No. 18-557

IN THE
Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS NEW YORK IMMIGRATION COALITION ET AL. IN OPPOSITION

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QUESTION PRESENTED

Whether the district court clearly and indisputably erred in concluding that plaintiffs made a strong showing of bad faith or improper behavior under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), warranting limited discovery to probe the mental processes of the agency decisionmaker.

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INTRODUCTION

Two days ago, the district court entered final judgment, concluding that Commerce Secretary Wilbur Ross's addition of a citizenship question to the Decennial Census reflected "a veritable smorgasbord of classic, clear-cut APA violations." *New York v. U.S. Dep't of Commerce*, No. 18-cv-02921, 2019 WL 190285, at *3 (S.D.N.Y. Jan. 15, 2019). The court concluded that the administrative record alone fully supported its decision to vacate Secretary Ross's decision. And the court vacated as moot its order compelling Secretary Ross's deposition. The Court should accordingly dismiss this petition as improvidently granted, because any remaining dispute about the propriety of extra-record discovery can be resolved, if necessary, on review of the final judgment.

If the Court does not dismiss, it should deny mandamus. Secretary Ross announced in a decisional memorandum and testified to Congress that he added a citizenship question "solely" because the Department of Justice ("DOJ") requested it to enforce the Voting Rights Act ("VRA"). He said DOJ "initiated" the request, that Commerce was "responding" "solely" to DOJ's request, and that he had not spoken to "anyone in the White House" about the question. Pet. App. 15a-16a, 136-37a, 150a.

None of that was true. Secretary Ross spoke to a White House official about adding the question well before DOJ got involved. Seven months before receiving DOJ's "request," he wrote that he was "mystified" that a citizenship question had not been added to the Census despite his "months old request," and ordered his aides to find a way to do it. J.A.107. Commerce then devised the VRA rationale, and Sec-

retary Ross personally solicited DOJ to send its "request." Commerce continued to conceal these facts from Congress and the public through the filing of this litigation, submitting an incomplete administrative record that omitted substantial materials predating DOJ's letter that contradicted Secretary Ross's public account. Finally, at the urging of counsel and in anticipation of the district court's order requiring discovery, Secretary Ross issued a "supplemental memorandum" acknowledging that he—not DOJ—had been pushing for a citizenship question all along.

Circumstances like these are precisely why this Court held in *Citizens to Preserve Overton Park, Inc. v. Volpe* that plaintiffs may obtain discovery beyond the administrative record upon "a strong showing of bad faith or improper behavior." 401 U.S. 402, 420 (1971). Such a showing suggests that the bare administrative record may conceal facts that would establish that agency action is arbitrary and capricious—such as evidence the decisionmaker ignored or misconstrued, or factors the decisionmaker improperly considered. Review under the Administrative Procedure Act depends on the good faith of the agency preparing its record; if the record may paint a false picture, courts must have the means to reach the truth.

The district court did not clearly and indisputably err in finding a strong preliminary showing of bad faith or improper behavior under the extraordinary circumstances presented here. The evidence readily supports the district court's finding 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," along with the court's myriad other findings supporting extra-record discovery. Pet. App. 124a. Cabinet secretaries with legitimate reasons for agency action do not need aides to invent a justification or to launder that justification through another agency.

And the extra-record discovery has confirmed that the district court was right. Acting Assistant Attorney General John Gore, who authored DOJ's request letter, admitted that a citizenship question "is not necessary for DOJ's VRA enforcement efforts," J.A.399, and that he has no idea whether the question will produce citizenship data that is "more precise" than data DOJ already has, J.A.391-92. When the Census Bureau, which opposed adding the question because it would distort Census results, offered to discuss an option for providing DOJ with even better citizenship data, the Attorney General personally vetoed the meeting. And Secretary Ross's chief policy officer—who concocted the VRA rationale—testified that Secretary Ross's reasons for adding a citizenship question "may or may not be … legally-valid," but that it was his job to devise a "legal rationale" for the decision. J.A.336-39, 362-63.

If Plaintiffs' showing does not warrant extra-record discovery, nothing will. This Court affords substantial deference to a district court's discovery orders—and all the more so on a mandamus petition. The court's discovery decisions do not remotely justify mandamus. That is especially so because final judgment has issued and the question presented is fully reviewable on appeal.

STATEMENT OF THE CASE

A. The Decennial Census

The Constitution commands the federal government to conduct a Decennial Census to count the total number of "persons"—regardless of citizenship status—residing in each state. U.S. Const. art. I, § 2, cl.3. The Census is a "mainstay of our democracy." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring). Its results govern the apportionment of the House of Representatives and the allocation of votes in the Electoral College. *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996). States and municipalities rely on Decennial Census data to redistrict state and local districts to conform with the constitutional command of one-person, one-vote. *Evenwel v. Abbott,* 136 S. Ct. 1120, 1123-24, 1130 (2016). And Census data are the "linchpin of the federal statistical system," *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (quotation marks omitted), determining the allocation of hundreds of billions of dollars in federal funds annually.

B. The Commerce Department's Decades-Long Opposition to a Citizenship Question on the Decennial Census

Since 1950, the Commerce Department has consistently declined to ask a question about citizenship on the Decennial Census form sent to every household in the United States. For decades, current and former Census Bureau officials appointed by presidents from both political parties have consistently opposed inquiring into the citizenship status of every person in the United States because doing so would

reduce response rates to the Census and distort the decennial enumeration.

In 1980, the Commerce Department argued in court that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980). Before the 1990 Census, the Census Bureau opposed "adding a citizenship question" because of accuracy concerns. *Census Equity Act: Hearings Before the Subcomm. On Census & Population of the H. Comm. On Post Office & Civ. Serv.*, 101st Cong. 44 (1989) (statement of C. Louis Kincannon, Census Bureau Deputy Director).

And in 2016, four former Census Bureau Directors appointed by presidents of both parties told this Court that "a [person-by-person] citizenship inquiry would invariably lead to a lower response rate to the Census in general," and "seriously frustrate the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats." Br. for Amici Curiae Former U.S. Census Bureau Directors at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

Instead, for decades, the Commerce Department has inquired about citizenship from only "a sample of the population," Br. 18—previously through the "long form," a "sampl[e]" survey that "ask[ed] a small subset of the population subsidiary census questions," *Utah v. Evans*, 536 U.S. 452, 468 (2002), and cur-

rently through the American Community Survey ("ACS"), a yearly survey of approximately 2% of households. These sample surveys, it is undisputed, "differ[] significantly in nature" from the Decennial Census, Pet. App. 141a, and can be statistically "adjust[ed] … for survey nonresponse," J.A.196-97, whereas the Decennial Census cannot, *Dep't of Commerce*, 525 U.S. at 343.

C. Secretary Ross's Decision to Add a Citizenship Question

In congressional testimony and his decision memo, Secretary Ross stated that he decided to add a citizenship question to the Census in response to a request DOJ made on December 12, 2017. Consistent with that explanation, Commerce initially filed an administrative record on June 8 that omitted all documents pre-dating December 12, 2017. But the subsequently completed administrative record (including a June 21 "supplemental memorandum," written in response to this litigation) revealed that in fact Secretary Ross began considering the question months before DOJ's "request" and decided to add the question before May 2017; that Commerce, not DOJ, devised the VRA rationale; that Commerce made the request of DOJ, not vice versa; and that DOJ rebuffed Commerce's initial overtures, changing its position only after Secretary Ross personally asked the Attorney General to intervene.

1. *Secretary Ross's Initial Timeline: DOJ Requests a Citizenship Question in December 2017*; *Commerce Initiates a Review*; *and Secretary Ross Decides in March 2018*

On December 12, 2017, DOJ sent the Census Bureau a letter requesting the inclusion of a citizenship question on the 2020 Census. Pet. App. 152a. The letter, signed by Arthur Gary and authored by then-Acting Assistant Attorney General for Civil Rights John Gore, asserted that that "the decennial census questionnaire is the most appropriate vehicle for collecting" citizenship data "critical to the Department's enforcement of Section 2 of the Voting Rights Act." *Id.* at 152a-53a. It further asserted that citizenship information from the ACS "does not yield the ideal data" for enforcing the VRA because, *inter alia*, it is not currently produced at the Census "block" level. *Id.* at 155a-56a.

In mid-March 2018, Secretary Ross told Congress in sworn testimony that DOJ "initiated the request for inclusion of the citizenship question,"[1] and that, in considering the question, Commerce was "responding solely to the Department of Justice's request."[2] He testified that he was "not aware of any" discussions about a citizenship question with "anyone in

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[1] *Hearing on Recent Trade Actions Before the House Comm. on Ways and Means*, 115th Cong., 2d Sess. (March 22, 2018), 2018 WLNR 8951469.

[2] *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. (March 20, 2018), 2018 WLNR 8815056.

the White House."[3] And he repeatedly represented that he had "not yet made a decision."[4]

On March 26, 2018, Secretary Ross issued a decisional memorandum instructing the Census Bureau to include a citizenship question on the Census, for the first time in 70 years. Pet. App. 136a-51a. The memorandum outlined the same timeline Secretary Ross had offered to Congress. It stated that "[f]ollowing receipt of the DOJ request," Secretary Ross "set out to take a hard look at the request" to decide how to "respond"; that the DOJ "request" prompted Commerce to "initiate[]" a "comprehensive review process"; and that the assessment of a citizenship question "began" after receipt of the request. Pet. App. 136a-37a. It relied exclusively on the VRA rationale, concluding that adding a citizenship question "is necessary to provide complete and accurate data in response to the DOJ request." Pet. App. 150a. The memorandum did not disclose any other factor that Secretary Ross considered.

In subsequent congressional testimony on May 10, 2018, Secretary Ross reaffirmed, when asked whether DOJ really needed census-based citizenship information to enforce the VRA, that "the Justice Department is the one who made the request of us."[5]

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[3] *Id.*

[4] *Id.*; *see* 2018 WLNR 8951469 (March 22, 2018 House Ways and Means) (no "final decision").

[5] *Hearing on the F.Y. 2019 Funding Request for the Department of Commerce Before the Subcomm. on Commerce, Justice, Science, and Related Agencies*, 115th Cong., 2d Sess. (May 10, 2018), 2018 WLNR 2179074.

On June 8, 2018, Commerce filed the administrative record below. Consistent with the decisional memorandum and Secretary Ross' testimony, the initial 1,320-page administrative record contained only materials generated after the December 12 DOJ request.

2. *The Real Timeline: Secretary Ross Decides to Add a Citizenship Question by Spring 2017, Devises a Voting Rights Act Rationale, and Gets DOJ to Assert It*

On June 21, 2018, in response to this litigation, Br. 7, 32, and shortly before a hearing to compel discovery that would ultimately contradict the story he initially presented to Congress and the public, Secretary Ross issued a "supplemental memorandum." The supplemental memorandum, and the full administrative record (subsequently completed in July 2018), revealed that the official timeline and rationale Secretary Ross had provided in his Congressional testimony and March 2018 decisional memorandum were false. Pet. App. 134a.[6]

According to the supplemental memorandum, Secretary Ross "began considering" a citizenship question not in response to the DOJ "request," but "soon after" his appointment in February 2017, for reasons the supplemental memorandum did not specify. Pet. App. 134a. "[O]ther senior Administration officials had previously raised" the question, also for reasons unspecified in the memo. *Id.* The completed administrative record shows, however, that in March 2017, Secretary Ross's policy director, Earl

[6] This discussion relies only on the administrative record unless otherwise noted.

Comstock, emailed the Secretary in response to "Your Question on the Census" informing him that "neither the 2000 nor the 2010 Census asked about citizenship," advising that noncitizens must by law be included in the Census, and enclosing an article about "the pitfalls of counting illegal immigrants." J.A.97-98 (capitalization omitted).

Although Secretary Ross told Congress that he never spoke with "anyone" in the "White House," the completed administrative record reveals that he spoke in April 2017 with White House chief strategist Steve Bannon, J.A.103, who "direct[ed]" Secretary Ross to speak with Kansas Secretary of State Kris Kobach about a citizenship question. J.A.112. Echoing Comstock's concerns, Kobach told Secretary Ross that the absence of a citizenship question on the Census "leads to the problem that aliens who do not actually 'reside' in the United States"—whom he defined as noncitizens who are "not [] green card holder[s]"—"are still counted for congressional apportionment purposes." J.A.112-13.[7]

On May 2, 2017—seven months before receiving the December 2017 DOJ "request," and before even becoming aware of the VRA rationale—Secretary Ross emailed Comstock that he was "mystified why nothing ha[s] been done in response to my *months old request* that we include the citizenship question." J.A.107 (emphasis added). Comstock promised to "get" it "in place." J.A.107. Comstock explained that

[7] Secretary Ross finally admitted to having spoken to Bannon only when the issue of whether he could be deposed reached this Court. J.A.280.

Commerce would need "to work with Justice to get them to request" the question. J.A.107.

Commerce then began a months-long campaign to solicit another agency to solicit Commerce to add a citizenship question. Commerce proposed the VRA rationale to DOJ. Pet. App. 134a. After DOJ declined, Commerce approached DHS, which also declined. J.A.128. By September, Comstock informed Ross he had struck out and was looking into "how Commerce could add the question to the Census itself." J.A.128.

Secretary Ross then interceded directly with the Attorney General, J.A.140, and DOJ agreed to "do whatever you all need us to do," J.A.135. After several more months went by without word from DOJ, Secretary Ross sent increasingly agitated emails to his staff, complaining that "[w]e are out of time," and promising to personally call "whoever is the responsible person at Justice" to get the request issued. J.A.154-55, 160. Two weeks later, on December 12, 2017, DOJ sent its "request."

None of this was mentioned in Secretary Ross's Congressional testimony, his first decisional memorandum, or the initial administrative record.

