No. 18A375

# In the Supreme Court of the United States

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

***On Renewed Application for a Stay Pending Disposition of a Petition for a Writ of Mandamus to the United States District Court for the Southern District of New York and Request for an Immediate Administrative Stay***

To the Honorable Ruth Bader Ginsburg,
Associate Justice of the United States and
Circuit Justice for the Second Circuit

**MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPLICANTS**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**RULES AND REGULATIONS**



**OTHER AUTHORITIES**

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## MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the application to stay the challenged orders of the United States District Court for the Southern District of New York in the above-captioned matter.* The governmental Plaintiffs do not oppose this motion, and the "New York Immigration Coalition plaintiffs" represented by the ACLU Voting Rights Project consented. Although EFELDF sought the position of all parties, no other party responded with a position.

## IDENTITY AND INTERESTS OF MOVANT

Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more

* By analogy to FED. R. APP. P. 29(c)(5) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel make a monetary contribution to preparation or submission of the motions and brief.

than thirty-five years, EFELDF has consistently defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community, EFELDF has supported efforts to ensure equality of voters consistent with the written Constitution and validly enacted laws. For the foregoing reasons, movant EFELDF has direct and vital interests in the issues before this Court and respectfully requests leave to file the accompanying *amicus* brief in support of the stay applicants.

**REASONS TO GRANT LEAVE TO FILE**

By analogy to Rule 37.2(b) of the Rules of the Supreme Court, movant respectfully seeks leave to file the accompanying *amici curiae* brief in support of the stay applicants. Movant EFELDF respectfully submits that the proffered *amicus* brief will bring several categories of relevant, additional matters to the Court's attention:

- First, the EFELDF brief discusses the All Writs Act, 28 U.S.C. §1651(a), as well as 28 U.S.C. §2106, which aid this Court's jurisdiction to apply a stay and remedial power not only to issue a stay but also to remedy the eventual merits. *See* EFELDF Br. at 11-13.
- Second, the EFELDF brief addresses the plaintiffs' lack of Article III standing, which provides an alternate – and threshold – basis on which this Court can resolve the dispute. *See* EFELDF Br. at 13-16.
- Third, and similarly, the EFELDF brief questions whether the challenged Census question presents a ripe threat, given that Democrat members of the House of Representatives have indicated plans to defund implementation of

citizenship questions if their party takes control of the House in the upcoming midterm elections. *See* EFELDF Br. at 14-15.

- Fourth, the EFELDF brief supplements the federal government's arguments on the irrelevance of the plaintiffs' requested depositions into the Commerce Secretary's mental processes. *See* EFELDF Br. at 17-18.
- Fifth, the EFELDF brief suggests that the Court consider using 28 U.S.C. §2106 to remand cases with anomalous results – widely and unexplainably off precedent – to different judges on remand. *See* EFELDF Br. at 20-22.

These issues are all relevant to deciding the stay application. Moreover, with respect to the jurisdictional issues, this Court has an obligation to consider those issues, even if raised only by an *amicus*. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991). For all these reasons, movant EFELDF respectfully submits that filing the brief will aid the Court.

Dated: October 12, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

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**MOTION FOR LEAVE TO FILE ON 8 1/2 BY 11 INCH FORMAT**

Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as EFELDF has done here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, EFELDF would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, EFELDF has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, EFELDF commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format). Movant EFELDF respectfully

requests leave to file the accompanying brief as *amicus curiae* to the above-captioned stay application – at least initially – in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

Dated: October 12, 2018

Respectfully submitted,

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## *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANTS

*Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully submits that the Circuit Justice (or the full Court, if referred to the full Court) should stay the depositions of high-level government officials ordered by the District Court in this action until the federal applicants[1] timely file and this Court duly resolves a petition for a writ of *certiorari*. *Amicus* EFELDF's interests are set out in the accompanying motion for leave to file.

