court of appeals denied the petition, explaining that it could not "say that the district court clearly abused its discretion in concluding that [respondents] made a sufficient showing of 'bad faith or improper behavior' to warrant limited extra-record discovery," including Acting AAG Gore's deposition. Pet. App. 7a. On October 2, 2018, the Second Circuit declined to stay Acting AAG Gore's deposition or other discovery. 18-2652 C.A. Doc. 74.

e. Meanwhile, respondents moved for an order compelling the deposition of Secretary Ross, and, on September 21, 2018, the district court entered an order compelling the deposition and denying a stay pending mandamus. Pet. App. 9a-23a. The court recognized that court-ordered depositions of high-ranking governmental officials are highly disfavored, but nonetheless concluded that "'exceptional circumstances'" existed that "compel[led] the conclusion that a deposition of

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[2] On October 11, 2018, the Senate confirmed Eric S. Dreiband as Assistant Attorney General for the Civil Rights Division. Mr. Gore was, however, the Acting AAG at all times relevant to this dispute.

Secretary Ross is appropriate." *Id.* at 10a-11a (citations omitted). The court reasoned that exceptional circumstances were present because, in the court's view, "the intent and credibility of Secretary Ross" were "central" to respondents' claims, and Secretary Ross has "'unique first-hand knowledge'" about his reasons for reinstating a citizenship question that cannot "'be obtained through other, less burdensome or intrusive means.'" *Id.* at 16a, 18a (citation omitted).

In concluding that Secretary Ross's deposition was necessary, the district court rejected the government's contention that the information respondents sought could be obtained from other sources, including a deposition under Federal Rule of Civil Procedure 30(b)(6), interrogatories, or requests for admission. Pet. App. 19a. The court found these alternatives unacceptable because they would not allow respondents to assess Secretary Ross's credibility or to ask him follow-up questions. *Ibid.* The court also believed that a deposition would be a more efficient use of the Secretary's time, because additional interrogatories, depositions, or requests for admissions would burden the Secretary. *Ibid.*

On September 27, 2018, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, seeking to quash Secretary Ross's deposition. See 18-2856 C.A. Pet. for Writ of Mandamus. The government also sought a stay to preclude the depositions of Secretary Ross and Acting AAG Gore and to preclude further extra-record discovery pending this Court's review. *Id.* at 28-32. On October 9, the court of appeals denied the petition, holding that the district court had not clearly abused its discretion in finding that "only the Secretary himself would be able to answer the Plaintiffs' questions." Pet. App. 3a.

5. On October 9, 2018, in response to the government's application for a stay, No. 18A375, Justice Ginsburg entered an administrative stay of the two depositions and further extra-record discovery. On October 22, 2018, this Court granted a stay as to the September 21 order compelling Secretary Ross's deposition, to "remain in effect until disposition of" a "petition for a writ of certiorari or a petition for a writ of mandamus," as long as it was filed "by or before October 29, 2018 at 4 p.m." 18A375 slip op. 1. The Court denied a stay as to Acting AAG Gore's deposition and further extra-record discovery into Secretary Ross's mental processes, but did "not preclude the [government] from making arguments with respect to those orders." *Ibid.*

Justice Gorsuch, joined by Justice Thomas, would have "take[n] the next logical step and simply stay[ed] all extra-record discovery pending [this Court's] review," because the depositions and the extra-record discovery all "stem[] from the same doubtful bad faith ruling." 18A375 slip op. 3 (opinion of Gorsuch, J.). Justice Gorsuch also expressed concern about "the need to protect the very review [this Court] invite[s]." *Ibid.* "One would expect that the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance. After all, that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent." *Ibid.*

On October 26, 2018, however, both the district court (Pet. App. 111a-129a) and the Second Circuit (18-2856 C.A. Doc. 75) denied the government's motion to stay the November 5 trial date. In declining to stay the trial, the district court stated its intention to issue two sets of rulings: it "directed the parties to differentiate in their pre- and post-trial briefing between arguments based

solely on the administrative record and arguments based on materials outside the record," and "anticipate[d] differentiating along similar lines in any findings of fact and conclusions of law that it enters." Pet. App. 114a.

6. The government filed a petition for a writ of mandamus or, in the alternative, for a writ of certiorari before the Court's October 29, 2018 deadline. On November 16, the Court treated the petition as a petition for a writ of certiorari and granted it. The government moved the district court and the court of appeals to stay further trial proceedings in light of this Court's grant of the government's petition. Both courts declined to stay further trial proceedings. 18-cv-2921 D. Ct. Doc. 544 (Nov. 20, 2018); 18-2856 C.A. Doc. 93 (Nov. 21, 2018). On November 26, 2018, the government lodged a letter with this Court suggesting that it might wish to reconsider staying trial proceedings.

7. Meanwhile, Acting AAG Gore was deposed on October 26, 2018, and a bench trial commenced on November 5. Closing arguments concluded on November 27. The district court has not yet issued its findings of fact, conclusions of law, or final judgment on respondents' claims.

SUMMARY OF ARGUMENT

The court of appeals erred in denying the government's petitions for writs of mandamus because the government's "right to issuance of the writ[s] is 'clear and indisputable'"; "no other adequate means exist to attain the relief [the government] desires"; and "the writ[s] [are] appropriate under the circumstances." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets omitted).

A. The government's right to mandamus relief is clear and indisputable. In evaluating a challenge to agency action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). A narrow exception to this rule exists if there is "a strong showing of bad faith or improper behavior" on the part of the agency decisionmakers. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971). The district court committed clear legal error in applying that exception here, and the court of appeals thus erred in denying mandamus relief.

1. The district court made two fundamental errors in concluding that respondents had made a "strong showing" of bad faith. First, the court assumed the truth of respondents' allegations and drew inferences in their favor. But that is not the appropriate standard because it is inconsistent with inter-Branch comity and defies the presumption of regularity that courts must accord to Executive Branch action. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); see also *Cheney*, 542 U.S. at 381. Second, the district court concluded that respondents had made a "strong showing" of bad faith or improper behavior because they alleged that Secretary Ross wanted to reinstate the citizenship question *before* reaching out to DOJ for a formal request, and that DOJ's VRA-enforcement rationale was pretextual. That fundamentally misunderstands what is required to show bad faith in this context. As long as an agency decisionmaker sincerely believes the stated grounds on which he ultimately bases his decision, and does not irreversibly prejudge the decision or act on a legally forbidden

basis, neither initial inclinations nor additional subjective motives constitute bad faith or improper bias.