D. The Inconsistencies Between Secretary Ross's Decisional Memorandum and the Administrative Record

Secretary Ross reached his decision over the Census Bureau's unequivocal objection that adding a citizenship question "is very costly, harms the quality of the census count, and would [provide DOJ with] substantially less accurate citizenship status data than are available from administrative sources." J.A.181. In reaching his decision, Secretary Ross re-

peatedly mischaracterized the administrative record and refused to authorize the testing that Census Bureau procedures required.

1. *The Impact of Adding a Citizenship Question on the Accuracy of the Census*

The decision memo claimed that "no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates." Pet. App. 145a. In fact, the Census Bureau had warned Secretary Ross that "inclusion of a citizenship question on the 2020 Census questionnaire is very likely to reduce the self-response rate" to the 2020 Census, and "harm[] the quality of the census count." J.A.243, 181.

The Census Bureau conducted several analyses to determine the likely impact of adding a citizenship question, including a comparison of response rates to the 2010 Census—which did not include a citizenship question—and to the 2010 ACS—which did. The Bureau found that "the decline in self-response [on the ACS as compared to the Census] was 5.1 percentage points greater for noncitizen households than for citizen households." J.A.187.

Secretary Ross asserted that "the Bureau 'attributed this difference' … to the greater outreach and follow-up associated with' the … decennial census." Pet. App. 141a. But the Census Bureau had explained that "the only difference … was the presence of at least one noncitizen in noncitizen households," and concluded that it was therefore "a reasonable inference that a question on citizenship would lead to some decline in overall" responses to the Census. J.A.187. The Census Bureau warned that its estimate was "conservative" and actual non-

response "could be much greater" "during the 2020 Census." J.A.191-92. And it subsequently revised this conservative estimate upward, to a 5.8% reduction in responses among noncitizen households, approximately 6.5 million people. Add.7a-8a.

The Census Bureau also determined that "item non-response" rates—the failure of ACS respondents to answer the citizenship question—were further evidence that a citizenship question would reduce census responses. J.A.185-86. Secretary Ross claimed that item non-response rates for the ACS citizenship question "were comparable to nonresponse rates for other questions" on the ACS. Pet. App. 141a. But the Census Bureau had advised him otherwise: "item nonresponse rates for the citizenship question are *much greater* than the comparable rates for other demographic variables like sex, birthdate/age, and race/ethnicity." J.A.186 (emphasis added). Black and Hispanic ACS respondents skipped the citizenship question at approximately twice the rate of whites. J.A.185-86. And Hispanics were eight times more likely than whites to "breakoff"—*i.e.*, stop answering the ACS altogether—upon encountering the citizenship question. J.A.188.

2. *The Failure to Pretest the Citizenship Question*

Secretary Ross claimed that "no one has identified any mechanism for … determin[ing]" the effect of a citizenship question, Pet. App. 146a, but the Department skipped the best mechanism for providing such information: pretesting. It did so despite the Census Bureau's requirement that "[p]retesting must be performed" when "new questions [are] added" to the Census. Add.13a-14a.

Because "[p]retesting is not required for questions *that performed adequately in another survey*," Add. 14a (emphasis added), Secretary Ross asserted that testing was unnecessary because "the citizenship question has been well tested" on the ACS. Pet. App. 138a. But Secretary Ross acknowledged evidence that the ACS citizenship question had *not* performed adequately: noncitizens "inaccurately mark 'citizen' about 30 percent of the time" on the ACS. Pet. App. 143a.

Secretary Ross also noted that, because there would be no pretesting, "the costs of *preparing* and adding the question would be minimal." Pet. App. 148a (emphasis added). But the Census Bureau had warned that *implementing* the question would be "very costly," J.A.181, with "at least $27.5 million" for outreach to households that do not respond because of the citizenship question. J.A.191. Its current estimate is $82.5 million. Add.31a.

3. *The Census Bureau's Unequivocal Recommendation to Use Administrative Data Alone*

Secretary Ross claimed to have ordered inclusion of a citizenship question as "necessary to provide complete and accurate data in response to the DOJ request." Pet. App. 150a. But the evidence before Secretary Ross uniformly indicated that the Census Bureau could produce more accurate and complete block-level citizenship information for DOJ without adding a citizenship question, by using existing government administrative records, including from the Social Security Administration. The Census Bureau determined that this option ("Alternative C") "best meets DOJ's stated uses, is comparatively far less

costly than [adding a citizenship question], does not increase response burden, and does not harm the quality of the census count." J.A.181. The Bureau concluded that "citizenship data [from administrative records] would most likely have both more accurate citizen status and fewer missing individuals than would be the case for any survey-based collection method" such as the Decennial Census. J.A.197.

The Census Bureau noted that, when presented with a government questionnaire, noncitizens, especially those who are not legal permanent residents, "have a strong incentive to provide an incorrect answer, if they answer at all." J.A.242. Secretary Ross's decision memo acknowledged that noncitizens "inaccurately mark 'citizen' about 30 percent of the time." Pet. App. 143a; *see* J.A.193, 532-33. Existing administrative records, by contrast, are based on a person's "verified" legal documents. J.A.192-93.

Secretary Ross nevertheless ordered the Census Bureau to use administrative records *and* a citizenship question together ("Alternative D"), asserting that "[t]he citizenship data provided to DOJ will be more accurate with the question than without it." Pet. App. 150a. But the Census Bureau had concluded that this would produce "poorer quality citizenship data" than administrative records alone. J.A.244. Because adding a citizenship question would reduce response rates, Alternative D would make it harder to identify Census respondents in the accurate "administrative citizenship data." J.A.243. Moreover, Alternative D would result in conflicting citizenship information (*e.g.*, a conflicting Social Security record and Census self-response) for approximately "9.5 million" people. Add.3a; *see* J.A.244.

Secretary Ross nevertheless rejected the Bureau's recommendation, asserting that "[a]sking the citizenship question … may eliminate the need" to impute citizenship for people who lack administrative citizenship records. Pet. App. 144a. But the Census Bureau had informed him that Alternative D "does not solve th[is] problem." J.A.244. Because millions of respondents would fail to answer the question or answer incorrectly, "there will be a need for imputing [citizenship for] many [people]" under Alternative D as well. Add.3a.

4. *The Absence of Evidence for the VRA Rationale*

Secretary Ross justified his decision as "necessary" in response to DOJ's request for data "critical" to VRA enforcement. Pet. App. 150a, 152a. But nothing in the administrative record supports this assertion other than the conclusory three-page DOJ letter itself. DOJ has since conceded that "[citizenship] data collected through the census questionnaire is not necessary for DOJ's VRA enforcement efforts." J.A.399.

In relying on the VRA rationale, Secretary Ross failed to address self-evident flaws in DOJ's letter. DOJ did not explain why citizenship data from Census Bureau sample surveys—on which DOJ has always relied for VRA enforcement—had become inadequate. Pet. App. 152a-157a. Indeed, DOJ did not cite a single case suggesting that existing sources of citizenship data were deficient. *See* Pet. App. 153a. And while the government asserts, based on the DOJ letter, that block-level data "is possible only with the decennial census," Br. 3, the Census Bureau advised that it can produce reliable block-level citizenship

data with administrative records and survey data, J.A.177, or using the ACS, J.A.181-83; Add.17a-18a.

E. Proceedings Below

1. Plaintiffs are five organizations serving immigrant communities that would be harmed by a differential undercount caused by the citizenship question. Plaintiffs allege that the addition of the citizenship question to the 2020 Census is arbitrary and capricious in violation of the Administrative Procedure Act (APA) and constitutes intentional discrimination in violation of the Fifth Amendment. Plaintiffs' complaint (18-cv-5025) was consolidated for trial with the lawsuit filed by New York and other jurisdictions (18-cv-2921).

2. Defendants produced an administrative record on June 8, 2018, but the record omitted all documents "predating DOJ's December 2017 letter," and other materials the Secretary considered. Pet. App. 97a. On June 21, 2018—just days in advance of a hearing on the adequacy of the administrative record—Defendants issued the "supplemental memorandum" revising their story about the genesis of the citizenship question.

On July 3, 2018, the district court found that Plaintiffs had rebutted the "presumption of regularity" and ordered Defendants to complete the administrative record. Pet. App. 95a-98a, 103a.

The court also authorized limited extra-record discovery. Pet. App. 98a. The court cited multiple factors that supported a showing of bad faith. First, the court noted that Secretary Ross's decisional memorandum and sworn congressional testimony "now appear[] [to be] potentially untrue," Pet. App.

96a, 98a, and that the supplemental memo "could be read to suggest that [Secretary Ross] 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, "Secretary Ross overruled senior Census Bureau career staff" on cost and statistical questions concerning "the quality of the census count." Pet. App. 98a-99a. Third, Defendants "deviated significantly from standard operating procedures," by "add[ing] an entirely new question after substantially less consideration [than is typical] and without any testing at all." Pet. App. 99a. Fourth, Plaintiffs made "at least a prima facie showing that Secretary Ross's stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act—was pretextual." Pet. App. 99a. The court strictly limited discovery in consideration of separation-of-powers principles, curtailing depositions and third-party discovery, and barring discovery from the White House. Pet. App. 101a-02a.

3. On July 26, 2018, the district court denied the government's motion to dismiss the APA and intentional discrimination claims. *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 812 (S.D.N.Y. 2018). The court concluded, *inter alia*, that Plaintiffs "plausibly allege that Secretary Ross's decision to reinstate the citizenship question on the 2020 census was motivated by discriminatory animus." *Id.* at 775. The government does not challenge that conclusion on this appeal.

The court reiterated its prior conclusions that evidence indicated that "Secretary Ross's sole proffered

rationale for the decision, that the citizenship question is necessary for litigation of Voting Rights Act claims, may have been pretextual." *Id.* at 808. The court further noted that, "while Secretary Ross initially (and repeatedly) suggested that the Department of Justice's request triggered his consideration of the issue, it now appears that the sequence of events was exactly opposite." *Id.* The court noted that, "'[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [defendant] is dissembling to cover up a discriminatory purpose.'" *Id.* at 809 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).

4. On August 17, 2018, the court compelled the deposition of then-Acting Assistant Attorney General for Civil Rights John Gore, who drafted DOJ's letter "requesting" addition of the citizenship question. *See* Pet. App. 26a-27a. On September 21, 2018, the court compelled a limited, four-hour deposition of Secretary Ross, Pet. App. 9a, 22a, noting that "[t]he record developed thus far … casts grave doubt" on many of Secretary Ross's statements about how the decision to add the citizenship question came about, Pet. App. 15a-18a. The district court also noted that Defendants themselves "argued vigorously that '[t]he relevant question in these cases 'is whether *Commerce's* stated reasons for reinstating the citizenship question were pretextual,'" and thus had acknowledged "the centrality" of Secretary Ross's "intent." Pet. App. 12a-13a. The district court cited Plaintiffs' equal protection claim as additional justification for ordering the depositions. Pet. App. 18a, 25a.

5. On September 7, 2018, more than two months after the district court ordered extra-record discovery, the government sought mandamus in the Second Circuit. The government subsequently also sought mandamus of the decision ordering the deposition of Secretary Ross. The Second Circuit unanimously denied both petitions. Pet. App. 3a-4a, 6a-7a.

On October 22, this Court declined to stay extra-record discovery or Acting AAG Gore's deposition, but temporarily stayed Secretary Ross's deposition.

6. The case then proceeded to trial. At the November 1 pretrial hearing, the district court held that Plaintiffs' constitutional claim independently justified all extra-record discovery taken. Add.19a-22a. The court explained that it had not relied on that claim when it initially authorized discovery only because briefing on the motion to dismiss was not yet complete. *Id.*; J.A.301 n.8. In a November 5 order, the court confirmed that the equal protection claim independently supported extra-record discovery: "[I]t would be perverse—and risk undermining decades of equal protection jurisprudence—to suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'" J.A.301-02.

7. The extra-record discovery and the testimony adduced at trial confirmed the significant irregularities in the agency decisionmaking process, the contradictions between the Secretary's decision and the facts before him, and the pretextual nature of the VRA justification. For example:

Deputy Chief of Staff Earl Comstock. Secretary Ross's key aide on the citizenship project testified that he never learned *why* Secretary Ross wanted to add the question, J.A.340, 353-63, and that as far as he knew, the Secretary never put those reasons down on paper, J.A.358. Comstock said that "[the Secretary's actual] rationale … may or may not be … legally-valid," J.A.363, but it was Comstock's "job" to "find a legal rationale"—the VRA justification—and to find an agency that would make the request. J.A.336-39, 362-63.

Acting AAG John Gore. The head of the Civil Rights Division, who drafted the "request" memo, admitted that census-based citizenship data "is not necessary for DOJ's VRA enforcement efforts," and that he didn't know whether the question would produce citizenship data that is "more precise" than the data currently available to DOJ. J.A.391-92, 399. He learned in January 2018 that the Census Bureau was seeking to meet with DOJ to discuss an alternative means for providing more accurate block-level citizenship data. J.A.392-98. But the Attorney General personally forbade DOJ personnel from accepting the meeting. J.A.397-400.

Census Bureau Chief Scientist John Abowd. In light of the fact that noncitizens "inaccurately mark 'citizen' about 30 percent of the time" on Census Bureau surveys, Pet. App. 143a, Dr. Abowd testified that he doesn't "think the question performs adequately" on the ACS, J.A.538; it therefore is not exempt from the Bureau's pretesting requirement, J.A.530-31. He also explained that, even with a citizenship question on the Census, the Bureau *cannot* satisfy DOJ's request for "full count" citizenship da-

ta, as opposed to statistical "estimates" that have a "margin of error." Pet. App. 156a. This is due to the Bureau's statutory obligation to apply "disclosure avoidance" protocols to ensure the confidentiality of Census responses. 13 U.S.C. § 9(a)(2); *see* J.A.506-12, 515-21. For every "single census block," the citizenship data produced by the Bureau will continue to be an "estimate rather than a precise tabulation," just like existing citizenship data from sample surveys. J.A.509-10, 519; *see* J.A.470-74.

