No. 18A375

IN THE

Supreme Court of the United States

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

RESPONSE OF PLAINTIFFS-RESPONDENTS NEW YORK IMMIGRATION COALITION ET AL. IN OPPOSITION TO RENEWED APPLICATION FOR STAY PENDING THE DISPOSITION OF PETITION FOR A WRIT OF MANDAMUS

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RULE 29.6 STATEMENT

The New York Immigration Coalition; Casa de Maryland, Inc.; the American-Arab Anti-Discrimination Committee; ADC Research Institute; and Make the Road New York are non-profit corporations that have no parent corporation and issue no stock.

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INTRODUCTION

This case concerns Secretary of Commerce Wilbur Ross's decision to add a citizenship question to the 2020 Census—a question that has not appeared on the Census since 1950. Secretary Ross stated that he added the question to assist the Department of Justice (DOJ) in enforcing the Voting Rights Act (VRA), but the evidence indicates that this reasoning was pretextual. On July 3, the district court ordered the government to complete the administrative record and authorized limited extra-record discovery; and, in measured and detailed opinions grounded in the unusual facts and circumstances of this case, the court subsequently ordered the deposition of Acting Assistant Attorney General for Civil Rights John Gore, and a four-hour deposition of Secretary Ross. Now, more than three months after the district court's initial discovery ruling and with only three days remaining until the close of discovery, Defendants seek the extraordinary remedy of mandamus to stay all discovery in this case, and to quash these depositions at the 11th hour. Two separate panels of the Second Circuit have unanimously concluded that Judge Furman's careful findings did not warrant mandamus. This Court should deny relief too.

The district court found that Plaintiffs made a "strong showing" of "bad faith" sufficient to warrant extra-record discovery under this Court's precedent. That decision was not erroneous, much less clearly and indisputably so—as mandamus relief requires. Secretary Ross deviated from the standard procedure to change the Census questionnaire, and he has offered shifting and inaccurate explanations, both

in his decisional memo and in testimony before Congress—and now in amended interrogatories that Defendants sent at noon today, four hours before this opposition was due. Secretary Ross stated in his March 26, 2018 decisional memo that his decision was a response to a December 12, 2017 request from DOJ stating that it needed citizenship information collected through the Census to enforce the VRA. Pet. App. 117a. And he testified to Congress that DOJ "initiated" the request to add the citizenship question, that in adding the question he was "responding *solely* to the Department of Justice's request," and that he had not consulted with "anyone in the White House." Pet. App. 10a (emphasis added).

Those statements were untrue. After Plaintiffs filed these lawsuits, Secretary Ross issued an extraordinary "Supplemental Memorandum" revising that explanation to state the opposite—namely, that DOJ did *not* initiate the request; Secretary Ross did, and months earlier than he initially let on. Pet. App. 116a. The administrative record and discovery to date have established that, shortly after his confirmation, Secretary Ross decided to add the citizenship question to the census, complaining in May 2017—seven months before DOJ's request—that he was "mystified why nothing ha[d] been done in response to my months old request that we include the citizenship question," and then ordering his senior aides to make it happen. Supp. App. 12a. One such aide has since admitted that he believed it was his job to come up with a legal rationale to support the Secretary's decision. CA2

Supp. Add. 141.[1] Believing that another agency had to request a change to the census, Secretary Ross's aides seized on the idea of having the DOJ request adding the citizenship question in order to enforce the VRA. *Id.* at 134, 137. As one aide wrote to the Secretary, "We need to work with Justice to get them to request" the addition of the question. *Id.* at 136. AAAG Gore then became involved. After speaking with Secretary Ross's chief of staff, he secretly penned a letter (sent under the signature of another DOJ official) to the Department of Commerce that requested the addition of the citizenship question. *Id.* at 111-18, 130-31. That letter cited the very VRA enforcement justification that Secretary Ross's aides had concocted. Pet. App. 125a.

Secretary Ross then cited DOJ's "request" in his letter announcing his decision to add the citizenship question, inaccurately stating that he began considering whether to add the citizenship question "[f]ollowing receipt of the DOJ request." Pet. App. 117a. His staff refused to permit the testing that normally precedes changes to the census questionnaire. Supp. App. 41a-44a. And he overruled the Census Bureau data scientists who advised that adding the question would reduce the accuracy of the census and that more accurate citizenship data could be obtained using existing administrative records and at far less cost. CA2 Supp. App. 96-104.

If this is not a strong showing of "bad faith" or pretext, nothing is. In light of this evidence, the district court's findings that Plaintiffs made a strong showing of

[1] Unless otherwise specified, cites to "CA2 Supp. Add." are to the supplemental appendix filed with Plaintiffs-Respondents' answer to the petition for mandamus in the Second Circuit, No. 18-2857.

bad faith and that they were entitled to extra-record discovery are entirely consistent with this Court's precedent. Extra-record discovery, including the taking of testimony from agency decisionmakers, is permissible in Administrative Procedure Act (APA) cases when there is a "strong showing of bad faith or improper behavior." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). Defendants fail to cite even a single case to show otherwise. Nor do they cite a single decision of this Court or any court granting the extraordinary remedy of mandamus to quash depositions or stop discovery on facts like these. As critical decisionmakers, Secretary Ross and AAAG Gore have unique knowledge and their testimony is uniquely relevant to the central questions in this case—including whether the Secretary's stated rationale varied from his actual rationale, in violation of the APA; and whether the VRA rationale was a pretext to cover up an effort to discriminate against immigrants and minorities, in violation of the equal protection component of the Due Process Clause.

Despite having sought and received a temporary stay of discovery from this Court, Defendants submitted discovery responses changing their story yet again at 12:06 p.m. *today*. On August 30, Defendants sent a supplemental interrogatory response certified by a Secretary Ross aide stating that Defendants "cannot confirm that the Secretary spoke to Steve Bannon regarding the Citizenship Question," Supp. App. 22a. Defendants represented in court that they had spoken to Secretary Ross before filing those responses. 9/14/2018 Tr. 16. Today, however, Defendants sent a "second supplemental" interrogatory response certified by the same aide

stating that suddenly "Secretary Ross recalls that Steven Bannon called Secretary Ross in the Spring of 2017 to ask Secretary Ross" to discuss the citizenship question with Kris Kobach, Supp. App. 27a. This discovery response—which directly contradicts Secretary Ross' Congressional testimony that he was not aware of any conversations with the White House about the citizenship question—only confirms the district court's conclusions about the need for extra-record discovery and depositions.

This Court rarely interferes with details of a district court's discovery orders. And the public interest in this case counsels strongly against issuance of a writ of mandamus. The Decennial Census is critical to the proper operation and structuring of our representative democracy, and to the faith of the American people in that democracy. The Court should be loathe to intervene to block discovery into even *inquiring* whether this tool has been exploited for impermissible purposes covered by pretext. Whether Plaintiffs ultimately succeed on that claim is a question for another day. The only question now is whether the district court "clearly and indisputably erred" in requiring the officials who made the decision and who supplied the purported rationale to give sworn testimony subject to cross-examination. As two panels of the Second Circuit unanimously concluded, the district court's thorough and careful findings are not clearly and indisputably erroneous and do not warrant mandamus.

STATEMENT OF FACTS

A. The U.S. Constitution's Actual Enumeration Requirement

The Constitution requires the federal government to conduct a Decennial Census to count the total number of "persons"—citizens and non-citizens—residing in each state. The Decennial Census plays a foundational role in the democratic process. All states use it to draw their congressional districts, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128–29 (2016), and many states and municipalities, including New York City, use the data to draw state or municipal legislative districts, *see, e.g.* Fla. Const. art. X § 8; Tex. Const. art. III, § 26. Because the one-person, one-person vote governs apportionment, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), when a local community is disproportionately undercounted in the Census, the community will be placed in a legislative district—congressional, state, or municipal—that has greater population, and hence less political power, than other districts in the same state or municipality.

Decennial Census data also plays an important role in the allocation of hundreds of billions of dollars in public funding each year. *See*, *e.g.*, Andrew Reamer and Rachel Carpenter, Counting for Dollars: The Role of the Decennial Census in the Distribution of Federal Funds (The Brookings Institution, Mar. 9, 2010), *available at* https://brook.gs/2xjxEax. The federal government distributes approximately $700 million annually through nearly 300 different census-guided federal grant and funding programs for education, public housing, transportation, health care and other services.

B. The Census Bureau's Careful Efforts to Prevent Undercounting of Minority Communities

Certain demographic groups have proven more difficult to count than others. The Census Bureau refers to the undercounting of particular racial and ethnic groups as a "differential undercount." Dkt. 1 ¶ 78.[2] Groups that have historically been the subject of a differential undercount include racial and ethnic minorities, immigrant populations, and non-English speakers. *Id.* ¶ 75. The Census Bureau has determined that Latinos in particular are at a greater risk of not being counted; persons identifying as Hispanic were undercounted by substantial numbers in both the 1990 and 2010 Decennial Censuses. *Id.* ¶¶ 76–77.

The Census Bureau has traditionally taken great care to ensure the accuracy of the Census. Bureau guidelines require "extensive testing, review, and evaluation" whenever a question is revised or a new question is proposed. Dkt. 1 ¶¶ 152, 155. For the 2020 Decennial Census, the Census Bureau began testing questions in 2007 and continued with annual tests in 2013, 2014, and 2015 that reached approximately 1.2 million people. Dkt. 1 ¶ 156. The Census Bureau also consults various scientific advisory panels comprised of outside experts to provide advice on the census. *Id.* ¶ 158.

C. Defendants' Addition of the Citizenship Question

The Census Bureau has for decades opposed inclusion of a question about citizenship status on the Decennial Census, because of concerns about exacerbating the differential undercount. *Id.* ¶¶ 81–90. Although the 1950 Census asked

[2] Unless otherwise specified, "Dkt." cites are to docket entries in No. 18-cv-5025 (S.D.N.Y.). This docket was closed after the NYIC Plaintiffs' case was consolidated with the State Plaintiffs' case.

respondents not born in the United States about citizenship status, a citizenship question did not appear on the questionnaire sent to every household in any Decennial Census conducted from 1960 through 2010. *Id.* ¶ 82. Over the past 30 years, current and former Census Bureau officials appointed by presidents from both political parties have consistently concluded that a citizenship question was likely to reduce response rates by non-citizens and hence the accuracy of counts for both citizens and non-citizens alike. *Id.* ¶¶ 84–90. To the extent there has been a need for citizenship data, the Census Bureau has collected that information through sample surveys, including the now-discontinued census "long form"—which was previously sent to one in six households during the same year as the Decennial Census—and the American Community Survey ("ACS"), a yearly survey of approximately 2% of households that began in 2000 and that is used to generate statistical estimates that may be used to adjust for undercount. *Id.* ¶¶ 92-5.