## INTRODUCTION

In the consolidated actions before the United States District Court for the Southern District of New York, plaintiffs-respondents (collectively, "Plaintiffs") are entities that claim that the use of a citizenship question on the 2020 Census will injure them because their jurisdictions include large populations of illegal aliens,

[1] Applicants (collectively, "Commerce") are the federal Department of Commerce, its Secretary Wilbur L. Ross, Jr., in his official capacity, the federal Census Bureau, and Ron S. Jarmin, its Acting Director, in his capacity.

whom the citizenship question might discourage from responding to the Census. Commerce plans to use the citizenship question in conducting the 2020 Census pursuant to the Constitution's Census Clause, U.S. CONST. art. I §2, cl. 3, and the implementing legislation. As Commerce explains, the decennial Census has included birthplace and citizenship questions for most of the Nation's history, although the most recent few sought that information through smaller samples and surveys. Appl. at 2-3. Commerce supported the decision to reinstate a citizenship question on the full decennial Census with a memorandum by Secretary Ross, Appl. App. 117a-124a, which – in turn – relies on an extensive administrative record. Although judicial review under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), would normally proceed on the basis of the agency's administrative record, 5 U.S.C. §706, the District Court granted Plaintiffs' motion for extra-record discovery – including depositions of Secretary Ross and other high-ranking officials – by orders dated July 3, 2018, August 17, 2018, and September 21, 2018. Commerce seeks to stay those orders and that extra-record discovery pending the completion of a petition for a writ of mandamus first to the United States Court of Appeals for the Second Circuit and, ultimately, to this Court.

## STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is a "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."

*Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Where the All Writs Act, 28 U.S.C. §1651(a) is implicated, the Court also considers the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers).

## SUMMARY OF ARGUMENT

With respect not only to the likelihood of this Court's granting review but also to the public interest in considering equitable relief, this Court is both likely to and even *compelled to* exercise its supervisory authority to retrain overbroad and unprecedented district-court interventions into the Executive Branch's attempts to exercise its authority. *See* Sections I.B, III.C *infra*. With respect to the likelihood of Commerce's prevailing on the merits, Commerce will prevail for two reasons. First, although 28 U.S.C. §2106 and the All Writs Act, 28 U.S.C. §1651(a), give this Court jurisdiction to resolve the issues presented here, *see* Sections II.A.1-II.A.2, *infra*, Plaintiffs lack an Article III case or controversy because their purported injury is not only too speculative for standing and ripeness, but also the result of illegal conduct, 13 U.S.C. §221(a), which breaks the causal link to Commerce's action. *See* Section II.A.3, *infra*. In addition, because judicial review is on the administrative record and Plaintiffs have made no showing of bad faith, the information sought by discovery is irrelevant, *See* Sections II.B.1-II.B.2, *infra*.

The additional stay factors also compel a stay: Commerce's harm of lost time is irreparable (Section III.A), the balance of equities tips to Commerce because of the agency's strong merits showing (Section III.B), and intrusive discovery for irrelevant information does not serve the public interest (Section III.C). In particular, *amicus* EFELDF respectfully submits that the pace of post-2016 district-court intervention to stymie the Executive Branch on insubstantial grounds – of which this litigation is but one example – warrants the Court's exercising its supervisory powers under 28 U.S.C. §2106 to remand to a different judge; alternatively, the Court could announce the *prospective* need for appellate courts to remand to a different judge when district courts seek to enjoin the government for rationales that plainly deviate from or fail to meet controlling standards. *See* Section III.C, *infra*.

## ARGUMENT

### I. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

There is a reasonable possibility that this Court will grant Commerce's petition for a writ of *certiorari* if the Second Circuit does not resolve this matter in Commerce's favor. The District Court's decision not only conflicts with this Court's precedents on extra-record discovery and, especially, deposing high-level government officials but also – in doing so – triggers the need for this Court's supervisory power over lower courts under Rule 10(a). Accordingly, Commerce meets the first criterion for a stay.