Nielsen Senior Vice President Christine Pierce. Secretary Ross's decisional memorandum claimed that Dr. Pierce stated that the Nielsen company "had added questions … on sensitive topics such as … immigration status … without any appreciable decrease in response rates," and that "no empirical data existed on the impact of a citizenship question on responses." Pet. App. 140a. But Dr. Pierce testified that she "did not share that Nielsen had added 'questions concerning immigration status … without any appreciable decrease in response rates'"; "did not say … no empirical data existed on the impact of a citizenship question on responses'"; and instead "told Secretary Ross unequivocally that [she] was concerned that a citizenship question would negatively impact self-response rates." J.A.545-47.

Secretary Ross' Yahoo Interview: While trial was underway, Secretary Ross gave an interview to Yahoo! News about the citizenship question. Ross admitted that there were "discussions" among administration officials in early 2017 about a citizenship

question, including his conversations with Messrs. Bannon and Kobach. PX-688.[8]

8. Trial concluded on November 15. On November 16, this Court granted certiorari to consider the circumstances in which a district court may order "discovery outside the administrative record to probe the mental processes of the agency decisionmaker." Pet. i.

9. On January 13, the district court issued a 277-page opinion with findings of fact and conclusions of law, vacating and remanding the matter to Commerce and enjoining Defendants from including a citizenship question on the 2020 Census. The court found that "Secretary Ross violated the APA in multiple independent ways … a veritable smorgasbord of classic, clear-cut APA violations." 2019 WL 190285, at *3. "[M]ost blatantly, he violated the mandate in Section 6(c) of the Census Act to 'acquire and use information' derived from administrative records 'instead of conducting direct inquiries' to the 'maximum extent possible.'" *Id.* at *95. Moreover, "every relevant piece of evidence in the Administrative Record supports the conclusion that [the Secretary's decision] would produce *less accurate citizenship data* than [using existing government records alone]." *Id.* at *98. The court also found "clear" evidence "that Secretary Ross' rationale was pretextual." *Id.* at *112. Each conclusion was fully justified by the administrative record alone, but the court held that discovery confirmed its conclusions. *Id.* at *3.

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[8] *Available at* https://finance.yahoo.com/video/wilbur-ross-addresses-controversy-surrounding-142918612.html.

The court vacated its order compelling Secretary Ross's deposition as moot given the final judgment. *Id.* at *125.

SUMMARY OF ARGUMENT

Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (citation omitted). There is no basis for such extraordinary intervention here. "[T]hree conditions must be satisfied before" mandamus "may issue," and the government cannot satisfy any. *Id.*

I. The government has "other adequate means" to attain relief, and mandamus is not "appropriate under the circumstances." *Id.* at 380-81. The dispute over Secretary Ross's deposition is now moot. All other extra-record discovery has been taken, and, if necessary, this Court can fully consider the propriety of that discovery on review of the final judgment.

II. The district court did not "clear[ly] and indisputabl[y]" abuse its discretion, *Cheney*, 541 U.S. at 381, in finding that Plaintiffs made a strong showing of bad faith or improper behavior warranting extra-record discovery under *Overton Park*. The court found evidence that Secretary Ross provided "false explanations of his reasons for, and the genesis of, the citizenship question," and that his decision to add a citizenship question "preceded the stated rationale," Pet. App. 98a, 124a; that he overruled technical experts on factual questions without explanation; that he deviated from standard Census operating procedures; and that Plaintiffs made a prima facie showing that the VRA justification was pretextual. Those factual findings are not clearly erroneous.

The government contends that a decisionmaker exhibits "bad faith or improper behavior" under *Overton Park* only when he disbelieves his own explanation, shows irreversible prejudgment, or acts for illegal reasons. But the government's attempt to redefine "bad faith" and "improper behavior" lacks any support in precedent or common sense. On the government's view, an agency decisionmaker does not act improperly when he *publicly misrepresents* the basis for his decision. That cannot be right; deception is textbook bad faith. In any event, even if the government were correct, extra-record discovery was still justified because there was strong evidence that Secretary Ross disbelieved the VRA justification, irreversibly prejudged the citizenship question, and acted for the illegal purpose of suppressing the enumeration of noncitizens.

III. The district court also authorized extra-record discovery on a basis entirely independent of the APA: its ruling—unchallenged here—that Plaintiffs plausibly alleged that Secretary Ross added a citizenship question to discriminate against minorities in violation of the Fifth Amendment. Courts routinely authorize discovery where plaintiffs plausibly allege intentional discrimination by an agency, without any separate showing of bad faith. Plaintiffs' right to discovery in such cases is not lost simply because they also bring an APA claim. Accordingly, even if the district court erred in authorizing *Overton Park* discovery, this Court cannot grant mandamus.

IV. The question presented concerns only the propriety of discovery "to probe the mental processes of the agency decisionmaker." Pet. i. Much of the

extra-record discovery ordered in this case was justified for other reasons, not challenged here: to assess standing, to explain complex technical matters, or for other reasons unrelated to Secretary Ross's mental processes. Such testimony is standard in APA actions and Census-related challenges, regardless of whether Plaintiffs can show bad faith. The propriety of such discovery is not presented and any ruling should be limited to extra-record discovery that goes exclusively to the Secretary's "mental processes."

ARGUMENT

The government has not met its heavy burden of showing that the district court clearly abused its discretion in applying the standard for "bad faith or improper behavior" this Court articulated in *Overton Park*, or that the district court clearly erred in surveying a record of shifting, inconsistent stories, and repeated misrepresentations, and finding bad faith. The government disagrees with the district court's application of *Overton Park*, but has not cited a single decision of this Court granting mandamus to quash discovery where the lower court applied the correct legal standard and the petitioner simply disputed factual findings.

The government's brief proceeds as if this Court reviews the district court's discovery orders and factual findings about bad faith *de novo*. In fact, this Court must apply a doubly deferential standard of review: Even on an ordinary appeal, the district court's factual findings of bad faith and improper behavior are reviewed for clear error, and its underlying discovery decisions are reviewed for abuse of discretion. *United States v. Nixon*, 418 U.S. 683, 702 (1974) ("pretrial subpoena" is "committed to the

sound discretion of the trial court"); *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 497 (1st Cir. 2007); *see United States v. Burnett*, 827 F.3d 1108, 1109 (D.C. Cir. 2016) (Kavanaugh, J.). "[C]lear error" review means the Court must put "a serious thumb on the scale for the [district] court." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018).

But this appeal is far from ordinary. The extraordinary remedy of mandamus requires a determination of "clear and indisputable" error. *Cheney*, 542 U.S. at 381. For the government to prevail, the district court must have made indisputably erroneous factual findings as to bad faith and indisputably abused its discretion in authorizing discovery. *Id.* The government does not come close to meeting that standard, or to satisfying the other prerequisites for mandamus.

I. Mandamus Is Inappropriate and Petitioners Have Other Adequate Means to Obtain Relief

Mandamus is unavailable because it is not "appropriate under the circumstances," and the government has other "adequate means" to obtain lief. *Cheney*, 542 U.S. at 381. Secretary Ross's deposition is now moot. And because the court found APA violations on the administrative record alone, it may be entirely unnecessary for this Court ever to address the remaining extra-record discovery. Any remaining disputes over the district court's discovery orders can be fully and adequately addressed, if necessary, on appeal of the final judgment. The relief this Court could order on mandamus would be exactly the same as the relief available on appeal.

The best course would now be to dismiss the writ as improvidently granted, as all remaining issues may be and are more appropriately addressed on review of the final judgment. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001) (dismissing writ because of "shift in the posture of the case that precludes … review" as "anticipated").

II. The District Court Did Not Clearly and Indisputably Abuse its Discretion in Ordering Extra-Record Discovery

It has been settled law for nearly 50 years that courts may authorize extra-record discovery where necessary to ensure meaningful review of agency action. *Overton Park*, 401 U.S. at 420. That discovery may include "inquiry into the mental processes of administrative decisionmakers" upon a "strong showing of bad faith or improper behavior." *Id.* Defendants "do not dispute—and have never disputed—that 'bad faith' can justify extra-record discovery." Pet. App. 123a.

Applying that standard, the district court did not clearly and indisputably err or abuse its discretion. Secretary Ross's serial misrepresentations about the rationale for and origin of the citizenship question—as well as the myriad irregularities in the administrative process—are textbook bad faith. The government's refrain that bad faith requires that the decisionmaker disbelieve his own explanation, exhibit irreversible prejudgment, or act for discriminatory reasons, Br. 15, 20, 23-24, flouts precedent and common sense. In any event, bad faith is evident even under the government's faulty definition.

A. Any Type of "Bad Faith or Improper Behavior" Justifies Extra-Record Discovery

1. "Bad faith" and "improper behavior," the showings that permit extra-record discovery under *Overton Park*, are familiar phrases. "Bad faith" means "dishonesty of belief, purpose, or motive," Black's Law Dictionary (10th ed. 2014). There are many ways to exhibit dishonesty in agency decisionmaking—in the decisionmaking process, in the ultimate result, or in disclosing the process or the result. "Improper" means "unsuitable or irregular," *id.*, and agencies may act improperly in a variety of different ways.

Thus, in *Camp v. Pitts*, 411 U.S. 138 (1973), this Court held that *Overton Park* authorized extra-record discovery "where there are inadequate fact-finding procedures." *Id.* at 141-42. If "the only deficiency suggested … is that the [decisionmaker] inadequately *explained* his decision," the Court cautioned, "the focal point for judicial review should be the administrative record already in existence." *Id.* at 142 (emphasis added). But any improper or dishonest "procedures" justify "affidavits or testimony" beyond the administrative record. *Id.* at 142-43.

This makes sense given the significance of the decisionmaking process to judicial review. An agency decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Veh. Mfrs. Ass'n of U.S.,*

Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The reason bad faith or improper behavior permits extra-record discovery, *Overton Park* held, is that "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence." 401 U.S. at 420. Dishonesty about the factors relied upon or the evidence before the agency makes it impossible for reviewing courts to fulfill their statutory duty under 5 U.S.C. § 706. If there is a "strong showing" of bad faith that undermines a court's confidence in the administrative record, the court must be able to order discovery to decide whether the undisclosed factors were impermissible ones.

Indeed, because process is so central to APA review, deliberately obscuring the true nature of that process—as Secretary Ross did by concealing how and why Commerce reached its decision—is perhaps the *worst* kind of bad faith in this setting. Such dishonesty creates reason to doubt that the bare administrative record shows the whole picture, and reason to infer that discovery might demonstrate that the agency's action was arbitrary or capricious.

Consistent with these principles, lower courts have looked beyond the four corners of a record on a strong showing of misstatements or misrepresentations by agency officials;[9] unexplained omissions or suppression of contrary opinions or negative docu-

[9] *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 460, 463 (4th Cir. 1993) (perjury by agency official means the "administrative record" cannot be "accepted as is," and remanding for district court to consider discovery).

ments from the administrative record;[10] unexplained departures from prior administrative practice;[11] and improper political influence or secret communications.[12] While a strong showing of bad faith or improper behavior is required, the standard is not nearly so narrow as the government suggests.

2. The government disputes that misrepresentations or deception can justify extra-record discovery,

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[10] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54, 59 (D.C. Cir. 1977) (ordering evidentiary hearing where "communications [we]re made to the agency in secret" and agency did "not disclose the information presented"); *Mar. Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (approving discovery where government "demonstrated bad faith by submitting an incomplete administrative record"); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987) (acknowledging that suppression of unfavorable scientific opinion would constitute bad faith warranting discovery).

[11] *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233-34 (E.D.N.Y. 2006) (finding bad faith and ordering discovery where "agency deviated from its traditional practices in reaching the decision"); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1238, 1245-46 (D.C Cir. 1971) (noting that district court held hearing with testimony from agency official where department "failed to apply its own procedures").

[12] *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 541-43 (D.C. Cir. 1978) (requiring agency, on remand, to disclose the substance of *ex parte* contacts); *Fed'n of Civic Assn's*, 459 F.2d at 1248 n.84 (on remand, agency to "insulate itself from extraneous pressures," *inter alia*, by "compiling [] full-scale administrative record"); *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 196 (E.D.N.Y. 2013) ("strong showing of bad faith and improper political influence" defeated "record rule"); *Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *4-6 (D. Conn. Nov. 3, 2006) (ordering discovery given evidence of political pressure); *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1279-81 (W.D. Wis. 1997) (same).

and even denies that misrepresentations constitute "dishonesty." Br. 23. It argues that *Overton Park*'s "bad faith or improper behavior" standard encompasses only three narrow types of misbehavior: (1) failing to "sincerely believe" the "formal[]" or "stated" grounds for the decision; (2) "irreversibly prejudg[ing]" the issue; or (3) "act[ing] on a legally forbidden basis," by which the government presumably means unlawful animus. Br. 15-16, 20, 23-24. The government's cramped interpretation lacks any basis in law or logic.

a. *Overton Park* itself refers generally to "bad faith or improper behavior," without qualification. And the government's theory cannot be reconciled with *Camp*, where the Court concluded that an "inadequate" factfinding procedure was sufficiently improper to justify *de novo* review, necessarily including factual discovery. 411 U.S. at 141-42. The government's theory also defies the ordinary understanding of "bad faith." As the government itself has previously maintained, "bad faith" encompasses "such factors as the accuracy of [a litigant's] statements [and] any other attempts by the [litigant] to mislead the … court or manipulate the … process."[13] Offering inaccurate or misleading statements is quintessential bad faith.

b. No precedent supports the government's newly-minted contrary view. *Jagers v. Federal Crop Insurance Corp.*, 758 F.3d 1179 (10th Cir. 2014) (cited at 23-24, 33) simply held that, in the absence of evi-

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[13] *See* Br. for the United States as Amicus Curiae at 28-29, *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (No. 05-996) (2006 WL 2803436) (internal quotations omitted).

dence that an agency decision was "predetermined," a litigant could not establish a due process violation on the merits based on alleged prejudgment. *Id.* at 1184-85. *Jagers* did not hold that evidence of prejudgment was necessary for discovery; the case did not even involve extra-record discovery, much less mention *Overton Park*.

