No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

—v.—

STATE OF NEW YORK, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether the district court correctly found that the Secretary of Commerce's decision to add a citizenship question to the Decennial Census was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act and the Census Act.

2. Whether questions concerning extra-record discovery and the deposition of Secretary Ross are moot or otherwise unsuitable for consideration, in light of the district court's merits decision based on the Administrative Record alone and vacatur of its order authorizing the deposition of Secretary Ross.

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INTRODUCTION

Commerce Secretary Wilbur Ross's decision to add a citizenship question to the 2020 Census would—according to the government's own "conservative" analysis—cause "approximately 6.5 additional million people" not to respond, Pet. App. 145a, 152a, more people than the population of Missouri, the 18th-most populous state. The district court found that, as a result, California, Texas, Arizona, Florida, New York, and Illinois face a "certainly impending" or "substantial risk of losing a seat" in the House of Representatives, Pet. App. 175a, and that numerous states would "lose funds from several federal programs." Pet. App. 205a. Secretary Ross's purported justification was to collect data that the Department of Justice admitted "is not necessary" for any purpose. Pet. App. 94a.

The district court applied well-settled administrative law principles to the exceptional facts of this case and found multiple "classic, clear-cut APA violations," Pet. App. 10a, each of which independently justifies the judgment below. "Based exclusively on the materials in the official 'Administrative Record,'" Pet. App. 10a, the court found that Secretary Ross's decision:

- was contrary to the Administrative Record showing unequivocally that adding a citizenship question would "materially reduce response rates among immigrant and Hispanic households," Pet. App. 286a, "harm[] the quality of the census count, and [produce] substantially less accurate citizenship status data than are available from administrative sources," Pet. App. 47a (quoting AR 1277);

- violated the Census Act's directives "to acquire and use" administrative records for data collection to "the maximum extent possible," instead of "direct inquiries," Pet. App. 263a (quoting 13 U.S.C. § 6(c)), and to report to Congress all topics to be included in the census no later than three years before Census Day, Pet. App. 272a-284a (citing 13 U.S.C. § 141);
- ignored that the Census Bureau is *prohibited* from sharing full count citizenship data at the level of granularity requested, because of the Bureau's statutory "confidentiality obligations and disclosure avoidance practices," App. 297a-300a;
- "dramatic[ally] depart[ed] from the standards and practices that have long governed administration of the census," including Office of Management and Budget (OMB) directives and the Census Bureau's Statistical Quality Standards, Pet. App. 300a-303a; and
- was pretextual, as the decision was made for reasons other than the official rationale advanced, and "well before" the Secretary even considered the asserted official rationale, Pet. App. 313a.

Far from "dictat[ing] the contents of the decennial census questionnaire," Pet. 16, the district court simply set aside the Secretary's decision as the APA instructs. 5 U.S.C. § 706.

This case is undoubtedly of national importance, and should be resolved expeditiously. That does not mean that this Court need take up the case—the district court's careful and extensive

opinion was correct. But if this Court is inclined to grant certiorari, impending deadlines and the Court's calendar counsel in favor of immediate review before judgment.

STATEMENT OF THE CASE

A. The Decennial Census

The Constitution requires a Decennial Census to count the total number of "persons"—regardless of citizenship status—in each state, "in such a manner as [Congress] shall by law direct." U.S. Const. art. I, § 2, cl.3. The census is a "mainstay of our democracy," governing the apportionment of the House of Representatives and the allocation of votes in the Electoral College. *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring). Census data are also 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, Pet. App. 178a.

The government has not asked every household in the United States about citizenship since 1950. Pet. App. 26a-28a. Census Directors appointed by presidents from both political parties have consistently opposed adding a citizenship question to the census because it would "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. of Former Directors of the U.S. Census Bureau as

Amici Curiae 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940); *see also Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

Because including a citizenship question is so at odds with the goal of the census, the government has, for decades, collected citizenship data through an independent process only from "a sample of the population." Pet. 3. Previously, it gathered citizenship data via the "long form," a sample survey that asked "a small subset of the population subsidiary census questions." *Utah v. Evans*, 536 U.S. 452, 468 (2002). Currently, it does so through the annual American Community Survey (ACS) of approximately two percent of households. Pet. 3. The Bureau is statutorily required to collect citizenship data through the ACS, 52 U.S.C. § 10503(b)(2)(A), which, unlike the census, can be statistically "adjust[ed] … for survey nonresponse." Pls.' Ex. 22, at 9 (AR 1285); *Dep't of Commerce*, 525 U.S. at 343.

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

On December 12, 2017, the Department of Justice (DOJ) sent the Census Bureau a letter requesting the inclusion of a citizenship question on the 2020 census, asserting that the question would produce "hard count" citizenship data at the census block level, purportedly "critical to the Department's enforcement of Section 2 of the Voting Rights Act." Pet. App. 564a. On March 26, 2018, Secretary Ross issued a decisional memorandum stating that the DOJ request prompted Commerce's consideration of a citizenship question and that he relied exclusively on DOJ's VRA rationale. Pet. App. 548a-562a. He

directed inclusion of the question, disregarding the unanimous conclusion of the Census Bureau that adding it would distort the decennial enumeration, produce less accurate data for purposes of VRA enforcement, and be more burdensome and expensive than alternatives. Pet. App. 114a.

Secretary Ross contemporaneously testified under oath to Congress that DOJ "initiated the request," that in adding the question he was "responding *solely*" to DOJ's request, and that he was "not aware" of any discussions about the question between Commerce and the White House. Pet. App. 72a (emphasis added).

On June 8, 2018, Commerce submitted what it presented as its Administrative Record to the district court. Pet. App. 39a. Consistent with the decisional memorandum and Secretary Ross's testimony, the initial 1,320-page Administrative Record contained only materials generated after the DOJ request.

As the district court concluded, however, "Secretary Ross's first version of events, set forth in the initial Administrative Record, the Ross Memo, and his congressional testimony, was materially inaccurate." Pet. App. 74a. On June 21, 2018, in response to this litigation, Secretary Ross issued a "supplemental memorandum" revealing that he actually first considered adding a citizenship question not in response to the DOJ "request," but well beforehand—in fact, "soon after" his appointment in February 2017, and for reasons the supplemental memorandum declined to specify. Pet. App. 75a-76a.