On March 26, 2018, however, without any testing whatsoever, Secretary Ross abruptly instructed the Bureau to include a citizenship question on the 2020 Decennial Census. Pet. App. 117a-124a. Secretary Ross explained that his decision was in response to a December 12, 2017 letter from the Department of Justice ("DOJ Letter"), requesting reinstatement of the question to assist with enforcement of the VRA. Pet. App. 117a. Signed by Arthur Gary, General Counsel of the Justice Management Division, the DOJ Letter did not explain the sudden need for citizenship information collected through the Decennial Census questionnaire, how such information would aid in enforcement of the VRA, or why citizenship data

derived from Census Bureau sample surveys—on which DOJ has always relied for purposes of VRA enforcement—had become inadequate. Pet. App. 125a-127a. Nor did the Ross Memo. Moreover, in directing addition of the citizenship question, the Ross Memo bypassed normal process and testing procedures, as well as the various Census Bureau scientific advisory panels the Bureau typically employs before making changes to the census questionnaire. Dkt. 1 ¶¶ 151–63. The Ross Memo stated that there was no need to test the effect of putting a citizenship question on the Decennial Census because it had previously appeared on the ACS and the "long-form" census. Pet. App. 118a. At the same time, the Ross Memo conceded that "the Decennial Census has differed significantly in nature from the sample surveys" like the ACS and the long-form census. Pet. App. 119a. Absent any supporting evidence, the Ross Memo concluded that the "value of more complete" citizenship data "outweigh[s] … concerns" regarding non-response" and rejected various other options, including simply using administrative records to which the Census Bureau has access, to calculate citizenship data. Pet. App. 120a, 123a.

Secretary Ross gave sworn testimony to Congress reciting this sequence of administrative decisionmaking—*i.e.*, that DOJ prompted Ross's consideration of a citizenship question to the census. A few days before the March 26 Memo, at a March 20 hearing before the House Appropriations Committee, Secretary Ross stated that, in considering adding a citizenship question to the census, he was "responding solely to the Department of Justice's request." Pet. App. 10a. He testified that he had not discussed the citizenship question with "anyone in the

White House." *Id.* At another hearing on March 22, 2018 before the House Ways and Means Committee, Secretary Ross testified that the DOJ "initiated the request" for a citizenship question. *Id.* On May 10, 2018, Secretary Ross similarly testified before the Senate Appropriations Committee on June 1, 2018, that "[t]he Justice Department is the one who made the request of us." *Id.*

Barely a month later, however, in the face of expected discovery in these cases, Secretary Ross changed his story. At DOJ's urging, Supp. App. 31a-32a, 34a-36a, Secretary Ross issued his June 21, 2018 Supplemental Memo admitted that he actually began considering the citizenship question shortly after his appointment as Secretary of Commerce in February 2017—nearly ten months earlier than the date offered in the original memorandum. Pet. App. 116a. Secretary Ross admitted that he and his staff had discussed adding a citizenship question that had been proposed by other unnamed "senior Administration officials" and that he subsequently "inquired whether the Department of Justice would support, and if so request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." *Id.* In other words, Secretary Ross, and not DOJ, originated the idea of adding the citizenship question, Supp. App. 37a-39a, and then Secretary Ross asked DOJ to ask the Department of Commerce add the citizenship question.

D. District Court Proceedings

1. Plaintiffs' Complaint in this case (Dkt. 18-cv-5025) was filed on June 8, 2018 in the Southern District of New York, and was designated as a related action

to the lawsuit filed by the State of New York and various other states (Dkt. 18-cv-2921).

Plaintiffs are five organizations that serve immigrant communities likely to be affected by a differential undercount. The Complaint alleges that the addition of the citizenship question to the 2020 Census is arbitrary and capricious in violation of the APA and constitutes intentional discrimination in violation of the Fifth Amendment. In particular, Plaintiffs allege that reinstatement of the citizenship question reflects a deliberate decision to decrease the response rate among certain minority communities in order to diminish their political power and access to federal resources. Dkt. 1 ¶111. The citizenship question originally was promoted to, and within, the Trump Administration by individuals who have no connection to VRA enforcement, but instead have a long record of seeking to reduce immigration and the representation of immigrant communities. *Id.* ¶¶ 101–02. Proponents of adding the citizenship question to the Decennial Census have long touted it as a way to base legislative apportionment on the number of citizens, thereby reducing political representation and economic assistance to communities with significant Hispanic and other minority immigrant populations, and disproportionately advantaging communities without significant immigrant populations. *Id.* ¶¶ 178–82.

Defendants moved to dismiss. In a 70-page opinion, the district court allowed Plaintiffs' APA and equal protection claims to proceed, but granted Defendants'

motion to dismiss Plaintiffs' claims under the Enumeration Clause, U.S. Const. art. I, § 2.

2. Defendants produced an administrative record on June 8, 2018, but the record was incomplete. As one example, it contained no records predating the December 2017 DOJ Letter, even though Secretary Ross had acknowledged that he began considering and discussing the addition of the question well before that date.

On July 3, 2018, the district court heard motions to supplement the administrative record and conduct discovery. Pet. App. 20a; Dkt. 199 (SDNY No. 18-2921). The district court granted the motions in part and denied them in part.

a. The district court ordered Defendants to complete the administrative record, with a privilege log, and to serve initial disclosures by July 23. Pet. App. 110a. The court acknowledged that a party can rebut the "presumption of regularity" that typically attaches to an agency's designation of the Administrative Record by showing that "'materials exist that were actually considered by the agency decision-makers but are not in the record as filed.'" Pet. App. 98a (quoting *Comprehensive Community Development Corp. v. Sibelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012)). Noting Secretary Ross's revised explanation for the timing and origin of the citizenship question, the district court found it "hard to fathom" "the absence of virtually any documents" in the Administrative Record that predated DOJ's December 2017 "request." Pet. App. 99a. And taking the changed explanation into account, the court found it "inconceivable . . . that there aren't

additional documents from earlier in 2017 that should be made part of the Administrative Record." Pet. App. 99a.

b. The district court also granted Plaintiffs' motion to permit limited extra-record discovery. Pet. App. 101a. Applying *National Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997), Judge Furman made four findings that supported the conclusion that Plaintiffs had carried their burden of making a "'strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith.'" Pet. App. 101a-105a. First, the June 21 Memo "could be read to suggest that [Secretary Ross] had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale." Pet. App. 101a (citing *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006)). Second, Secretary Ross's decision overruled senior Census Bureau career staff who had advised him that "reinstating the citizenship question would be 'very costly' and 'harm the quality of the census count,'" supporting a showing of bad faith. Pet. App. 101-102a (citing AR 1277). Third, Plaintiffs pleaded facts showing that Defendants "deviated significantly from standard operating procedures in adding the citizenship question" and "added an entirely new question after substantially less consideration [than is typical] and without any testing at all." Pet. App. 102a. Fourth, Plaintiffs made "at least a *prima facie* showing that Secretary Ross's stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act—was pretextual." Pet. App. 102a.

Despite finding that extra-record discovery was warranted, the district court strictly limited its scope. Pet. App. 104a-106a. Although Plaintiffs requested 20 fact depositions, the court permitted only 10. Pet. App. 105a. Absent agreement of Defendants or leave of court, Plaintiffs were authorized to seek discovery *only* from the Departments of Commerce and Justice. *Id.* With respect to DOJ, the district court pointed out that Defendants' own arguments made clear that DOJ materials "are likely to shed light on the motivations for Secretary Ross's decision—and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision." *Id.* The court did not allow any other third party discovery, including from the White House. *Id.* And the court declined at that stage to authorize the deposition of Secretary Ross, stating that it would do so only if discovery and other depositions of lower-level officials proved insufficient. Pet. App. 106a.

c. Throughout the discovery process in this case, the district court has been "mindful of … the limited scope of review under the APA," and has "rein[ed] discovery in in a way that it wouldn't be [in] a standard civil action." Pet. App. 109a. The district court has denied many of Plaintiffs' requests. For example, the district court has repeatedly upheld Defendants' assertions of privilege over contested documents and has refused to order discovery from third parties who communicated with Secretary Ross and other Commerce officials in connection with the decision to add the citizenship question, including White House staff and Kansas Secretary of State Kris Kobach. *See, e.g.,* Dkt. 83, 91, 119, 127, 133.

3. Because AAAG Gore is the actual author of the DOJ Letter, Plaintiffs on July 12 requested that Defendants provide dates when he would be available for deposition. After ignoring multiple follow-up requests for AAAG Gore's availability, on August 3, Defendants stated that they would not produce him for deposition. On August 10, Plaintiffs moved for an order compelling his deposition. Dkt. 81. Defendants opposed the motion, challenging Gore's deposition solely on grounds of relevance. Defendants did not dispute that he had played a central role in the false "origination" of the citizenship question, that he was the DOJ Letter's actual author, or that he was DOJ's primary point of contact with senior Commerce Department political appointees about adding the question. Nor did they assert that any kind of heightened legal standard applied to Plaintiffs' request to depose Gore. *Id.*; Dkt. 90; *see* CA2 Supp. Add in No. 18-2659, at 11, 12, 13, 18, 21–22, 25–26, 19–20, 33.

On August 17, the district court granted Plaintiffs' motion, finding that Gore's testimony is "plainly 'relevant'" and, given Plaintiffs' claim that he "'ghostwrote'" the DOJ letter, that he "possesses relevant information that cannot be obtained from another source." Pet. App. 18a. Citing cases ordering depositions of senior government officials, the district court was "unpersuaded" that "compelling AAAG Gore to sit for a single deposition would meaningfully 'hinder' him 'from performing his numerous important duties,' let alone 'unduly burden' him or the Department of Justice." *Id.*

4. On the evening of Friday, August 31—nearly two months after the district court authorized extra-record discovery, and two weeks after the court ordered AAAG Gore's deposition—Defendants filed a letter motion to stay all discovery, particularly the Gore deposition, pending resolution of a forthcoming mandamus petition to the Second Circuit. Dkt. 116.

The district court denied the motion to stay on September 7, 2018, concluding that Defendants "do not come close to showing likelihood of success on the merits." Supp. App. 6a. He noted that the Defendants had cited the wrong legal standard and that they had "badly mischaracterized" his prior findings of bad faith. *Id.* Noting the exacting standards for mandamus and for stays pending mandamus, and citing Defendants' nearly two-month delay before filing the mandamus petition, the district court concluded that Defendants' motion to stay all discovery "is frivolous." *Id.* at 4a. The district court further found that Defendants could not establish irreparable harm because the obligation to respond to discovery does not constitute irreparable harm.