And *Air Transport Ass'n of America, Inc. v. National Mediation Board*, 663 F.3d 476 (D.C. Cir. 2011), correctly required a "significant showing [that plaintiffs would] find material in the agency's possession indicative of bad faith or an incomplete record." *Id.* at 487. The court focused on evidence of an "unalterably closed mind" because that was the bad faith alleged, not because it is the only cognizable type of bad faith. *Id.* at 487-88. Quite the contrary, the court believed that even improper delay could support extra-record discovery, but concluded that there was an insufficient factual showing. *Id.* at 488.

c. Finally, the government's rule conflates discovery with the merits. Proof that the agency disbelieved the stated rationale, irreversibly prejudged the issue, or relied on a forbidden rationale are among the ways to establish an APA violation. 5 U.S.C. § 706. But no authority suggests that a litigant must make a "strong showing" on the ultimate merits before obtaining extra-record discovery. *Overton Park*'s point was that discovery may be essential to *establish* that the agency's action was "[un]justifiable under the applicable standard." 401 U.S. at 420; *accord Camp*, 411 U.S. at 142-43 (courts may order extra-record discovery where absence would "frustrate effective judicial review").

Overton Park accordingly authorized extra-record discovery where the agency did not maintain an administrative record—without regard to whether plaintiffs established an APA violation on the merits. 401 U.S. at 420. That rule is sound. Where the agency has curated or censored the record to avoid detection of impermissible contacts, evidence, or considerations, it may be impossible to demonstrate arbitrary action without discovery. The *Overton Park* rule would serve no purpose if the only litigants entitled to extra-record discovery are those who would succeed without it.

Moreover, the government's novel bad faith standard is at odds with the APA itself. Plaintiffs need not show lack of "sincerity," irreversible prejudgment, or discriminatory animus to prevail on an APA claim. A mere failure to consider important facts or factors will do. *State Farm*, 463 U.S. at 43; *see, e.g.*, *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 719 (10th Cir. 2010) (Gorsuch, J., concurring) (prejudgment is only "one way an agency can fail § 706's test"). And as the government conceded below, a showing of pretext would alone be grounds to vacate the decision to add a citizenship question. Pet. App. 12a. If "the stated rationale for Secretary Ross's decision was not his *actual* rationale," then he did not "'disclose the basis of [his] decision,'" as the APA requires. Pet. App. 11a (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

In short, any strong showing of bad faith or improper behavior that bears on the integrity of the agency decisionmaking process suffices under *Overton Park*.

B. The District Court Did Not Clearly and Indisputably Err in Finding a Strong Showing of Bad Faith or Improper Behavior

Plaintiffs made a "strong showing" of bad faith or improper behavior. Pet. App. 98a-100a. The district court did not clearly err in finding strong evidence that Secretary Ross misled Congress and the public about how and why he decided to add a citizenship question, disregarded the normal procedures for adding a question to the Decennial Census, and offered a pretextual rationale for the question to mask his true reasons.

1. *The Extensive Evidence of False Statements and Concealment Readily Establishes Bad Faith and Improper Behavior*

Secretary Ross's "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"—constituted the "[m]ost significant" evidence of bad faith. Pet. App. 124a (citing July 3 findings); *see also* Pet. App. 15a-16a, 96a-98a.[14] Secretary Ross's prolonged campaign to perpetuate a false narrative is prototypical bad faith

[14] The government mischaracterizes this as a "fifth" explanation that the district court "added" after July 3. Br. 24. The district court's July 3 oral ruling expressly recounted Secretary Ross's misrepresentations in the decisional memorandum and to Congress. Pet. App. 96a-97a (finding that the supplemental memorandum represented a "significant change in the timeline" the Secretary had previously offered and demonstrated that Secretary Ross's statements to Congress "were potentially untrue"); Pet. App. 98a (relying on that conclusion in authorizing extra-record discovery).

and improper behavior. It provides strong evidence that he had other reasons to add a citizenship question—reasons which, if benign, would likely have been made public.

a. In March 2018, members of Congress questioned the Secretary about the impact of politics on his decision, especially in light of a March 19 email from the President's re-election committee declaring that President Trump supported a citizenship question.[15] Secretary Ross testified that, in considering a citizenship question, Commerce was "responding solely to the Department of Justice's request" for information to enforce the VRA.[16] Asked, "Has the president or anyone in the White House discussed with you or anyone on your team about adding this citizenship question?," Secretary Ross said: "I am not aware of any such."[17] Two days later, Secretary Ross again testified that DOJ "initiated the request for inclusion of the citizenship question."[18]

The March 26, 2018 decisional memorandum perpetuated this narrative. Secretary Ross stated that he "set out to take a hard look" at DOJ's "request" "[f]ollowing receipt" of the "request" on December 12, 2017. Pet. App. 136a. He added that, after receiving the DOJ "request," he "immediately *initiated* a comprehensive review process," *id.* (emphasis added), and that Commerce then "began" its "assessment" of a citizenship question, Pet. App. 137a. Secretary

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[15] 2018 WLNR 8815056 (March 20, 2018 House Appropriations)

[16] *Id.*

[17] *Id.*

[18] 2018 WLNR 8951469 (March 22, 2018 House Ways and Means).

Ross continued to tell this story to Congress through May 2018: when asked about DOJ's "sudden interest" in citizenship information, Secretary Ross answered: "Well, the Justice Department is the one who made the request of us."[19]

As the district court properly found, Secretary Ross's story "shifted quite dramatically" in the June 21, 2018 supplemental memorandum, Pet. App. 87a—which DOJ acknowledges was issued only because of this litigation, Br. 7, 32. There, the Secretary admitted *for the first time* that he considered a citizenship question "[s]oon after [his] appointment" in February 2017, in response to requests from "senior Administration officials," and that *he* asked DOJ to request a citizenship question and to cite the VRA as its reason. Pet. App. 134a. Thus, "while Secretary Ross initially (and repeatedly) suggested that the Department of Justice's request triggered his consideration of the issue," the "sequence of events was exactly [the] opposite." *New York*, 315 F. Supp. 3d at 808. Contrary to Secretary Ross's sworn statements, he personally discussed a citizenship question with Steve Bannon, then-White House chief strategist, J.A.103, 111-13, 286-87; DOJ did not "initiate" the request; Commerce did not "beg[in]" its assessment in December 2017; and it did not "respond[] solely" to DOJ's request.

That is not normal, proper, good faith agency behavior. Falsehoods and deception are quintessential bad faith. *United States v. Bove*, 888 F.3d 606, 608 (2d Cir. 2018). "[I]nconsistent statements in themselves cast considerable doubt on the sincerity" of

[19] 2018 WLNR 2179074 (May 10, 2018 Senate Appropriations).

Secretary's Ross's stated VRA justification. *Witmer v. United States*, 348 U.S. 375, 382-83 (1955); *see City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1770 n.1 (2015). Factfinders routinely infer a guilty mind from shifting statements—even in criminal cases, where facts must be found beyond a reasonable doubt. *United States v. Timlick*, 481 F.3d 1080, 1084 (8th Cir. 2007). This is precisely the kind of evidence that signals that the bare administrative record may not tell the full story, justifying extra-record discovery.

b. The district court's bad faith finding turned on the totality of the evidence, which showed that Secretary Ross wanted to add a citizenship question, contrived a VRA-based justification, laundered the justification through DOJ, and lied about discussing the issue with White House officials. To further propagate the false narrative that DOJ initiated the request, Commerce initially submitted an administrative record in this litigation that omitted any materials predating the December 12, 2017 DOJ letter. Pet. App. 77a. Only after the district court called a hearing on record issues did Secretary Ross finally own up to the real story.

The government addresses each statement by Secretary Ross in a vacuum, parsing his words to try to explain away each individual false or misleading claim. Br. 25-32. But it strains credulity that, over a period of months and given multiple opportunities, Secretary Ross inadvertently failed to mention his extensive efforts prior to receipt of the DOJ letter; inadvertently failed to mention that he himself asked the Attorney General to have DOJ send that letter; inadvertently failed to mention that Commerce—not

DOJ—concocted the VRA justification; and that he then gave Congress false answers when asked about these events because he misunderstood every question posed. By contrast, it is entirely plausible that the Secretary wished to conceal the unhelpful fact that the VRA rationale arose not organically from DOJ but from Commerce, which needed a rationale for what the Secretary had already decided to do, for reasons he did not want to disclose. None of the government's post-hoc speculations establish that the district court clearly erred in finding bad faith and improper conduct.

The government's efforts to explain away each individual statement fail. First, the government argues that the March 2018 decisional memorandum did not imply that Commerce's consideration of the citizenship question began in December 2017, because the Secretary merely represented that he "set out to take a hard look" at DOJ's "request," not at the citizenship question in general. Br. 25. But the memorandum actually says that the Census Bureau "initiated" and "began" its assessment after receiving the DOJ letter. Pet. App. 136a-37a. And the Secretary's statement masked the fact that it was his *own request* that set matters in motion, not DOJ's. The Secretary's language—"*following the receipt of the DOJ request*, I set out to take a hard look," Pet. App. 136a (emphasis added)—falsely implied that the Secretary was not the source of the request; that he heard about it for the first time from DOJ; and that it was arms-length. The district court committed no clear error in concluding that the memorandum was deceptive in omitting that Commerce requested the DOJ letter.

Second, the government argues that when Secretary Ross told Congress that Commerce was "responding solely to the [DOJ's] request," all he meant "in context" was that Commerce was not responding to requests from "political parties or campaigns." Br. 26-27. But that is not what Secretary Ross said, and it was not clear error for the district court to rely on what he *actually* said ("solely to the [DOJ]") rather than the government's post-hoc speculation about what he *might* have meant (not "political parties"). Moreover, Secretary Ross's use of the word "responding" is itself misleading; it implies that Commerce was a passive recipient of DOJ's request, not its instigator.

Third, the government argues that when Secretary Ross falsely denied that he spoke with "anyone in the White House" about the citizenship question, he only meant that no "political actors in the White House had made a *formal request* to reinstate the citizenship question." Br. 28 (emphasis added). That was not the question posed, which was clear as day: Had the Secretary "discussed" the citizenship question with "anyone in the White House?" Secretary Ross said no.[20] That statement was plainly false. The government says that Bannon called Secretary Ross "only to ask him to speak to then-Kansas Secretary of State Kris Kobach—not to request … the citizenship question." Br. 28. But emails in the administrative record state that Bannon requested a conversation "about the Census," J.A.103, and then "direct[ed]" Secretary Ross and Kobach to speak about the "citizenship" "issue." J.A.112. Commerce has

[20] 2018 WLNR 8815056 (March 20, 2018 House Appropriations).

admitted that Bannon asked Secretary Ross to speak to Kobach "about a possible citizenship question," J.A.286. Moreover, Secretary Ross admitted that he discussed the citizenship question with Bannon in the mid-trial interview with Yahoo! News. PX-688.

Fourth, the government defends Secretary Ross's testimony that DOJ "initiated the request for inclusion of the citizenship question," claiming that the Secretary only meant that DOJ "initiated" the so-called "formal process." Br. 29-30. But the government's formal/informal process distinction is fabricated after the fact, and finds no support in law or in anything Secretary Ross said (*see infra*). Regardless, if the "formal process" began with DOJ's request letter, Commerce *still* initiated that process by *asking* DOJ to send the letter. Pet. App. 134a.

Fifth, the government defends Secretary Ross's false testimony that DOJ "is the one who made the request of us," asserting that the "Secretary was merely pointing out that the VRA rationale came from DOJ itself." Br. 30. But *it didn't*. The VRA rationale originated in the Commerce Department. Pet. App. 134a.

Even if the government's post-hoc rationalizations were plausible (and they are not), they would not justify mandamus. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); *accord Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). The question is not whether one can hypothesize that Secretary Ross repeatedly misunderstood simple questions and inadvertently deceived Congress and the public at every conceivable opportuni-

ty. Rather, it is whether the district court *clearly and indisputably erred* in finding that Plaintiffs made a strong preliminary showing that Secretary Ross misrepresented material facts, sufficient to justify discovery.

c. The June 21 supplemental memorandum—in which Secretary Ross's story "shifted quite dramatically," Pet. App. 87a—is itself an admission that Secretary Ross's original memorandum and statements to Congress did not fully and accurately describe what happened. The government tellingly now admits that the memo was issued in response to this litigation (Br. 7, 32), and it does not plausibly explain *why* it issued a corrective memorandum if there was nothing to correct. That memo is evidence of deception and irregularity that justifies extra-record discovery. Pet. App. 98a.

The government asserts that the original memorandum—and all of Secretary Ross's statements to Congress—described the "formal" process but not the "informal" one. Br. 15-16, 25, 28-32. On the government's theory, when Secretary Ross said that DOJ "initiated" the request, that Commerce "began" consideration only after DOJ's request, and that he never spoke to the White House, Secretary Ross was secretly drawing a distinction between formal and informal processes. The government thus argues that the supplemental memorandum didn't change the story because it described only the "informal" process, while the original memorandum only described the "formal" process. Br. 32.