The supplemented Administrative Record revealed that "shortly after his confirmation" in

February 2017, Secretary Ross discussed the addition of a "citizenship question with then-White House advisor Steve Bannon, among others; that Secretary Ross wanted to add the question to the 2020 census prior to, and independent of, DOJ's … request; that the Secretary and his aides pursued that goal vigorously for almost a year, with no apparent interest in promoting more robust enforcement of the VRA; [and] that … Secretary Ross and his aides worked hard to generate such a request for the citizenship question from DOJ." Pet. App. 77a; *see also* Pet. App. 78a-95a (detailing evidence).

None of this was mentioned in Secretary Ross's Congressional testimony, his first decisional memorandum, or the initial Administrative Record. It came to light only after this suit was filed.

C. Secretary Ross's Disregard of the Administrative Record

Secretary Ross made his decision in the face of unequivocal evidence in the Administrative Record 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.'" Pet. App. 47a (quoting AR 1277).

Although Secretary Ross asserted in his decisional memorandum that "no one provided evidence that" adding a citizenship question "would materially decrease response rates," Pet. App. 557a, that "[w]as simply untrue." Pet. App. 285a-286a. The Census Bureau unambiguously concluded that the question would have "'an adverse impact on self-

response'" and "'on the accuracy and quality of the 2020 Census.'" Pet. App. 47a (quoting AR 1280).

Secretary Ross asserted that a citizenship question is "necessary to provide complete and accurate data in response to the DOJ request," Pet. App. 562a, but that was wrong, as the Census Bureau advised that it can already produce block-level data without a citizenship question. Pet. App. 47a-50a. Moreover, the Administrative Record indicated that citizenship data gathered through a census question would be "highly suspect." Pet. App. 291a. The citizenship question on census sample surveys frequently goes unanswered, and as Secretary Ross acknowledged, noncitizens who answer it "inaccurately mark 'citizen' about 30 percent of the time." Pet. App. 555a. The Census Bureau thus concluded that it could produce "more accurate" and complete information without a citizenship question, by linking census respondents to existing governmental administrative records on citizenship. Pet. App. 290a-291a. This method, the Bureau determined, "'better meets DOJ's stated uses, is comparatively far less costly than [adding a citizenship question], and does not harm the quality of the census count." Pet. App. 46a (quoting AR 5475).

Secretary Ross nevertheless ordered the Census Bureau to use administrative records *and* a citizenship question ("Alternative D"), speculating that the citizenship question "may eliminate the need" to impute citizenship for people who lack records, and that "citizenship data provided to DOJ will be more accurate with the question than without it." Pet. App. 556a, 562a. This was wrong too. The Administrative Record showed that Alternative D

"would not 'help fill the … gaps'" in available records, because millions of respondents would fail to answer the question. Pet. App. 52a (quoting AR 1311). Thus, "Alternative D would rely on imputation … as well." Pet. App. 291a (citing AR 1305, 1307). And although Secretary Ross stated that Alternative D would "improve the accuracy of the imputation," Pet. 21, the Administrative Record established the opposite: that absent the citizenship question, "missing citizenship data would be imputed from a more accurate source—namely, administrative records—than in Alternative D." Pet. App. 291 (citing AR 1305, 1307).

Ultimately, the Administrative Record categorically established that the Secretary's joint approach would result in "'poorer quality citizenship data" than records alone. Pet. App. 51a (quoting AR 1312). It would result in "9.5 million people whose census responses would conflict with administrative records"—i.e., they would respond to the census saying they are a citizen when their social security records say they are not. Pet. App. 57a (citing AR 1305). Moreover, by reducing census self-response rates, a citizenship question would force the Bureau to count more people through less-favored methods, including "proxy" responses from neighbors. Pet. App. 53a-54a (citing AR 1311). This yields lower-quality census data than self-responses to the census questionnaire, and people who are enumerated through such methods are consequently harder to identify in administrative records. Pet. App. 53a-58a. Thus, "Alternative D would [result in] *more* people who could not be linked to administrative records" on citizenship. Pet. App. 56a (citing AR 1307). There

was nothing in the Administrative Record supporting the Secretary's combined approach.

And, notwithstanding DOJ's request for "full count" citizenship data, Pet. App. 568a, the Administrative Record showed that even with a citizenship question, the Bureau is incapable of fulfilling DOJ's request for such data at the block-level. The Census Bureau operates under a statutory directive to ensure the confidentiality of responses, 13 U.S.C. § 9(a)(2), and applies "disclosure avoidance" protocols to alter census block-level data before it is shared. Pet. App. 297a-299a. Thus, "even with a citizenship question on the census, there would not be a single census block … where citizenship data would actually reflect the responses of the block's inhabitants to the census questionnaire." Pet. App. 298a. At best, data would "be estimates, with associated margins of error"—just like the citizenship data DOJ currently uses—"rather than a true or precise 'hard count.'" Pet. App. 298a.

D. Proceedings Below

1. Respondents are five organizations serving immigrant communities that would be harmed by the differential undercount a citizenship question would create. Respondents alleged that the addition of the citizenship question was contrary to law and arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706, and was intentionally discriminatory in violation of the Fifth Amendment. The district court consolidated respondents' complaint (18-cv-5025) with a similar suit filed by states and other governmental entities (18-cv-2921).

2. The initial Administrative Record proffered by Commerce omitted all documents "predating DOJ's December 2017 letter" and other materials that the Secretary considered. Pet. App. 525a. On July 3, 2018, the district court found that respondents had "rebutted" the "presumption of regularity" typically afforded to the "agency's designation of the Administrative Record," and ordered petitioners to complete the record. Pet. App. 523a-526a. Finding that respondents had made the requisite "strong showing … of bad faith or improper behavior on the part of agency decisionmakers," the court permitted limited extra-record discovery. Pet. App. 526a.