The district court relied on several circumstances to support its bad-faith ruling, none of which withstands scrutiny. The most recent one, provided in its order denying a stay of trial (Pet. App. 111a-129a), was its conclusion that Secretary Ross "provided false explanations of his reasons for, and the genesis of, the citizenship question—in both his decision memorandum and in testimony under oath before Congress." *Id.* at 124a. But none of the statements in the memorandum or in congressional testimony, viewed in context, is false or misleading. The Secretary's formal decisional memorandum and sworn testimony to Congress understandably focused on the *formal* agency process that began with DOJ's formal request letter. So, for example, the Secretary's March 20, 2018 statement to Congress that he was "responding *solely* to the Department of Justice's request," *id.* at 15a (citation omitted), was simply making clear that the agency's *formal* process was triggered by DOJ's request, not the requests of outside political parties or campaigns. By contrast, the supplemental memorandum provided "further background and context" about the *informal* discussions that preceded the formal process, *id.* at 134a—the types of informal discussions that routinely take place before the government commences its formal consideration of a policy initiative. Only by plucking the Secretary's statements out of context and straining to read them in the least favorable light could one possibly conclude that the Secretary was not telling the truth.

Also flawed is the district court's conclusion (Pet. App. 99a) that the VRA rationale was "pretextual" simply be-

cause "[t]o [the court's] knowledge" DOJ had never previously requested citizenship data from the decennial census. That conclusion utterly failed to consider the Gary Letter, in which DOJ *actually requested* such data and explained in detail the reasons why (*id.* at 152a-157a), and also ignored Secretary Ross's memoranda and other evidence in the record (*id.* at 134a-135a, 136a-151a, 158a) showing that Department of Commerce officials acted in good faith in response to DOJ's request.

2. The district court compounded its error by compelling the deposition of Secretary Ross himself. As this Court has recognized since at least *United States* v. *Morgan*, 313 U.S. 409 (1941) (*Morgan II*), and its predecessor, *Morgan* v. *United States*, 304 U.S. 1 (1938) (*Morgan I*), in a challenge to agency action, it is "not the function of the court to probe the mental processes of the Secretary" by compelling his testimony. *Morgan II*, 313 U.S. at 422 (quoting *Morgan I*, 304 U.S. at 18). The district court purported to find "'exceptional circumstances'" to warrant a departure from this rule: namely, that "the intent and credibility of Secretary Ross" are "central" to respondents' claims. Pet. App. 16a, 18a (citation omitted). But it does not matter how "central" the Secretary's credibility is to respondents' claims; to stray beyond the administrative record, respondents must make a "strong showing of bad faith or improper behavior," not merely allege that the Secretary made statements that, in their view, are inaccurate. *Overton Park*, 401 U.S. at 420. And it is hardly exceptional that Secretary Ross was "personally and directly involved" in the decision to reinstate the citizenship question, Pet. App. 13a, or that his testimony would "fill in critical blanks in the current record" about his conversations with third parties, *id.* at 17a. Cabinet Secretaries often

are personally involved in significant policy decisions, and the Secretary's alleged conversations with third parties are irrelevant both to any alleged bad faith on the Secretary's part and to the ultimate legality of the agency's action. See *Sierra Club* v. *Costle*, 657 F.2d 298, 408-409 (D.C. Cir. 1981).

B. No other adequate means exist for the government to attain relief. Absent mandamus relief, the Secretary will have to prepare for and attend a deposition, which cannot be undone, and the district court will continue to rely on the improper extra-record discovery into the Secretary's mental processes in analyzing the legality of the agency action. See, *e.g.*, *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.).

C. For similar reasons, mandamus is appropriate under the circumstances. Both the district court and the court of appeals have repeatedly refused to quash or even stay the deposition of Secretary Ross and extra-record discovery into the Secretary's mental processes, which impermissibly "interfer[es] with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382.

ARGUMENT

Secretary Ross reinstated to the decennial census a wholly unremarkable demographic question about citizenship. Questions about citizenship or country of birth (or both) have been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and have been (and continue to be) asked of a small sample of the population on annual ACS surveys for the last 13 years. Respondents speculate that some

people in households with unlawfully present aliens (or ties to them) might refuse to answer the question despite their legal obligation to do so; that Secretary Ross's decision to ask the question despite this possibility was driven by secret motives, including animus against racial minorities; that the risk of any resulting undercount is fairly traceable to the government's action rather than to the individual or household's (unlawful) refusal to fill out and return the census questionnaire; and that the risk of undercount is sufficient to render merely *asking* the question arbitrary and capricious notwithstanding that VRA enforcement efforts rely on citizenship data. On respondents' novel theory, the district court ordered discovery outside the administrative record to probe Secretary Ross's mental processes when he made his decision, including by compelling the depositions of Secretary Ross and other high-ranking Executive Branch officials.

The district court's orders defy decades of settled law establishing that in a challenge to agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). And the orders defy equally well settled law establishing that plaintiffs challenging agency action may not probe the subjective mental processes of the agency decisionmaker, especially by compelling his testimony. *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941). Although this Court has recognized a narrow exception where the plaintiffs make "a strong showing of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), the district court committed clear legal error in applying that exception here.

The district court's rationale for its "highly unusual" orders, 18A375 slip op. 2 (opinion of Gorsuch, J.), is that there is strong evidence that Secretary Ross acted in bad faith because, whether or not the reasons in the administrative record are objectively valid, he allegedly had secret motives in deciding to reinstate the citizenship question. But as long as the Secretary sincerely believed the grounds on which he formally based his decision, and did not irreversibly prejudge the decision or act on a legally forbidden basis, any additional subjective reasons or motives he might have had do not constitute bad faith. And given the absence of strong evidence that the Secretary did *not* sincerely believe the basis for his decision, or that he *had* irreversibly prejudged the issue or acted on a legally forbidden basis, the district court has no authority to review the Secretary's decision on anything but the administrative record.