But the formal/informal process distinction is a post-hoc invention of the government's lawyers. As a legal matter, this entire proceeding was "informal"

under the APA. *Cf.* 5 U.S.C. § 554(a). The government cites no Commerce Department rule or policy distinguishing between "formal" and "informal" discussions. And Secretary Ross himself never made any such distinction, either in his memorandum or when he responded to Congress's questions, all of which asked generally about Commerce's consideration of the citizenship question. Given that "courts may not accept appellate counsel's post-hoc rationalizations for agency action" but rather may rely only on "the basis articulated by the agency itself" contemporaneously, *State Farm*, 463 U.S. at 50, it would have been clear error for the district court to rely on the government's novel formal/informal distinction—not the other way around.

Ultimately, the government's distinction would undermine the very foundation of APA review. Courts review "the whole record," 5 U.S.C. § 706, not some partial record the agency (much less its counsel after the fact) arbitrarily designates as "formal." The APA does not empower agencies to conceal evidence or factors they considered by unilaterally deeming them "informal." To evaluate whether DOJ's purported desire to enforce the VRA in fact prompted Commerce to add the citizenship question, it is important to know that Commerce devised that rationale before even speaking to DOJ. Pet. App. 134a. And to evaluate whether the agency relied on impermissible factors, it is important to know that Secretary Ross received articles from his aides about the "pitfalls of counting illegal immigrants," and was told that the absence of a citizenship question "leads to the problem" that undocumented immigrants are "counted for congressional apportionment purposes."

J.A.97-102, 112. The degree of "formality" the government now ascribes to these exchanges is irrelevant under the APA. They were part of the decisionmaking process, are within the administrative record, and Secretary Ross sought to conceal them.

d. Contrary to the government's argument (Br. 22), the district court did not improperly assume the truth of Plaintiffs' allegations. The district court's conclusion that Secretary Ross offered shifting stories and false explanations relied on materials that were in the initial administrative record or were judicially noticeable, like statements to Congress. Pet. App. 96a.

Nor can the government fall back on the "presumption of regularity." Br. 25, 31-32. *Overton Park*'s bad faith standard fully encompasses that presumption, 401 U.S. at 415; here, the district court found it rebutted. Pet. App. 95a-96a, 103a. And to the extent it even applies here, the presumption just assigns plaintiffs the burden of producing "particularized proof of irregularities." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (citation omitted). The government cites no case—and Plaintiffs are aware of none—holding that if plaintiffs adduce such evidence, it must be interpreted in the light most favorable to the agency. The district court was not obligated to indulge post hoc rationalizations. Nor does any presumption lessen the deference this Court owes to the district court's factual findings. *Cooper*, 137 S. Ct. at 1474 n.8.

2. *The Evidence of Prejudgment, Overruling Experts on Questions of Fact, Deviating from Standard Procedure, and Pretext*

Further Establish Bad Faith or Improper Behavior

The district court did not clearly and indisputably err in pointing to a constellation of other factors establishing bad faith or improper behavior. Pet. App. 98a-100a.

a. The court concluded that the 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; *see id.* at 96a-97a. The government surmises that the Secretary only thought the question "could" be warranted, Br. 33, but the court's rejection of a competing interpretation is not clear error. In fact, the administrative record unequivocally confirms the Secretary's prejudgment. On May 2, 2017, Secretary Ross wrote that he was "mystified why nothing ha[s] been done in response to my months old request that we include the citizenship question," and an aide promised "we will get that in place" by "get[ting] [DOJ] to request" it. J.A.107; *see New York*, 315 F. Supp. 3d at 809. It is not "indisputably" erroneous to conclude that Secretary Ross had already decided to add the citizenship question by May 2017 and laundered the request through DOJ—which constitutes bad faith given that Secretary Ross repeatedly assured Congress in March 2018 that he had not yet reached a decision. *Supra* p.7 & n.4.

Respondents need not show that a decisionmaker "act[ed] with an 'unalterably closed mind.'" Br. 33 (quoting *Miss. Comm'n on Envtl. Quality* v. *EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam)). That

standard governs whether a decisionmaker must be disqualified altogether from the rulemaking process. *Id.* The government cites no case applying the "unalterably closed mind" test as a discovery prerequisite.

The government attacks a strawman in arguing that merely "favor[ing] a particular outcome" does not constitute bad faith. Br. 23, 33. The district court did not hold otherwise. Pet. App. 123a. The evidence here suggested something different: Secretary Ross decided to add the citizenship question *before* he even *knew* about the rationale that he ultimately purported to rely upon. Pet. App. 98a. Moreover, because Secretary Ross assured Congress that his "sole[]" reason for adding a citizenship question was VRA enforcement, Pet. App. 15a, evidence of prejudgment by May 2017 without regard to any VRA justification supports the conclusion that he acted in bad faith.

b. The district court also cited the fact that Secretary Ross disregarded the unanimous conclusion of Census Bureau leadership that adding the citizenship question would be "very costly" and would "harm the quality of the census count." Pet. App. 98a-99a (quoting J.A.181). The government observes that a policy disagreement with staff does not constitute bad faith. Br. 34-35. But the district court did not rely on the Secretary's disagreement as to *policy*, but his unexplained disregard of the Bureau's *factual* conclusions. Pet. App. 123a. The Secretary declared that he "prioritized the goal of obtaining *compete and accurate data*," Pet. App. 137a, but uncontested evidence from the Census Bureau established that adding the question would "harm[]the quality of the census count" and produce "substantially less accurate

citizenship data" for DOJ. J.A.181-82, 244. The court did not abuse its discretion in concluding that the Secretary may be acting improperly when he inexplicably overrules the unanimous factual conclusion of subject-matter experts that his chosen course would lead to the opposite of his professed goal. *Camp*, 411 U.S. at 142-43 ("inadequate factfinding" can constitute improper behavior warranting extra-record discovery).

This is nothing like *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (cited at Br. 34). *Wisconsin* held that so long as the Secretary's statistical "conclusion [was] supported by the reasoning of *some* of his [technical] advisers," it was reasonable on the merits. *Id.* at 23-24 (emphasis added). Here, Census Bureau technical experts *unanimously* warned that adding a citizenship question would produce *worse* citizenship data and distort the Census. J.A.180-98, 236-44. And *Wisconsin* said nothing about whether a decision overruling technical experts could support discovery; indeed, the record there reflected extensive extra-record discovery and a 13-day trial. *City of New York v. Dep't of Commerce*, 34 F.3d 1114, 1123 (2d Cir. 1994).

c. The district court also did not clearly err in finding that the Secretary "deviated significantly from standard operating procedures." Pet. App. 99a. "[B]y defendants' own admission" the citizenship question was added "after substantially less consideration [than usual] and without any testing at all." *Id.*

The government points (Br. 35) to Secretary Ross's explanation that a citizenship question previously appeared on sample surveys, but ignores his

acknowledgment that those surveys "differ[] significantly in nature" from the Decennial Census. Pet. App. 141a. And the government ignores Secretary Ross's acknowledgment that noncitizens "inaccurately mark 'citizen' about 30 percent of the time," Pet. App. 143a—which means that the question has *not* performed adequately on sample surveys and is *not* exempt from the Bureau's pretesting requirement. *Supra* pp.12, 19.

Failing even to *test* a question that will produce inaccurate results and distort representation in our democracy for a decade does not constitute "cutting through red tape." Br. 35. It is a significant deviation from standard Census Bureau procedures. The district court did not indisputably err in finding the deviation to be improper behavior warranting discovery.

d. Finally, the district court did not indisputably err in finding a "prima facie showing" that the VRA justification "was pretextual." Pet. App. 99a. As the court found, "the Department of Justice … ha[s] never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census … would be helpful let alone necessary to litigating such claims." *Id.* There is nothing "clearly and indisputably" wrong about the district court's conclusion that this undisputed historical fact cast doubt on the Secretary's claim that the question was suddenly "necessary" for VRA enforcement. Pet. App. 150a. And the sequence of events—that Commerce rather than DOJ contrived the VRA rationale, then tried to conceal its role—also supports the district court's finding of pretext. The very notion that the Secretary, who has no responsibility for the VRA,

told DOJ that this should be the rationale for its request raises a red flag both as to the bona fides of that rationale and as to the "actual" rationale of the Secretary.

The government denies that the Secretary "disbelieved" DOJ or thought a citizenship question would "*not* be useful for VRA enforcement." Br. 36. But the Secretary declared that the question was not merely useful but "necessary," Pet. App. 150a, something the Secretary could not have believed because history disproves it, and because the rationale arose not from DOJ but from Commerce.

The government's proposed "sincere belief" test (Br. 20, 24) also misapprehends the nature of the pretext inquiry. The question is not whether Secretary Ross disbelieved the stated reason; the question is whether the stated reason was not the *real* reason, *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), because he had already made his decision, irrespective of the stated reason. If "the stated rationale for Secretary Ross's decision was not his *actual* rationale," he did not "'disclose the basis of [his]' decision," as the APA requires. Pet. App. 11a (quoting *Burlington*, 371 U.S. at 168). Advancing a pretextual reason, moreover, provides strong evidence that the actual, hidden reason is illicit or insufficient to sustain the agency's action. *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008); *Reeves*, 530 U.S. at 147-48.

The government also contends that Secretary Ross's self-proclaimed "thorough assessment" of DOJ's request confirms that he did not disbelieve it. Br. 36. That is mere *ipse dixit*. As the district court found, by foregoing testing in violation of ordinary

assessment procedures, Secretary Ross did *not* thoroughly assess the request. Pet. App. 99a. And he added the question despite undisputed evidence that there was a cheaper and more accurate alternative for obtaining the data DOJ supposedly needed. J.A.182, 244.

C. Even Under the Government's Unduly Cramped Interpretation of the Bad Faith Standard, the District Court Did Not Indisputably Err or Abuse its Discretion

The district court did not indisputably err or abuse its discretion, even under the government's proffered definition of bad faith as requiring irreversible prejudgment, insincerity, or reliance on a legally impermissible rationale. The district court did not use those precise words because the government first advanced its current interpretation of the record rule in its stay motion. But the court's factual findings and the administrative record satisfy the government's test.

1. The evidence supports irreversible prejudgment. Pet. App. 98a. Secretary Ross decided to add the question several months prior to May 2017, J.A.106-07, before anyone at Commerce ever spoke with DOJ. By September 2017, after Secretary Ross's aides had struck out with DOJ and DHS, they began looking into "how Commerce could add the question to the Census itself." J.A.128. Secretary Ross had decided to add the question no matter what DOJ thought. Whether he would have "asserted the VRA-enforcement rationale had DOJ disagreed," Br. 33-34, is beside the point. He would have manufactured another rationale; indeed, his staff were doing so. J.A.128. The government observes that "nothing

happened until *after* DOJ sent its formal request," Br. 34, but the record shows that Secretary Ross was already prepared to move forward when DOJ finally agreed to do "whatever you all need us to do," J.A.135.

Overruling career officials on basic factual matters and refusing to engage in standard testing processes further support prejudgment. *Supra* p.41. The problem is not that Secretary Ross had a "subjective hope that factfinding would support a desired outcome" (Br. 24), it's that he bypassed normal factfinding altogether—indicating that he did not care (or feared) what it would find. And Secretary Ross's persistent efforts to misrepresent and conceal his own role in the process, *supra* pp.31-39, strongly support an inference of irreversible prejudgment.

2. The administrative record also establishes a prima facie case that Secretary Ross did not "sincerely believe" in the VRA rationale. Secretary Ross knew that: his aides, not DOJ, devised the rationale; DOJ enforced the VRA from enactment with sample-based citizenship data rather than "full count" citizenship data; the Census Bureau unanimously concluded that a citizenship question would produce less accurate data for DOJ than a cheaper alternative; DOJ had resisted adoption of the VRA rationale; and things changed only after he personally interceded with the Attorney General. J.A.128, 135, 181-83, 236-44.

All of this, taken together with his concealment of the origins of the VRA rationale, indicates that Secretary Ross doubted the sincerity of the rationale. Most important, Secretary Ross's "inconsistent statements in themselves cast considerable doubt on

the sincerity" of his belief in the VRA rationale, *Witmer*, 348 U.S. at 382-83, and are "highly damaging" to his "credibility," *Atkins v. Virginia*, 536 U.S. 304, 308 n.2 (2002).

3. Plaintiffs also made a strong showing that Secretary Ross acted on an unlawful basis, *i.e.*, to reduce the number of undocumented immigrants who would be considered for purposes of reapportionment. That is the only justification—other than the VRA—found in the administrative record, and it predates the VRA rationale. In March 2017, Earl Comstock emailed the Secretary about "the pitfalls of counting illegal immigrants" in the Census. J.A.97-98. By April or May, Secretary Ross had spoken to Bannon and Kobach, J.A.103, 112, who connected the absence of a citizenship question with "the problem" that undocumented immigrants are "counted for congressional apportionment purposes." J.A.112. These facts strongly suggest that Secretary Ross impermissibly intended to undercount undocumented immigrants.

Finally, Secretary Ross's "shifting explanations" and "misrepresentations" about the reasons and process to add the citizenship question are further strong circumstantial evidence of an illicit "discriminatory intent." *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) (citations omitted); *accord Reeves*, 530 U.S. at 147-48.

As the district court concluded: "If those circumstances, taken together, are not sufficient to make a preliminary finding of bad faith that would warrant extra-record investigation, it is hard to know what circumstances would." Pet. App. 124a.

III. The District Court Did Not Clearly and Indisputably Abuse Its Discretion in Ruling that Discovery Was Independently Permissible Because of Plaintiffs' Constitutional Claim

The district court held that extra-record discovery was independently permissible because Plaintiffs plausibly alleged intentional discrimination in violation of the Fifth Amendment. The government addresses that holding in a two-sentence footnote (Br. 22 n.3) that does not preserve the issue, much less establish a "'clear abuse of discretion'" warranting mandamus. *Cheney*, 542 U.S. at 380 (citations omitted). Because this separate holding independently justifies the extra-record discovery, the Court cannot grant mandamus *even if* the district court erred in ordering discovery under *Overton Park*.