With regard to AAAG Gore—whose deposition had been ordered a full two weeks before Defendants moved for a stay pending mandamus—the district court found that the Defendants "inexplicably delayed in seeking relief" and that any purported "irreparability" of harm was due to Defendants' delay. *Id.* at 8a–9a. The district court also found that Defendants had failed to show likelihood of success on the merits. He noted that Defendants had argued in opposing the motion to compel AAAG Gore's testimony that the Federal Rule of Civil Procedure 45 "relevance

standard" was the proper standard, but now sought mandamus on the ground that "exceptional circumstances" was the proper standard. Supp. App. 9a. Regardless, the district court concluded that exceptional circumstances were present because AAAG Gore had "unique first-hand knowledge related to the litigated claims" which "could not be obtained through other, less burdensome or intrusive means." *Id.* at 10a. The district court again found that AAAG Gore's role in ghostwriting the December 17 DOJ Letter warranted his deposition. *Id.* at 10a–11a.

5. On September 7, 2018, well over two months after the district court ordered extra-record discovery, three weeks after the district court ordered Gore's deposition, one week after Defendants filed their motion in the district court for a stay pending the resolution of their "forthcoming" mandamus petition, and just three business days before Gore was scheduled for deposition, Defendants filed a petition for writ of mandamus in the Second Circuit challenging the order permitting extra-record discovery and the deposition of AAAG Gore.

The Second Circuit issued an administrative stay of the Gore deposition, but then denied the petition for mandamus on September 25 and lifted the stay. Pet. App. 3a-4a. Citing *National Audubon*, the court held that the district court had "applied controlling case law and made careful factual findings" in ordering Defendants to supplement the administrative record and limited extra-record discovery. Pet. App. 4a. The court explained that it "cannot say that the district court clearly abused its discretion in concluding that plaintiffs made a sufficient showing of 'bad faith or improper behavior' to warrant limited extra-record

discovery." *Id.* The Second Circuit found no abuse of discretion in the order compelling AAAG Gore's deposition "because he 'possesses relevant information that cannot be obtained from another source' related to plaintiffs' allegations that the Secretary used the December 2017 Department of Justice letter as a pretextual justification for adding the citizenship question." *Id.*

After the Second Circuit's September 25 order, Defendants agreed to schedule AAAG Gore's deposition for October 10, 2018. Despite the impending deposition date, Defendants did not immediately seek relief in this Court. Instead, Defendants waited over a week, until October 3, to seek any relief in this Court, decreasing the possibility that the Court would have time to rule in advance of the deposition date.

6. On September 10, Plaintiffs moved to compel the deposition of Secretary Ross. Dkt. 139. On September 21, in a detailed order, the district court granted Plaintiffs' motion. Pet. App. 5a. Applying the Second Circuit's "exceptional circumstances" test for the deposition of high-ranking officials, the district court found that "a deposition of Secretary Ross is appropriate" because he "plainly has 'unique first-hand knowledge related to the litigated claims,'" Pet. App. 6a (quoting *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013)), and because "Plaintiffs have demonstrated that taking a deposition of Secretary Ross may be the only way to fill in critical blanks in the current record," Pet. App. 11a; *see* Pet. App. 12a. The district court noted that Defendants themselves [had] argued vigorously that '[t]he relevant question in these cases 'is

whether Commerce's stated reasons for reinstating the citizenship question were pretextual,'" and thus had acknowledged "the centrality" of the "intent" of the "ultimate decisionmaker" at the Department of Commerce—*i.e.*, Secretary Ross. Pet. App. 8a. The court concluded that Secretary Ross's intent, including whether he relied on a pretextual justification for adding the citizenship question, was thus highly relevant to Plaintiffs' APA and equal protection claims. *Id.* at 7a-8a. And given "the unusual circumstances presented here, the concededly relevant inquiry into 'Commerce's intent could not possibly be conducted without the testimony of Secretary Ross himself." Pet. App. 8a. This was so because "Secretary Ross was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree," and "Secretary Ross's three closest and most senior advisors who advised on the citizenship question … testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs' claims." Pet. App. 8a, 11a (citing deposition testimony).

Independently, the district court found that a deposition was warranted because Defendants and Secretary Ross had "placed the credibility of Secretary Ross squarely at issue," Pet. App. 9a-10a, and because the record "casts grave doubt" on many of his statements, including congressional testimony, about how the decision to add the citizenship question came about. Pet. App. 10a.

The district court limited the deposition to four hours rather than the standard seven, but denied Defendants' request to hold the deposition only after all other discovery was completed. Pet. App. 16a. Noting that Defendants did "not

even attempt to establish that the circumstances warranting a stay are present" and the rapidly approach October 12 discovery cutoff, the district court denied Defendants' request to stay the order until the later of 14 days or resolution of Defendants' mandamus petition. *Id.*

7. Six days later, on September 27, Defendants petitioned the Second Circuit to issue a writ of mandamus quashing the deposition of Secretary Ross and a stay of AAAG Gore's deposition. The Second Circuit denied Defendants' simultaneously-filed request for a stay of AAAG Gore's deposition—which the Second Circuit had already considered on the merits—pending mandamus review by this Court, but issued an administrative stay of the Ross deposition pending consideration of the petition for mandamus. Pet. App. 129a.

8. On September 28, Defendants again moved the district court to stay all discovery proceedings until the later of 14 days or resolution of Defendants' mandamus petition. Dkt. 359 (S.D.N.Y. No. 18-cv-2921). The district court denied this request on September 30, noting that Defendants once more did "not even attempt to establish that the circumstances warranting a stay are present," and that the October 12 discovery cutoff was rapidly approaching. Dkt. 362 at 1 (S.D.N.Y. No. 18-cv-2921). With respect to Defendants' request to stay extra-record discovery generally, the district court further stated that he would not permit, "and doubts that either the Second Circuit or the Supreme Court would permit, Defendants to use their arguably timely challenge to the Orders authorizing depositions of Assistant Attorney General Gore and Secretary Ross to bootstrap an

untimely — and almost moot — challenge to the July 3 Order authorizing extra-record discovery, particularly when only nine business days remain before the close of such discovery and much apparently remains to be done." *Id.* The district court further noted that Defendants waited two months before seeking the stay on extra-record discovery, and had previously represented to the Second Circuit that they were not seeking a stay of all discovery. *Id.*

9. On October 9, 2018, a different panel of the Second Circuit unanimously denied the government's petition for a writ of mandamus to stop the deposition of Secretary Ross. Pet. App. 131a. The Second Circuit observed that, "[t]he district court, which is intimately familiar with the voluminous record, applied controlling case law and made detailed factual findings supporting its conclusion that Secretary Ross likely possesses unique, firsthand knowledge central to the Plaintiffs' claims." Pet. App. 131a. Mandamus was especially inappropriate, the court noted, "deposition testimony by three of Secretary Ross's aides indicated that only the Secretary himself would be able to answer the Plaintiffs' questions." Pet. App. 131a.

The court stayed the deposition of Secretary Ross for 48 hours to allow the government to seek relief from this Court. *Id.* On October 10, it also stayed the deposition of AAAG Gore for 36 hours for the same reason.

10. Meanwhile, on October 9, Defendants filed this petition for a writ of mandamus and a stay with respect to all three orders in this case authorizing extra-record discovery, but not challenging the district court's order compelling

Defendants to complete the administrative record. Justice Ginsburg subsequently issued an administrative stay of the orders authorizing extra-record discovery, pending consideration of Defendant's petition.

11. Despite having sought and receive a stay of extra-record discovery, at 12:06 p.m. today Defendants served a "second supplemental" interrogatory response amending their answer to the question of who Secretary Ross consulted with in adding the citizenship question. Supp. App. 25a-29a. On August 30, Defendants sent a supplemental interrogatory response certified by Secretary Ross's aide, Earl Comstock, stating that Defendants "cannot confirm that the Secretary spoke to Steve Bannon regarding the Citizenship Question," Supp. App. 22a-24a. Defendants represented in court that they had spoken to Secretary Ross before filing those responses. 9/14/2018 Tr. 16. Today's response, also certified by Mr. Comstock, states that "Secretary Ross recalls that Steven Bannon called Secretary Ross in the Spring of 2017 to ask Secretary Ross" to discuss the citizenship question with Kris Kobach, Supp. App. 27a—even though Secretary Ross testified to Congress that he had not spoken with "anyone in the White House." Pet. App. 10a.

Discovery is scheduled to close tomorrow on October 12, 2018. Pet. App. 108a.

ARGUMENT

I. THE COURT SHOULD DENY MANDAMUS AND A STAY PENDING MANDAMUS

This Court rarely intercedes in ongoing discovery disputes, and as the unanimous conclusions of all judges to consider these claims below indicate, there is

no basis for such extraordinary intervention here. Mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–260 (1947)). The orders at issue in this case do not even come close. The district court's carefully-explained decisions to complete the administrative record, order limited extra-record discovery and to order the depositions of the two officials who were the most critical decisionmakers do not amount to "exceptional circumstances amounting to a judicial usurpation of power," or a "clear abuse of discretion." *Id.* The government cannot show that its "right to issuance of the writ is "clear and indisputable," that issuing the writ is "appropriate under the circumstances," or that it has no other "adequate means" to obtain relief. *Id.* at 381.

"To obtain a stay pending the filing and disposition of a petition for a writ of mandamus," the government must show a "fair prospect" that the Court will grant mandamus and "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

The government cannot meet any of these standards. Where, as here, the legitimacy of a tool central to the democratic process is at issue, the Court should be especially reluctant to bar discovery of all the relevant facts. And mandamus would be singularly inappropriate here in light of the government's extraordinary three-month delay in seeking appellate review of the bad-faith finding underlying the district court's decision to order extra-record discovery and to order the depositions

of AAAG Gore and Secretary Ross, and its further delay in seeking review of the court's decision ordering the deposition of AAAG Gore.

The Court should lift the temporary stay, deny mandamus, and deny any further stay pending mandamus.

A. Defendants Have Not Demonstrated A Clear and Indisputable Right to Relief

1. The District Court Acted Well Within its Discretion in Ordering Limited Extra-Record Discovery Based on Plaintiffs' Strong Showing of Bad Faith

a. Where, as here, there is a "strong showing of bad faith or improper behavior" in an APA case, courts may go beyond the administrative record and may even "require the administrative officials who participated in the decision to give testimony explaining their action." *Overton Park*, 401 U.S. at 415-16.