3. On August 17, 2018, the court compelled the deposition of then-Acting Assistant Attorney General for Civil Rights John Gore, who wrote DOJ's letter. Pet. App. 452a-455a. On September 21, 2018, the court compelled a limited deposition of Secretary Ross, which this Court subsequently stayed. Pet. App. 439a, 450a. On November 16, 2018, 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 (No. 18-557).

4. The district court held an eight-day bench trial between November 5 and November 27, 2018. Pet. App. 8a.

5. On January 15, 2019, the district court concluded that the decision to add a citizenship question to the 2020 census "violated the APA in multiple independent ways." Pet. App. 9a. The court made extensive findings of fact, and reached its

merits conclusions "based exclusively on the materials in the official 'Administrative Record,'" citing extra-record evidence only by way of "confirm[ing] [its] conclusions." Pet. App. 10a.

Standing. The district court concluded that plaintiffs had standing to assert their claims on multiple independent bases. Pet. App. 137a-138a. The government's own analyses were "clear[]" that adding a citizenship question would "cause a significant differential decline in self-response rates among noncitizen households"—"conservative[ly]," a decline "of at least 5.8%." Pet. App. 150a. The court found that Census Bureau procedures for following up with non-responsive households would only "reinforce or exacerbate" that difference. Pet. App. 155a.

The resulting differential undercount would "translate into several further concrete harms." Pet. App. 173a. Several states—including five in which members of respondent organizations reside—would likely "lose at least one seat in the congressional reapportionment." Pet. App. 173a-174a; *see also* Pet. App. 202a-203a. The undercount would also cause financial harm to the many members of respondent organizations who "receive funds from federal programs that distribute those funds on the basis of census data." Pet. App. 198a. The court found that respondents have associational standing to seek redress on behalf of their members for these representational and financial injuries. Pet. App. 200a.

Separately, the court held that respondent organizations had standing "to pursue … claims in their own right," Pet. App. 196a, because they would be forced "to divert organizational resources away

from their core missions and towards combating the negative effects of the citizenship question," Pet. App. 221a (applying *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). These injuries were "imminent and fairly traceable" to the addition of a citizenship question, based on the government's own evidence that the question will reduce census self-responses. Pet. App. 226a-227a.

Merits. The district court concluded that the Secretary's decision violated the APA "in multiple independent ways." Pet. App. 9a.

a. First, the court found that the Secretary's decision was "not in accordance with law," 5 U.S.C. § 706(2)(A), because it violated two Census Act provisions that "constrain[] the Secretary's authority": Sections 6(c) and 141(f)(1). Pet. App. 264a, 284a.

Section 6(c) requires the Secretary to "'acquire and use information' derived from administrative records 'instead of conducting direct inquiries' to the 'maximum extent possible.'" Pet. App. 261a (quoting 13 U.S.C. § 6(c)). The court found that by using direct inquiries to obtain citizenship information that could be obtained more accurately and less expensively through administrative records (such as Social Security records), the Secretary "ignored [§ 6(c)'s] requirement altogether—and, in the process, blatantly violated it as well." Pet. App. 272a. The Secretary's decision "nowhere mention[ed], consider[ed] or analyze[d] his statutory obligation." Pet. App. 266a. And the Secretary's "explanation" for using direct inquiries "d[id] not come close to meeting Section 6(c)'s requirements," as "every relevant piece of evidence in the Administrative Record" showed

that "data gained from available administrative records would have been adequate." Pet. App. 268a-270a.

The Secretary's decision also violated 13 U.S.C. § 141(f), which requires the Secretary to provide three-years advance notice before adding a subject to the census. Pet. App. 272a-273a, 284a. The Secretary's March 2017 report to Congress describing the planned subjects for the 2020 census—required by § 141(f)(1)—"did not include 'citizenship.'" Pet. App. 274a.

b. The district court further found that the Secretary's decision ran "counter to … the evidence before the agency." Pet. App. 285a. The Secretary's stated purpose for adding a citizenship question was "'obtaining *complete and accurate data*'" on citizenship. Pet. App. 292a (quoting AR 1313). Yet, "all relevant evidence in the Administrative Record establishe[d] that adding a citizenship question to the census will result in *less* accurate and *less* complete citizenship data." Pet. App. 290a. The court also identified several other "errors or overstatements" in the Secretary's decision, "[a]ny one of" which "would arguably support a finding that Secretary Ross's decision was arbitrary and capricious." Pet. App. 289a. For example, although the decisional memorandum discounted the likelihood of decreased response rates, "the *only* quantitative evidence in the Administrative Record on the effect of the citizenship question"—the Bureau's own analyses—predicted a decline of over five percent. Pet. App. 286a (citing AR 5505-06).

c. The court also found the decision arbitrary and capricious because the Secretary

"'failed to consider' several 'important aspect[s] of the problem,'" Pet. App. 294a (quoting *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), including whether the Census Bureau's statutory confidentiality obligations would prohibit it from sharing citizenship data collected through the new census question at the level of granularity DOJ requested. Pet. App. 298a-299a. The Secretary also ignored "plenty of evidence" in the Administrative Record indicating that "more granular CVAP data" was not "'necessary for enforcement of the VRA." Pet. App. 295a. In short, Secretary Ross "treated DOJ's request as conclusive." Pet. App. 294a.

d. Further, the court found that the Secretary failed to justify "dramatic departure[s]" from standards "that have long governed administration of the census," Pet. App. 300a, such as OMB directives prohibiting "an option that is less accurate and less complete than an alternative," Pet. App. 304a. Moreover, the Secretary's decision "departed without adequate justification from the Census Bureau's own" procedures, which mandate that new census questions be pretested, absent exceptions not applicable here. Pet. App. 305a.

e. The district court also found it "clear that Secretary Ross's [VRA] rationale was pretextual." Pet. App. 311a. The district court cited evidence in the Administrative Record showing "that Secretary Ross had made the decision to add the citizenship question well before DOJ requested its addition"; that communications prior to receipt of that letter lacked "any mention … of VRA enforcement"; that "Commerce Department staff" had

