No. 18-557

In The Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF OKLAHOMA, ARKANSAS, ALABAMA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, SOUTH CAROLINA, TEXAS, UTAH, AND THE PEOPLE OF THE STATE OF COLORADO *EX REL.* CYNTHIA H. COFFMAN, IN HER OFFICIAL CAPACITY AS COLORADO ATTORNEY GENERAL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Amici curiae are the States of Oklahoma, Arkansas, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, Nebraska, South Carolina, Texas, Utah, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, in her Official Capacity as Colorado Attorney General ("Amici States"). Amici States rely upon demographic information specifically provided by the U.S. Department of Commerce when redistricting. 13 U.S.C. § 141(c). The Department's decision to include a citizenship question in the 2020 Census will improve Amici States' ability to comply with the Voting Rights Act of 1965 ("VRA"), codified at 52 U.S.C. § 10301, by affording States superior data of the citizen voting age population.[1]

For purposes of this appeal, no one disputes that the federal government generally possesses the constitutional and statutory authority to include a citizenship question on a census form. *State v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 799-806 (S.D.N.Y. 2018); *United States v. Moriarity*, 106 F. 886 (C.C.S.D.N.Y. 1901); *Morales v. Daley*, 116 F. Supp. 2d

[1] Oklahoma together with 17 other States filed an amicus brief in support of Petitioners at the trial court stage. Doc. 162-1 (June 1, 2018) (Brief of the States of Oklahoma, Louisiana, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, by and through Gov. Matthew G. Bevin, Maine, by and through Gov. Paul R. LePage, Michigan, Missouri, Montana, Nebraska, South Carolina, Tennessee, and Texas, and the People of the State of Colorado *ex rel.* Cynthia H. Coffman, In Her Official Capacity as Colorado Attorney General, as Amici Curiae in Support of Defendants' Motion to Dismiss).

801, 809 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001). But States have an interest in rebutting assertions that the citizenship question was added to the 2020 Census for pretextual reasons, in part because the States themselves requested the question for the reasons stated herein.

Moreover, the States have an interest in "protect[ing] officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978). If this Court should permit the deposition of a federal cabinet officer in order to ascertain his subjective motives in making a commonplace administrative decision, that would open the floodgates for similar depositions and subpoenas against state officers.

SUMMARY OF ARGUMENT

Citizenship still matters. It has always been and continues to be the hallmark of civic participation. *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950). It is nothing short of sovereignty as it exists at the atomic level. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995). The lack of reliable data on citizenship degrades each citizen's right to participate in free and fair elections. When legislators determine districts based on population without access to accurate statistics on citizenship, the result is that legally eligible voters may have their voices diluted or distorted. Matters of such constitutional importance should not be unnecessarily imperiled when the solution is as simple as a question on a census form.

In recognition of this commonsense principle, the Department has decided to include a question about citizenship on the 2020 Census. Such a question is hardly dissimilar to asking about a resident's age, name, race, sex, relationship status, Hispanic origin, and housing status—the other questions to be asked on the 2020 Census. And including a citizenship question stands to provide substantial, known benefits to States complying with the VRA.

Yet "[a]s one season follows another, the decennial census has again generated a number of reapportionment controversies." *Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992); *see also Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (noting "the plethora of lawsuits that inevitably accompany each decennial

census"). This time, Respondents argue that government's facially neutral policy was made with an impermissible intent. Unable to prove this point by reference to the administrative record, Respondents seek to compel the deposition of a cabinet-level official: Commerce Secretary Wilbur Ross.

Amici States respectfully urge this Court to reverse for two important reasons. First, including a citizenship question on the 2020 Census would yield significant benefits to Amici States by providing them superior data to use in their efforts to comply with the VRA, as well as reducing litigation surrounding VRA compliance. It is historically grounded, legally sound, and justified by common sense; no pretext or ill motive should be inferred from its inclusion. The district court's order permitting the deposition of Secretary Ross, based on the assumption that inclusion of the question was pretextual, was fundamentally flawed.

Second, failing to immunize a high-level federal official from such subpoena requests would set a dangerous precedent that would permit litigants to employ the same *in terrorem* litigation tactics against senior state government officials. Amici States have already faced numerous such requests, and a decision by this Court affirming the decision below would have significant negative consequences for the day-to-day administration of state governments across the nation.

ARGUMENT

I. Inclusion Of The Citizenship Question On The 2020 Census Is Not Pretextual, But Instead Is Justified By Historical Practice And The Significant Benefits It Provides To Amici States.

The district court concluded that discovery outside the administrative record in this case was permitted in part based on the conclusion that the justification for the citizenship question—to obtain better day for enforcement of the VRA—was not valid and therefore pretextual. Pet. App. 99a-100a. But far from being unjustifiable and necessarily the product of pretext, the Bureau's decision to include a citizenship question reflects long historical practice and good public policy. Questions about citizenship and other characteristics of a population in a census have been asked for millennia across the Western world, and have been asked to those in America over a billion times. Doing so would provide substantial benefits by reducing litigation under Section 2 of the VRA, allowing States to achieve greater certainty in redistricting, and promoting the equal suffrage of all citizens. Any suggestion that this question might only stem from impermissible motives ignores these historical and practical realities.