#### A. The District Court's discovery orders are unsupportable under this Court's precedents.

As Commerce explains, the mental state of administrative decisionmakers is generally irrelevant, Appl. at 4 (*citing Morgan v. U.S.*, 304 U.S. 1, 18 (1938)), and the

barrier is even higher for deposing high-ranking officials. *Id.* (*citing U.S. v. Morgan*, 313 U.S. 409, 422 (1941). Given Commerce's extensive briefing of the issue, *id.* at 21-24, there is no reason for *amicus* EFELDF to plow the same ground. S.Ct. R. 37.1.

### B. The District Court's discovery orders – and other decisions like it against this Administration – demand that this Court exercise its supervisory power over the lower federal courts whenever the relevant Court of Appeals refuses to do so.

Under this Court's rules, it "call[s] for an exercise of this Court's supervisory power" when "a United States court of appeals has so *far departed from the accepted and usual course* of judicial proceedings, *or sanctioned such a departure by a lower court*." S.Ct. R. 10(a) (emphasis added). As just explained, Section I.A, *supra*, the District Court's actions here is well outside acceptable bounds of judicial proceedings; if the Second Circuit will not nullify those actions, this Court must do so. Accordingly, as argued under the public-interest criterion, *see* Section III.C, *infra*, it is imperative for this Court to exercise its supervisory powers over the lower courts.

## II. COMMERCE IS LIKELY TO PREVAIL.

In order to warrant a stay, there must be a "fair prospect" that Commerce will prevail. *Hollingsworth*, 558 U.S. at 190. If the Court needs to reach the merits, Commerce is likely to prevail for the reasons ably set out in Commerce's application. Insofar as Plaintiffs lack an Article III case or controversy, however, Commerce is also likely to prevail on threshold jurisdictional grounds. After establishing this Court's jurisdiction to determine its own jurisdiction, *amicus* EFELDF then argues that Commerce is likely to prevail under Article III and, if necessary, the substantive merits.

### A. Plaintiffs lack an Article III case or controversy.

Before reaching the question of Commerce's likelihood of prevailing on the substantive merits, this Court – or the Circuit Justice – first must establish federal jurisdiction, not only of this Court but also of the lower federal courts. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Although Plaintiffs lack an Article III case or controversy, this Court – like all federal courts – has jurisdiction to determine its jurisdiction. *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970). Indeed, under *Steel Company*, courts have an *obligation* – not the mere discretionary power – to resolve threshold jurisdictional issues:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

*Steel Co.*, 523 U.S. at 95 (interior quotations, citations, and alterations omitted). That obligation compels dismissal for lack of an Article III case or controversy.

#### 1. The All Writs Act gives this Court jurisdiction *now* to preserve its *future* jurisdiction over Commerce's petition for a writ of *certiorari*.

The All Writs Act provides jurisdiction to stay the District Court's actions here, if only to preserve the full range of the controversy *now* for this Court's consideration upon Commerce's *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective

> jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

*FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (interior quotations and citations omitted, emphasis added). The All Writs Act provides "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels," and that "power has been deemed merely incidental to the courts' jurisdiction to review" the ultimate merits of the future appeal. *Id.* at 604 (alterations omitted). As explained in this section, that power is appropriate in this case. If this Court's inaction now allowed the District Court's intrusive, unauthorized, and irrelevant depositions to take place, a future court order could not remedy that harm.

Although resort to the All Writs Act is an extraordinary remedy – as indeed is any stay – the writ "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. U.S.*, 389 U.S. 90, 95 (1967) (interior quotations omitted). While "only exceptional circumstances … will justify the invocation of this extraordinary remedy," those circumstances certainly include a "judicial usurpation of power" as happened here. *Id.* (interior quotations omitted); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (discovery of government officers). As the stay application explains, the District Court's actions here are sufficiently extreme to meet the "judicial usurpation of power" test.

### 2. 28 U.S.C. §2106 gives this Court further authority to remedy the situation that the District Court has created.

In addition to the All Writs Act, this Court also can rely on §2106 for additional authority to resolve this matter:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. §2106. As §2106 makes clear, this Court can not only alter the orders from the lower court but also require further proceedings on remand consistent with the Court's resolution of the issues presented to this Court.