Lower courts have applied this standard uniformly and Defendants point to no disagreement about the bad faith standard. The Second Circuit, for example, holds that "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of bad faith or improper behavior on the part of agency decisionmakers. . . ." *Nat'l Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). And federal courts have recognized a diverse set of circumstances that may constitute bad faith and permit extra-record discovery in an APA case, including improper political influence, *ex parte* communications, and unexplained departures from prior administrative practice. *See*, *e.g.*, *U.S. Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, (D.C. Cir. 1978); *D.C. Fed'n of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C Cir. 1971); *Tummino v. Hamburg*, 936 F.

Supp. 2d 162, 166 (E.D.N.Y. 2009); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006); *Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *4–6 (D. Conn. Nov. 3, 2006); *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1280–81 (W.D. Wis. 1997). Indeed, Defendants themselves previously conceded in the district court that pretext alone would be grounds to vacate the decision to add a citizenship question to the census. Pet. App. 7a.

These cases reflect a common rationale. When factors such as improper political influence, pretext, bad faith, and improper political influence are vital to an agency's decision, it "necessarily calls into question whether the justifications put forth by the agency in its decision were in fact its motivating force." *U.S. Lines*, 584 F.2d at 542.

b. The government cannot show that the district court clearly and indisputably erred. In allowing extra-record discovery, the district court pointed to a constellation of factors that, taken together, fully supported its finding that Plaintiffs had made a "strong showing" of bad faith. Pet. App. 101a. They include: (1) the suggestion in the Supplemental Memo that Secretary Ross's decision to add the citizenship preceded his receipt of the DOJ Letter that he originally identified as the basis of his decision, and the fact that Secretary Ross reached out to DOJ to secure that letter, rather than vice versa, as he had testified; (2) evidence in the administrative record that Secretary Ross overruled senior career staff in the Census Bureau; (3) the Commerce Department's significant deviation from

established procedures for adding a question to the census; and (4) Plaintiffs' "prima facie showing" that Secretary Ross's stated justification for adding the citizenship question, namely to enhance enforcement of the VRA, was pretextual. Pet. App. 101-103a. As the district court later explained, if "the stated rationale for Secretary Ross's decision was not his *actual* rationale" then he did not "'disclose the basis of [his]' decision," as the APA requires. Pet. App. 7a (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

In addition, Secretary Ross's Supplemental Memo—which offered a completely different explanation and timeline for his decision than he originally set out in his decision memo and then repeated under oath on three separate occasions in congressional testimony—supports the district court's finding that Plaintiffs made a strong showing of bad faith. Pet. App. 101a, 104a. That memo represents a belated effort to clean up Secretary Ross's false narrative that DOJ had birthed the idea to add the citizenship question to aid in VRA enforcement. Secretary Ross had no other reason to issue the June 21 Memo. This is compounded by its curious timing, only weeks after the census lawsuits were filed and the first discussions with the district court about the possibility of extra-record discovery.

Defendants barely acknowledge the record. They maintain that Secretary Ross never stated in his memorandum or congressional testimony that "he had not previously considered whether to reinstate a citizenship question" or that he "had no discussions with other agencies or government officials before he received the Department of Justice's formal request." Pet. 37. But Secretary Ross's omissions

are precisely the point. A key reason why the Ross Memorandum and congressional testimony are misleading is that Secretary Ross described the decisionmaking process as *beginning* with the DOJ request to include the citizenship question based on a VRA rationale, without disclosing that he was the one who told DOJ to make that request in the first instance. The district court correctly observed that the actual sequence of events was "exactly [the] opposite" of the description Secretary Ross initially provided. Dkt. 215 at 64. This attempt to hide how an agency made its decision, which it repeated on multiple occasions to the public and Congress over several months, is highly indicative of bad faith.

c. As they did several times below, Defendants "badly mischaracterize the basis for the Court's finding of potential bad faith," which "relied on several considerations that, *taken together*, provided a 'strong showing . . . of bad faith.'" Supp. App. 6a (emphasis added). More generally, while Defendants (unsuccessfully) nitpick the district court's individual findings, such disagreements with the district court's preliminary factfinding do not amount to the sort of exceptional circumstances or clear abuse of discretion that would justify the extraordinary remedy of mandamus. In any event, Defendants never grapple with their cumulative impact, nor do they point to any precedent denying discovery in an APA case that involved a record as thorough and replete with departures from standard agency practice and decisionmaking as here. Yet even taking an individualized approach to the district court's reasons for finding that Plaintiffs had

made a strong showing of bad faith, Defendants fail to show clear and indisputable error.

(i) Defendants first argue that the district court improperly "assumed the truth" of plaintiffs' allegations. Pet. 24. As an initial matter, that would not be improper. The extra-record discovery rule cannot require litigants to provide the evidence they would obtain in discovery as a prerequisite to establishing a right to discovery. Indeed, *Overton Park* requires only a "strong showing of bad faith or improper behavior" before extra-record discovery may be allowed, not the definitive proof Defendants seem to think is required. 401 U.S. at 420. In any event, the factual allegations on which plaintiffs initially relied to establish bad faith generally were based on Defendants' own statements, uncontested *documents* or historical facts—such as Secretary Ross's misleading Congressional testimony and memoranda, portions of the administrative record showing that Defendants deviated from standard operating procedure, and historical facts concerning enforcement of the VRA that supported plaintiffs' allegations that Defendants' VRA enforcement rationale was pretextual. Pet. App. 102a-103a. The district court performed its own careful analysis of those documents and facts and concluded that they established a "strong showing" of bad faith—i.e., one that overcomes any "presumption of regularity" (Pet. 24).

Since the July 3 oral order, the district court has re-confirmed its finding that Plaintiffs made a strong showing of bad faith in three written orders—orders granting the AAAG Gore and Secretary Ross depositions and declining to issue a

stay. The court noted that "if anything, the basis for that conclusion [that plaintiffs made a strong showing of bad faith] appears even stronger today" in light of discovery. Supp. App. 7a.

(ii) Defendants next argue that the district court applied the wrong legal standard in finding that Secretary Ross's supplemental memorandum could be read to suggest that he had already decided to add the citizenship question before he reached out to DOJ. Pet. 25-26. Defendants argue that the record shows only that Secretary Ross "was leaning in favor of adding the question" and that prejudgment requires showing that "the Secretary 'act[ed] with an 'unalterably closed mind' or was 'unwilling or unable' to rationally consider arguments.'" Pet. 25-26 (quoting *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015). But Defendants waived this argument because they never raised it in the district court—the first time they argued that the district court was required to apply the "unalterably closed mind" standard was in their mandamus petition in the Second Circuit.

Even if defendants had timely raised this argument, it would still fail because the unalterably closed mind standard does not apply in this context. Rather, this is the standard federal courts use to determine whether a decisionmaker must be disqualified from the rulemaking process. *See Mississippi Comm'n on Envtl. Quality*, 790 F.3d at 183 (rejecting attempt to disqualify decisionmaker from rulemaking due to unalterably closed mind); *Air Transport Association of America, Inc. v. National Mediation Board*, 663 F.3d 476, 487 (D.C.

Cir. 2011) (explaining that "[d]ecisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."). Defendants cite no case from this Court, or any other court, that requires showing that the decisionmaker had an "unalterably closed mind" before a party can obtain extra-record discovery in an APA case.

Defendants also argue that it is not "bad faith or improper bias" if the decisionmaker relies on "additional subjective reasons" as long as he "sincerely believes the ground on which he ultimately bases his decision[] and does not act on a legally forbidden basis." Pet. 25 (citing *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185 (10th Cir. 2014)). But the question in this case is not whether Secretary Ross had additional subjective reasons for his decision, but rather whether he concocted a pretextual reason to conceal the actual basis for his decision. The Tenth Circuit in *Jagers* was not discussing the standard for extra-record discovery in APA actions due to bad faith. And, unlike here, the administrative record included an objective, scientific justification that was consistent with the agency's decision. Here, however, the objective evidence in the administrative record ran against Secretary Ross's decision. So even if *Jagers* properly states what the law is—no court has ever cited *Jagers* for the proposition that Defendants do—it would provide no support for Defendants' argument.

Nor did the district court clearly err in finding that Plaintiffs had made a showing of prejudgment. Defendants point to Secretary Ross's statement in the

March 26, 2018 memorandum that he "initiated a comprehensive review process led by the Census Bureau" after he received DOJ's request. Pet. App. 117a. But this ignores Secretary Ross's concession in the supplemental memorandum that *he* was the one who requested that the DOJ make the request in the first place after discussing the citizenship question with "other senior Administration officials." Pet. App. 116a. In other words, the record shows that Secretary Ross decided to include the citizenship question first and only later did he ask DOJ to ask the Department of Commerce to add the question.

As a key senior staff member admitted, "the initial impetus for putting the citizenship question on the 2020 census was not DOJ's idea," it came from Secretary Ross. Supp. App. 39a. In May 2017, Secretary Ross was already admonishing his senior staff that he was "mystified" why nothing had been done on his "months old request that we include the citizenship question" on the census. Supp. App. 12a. "At that point in time, the Department of Justice had made no request to Commerce for the addition of a citizenship question …." Supp. App. 37a-38a. During the year, the Secretary repeatedly asked his staff what progress they were making toward getting a citizenship question in place. Supp. App. 39a-40a. In September 2017, Secretary Ross's staff contemplated having Commerce add the question even if DOJ would not make the request. Supp. App. 14a. In late November 2017, when Justice still hadn't made its request, Secretary Ross complained to his staff that "[w]e are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." Supp. App. 15a. Had the

citizenship question really been a DOJ initiative, these concerns would be inexplicable. There should have been no need for Secretary Ross to worry about time running out or needing to call DOJ to resolve the matter. These should have been DOJ concerns. But what the record confirms from beginning to end is that the citizenship question was Secretary Ross's idea. The DOJ request, when it was finally made, was mere pretext.

(iii) Defendants next argue that the district court should not have taken into account that Secretary Ross overruled the recommendation of the senior Census Bureau career staff who advised against adding a citizenship question. Because Secretary Ross provided an explanation for his disagreement with the Census Bureau staff's proposals, Defendants argue that it is of no moment that he "'overruled the views of his subordinates.'" Pet. 27 (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996)). But Secretary Ross's explanation made no sense on its face. The Census Bureau's chief scientist opined that adding the citizenship question *will undermine* the quality of the very citizenship data DOJ purportedly needed for VRA enforcement, and recommended collecting that data through different means, primarily through the use of administrative records. Secretary Ross rejected that option based on the fact that such records are not available for a small segment of the population—but he ignored the Census Bureau's advice that the Bureau could still determine the citizenship status for this subset of individuals with *greater accuracy* than any data collected through census. CA2 Supp. Add. 93, 97.