Issuance of a writ of mandamus is appropriate when (1) the petitioner's "right to issuance of the writ is 'clear and indisputable' "; (2) "no other adequate means [exist] to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). Each of those prerequisites for mandamus relief is met here. Accordingly, the court of appeals erred in denying the government's petitions for writs of mandamus to (1) quash the deposition of Secretary Ross; and (2) exclude from the district court's consideration all extra-record evidence concerning Secretary Ross's mental processes. This Court should therefore reverse the court of appeals' decisions.

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

1. The district court clearly and indisputably erred in allowing discovery beyond the administrative record to probe the Secretary's mental processes

"This Court has recognized, ever since *Fletcher* v. *Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). In part for that reason, "[t]he APA specifically contemplates judicial review" only on the basis of "the record the agency presents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); see *Camp*, 411 U.S. at 143. This Court has "made it abundantly clear" that APA review focuses on the "contemporaneous explanation of the agency decision" that the agency rests upon. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 549 (1978) (citing *Camp*, 411 U.S. at 143).

Accordingly, courts must "confin[e] * * * review to a judgment upon the validity of the grounds upon which the [agency] itself based its action." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). The agency decision must be upheld if the record reveals a "rational" basis supporting it. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Conversely, if the record supplied by the agency is inadequate to support the agency's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.*, 470 U.S. at 744. Either way, "the focal point for judicial review should

be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142.[3]

This Court has recognized a narrow exception to the general rule prohibiting discovery beyond the administrative record if there is "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. Respondents did not make this "strong showing" here. In nevertheless allowing extra-record discovery into the Secretary's mental processes, the district court made two critical errors.

a. First, by its own admission, the district court "assum[ed] the truth of the allegations in [respondents'] complaints," Pet. App. 100a, and drew disputed inferences in respondents' favor. Although that is the familiar standard for deciding a motion to dismiss, it is deeply misguided in this context for several reasons. It is inconsistent with the requirement that plaintiffs make a "strong showing of bad faith or improper behavior"—not just an allegation that passes some minimum threshold of plausibility—before taking the extraordinary step of piercing the administrative record to examine a decisionmaker's mental processes. *Overton Park*, 401 U.S. at 420. It is also inconsistent with the presumption of regularity, which requires courts to presume that executive officers act in good faith. See *United States* v.

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[3] Respondents cannot evade these principles by pointing to their constitutional claims because the APA governs those claims too. See 5 U.S.C. 706(2)(B) (providing cause of action to "set aside agency action" "contrary to constitutional right"); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The district court initially appeared to recognize this point, Pet. App. 101a, but later seemed to retreat from it, see 18-cv-2921 D. Ct. Doc. 485, at 10 n.9 (Nov. 5, 2018).

Armstrong, 517 U.S. 456, 464 (1996); cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). And it is inconsistent with principles of inter-Branch comity, which caution against imputing bad faith to officials of a coordinate Branch—particularly a Senate-confirmed, Cabinet-level constitutional officer. See *Cheney*, 542 U.S. at 381-382. Instead, as discussed below, the court seemed to go out of its way to adopt the most uncharitable reading possible of the Secretary's actions.

b. Second, the court of appeals and the district court fundamentally misunderstood what a showing of "bad faith or improper behavior" requires in this context. That high standard is not triggered even if an agency decisionmaker favors a particular outcome before fully considering and deciding an issue, or has additional reasons for the decision beyond the ones expressly relied upon. Were that enough to constitute "bad faith," extra-record review would be the rule rather than the rare exception.

Instead, an "extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification." 18A375 slip op. 2 (opinion of Gorsuch, J.). To show the requisite bad faith in this context, a plaintiff must make a strong showing that the decisionmaker did not actually believe the stated grounds on which he ultimately based his decision, irreversibly prejudged the decision, or otherwise acted on a legally forbidden basis. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F.3d 1179, 1184-1185 (10th Cir. 2014); *Air Transp. Ass'n of Am., Inc.* v. *National Mediation Bd.*, 663 F.3d 476, 488 (D.C. Cir. 2011). Only in those circumstances can it fairly be said the decisionmaker acted with "[d]ishonesty of belief, purpose, or motive." *Black's Law Dictionary* 166 (10th ed. 2014).

Allegations that the agency decisionmaker was merely inclined to follow a certain path or harbored additional motivations for his action are insufficient; for as long as the decisionmaker sincerely believes the stated grounds on which he ultimately bases his decision, and does not irreversibly prejudge the decision or act on a legally forbidden basis, neither initial inclinations nor additional subjective motives constitute bad faith or improper bias. See *Jagers*, 758 F.3d at 1184-1185 (a "subjective hope" that factfinding would support a desired outcome does not "demonstrate improper bias on the part of agency decisionmakers"). The district court misunderstood this point, repeatedly conflating mere allegations about the Secretary's supposed additional motivations with a strong showing of "bad faith." *E.g.*, Pet. App. 123a-124a.

Here, there is no strong evidence, nor did the district court find, that the Secretary did not actually believe that DOJ would find the citizenship question useful to its VRA enforcement activities, or that the Secretary had irreversibly prejudged the issue or acted upon a legally forbidden basis. Instead, at the time of its order, the court relied on four circumstances (discussed below) that it thought constituted bad faith on the Secretary's part. Pet. App. 98a-100a. Since then it added a fifth—that the Secretary "provided false explanations of his reasons" for reinstating the citizenship question, *id.* at 124a—that respondents have latched onto in their defense of the court's order, see Br. for Gov't Resps. in Opp. 2, 5-11, 24-36; Br. for Resps. N.Y. Immigration Coal. (NYIC) in Opp. 1-2, 6-9, 11, 14-16, 18-21, 24-25, 27-29, 31. Yet neither this new theory nor the original four, individually or taken together, constitute a "strong show-

ing" of bad faith or improper behavior entitling respondents to venture beyond the administrative record to probe the Secretary's mental processes.

i. In its October 26, 2018 order denying a stay of trial, the district court said that extra-record discovery was justified because Secretary Ross "provided false explanations of his reasons for, and the genesis of, the citizenship question—in both his decision memorandum and in testimony under oath before Congress." Pet. App. 124a; see *id.* at 15a (compelling the Secretary's deposition because his credibility was "squarely at issue in these cases"). But none of the statements is false, and the court's uncharitable inferences to the contrary ignore the context of these statements and violate the presumption of regularity. *Armstrong*, 517 U.S. at 464.