"unsuccessful[ly] … shop[ped] around for a request by another agency regarding citizenship data"; and that the DOJ letter immediately followed "Secretary Ross's personal outreach to [the] Attorney General." Pet. App. 313a; *see also* Pet. App. 118a-124a. All of this showed that Secretary Ross "made the decision to add a citizenship question well before he received DOJ's request and for reasons unrelated to the VRA." Pet. App. 313a. Accordingly, the Secretary "did not comply with the APA's requirement that he 'disclose the basis of [his]' decision." Pet. App. 320a-321a (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962)).

f. Finally, the district court concluded that respondents had not proven their Fifth Amendment claim. Pet. App. 334a-335a.

g. The district court "reache[d] all of th[e]se conclusions based exclusively on the materials in the official 'Administrative Record.'" Pet. App. 10a. The court looked to extra-record material only to "confirm[]" certain of its conclusions. Pet. App. 10a. For example, the court noted expert testimony establishing "that the impact of the question on the self-response rates of immigrant and Hispanic households is likely to be even higher" than the Bureau's estimate. Pet. App. 293a n.68. The court also cited testimony "from dozens of experts … that the citizenship question has not been adequately tested for inclusion in the decennial census questionnaire." Pet. App. 306a n.74.

h. The district court vacated the Secretary's decision, enjoined him from adding a citizenship question to the 2020 census unless he cured the identified defects, and remanded. Pet. App.

352a. The court also vacated as moot its September 2018 order authorizing respondents to depose Secretary Ross. Pet. App. 353a.

5. In light of final judgment and vacatur of the order authorizing Secretary Ross's deposition, respondents moved to dismiss the Court's writ (No. 18-557) as improvidently granted. Petitioners subsequently appealed and filed this petition for certiorari before judgment. Pet. App. 539a.

6. On February 1, 2019, the Second Circuit set an expedited briefing schedule and indicated that it is likely to hear argument the week of April 8, 2019.

ARGUMENT

The government advances two reasons for granting certiorari before judgment: that the district court's decision is erroneous, and that the question presented is "of imperative public importance" and needs to be resolved expeditiously. Pet. 13, 17. The district court did not err, and therefore certiorari is not warranted on that ground. Expeditious resolution of this case, however, is appropriate, and if the Court is inclined to grant certiorari, it should do so before judgment.

I. THE DISTRICT COURT'S DECISION WAS CORRECT.

The Decennial Census is undoubtedly a matter "of imperative public importance," Pet. 13, but the district court's comprehensive resolution of this matter does not require this Court's review. The district court applied well-settled principles of administrative law to the complex and unique facts

of the case and granted relief routinely imposed in APA challenges.

The government grossly inflates the consequences of allowing the decision below to stand. Although *adding* a citizenship question would distort the census at incalculable cost to our democracy, leaving the question out carries no corresponding significance. The government has admitted what over 50 years of experience has shown: DOJ does *not* need citizenship information from the census to enforce the VRA. Pet. App. 94a-95a. That—and the Census Bureau's admission that, even with a citizenship question, it cannot fulfill DOJ's request for "full count" block-level citizenship data, Pet. App. 298a—eviscerate the only justification the Secretary offered for the question.

Petitioners itemize aspects of the decision that they deem "unprecedented." Pet. 14-16. But described so granularly, any holding can be made to sound "unprecedented." Unique facts are not sufficient to warrant certiorari. This Court has found countless informal agency decisions to violate the APA, as have scores of lower-court decisions that this Court has declined to review.[1]

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[1] *E.g., Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (agency's rule did "not rest … 'on a consideration of the relevant factors'"—namely, "the costs of its decision"); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (board's policy was "unmoored from the purposes and concerns of the immigration laws," and Court could not "discern a reason for it"); *State Farm*, 463 U.S. at 56 (Secretary's rescission of safety standards "failed to offer [a] rational connection between facts and judgment"); *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1407 (D.C. Cir.

What is truly "unprecedented" here is that Commerce flouted so many principles of administrative law. The district court identified a "smorgasbord" of APA violations, each of which independently supported its judgment, falling in five different categories. The Secretary's decision: (1) was contrary to Sections 6(c) and 141(f) of the Census Act, Pet. App. 268a, 284a; (2) contradicted unequivocal evidence in the Administrative Record as to the cost, impact, and accuracy of a citizenship question, in "a startling number of ways," Pet. App. 285a; (3) ignored at least three important aspects of the problem, including the Bureau's inability to share "full count" citizenship data at the level of granularity sought by DOJ, Pet. App. 294a-295a; (4) made "dramatic departure[s]" from standard OMB directives and Census Bureau guidelines "that have long governed administration of the census," and failed to explain the basis for doing so, Pet. App. 300a; and (5) was made "well before [the Secretary] received DOJ's request and for reasons unrelated to the VRA," establishing that the stated reason was pretextual, Pet. App. 313a.

These determinations rested on careful, comprehensive factual findings, which in turn were rooted in the district court's analysis of a technically complex, 13,000-plus-page Administrative Record. To reverse, this Court would have to reject each and every one of these fact-based determinations.

1996) (agency "reversed itself at the eleventh hour" without addressing "reliance interests"), *cert. denied*, 519 U.S. 823.

A. Respondents Have Standing.

1. The district court correctly determined that respondents have standing. Petitioners characterize respondents' injuries as "conjectural or hypothetical." Pet. 18. But the district court's findings of injury were based on the government's own testimony about the citizenship question's effect on census response rates, and largely uncontested testimony regarding the effects of such reduced responses on reapportionment, federal funding, and respondents' organizational resources.

The government's lone witness testified that a citizenship question will reduce census responses among non-citizen households by at least 5.8 percent—approximately 6.5 million people. Pet. App. 152a, 170a-171a. Further, the court found that the Census Bureau's follow-up outreach efforts have historically been less successful with noncitizen households, and would only "replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households." Pet. App. 151a.