Defendants argue that under *Wisconsin v. City of New York*, 517 U.S. 1 (1996), the district court could not rely on Secretary Ross's decision to overrule the recommendations of the Census Bureau staff as a factor in finding bad faith. Pet. 17. But *City of New York* says no such thing. The Court held only that it would not review de novo the Secretary of Commerce's decision against the use of a particular statistical adjustment on the census based on the "mere fact" that he overruled the recommendation of Census Bureau personnel. 517 U.S. at 23. *City of New York* did not involve the APA, much less the bad faith standard for allowing extra-record discovery. And there, unlike here, the Census Bureau personnel acknowledged that the Secretary's position was reasonable and supportable. *Id.* at 24 (noting comments in report by Director of Census Bureau that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree"). Here, Census Bureau staff and statisticians were unanimous that adding a citizenship question will decrease the accuracy of the actual enumeration and is a highly flawed way to obtain the information DOJ purportedly needs for VRA enforcement purposes. CA2 Supp. App. 96-104.

(iv) Defendants make a similarly flawed attack on the district court's finding that they "deviated significantly from standard operating procedures in adding the citizenship question" by failing to conduct any testing. Pet. 27. Defendants point exclusively to Secretary Ross's explanation that the question did not need to be tested, because a citizenship question had previously appeared on the ACS and an ACS predecessor known as the "long-form" census. Pet. App. 118a. But they ignore

that the Ross Memo conceded that "the Decennial Census has differed significantly in nature from the sample surveys" like the ACS and the long-form census. Pet. App. 119a. It is thus undisputed that Defendants abandoned the rigorous procedures that the Census Bureau normally follows before changing questions on the Decennial Census, including extensive pretesting and survey work.

(v) Finally, Defendants fall short in challenging the district court's finding that plaintiffs had made a prima facie showing that Secretary Ross offered a pretextual justification—VRA enforcement—to support adding the citizenship question. Pet. 28. Defendants insist that DOJ relied on citizenship data from the decennial census in VRA enforcement between 1970 and 2000, but they admit that this data came "from the long-form questionnaire," *id.*, which was not sent to every household; it was survey sample data, and thus materially identical to the statistical estimates on which DOJ currently relies. The type of data that Commerce plans to collect now—census responses about the citizenship status of every member of every household in the United States—has *never* been collected while the VRA has been in effect. More revealing of pretext, however, is Secretary Ross's admission in the Supplemental Memorandum that the idea to add the citizenship question came from him, and other unnamed senior Administration officials, rather than from DOJ itself. Pet. App. 116a. In other words, until Secretary Ross and his senior aides planted the seed, DOJ had never before cited a need for citizenship data from the Decennial Census to aid in VRA enforcement; never asserted that it had failed to bring or win a VRA case because of the absence

of citizenship data from the Decennial Census; and never claimed that it had been hampered in any way by relying on the citizenship estimates currently produced by the Census Bureau through sample surveys. And the fact that Secretary Ross initially sought to conceal his role in asking DOJ to ask the Commerce Department to add the citizenship question supports the district court's finding of a prima facie showing that Secretary Ross's stated rationale was pretextual.

The administrative record contains still more evidence of pretext. Notably, the evidence in the administrative record is undisputed that adding a citizenship question is a costly and unreliable tool for obtaining the block level data DOJ purportedly needed. CA2 Supp. Add. 97. In a memorandum prepared for Secretary Ross after receipt of the DOJ letter expressing a need for block level data, the Census Bureau's chief scientist, Dr. John Abowd, explained that this information could be obtained at relatively little cost through existing administrative records. In contrast, he explained that adding a citizenship question is "very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources." *Id.* at 96. And in comparing the two alternatives, Dr. Abowd explained that a citizenship question will "improv[e]" block level data "but with serious quality issues remaining," while using administrative records presents the "[b]est option for block-level citizenship data" with "quality much improved." *Id.* at 97. That Secretary Ross nevertheless went ahead with his decision to add the citizenship question even though all of the evidence in the administrative record established that it was not a

reliable way to produce the data DOJ purportedly needed strongly suggests that he made the decision for other reasons.

Moreover, contrary to Defendants' argument, the evidence produced in discovery reinforces the district court's finding on pretext. Defendants insist that "Commerce officials sincerely believed 'that DOJ has a legitimate need for the [citizenship] question to be included,'" pointing to a May 2, 2017 email from a senior Commerce appointee, Earl Comstock, to Secretary Ross. *See* Pet. 28 (quoting Pet. App. 128a). But when Mr. Comstock sent that email, he had not yet spoken with anyone in DOJ about the citizenship question. Supp. App. 33a (Q: "So before May 2, 2017, you had not had any discussions with the Department of Justice about the citizenship question, right? A: Not to my knowledge."). Mr. Comstock could not possibly have known whether "DOJ has a legitimate need" for adding the citizenship question. In fact, what Mr. Comstock actually said in the email is that Commerce "need[ed] to work with Justice to *get them* to request" a citizenship question, and that Mr. Comstock had located "court cases" that Mr. Comstock believed could "illustrate that DoJ has a legitimate need," even though Mr. Comstock at that time had no idea whether DOJ believed it had a legitimate need. Pet. App 128a (emphasis added). Mr. Comstock's deposition testimony elucidating the circumstances of this email only highlights why the district court was correct to order extra-record discovery.

In fact, Mr. Comstock all but admitted that the VRA justification was pretextual. He testified that he believed it was his job to come up with a legal

rationale to support adding the citizenship question. CA2 Supp. Add. 133. After Secretary Ross decided to add the citizenship question, Comstock came up with a justification—the need to enforce the VRA—and then set about set about to find an agency that would make the request. CA2 Supp. Add. 135-41. After Commerce struck out with DHS, Supp. App. 14a, Secretary Ross eventually spoke with Attorney General Sessions and DOJ agreed to make the request. CA2 Supp. Add. 30, 115, 117, 120-23. AAAG Gore then ghostwrote DOJ's request, which did not disclose that the Department of Commerce had actually solicited the request in the first place. Supp. Ad. 111-18, 130-31. Secretary Ross then plowed ahead with the decision even though the Census Bureau's experts agreed that there were far better and less costly ways to obtain the same information and believed that a citizenship question was not necessary to obtain the information DOJ purportedly needed. Supp. Ad. 93-106.

d. The government cites (Pet. 21) this Court's decision vacating discovery orders in a DACA challenge, *In re United States*, 138 S. Ct. 443 (2017) (per curiam), but this case could not be more different. There, the Court explained that, "[u]nder the specific facts of this case," the district court should have resolved the government's threshold motion to dismiss arguments before ordering the government to supplement the administrative record. *Id.* at 445. The district court in that case had ordered discovery far more expansive than here—including "all DACA-related materials considered by" anyone "anywhere in the government" who provided any input to the Acting Secretary, *id.* at 444, and the government had

raised privilege concerns. And the court had failed to make a finding of bad faith—a failure that formed the basis for the government's mandamus petition. Pet. for Mandamus at 8, 15, 20, 27 (No. 17-801). In this case, by contrast, the district court painstakingly set forth its findings concerning bad faith, and only then authorized limited discovery.

2. The District Court did not Clearly and Indisputably Err in Ordering the Deposition of Secretary Ross

Given the unusual centrality of Secretary Ross—and particularly his motivations—to the APA and unconstitutional discrimination challenge at issue in this case, the district court did not "clearly and indisputably" err in compelling his deposition.

a. The district court compelled Secretary Ross's deposition pursuant to the "extraordinary circumstances" standard set forth in *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), and the Second Circuit denied mandamus on the ground that the district court had reasonably applied that test. Under *Lederman*—and consistent with the standard that many other courts of appeals have applied—a court may find "exceptional circumstances" and order a deposition of a high-ranking government official, if, for example, "the official has unique first-hand knowledge related to the litigated claims *or* [] the necessary information cannot be obtained through other, less burdensome or intrusive means." 731 F.3d at 203.

The government argued below that *Lederman* was the appropriate standard and does not dispute that *Lederman* is consistent with this Court's precedents,

including the Court's decision in *United States v. Morgan*, 313 U.S. 409, 421-22 (1941), on which the government relies. The government thus does not argue that the district court applied the wrong legal standard in compelling Secretary Ross's deposition; it rather asks this Court to issue the extraordinary remedy of mandamus to police the court's application of the law to the facts. The Court should not do so.

The district court concluded that Secretary Ross had "unique first-hand knowledge" key to the APA claims and to the discrimination claims, which turn on whether the Secretary's stated rationale for adding the citizenship question was his actual rationale, and on whether the decision was made with discriminatory intent. Pet. App. 6a-7a. The court observed that Defendants themselves argued that "the relevant question" in these cases "is whether Commerce's stated reasons for reinstating the citizenship question were pretextual" and whether "Commerce actually believed the articulated basis for adopting the policy." Pet. App. 8a (quoting DOJ). The court made factual findings that Secretary Ross did far more than just make the decision to include the citizenship question. Rather, he "was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree." Pet. App. 8a. He displayed "an unusually strong personal interest in the matter." Pet. App. 9a. Citing an email from the Secretary, the district court observed that the Secretary "demand[ed] to know as early as May 2017—seven months before the DOJ request—why no action had been taken on his 'months old request that we include the citizenship question,'" and "personally

lobbied the Attorney General" to request the addition of the citizenship question, despite initially being told that DOJ "did not want to raise the question." Pet. App. 9a. And the district court found that Secretary Ross's repeated statements before Congress, in his initial decision memorandum, in his Supplemental Memorandum changing the story, placed his intent and credibility "squarely at issue." Pet. App. 9a-10a.

The district court noted that three senior Commerce Department officials sat for deposition in this case and testified repeatedly that the Secretary "was the only person who could provide certain information central to Plaintiffs' claims," repeatedly answering questions with the statement, "You would have to ask [Secretary Ross]." Pet. App. 11a-12a. For example, Secretary Ross vaguely stated in his "Supplemental Memorandum" that "other senior Administration officials" had raised the question of "whether to reinstat[e] a citizenship question" with him before he began considering it and before he approached DOJ. Pet. App. 116a.

Who these individuals were and what they told the Secretary go directly to the question of whether the Secretary's stated rationale—that DOJ needed the question to enforce the VRA—is the actual rationale. But, the district court noted, "[n]o witness has been able to identify to whom Secretary Ross was referring." Pet. App. 12a. Secretary Ross's Chief of Staff Wendy Teramoto, for example, testified that she had no idea who the Secretary was referring to and that to find out "[y]ou would have to ask Secretary Ross." CA2 Supp. Add. 47. The district court accordingly concluded that it is "plain" that "exceptional circumstances are present

here, both because Secretary Ross has 'unique first-hand knowledge related to the litigated claims' *and* because 'the necessary information cannot be obtained through other, less burdensome or intrusive means.'" Pet. App. 12a (quoting *Lederman*, 731 F.3d at 203). Given the "central[ity]" of Secretary Ross's intent to the claims in this case, the district court did not abuse its discretion in concluding that Plaintiffs needed an opportunity to depose him. Pet. App. 11a.