First, the district court determined that the Secretary's March 2018 memorandum falsely stated that he "'set out to take a hard look' *at adding the citizenship question* 'following receipt'" of the Gary Letter. Pet. App. 15a (emphasis added; brackets, citation, and emphasis omitted). But the memorandum does not say that; the italicized text above was inserted by the court. The memorandum actually says that the Secretary "set out to take a hard look *at the request*" he received from DOJ to reinstate the citizenship question "[f]ollowing receipt" *of that request*. *Id.* at 136a (emphasis added). That statement is not only true, but a truism; the Secretary could not have taken a hard look at the request before receiving it. More to the point, the Secretary never said that he had not personally considered whether to reinstate a citizenship question before DOJ's formal request, or that he had not had informal discussions with other agencies or governmental officials before that re-

quest. Both are precisely the kind of activities that routinely take place before an agency commences the formal process for making policy changes. And the memorandum makes clear that by a "hard look" the Secretary meant a "comprehensive review" by the agency to "ensure that [he] considered all facts and data relevant to the question so that [he] could make an informed decision." *Ibid.* Even respondents do not allege that the Department of Commerce or the Census Bureau undertook any sort of "comprehensive review" *before* receiving DOJ's letter.

Second, the district court cited the Secretary's March 20, 2018 statement to Congress that the Department of Commerce was "responding *solely* to the Department of Justice's request." Pet. App. 15a (citation omitted). But as the full context shows, that statement was in response to questions asking whether the Department of Commerce was responding to requests from political campaigns or political parties:

> SERRANO: Should political parties and campaign politics ever factor into what is asked of every household in the country on the census?
>
> ROSS: No political party has asked us to do anything on the census. We have had a request, as everyone is aware, from the Department of Justice, to add a citizenship question to the 2020 census.
>
> SERRANO: * * * I was very disappointed to see yesterday that the Republican Party campaign to reelect the president put out an appalling e-mail specifically noting that the president wants a new citizenship question added to the census * * * .
>
> Do you disavow this campaign e-mail? * * *

> ROSS: I'm not familiar with the e-mail. I'm not part of the Republican campaign committee. So, I have not seen it. I have heard about it, this morning.
>
> *We are responding solely to the Department of Justice's request, not to any campaign request, not to any other political party request.* We are listening to stakeholders. Many have written to us. Some have come in to talk with me.

2018 WLNR 8815056 (emphasis added).[4] Viewed in context, Secretary Ross's statement simply made clear that no *outside political parties or campaigns* had made a request to which the Department of Commerce was responding. The Secretary's statement cannot reasonably be interpreted as claiming that the Department of Commerce itself (or Secretary Ross himself) had not previously considered the issue or spoken to others within the Administration about it.

Third, and relatedly, the district court cited another statement in the March 20, 2018 testimony by Secretary Ross "that he was 'not aware' of any discussions between him and 'anyone in the White House,' " which the court viewed as false because "there is now reason to believe that" Secretary Ross consulted with Steve Bannon. Pet. App. 16a (citation omitted). But in context, that statement was referring to the campaign email discussed above:

> MING: And going back to Mr. Serrano's question about potential politicizing of this question and input on the census, I—you mentioned that you had not

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[4] *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.

> seen the e-mail that the Trump campaign sent out. So, I just wanted to show you a copy. And if I could submit it for the record, Mr. Chairman.
>
> ROSS: My eyesight is not good enough to read it from over here.
>
> MING: Neither is mine. But I have extra copies.
>
> Has the president or anyone in the White House discussed with you or anyone on your team about adding this citizenship question?
>
> ROSS: I'm not aware of any such.

2018 WLNR 8815056. As is clear, Secretary Ross was reading the campaign email and responding to a specific question about that email and whether any political actors in the White House had made a formal request to reinstate the citizenship question to the decennial census. He was not commenting more broadly on any and all informal discussions he might have had with Administration officials. And in any event the statement is true. The evidence in the record shows that Mr. Bannon called Secretary Ross in April 2017 only to ask him to speak to then-Kansas Secretary of State Kris Kobach—not to request that the Department of Commerce reinstate the citizenship question. 18-cv-2921 D. Ct. Doc. 546, at 53 (Nov. 21, 2018).

Fourth, the district court cited the Secretary's March 22, 2018 statement to Congress that DOJ "*initiated* the request for inclusion of the citizenship question." Pet. App. 15a (citation omitted). But that statement was not in response to a question about *who* (be it DOJ, the Department of Commerce, or Secretary Ross himself) first came up with the idea of reinstating the citizenship question; it was in response to a question about *whether* the citizenship question would be reinstated:

> CHU: * * * The Census Bureau of [course is] under your purview (ph), but it's been reported that the Department of Commerce is considering asking—adding a citizenship question to the 2020 Census.
>
> And there's a lot of fear by immigrant stakeholders that adding this question will create a lot of fear. That many immigrants will fail to respond to the entire questionnaire, fearing that their legal status will come under scrutiny. There are many that argue that the numbers reported from the census will be more inaccurate and that it will be more difficult to provide benefits and resources for low income communities who are afraid to be counted.
>
> * * * * *
>
> * * * Can you tell me whether the Department of Commerce plans to include the citizenship question in the 2020 census?
>
> ROSS: The Department of Justice, as you know, initiated the request for inclusion of the citizenship question. We have been talking on the phone and received written correspondence from quite a lot of parties on both sides of that question. There are many—many sub-questions about accuracy, about suppression of responses that we are taking into account. We have not made a final decision, as yet, because it's a very important and very complicated question.

2018 WLNR 8951469.[5] In context, the Secretary's statement was merely reiterating that the formal process was initiated by DOJ (not anybody else), and that

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[5] *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel and Aluminum Before the House Comm.*

as part of that formal process he had spoken to many of the "stakeholders" Congresswoman Chu had just mentioned. No reasonable listener would have understood the Secretary, in that moment, to be claiming that neither he nor anybody else in the Department of Commerce had ever discussed or considered the citizenship question before DOJ's formal request.