### 3. Plaintiffs lack an Article III case or controversy and cannot premise one on illegal aliens' unlawful refusal to respond to the Census.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Similarly, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). Under both principles, a plaintiff must show that it "has sustained or is immediately in danger of sustaining some direct injury" from the challenged action,

and that injury must be "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (interior quotations omitted). For three independently fatal reasons, Plaintiffs cannot meet these threshold tests for having a suit in federal court.

First, it remains entirely speculative whether illegal aliens will not only decline to respond to the Census but also will elude the Census Bureau's efforts to follow up with those who fail to respond. To have standing "to challenge the operation of the … census-taking machinery … [a plaintiff] must show at least a substantial likelihood that the relief which he seeks will result in some benefit to himself." *Sharrow v. Brown*, 447 F.2d 94, 96-97 (2d Cir. 1971). Insofar as federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), and parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), that alone would suffice to vacate the District Court's order for lack of Article III standing.

Second, even if the challenged Census question could provide Plaintiffs with a sufficiently concrete injury, it would remain entirely uncertain whether Commerce will, in fact, ask the question on the 2020 census. With the approaching midterm elections, it remains entirely possible that the current opposition party would capture a majority of the House of Representatives, and their candidates are claiming that they would defund the Census question on citizenship. *See* Tara Bahrampour, "*How Democrats would work to kill the census citizenship question if they win the*

*midterms*," WASH. POST (Oct. 11, 2018) (available at https://wapo.st/2pKNpUG) (last visited Oct. 12, 2018). Under the circumstances, it is unclear that Plaintiffs have a ripe claim for relief.

Third, and more fundamentally than Plaintiffs' evidentiary failure to show the required actual and imminent injury, *Lyons*, 461 U.S. at 102, Plaintiffs' entire premise rests on the claim that illegal aliens will elude responding to the Census, in violation of federal law. 13 U.S.C. §221(a). The offense by third-party illegal aliens breaks the causal chain in Plaintiffs' theory of injury: "a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Plaintiffs cannot rest their standing on third parties' unlawful actions or inactions.

Given that we deal here with *noncitizens*, "[t]o afford controlling weight to such impressions… is essentially to subject a duly enacted statute to an international heckler's veto." *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting). Although *amicus* EFELDF does not agree with all of the rights that this Court has afforded illegal aliens under the Equal Protection Clause or otherwise, this Court has never held that illegal aliens have a "heckler's veto" over the United States' ability to collect required citizen-related information in the Census. *See* U.S. CONST. art. I §2, cl. 3; *cf. Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997). This Court should not read the Constitution or federal law to create an implied right for illegal aliens to come here illegally, to thwart the Census

illegally, and thereby to support injunctive relief against the federal sovereign:

> While [the Constitution] confirms citizenship rights, plainly there are imperative obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact. One of the most important of these is to serve the country in time of war and national emergency. The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact.

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). To be sure, answering Census questions is not be as foundational as the Nation's defense, but the Constitution is no more a self-abuse pact than a "suicide pact."

### B. Commerce is likely to prevail on the merits.

If the Court reaches the merits, Commerce likely will prevail not only because Plaintiffs did not establish the bad faith required for high-level depositions in this context, but also because the Secretary's personal mental processes are irrelevant.

#### 1. Neither Plaintiffs nor the lower courts meet the high bar for discovery of a Cabinet secretary or other high government official.

As Commerce's application ably demonstrates, deposing high-ranking officials to go outside the administrative record requires "a strong showing of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), which Plaintiffs failed to make. Appl. at 24-39. Again, *amicus* EFELDF does not seek to repeat arguments that Commerce ably makes. S.Ct. R. 37.1. Instead, *amicus* EFELDF focuses on arguments that the supplement Commerce's arguments.