1. The district court's initial July 3 ruling authorizing extra-record discovery did not "rest heavily on" Plaintiffs' constitutional claim because the government's motion to dismiss was still pending. J.A.301 n.8. On July 26, however—well before the government produced any discovery—the court denied that motion, holding that Plaintiffs plausibly alleged the "decision to reinstate the citizenship question was motivated by discriminatory animus." *New York*, 315 F. Supp. 3d at 811.

The court subsequently relied on that decision—which is unchallenged here—to compel the depositions of Acting AAG Gore and Secretary Ross, Pet. App. 18a, 25a, and held that it independently justified all extra-record discovery in the case, whether or not *Overton Park* was satisfied. At the pretrial conference, the court explained that because Plaintiffs "stated a plausible due process claim," "that alone

would justify and does justify and did justify the extra-record discovery that the parties engaged in until last week." Add.20a. The district court confirmed its ruling in a November 5 order. J.A.301-02 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)).

2. It is beyond dispute that plaintiffs who plausibly allege unconstitutional discrimination are presumptively entitled to discovery. That was an express premise of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which applied strict pleading and qualified immunity standards in cases alleging unconstitutional discrimination by government agencies in part *because* of the discovery that results when claims survive the pleading stage. *Id.* at 678, 684-86; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 578 (1998) (plaintiffs received "discovery" in First Amendment challenge to agency action); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (plaintiff suing federal agency for unconstitutional discrimination "ordinarily will be entitled to some discovery" after surviving motion to dismiss); *Webster v. Doe*, 486 U.S. 592, 604 (1988) (plaintiff suing for APA violation and unconstitutional discrimination is entitled to discovery to support "colorable constitutional claim").

Plaintiffs' entitlement to discovery follows ineluctably from the *de novo* standard of review for an intentional discrimination claim. Discovery is ordinarily unavailable in APA actions because the standard of review is *not* de novo; the question is generally whether agency action is arbitrary or capricious based on the record before it. *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (contrasting

"de novo" review with review "confined to the administrative record"); *see Camp*, 411 U.S. at 141-42. Judicial review of a discrimination claim is, of course, *de novo*—so the record rule does not apply. *Chandler v. Roudebush*, 425 U.S. 840, 861 (1976) (plaintiff challenging agency action under Title VII was entitled to discovery because Title VII provided for "de novo" review, rather than "record review of agency action.").

The fact that a party *also* brings an APA claim does not deprive it of the discovery to which it is entitled on its non-APA claim—particularly if that claim entails intentional discrimination. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Discovery is essential in such cases. *Id.* at 270 (considering testimony of decisionmaker); *Easley v. Cromartie*, 532 U.S. 234, 239-41 (2001) (describing discovery and testimony in racial gerrymandering case). And if raising an equal protection claim alongside an APA claim somehow destroyed the right to discovery, plaintiffs would have perverse incentives to bring only constitutional claims, undermining this Court's well-settled preference for avoiding constitutional issues where possible.

Of course, as the district court noted, "plaintiffs can[not] evade the APA record rule merely by *bringing* a constitutional claim," because such a claim must survive pleading standards and because courts should "limit the scope of discovery," as the court did here, "to avoid undue intrusion on the governmental decisionmaking process." J.A.302 n.9. But "it would

be perverse—and risk undermining decades of equal protection jurisprudence—to suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'" J.A.302.

While a few courts have refused extra-record discovery where plaintiffs bring a non-APA claim sounding in rational basis, that is because "[t]he information necessary for the Court to determine whether the agency's [action] was rational … will, presumably, be found in the administrative record." *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C 2017). Lower courts regularly authorize discovery where a plaintiff plausibly alleges invidious discrimination or other constitutional violations.[21]

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[21] *See, e.g.*, *Muniz-Muniz v. U.S. Border Patrol*, 869 F.3d 442, 446 (6th Cir. 2017) (considering agency testimony in Fifth Amendment racial discrimination suit against Border Patrol); *Jean v. Nelson*, 711 F.2d 1455, 1485-94 (11th Cir. 1983) (considering discovery in Fifth Amendment challenge to INS policy), *vacated on other grounds*, 727 F.2d 957 (11th Cir. 1984); *Rowell v. Andrus*, 631 F.2d 699, 705-06 (10th Cir. 1980) (in APA and equal protection challenge to Department of Interior regulation, remanding for discovery); *Grill v. Quinn*, 2012 WL 174873, at *2 (E.D. Cal. Jan. 19, 2012) ("A direct constitutional challenge is reviewed independent of the APA … discovery as to the non-APA claim is permissible."); *Miccosukee Tribe of Indians of Fla. v. United States*, 2010 WL 337653, at *1-2 (S.D. Fla. Jan. 22, 2010) (same); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 802 (E.D. Va. 2008) (same); *Jones v. Rose*, 2008 WL 552666, at *12 (D. Or. Feb. 28, 2008) (same); *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (same).

3. The government's footnote contains no support for the notion that the record rule governs constitutional challenges to agency action. Br. 22 n.3. The single case cited—*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)—did not even involve discovery. *Fox* merely held that constitutional challenges to agency action do not entail a "more stringent" version of "arbitrary-and-capricious review"; rather, "lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge." *Id.* at 516. If anything, *Fox* supports the district court's holding distinguishing constitutional challenges from ordinary APA challenges.

This Court cannot grant *mandamus* on the basis of a conclusory two-sentence footnote. In fact, the footnote does not even properly preserve the issue. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 223-24 (1997); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring).

4. Although the district court has now concluded that the absence of sworn testimony from Secretary Ross prevented Plaintiffs from ultimately proving their discriminatory intent claim, *New York*, 2019 WL 190285, at *119, that does not undermine its initial discovery decision. Because the district court's independent equal protection holding authorizes all discovery at issue here, mandamus should be denied regardless of whether the *Overton Park* exception is satisfied. Disputes about which discovery may be considered for which claims are best resolved on review of the district court's final judgment.

IV. Any Ruling Should Be Limited to the Narrow Question Presented in the Petition

The Court should confine its ruling to the narrow issue identified in the government's petition:

> Whether, in an action seeking to set aside agency action under the [APA] … a district court may order discovery outside of the administrative record *to probe the mental processes of the agency decisionmaker*…

Pet. i (emphasis added); Br. i (same).

The propriety of extra-record discovery for any other purpose—such as to assess standing or to understand highly technical matters—is not presented and should not be considered at this time.

1. Supreme Court Rule 14.1(a) provides that "*[o]nly the questions set out in the petition*, or fairly included therein, will be considered by the Court." (emphasis added). The rule "assists the Court in selecting the cases in which certiorari will be granted," allowing it to use its "resources most efficiently, … to resolve particularly important questions." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992). Even if an issue appears to be "'complementary' or 'related' to the question presented," it does not mean it is "'fairly included therein.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (quoting *Yee,* 503 U.S. at 537); *see also Wood v. Allen*, 558 U.S. 290, 303-04 (2010).

2. The Court should accordingly limit its decision to the propriety of discovery to probe "mental processes," Pet. i, not for any other purpose. Courts routinely consider extra-record evidence in APA actions for reasons other than to probe the decisionmaker's mental processes, without any predicate showing of

bad faith or improper behavior. None of these alternative bases have been challenged by the government, and the vast majority of extra-record discovery here is relevant for alternative reasons, including:

Standing. When "standing is not self-evident, … the petitioner must supplement the record … to explain and substantiate its entitlement to judicial review." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Expert testimony regarding standing is common in census cases. *See Dep't of Commerce*, 525 U.S. at 330-31. Here, the government conceded that "the court can consider extra-record evidence for purposes of standing," J.A.541, which includes evidence of a citizenship question's effects, including testimony from Plaintiffs, experts, and the Census Bureau's own post-decisional research concluding that "[t]he citizenship question may be a major barrier" to Census participation, in part because "Hispanics believe the census would be used to find undocumented people," J.A.559, 553.

Complex Technical Matters. In APA matters, extra-record evidence is sometimes "necessary to explain technical terms or complex subject matter" involved in the agency decision at issue. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted); *see also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1428 (6th Cir. 1991). A "reviewing court might want additional testimony by experts, simply to help it understand matters in the agency record." *Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 460 (1st Cir. 1989).

Such explanatory expert evidence is commonplace in census cases concerning statistical techniques and survey methodology. *See, e.g.*, *Utah*, 536 U.S. at 466-

68 (noting that district court considered expert testimony regarding the Census Bureau's practice of "imputation"); *see also Massachusetts v. Mosbacher*, 785 F. Supp. 230, 245 n.13, 254-55 (D. Mass. 1992) (relying on expert testimony regarding mathematical formula for apportionment), *rev'd on other grounds*, *Franklin*, 505 U.S. 788. Here, all parties here offered extensive expert testimony on various technical matters.

Failure to Consider Relevant Factors. In some cases, discovery may be required to determine whether the agency ignored relevant factors or information, even absent bad faith. Such evidence is essential in census litigation, where the reviewing court would otherwise lack the technical expertise to know the factors that a reasonable decision-maker should consider. *See, e.g.*, *City of New York v. U.S. Department of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993) (thirteen-day trial with expert testimony regarding whether the "Secretary considered all factors specified in the guidelines").

Here, Secretary Ross asserted that including a citizenship question was "necessary to provide complete and accurate data in response to the DOJ request," Pet. App. 150a, for "full count" citizenship data at the level of individual census blocks, Pet. App. 156a. But, as noted, the Bureau *cannot* fulfill that request. J.A.509-10, 519. And the Bureau does not even know if citizenship data based on responses to the Census questionnaire will be "any more precise than the [citizenship] data on which the Department of Justice currently relies." J.A.521.

Completion of the Administrative Record. The Court must evaluate the "whole record," which in-

cludes all materials before the decisionmaker "at the time he made his decision," *Overton Park*, 401 U.S. at 420. In its merits opinion, the district court thus considered as part of the "whole record," 5 U.S.C. § 706, testimony from Dr. Abowd describing his February 2018 meeting with Secretary Ross, because the paper administrative record contained no notes of the meeting. 2019 WL 190285, at *107 n.72 (citing J.A.522-23).

The propriety of taking discovery for these various purposes is not "fairly included" within the question presented. The district court's January 15 final judgment carefully elucidated the purpose for which it considered different types of discovery. To the extent necessary given that the court found APA violations on the administrative record alone, this Court can consider these other rationales for discovery on an appeal of the final judgment.

CONCLUSION

The petition for mandamus should be denied.

Respectfully submitted,

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January 17, 2019

ADDENDUM

ADDENDUM A

Summary Analysis of the Key Differences Between Alternative C and Alternative D

This short note describes the Census Bureau's current assumptions about two alternatives to address the need for block level data on citizen voting age populations. The goal is to measure the citizenship status of all people enumerated in the 2020 Decennial Census. Both alternatives utilize administrative data on the citizenship status of individuals, however one option, Alternative D, proposes to also include the current American Community Survey (ACS) question on citizenship status on the 2020 Decennial Census short form.

In both alternatives described here, the methodology requires linking 2020 census response data and administrative records. However, as illustrated both alternatives would also need to assign/impute citizenship for a portion of the population. The Census Bureau will have to assign citizenship in cases of questionnaire non-response and item non-response. Additionally, it is important to note, that even when a self-response is available it is not always possible to link response data with administrative records data. Poor data quality (e.g., name and age) and nonresponse or incomplete 2020 Census responses mean that we will not have a direct measure of citizenship status for all residents enumerated in 2020. The Census Bureau will to need employ an imputation model for these cases.

One of the key differences between to the two alternatives described below is the number of cases requiring imputation. The other key difference is the impact of errors in the citizenship status reported on the 2020 Census.

In the most recent version of the 2020 Decennial Life Cycle Cost Estimate, the Census Bureau projects counting 330 million residents in 2020. Figure 1 summarizes how citizenship status will be measured under Alternative C that does not employ a citizenship question on the 2020 Census. Figure 2 summarizes how this will be done using both administrative records and a 2020 citizenship question under Alternative D.

Alternative C is a simplified process for assigning citizenship through direct linkage and modelling, without including the question on the 2020 Census. The Census Bureau will link the responses for the 330 million census records to administrative records that contain information on the citizenship status of individuals. The Census Bureau expects to successfully link and observe this status for approximately 295 million people. The Census Bureau would need to impute this status for approximately 35 million people under Alternative C whose 2020 responses cannot be linked to administrative data. Although the Census Bureau has fully developed and tested the imputation model, it has high confidence that an accurate model can be developed and deployed for this purpose. Further, we will most likely never possess a fully adequate truth deck to benchmark it to.

Measuring citizenship status is slightly more complex under Alternative D where all U.S. households will be given the opportunity to provide the citizenship status of each household member. Based on response data for the ACS citizenship and other response data research, we know that not all households that respond to the 2020 Census will answer this question, leaving the question blank or with otherwise invalid responses. Additionally, Alternative D, must also account for those households that do not respond at all or will have

proxy responses. Due to these reasons, we estimate that we will get 2020 citizenship status responses for approximately 294.6 million people, a slightly higher estimate than Alternative C. For the 35.4 million people without a 2020 citizenship response, the Census Bureau will employ the same methodology as in Alternative C, linking the 2020 Census responses to the administrative records. The Census Bureau estimates that it will be able to link these cases to administrative records where we observe citizenship status for approximately 21.5 million people. For the remaining 13.8 million will be imputed through a model as described above. Thus, there will be a need for imputing many cases across either alternative.