The district court correctly found that the resulting decline in census responses would injure respondents in several ways. First, the court found that respondents have already diverted, and would continue to divert, "significant resources"—including hundreds of thousands of dollars—"from their organizational missions and other priorities to address the effects of a citizenship question" on census participation. Pet. App. 187a; *see also* 188a-194a. It is long-settled that such a "drain on [an] organization's resources" constitutes a "concrete and demonstrable injury to [its] activities." *Havens Realty Corp. v.*

Coleman, 455 U.S. 363, 379 (1982); *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017).

The court further found that the organizational respondents had "associational standing" on the basis of representational and financial injuries to their members. Pet. App. 197a. Specifically, as a result of the undercount of noncitizen households: (a) several states where plaintiffs have members face a "certainly impending" (California) or "substantial risk" (Texas, Arizona, Florida, New York, Illinois) of losing a seat in the House of Representatives, Pet. App. 175a; and (b) specified states will lose federal funding for programs upon which specific, identified members who reside in those states rely, Pet. App. 180a-184a. These injuries are cognizable and redressable. *See Dep't of Commerce*, 525 U.S. at 330-32 (apportionment-based injuries); *City of Detroit v. Franklin*, 4 F.3d 1367, 1374-75 (6th Cir. 1993) (funding-based injuries); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (same).

2. Petitioners also argue that respondents' injuries are not fairly traceable to the Secretary's decision because they arise from third parties' failure to respond to the Decennial Census. Pet. 18. But "[t]raceability" does not exclude injuries produced by an "effect upon the action" of a third party. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Rather, injuries are traceable to the government's conduct where the challenged decision "affect[s] the … decisions of those third part[ies] … to such an extent that the plaintiff's injury could be relieved." *Sierra Club v. Glickman*, 156 F.3d 606, 614 (5th Cir. 1998); *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Ad-*

min., 901 F.2d 107, 113-14 (D.C. Cir. 1990). This Court has specifically held that litigants have standing where their injury depends on an undercount caused by "unidentified third parties," Pet. 15, who fail to respond to the census. *Dep't of Commerce*, 525 U.S. at 330.

The district court's finding that respondents will suffer injury caused by the Secretary's decision is not "guesswork" about "independent decisionmakers." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013). It rests on the government's own conservative estimate that a citizenship question will cause millions not to respond, based on nonresponse rates for citizenship questions on previous census sample surveys. Pet. App. 145a.

The fact that federal law requires individuals to answer the census questionnaire changes nothing. Standing is met where a party challenging unlawful government conduct "adduce[s] facts showing" that the choices of an independent, regulated party "will be made in such a manner as to produce causation and permit redressability." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *see Competitive Enter. Inst.*, 901 F.2d at 113-14. Nobody doubts that millions of people will abstain from responding to the census—even if it is formally unlawful to do so—and the government's own "conservative estimate" shows that Secretary Ross's decision will exacerbate that problem. Pet. App. 145a. Whether such conduct is legal or not is not the issue; what matters is that it is indisputably foreseeable. *E.g.*, *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627-30 (D.C. Cir. 2017) (insured plaintiffs injured by substantial risk of identity theft

from unknown third parties following insurer's data breach). The district court found correctly that it is.[2]

B. Census Decisions Are Reviewable.

The government contends that the question presented is nonjusticiable, but decisions regarding the content of the Decennial Census questionnaire are not "committed to agency discretion by law." Pet. 19 (quoting 5 U.S.C. § 701(a)(2)). The Court applies a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), which can only be overcome "upon a showing of 'clear and convincing evidence' of a contrary legislative intent," *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). The government offers no such evidence.

The Constitution vests in Congress the authority to conduct the census "in such a Manner as they shall by law direct." U.S. Const. art. I, § 2, cl. 3. Congress has, in turn, empowered the Commerce Secretary to conduct the census via the Census Act, but the 1976 amendments to the Act "constrained the Secretary's authority" in ways relevant here. Br. for Respondents 37 n.50, *Dep't of Commerce*, 525 U.S. 316 (1999) (No. 98-404), 1998 WL 767637. Moreover, the Census Act was enacted against the backdrop of the APA, which itself provides "meaningful standards," Pet. 19, to assess agency action that courts

[2] The district court catalogued numerous cases in which federal courts have found injuries traceable to illegal third-party conduct. Pet. App. 236a-238a. This Court also found such injury in the *Department of Commerce* case; the government cites no authority to the contrary.

apply all the time, such as whether the decision runs "counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

The fact that the Secretary may make discretionary policy choices so long as he *complies* with the Census Act and the APA does not distinguish the census from any other presumptively-reviewable discretionary agency decision. "A court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).

There is no evidence that Congress intended to reverse the presumptive rule and render the Census Act's specific provisions or the content of the census questionnaire exempt from ordinary APA review. Indeed, this Court has frequently entertained challenges to census-related decisions, including "to the method of tabulating data for reapportionment after completion of the census." Pet. 15 (citing *Evans*, 536 U.S. at 460-61).[3] The government offers no justification for its good-for-this-case-only rule that courts can review everything census-related but the actual census questions themselves. While the district court was the first to hold that 13 U.S.C. § 6(c) or § 141(f) create "judicially reviewable" duties, that is only because this is the first time that a Commerce Secretary is alleged to have violated those unambiguous provisions.

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[3] *See also*, *e.g.*, *Wisconsin v. New York*, 517 U.S. 1 (1996); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992).

The two cases the government cites are inapposite. *Webster v. Doe*, 486 U.S. 592 (1988), involved the termination of a CIA official. As Justice Stevens explained in distinguishing *Doe*, "[w]hile the operations of a secret intelligence agency may provide an exception to the norm of reviewability, the taking of the census does not." *Franklin*, 505 U.S. at 818 (Stevens, J., concurring). And *Heckler v. Chaney*, 470 U.S. 821 (1985), involved an agency's failure to act. Here, ordinary APA review principles—not to mention specific provisions of the Census Act cabining the Secretary's authority and a myriad of procedural regulations governing development of census questionnaires—provide a "meaningful standard against which to judge the agency's exercise of discretion." *Webster*, 486 U.S. at 600. There is nothing "unmanageable" about deciding whether an agency acted contrary to the administrative record, failed to consider important factors, departed from standard practices, or failed to disclose the actual basis for its decision. Federal courts do this every day.