### 2. The deponents' internal mental processes would be irrelevant.

"It was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions," *Morgan v. U.S.*, 304 U.S. 1, 18 (1938); *accord U.S. v. Morgan*, 313 U.S. 409, 422 (1941), because the administrative record here suffices. 5 U.S.C. §706 ("the court shall review the whole record or those parts of it cited by a party"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947). Because Plaintiffs have not shown that their discovery would likely lead to relevant information, that discovery should be denied.

Indeed, even if discovery established the Secretary Ross had initially intended to adopt the citizenship question – for whatever reason, before his conferring with other governmental stakeholders – that would not invalidate his eventual decision to adopt the question for the reasons stated in the administrative record. Neither the APA nor Article III give judges the power that the District Court claimed here. With the APA, Congress confined review to the record. 5 U.S.C. §706 (quoted, *supra*). More importantly, "treat[ing an] Act as merely a ruse … to evade constitutional safeguards" "would be indulging in a revisory power over enactments as they come from Congress – a power which the Framers of the Constitution withheld from this Court – if we so interpreted what Congress refused to do and what in fact Congress did." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 85 (1961). In *Subversive Activities Control Board*, the initial bills would have targeted the Communist Party by name and effectively outlawed it, but – in response to

constitutional questions raised against that approach – Congress amended the bill to target certain activities, *id.*, which the Court upheld without regard to the alleged constitutional defects of the bills as first envisioned by the drafters.

During the Cold War, when presented with the argument that regulating the Communist Party one way would violate the Constitution, the Government changed the bill's focus to achieve a desired end lawfully. The Court simply did not inquire whether "the Act is only an instrument serving to abolish the Communist Party by indirection" because the "true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible." *Id.* at 84-86. Similarly, here, Commerce has every right to conduct the Census to gather information that it has gathered for most of this Nation's history, without regard to whatever Plaintiffs or the District Court might think motivated the Secretary. It is enough that the proposed Census question is both lawful and supported by the record before the agency.

## III. THE OTHER STAY CRITERIA TIP IN COMMERCE'S FAVOR.

Although the likelihood of this Court granting a writ of *certiorari* and ruling for Commerce would alone justify granting a stay, *amicus* EFELDF addresses the three other potential stay factors. All of these factors weigh in favor of staying the District Court's actions until the conclusion of any timely filed petition for a writ of *certiorari.*

### A. Commerce's harm is irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents."

*Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[2]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* Commerce meets both tests.

As to standing, Commerce has standing not only to defend its actions in the form of the 2020 Census, *Diamond v. Charles,* 476 U.S. 54, 62-63 (1986), but also to defend itself – and its Cabinet Secretary – from unauthorized interference by lower federal courts and plaintiffs. *Cf. Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014) (separation of powers); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989) (burdens of litigation). As to irreparable harm, it would be impossible to restore the *status quo ante* after the District Court allowed discovery: the harm would have already occurred. Moreover, the principle at issue is greater than the burden of any one single deposition. If Plaintiffs can depose high-level officials in this one suit without support, then other plaintiffs in countless other suits will get the same relief, collectively hamstringing the ability of the government to function.

**B. <u>The equities balance in favor of Commerce.</u>**

To the extent that this Court balances the equities as distinct from the merits, the balance tips in Commerce's favor because Plaintiffs lack standing and the District

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[2] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

Court's discovery order would be unsustainable on the merits if this Court reached the merits.

### C. The public interest favors not only a stay but also a rebuke of the District Court's unprecedented intrusion into the workings of the Executive Branch.

The last stay criterion is the public interest. While the District Court has injected itself into this litigation as a judicial challenger to Commerce's action, the case began as – and, for stay purposes, remains – litigation by Plaintiffs against the federal government over the Census. When parties dispute the lawfulness of government programs, this last criterion collapses into the merits. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4. If the Court sides with Commerce on either Article III jurisdiction or the merits, the public interest will tilt decidedly toward Commerce: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). Using a writ of mandamus can "ha[ve] the unfortunate consequence of making a district court judge a litigant," *Daiflon, Inc.*, 449 U.S. at 35, but here it would not be this Court's or Commerce's doing: the District Judge made himself a virtual litigant here on his own. As to the judicial attempt to usurp Commerce's obligations under the Census Clause and the implementing statutes, the public-interest criterion heavily favors Commerce.