Nothing about this decision justifies mandamus. Where, as here, there is a "strong showing of bad faith or improper behavior" in an APA case, courts may "require the administrative officials who participated in the decision to give testimony explaining their action." *Overton Park*, 401 U.S. at 415-16. Lower courts have similarly recognized that, under some circumstances, a decisionmaker's intent *is* relevant in an APA action; and further, that where intent is relevant, judicial review is not limited to the administrative record. This includes cases involving bad faith, improper political influence, and *ex parte* communications.[3] Given the district court's finding that Plaintiffs had made a strong preliminary showing of bad faith, *see supra*, that justified extra-record discovery, it necessarily follows that testimony

[3] *See*, *e.g.*, *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977) ("[W]here, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary") (internal citations omitted); *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854 (10th Cir. 1994) (invalidting agency decision as arbitrary and capricious where action was pretext for ulterior motive); *Parcel 49C Ltd Partnership v. United States*, 31 F.3d 1147 (Fed. Cir. 1994) (same); *U.S. Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, (D.C. Cir. 1978); *D.C. Fed'n of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C Cir. 1971); *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 166 (E.D.N.Y. 2009); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006); *Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *4–6 (D. Conn. Nov. 3, 2006); *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1280–81 (W.D. Wis. 1997).

from the person whose conduct and decisions were at the center of that conduct is essential to determining if the VRA justification he offered is pretextual. If "the stated rationale for Secretary Ross's decision was not his *actual* rationale" then he did not "'disclose the basis of [his]' decision," as the APA requires. Pet. App. 7a (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)). The district court's opinion was thorough and grounded in the record, which that court is best equipped to evaluate.

b. Defendants nonetheless argue that, in an APA case, the court should not probe the Secretary's "mental processes," and that an agency head's motives and intent can *never* be the basis for judicial review. Pet. 31 (quoting *Morgan II*, 313 U.S. at 422). That is not the law. *Morgan II*, a decision considering a challenge to the Secretary of Agriculture's setting of certain stockyard rates, did not suggest that cabinet officials are immune from deposition—just that they should be deposed rarely. *Overton Park*, which construed *Morgan II*, explained that district courts can compel testimony of the "administrative officials who participated in the decision"—including specifically the testimony of the Secretary of Transportation, so long as there is a strong showing of bad faith. *Overton Park*, 401 U.S. at 420. And the government attacks a strawman in arguing that *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), creates no "exception" to the principle of *Morgan II*. Pet. 31. The district court did not say that it did. The court instead applied the bad faith exception this Court recognized in *Overton Park*. Pet. App. 5a. Having made the July 3 finding of bad faith that justified extra-record

discovery in the first place, the district court's September 21 order addressed the question of whether Secretary Ross's testimony should be part of that extra-record discovery. The court cited *NAHB*'s description of the Administrative Procedure Act standard of review simply for purposes of explaining why Ross's rationale was highly relevant. Pet. App. 6a.

The district court did not make the decision to compel Secretary Ross's deposition lightly. As the court explained, "depositions of agency heads are rare – and for good reasons." Pet. App. 14a. But at the same time, "courts have not hesitated to take testimony from federal agency heads … where, as here, the circumstances warranted them." Pet. App. 14a. The district court cited multiple examples, Pet. App. 14a, demonstrating that its own order is not nearly as novel as Defendants would have this Court believe. Indeed, this would not even be the first case over the census in which a Secretary of Commerce was deposed.[4] Moreover, the bad faith element in this case, and Secretary Ross's role in it, distinguishes this case from the ones Defendants rely upon that declined to compel the testimony of senior government officials. *See* Pet. 29-30. As a result, there is little risk that compelling a four-hour deposition of Secretary Ross under the unique facts of this case will open the door to depositions of every senior government official who happens to take part in an important agency decision.

[4] Robert McG. Thomas Jr., "Commerce Secretary Is Told to Testify on Census Count," *N.Y. Times,* Nov. 13, 1980 at B3 (describing district court "order[ing] the Secretary of Commerce to come to New York to complete a legal deposition in the city-state census litigation.").

Defendants cite separation of powers concerns, but "interactions between the Judicial Branch and the Executive, even quite burdensome interactions," do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). This Court has held that "separation of powers considerations should inform … evaluation of a mandamus petition involving the President or the Vice President," *Cheney*, 542 U.S. at 382, but those officials are not at issue here. The district court denied any discovery involving the White House. Moreover, the federal courts have the constitutionally (and congressionally) mandated function of judicial review. Where the testimony of the ultimate decisionmaker is essential so that the court can discharge its duty to evaluate whether the stated rationale for the agency's decision was its actual rationale, separation of powers concerns favor compelling that testimony. So does the public interest, as the district court explained. Pet. App. 15a.

c. The APA aside, the district court found Secretary Ross's deposition to be independently justified because the organizational Plaintiffs bring a claim for unconstitutional discrimination on the basis of race and national origin. Pet. App. 12a; *see* Complaint ¶¶ 193-200. Plaintiffs "plausibly allege that an invidious discriminatory purpose was a motivating factor in the challenged decision," Pet. App. 12a, i.e., that the question was added for the purpose of undercounting immigrants. Plaintiffs have substantial allegations and evidence to support this claim, including discussions within the Commerce Department and between

Commerce and other individuals reflecting concern about the fact that the census counted non-citizens in the first place. CA2 Supp. Add. 5 (email to Wilbur Ross about "the problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes"); *id.* at 1-4, 124; *see also State of New York, et al. v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 806-11 (S.D.N.Y. 2018) (district court decision denying motion to dismiss equal protection claim under the due process clause). The government acknowledged to the Second Circuit that the district court concluded "that plaintiffs' equal protection claim provided an independent basis for compelling Secretary Ross's deposition." Pet. 26, No. 18-2857 (2nd Cir. filed Sept. 27, 2018).

But in its mandamus petition to this Court, the government fails to challenge the district court's alternative, non-APA justification for the Ross deposition. That failure is reason alone to deny mandamus. In any event, the district court's decision to permit a deposition in light of the plausible allegations of unconstitutional discrimination was not remotely erroneous, much less clearly or indisputably so. To prove their discrimination claim, in addition to showing discriminatory effects, "Plaintiffs must show that an 'invidious discriminatory purpose' was a motivating factor' in Secretary Ross's decision." Pet. App. 7a (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)). Plaintiffs may seek to show "the stated reason for Secretary Ross's decision was not the real one" and that "he was dissembling to cover up a discriminatory purpose." *Id.* (internal quotations omitted). Secretary Ross is thus one of the most important

witnesses, if not the most important witness, on the question of his own intent. Pet. App. 8a, 11a.

Permitting Plaintiffs to depose Secretary Ross with respect to their discrimination claim is perfectly consistent with precedent. This Court has recognized that discovery from a governmental decisionmaker may be necessary to resolve constitutional discrimination claims. *Webster v. Doe*, 486 U.S. 592, 604 (1988); *cf. Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) (noting that "courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making"). The government admitted to the Second Circuit that, when a "plaintiff alleges that an agency decisionmaker acted with discriminatory animus," this Court permits compelling the testimony of "high-ranking officials" in "'extraordinary circumstances.'" Pet. 26, No. 18-2857 (2nd Cir.) (quoting *Village of Arlington Heights*, 429 U.S. at 268). That perfectly describes this case, as the district court found.

d. Defendants also quibble with the court's factual findings. They challenge the district court's finding that a deposition of Secretary Ross is particularly warranted "because he was 'personally and directly involved' in the decision to include a citizenship question 'to an unusual degree.'" Pet. 33 (quoting Pet. App. 8a). Defendants argue that his reasoning would open the door to deposing decisionmakers in every case. But Defendants misstate the district court's ruling. What they describe is actually the opposite of the court's holding. The court took pains to emphasize the "*unusual* circumstances presented here" and that he was *not*

holding that Plaintiffs could depose Secretary Ross "merely because [he] made the decision that Plaintiffs are challenging." Pet. App. 8a (emphasis added).

Rather, the district court held that the "concededly relevant inquiry into 'Commerce's intent' could not possibly be conducted" without Secretary Ross's testimony because "[he] was personally and directly involved in the decision, *and the unusual process leading to it, to an unusual degree*." Pet. App. 8a (emphasis added). In other words, Secretary Ross's deposition is justified by his personal involvement in the unusual conduct that formed the basis for Plaintiffs' strong preliminary showing of bad faith. This includes the facts that he *personally* began considering adding the citizenship question well before the DOJ memo; he consulted with still-unknown "government officials" about the citizenship question; he "manifested an unusually strong personal interest in the matter," including demanding to know why no action had been taken on his "request that we include the citizenship question" seven months before the DOJ Memo; he personally lobbied the Attorney General to request inclusion of the citizenship question, and then subsequently used that request to justify the decision; and he "ultimately mandated addition of the citizenship question over the strong and continuing opposition of subject-matter experts at the Census Bureau." Pet. App. 9a. Defendants' portrayal of the district court's finding thus has little to do with what it actually held.

Defendants next argue that the identity of the senior administration officials with whom Secretary Ross consulted "ha[s] no bearing on the legality of his decision" because consultation "'does not establish the required degree of bad faith.'"

Pet. 34-35 (quoting *In re FDIC*, 58 F.3d at 1062). But the former proposition does not follow from the latter. The district court did not hold that the Secretary's consultations by themselves *established* bad faith. The court merely held that the nature of these consultations was important in evaluating whether the Secretary's reliance on DOJ's purported VRA rationale was pretextual. This is obviously true; if the Secretary testifies that these outside senior Administration officials suggested that he approach DOJ and asked them to come up with the VRA rationale, for example, that would strongly support a finding of pretext. Moreover, *Defendants* put these consultations at issue by highlighting them in the Supplemental Memorandum outlining the basis and process of the decisionmaking. Defendants also say the administrative record "reflects the substantive views of the stakeholders who communicated with Secretary Ross"—but they acknowledge a sentence later that they mean only DOJ and Kansas Secretary of State Kris Kobach, not the "other government officials" with whom the Secretary consulted. Pet. 35. Defendants then say that the Secretary's consultations with these other officials are "likely privileged." Pet. 36. They offer no basis whatsoever for this assertion. The district court has been respectful of various privileges the government has asserted throughout this process; if the deposition of Secretary Ross proceeds, the parties can resolve privilege issues with respect to specific testimony at that time. Defendants do not assert, nor could they, that *all* of Secretary Ross's testimony would be privileged.

Defendants also say there is no "legitimate basis" for the district court's conclusion that Secretary Ross's statements put his credibility "squarely at issue in these cases." Pet. 36. As discussed, *supra*, the government's contorted efforts to explain away the inaccuracies and inconsistencies in Secretary Ross's statements to Congress and his initial memorandum only highlight the justification for subjecting Secretary Ross to a short deposition concerning his decisionmaking process and the rationale for his decision.

e. Defendants argue that the district court failed to "properly evaluate whether respondents could obtain the information they sought by other means." Pet. 32. But the district court addressed this question at length. Pet. App. 11a-13a. Defendants simply ignore the district court's point-by-point explanation for not requiring Plaintiffs to rely on interrogatories, requests for admission, or a Rule 30(b)(6) deposition. *Id.* Defendants' assertion that the court "refused to consider *any* alternative" to a deposition, Pet. 33, is just flat wrong. The court not only explained why those alternatives would be insufficient; it observed that plaintiffs had *already tried* those options and they hadn't worked. Pet. App. 13a. Defendants note that the Commerce Department has turned over documents and deposed Commerce officials, but as noted, they do not answer key questions about the Secretary's intent. Pet. App. 11a-13a. As just one example, plaintiffs have issued interrogatories seeking to determine with whom Secretary Ross spoke in deciding to add the citizenship question—something that should properly be part of the administrative record—but the government has provided interrogatory responses

signed by officials other than Secretary Ross and the answers keep changing, even as recently as today. *Supra*.

Given the tight time frame between now and the November 5 trial date, the district court was perfectly justified in failing to give the government yet *another* chance to provide the information sought from Secretary Ross through other discovery devices. Today's belated and still-incomplete interrogatory response reflecting more changes and contradictions, again filtered through someone other than Secretary Ross, demonstrates that the only way to get to the bottom of the Secretary's actual rationale and process is to question the Secretary. As the district court held, a deposition is the only adequate way to "test or evaluate Secretary Ross's credibility" and, if necessary, to "refresh Secretary Ross's recollection." Pet. App. 11a-12a. Mandamus should not be used for micro-managing the district court's supervision of the discovery process.[5]

3. The District Court Did Not Clearly and Indisputably Err in Ordering the Gore Deposition

The government also fails to show that the district court clearly and indisputably erred in ordering the deposition of AAAG Gore.

First, the government argues that the district court's order would contravene *Morgan II* by effectively making depositions of high-ranking government officials routine. But the government waived this argument by failing to raise it in opposing

[5] *In re Cheney*, 544 F.3d 311 (D.C. Cir. 2008) (cited at Pet. 32) is irrelevant. The court granted mandamus to block the deposition of the Vice President's chief of staff, not because the plaintiff had failed to seek the information from other sources, but because he had "no apparent involvement in th[e] litigation." *Id.* at 314. That concern is not present here.

the motion to compel in the district court. *Morgan II* concerned a Cabinet Secretary. Defendants did not argue to the district court that any special test for high-ranking officials applied to AAAG Gore—who is three full rungs below the Attorney General in the DOJ hierarchy. Instead, Defendants told the district court that it should apply "Rule 45"—*i.e.*, the standard rule applicable to third-party discovery—and quash the deposition because of the purportedly "low likelihood of AAAG Gore's testimony resulting in any relevant evidence" and because of the purported "burden" of the deposition. Dkt. 90 at 1; Supp. App. 9a (district court noting in denying stay pending mandamus that the defendants had "relied exclusively on the standard set forth in Rule 45" in opposing the AAAG Gore deposition). The court applied the test the government proposed, but properly concluded that AAAG Gore had relevant evidence and that a deposition would not be unduly burdensome under the circumstances.

Yet even as Defendants now argue that the district court should have required something more than relevance before ordering Gore's deposition, they never explain precisely what standard they think should have been applied. Pet. 38. Moreover, in denying defendants' motion for a stay, the district court held that its August 17 decision compelling AAAG Gore's deposition was fully "consistent with" a higher "exceptional circumstances" standard. Supp. App. 10a. The district court held in his August 17 order that AAAG Gore had unique first hand-knowledge that could not be obtained from another source, citing his "role in drafting the

Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census." Pet. App. 18a.

This conclusion was not erroneous, much less "clearly and indisputably" so. The Administrative Record confirms that AAAG Gore was the primary DOJ contact with senior Commerce Department officials orchestrating DOJ's request. For example, on September 13, 2017, after Commerce Department officials decided to reach out to DOJ, AAAG Gore called Secretary Ross's Chief of Staff. CA2 Supp. Add. 23-24. Later that day, AAAG Gore arranged for Attorney General Sessions to talk with Secretary Ross, *id.* at 23, following which AAAG Gore reported back to Commerce officials "we can do whatever you all need us to do." *Id.* Several weeks later, AAAG Gore sent the initial draft of the DOJ request to Mr. Gary. CA2 Supp. Add. 41. Materials produced by DOJ confirm that data generated by asking a citizenship question will not enhance enforcement of the VRA, and that when Census Bureau officials asked to meet with DOJ to discuss the irrelevance of the data, DOJ refused. *Id.* at 27. And when several weeks later Secretary Ross complained to the Commerce General Counsel that "we are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved," the Commerce General Counsel called AAAG Gore. Supp. App. 15a; CA2 Supp. Add. 33, 12.

Second, the government argues that AAAG Gore's testimony "would achieve no legitimate purpose" because Secretary Ross, rather than AAAG Gore, was the ultimate decisionmaker, and the district court has not found that DOJ itself acted

in bad faith. Pet. 38. But as the district court explained: "[I]t does not follow" from such arguments "that the information possessed by AAAG Gore is irrelevant to assessing the Commerce Secretary's reasons for adopting a citizenship question." Supp. App. 11a. The court explained: "Among other things, AAG Gore's testimony is plainly relevant to whether Secretary Ross 'made a decision, and only thereafter took steps to find acceptable rationales for the decision.'" Supp. App. 11a (quotations omitted). "It is also relevant to whether Secretary Ross's stated rationale — that reinstating the citizenship question was necessary to enforce the Voting Rights Act — was pre-textual." Supp. App. 11a.

Defendants do not deny that AAAG Gore wrote that memorandum. Given the district court's finding that Plaintiffs have made a *prima facie* case that reliance on the VRA was pretextual, Pet. App. 102a-103a; *State of New York*, 315 F. Supp. 3d at 806-11 (MTD Decision), there is no substitute for testimony by the individual who *supplied* the potentially pretextual rationale. Despite their burden to establish that the district court clearly and indisputably abused its discretion in ordering a deposition of AAAG Gore, Defendants make no effort to respond to any of these findings by the district court.[6]

B. Mandamus Relief is Not Necessary or Appropriate Under the Circumstances and Defendants Have Not Established Irreparable Harm

[6] Defendants suggest that AAAG Gore's testimony "is likely to be protected by privilege." Pet. 38. But they do not challenge the district court's conclusion that "any applicable privileges can be protected through objections to particular questions at a deposition; they do not call for precluding a deposition altogether." Pet. App. 19a.

Defendants do not come close to showing that the district court clearly and indisputably erred in ordering extra-record discovery or compelling the depositions of Secretary Ross and AAAG Gore. Regardless, the Court should deny mandamus because it is not necessary or appropriate under the circumstances of this case, 28 U.S.C. § 1651(a); *Cheney*, 542 U.S. at 381, and should deny any stay pending mandamus because defendants have not established irreparable harm.

That is especially evident with respect to Defendants' request for mandamus of the July 3 order permitting *any* extra-record discovery.[7] When Defendants asked the district court to stay "discovery altogether" pending their mandamus petition, the court rightly dismissed that request as "frivolous." Supp. App. [4]. The court noted that "Defendants waited *nearly two full months* to seek a stay of the Court's ruling" and that "[t]hat delay, in itself, belies Defendants' conclusory assertions of irreparable harm." Supp. App. [4-5]; *see Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm."). In their petition to this Court, Defendants offer no argument at all that they will suffer irreparable harm from finishing up the few fact depositions remaining and producing the few documents remaining. Defendants' "long delay in asking the extraordinary remedy of mandamus" also "fully justif[ies]"

[7] Justice Ginsburg's administrative stay stated that the district court's "order … dated July 3, 2018" was "stayed" pending this response and further order of Justice Ginsburg or the court. Order, No. 18A375 (Oct. 9, 2018). The district court's July 3 order did not simply authorize extra-record discovery, but also ordered *supplementation* of the administrative record and other relief as to which Defendants do not seek mandamus. If the Court were to continue the stay of the July 3 order, Plaintiffs respectfully request that the Court limit any relief to the portion of the July 3 order at issue here.

the denial of mandamus relief, which of course is discretionary. *Ex parte Am. Steel Barrel Co.*, 230 U.S. 35, 46 (1913). Like the district court, this Court should reject Defendants' effort to "use their arguably timely challenges to the . . . depositions of [Acting AAG] Gore and Secretary Ross to bootstrap an untimely—and almost moot—challenge to the July 3rd Order authorizing extra-record discovery." Dkt. 362 at 1 (S.D.N.Y. No. 18-cv-2921). In the meantime Plaintiffs have suffered severe prejudice from the delay, spending 3 months taking discovery and preparing for trial on the understanding that the information at issue would be part of the trial presentation.

Defendants barely even attempt to justify their assertion that mandamus with respect to extra-record discovery generally is "appropriate under the circumstances." Pet. App. 39. They offer *one* sentence, stating that "document discovery – especially into the Secretary's mental processes," is "intrusive and disruptive to an agency's functioning." Pet. 39. That conclusory assertion should not suffice to justify the extraordinary remedy of mandamus. The deposition of a few more fact witnesses and the production of a few remaining documents is obviously not going to threaten the functioning of the Department of Commerce, which has been producing documents in this case for three months. The government regularly is subject to discovery in civil litigation of all sorts and its proffered rationale would justify mandamus in every single one of those cases. Indeed, Defendants' conduct—taking more depositions than Plaintiffs have, and, since issuance of the administrative stay, continuing to pursue extra-record

discovery from Plaintiffs including depositions, while shielding their own witnesses from reciprocal discovery—belies any assertion of irreparable injury from the completion of extra-record discovery.