The Census Bureau will link the 294.6 million records from the 2020 Census with the administrative records. This will be done both for potential quality assurance purposes and to improve the quality of future modeling uses. Based on the current research from the ACS, the Census Bureau expects to successfully link approximately 272.5 million of these cases. Of these, 263 million will have citizenship statuses that agree across the 2020 response and administrative record. The Census Bureau estimates there will be 9.5 million cases where there is disagreement across the two sources. Historic Census Bureau practice is to use self-reported data in these situations. However, the Census Bureau now knows from linking ACS responses on citizenship to administrative data that nearly one third of noncitizens in the administrative data respond to the questionnaire indicating they are citizens, indicating that this practice should be revisited in the case of measuring citizenship. Finally, for those 22.2 million cases that do not link to administrative records (nonlinkage occurs for the same data quality reasons discussed above), the Census Bureau will use the observed

2020 responses. Again, Census Bureau expect some quality issues with these responses. Namely, the Census Bureau estimates that just under 500 thousand noncitizens will respond as citizens.

The relative quality of Alternative C versus Alternative D will depend on the relative importance of the errors in administrative data, response data, and imputations. To be slightly more but not fully precise consider the following description of errors under both alternatives. First note that all possible measurement methods will have errors. Under Alternative C, there will be error in the administrative records, but we believe these to be relatively limited dues to the procedure following by SSA, USCIS and State. In both Alternative, the modeled cases will be subject to prediction error. Prediction error occur when the model returns the incorrect status of a case.

Figure 1

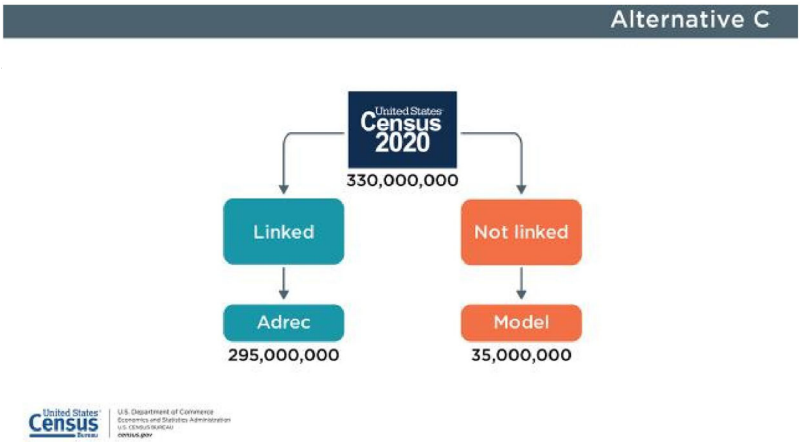
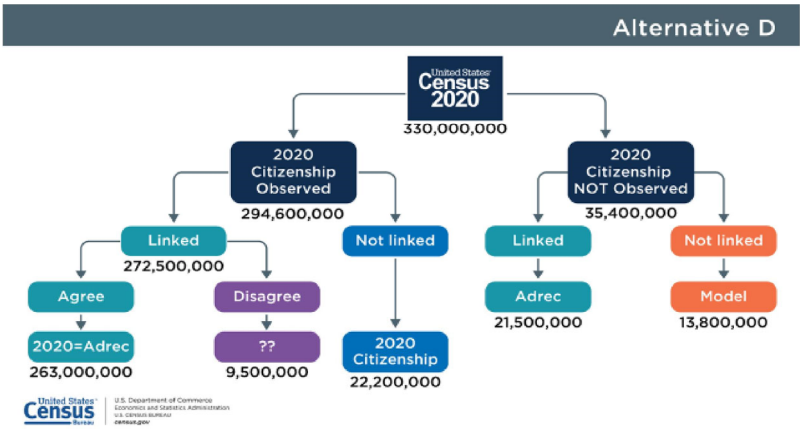


Figure 2


Alternative D
United States Census 2020
330,000,000
2020 Citizenship Observed
294,600,000
2020 Citizenship NOT Observed
35,400,000
Linked
272,500,000
Not linked
Linked
Not linked
Agree
Disagree
Adrec
Model
21,500,000
13,800,000
2020=Adrec
263,000,000
??
9,500,000
2020 Citizenship
22,200,000
United States Census Bureau
U.S. Department of Commerce
Economics and Statistics Administration
U.S. CENSUS BUREAU
census.gov

ADDENDUM B

Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census[1]

J. David Brown[2]
Misty L. Heggeness[3]
Suzanne M. Dorinski[4]
Lawrence Warren[5]
Moises Yi[6]

August 6, 2018

* * *

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[1] We thank career staff and statistical experts within the Bureau who graciously gave their time and effort to review, comment, edit, and make improvements to this document. The analysis, thoughts, opinions, and any errors presented here are solely those of the authors and do not necessarily reflect any official position of the U.S. Census Bureau. All results have been reviewed to ensure that no confidential information is disclosed. The Disclosure Review Board release numbers are DRB-B0093-CDAR-20180621, DRB-B0103-CDAR-20180712, and DRB-B0113-CDAR-20180806. Republication in whole or part must be cleared with the authors.

[2] J. David Brown is a Senior Economist in the Center for Economic Studies at the U.S. Census Bureau and the corresponding author on this paper, 4600 Silver Hill Road, Washington, DC 20233, j.david.brown@census.gov.

[3] Misty L. Heggeness is Senior Advisor for Evaluations and Experiments in the Research and Methodology Directorate at the U.S. Census Bureau.

[4] Suzanne M. Dorinski is a Mathematical Statistician currently on detail with the Social, Economic, and Housing Statistics Division at the U.S. Census Bureau.

[5] Lawrence Warren is an Economist in the Center for Economic Studies at the U.S. Census Bureau.

[6] Moises Yi is an Economist in the Center for Economic Studies at the U.S. Census Bureau.

Table 12. Enumeration Quality in Mailout/Mailback and Nonresponse Follow-up (NRFU) Proxy Responses

	Mailout/Mailback Response	NRFU Proxy
Correct Enumerations	97.3	70.2
Erroneous Enumerations	2.5	6.7
Whole-Person Census Imputations	0.3	23.1
Person Linkage Rate	96.7	33.8

Source: Mule (2012) for correct enumerations, erroneous enumerations, and whole-person Census imputations, and Rastogi and O'Hara (2012) for the person linkage rate.

We provide two sets of estimates, the first based on our initial assumptions (in parentheses), and a second based on revised assumptions. The main changes in the revised assumptions are an expansion of the group of housing units considered potentially sensitive to a citizenship question and the estimated percentage of them who will not respond to a questionnaire due to the presence of a citizenship question (5.8 percent in Table 9 vs. 5.1 percent in Table 6).

Using these estimates as well as the data in Table 12, we can develop cautious estimates of the data quality and cost consequences of adding the citizenship question to the enumeration form. We assume that all-citizen households are unaffected by the change and that an additional 5.8 percent (5.1 percent) of households that possibly have noncitizens go into

NRFU because they do not selfrespond.[56] We expect 320 million persons in 126 million occupied households in the 2020 Census.[57] Based on a combination of administrative records from the 2016 Numident and ITINs and the 2016 ACS, we estimate that 28.6 percent (9.8 percent) of all households could potentially contain at least one noncitizen. Combining these assumptions implies an additional 2,090,000 households (630,000 households) and 6.5 million persons (1.6 million persons) in NRFU.[58] If the NRFU data for those households have the same quality as the average NRFU data in the 2010 Census, then the result would be 561,000 (139,000) fewer correct enumerations, of which 185,000 (46,000) are additional erroneous enumerations and 376,000 (93,000) are additional whole-person census imputations. This analysis assumes that during the NRFU operations a cooperative member of the household supplies data 79.0 percent of the time, and 21.0 percent receive proxy responses. If all

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[56] Recall that the initial estimate is based on households with at least one AR noncitizen, which is only a fraction of the housing units in the all other households category, which also includes persons with missing citizenship in AR or the ACS or citizenship values that conflict between AR and the ACS.

[57] We assume 10 million residents of group quarters. Group quarters are not included in either mailout/mailback or NRFU operations, and here we assume no effect of a citizenship question on their enumeration.

[58] The initial assumption here is that average household size for households with at least one noncitizen is the same as the forecast for all households in the 2020 Census (2.54 persons). The revised assumption is that average household size for all other households is the same as its average in the 2016 ACS, 3.1 persons.

of these new NRFU cases go to proxy responses instead,[59] the result would be 1,750,000

* * *

[59] If a household declines to self-respond due to the citizenship question, we suspect it would also refuse to cooperate with an enumerator coming to their door, resulting in a need to use a proxy.

ADDENDUM C

Reissued Jul 2013

U.S. Census Bureau Statistical Quality Standards

The leading source of quality data about the nation's people and economy.

* * *

PLANNING AND DEVELOPMENT

* * *

Preface[1]

1. Introduction

Purpose

This document specifies the statistical quality standards for the U.S. Census Bureau. As the largest statistical agency of the federal government, the Census Bureau strives to serve as the leading source of quality data about the nation's people and economy. The Census Bureau has developed these standards to promote quality in its information products and the processes that generate them. These standards provide a means to ensure consistency in the processes

[1] Please note that this document contains some Intranet links that are accessible only within the U.S. Census Bureau.

of all the Census Bureau's program areas, from planning through dissemination. By following these standards, the Census Bureau's employees and contractors will ensure the utility, objectivity, and integrity of the statistical information provided by the Census Bureau to Congress, to federal policy makers, to sponsors, and to the public.

Background

In 2002, the United States Office of Management and Budget (OMB) issued Information Quality Guidelines (OMB, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, February 22, 2002, 67 FR 8452-8460), directing all federal agencies to develop their own information quality guidelines. In October 2002, the Census Bureau issued its information quality guidelines (U.S. Census Bureau, *U.S. Census Bureau Section 515 Information Quality Guidelines,* 2002). These guidelines established a standard of quality for the Census Bureau and incorporated the information quality guidelines of the OMB and the Department of Commerce, the Census Bureau's parent agency.

Following the OMB's information quality guidelines, the Census Bureau defines information quality as an encompassing term comprising utility, objectivity, and integrity. Our definition of information quality is the foundation for these standards.

> *Utility* refers to the usefulness of the information for its intended users. We assess the usefulness of our information products from the perspective of policy makers, subject matter users, researchers, and the public. We achieve utility by continual assessment of customers' information needs, an-

ticipation of emerging requirements, and development of new products and services.

- The statistical quality standards related to utility include: Planning a Data Program (A1), Developing Data Collection Instruments and Supporting Materials (A2), Developing and Implementing a Sample Design (A3), Acquiring and Using Administrative Records (B2), Reviewing Information Products (E3), Releasing Information Products (F1), and Providing Documentation to Support Transparency in Information Products (F2).

* * *

Sub-Requirement A2-3.2: Data collection instruments and supporting materials must clearly state the following required notifications to respondents:

1. The reasons for collecting the information.

2. A statement on how the data will be used.

3. An indication of whether responses are mandatory (citing authority) or voluntary.

4. A statement on the nature and extent of confidentiality protection to be provided, citing authority.

5. An estimate of the average respondent burden associated with providing the information.

6. A statement requesting that the public direct comments concerning the burden estimate and suggestions for reducing this burden to the appropriate Census Bureau contact.

7. The OMB control number and expiration date for the data collection.

8. A statement that the Census Bureau may not conduct, and a person is not required to respond to, a data collection request unless it displays a currently valid OMB control number.

Sub-Requirement A2-3.3: Data collection instruments and supporting materials must be pretested with respondents to identify problems (e.g., problems related to content, order/context effects, skip instructions, formatting, navigation, and edits) and then refined, prior to implementation, based on the pretesting results.

Note: On rare occasions, cost or schedule constraints may make it infeasible to perform complete pretesting. In such cases, subject matter and cognitive experts must discuss the need for and feasibility of pretesting. The program manager must document any decisions regarding such pretesting, including the reasons for the decision. If no acceptable options for pretesting can be identified, the program manager must apply for a waiver. (See the *Waiver Procedure* for the procedures on obtaining a waiver.)

1. Pretesting must be performed when:

a. A new data collection instrument is developed.

b. Questions are revised because the data are shown to be of poor quality (e.g., unit or item response rates are unacceptably low, measures of reliability or validity are unacceptably low, or benchmarking reveals unacceptable differences from accepted estimates of similar characteristics).

c. Review by cognitive experts reveals that adding pretested questions to an existing instrument may cause potential context effects.

d. An existing data collection instrument has substantive modifications (e.g., existing questions are revised or new questions added).

Note: Pretesting is not required for questions that performed adequately in another survey.

2. Pretesting must involve respondents or data providers who are in scope for the data collection. It must verify that the questions:

a. Can be understood and answered by potential respondents.

b. Can be administered properly by interviewers (if interviewer-administered).

c. Are not unduly sensitive and do not cause undue burden.

Examples of issues to verify during pretesting:

- The sequence of questions and skip patterns is logical and easy-to-follow.
- The wording is concise, clear, and unambiguous.
- Fonts (style and size), colors, and other visual design elements promote readability and comprehension.

3. One or more of the following pretesting methods must be used:

a. Cognitive interviews.

b. Focus groups, but only if the focus group completes a self-administered instrument and discusses it afterwards.

c. Usability techniques, but only if they are focused on the respondent's understanding of the questionnaire.

d. Behavior coding of respondent/interviewer interactions.

e. Respondent debriefings in conjunction with a field test or actual data collection.

f. Split panel tests.

Notes:

(1) Methodological expert reviews generally do not satisfy this pretesting requirement. However, if a program is under extreme budget, resource, or time constraints, the program manager may request cognitive experts in the Center for Statistical Research and Methodology or on the Response Improvement Research Staff to conduct such a review. The results of this expert review must be documented in a written report. If the cognitive experts do not agree that an expert review would satisfy this requirement, the program manager must apply for a waiver.

(2) Multiple pretesting methods should be used as budget, resources, and time permits to provide a thorough evaluation of the data collection instrument and to document that the data collection instrument "works" as expected. In addition, other techniques used in combination with the pretesting methods listed above may be useful in developing data collection instruments. (See Appendix A2, Questionnaire Testing and Evaluation Methods for Censuses and Surveys, for descriptions of the various pretesting methods available.)