Fifth, respondents cite the Secretary's May 10, 2018 statement to Congress that "'the Justice Department is the one *who made the request of us*,'" thereby supposedly "masking his own active role in DOJ's request." Br. for Gov't Resps. in Opp. 29 (citation omitted). Again, this overlooks the context of the statement. The Secretary was merely pointing out that the VRA rationale came from DOJ itself:

> LEAHY: * * * Now, you've also marketed the citizenship question as necessary to enforce the Voting Rights Act. [The] Justice Department hasn't brought any voting rights cases since the president took office, they don't seem to see a problem out there.
>
> All voting rights advocates I've spoken with oppose including the question. They say it's going to have the opposite effect and will bring about severe underrepresentation of those who they're trying to protect. And why this sudden interest in that when the department that's supposed to enforce violations doesn't see any problems?
>
> ROSS: Well, the Justice Department is the one who made the request of us.

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on Ways and Means, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8951469.

2018 WL 2179074.[6] As is clear from this exchange, Secretary Ross was rebutting Senator Leahy's repeated insistence that DOJ "do[es]n't seem to see a problem" and "doesn't see any problems" with VRA enforcement by pointing out that it was DOJ "who made the request." *Ibid.* In context, the statement in no way implies that Secretary Ross himself had not previously discussed the issue with DOJ or previously considered reinstating the citizenship question on his own (whether for VRA- or non-VRA-based reasons). And no reasonable listener could conclude he was attempting to "mask[] his own active role" in the process. Br. for Gov't Resps. in Opp. 29.

Only by plucking these statements out of context and eliding the presumption of regularity could the district court find that the Secretary "provided false explanations." Pet. App. 124a. Indeed the court and respondents' view of these statements as false reflects a fundamental confusion between the agency's *formal* process leading to the decision to reinstate the citizenship question, on the one hand, and the *informal* discussions that preceded the formal process, on the other. Informal communications of policy issues—discussions with agency staff and discussions between agency heads about whether the agency should consider pursuing a particular policy proposal—are routine. An agency head ordinarily does not discuss such informal communications in a formal decisional memorandum or in sworn testimony before Congress. Secretary Ross's statements in

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[6] *Hearing on the F.Y. 2019 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.

his decisional memorandum and congressional testimony thus unsurprisingly addressed only the *formal* process—that is, upon receipt of DOJ's formal request for the reinstatement of the citizenship question to the decennial census, the process by which his agency evaluated that request, presented him with various options (including the pros and cons of each), and, ultimately, his decision on which option to pursue.

Secretary Ross's subsequent supplemental memorandum in no way contradicted that original decisional memorandum. In light of this and related litigation, Secretary Ross supplied "further background and context" about his informal discussions in the supplemental memorandum. Pet. App. 134a. That memorandum was not, as respondents claim (Br. for Gov't Resps. in Opp. 25), an "extraordinary reversal" from the Secretary's initial memorandum or congressional testimony. Rather, it was addressing an *entirely different* set of communications and processes. The only way to view the supplemental memorandum as contradicting the initial memorandum or congressional testimony is to start by assuming that Secretary Ross acted in bad faith, willfully view all of his statements through that uncharitable lens, and thereby conclude (in circular fashion) that they are evidence of his bad faith. That is precisely what the district court did. It is precisely what the court of appeals approved. And it is precisely what courts may *not* do under the presumption of regularity. See *Armstrong*, 517 U.S. at 464; cf. *Harlow*, 457 U.S. at 807.

ii. The district court's original four circumstances justifying extra-record discovery (Pet. App. 98a-100a) also are unavailing.

1. First, the district court concluded that Secretary Ross's supplemental memorandum "could be read to

suggest" that the Secretary already had "decided to add the citizenship question before he reached out" to DOJ. Pet. App. 98a. But the memorandum, fairly read, says only that the Secretary "*thought* reinstating a citizenship question *could be* warranted," and so reached out to DOJ and other officials to ask if they would support it. *Id.* at 134a (emphases added). That does not indicate prejudgment; at most it shows that the Secretary was leaning in favor of adding the question at the time. "[T]here's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, [and] soliciting support from other agencies to bolster his views." 18A375 slip op. 2 (opinion of Gorsuch, J.). As the D.C. Circuit has explained in a related context, it "would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future actions." *Air Transp. Ass'n of Am.*, 663 F.3d at 488 (citation omitted); see *Jagers*, 758 F.3d at 1185. Indeed, virtually every new Administration arrives in office with policy inclinations that differ from those of its predecessors. If such inclinations were evidence of "prejudgment," extra-record discovery would be the norm, not the rare exception.

Rather, to justify extra-record discovery based on alleged prejudgment, respondents should have to make a strong showing that the Secretary "act[ed] with an 'unalterably closed mind'" or was "'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) (citations omitted). Neither has been shown here. Nothing in Secretary Ross's memoranda (or any other document) suggests that Secretary Ross would have asserted the VRA-enforcement rationale had DOJ

disagreed or, conversely, that DOJ's request made the Secretary's decision a *fait accompli*. To the contrary, after the Secretary received the Gary Letter, he "initiated a comprehensive review process led by the Census Bureau." Pet. App. 136a. There is no basis to conclude that this process was a sham or that Secretary Ross had an unalterably closed mind and could not or would not consider new evidence and arguments.

Indeed, as respondents themselves repeatedly point out (Br. for Gov't Resps. in Opp. 6, 7, 35; Br. for Resps. NYIC in Opp. 7, 20, 27, 31), Secretary Ross asked his staff "why nothing ha[d] been done" about his "months old" request regarding the citizenship question. Pet. App. 158a. That "nothing" happened until *after* DOJ sent its formal request belies any claim that Secretary Ross had prejudged the issue; if he had, he simply would have exercised his authority to reinstate the citizenship question before then. Instead, he consulted other agencies, solicited formal inter-agency requests, and launched a formal decisionmaking process only *after* receiving DOJ's formal request. That is the opposite of prejudgment.