Tucker v. Department of Commerce, 958 F.2d 1411 (7th Cir. 1992), did not address the routine APA challenges presented here, nor the specific sections of the Census Act the Secretary violated. And its broad dicta about nonreviewability is irreconcilable with this Court's subsequent decision in *Wisconsin*, 517 U.S. 1, which reviewed the Secretary's failure to make statistical adjustments. This Court and others have repeatedly reviewed agency action related to the conduct of the census. Thus, "[t]he great weight of authority supports the view that the conduct of the census is not 'committed to agency discretion by law.'" *Franklin*, 505 U.S. at 819 n.19 (Stevens, J., concurring) (citing cases); *see also* Pet. App. 405a-

406a (citing cases). Not only are there manageable standards for reviewing such decisions, "[t]he reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Franklin*, 505 U.S. at 818 (Stevens, J., concurring).

C. The District Court Correctly Determined that Adding a Citizenship Question Violated the APA.

1. *The Decision Was Contrary to the Evidence.*

The district court properly determined that Secretary Ross's decision ran counter to the facts in the Administrative Record in "a startling number of ways." Pet. App. 285a.

a. Secretary Ross asserted that "no one provided evidence that" adding "a citizenship question [to] the decennial census would materially decrease response rates." Pet. App. 557a. That "[w]as simply untrue." Pet. App. 285a-286a. The Administrative Record was "rife with both quantitative and qualitative evidence … demonstrating that" the question would "materially reduce response rates among immigrant and Hispanic households." Pet. App. 286a (citing AR 1277-78; 5500, 5505-06; 10386).

The Census Bureau itself unequivocally concluded that the question would have "an adverse impact on self-response" and, consequently, "on the accuracy and quality of the 2020 Census." Pet. App. 47a (quoting AR 1280). The Bureau also warned that, regardless of past practices, the contemporary

"macroenvironment"—illustrated by focus group research showing "a higher level of concern" about immigration enforcement—could "exacerbate the effects of adding a citizenship question." Pet. App. 143a (internal quotations omitted). There was "no evidence in the Administrative Record supporting [Secretary Ross's] conclusion that addition of the citizenship question will *not* harm the response rate[s]." Pet. App. 286a.

b. The "most significant" way in which Secretary Ross's decision ran counter to the evidence in the Administrative Record" was his "'judgment' that adding the question to the census 'will provide DOJ with the most complete and accurate [citizenship] data in response to its request.'" Pet. App. 289a-290a. This was the Secretary's sole justification for adding the question, and it was entirely at odds with the record before him. In fact, "all relevant evidence in the Administrative Record establishe[d] that adding a citizenship question to the census will result in *less* accurate and *less* complete citizenship data" than available alternatives, Pet. App. 290a, given that noncitizens "inaccurately mark 'citizen' about 30 percent of the time" on the ACS, Pet. App. 555a.

The Administrative Record also unequivocally showed that "using administrative records *and* adding a citizenship question to the census, as the Secretary desired," Pet. 20, "would result in poorer quality citizenship data than" relying on administrative records alone, Pet. App. 291a (quoting AR 1312). The Bureau warned that Secretary Ross's approach would result in millions of people with conflicting citizenship data, "with no reliable method

for discerning accurate data amidst the conflict." Pet. App. 57a (citing AR 1305). The Bureau also concluded that adding a citizenship question "would produce *more* people who could not be linked to administrative records." Pet. App. 56a (citing AR 1306-07).

And while Secretary Ross asserted that "the citizenship question … may eliminate the need" to impute citizenship for people who lack records, Pet. App. 556a, and would "help improve the accuracy of the imputation from administrative records in the future," Pet. 21, both propositions were flatly contradicted by the Administrative Record. The Bureau explained that millions of respondents would fail to answer the citizenship question, making inevitable imputation of citizenship for millions. Pet. App. 291a (citing AR 1305, 1307). At the same time, adding a citizenship question would render imputation *less*, not more accurate. Pet. App. 291a-292a (citing AR 1305, 1307).

c. Based on these and many other assertions that were plainly contrary to all of the relevant evidence in the Administrative Record, the district court properly found that the Secretary's decision was arbitrary and capricious. Pet. App. 285a-293a. There was no "rational connection between the facts found and the choice made." *State Farm,* 463 U.S. at 42-43. "Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard." *Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) (citing *State Farm*, 463 U.S.

at 43). Moreover, Secretary Ross failed to explain why he reached conclusions directly contradicted by the Administrative Record. *See Clark Cty. v. FAA*, 522 F.3d 437, 441-42 (D.C. Cir. 2008) (Kavanaugh, J.) (conclusory statements that do not address the contrary evidence do not satisfy the APA's reasoned decisionmaking requirement).

This case is nothing like *Wisconsin*, 517 U.S. 1 (cited at Pet. 21). *Wisconsin* held that, "in an area where technical experts disagree," the Secretary's conclusion was reasonable so long as it was "supported by the reasoning of *some* of his [technical] advisers." *Id.* at 23 (emphasis added). Here, Secretary Ross's decision was unanimously opposed by *all* of his technical advisors, Pet. App. 44a, 46a—including by the government's sole trial witness, Census Chief Scientist Dr. John Abowd, who testified that "the conclusion of the Census Bureau remains that Alternative D produces worse data quality than [administrative records alone]." Nov. 13 Trial Tr. 986. The problem was not, as the government suggests, that Secretary Ross overruled the Census Bureau, but that "the Secretary's decision was irrational on its own terms and in light of the evidence before the Secretary at the time." Pet. App. 285a n.65. The court did not substitute its own judgment for the Secretary's; it simply found *nothing* in the Administrative Record to support Secretary Ross's assertions about the effect of a citizenship question, and mountains of evidence to the contrary.

2. *The Decision Was Contrary to the Law.*

The district court also properly determined that Secretary Ross's decision to add a citizenship

question was contrary to the Census Act in two respects.