Under this Court's supervisory authority over the lower federal courts, this action warrants review as but one example of the increasing pace of injunctions and

other forms of interference from reliably liberal circuits against policies on which the prevailing party campaigned in the 2016 election.[3] While independent judicial review is critical to the separation of powers under our tripartite branches of government, there is a fine line between unbiased and independent judicial review and an attempt to nullify the 2016 election based on the prejudices of some members of the judiciary. In order to preserve public respect for the former, *amicus* EFELDF respectfully submits that this Court must pay attention to even the *appearance* of the latter, which would be profoundly dangerous to our system of government and Constitution.

Generally, this Court has preferred that the Courts of Appeals serve as the first line of defense to enforce judicial norms on the District Courts. *See*, *e.g.*, *In re Commerce Dep't*, No. 18A350 (Oct. 5, 2018) (deferring to Second Circuit); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 200 L.Ed.2d 325 (2018) (deferring to Ninth Circuit). In enforcing judicial norms, for example, the Courts of Appeals may adopt "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941). Where – as here – the Courts of Appeals fail to enforce judicial norms, it falls to this Court's "general power to supervise the administration of justice in the federal courts," and "the responsibility lies with this

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[3] *See*, *e.g.*, *Regents of the Univ. of Cal. v. United States, Dep't of Homeland Sec.*, 279 F.Supp.3d 1011, 1047 (N.D. Cal. 2018) (enjoining rescission of purported exercise of enforcement discretion by federal agencies based *inter alia* on racial animus of President); *Ramos v. Nielsen*, No. 18-cv-01554-EMC, 2018 U.S. Dist. LEXIS 171272, at *56-58 (N.D. Cal. Oct. 3, 2018) (same with respect to Temporary Protected Status designations by federal agencies).

Court to define [the] requirements and insure their observance." *Western Pacific,* 345 U.S. at 260 (interior quotations omitted). *Amicus* EFELDF respectfully submits that the actions of the lower courts here require this Court's intervention.

Under 28 U.C.S. §2106, federal appellate courts have the authority to remand a case to a different judge, *Liteky v. U.S.,* 510 U.S. 540, 554 (1994); *U.S. v. Microsoft Corp.,* 253 F.3d 34, 108 (D.C. Cir. 2001), even without a motion by the affected party to recuse the judge under 28 U.S.C. §455(a). While that relief would be appropriate here, an alternate course could be to announce, *prospectively*, that unexplained departures from precedent will occasion remand to a different judge: "If the challenged … practice continues and is not addressed by the Court of Appeals, future review may be warranted." *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting denial of the petition for writ of *certiorari*). For example, in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689 (1979), this Court followed prior precedent regarding implied rights of action while announcing the end to that practice. A prospective announcement here might incentivize lower-court judges to dispense their power more judiciously.

## CONCLUSION

If this Court is not inclined to address the lack of Article III jurisdiction on this stay application, the Court should stay the District Court's discovery orders pending the timely filing and resolution of a petition for a writ of *certiorari*. Alternatively, this Court should remand with instructions to dismiss this action for lack of standing and, in so doing, the Court should remand the case to a different District Judge.

Dated: October 12, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

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## CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in 8.5-by-11-inch format, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 3, 2, and 17 pages (and 580, 249, and 4,673 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: October 12, 2018

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that, on this 12th day of October, 2018, in addition to filing the foregoing document via the Court's electronic filing system, in compliance with Supreme Court Rules 29.3 and 29.5(b), the foregoing document was served on counsel of record via U.S. Priority Mail, postage pre-paid, with a PDF copy served via electronic mail.

The undersigned further certifies that, on this 12th day of October, 2018, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed October 12, 2018, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph