No. 18A375

# In the Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
*Applicants.*

ON APPLICATION FOR STAY PENDING
DISPOSITION OF PETITION FOR WRIT OF MANDAMUS

## MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS


XAVIER BECERRA
*Attorney General of California*
EDWARD C. DUMONT
*Solicitor General*
MICHAEL J. MONGAN*
*Deputy Solicitor General*
KRISTIN A. LISKA
*Associate Deputy Solicitor General*

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue
San Francisco, CA 94102
(415) 510-3920
Michael.Mongan@doj.ca.gov
**Counsel of Record*


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## MOTION FOR LEAVE TO FILE

The Attorney General of California, on behalf of the State, moves this Court for leave to file the enclosed brief as amicus curiae in support of respondents and in opposition to the application for a stay, without 10 days' advance notice to the parties of amicus's intent to file as ordinarily required by Supreme Court Rule 37.2(a). In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. Respondents have consented to the filing of this brief; applicants did not respond to our inquiries regarding consent.

As explained in the brief, California has a direct interest in this proceeding because it is currently litigating its own challenge to the Commerce Secretary's decision to add a citizenship question to the 2020 Census questionnaire. It also has a general interest in the administrative law issues raised by applicants because it is a plaintiff in a number of pending challenges under the Administrative Procedure Act. *See* Sup. Ct. R. 37.1.

Applicants originally informed the Court in their stay application (at 20) that they "intend[] to file forthwith a petition for a writ of mandamus or certiorari." But they have not yet filed such a petition, and they suggest in their reply (at 4) that, "to avoid repetitive filings, the Court could construe the government's stay application as that petition." We seek leave to file an amicus brief in opposition to the stay application to ensure that the brief will be timely to the extent the Court considers applicants' underlying legal arguments. As explained in our brief, a stay is inappropriate for the same reason that the Court should deny any forthcoming petition: the district court rulings

challenged by applicants are correct, and, in any event, they do not warrant either mandamus or certiorari.

## CONCLUSION

The Court should grant leave to file the enclosed amicus curiae brief in opposition to the stay application.

Respectfully submitted,

XAVIER BECERRA
*Attorney General of California*
EDWARD C. DUMONT
*Solicitor General*
MICHAEL J. MONGAN
*Deputy Solicitor General*
KRISTIN A. LISKA
*Associate Deputy Solicitor General*

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## QUESTION PRESENTED

Whether this Court should grant extraordinary mandamus relief to halt discovery in district court litigation regarding the 2020 Census.

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## INTERESTS OF AMICUS CURIAE

The Constitution requires the federal government to make an "actual Enumeration" of "the whole number of persons in each State" every ten years. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. The decennial census must "count every person residing in a state on census day," regardless of citizenship status. *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980). Congress assigned the Secretary of Commerce responsibility for obtaining a census count that is "as accurate as possible." 13 U.S.C. § 141 note. California and its sister States rely on the Secretary properly discharging this responsibility because the census count directly affects the apportionment of federal and state representatives, presidential electors, and federal funding.

In March 2018, Commerce Secretary Wilbur Ross decided to add a citizenship question to the 2020 census questionnaire. Empirical evidence—including studies conducted by the federal government's own Census Bureau—indicates that this question would depress responses from non-citizens and from citizens with relatives who are non-citizens. That possibility is particularly worrisome to California, which has more non-citizen residents (over 5 million) and more foreign-born residents (over 10 million) than any other State.

Secretary Ross dismissed the concern that adding a citizenship question would lead to an inaccurate count. His March 2018 decision memorandum explained that he was acting in response to a December 2017 letter from the Department of Justice, which asked the Census Bureau to add the question in order to assist in DOJ's "enforcement of Section 2 of the Voting Rights Act." Stay App'x 125a. Three months later,

however, he offered a materially different explanation. He acknowledged that he had initiated the decisionmaking process long before December 2017, and that he had asked DOJ to make the request that he ultimately used to justify his decision. *Id.* at 116a.

The federal government's pending stay application arises out of lawsuits filed by 17 States and other plaintiffs in the Southern District of New York in response to Secretary Ross's decision. The applicants have indicated that they intend to file a mandamus petition challenging three district court discovery rulings in those proceedings. In the first order, the court concluded that plaintiffs were entitled to limited extra-record discovery based on a strong showing of bad faith or improper behavior. In two subsequent orders, following written discovery and the depositions of lower-level officials, the court compelled the depositions of Secretary Ross and Acting Assistant Attorney General John Gore, the apparent author of the December 2017 letter.

California filed its own suit challenging the Secretary's decision before the New York proceedings commenced. *See California v. Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018). Like the complaints in the New York cases, California's complaint alleges that the Secretary violated the Enumeration Clause and that his decision was arbitrary and capricious in violation of the Administrative Procedure Act. *See id.*, Dkt. 1 ¶¶ 33-34. The district court in the California action recently denied the defendants' motion to dismiss. *See id.*, Dkt. 75. It also authorized discovery going beyond the administrative record, subject to the same limitations imposed by the district court in the New York proceeding and with the understanding that California would coordinate its discovery with the

New York plaintiffs. *See id.*, Dkt. 76. California thus has a direct stake in the outcome of this proceeding.

More generally, California has an interest in preserving legal principles that allow district courts to fairly adjudicate challenges to federal actions. California is a plaintiff in a range of pending APA proceedings. Through its experience as an APA plaintiff, California understands that effective judicial review of agency actions depends on federal officials offering good faith explanations for their decisions and producing the complete record of materials considered by the agency decisionmaker. Applicants are correct that the presumption of regularity is a "bedrock principle[] of administrative law." Stay Appl. 40. But that presumption is not irrebuttable. Where federal officials appear to have deliberately obscured the true basis for their actions, it is appropriate for a district court to order the production of information needed to permit effective judicial review—including, in appropriate circumstances, by "requir[ing] the administrative officials who participated in the decision to give testimony explaining their action." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

## ARGUMENT

Applicants have asked the Court to grant a stay pending disposition of a forthcoming petition for a writ of mandamus, or, alternatively, to construe their stay application as such a petition and grant immediate mandamus relief. *E.g.*, Stay Appl. 7-8. Whether the Court treats applicants' submission as a stay application or as a petition, it should deny relief. Applicants cannot satisfy the demanding standard governing mandamus relief and, for that reason, they are not entitled to a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

## I. EFFECTIVE REVIEW OF AGENCY ACTION DEPENDS ON A GOOD-FAITH EXPLANATION AND THE COMPLETE ADMINISTRATIVE RECORD

The Administrative Procedure Act requires courts to "review the whole record" to determine whether an agency's action was lawful. 5 U.S.C. § 706. The "whole record" means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).[1] It "consists of all documents and materials directly or indirectly considered by the agency," *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)—including "evidence contrary to the agency's position," *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quoting *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981)).

Our system presumes that administrative officials will act in good faith in making and explaining their decisions, and will provide reviewing courts with the complete record of materials underlying those decisions. In light of that presumption of regularity, judicial review of agency action ordinarily focuses on whether the "contemporaneous explanation" offered by the agency is "sustainable on the administrative record made" by the agency. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam). But that ordinary approach is subject to exceptions.

When "it appears the agency has relied on documents or materials not included in the record" it produced, the reviewing court may order the agency to produce the complete record. *Pub. Power Council v.*

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[1] *Cf. Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

*Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.). That authority follows naturally from "the rule that judicial review is based upon the full administrative record in existence at the time of the agency decision." *Id.* Courts need not ignore "credible allegations" that rebut the presumption of regularity by establishing that the record the agency proffered "for judicial review is incomplete." Administrative Conference of the United States Recommendation 2013-4: The Administrative Record in Informal Rulemaking 11-12 (adopted June 14, 2013) (ACUS Recommendation).

Indeed, effective judicial review depends on production of the complete administrative record. For a court "to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). A review of "less than the full administrative record might allow a party to withhold evidence unfavorable to its case," *id.*, and to "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question," *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). That type of gamesmanship would frustrate judicial review by forcing courts to proceed based on "a fictional account of the actual decisionmaking process." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).[2]

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[2] *See, e.g.*, *In re United States*, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from grant of stay) ("A court deprived of a full administrative record could not consider . . . whether the decision was based on the consideration of irrelevant factors; whether it

On rare occasions, even when the administrative record is facially complete, a court may also supplement the record by authorizing focused discovery into the agency's decision. *See Overton Park*, 401 U.S. at 420. Supplementation is particularly appropriate in cases involving "a strong showing of bad faith or improper behavior." *Id.*; *see, e.g.*, *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 497 (1st Cir. 2007). In appropriate circumstances, that extra-record discovery may include "requir[ing] the administrative officials who participated in the decision to give testimony explaining their action." *Overton Park*, 401 U.S. at 420; *see generally* ACUS Recommendation at 7 ("supplementation of the administrative record for judicial review may be appropriate where a strong showing has been made to overcome the presumption of regularity").