First, Section 6(c) of the Census Act requires the Secretary to "acquire and use" administrative records from other governmental entities, "instead of conducting direct inquiries" of the population, "[t]o the maximum extent possible." 13 U.S.C. § 6(c). Section 6 was enacted as part of the 1976 Census Act amendments—more than two decades after the last census that included a citizenship question—specifically to "address[] concerns that the Bureau was requiring the citizenry to answer too many questions in the decennial census." Br. for Respondents 40, *Dep't of Commerce*, 525 U.S. 316, 1998 WL 767637. Thus, "[i]f the collection of data through the acquisition and use of administrative records" is possible, "Section 6(c) leaves the Secretary no room to choose; he may not collect the data through a question on the census." Pet. App. 266a.

Here, the district court "easily conclude[d] that Secretary Ross's decision ran afoul of Section 6(c)." Pet. App. 266a. "[E]very relevant piece of evidence … support[ed] the conclusion that Alternative D [using administrative records and asking a citizenship question on the Decennial Census] would produce less accurate citizenship data than [using administrative records alone]." Pet. App. 270a. "[*N*]*one* [suggested] that Alternative D would yield more accurate citizenship data." Pet. App. 270a. The district court thus properly concluded that "Secretary Ross violated Section 6(c) by adding a 'direct inquiry' to the census questionnaire when the data gained from available administrative records would have been adequate—indeed, better." Pet. App. 268a.

Secretary Ross failed even to address "how adding a citizenship question" was consistent with Section 6(c), or, for that matter, whether the citizenship statistics sought by DOJ "are *required*—as opposed to merely desired." Pet. App. 267a. Instead, Secretary Ross treated his choice as a matter of policy left entirely to his discretion. That is not the law. "Congress ha[s] already made the policy decision to *require* the acquisition and use of administrative records to the maximum extent possible *in lieu* of conducting direct inquires. The congressional preference set forth in Section 6(c) precludes a decision which totally ignores that preference." Pet. App. 266a-267a (internal citations and quotation omitted).

Second, the district court also correctly concluded that the Secretary's decision violated 13 U.S.C. § 141(f). Pet. App. 272a-284a. It is undisputed that the Secretary failed to disclose citizenship as a subject to be included on the 2020 census "3 years before the appropriate census date," as § 141(f)(1) requires. Pet. App. 275a.

Petitioners assert that the failure to comply with § 141(f)(1) is judicially non-reviewable because only Congress can evaluate the "adequacy" of "purely informational" reports. Pet. 25; *see Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998); *NRDC v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988). But *Hodel* and *Guerrero* do not apply here. As the district court held, respondents do not challenge the substantive "adequacy" of a report, but the failure to file one at all. Pet. App. 282-283a. Petitioners make no effort to explain why courts are incapable of reviewing that issue.

3. *The Secretary Ignored Important Aspects of the Problem.*

The district court correctly concluded that Secretary Ross "'failed to consider' several 'important aspects of the problem,'" Pet. App. 294a (quoting *State Farm*, 463 U.S. at 43), in violation of the APA.

First, Secretary Ross ignored "the effect of the Census Bureau's confidentiality obligations," Pet. App. 297a, which make it *impossible* for the Bureau—even with a citizenship question on the census—to satisfy DOJ's request for "full count" citizenship data at the block level, as opposed to statistical "estimates" that have a "margin of error." Pet. App. 568a. By law, the Census Bureau must ensure the confidentiality of census responses and follow "disclosure avoidance" protocols, 13 U.S.C. § 9(a)(2), requiring the alteration of data published at the block level to protect the confidentiality of responses. Thus, "even with a citizenship question on the census, there would not be a single census block … where citizenship data would actually reflect the responses of the block's inhabitants to the census questionnaire." Pet. App. 298a. "[B]lock-level [citizenship] data based on responses to a citizenship question on the census would themselves be estimates, with associated margins of error, rather than a true or precise 'hard count'"—just like existing citizenship data from sample surveys on which DOJ has always relied—and there was no reason to conclude that census-based citizenship data "would be any more precise." Pet. App. 298a-299a.

"There is no indication that Secretary Ross considered any of this…." Pet. App. 299a. Never before has the Secretary ordered the inclusion of a

question on the census for the purpose of collecting data that he is *forbidden* to share. The Secretary's failure to consider this "important aspect of the problem" constituted "unreasoned, arbitrary, and capricious decisionmaking.'" Pet. App. 299a-300a (quoting *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017)). The government does not even challenge this aspect of the district court's decision.

Second, Secretary Ross did not confirm whether such "full count" citizenship data were in fact "necessary" to advance DOJ's VRA enforcement efforts. Pet. App. 294a-295a. While it is not "unusual for one department to rely on the expertise of the other," Pet. 23, DOJ's letter "[c]onspicuously … d[id] not state that such data is '*necessary*' to enforce the VRA."[4] Pet. App. 295a (emphasis added). Tellingly, even now, the government studiously avoids that word, and asserts only that such data could be "useful" to DOJ. Pet. 23. This is unsurprising. "[D]uring the entire fifty-four-year existence of the VRA, DOJ has never had 'hard count' [citizenship] data from the decennial census," and DOJ's letter did not "identify a single VRA case that DOJ failed to bring or lost because of inadequate block-level [citizenship] data." Pet. App. 295a. Thus, Secretary Ross failed to discharge his obligation to confirm whether this data was in fact necessary for DOJ. "Administrative law does not permit" an agency to

[4] While certain states conclusorily represented that a citizenship question could prove "useful for their own VRA and redistricting efforts," Pet. 22, that provides no support for the Secretary's assertion that the question is necessary for *DOJ's* enforcement duties, the only rationale offered for his decision.

"dodge" its obligations "by passing an entire issue off onto a different agency." *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015).

4. *The Secretary Departed from Standard Practice.*

The district court correctly held that the Secretary violated the APA by departing, without justification or acknowledgement, from applicable OMB and Census Bureau standard practices. Pet. App. 300a-311a. The Secretary's decision failed to comport with three separate statistical guidelines—the OMBs' Statistical Policy Directives Nos. 1 and 2, and the Census Bureau's Statistical Quality Standards—as well as with the standard procedure of meeting with an agency (DOJ) to discuss the agency's data request. Pet. App. 304a.