A. Census Citizenship Questions Are Historically Commonplace.

"Census taking is an age-old practice," *Utah v. Evans*, 536 U.S. 452, 496 (2002) (Thomas, J., concurring

in part and dissenting in part), and has long been a tool to collect more information beyond a mere headcount. The Pharaohs of Ancient Egypt, in addition to a headcount, asked every inhabitant to declare how he earned his living. HERODOTUS, HISTORIES 2.177. The Bible records several censuses, which were not exclusively limited to headcounts. EXODUS 30:11-16 (collecting atonement monies); NUMBERS 1-4 (separately counting men above the age of 20 capable of military service); 1 CHRON. 21 (same). And Ancient Athens was known to have separately counted citizens, metics (*i.e.*, resident aliens), and slaves. HAYMAN ALTERMAN, COUNTING PEOPLE: THE CENSUS IN HISTORY 30 (1969).

Most notably, the Roman "census" (whence the English word derives) was established in the 6th century B.C. by King Servius Tullius to count the number of arms-bearing citizens. LIVY, AB URBE CONDITA 42.4-5. During the Roman Republic, the head of each family was required to appear in the Campus Martius to give under oath an account of himself, his family, and all his property, including: his full name, whether he was a freedman, his age, whether he was married, the number and names of children, a list of all his property, and his citizenship status. Officials made a list of citizens that was then published.

The first English census was taken by William I and published in the Domesday Book in 1086. Inhabitants were asked: what the local manor was called; who held it in 1066; who held it now; the area of land the manor encompassed; how many ploughs there were; how many freemen, sokemen, villans, cottages, and

slaves there were; a description of the land's natural resources; a valuation of the property; and a description of how much property each freeman and sokeman had.[2]

"[F]rom the first census, taken in 1790, the Congress has never performed a mere headcount. It has always included additional data points, such as race, sex, and age of the persons counted." *Morales*, 116 F. Supp. 2d at 809. Between 1820 and 1950, almost every decennial census asked a question about citizenship in some form. Act of March 14, 1820, 3 Stat. 548, 550; Act of March 23, 1830, 4 Stat. 383, 389; Act of May 23, 1850, 9 Stat. 430, 433; Act of March 3, 1879, 20 Stat. 475, 477; Act of March 3, 1899, 30 Stat. 1014, 1015; Act of July 2, 1909, 36 Stat. 1, 3; Act of March 3, 1919, 40 Stat. 1291, 1294; Act of June 18, 1929, 46 Stat. 21, 22; *see also* Dfs. Motion to Dismiss, Doc. 155, at 3-6 (May 25, 2018) ("MTD") (reviewing history of census questions). It was not until 1960—following more than 30 years of very low immigration levels—that the census omitted a question about citizenship, although even that census asked about each respondent's "[p]lace of

[2] Before the first decennial census in 1790, no modern nation in the Western world had conducted a census (although several colonial States did so). The Twenty-Second Decennial Census, 18 U.S. Op. Off. Legal Counsel 184, 188 (1994) (citing ALTERMAN, *supra*, at 164). The absence of a national census between the Domesday Book and Enumeration Clause appears to be explained by a fear that the biblical plague that beset the Jews after David's census would reprise itself. Indeed, the British seem to have only instituted their modern census after receiving assurances from the American example that nothing bad would happen if their people were enumerated. ALTERMAN, *supra*, at 205-07.

birth" and "[i]f foreign born . . . the person's mother tongue" (as well as the birth country of each person's mother and father).[3] In 1970, the census included on its long-form questionnaire: "Where was this person born?" and "For persons born in a foreign country—Is the person naturalized?"[4] Again in 1980, the census asked a sample of respondents "In what state or foreign country was the person born?" and "If this person was born in a foreign country . . . Is this person a naturalized citizen of the United States?"[5] Then in 1990, the long-form, sent to about one in six households,

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[3] U.S. Census Bureau, *History: 1960 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1960_population.html. A citizenship question *was* included on the 1960 Census questionnaire for all residents of New York state. *See* Frederick G. Bohme, *Twenty Censuses: Population and Housing Questions 1790-1980*, Bureau of the Census, at 71 (Oct. 1979), https://www.census.gov/history/pdf/20censuses.pdf.

[4] U.S. Census Bureau, *History: 1970 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1970_population.html. Contrary to Respondents' assertion that "no citizenship question has been included on the decennial census since 1950," Pls. First Amend. Compl., Doc. 85, at ¶ 97 & n.43 (Apr. 30, 2018) ("FAC"), the long-form questionnaire *was* the decennial census questionnaire for selected households from 1970 to 2000. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION AND HOUSING: PROCEDURAL HISTORY, § 15, 1 (1976); BUREAU OF THE CENSUS, PROCEDURAL HISTORY: 1980 CENSUS OF POPULATION AND HOUSING, § 12, 3; BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, § 14, 3; BUREAU OF THE CENSUS, 2000 CENSUS OF POPULATION AND HOUSING, V.1, chapter 1, 3 (2009).

[5] U.S. Census Bureau, *History: 1980 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1980_population.html.

directly asked respondents "Is this person a citizen of the United States?"[6] And it repeated this question in 2000.[7]

Following the 2000 Census, the Bureau decided to retire the long-form questionnaire and initiate the American Community Survey ("ACS"), beginning in 2005. The ACS features a question on citizenship, and this has been asked every year from 2005 until the present.[8]

In total, the federal government has asked a resident whether he is a citizen of this country more than a ***billion*** times since 1820.[9] Given this nearly unbroken history of asking about citizenship—repeatedly in the decennial census, and yearly in the ACS—it is a dramatic understatement to say that including a citizenship question on the upcoming census would be "wholly unremarkable." Pet. 13. Claims that re-insertion of such a question, grounded in millennia of history, must be based on impermissible motives are simply not plausible on their face.

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[6] U.S. Census Bureau, *History: 1990 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1990_population.html.

[7] U.S. Census Bureau, *History: 2000*, www.census.gov/history/www/through_the_decades/index_of_questions/2000_1.html.

[8] U.S. Census Bureau, *American Community Survey: Questionnaire Archive*, www.census.gov/programs-surveys/acs/methodology/questionnaire-archive.html.

[9] This figure includes all residents enumerated from 1820 to 1830 and from 1850 to 1950, plus those who responded to the long-form questionnaire from 1980 to 2000, as well as all those surveyed in the ACS from 2005 to 2016.

B. Amici States Will Benefit From Accurate, Granular Citizenship Information When Complying With This Court's Decisions Interpreting The VRA.

States must comply with Section 2 of the VRA, which prohibits any practice that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301. Claims under Section 2 most commonly involve allegations of vote dilution, *i.e.*, "the dispersal of [a minority group] into districts in which they constitute an ineffective minority of voters or by the concentration of [the minority] into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). To establish a vote dilution claim, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district." *Id.* at 50 & n.16.

But this Court has made clear that it is not enough to say that a minority group forms the majority of the total population in a given area, or even forms "a bare majority of the voting-age population"; rather, "the relevant numbers must include citizenship" since "only eligible voters affect a group's opportunity to elect candidates." *LULAC v. Perry*, 548 U.S. 399, 429 (2006). Failure to take into account citizenship risks creating majority-minority districts "only in a hollow sense." *Id.* Thus, in order for States to achieve any certainty over whether their districts comply with Section 2, they

must obtain information about the voting-eligible population.[10]

In recent years, because "[t]he decennial census does not include a question on citizenship," "the sole source of citizenship data published by the Census Bureau now comes from the American Community Survey [ACS]." *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 687 (S.D. Tex. 2017) (citations omitted). Yet as Respondent the State of New York and other Respondents in this case have acknowledged elsewhere, ACS data is inferior for several reasons. Brief of New York *et al.* as *Amici Curiae* in Support of Appellees, *Evenwel v. Abbott*, No. 14-940, at 1-5 & 14-26 (U.S. Sept. 25, 2015) ("N.Y. Br., *Evenwel*"). In other words, up until this litigation, Respondents—and everyone else—acknowledged the inferiority of ACS citizenship data, as further explained below.

1. ACS data is less accurate than decennial census data.

Statistical accuracy in Section 2 litigation is very important, as cases often come down to 1% or 2% differences in the citizen voting age population of a challenged district. *See*, *e.g.*, *LULAC*, 548 U.S. at 429; *Luna*

[10] Because of demographic and socioeconomic differences between minority populations and the national population, States cannot assume that the percentage of minority voter-eligible residents in a given area matches the percentage of minority residents in the same area. Brief of U.S., *Evenwel v. Abbott*, No. 14-940, at 33 (Sept. 25, 2015). A higher proportion of the country's minority population consists of children under the age of 18, and there are disparities in the rates of citizenship among ethnicities. *Id.*

v. Cty. of Kern, 291 F. Supp. 3d 1088, 1114 (E.D. Cal. 2018); *Rios-Andino v. Orange Cty.*, 51 F. Supp. 3d 1215, 1224-25 (M.D. Fla. 2014). But ACS data is less accurate than data obtained from the census. The ACS surveys only one out of every thirty-eight households, whereas a census question would reach every resident. This smaller sample size translates to larger margins of error. Courts presume the decennial census data is accurate and reliable, *e.g.*, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-54 (5th Cir. 1999); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 439 (S.D.N.Y. 2010), but the reliability of ACS data is a significant and costly focus of Section 2 litigation, particularly in cases involving small political units like town councils and school districts for which ACS data has large margins of error. *See*, *e.g.*, *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 459-60 (N.D. Tex. 2010) (rejecting plaintiff's reliance on ACS data); *see also Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1033 & n.10 (E.D. Mo. 2016); *Pope v. Cnty. of Albany*, No. 11-CV-0726, 2014 WL 316703, at *13 n.22 (N.D.N.Y. Jan. 28, 2014).

Indeed, litigants often must expend significant resources to cull separate corroborative data to successfully overcome criticisms of ACS data. *See*, *e.g.*, *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *4-8 (N.D. Tex. Aug. 2, 2012). And even where the parties agree that it is appropriate to use ACS data, there is litigation over obscure technical issues about *how* to use the data. *See*, *e.g.*, *Rios-Andino*, 51 F. Supp. 3d at 1224-25 (resolving dispute over

whether ACS data indicated proposed district had 50.19% or 48.0% Latino citizen voting age population). The inclusion of a citizenship question in the 2020 Census would obviate these many problems and costs imposed by the inaccuracy of ACS data.