2. The district court also relied on the fact that "Secretary Ross overruled senior Census Bureau career staff," who recommended against reintroducing a citizenship question. Pet. App. 98a-99a. But "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). Indeed, "there's nothing unusual about a new cabinet secretary['s] * * * disagreeing with staff." 18A375 slip op. 2 (opinion of Gorsuch, J.). That is particularly true where, as here, the Secretary explained why he disagreed with the proposals favored by the staff. Besides, the ultimate issue

is one of policy—whether the benefits of reinstating the question outweigh the potential costs—and it is solely the Secretary, not his staff, "to whom Congress has delegated its constitutional authority over the census." *Wisconsin*, 517 U.S. at 23. It was thus clear legal error to treat overruling career staff as an indicium of bad faith.

3. The district court further concluded that respondents' "allegations suggest that [the government] deviated significantly from standard operating procedures in adding the citizenship question" because it did not conduct "any testing at all." Pet. App. 99a. But, as the Census Bureau advised Secretary Ross and as he explained in his decisional memorandum, the citizenship question "has already undergone the cognitive research and questionnaire testing required for new questions" because the question "is already included on the ACS." *Id.* at 148a. In fact, it has been on the ACS since 2005. *Id.* at 138a. Therefore, "the citizenship question *has* been well tested." *Ibid.* (emphasis added). Indeed that is precisely why Census Bureau staff concluded that "the costs of preparing and adding the question would be minimal." *Id.* at 148a. And despite the longstanding historical use of the citizenship question, including in the ACS, there was little evidence that reinstating the citizenship question would have any material impact on response rates. See *id.* at 146a-147a. It would thus have made little sense to conduct additional, expensive, time-consuming, and redundant testing of a question that already had been well tested for years. See 18A375 slip op. 2 (opinion of Gorsuch, J.) ("[T]here's nothing unusual about * * * cutting through red tape."). The court's crediting respondents' allegations was thus clearly erroneous.

4. Finally, the district court concluded that respondents had made "a prima facie showing" of "pretext[]"

because DOJ had never previously "suggested that citizenship data collected as part of the decennial census * * * would be helpful let alone necessary to litigating [VRA] claims." Pet. App. 99a. That rationale was misguided for two independent reasons.

First, there is no evidence (much less strong evidence) that the Secretary disbelieved DOJ's letter and instead thought that reinstating the citizenship question to the decennial census would *not* be useful for VRA enforcement. To the contrary, the record evidence shows the opposite. For example, contemporaneous emails in the administrative record show that Department of Commerce officials responded in good faith to DOJ's request "for the question to be included." Pet. App. 158a. And Secretary Ross's decisional memorandum makes clear that he took DOJ's formal request at face value and conducted "a thorough assessment" of the request, including holding dozens of meetings and reviewing dozens of letters from stakeholders. *Id.* at 137a. Those are not the actions of someone who disbelieved DOJ's request.

Second, the Gary Letter sets forth in detail the reasons why DOJ thought reinstating the citizenship question to the decennial census would be helpful for VRA enforcement and "mo[re] appropriate" than the ACS data that is currently used. Pet. App. 153a. Those reasons included: avoiding having to "rely[] on two different data sets"—namely, the ACS and the decennial census—"the scope and level of detail of which vary quite significantly," *id.* at 155a; avoiding the imprecision of ACS estimates, which "do not align in time with the decennial census data" and whose "margin of error increases as the sample size * * * decreases," *id.* at 156a; and allowing DOJ to obtain CVAP data at the "census block" level, the most granular level possible, rather than at

the larger "census block group" level, which is all the ACS can offer, *ibid.* DOJ concluded that "[h]aving all of the relevant population and citizenship data available in one data set * * * would greatly assist the redistricting process." *Ibid.* The district court never engaged with any of these reasons.

The bare fact that respondents *alleged* that "the current Department of Justice has shown little interest in enforcing the Voting Rights Act," Pet. App. 99a, neither establishes a prima facie case of *Secretary Ross*'s bad faith nor calls into question DOJ's commitment to enforce the VRA. Cf. *Armstrong*, 517 U.S. at 464 (presumption of good faith applies to Executive Branch officials). As DOJ explained in the Gary Letter, Section 2 of the VRA prohibits "vote dilution" by state and local officials engaged in redistricting. Pet. App. 153a. Because redistricting cycles are tied to the decennial census, fewer new Section 2 cases would be expected at this point in the decade to challenge redistricting plans drawn using data from the prior census. In any event, DOJ's conclusion that block-level citizenship data would be useful in enforcing Section 2 remains true regardless of whether the current administration will have the opportunity to use the information collected. And, as Secretary Ross concluded, "the value of more complete and accurate data derived from surveying the entire population outweighs * * * [and] is of greater importance than any adverse effect that may result from people violating their legal duty to respond." *Id.* at 150a.

2. The district court clearly and indisputably erred in compelling the deposition of Secretary Ross

Beyond improperly finding that respondents had made a "strong showing of bad faith," *Overton Park*, 401 U.S. at 420—thereby opening the door to discovery

into Secretary Ross's mental processes—the district court exacerbated its error by compelling the deposition of Secretary Ross himself.

a. "[A] district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding." *In re USA*, 624 F.3d 1368, 1376 (11th Cir. 2010). So said this Court in *Morgan II*, 313 U.S. at 421-422. Instead, as this Court and lower courts applying *Morgan II* and its predecessor, *Morgan* v. *United States*, 304 U.S. 1 (1938), have recognized, compelling the testimony of high-ranking governmental officials is justified only in "extraordinary instances." *Arlington Heights*, 429 U.S. at 268; accord, *e.g.*, *In re United States*, 542 Fed. Appx. 944, 948 (Fed. Cir. 2013); *Lederman* v. *New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *In re USA*, 624 F.3d at 1376; *Bogan* v. *City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586-587 (D.C. Cir. 1985). That strict limitation on the compelled testimony of high-ranking officials is necessary because such orders raise significant "separation of powers concerns." *In re USA*, 624 F.3d at 1372 (citation omitted); see *Arlington Heights*, 429 U.S. at 268 & n.18. As *Morgan II* emphasized, administrative decisionmaking and judicial processes are "collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." 313 U.S. at 422. "Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *Ibid.* (citation omitted).

As a practical matter, requiring high-ranking officials to appear for depositions also threatens to "disrupt the functioning of the Executive Branch." *Cheney*,

542 U.S. at 386. High-ranking governmental officials "have 'greater duties and time constraints than other witnesses.'" *Lederman*, 731 F.3d at 203 (citation omitted). As a result, "[i]f courts did not limit the[] depositions [of high-ranking officials], such officials would spend 'an inordinate amount of time tending to pending litigation.'" *Ibid.* (citation omitted). The threat to inter-Branch comity is particularly acute where, as here, the district court orders a Cabinet Secretary's deposition expressly to test the Secretary's credibility and to probe his deliberations with other Executive Branch officials. See Pet. App. 13a-17a.

b. The district court clearly erred in concluding that "exceptional circumstances" justify Secretary Ross's deposition. Pet. App. 10a (citations omitted). The court's "exceptional circumstances" finding was based on its conclusion that "the intent and credibility of Secretary Ross himself" are "central" to respondents' claims. *Id.* at 16a. That conclusion was erroneous for the reasons above: in a challenge to an agency decision, it is "not the function of the court to probe the mental processes of the Secretary." *Morgan II*, 313 U.S. at 422 (quoting *Morgan I*, 304 U.S. at 18).

The district court purported to find an exception to this rule in *National Association of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007). The court reasoned that, to prevail on their APA claims, respondents "must show that Secretary Ross 'relied on factors which Congress had not intended [him] to consider, . . . [or] offered an explanation for [his] decision that runs counter to the evidence before the agency.'" Pet. App. 11a (quoting *Home Builders*, 551 U.S. at 658) (citation omitted; brackets in original). The court then concluded that,

because Secretary Ross was the decisionmaker, his deposition would aid respondents in making that showing. *Id.* at 13a. But *Home Builders* does not suggest that APA plaintiffs may look beyond the stated reasons for the agency's decision and the administrative record to prove their claims, let alone that they should be permitted to depose a Cabinet Secretary to probe his mental processes. To the contrary, the Court emphasized that courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Home Builders*, 551 U.S. at 658 (citations omitted). Here, the path Secretary Ross took to his decision to reinstate a citizenship question can readily be discerned from his decisional memorandum, his supplemental memorandum, and the extensive administrative record. And even if it could not be discerned, the remedy would be to remand to the agency for further explanation—not to order the deposition of the Cabinet official who heads the agency.

c. Nor did the district court properly evaluate whether respondents could obtain the information they sought by other means. "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). The Department of Commerce provided respondents with thousands of pages of materials, including materials reviewed and created by the Secretary's most senior advisers, among other discovery responses. And respondents deposed a number of senior Census Bureau, Department of Commerce, and DOJ officials, including (over the government's objection) Acting AAG Gore. Respondents are well aware of the cir-

cumstances that led to the decision to reinstate a citizenship question. Secretary Ross's deposition is unlikely to add any material details, all the more so because much of his testimony likely would be privileged. See *Arlington Heights*, 429 U.S. at 268 (decisionmaker's testimony "frequently will be barred by privilege").

The district court barely paused to consider whether these materials satisfied respondents' informational demands. Even *Overton Park*, the case on which respondents rely most heavily, made clear that extra-record discovery, including the compelled testimony of the agency decisionmaker, is inappropriate if "the Secretary can prepare formal findings * * * that will provide an adequate explanation for his action." 401 U.S. at 420. Here the Secretary prepared precisely that in his decisional memorandum and supplemental memorandum. Indeed the court refused to consider *any* alternative to deposing the Secretary—such as interrogatories, requests for admission, or a Rule 30(b)(6) deposition, all of which the government offered—because, in the court's view, none would allow respondents to probe the Secretary's credibility or ask follow-up questions. See Pet. App. 19a.

d. Instead, the district court jumped straight to ordering a deposition on the ground that Secretary Ross had "unique first-hand knowledge" about his intent in reinstating a citizenship question. Pet. App. 11a (citation omitted). But none of the court's rationales withstands scrutiny.

i. The district court asserted that Secretary Ross was "personally and directly involved" in the decision to reinstate a citizenship question "to an unusual degree." Pet. App. 13a. Yet the court did not explain how Secretary Ross's direct participation in the decision to reinstate

a citizenship question was "unusual." It is not at all exceptional for an agency head to participate actively in an agency's consideration of a significant policy decision —particularly one that concerns, as the court described it, one of the agency head's "most important dut[ies]." *Id.* at 22a. Nor is it "unusual" that Secretary Ross informally consulted with staff and DOJ before DOJ sent its formal request. For these reasons, courts have rejected the notion that a decisionmaker's personal involvement in the decision qualifies as an exceptional circumstance in this context. *In re United States*, 542 Fed. Appx. at 946 (high-ranking official's supposed "personal involvement in the decision-making process" did not provide a basis for deposing that official); *In re FDIC*, 58 F.3d 1055, 1061 (5th Cir. 1995) (that three directors of the FDIC were the only "persons responsible for making the [challenged] decision" did not justify their depositions).

ii. The district court likewise erred in concluding that Secretary Ross's testimony was needed "to fill in critical blanks in the current record." Pet. App. 17a. The court identified those "blanks" as "the substance and details of Secretary Ross's early conversations" with "the Attorney General," "interested third parties such as Kansas Secretary of State Kris Kobach," and "'other senior Administration officials.'" *Ibid.* (citation omitted). This was erroneous for at least three reasons.

First, the Secretary's alleged conversations with third parties are irrelevant to respondents' APA claims here. Those claims seek to set aside the agency's decision to reinstate the citizenship question to the decennial census. But as described above, the proper focus of a court's review of that decision is on the reasons *the*

agency gave for making that decision—here, the reasons stated in Secretary Ross's decisional memorandum. *Florida Power & Light Co.*, 470 U.S. at 744; *Camp*, 411 U.S. at 142. That some third parties and outside stakeholders might have had other reasons for supporting the reinstatement of a citizenship question that they shared with the Secretary has no bearing on the validity of the agency's stated reasons for its action. See *Sierra Club* v. *Costle*, 657 F.2d 298, 408-409 (D.C. Cir. 1981).

Second, even if these conversations were somehow relevant to the substance of respondents' claims, they in no way establish the Secretary's *bad faith*, which is what is required to trigger extra-record discovery. *Overton Park*, 401 U.S. at 420. "[T]he fact that agency heads considered the preferences (even political ones) of other government officials concerning how th[eir] discretion should be exercised does not establish the required degree of bad faith or improper behavior." *In re FDIC*, 58 F.3d at 1062. Indeed agency decisionmakers are generally free to meet with White House and other governmental officials, legislators, and even industry advocates while considering agency action. See *Sierra Club*, 657 F.2d at 409. Nor is it of any moment that respondents believe these third parties themselves might have been motivated by improper reasons. Even if that were true, it would affirmatively contradict the presumption of regularity and inter-Branch comity to impute any alleged biases of these third parties to Secretary Ross. See *Armstrong*, 517 U.S. at 464; see also *Cheney*, 542 U.S. at 381.

Third, at all events, the administrative record here *does* reflect the substantive views of many stakeholders who communicated with Secretary Ross and the Department of Commerce—including Secretary Kobach

and DOJ. See, *e.g.*, Pet. App. 152a-157a (Gary Letter); Administrative Record (A.R.) 763-764 (emails from Secretary Kobach); A.R. 765-1276 (additional communications).[7] And to the extent respondents seek information about the Secretary's deliberations with other governmental officials, those discussions likely are privileged, rendering the Secretary's deposition both improper and futile. See *Arlington Heights*, 429 U.S. at 268 (decisionmaker's testimony "frequently will be barred by privilege").

B. No Other Adequate Means Exist To Attain Relief

Absent review on mandamus, the district court's order compelling the deposition of Secretary Ross will effectively be unreviewable on appeal from final judgment. Secretary Ross will be forced to prepare for and attend a deposition, which cannot be undone. The government thus has "no other adequate means" of protecting its interests. *Perry*, 558 U.S. at 190 (citation omitted). And that logic applies equally to the orders compelling extra-record discovery into Secretary Ross's mental processes more generally; for until the district court enters a judgment and that judgment becomes final (without a remand) after review by the court of appeals and perhaps this Court, it remains a near certainty that the district court will rely on evidence of Secretary's mental processes in its analysis. Indeed other district courts, relying on the district court's and court of appeals' orders in this case, already have ordered similar extra-record discovery into Secretary Ross's mental processes. *E.g.*, *Kravitz* v. *United States Dep't of Commerce*, No. 18-cv-1041,

[7] A link to these pages of the administrative record, which are publicly available, is in 18-cv-2921 D. Ct. Doc. 173 (June 8, 2018).

2018 WL 4005229 (D. Md. Aug. 22, 2018); Order Granting Request to Conduct Discovery Outside the Administrative Record, *California* v. *Ross*, No. 18-cv-1865 (N.D. Cal. Aug. 17, 2018), ECF No. 76.

To be sure, the government might be able to raise some of the arguments asserted in this brief following the district court's entry of final judgment—if it is in favor of respondents and assuming the court relies on the extra-record evidence in reaching its decision. But an appellate reversal at that point would hardly provide an "adequate" means of relief. *Cheney*, 542 U.S. at 380 (citation omitted). It would not remedy the irreversible burdens of preparing for and being deposed, all in service of a trial to resolve an issue that under bedrock principles of administrative law should be resolved solely on the administrative record; and it likely would come far too late given the need to finalize the census questionnaire by mid-2019. See, *e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761, 764 (D.C. Cir. 2014) (Kavanaugh, J.) (granting mandamus where appeal after final judgment would not provide an "adequate" means of obtaining relief), 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.) (same); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932 (3d ed. 2012 & Supp. 2018) (citing similar cases).

C. Mandamus Is Appropriate Under The Circumstances

As this Court has recognized, "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382. Here, a Cabinet Secretary would be forced to prepare for and attend a deposition,

which would indisputably "interfer[e] with" his "ability to discharge [his] constitutional responsibilities." *Ibid.* And document discovery—especially into the Secretary's mental processes—also is intrusive and "burdens a coordinate branch in most unusual ways." 18A375 slip op. 3 (opinion of Gorsuch, J.); cf. *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam).

Nor is it of any moment that the extra-record discovery and the depositions (save for Secretary Ross's) already have occurred; respondents have not disavowed their intent to depose Secretary Ross (presumably to offer as supplemental evidence to the district court), so mandamus is appropriate—indeed essential—to the government's ability to secure relief. And a reversal of the court of appeals' orders denying mandamus relief on extra-record discovery more generally would avoid the district court's having to make two parallel sets of rulings, as it indicated it would do, Pet. App. 114a, or, at a minimum, would help to focus appellate review of the district court's final judgment when it is eventually issued. For the reasons stated above, that judgment should be based solely on the agency's stated reasons for its action and the objective evidence in the administrative record.

CONCLUSION

The Court should reverse the court of appeals' decisions denying the government's petitions for writs of mandamus to (1) quash the deposition of Secretary Ross; and (2) exclude from the district court's consideration all extra-record evidence concerning Secretary Ross's mental processes.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. I, § 2, Cl. 3 provides in pertinent part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * * . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

* * * * *

2. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 13 U.S.C. 2 provides:

Bureau of the Census

The Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.

4. 13 U.S.C. 4 provides:

Functions of Secretary; regulations; delegation

The Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and duties, and may delegate the performance of such functions and duties and the authority

to issue such rules and regulations to such officers and employees of the Department of Commerce as he may designate.

5. 13 U.S.C. 5 provides:

Questionnaires; number, form, and scope of inquiries

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

6. 13 U.S.C. 141(a) provides:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

7. 13 U.S.C. 221 provides:

Refusal or neglect to answer questions; false answers

(a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary, or by any other authorized officer or employee of the Department of Commerce or bureau or agency

thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100.

(b) Whoever, when answering questions described in subsection (a) of this section, and under the conditions or circumstances described in such subsection, willfully gives any answer that is false, shall be fined not more than $500.

(c) Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.