Petitioners argue that the district court substituted its judgment for the Secretary's in concluding that adding the citizenship question did not "best balance" the factors in OMB Directive No. 2. Pet. 23-34. But the district court actually found that the Secretary *ignored* OMB Directive No. 2, because he chose the option that fared worst as to *every* relevant factor. Pet. App. 304a.

Petitioners make no effort to dispute that the Secretary departed without explanation from the Census Bureau's Statistical Quality Standards, which require pretesting. Pet. App. 305a. The citizenship question was not pretested and did not meet any pre-testing exception, given that the question performed poorly on the ACS—with a 30

percent inaccuracy rate among noncitizens responding. Pet. App. 305a-306a.

5. *The Secretary's Rationale Was Pretextual.*

The district found "clear" evidence, based on the Administrative Record alone, that Secretary Ross "made the decision to add the citizenship question well before DOJ requested its addition," and that the VRA rationale was therefore pretextual. Pet. App. 312a-313a. That factual finding was well-supported by the Administrative Record: among other things, Secretary Ross instructed his subordinates to add the question *before* even learning of the VRA rationale. Pet. App. 313a. Ignoring the extensive evidence on which the district court relied, petitioners argue that the district court erred because the Secretary did not actually "add the question until *after* DOJ had made the request." Pet. 26. This is nonresponsive. No one disputes that the Secretary issued the *decisional memorandum* after DOJ made the request; the point is that his decision was predetermined long before DOJ even made the request.

Petitioners argue, citing *Jagers v. Federal Crop Insurance Corp.*, 758 F.3d 1179 (10th Cir. 2014), that "it does not matter" whether the Secretary had "additional reasons" for adding the question so long as he "actually believed" the VRA rationale. Pet. 26. *Jagers* did not hold that the APA permits a decisionmaker to decide an issue based on some unstated rationale while publicly announcing a different one. And the government has disclaimed any argument that reliance on pretextual rationales complies with the APA. Pet. App. 312a.

As their sole evidence that Secretary Ross "actually believed" the VRA rationale, petitioners note that the decisional memorandum "expressly relies" on it. Pet. 26. But every pretextual rationale is "relied" upon by the decisionmaker in that sense. The government simply ignores the extensive evidence in the Administrative Record on which the district court relied to find any presumption of regularity rebutted. Pet. App. 315a-317a.

II. THE DISTRICT COURT'S DISCOVERY RULINGS DO NOT MERIT THIS COURT'S REVIEW.

Months before the district court entered final judgment, this Court granted certiorari to resolve the second question presented here: whether the district court properly "order[ed] discovery outside the administrative record to probe the mental processes of the agency decisionmaker." Pet. I; *see* No. 18-557. But the entry of final judgment and vacatur of the order allowing Secretary Ross's deposition have eliminated any basis for this Court's review of that question.

1. In seeking mandamus in No. 18-557, petitioners principally took issue with the district court's order compelling the deposition of Secretary Ross. But, as explained in respondents' motion to dismiss, the vacatur of that order renders this issue moot.

Moreover, the district court based each of its independent findings of APA violations on the Administrative Record alone, and cited extra-record materials only to corroborate the Administrative Record. Pet. App. 10a, 298a n.68. Resolving the

second question presented could only have a practical effect in the unlikely event that the Court disagrees with all five categories of APA violations the district court identified based on the Administrative Record alone.

2. But the second question is unlikely to have any practical effect in that event either. Secretary Ross was not deposed; and the remaining extra-record discovery was also independently justified for reasons unrelated to probing the Secretary's "mental processes," Pet. I—reasons that petitioners do not challenge. The court considered expert testimony on topics like statistical testing not to "probe" the Secretary's "mental processes," but rather to aid "in understanding the problem faced by the [a]gency and the methodology it used to resolve it," Pet. App. 255a (quoting *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811 (9th Cir. 1980) (Kennedy, J.)), or to determine whether there were technical factors or practices the agency ignored or deviated from. Pet. App. 255a-256a. This is routine in APA cases and does not require a finding of bad faith, and the government does not argue otherwise.

III. IF THE COURT GRANTS CERTIORARI, IT SHOULD EXPEDITE THE CASE BUT NOT ON THE SCHEDULE PROPOSED BY THE GOVERNMENT.

Because the district court identified so many blatant violations of the APA and the Census Act, any one of which would justify its decision, this is a poor candidate for certiorari. But if the Court disagrees, respondents agree that the case should be resolved expeditiously. The government has repre-

sented that it "need[s] a final resolution" of this case in the coming months. Pet. 14. *See* Nov. 13 Trial Tr. 1023 (census questionnaire "is due at the printers" by June 30; but "with exceptional resources the final date for locking down content of the census questionnaire is October 31."). With respondents' consent, the Second Circuit has ordered expedited briefing and has indicated that it will hear argument in April. *See New York v. Dep't of Commerce*, No. 19-212, Doc. 37 (2d Cir. Feb. 1, 2019).

In the event that this Court grants certiorari, respondents concur that impending deadlines and the Court's calendar counsel in favor of immediate review, and would propose the following schedule to enable each side at least 30 days for briefing:

- Opening Brief - March 22
- Respondents' Briefs - April 26
- Reply - May 3
- Oral Argument - Special Sitting May 10 or later

If the Court considers the case at the February 15 conference instead of the February 22 conference, the Court could move those dates up by one week and hear argument as early as May 3.

In the alternative, if the Court prefers to hear oral argument at a regularly-scheduled sitting, respondents would propose the following schedule:

- Opening Brief - March 11
- Respondents' Briefs - April 10
- Reply - April 17

- Oral Argument - April 24

CONCLUSION

For the reasons stated above, the district court's decision was correct and does not require this Court's review. If the Court deems the question of sufficient importance to review, however, respondents agree that it should be resolved expeditiously by granting certiorari before judgment.

Respectfully submitted,

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