*Overton Park* imposes a demanding standard for obtaining extra-record discovery, but not an insuperable one. *See, e.g.*, *New York v. Salazar*, 701 F. Supp. 2d 224, 243 (N.D.N.Y. 2010). It recognizes that in the rare case involving credible allegations of bad faith behavior, even the complete administrative record is unlikely to contain all the information necessary for a court to effectively review the validity of the agency action. For example, agency officials are unlikely to document personal biases against parties, *see L-3 Commc'ns Integrated Systems, L.P. v. United States*, 91 Fed. Cl. 347, 354 (2010), or "to keep a written record of improper political contacts," *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis.

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considered the relevant factors; whether the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'; or whether the decision was unlawful for some other reason.") (citations omitted).

1997); *see also Beta Analytics Int'l, Inc. v. United States*, 61 Fed. Cl. 223, 226 (2004) (placing "evidence of bad faith . . . in an administrative record" would be "both sinister *and* stupid"). In such a case, extra-record discovery may be the only way for the court to understand the true nature of the decision. *See Pub. Power Council*, 674 F.2d at 794 (Kennedy, J.) (courts may "admit certain testimony . . . or provide limited discovery when serious gaps would frustrate challenges to the agency's action").

The authority of reviewing courts to order completion or supplementation of administrative records is an important safeguard. It protects against any impulse on the part of agencies to insulate decisions from judicial review by obscuring the true rationale for their actions or by producing Potemkin records that hide the actual materials considered by agency decisionmakers. It provides the judicial branch with the tools needed to review the validity of agency action based on the whole record. And it serves the public's interest in understanding why the government decided to act and what evidence supported that decision.

## II. THIS CASE HIGHLIGHTS WHY DISTRICT COURTS ARE AUTHORIZED TO PRESS FOR MORE INFORMATION IN APPROPRIATE CIRCUMSTANCES

This case illustrates the importance of these protections. Faced with an incomplete record and an explanation for adopting the citizenship question that was belied by subsequent disclosures, the district court properly required the federal defendants to complete and supplement the record in ways that will enable fair and effective review of plaintiffs' claims.

1. The Secretary of Commerce formally announced his decision to add a citizenship question to the 2020 Census in a March 2018 memorandum. *See* Stay App'x 117a-124a. He explained that the decision was "in response to" a December 2017 letter from the Department of Justice, which "requested that the Census Bureau reinstate a citizenship question on the decennial census." *Id.* at 117a, 124a. The DOJ letter asserted that this question was necessary because citizenship data "is critical to the Department's enforcement of Section 2 of the Voting Rights Act." *Id.* at 125a. The Secretary's subsequent decision memorandum explained that, "[f]ollowing receipt" of that letter, he "set out to take a hard look at the request." *Id.* at 117a. He concluded that adding "a citizenship question [to] the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request." *Id.* at 124a.

After these lawsuits were filed, applicants produced a 1,320-page administrative record. *See* D.Ct. Dkt. 173.[3] Two weeks later, they "supplemented" the administrative record with a two paragraph memorandum in which the Secretary acknowledged—for the first time—that the December 2017 DOJ letter did not prompt his consideration of the citizenship question. *See* Stay App'x 116a. He explained that he actually began considering the citizenship question "[s]oon after [his] appointment" in early 2017; that he "thought reinstating a citizenship question could be warranted" from the beginning; and that he later "inquired whether [DOJ] would support, and if so would

[3] Citations to "D.Ct. Dkt." are to the docket in *New York v. United States Department of Commerce*, No. 18-cv-2921 (S.D.N.Y.).

request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." *Id.*

2. As the district court explained, this proffered administrative record was incomplete on its face. It contained hardly any documents pre-dating the December 2017 DOJ letter, despite the Secretary's belated admission that the decisionmaking process began soon after he took office in February 2017. *See* Stay App'x 99a. The proffered record also "expressly reference[d] documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record." *Id.* at 100a. And it excluded documents relied on by the Secretary's senior advisers, including most of the materials reviewed by "key personnel at the Census Bureau." *Id.*

After the district court ordered applicants to complete the administrative record, *see* D.Ct. Dkt. 199, they produced "over 12,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary," Stay Appl. 15. That complete record—which is nearly ten-times the size of the one applicants had initially proffered—has proven essential to the district court's review of the claims before it.

For example, the district court recently pointed to two documents from the completed administrative record that "suggest that Secretary Ross's sole proffered rationale for the decision . . . may have been pretextual." D.Ct. Dkt. 215 at 63. Those documents involve a May 2017 email exchange in which the Secretary stated that he was "mystified why nothing have [*sic*] been done in response to my months old request that we include the citizenship question," and his sub-

ordinate responded that "[w]e need to work with Justice to get them to request that citizenship be added back as a census question." *Id.* at 64-65. As the district court noted, "evidence of pretext . . . may well suffice to prove a violation of the APA." *Id.* at 65 n.24. Had the district court not ordered completion of the record, it never would have seen those documents.[4]

As this case demonstrates, when federal agencies produce incomplete administrative records, they frustrate judicial review and impose unnecessary costs on the judicial branch.[5] Instead of adjudicating pressing merits issues, courts must devote time and attention to ordering agencies to comply with their statutory obligation to produce the complete record. The resulting delay is especially problematic in time-sensitive cases like this one, where the impending decennial

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[4] Applicants now assert that they "do[] not here challenge the district court's order[] about the scope of the administrative record." Reply 9 n.2. Before the district court issued that order, however, they insisted that the record they initially produced included "all of the non-privileged documents that were directly or indirectly considered by the Secretary in deciding whether to reinstate a citizenship question on the decennial census." D.Ct. Dkt. 194 at 2.

[5] For example, in response to suits challenging the termination of the Deferred Action for Childhood Arrivals program, the federal government proffered an administrative record with just "256 pages of documents," of which "[n]early 200 pages consist of published opinions from various federal courts." *In re United States*, 138 S. Ct. 443, 444 (2017) (per curiam). Although this Court has not ruled on the adequacy of that record, *see id.* at 445, multiple lower courts have found it to be incomplete, *see, e.g.*, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 2017 WL 4642324, at *5 (N.D. Cal. Oct. 17, 2017).

census requires a prompt and final resolution of the proceedings.

3. This case further illustrates why, even when a court has received the complete administrative record, it is also sometimes necessary for the court to order extra-record discovery before ruling on the validity of agency action. *See Overton Park*, 401 U.S. at 420. In the Secretary's March 2018 memorandum (and in sworn testimony to both Houses of Congress), he gave a misleading explanation for an important decision with lasting implications for the Nation and the States.[6] He now acknowledges that he manufactured the DOJ request to provide a basis for adding the citizenship question. *See* Stay App'x 116a.

The balance of the current record adds to the showing of improper behavior. Among other things, it suggests that the Secretary pre-judged the decision long before he received anything from DOJ; that (contrary to his congressional testimony) he consulted with White House Chief Strategist Stephen Bannon about the effort to add the citizenship question; that he abandoned regular procedures regarding the census questionnaire; that he ignored the advice of internal

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[6] *See* Stay App'x 117a-124a; *Hearing on the Fiscal Year 2019 Funding Request for the Commerce Department: Hr'g Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the S. Comm. on Appropriations*, 115th Cong. (May 8, 2018) (unofficial transcript 2018 WL 2179074) ("May 8 Senate Hearing") ("Well, the Justice Department is the one who made the request of us."); *Recent Trade Actions: Hr'g Before the H. Ways & Means Comm.*, 115th Cong. (March 22, 2018) (unofficial transcript 2018 WLNR 8951469) ("March 22 House Hearing") ("The Department of Justice, as you know, initiated the request for inclusion of the citizenship question.").

experts; and that he coordinated with his subordinates on a plan "to work with Justice to get them to request" the citizenship question.[7]

Under these circumstances, the district court acted within its discretion in finding a showing of bad faith sufficient to warrant limited extra-record discovery. To be sure, the district court has been careful not to pre-judge the question whether Secretary Ross's stated rationale was pretextual. *See* Stay Appl. 103a. And that is the point. The circumstances here make it impossible for the court to effectively judge the validity of the agency's action without first receiving additional information that is not available in the administrative record. *See supra* 6-7.

4. Finally, this case illustrates the importance of preserving judicial authority to compel the depositions of senior officials in APA cases involving bad faith or improper behavior. *See Overton Park*, 401 U.S. at 420. As a government itself, California is mindful of the need to protect senior government officials from unwarranted discovery. "The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere." *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam); *cf. Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013); *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). We routinely represents state officers as defendants in civil litigation, and we often resist depositions of those officials, including in circumstances where the information sought by plaintiffs is available from other sources.

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[7] Stay App'x 99a, 101a, 102a, 116a, 128a; N.Y. Immigration Coal. Resp. App'x 21A-22A, 26A-27A, 39A.

But a corollary of the principle that high-ranking officials should not be deposed absent "exceptional circumstances," *Lederman*, 732 F.3d at 203, is that sometimes such circumstances warrant their depositions. Courts have allowed the deposition or trial testimony of federal officials at the cabinet level and above. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 704-706 (1997); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 53 (D.D.C. 1999). And this particular dispute falls into a recognized category of cases in which senior officials may be deposed: where evidence of improper behavior renders their testimony necessary to the fair adjudication of an APA claim. *See Overton Park*, 401 U.S. at 420; *supra* 6-7.

The district court here wisely deferred the question whether Secretary Ross should be deposed pending written discovery and the depositions of lower-level officials. *See* Stay App'x 105a-106a. But that discovery only confirmed that the information needed to review plaintiffs' APA claims is not available from any source other than the Secretary. The shifting and highly personalized explanations that Secretary Ross has offered for adopting the citizenship question put his intent and credibility squarely at issue. *See id.* at 10a-11a. His "three closest and most senior advisors . . . testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs' claims." *Id.* at 11a. And applicants' written discovery responses have only muddied the waters further. *See id.* at 13a.[8] After carefully

[8] For example, applicants served a supplemental interrogatory response on August 30 stating that they "cannot confirm" that Secretary Ross discussed the citizenship question with Stephen Bannon, N.Y. Immigration Coal. Resp. App'x 22A, followed by a second supplemental response on October 11 acknowledging that

reviewing the results of existing discovery, the district court acted within its discretion when it authorized a four-hour deposition of Secretary Ross at a place of his choosing. *See id.* at 16a.

As to Gore, who is no longer Acting Assistant Attorney General (*see* Reply 10 n.3), the district court's reasoning was equally sound. Gore apparently authored the December 2017 letter that the Secretary requested and on which the Secretary originally said he based his decision. Gore's testimony about the circumstances surrounding that letter is critical to assessing whether the stated explanation for this important agency action was a pretextual one. *Cf.* D.Ct. Dkt. 215 at 65 n.24 (noting applicants' concession that evidence of pretext may "suffice to prove a violation of the APA"). To the extent Gore qualifies as a "high-ranking executive officer[]," *In re Cheney*, 544 F.3d at 314, he is surely one who can be subject to a focused deposition under these circumstances without "rais[ing] serious separation-of-powers issues," Stay Appl. 21.

It is no response for applicants to argue that the deposition would improperly "open[] the doors to discovery into Secretary Ross's mental processes." Stay Appl. 29. *Overton Park* recognized that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," 401 U.S. at 420, consistent with the presumption of regularity that normally applies in APA proceedings. It also recognized that in certain cases, involving irregular conduct that calls into doubt the veracity of the agency's purported rationale, "it may be that the only way there

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Ross now "recalls" discussing the issue with Bannon "in the Spring of 2017," *id.* at 27A.

can be effective judicial review is by examining the decisionmakers themselves" to understand the actual basis for the decision. *Id.*

Nor are applicants' complaints about the burdens of deposition persuasive here. We recognize that preparing for and attending a four-hour deposition is not a trivial intrusion on the schedule of a cabinet secretary. But this is not a case in which an agency head merely rubber-stamped a decision memorandum prepared by subordinates, and would need to educate himself in order to provide informed testimony about the decision. By his own account, Secretary Ross was personally and centrally involved in this decisionmaking process from the start. *See* Stay App'x 116a. He is the only person in a position to provide essential information. And he has already invested the hours necessary to prepare for and attend three separate congressional hearings that involved questioning on the subject (not to mention multiple interviews with media outlets).[9] On these facts, it was not unreasonable to require him to spare a few more hours for the judicial branch.

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[9] *See* May 8 Senate Hearing; March 22 House Hearing; *Hearing on Fiscal Year 2019 Dep't of Commerce Budget: Hr'g Before the Subcomm. on Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. (Mar. 20, 2018) (unofficial transcript 2018 WLNR 8815056); *see, e.g.*, *Commerce Secretary Wilbur Ross at National Press Club* 55:35-59:34, C-SPAN (May 14, 2018), https://www.c-span.org/video/?445463-1/commerce-secretary-ross-administration-alternative-remedies-zteban; *We're in trade discussions with the EU: Wilbur Ross* 4:02-5:30, Fox Business (Mar. 27, 2018), https://video.foxbusiness.com/v/5758978018001/?#sp=show-clips; *cf. 2020 Census Progress Report: Hr'g Before the H. Oversight & Gov. Reform Comm.*, 115th Cong. (May 18, 2018) (unofficial transcript 2018 WL 2299033) (Gore testimony).

## III. MANDAMUS RELIEF IS NOT APPROPRIATE

To obtain mandamus relief from this Court, a petitioner "must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1. Mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). Among other things, petitioners must show that they have a "clear and indisputable" right to mandamus relief, and the Court "must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381 (internal quotation marks omitted). That demanding standard applies to all mandamus petitions, including those filed by the federal government in high-profile cases. *See, e.g.*, *id.*

Courts of appeals are typically reluctant to use their extraordinary mandamus powers to police pretrial record and discovery disputes, including disputes involving the federal government. *See, e.g.*, *In re Shalala*, 996 F.2d 962, 964-965 (8th Cir. 1993). There is good reason for that reluctance. The use "of mandamus to vacate a district court's order compelling discovery" has "the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation." *Id.* at 964 (quoting *In re Burlington N., Inc.*, 679 F.2d 762, 767 (8th Cir. 1982)).

This Court, too, has followed a "long-settled practice" of leaving "these sorts of burden and discovery-related procedural disputes to the district courts, with occasional court of appeals intervention." *In re United*

*States*, 138 S. Ct. 371, 375 (2017) (Breyer, J., dissenting from grant of stay). That practice is founded on the view that examining "whether a particular discovery order is overly burdensome typically requires a deep understanding of the overall factual context and procedural history of an individual case," leaving this Court "poorly positioned to second-guess district courts' determinations" in the context of a fast-moving mandamus proceeding. *Id.* This Court's intervention in interlocutory record and discovery disputes also increases the chance that it "will be asked to address run-of-the-mill discovery disputes in many other matters," especially "when the Government is involved." *Id.* at 375-376.[10]

On rare occasions, a ruling by a district court on such an issue might be so extraordinary that the "drastic" remedy of mandamus is appropriate under the circumstances. *Cheney*, 542 U.S. at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). But this is far from that case. The district court's orders allowing focused extra-record discovery and compelling the depositions of Gore and Secretary Ross were within its discretion. *See supra* 11-15. They certainly do not constitute clear or indisputable error of the type required for mandamus relief. *See Cheney*, 542 U.S. at 381. Indeed, six federal judges have now concluded

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[10] In the rare circumstances in which this Court has found it appropriate to intervene in discovery disputes, it typically has avoided exercising its mandamus powers. In *In re United States*, for example, the Court did not grant mandamus, but instead granted certiorari, vacated the order of the court of appeals, and remanded with guidance on how the lower courts should proceed. *See* 138 S. Ct. at 444-445; *cf. Cheney*, 542 U.S. at 391 (remanding for the court of appeals to determine whether a writ of mandamus should issue). As discussed below, certiorari would not be appropriate under the present circumstances. *See infra* 18 n.11.

that the district court "did not clearly abuse its discretion in authorizing extra-record discovery based on a preliminary showing of 'bad faith or improper behavior.'" *In re Dep't of Commerce*, No. 18-2856, Dkt. 55 at 2 (2d Cir. Oct. 9, 2018) (denying mandamus regarding extra-record discovery generally and Ross deposition); *see* Stay App'x 3a-4a (separate Second Circuit panel denying mandamus regarding extra-record discovery generally and Gore deposition). Precedent forecloses mandamus relief under these circumstances, *see Cheney*, 542 U.S. at 381, and a contrary ruling could invite the filing of still more fact-specific mandamus proceedings in this Court as a means of seeking interlocutory review of adverse discovery orders.[11]

[11] Nor is this case a suitable candidate for certiorari. The parties (and the courts below) agree on the legal standards governing extra-record discovery and the deposition of senior government officials. Applicants simply disagree with how the district court applied those standards to the particular—and highly unusual—facts of this case.

## CONCLUSION

The application for a stay pending this Court's disposition of a petition for a writ of mandamus or certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
*Attorney General of California*
EDWARD C. DUMONT
*Solicitor General*
MICHAEL J. MONGAN
*Deputy Solicitor General*
KRISTIN A. LISKA
*Associate Deputy Solicitor General*

October 17, 2018