2. ACS data is less granular than decennial census data.

Second, ACS data is less granular than decennial census data. Census data is available at the level of census block groups (600 – 3,000 people) and census tracts (1,500 – 8,000 people).[11] But because of the ACS's limited sample size, its 1-year estimates are only statistically reliable for areas of 65,000 people or more. *Perez v. Perry*, No. SA-11-CV-360, 2017 WL 962686, at *3 (W.D. Tex. Mar. 10, 2017). In other words, such data is reliable only for 6.6% of school districts, 10.4% of urban areas, and 25% of counties in the country.[12] The ACS's 3-year estimates are available for areas containing more than 20,000 people, and only the 5-year estimates are available for smaller areas such as census tract and block groups—although even here "block group estimates may contain large margins of error." *Id.* Respondents themselves have previously argued to this Court that, without a citizenship question

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[11] U.S. Census Bureau, Participant Statistical Areas, *available at* www2.census.gov/geo/pdfs/partnerships/PSAP_info_sheet.pdf.

[12] U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What State and Local Governments Need to Know*, at 2-3 (Feb. 2009), www.census.gov/content/dam/Census/library/publications/2009/acs/ACSstateLocal.pdf.

on the census, "[Citizen Voting Age Population] figures simply do not exist at the level of granularity that the States require for purposes of drawing state legislative districts." N.Y. Br., *Evenwel*, at 19.

3. ACS data is not compatible with other decennial census data.

Third, the ACS dataset does not mesh with the decennial census dataset. ACS data is continually collected on a monthly basis and only later aggregated into one-, three-, and five-year estimates. The decennial census, by contrast, is a snapshot of the country taken once per decade. Further complicating matters, ACS geography (*e.g.*, urban areas, census tracts, block groups, *etc.*, as well as how those terms are defined) resets with the decennial census, which results in data discontinuity at precisely the time officials who are engaged in redistricting need race and citizenship data to ensure VRA compliance. Thus, any attempt to merge population data from the census with citizenship data from the ACS requires significant adjustments to the datasets.

Accordingly, it was bizarre for the district court to find that, because census citizenship data "is by definition quickly out of date," it cannot be helpful in enforcing the VRA. Pet. App. 99a. That is true of *all* census data upon which *all* redistricting is premised. The district court's argument is not a criticism of the citizenship question; it is an attack on the census itself. Because VRA compliance and enforcement relies primarily on decennial census data—including for total

population and racial demographic figures—it is *better* for the citizenship data to stem from that same source, rather than a completely separate survey.

4. ACS data is not authoritative and subject to manipulation in litigation.

Fourth, the ACS does not provide an authoritative dataset for States to rely upon. Rather, courts must wrestle with whether the relevant dataset should be the one-, three-, or five-year estimate. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 777 (2001) ("Each [range] . . . indicate[s] a different number of citizens, include[s] a different statistical range for each level of geography, and [is] amenable to different arguments as to their relative validity."). And litigants may further debate when the relevant time period should begin and end. *See*, *e.g.*, *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 731-33 (S.D. Tex. 2013) (resolving whether to use 2005-2009 or 2006-2010 ACS data). In contrast, the decennial census occurs only once every ten years. There is no room for manipulation in selecting the relevant time-band—a virtue Respondents themselves have acknowledged. *See* N.Y. Br., *Evenwel*, at 19-20; *cf. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348-49 (1999) (Scalia, J., concurring in part) (arguing for the interpretation "with minimal possibility of partisan manipulation").

* * *

In the absence of reliable citizenship data from the federal census, States lack the resources to conduct their own statewide citizenship surveys. Some States—including Respondents New York and Massachusetts—used to do so in order to apportion state districts according to citizen populations. N.Y. Br., *Evenwel*, at 1-5. Yet because States lacked the expertise and resources of the Bureau, their data was intolerably inaccurate. Ruth C. Silva, *The Population Base for Apportionment of the New York Legislature*, 32 FORDHAM L. REV. 1 (1963). As a result, several States specifically amended their Constitutions to require only apportionment by population. *See* N.Y. Const. art. III, § 5-a; Mass Const. art. CXII; Tenn. Const. art. II, §§ 4-6.

Significant amounts of Section 2 litigation stem from the inaccuracies of ACS data, its incompatibility with decennial census data, and the lack of any authoritative dataset.[13] These uncertainties are compounded by the corresponding uncertainty as to how any particular court will view the same issues. The Bureau's simple step of adding a citizenship question to the census will reduce the likelihood of litigation, and the expense of litigation that does occur, by providing a unified dataset that will be authoritative, accurate, and reliable. Legislatures can therefore draw districts with greater

[13] For example, *compare* Expert Report of Jorge Chapa, Ph.D. (Univ. of Ill. at Urbana-Champaign), Doc. 128-5 (Aug. 8, 2011), *with* Expert Report of Stephen Ansolabehere, Ph.D. (Harvard University), Doc. 272 (Aug. 31, 2011). *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex.).

certainty. And citizens, in turn, can rest more confident that their fundamental right to vote is adequately protected.

In light of these benefits, sixteen States wrote letters to the Secretary of Commerce formally requesting that he include a citizenship question on the 2020 Census. Letter from Jeff Landry, Attorney General of Louisiana, to Wilbur Ross, U.S. Secretary of Commerce (Feb. 8, 2018), Administrative Record ("AR") 1079; Letter from Steve Marshall, Attorney General of Alabama, to Wilbur Ross, U.S. Secretary of Commerce (Feb. 23, 2018), AR 1163; Letter from Ken Paxton, Attorney General of Texas, to Dr. Jamin, U.S. Census Bureau (Feb. 23, 2018), AR 1155; Letter from Mike Hunter, Attorney General of Oklahoma, *et al.*, to Wilbur Ross, U.S. Secretary of Commerce (Mar. 13, 2018), AR 1210. Based in part upon these requests, the Department plans to include a citizenship question on the 2020 Census. Pet. App. 137a, Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs, from Wilbur Ross, Jr., Secretary of Commerce, on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire at 1 (Mar. 26, 2018) ("[M]y staff and I reviewed over 50 incoming letters from stakeholders, interest groups, Members of Congress, and state and local officials regarding reinstatement of a citizenship question on the 2020 decennial census."). Respondents' allegations that the citizenship question was only added to serve impermissible motives cannot be squared with the reality reflected in the administrative record of the chorus of States requesting this question in light of the undeniable benefits it would confer.

C. Including A Citizenship Question Will Not Have Any Adverse Effect On Participating Residents.

It appears that Respondents' principal justification for deposing Secretary Ross is to prove that the true motivation of adding the citizenship question was to harm racial minorities. But there is no evidence to believe that this motive for adding the question is even plausible. Census respondents have zero reasons to fear that disclosing their citizenship status will negatively affect them in any way.

Respondents' allegations of fear is nothing new. Even in the very first census the federal government had to grapple with the fear of an undercount "because the religious scruples of some, would not allow them to give in their lists" and others "fear[ed] . . . that it was intended as the foundation of a tax[, which] induced them to conceal or diminished theirs." *Baldrige v. Shapiro*, 455 U.S. 345, 353-54 n.8 (1982) (quoting 31 The Writings of George Washington 329 (J. Fitzpatrick, ed. 1939)). Fear itself is no reason to grind the census to a halt. And irrational fears cannot be the basis for the fishing expedition outside of the administrative record that Respondents demand in this case.

1. Census responses could not convey whether the person responding is an illegal immigrant.

First, as a matter of logic, non-citizen status does not imply illegal alien status. Even if the federal

government sought to use census form responses to deport illegal immigrants, immigration officials would not be able to tell from the form whether a particular alien was here legally or illegally. *Cf. United States v. Greenberg*, 200 F. Supp. 382, 390-91 (S.D.N.Y. 1961) (noting that access to census lists "would be of little aid" in jury selection process).

As the Attorney General summarized long ago: "The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs." *FTC v. Orton*, 175 F. Supp. 77, 79-80 (S.D.N.Y. 1959) (quoting 36 Op. Att'y Gen. 362, 366 (1930)).

2. The Bureau is prohibited from sharing census response data with law enforcement.

Moreover, the Bureau is statutorily prohibited from sharing any data where an "individual . . . can be identified." 13 U.S.C. § 9(a)(2). "Sections 8(b) and 9(a) explicitly provide for the nondisclosure of certain

census data." *Baldrige*, 455 U.S. at 355. This "confidentiality of individual responses has long been assured by statute." *Franklin*, 505 U.S. at 818 n.18 (Stevens, J., concurring in part). And "the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality." *Carey v. Klutznick*, 653 F.2d 732, 739 (2d Cir. 1981) (citation and quotation marks omitted). By its text, "[n]o discretion is provided to the Census Bureau on whether or not to disclose the information referred to in §§ 8(b) and 9(a)." *Baldrige*, 455 U.S. at 355. As a result, this prohibition has been interpreted as "a flat barrier to disclosure with no exercise of discretion permitted." *Seymour v. Barabba*, 559 F.2d 806, 808 (D.C. Cir. 1977).

These protections reflect "a determination that the purpose of encouraging ready response to census inquiries would be better served by extending the privilege of confidentiality to the retained copies." *LaMorte v. Mansfield*, 438 F.2d 448, 452 (2d Cir. 1971) (Friendly, J.); *see also Baldrige*, 455 U.S. at 361 ("[T]he Census Act embod[ies] explicit congressional intent to preclude all disclosure of raw census data reported by or on behalf of individuals."). This "strong policy of nondisclosure" was implemented "to encourage public participation and maintain public confidence that information given to the Census Bureau would not be disclosed." *Id.* Indeed, the "Congressional purpose that filed information be kept inviolate is underscored by

[o]ther section[s] which impos[e] substantial criminal sanctions for any unauthorized disclosure." *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568, 572 (S.D.N.Y. 1958) (citing 13 U.S.C. § 214); *see also* 13 U.S.C. § 213.[14]

As a result, courts have staunchly protected the confidentiality of census response forms. *Fed. Trade Com. v. Dilger*, 276 F.2d 739, 744 (7th Cir. 1960) (holding retained copies of response forms are protected from disclosure); *United States v. Int'l Bus. Machs. Corp.*, 20 Fed. R. Serv. 2d 1082, 1975 WL 905 (S.D.N.Y. 1975) (holding the Bureau's refusal to release responses does not violate due process); *Orton*, 175 F. Supp. at 78-79 (holding responses are protected from disclosure to federal agencies); *Bethlehem Steel Corp.*, 21 F.R.D. at 572 (holding responses could not be disclosed because of Congress' "clear and unambiguous" intention to keep them privileged); *see also St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961) (noting the importance of "free and full" submissions by the public to the Bureau); *United States v. Little*, 321 F. Supp. 388, 392 (D. Del. 1971) ("[T]he information

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[14] As one court noted: "One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests." *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568, 570 (S.D.N.Y. 1958).

obtained by the census questionnaire is strictly confidential. It may not be used other than for statistical reporting and may never be disclosed in any manner so as to identify any individual who has answered the questions.") (citation omitted).

Not even States have a right to obtain census information that the Bureau deems confidential. *Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 978-79 (9th Cir. 1992) (California not entitled to Bureau's statistical methods because actual enumeration clause offers no right to disclosure). Nor, as a legal matter, should this Court rest its judgment on the assumption that federal executive officers will violate statutory law.

3. There is no empirical evidence that asking about citizenship will result in data suppression.

Nor is it plausible that the citizenship question was a deliberate attempt to cause an undercount in minority communities, since fears of an undercount are speculative at best.

Citizenship questions are not untested. Rather, they have consistently been included on *both* the decennial census and the ACS for many iterations. *Supra* at I.A. Respondents do not claim that asking about citizenship in these surveys has, in fact, had a detrimental effect on response rates. Rather, there is evidence suggesting the inclusion of the citizenship question in the ACS has had no effect on the response rate in minority communities. *Rodriguez v. Harris Cty.*,

964 F. Supp. 2d 686, 730-31 (S.D. Tex. 2013) (finding that ACS approximated the census tallies for ethnic and minority populations); *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *6 (N.D. Tex. Aug. 2, 2012) (noting that the ACS significantly over-represents the number of Hispanics in Dallas County). Further, when the citizenship question was introduced in the ACS in 2005, the response rate actually increased for the following four years.[15] Respondents' claims of data suppression are therefore exaggerated and unsupported, and such bald speculation cannot be the basis for deposing a Cabinet official.

Further evidence from the Bureau itself suggests that the inclusion of a citizenship question would not significantly deter participation in census surveys. In 2006, the Bureau studied proposed modifications to ACS questions, including the citizenship question. Philip Harris, *et al.*, *Evaluation Report Covering Place of Birth, U.S. Citizenship Status, and Year of Arrival* (Jan. 12, 2007).[16] The study concluded that revising that question to ask for more detailed information—namely, year of naturalization—did not impact either the overall response rate, which was greater than 95%, or the nonresponse rate to the citizenship question, which was about 3 percent. *Id.* at 15, 19. This high response rate—and the fact that even respondents who

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[15] U.S. Census Bureau, *American Community Survey: Response Rates*, www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates/.

[16] *Available at* www.census.gov/library/working-papers/2007/acs/2007_Harris_01.html.

decline to answer the citizenship question (the 3 percent) are still counted in the broader survey—undermine Respondents' theory that reintroducing a citizenship question in the census will cause an undercount. *Id.* at 19.

Rather than providing empirical support for their assertion, Respondents claim that the Bureau has acknowledged for decades that asking about citizenship reduces response rates. N.Y. Br. in Opp. 4. But the Bureau has acknowledged no such thing. Most of the alleged acknowledgements were responses to the proposed exclusion of undocumented residents from the census entirely. For example, Respondents cite *Federation for American Immigration Reform v. Klutznick*, N.Y. Br. in Opp. 4, 33, but the issue in that case was not whether to ask about citizenship, but whether the Bureau was required to "exclude [illegal aliens] from the apportionment base." 486 F. Supp. 564, 567 (D.D.C. 1980). Likewise, the 1988 and 1989 congressional testimony of Bureau officials, *see* First Am. Compl. ¶¶ 40-41, related to a proposal to exclude undocumented residents from the census.[17] With respect to that proposal, Bureau officials were primarily concerned with the effect of asking, not about citizenship, but about legal residency.[18] And rightfully so, since asking whether

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[17] *See* Census Equity Act, H.R. 2661, 101st Cong. § 2(2) (1989), www.congress.gov/bill/101st-congress/house-bill/2661/text.

[18] *See Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 43-44 (1989) (statement of C. Louis Kincannon); *see also Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing Before the Subcomm. on Census &*

someone is lawfully present raises very different concerns from asking whether he is a U.S. citizen. The 2009 letter from former Bureau directors supports that distinction, *see* First Am. Compl. ¶ 43, because it contrasted a proposed "untested" question about both "citizenship and immigration status" with the well-tested ACS citizenship question, which "only asks if respondents are U.S. citizens, not if they are in the country lawfully." *Statement of Former Census Directors on Adding a New Question to the 2010 Census* 1 (Oct. 16, 2009).[19]

The only affirmative evidence Respondents cite is a memorandum prepared by John Abowd. N.Y. Brief in Opp. 8; GRA75. But that memorandum conspicuously omits any consideration of the States' important interests in complying with the VRA. Instead, the memorandum notes that if the Department of Justice is interested in bringing a claim under the VRA, the Census Bureau can assemble an ad hoc team to provide the relevant data to federal litigators. GRA77. But the whole point of including a citizenship question on the census is so that all parties can have access to the best possible data at the time States are engaged in redistricting. Promises that federal litigators can

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Population of the H. Comm. on Post Office & Civil Serv., 100th Cong. 50 (1988) (testimony of John Keane).

[19] The remaining "acknowledgements" cited by Respondents were not positions of the Bureau, but merely private opinions of former Bureau officials. *See* First Am. Compl. ¶ 42 (citing congressional testimony of former Director Prewitt); *id.* ¶ 45 (citing the former Directors' brief filed in *Evenwel v. Abbott*, which relied heavily on Prewitt's testimony).

access data when bringing enforcement suits do not adequately protect States' interests—or voters.

To the degree that Respondents possess but have so far declined to share evidence that a citizenship question will materially depress the census response rate, they had an adequate opportunity to present this to the Bureau back when the agency was considering whether or not to include the question. Amici States and numerous other stakeholders availed themselves of this opportunity to present their views. Pet. App. 137a. But "no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did." Pet. App. 146a.

If indeed there is a significant undercount of immigrant residents in the 2020 Census, it will only be because certain actors have politicized a commonsense issue by choosing to fan unsubstantiated fears that may deter non-citizens from participating in the census. Those persons instead should be assuring the public that their responses are protected by the most robust legal mechanisms. Respondents' attack on the citizenship question, filled with allegations that it is intended to harm minorities and designed to produce an undercount, risks becoming a self-fulfilling prophecy.

II. Permitting Deposition Of Secretary Ross Will Increase Litigation Harassment Of High-Level State Officials Based On Speculation That Official Actions Were Taken With Ulterior Motives.

This Court has developed several doctrines that insulate high-level government officials from intrusive litigation. *See*, *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). These serve "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978). The "mental processes" of agency heads in particular should not be subject to "prob[ing]" by the courts. *Morgan v. United States*, 298 U.S. 468, 480 (1936). In this spirit, the Eleventh Circuit has noted that this Court's precedents caution that "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). The courts of appeals are in accord in requiring exceptional circumstances before the testimony of high-level officials may be compelled. *See*, *e.g.*, *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995); *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982); *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979); *U.S. Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973).

Because states are coequal sovereigns, federalism principles dictate that their high-level officials deserve no less comity than do federal officials, and that federal

courts should be equally cautious when subjecting state officials to their legal processes. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."). But a ruling for Respondents by this Court will impel other courts across the land, both state and federal, to accede to all-too-common requests to depose state officials in order to fish for impermissible motives or make *in terrorem* demands.

A. State Officials Will Likely Suffer Increased Litigation Burdens If Respondents Prevail.

Amici States have a vital interest in ensuring that the constitutional protections this Court ultimately affords high-level federal officials will also adequately protect high-level state officials. Although this case arises under the Administrative Procedure Act, the normal rule limiting review to the administrative record stems from broader structural principles that would be undermined if extra-record discovery is permitted in this case. *See* Pet. 16. This will inevitably result in increased demands to depose state officials in every challenge to state laws and regulations.

Unfortunately, it is already not unusual for litigants to seek to depose such state officials, and these requests will grow if Respondents prevail in this case. *See*, *e.g.*, *Freedom From Religion Found., Inc. v. Abbott*,

A-16-CA-00233-SS, 2017 WL 4582804, at *12 (W.D. Tex. Oct. 13, 2017) (granting 1-hour deposition of Texas governor in Establishment Clause case); *Estate of Levingston v. Cty. of Kern*, 320 F.R.D. 520, 522 (E.D. Cal. 2017) (denying motion seeking to depose sheriff); *Locker v. Encana Oil & Gas (USA), Inc.*, 1:14-cv-00131, ECF No. 97 (D. Wyo. June 14, 2017) (order denying motion to quash deposition of Wyoming governor's policy director); *A.R. v. Dudek*, 12-60460-CIV-ZLOCH/HUNT, 2016 WL 3753706, at *2 (S.D. Fla. Apr. 8, 2016) (denying United States' request to depose the secretary of Florida's Agency for Health Care Administration); *Hernandez v. Tex. Dep't of Aging & Disability Servs.*, A-11-CV-856 LY, 2011 WL 6300852 (W.D. Tex. Dec. 16, 2011) (declining to permit deposition of Texas governor); *Flandreau Santee Sioux Tribe v. South Dakota*, CIV. 07-4040, 2011 WL 294450 (D.S.D. Jan. 26, 2011) (quashing deposition of South Dakota governor); *Thomas v. Cate*, 1:05-cv-01198-LJO-JMD-HC, 2010 WL 1343789, at *4 (E.D. Cal. Apr. 5, 2010) (disallowing deposition of California governor's legal affairs secretary); *Coleman v. Schwarzenegger*, CIV S-90-0520 LKK JFM P, 2008 WL 4300437, at *4 (N.D. Cal. Sept. 15, 2008) (holding that "the magistrate judge clearly erred in ordering the depositions of the California Governor and his Chief of Staff"); *California v. United States*, C 05-0328 JSW, 2006 WL 2621647, at *1 (N.D. Cal. Sept. 12, 2006) (disallowing deposition of California attorney general); *Alliance for Global Justice v. District of Columbia*, A.01-00811(PLF/J), 2005 WL 1799553, at *3 (D.D.C. July 29, 2005) (disallowing deposition of mayor of District of Columbia).

It is likewise common for litigants to seek to depose high-level officials of counties and cities—political subdivisions of States. *See Stormo v. City of Sioux Falls*, 12-CV-04057-KES, 2016 WL 697116, at 7–10 (D.S.D. 2016) (disallowing deposition of Sioux Falls mayor); *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 204 (2d Cir. 2013) (district court did not abuse its discretion in issuing a protective order barring depositions of the Mayor and former deputy mayor of New York City); *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (district court did not abuse its discretion in disallowing deposition of Boston mayor); *Gil v. Cty. of Suffolk*, CV 06-1683, 2007 WL 2071701, at *2 (E.D.N.Y. July 13, 2007) (declining to allow deposition of county attorney); *Marisol A. v. Giuliani*, 95 CIV. 10533 (RJW), 1998 WL 132810, at *4 (S.D.N.Y. Mar. 23, 1998) (denying motion to depose New York City Mayor Rudy Giuliani).

Just as in the federal context, depositions of high-ranking state officials can "disrupt the functioning of the Executive Branch." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 386 (2004). State officials likewise "have 'greater duties and time constraints than other witnesses.'" *Lederman*, 731 F.3d at 203 (quoting *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993)). Consequently, "[i]f courts did not limit these depositions, such officials would spend 'an inordinate amount of time tending to pending litigation.'" *Id.* (quoting *Bogan*, 489 F.3d at 423). It is therefore vital that this Court take care to afford government officials—whether at the state or federal level—robust

protection against being forced to sit for depositions or answer other extra-record discovery on their mental processes and internal motivations.

Countenancing the decision of the district court compelling the deposition of Secretary Ross risks subjecting state officials to abusive and harassing depositions—a risk that courts have recognized even in the commercial litigation context. *See*, *e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012) ("When a party seeks the deposition of a high-level executive . . . , courts have 'observed that such discovery creates a tremendous potential for abuse or harassment.'") (quoting *Celerity, Inc. v. Ultra Clean Holding, Inc.*, C 05-4374MMC(JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). This is particularly true where litigation concerns decisions of high-level officials regarding controversial issues, such as the present case. *See*, *e.g.*, *Freedom From Religion Found.*, 2017 WL 4582804, at *2 (challenging decision of Texas Governor requesting removal of monument mocking the Nativity scene); *Coleman*, 2008 WL 4300437, at *4 (case alleging unconstitutional prison overcrowding); *cf. Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed."). Only by curbing such harassing and abusive discovery requests can courts "protect officials who are required to exercise their discretion" in these important matters. *Butz*, 438 U.S. at 506. Failing to do so will no doubt hinder the "public interest in encouraging the vigorous exercise of official authority." *Id.*

B. State Law Provides Helpful Guidance On The High Hurdles Litigants Must Clear Before Deposing High-Level Officers.

In this context, the Court may glean valuable lessons from state appellate court decisions applying the "apex" doctrine to analyze requests to depose high-level government and corporate officers. Most notably, the Texas Supreme Court has held that, in order to depose a corporation's "upper level management," the party seeking the disposition must establish that the officer has "unique or superior personal knowledge of discoverable information." *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995). If not, the party is required "to attempt to obtain the discovery through less intrusive methods," such as "depositions of lower level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation." *Id*. Only after making this good-faith attempt may the party "attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate." *Id*.

Many other state courts have adopted this apex rule with respect to both government and corporate officials. *See*, *e.g.*, *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 364 (W. Va. 2012); *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 495 (Mich. App. 2010); *Liberty Mut. Ins. Co. v. Super. Ct. of San Mateo Cty.*, 13 Cal. Rptr. 2d 363, 367–68 (Cal. App. 4th 1992).

Even states that have not adopted this approach have recognized the importance of limiting the ability of litigants to force high-ranking officials to sit for depositions. *See Crest Infiniti II, LP v. Swinton*, 174 P.3d 996, 1003–04 (Okla. 2007) (declining to adopt "apex" rule, but allowing for a protective order where an apex deposition "would inflict annoyance, harassment, embarrassment, oppression or undue delay, burden or expense" or where an "appropriate corporate official" may "provide the information sought"); *Clarke v. State Attorney General's Office*, 138 P.3d 144, 151 (Wash. App. Div. 1 2006) (declining to allow deposition of current Governor and former Attorney General and following federal cases that "protect high-ranking government officials from discovery when other available witnesses can provide the same information"); *Dep't of Agric. and Cons. Servs. v. Broward Cty.*, 810 So.2d 1056, 1058 (Fla. 1st DCA 2002) (An "agency head should not be subject to deposition . . . unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources."); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606–07 (Mo. 2002) (en banc) (declining to adopt an "apex" rule but holding that in determining whether to allow "top-level employee depositions, the court should consider: whether other methods of discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent").

These decisions are particularly instructive in that they almost uniformly require litigants seeking to depose a high-level official to demonstrate that they have exhausted less intrusive means of discovery before a deposition will be allowed. *See*, *e.g.*, *Crown Cent.*, 904 S.W.2d at 128 (requiring the litigant to show "that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate"). That this case involves an agency head instead of corporate executives *strengthens* the concerns that motivated the state-court decisions. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) ("[T]he Secretary should never have been subjected to this [deposition]. . . . Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." (citations omitted)). The district court, however, refused to seriously consider other options besides a deposition of Secretary Ross. *See* Pet. App. 19a. But failing to require litigants to exhaust other means of obtaining relevant information will only increase the risk of high-level officials facing harassing depositions, thereby "disrupt[ing] the functioning of" state governments. *Cheney*, 542 U.S. at 386. If litigants may avoid less intrusive means of discovery and proceed directly to deposing agency heads, as was the case below, they will be emboldened to do so whenever it is convenient.

CONCLUSION

The Court should reverse the decision below.

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