4. When surveys or censuses are administered using multiple modes and meaningful changes to ques-

tions are made to accommodate the mode differences, all versions must be pretested.

Meaningful changes to questions to accommodate mode differences include changes to the presentation of the question or response format to reflect mode-specific functional constraints or advantages. In these cases, the proposed wording of each version must be pretested to ensure consistent interpretation of the intent of the question across modes, despite structural format or presentation differences. As long as the proposed wording of each version is pretested, testing of the mode (e.g., paper versus electronic) is not required, although it may be advisable.

* * *

ADDENDUM D

American Community Survey (ACS)

When to Use 1-year, 3-year, or 5-year Estimates

Choosing which dataset involves more than simply considering the population size in your area. You must think about the balance between currency and sample size/reliability/precision. For details, research implications, and examples, see "Understanding and Using CS Single-Year and Multiyear Estimates, in section 3 of the General Data-Users Handbook.

Distinguishing features of ACS 1-year, 1-year supplemental, 3-year, and 5-year estimates

1-year estimates

12 months of collected data Example: 2017 ACS 1-year estimate*s D*ate collected between: January 1, 2017 and De*c*ember 31, 2017

Data for areas with populations of 65,000+

Smallest sample size

Less reliable than 3-year or 5-year

1-year supplemental estimates

12 months of collected data Example: 2017 ACS 1-year supplemental estimates Date collected between: January 1, 2017 and

December 31, 2017

Data for areas with populations of 20,000+

Smallest sample size

Less reliable than 5-year

3-year estimates*

36 months of collected data Example: 2011-2013 ACS 3-year estimates Date collected between: January 1, 2011 and December 31, 2013

Data for areas with populations of 20,000+

Larger sample size than 1-year

More reliable than 1-year, less reliable than 5-year

5-year estimates

60 months of collected data Example: 2013-2017 ACS 5-year estimates Date collected between: January 1, 2013 and December 31, 2017

Data for all areas

Largest sample size

Most reliable

ADDENDUM E

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 2921 (JMF)

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

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18 Civ. 5025 (JMF)

NEW YORK IMMIGRATION COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

New York, N.Y.
November 1, 2018
11:15 a.m.

Before:
HON. JESSE M. FURMAN,
District Judge

Conference

* * *

[5]

* * *

Now, I did obviously say my peace last Friday, but upon reading the parties' briefs there is at least one additional point that comes to my mind with respect to both why trial is necessary, in my view, and why my decision authorizing extra-record discovery back in July was in my view, and remains, a sound one.

You will recall at the time I rested primarily on the APA claims and that was in large part because I was aware of and sensitive to the fact that the Supreme Court had taken the District Court to task in the DACA litigation in In Re: United States 138 U.S. 443 at 445 2017 for authorizing expansive extra-record discovery without first resolving the government's threshold arguments. That was at pages 76 and 77 of the July 3rd transcript. While I was in position at the time having read the parties' briefs on the APA claims to say that it was [6] my belief that the APA claims would likely survive at least in part, I was not in a position at the time to say the same as to the due process claim because briefing on that claim, which was alleged only in the NYIC complaint, which was filed later, was not yet complete at the time.

Three weeks later of course I did deny defendant's motion to dismiss that claim and held that plaintiffs had stated a plausible due process claim. In my view, that alone would justify and does justify and did justify the extra-record discovery that the parties engaged in until last week.

Now, under long-standing Supreme Court precedent the Due Process Clause claim turns on whether plaintiffs can prove that defendants acted with a "racially discriminatory intent or purpose." That's from Village of Arlington Heights v. Metropolitan Housing Corporation, 429 U.S. 252, 265 1977. Moreover, that same case mandates "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and explicitly calls for consideration of "evidence" such as the "historical back ground of the decision," the "specific sequence of events leading up to the challenged decision," procedural and substantive "departures" from the norm and in "some extraordinary instances" the testimony of decision makers. That is from pages 266 to 268.

Having survived defendant's motion to dismiss the due process claims plaintiffs, in my view, were plainly entitled to [7] seek such evidence through at least limited discovery. On that score, I note that merely alleging a due process claim, even one that survived the motion to dismiss, did not open the doors to discovery fully in my view. As I said on July 3rd, exercising my discretion under Rule 26 of the Federal Rules of civil procedure, I found that the scope of that discovery should be cabined in large part based on separation of powers considerations including to minimize intrusion on the White House and the Executive Branch.

Ultimately, I think it would be perverse, and one could argue would risk undermining decades of equal protection jurisprudence beginning with Arlington Heights to suggest that litigant and Courts evaluating whether government actors have engaged in invidious discrimination in violation of due process clause cannot look beyond the record that those very same

decision makers have compiled and potentially carefully curated to exclude evidence of their true motives. Again, I'm not suggesting that that is what happened here, but it does underscore, in my view why extra-record discovery was and remained appropriate. All which is to say as yet another reason that my decision to authorize extra-record discovery was on firm ground and, in my judgment, why the Supreme Court should not and is not likely to disturb it, let alone in the current interlocutory posture.

* * *

ADDENDUM F

[775] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 2921 (JMF)

STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

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18 Civ. 5025 (JMF)

NEW YORK IMMIGRATION COALITION, *et al.*,

Consolidated Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

*Defendant*s.

New York, N.Y.
November 13, 2018
9:00 a.m.

Before:
HON. JESSE M. FURMAN,
District Judge

Trial

* * *

[894] Q. Now, in this memo, for purposes of calculating some of your estimates, you expect there are about 126 million occupied households to be enumerated in the 2020 census, is that right?

A. Yes, that's correct.

Q. And you estimate that 9.8 percent of households contained at least one noncitizen, correct?

A. Yes, that's correct.

Q. And so a reduction of 5.1 percentage points in the self-response of those households would translate to about 630,000 households, correct?

A. 630,000 households in NRFU that would not otherwise have been there, yes.

Q. OK. And that likely translates into millions of people, right, Dr. Abowd?

A. At average household sizes, it's more than a million people, yes.

Q. Now, today, the Census Bureau's best conservative estimate of the differential effect of adding a citizenship question to the census in terms of self-responses of all citizen households to other households is not 5.1 percentage points, right, Dr. Abowd?

A. Yes, that's correct.

Q. Today, the best conservative estimate of the Census Bureau for that differential effect in self-response is 5.8 percentage points, correct?

[895] A. Best estimate we have at the moment is 5.8 percentage points.

MR. HO: OK. Let's bring up Plaintiffs' Exhibit 162, which is also Defendants' Exhibit 2. For the record, it's been admitted.

Q. Dr. Abowd, we talked about a white paper earlier and how you were charged with putting a white paper together. Do you remember that?

A. Yes, I do.

Q. Is this the white paper?

A. This is the most recent version of the technical report performed under my supervision, yes.

Q. And you've been sitting through trial for the last week or so; sometimes people have referred to this as the Brown memo during their testimony, right?

A. Yes, I believe that's right.

Q. OK, so white paper, Brown memo, different colors, different names, but the same document, right?

A. Yes, in deference to the authors, I usually call it Brown *et al*.

Q. OK. The analysis in Brown *et al.*, or the white paper, that was begun in response to the Department of Justice's request for block-level CVAP data, correct?

A. Yes, that's correct.

Q. And the authors of this paper, they're a subset of the SWAT

* * *

[898] A. Yes, that's correct.

Q. Now, several factors account for the difference between your current best estimate of 5.8 percentage points and your older estimate of 5.1 percentage points, correct?

A. Yes, that's correct.

Q. OK. I want to talk through some of these. One difference, one factor that accounts for the difference is you compared different households at this time, right?

A. The comparison households are constructed differently, that's correct.

Q. Right, so for the 5.1 percentage point estimate, you compared households that were all citizen, as identified in the administrative records, to households that had one or more noncitizens, as identified in the administrative records, right?

A. That's correct.

Q. And for the 5.8 percent comparison, you compared households for which their ACS response was "all members of the household are citizens" and the administrative records indicate that they're all citizens, on the one hand, and all the other households, on the other hand, correct?

A. Yes, that's correct.

Q. Another difference is that the 5.8 percentage point estimate is based on more recent ACS data, correct?

A. It's based on the 2016 ACS data, that's correct.

[899] Q. Right, so the 5.1 percentage point estimate, that's based on a comparison of 2010 decennial census

response rates and 2010 ACS response rates whereas the 5.8 percentage point estimate, that's based on a comparison of 2010 decennial response rates to 2016 ACS response rates, correct?

A. Yes, that's correct.

(Continued on next page)

[900] BY MR. HO:

Q. And the reason you like the 5.8 percentage point estimate better is because you think that when you're trying to assess the impact of a citizenship question today, it is more reliable to use more recent ACS data, correct?

A. You wanted more currency, that's correct.

Q. And you view this five point -- I'm sorry. Let me start that question again.

When you look at that 5.8 percentage point estimate and you view it in light of the 3.3 percentage point estimate from the 2000 short form and long form comparison and the 5.1 percentage point estimate from the 2010 census and ACS 2010 ACS comparison, you agree that this 5.8 percentage point figure is an indicator that nonresponse rates to surveys with a citizenship question are increasing for households that might have a noncitizen, right?

A. I think we discussed this before. I've said that I am reluctant as a statistician to fit a trim line to those three numbers, but I did say that 5.8 is bigger than 5.1 and 5.1 is bigger than 3.3.

Q. Dr. Abowd, the 5.8 percentage point estimate, that is a conservative estimate, right?

A. We still haven't discussed what a statistician would mean by conservative, but assuming we are using that as an undefined term for the moment, yes.

* * *

ADDENDUM G

[1068] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 2921 (JMF)

STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

---

18 Civ. 5025 (JMF)

NEW YORK IMMIGRATION COALITION, *et al.*,

Consolidated Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

New York, N.Y.
November 14, 2018
9:00 a.m.

Before:
HON. JESSE M. FURMAN,
District Judge

Trial

* * *

[1249] those to those of plaintiffs' expert, Dr. Hillygus.

If we can bring up Plaintiffs' Demonstrative 1. You remember this, right, Dr. Abowd, this demonstrative summarizing Dr. Hillygus' opinions?

A. Yes, I do.

Q. If we take her first opinion and we define census participation as self-response, you agree with the first part of her first opinion that there is considerable evidence indicating that the citizenship question will depress census participation among noncitizens and Hispanics, correct?

A. I agree with that statement, to the extent that Hispanics subpopulations are highly correlated with noncitizen subpopulations, yes.

Q. I want to compare this briefly to Defendants' Demonstrative 15, DDX 15.

The second column here, the 5.8 percent decrease in noncitizen self-response rate. The information in that column corresponds to your best conservative estimate for the effect of the citizenship question in terms of reducing self-responses among noncitizen households, correct?

A. It's a conservative cost estimate based on our best point estimate of that reduction, yes.

Q. Great.

And the conservative cost estimate in terms of the effect of the citizenship question then is $82.5 billion, [1250] correct?

A. That's correct.

Q. I just want the record to be clear, because you and I talked a lot about an estimate in your January 2018 memo of 27.5 billion.

Do you remember that?

A. Yes, I do.

Q. But today, the Census Bureau's best conservative estimate of the effect of the citizenship question is not $27.5 billion, it's $85.2 billion, correct?

MR. EHRLICH: Objection.

THE COURT: Overruled.

A. That's correct.

Q. Dr. Abowd, all of the evidence that you have analyzed, including data from the long form from the ACS unit nonresponse rates, ACS item nonresponse rates and ACS breakoff rates suggests that the sensitivity to a citizenship question has increased for subpopulations such as noncitizens and Hispanics, correct?

A. The evidence I've suggested -- the evidence I've examined suggests that it is at a high level. I was reluctant to characterize it as a trend, but I will characterize it as a high level, a concerning level for the conduct of the 2020 census.

Q. But all of the evidence that we just described suggests

* * *

ADDENDUM H

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 1:18-CF-05025-JMF

NEW YORK IMMIGRATION COALITION, *et al.*,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

Washington, D.C.
Wednesday, August 29, 2018

Deposition of:

DR. JOHN ABOWD

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of Arnold & Porter, 601 Massachusetts Avenue NW, Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:06 a.m., when were present on behalf of the respective parties:

Veritext Legal Solutions
Mid-Atlantic Region
1250 Eye Street NW - Suite 350
Washington, D.C. 20005

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[100] get seven hours for the 30(b)(6). If you want to reserve time at the end of today in order to review those documents and ask him more questions, we can produce him again for you.

MR. HO: Thanks for that offer. I'll confer with co-counsel and counsel for the other plaintiffs -¬

MR. EHRLICH: Okay.

MR. HO: -- and we'll talk.

MR. EHRLICH: Thank you.

BY MR. HO:

Q Dr. Abowd, before moving on to another topic, I just want to ask a few questions about some things we discussed earlier.

You testified that when the Census Bureau, after the 2020 decennial census, produces the block-level CVAP data, that there will be error margins associated with that block-level CVAP data. Do you remember that?

A Yes.

Q Okay. Today, does the Census Bureau know whether or not the error margins associated with [101] that block-level CVAP data will be larger or smaller than the error margins associated with the block-level CVAP data that DOJ currently uses, based on ACS estimates?

A I have to give a nuanced answer to that question. We don't know, because we haven't set the parameters of the disclosure avoidance system yet. That's somewhat new territory for my colleagues, and I am certain that one of the things we will be discussing is whether

the error margins associated with both the P.L. 94 and the CVAP table at the block level still allow redistricting offices and the Department of Justice to use the data effectively. That is the use case for those data.

Q Would you agree – never mind. That's fine.

You testified a little bit about a possible RCT of the citizenship question and request from, I believe it was Enrique Lamas, to get a proposal for doing an RCT of the citizenship question without the prefatory nativity question

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