Nor is mandamus or a stay appropriate with respect to the deposition of AAAG Gore and Secretary Ross. The district court issued its order compelling AAAG Gore's deposition on August 17. Defendants "inexplicably delayed" in seeking relief, waiting "two full weeks," until 6 p.m. on August 31, 2018 -- the Friday before Labor Day weekend -- to seek a stay pending mandamus. Supp. App. [8]. Defendants then failed to file their Second Circuit mandamus petition with respect to AAAG Gore until September 7, 2018. Then, although the Second Circuit denied mandamus on September 25, 2018, the government waited over a week, until October 3, 2018, before seeking relief as to AAAG Gore in this Court. *See* No. 18A350. These delays belie the government's assertion of irreparable harm, and render mandamus inappropriate. The government's delay has prejudiced Plaintiffs, including by resulting in the rushed process here, in which Plaintiffs have little time to brief the issues before this Court and every additional delay threatens Plaintiffs' ability to prepare for trial, which is set for November 5. Mandamus as to AAAG Gore should be denied on the ground of delay alone.

More generally, the government does not establish that the limited depositions ordered in this case are so intrusive as to warrant mandamus. The government states that mandamus may be appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional

responsibilities," Pet. 39 (citing *Cheney*, 542 U.S. at 382), but these depositions will hardly prevent the Departments of Justice and Commerce from "discharg[ing] [their] constitutional responsibilities." The government cannot seriously argue otherwise in light of the minimal periods of time at issue here. Indeed, Secretary Ross has testified before Congress three times about his decision to add the citizenship question to the census, further establishing that attending a 4-hour deposition will not prevent him from discharging his constitutional responsibilities. And presumably AAAG Gore and Secretary Ross have already prepared for their depositions, given that this Court ordered a stay only 36 hours before the Secretary Ross deposition was set to start – and only 12 hours before the Gore deposition. Defendants cite *Cheney*, but that case involved "special considerations applicable the President and the Vice President," and even then the Court did not *grant* mandamus. 542 U.S. at 391-92. The Court simply directed the lower court to consider whether the discovery the district court had ordered in that case was too broad in comparison to the needs of the case. *Id.* at 388-89, 391-92.

C. The Government Has Other Adequate Means to Attain Relief

The government asserts that the district court's deposition orders "will be effectively unreviewable on appeal from final judgment," Pet. 39, but that is untrue. First, the government makes no such assertion with respect to the July 3 order, and that is reason alone to deny mandamus relief as to extra-record discovery generally. There is simply no need for this Court on a rushed schedule to stop the last few days of general discovery in this case. The government can raise the extra-record

discovery issue on appeal to the Second Circuit and as part of certiorari review to this Court. If this Court ultimately agrees that the district court erred in granting extra-record discovery, the Court can simply decline to consider those documents in assessing the merits of the claims here. The same is true with respect to the depositions of AAAG Gore and Secretary Ross. If this Court ultimately accepts certiorari in this case and decides that the depositions were unwarranted, it can exclude the testimony. That route is far preferable because it would enable the Court the time to review in detail the record on which the district court relied to justify its finding of bad faith, rather than as part of the rushed process here.

II. THE COURT CANNOT GRANT A STAY PENDING CERTIORARI

The government says this Court may consider its application as a request for a stay pending the disposition of a petition for a writ of certiorari. Pet. 20-21. Not so. The applicable statute authorizes this Court to "stay[]" the "execution and enforcement" of "final judgments" only. 28 U.S.C. § 2101(f). As Justice Scalia has explained, "[i]t is clear from this language that, even though certiorari review of interlocutory orders of federal courts is available, it is only the execution or enforcement of final orders that is stayable under § 2101(f)." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (citation omitted).

The discovery orders that the government challenges are all interlocutory. Accordingly, the Court may only grant a stay pursuant to its mandamus authority under the All Writs Act, 28 U.S.C. 1651(a)--which, as discussed above, "demands a

significantly higher justification than" a stay pending certiorari. *Ohio Citizens*, 479 U.S. at 1312.

CONCLUSION

The application should be denied.

Respectfully submitted,

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October 11, 2018

Plaintiffs-Respondents’ Supplemental Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

NEW YORK IMMIGRATION COALITION, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

18-CV-5025 (JMF)

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In these cases, familiarity with which is assumed, Plaintiffs bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). In an oral decision on July 3, 2018, the Court granted Plaintiffs' application for discovery beyond the administrative record, finding — among other things — that Plaintiffs had "made a strong preliminary or *prima facie* showing that they will find material beyond the Administrative

Record indicative of bad faith." (Docket No. 205 ("July 3 Oral Arg. Tr."), at 85).[1] In the two succeeding months, the parties have conducted substantial discovery (*see* Docket No. 305, at 1-2 (summarizing the discovery to date)), and have briefed (or are in the midst of briefing) a slew of discovery disputes, (*see, e.g.*, Docket Nos. 236, 237, 293, 299). One of those disputes concerned Plaintiffs' request to depose Acting Assistant Attorney General for Civil Rights John Gore ("AAG Gore"), who allegedly "ghostwrote" a letter from the Department of Justice ("DOJ") to Secretary Ross requesting the citizenship question that lies at the heart of the parties' disputes. (Docket No. 236, at 1; *see also* Docket No. 255). In an Order entered on August 17, 2018, the Court granted Plaintiffs' request. (Docket No. 261 ("AAG Gore Order")). The deposition of Gore is apparently scheduled for September 12, 2018. (Docket No. 304 ("Pls.' Opp'n"), at 3).

On the eve of Labor Day weekend — Friday, August 31, 2018, at approximately 6 p.m. — Defendants filed a letter motion to stay discovery pending resolution of a "forthcoming petition for a writ of mandamus in the U.S. Court of Appeals for the Second Circuit." (Docket No. 292 ("Defs.' Ltr."), at 1). Defendants seek a stay of *all* discovery, or, at a minimum, "further discovery of the Department of Justice . . . particularly the deposition of Acting Assistant Attorney General . . . John Gore." (*Id.*). In their motion, Defendants also sought an "administrative stay while the Court considers this stay request." (*Id.*). On September 4, 2018, the Court summarily denied the latter request and set an expedited briefing schedule (later modified), with Plaintiffs' opposition due on September 6, 2018, and any reply due today at noon. (Docket Nos. 297, 306). Thereafter, on September 5, 2018, Defendants filed a Petition for a Writ of Mandamus and an Emergency Motion for Immediate Administrative Stay Pending Resolution of the Government's Petition for Writ of Mandamus with the Second Circuit. To the

[1] Unless otherwise noted, docket references are to 18-CV-2921.

Court's knowledge, the Second Circuit has not yet acted on that application.

In determining whether to grant a stay pending mandamus, district courts must consider the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The "'most critical' factors" are whether "the stay movant has demonstrated (1) a strong showing of the likelihood of success and (2) that it will suffer irreparable harm." *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *cf. Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) ("A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." (internal quotation marks omitted)). Critically, to satisfy the likelihood-of-success requirement here, Defendants must not only demonstrate that this Court erred in its decisions, but also that the Second Circuit is likely to grant mandamus. *See, e.g.*, *Emp'rs Ins. of Wausau v. News Corp.*, No. 06-CV-1602 (SAS), 2008 WL 4560687, at *1 (S.D.N.Y. Oct. 6, 2008) (denying motion to stay pending mandamus where "plaintiffs have made no showing that their mandamus petition has a likely chance of success"). That is a very high burden. Indeed, to succeed in their mandamus petition, Defendants must overcome the "expressed reluctance" of the Second Circuit "to overturn discovery rulings" by demonstrating that the issue here "is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment." *In re the City of New York*, 607 F.3d 923, 939 (2d Cir. 2010). If Defendants meet *those* requirements, they must *also* show that their "right to issuance of the writ is clear and

indisputable," *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (internal quotation marks omitted); *see also In re the City of New York*, 607 F.3d at 943 ("Because a writ of mandamus is a 'drastic and extraordinary remedy reserved for really extraordinary causes,' we issue the writ only in 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'" (quoting *Cheney*, 542 U.S. at 380)).

The Court turns, first, to Defendants' request for a stay of discovery altogether and, then, to their request for a stay of the AAG Gore deposition scheduled for September 12th.

STAY OF DISCOVERY ALTOGETHER

In light of the standards above, Defendants' motion to stay discovery altogether is frivolous. First, a court "must consider a plaintiff's delay in seeking relief when analyzing whether the plaintiff will suffer irreparable harm in the absence of relief." *Ingber v. N.Y.C. Dep't of Educ.*, No. 14-CV-3942 (JMF), 2014 WL 2575780, at *2 (S.D.N.Y. June 9, 2014) (citing *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 39 (2d Cir. 1995)). That is because "inexcusable delay in filing" a motion to stay "severely undermines the . . . argument that absent a stay irreparable harm would result." *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993); *see, e.g., S.E.C. v. WorldCom, Inc.*, 452 F. Supp. 2d 531, 531-32 (S.D.N.Y. 2006) (denying a stay on the ground that the defendant's delay in requesting it was "dilatory in the extreme but also patently prejudicial"); *cf., e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (holding that "significant delay in applying for injunctive relief . . . alone may justify denial" of preliminary relief). Here, the Court authorized extra-record discovery on July 3, 2018, and set a tight discovery schedule in light of the parties' agreement that Plaintiffs' claims in these cases should be resolved quickly to allow Defendants to prepare for the 2020 census. (July 3 Oral Arg. Tr. 87-89, 91). Nevertheless, Defendants waited *nearly two full*

months to seek a stay of the Court's ruling (and even then filed their motion at 6 p.m. on the eve of a three-day weekend) — during which time the parties conducted substantial discovery. That delay, in itself, belies Defendants' conclusory assertions of irreparable harm.

That is enough to defeat Defendants' claim of irreparable harm, but their claim — that, "[w]ithout a stay, Defendants will be required to expend significant time and resources to collect, review, and produce additional discovery materials," (Defs.' Ltr. 3) — does not withstand scrutiny for two independent reasons. First, "[t]he prospect of burdensome or expensive discovery alone is not sufficient to demonstrate 'irreparable injury.'" *M.D. v. Perry*, No. C-11-84 (JGJ), 2011 WL 7047039, at *2 (S.D. Tex. July 21, 2011); *see, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *see also, e.g.*, *Linden v. X2 Biosystems, Inc.*, No. C17-966 (RSM), 2018 WL 1603387, at *3 (W.D. Wash. Apr. 3, 2018); *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. H-14-3428, 2017 WL 3620590, at *4 (S.D. Tex. Aug. 23, 2017); *In re: BP P.L.C. Sec. Litig.*, No. 4:10-CV-4214, 2016 WL 164109, at *2 (S.D. Tex. Jan. 14, 2016); *DL v. District of Columbia*, 6 F. Supp. 3d 133, 135 (D.D.C. 2014). Second, and in any event, Secretary Ross's decision to add the citizenship question is the subject of parallel litigation in the Northern District of California and the District of Maryland. (*See* Docket Nos. 221, 224, 287). The judges presiding over those cases have also — and independently — allowed extra-record discovery, and to date Defendants have not sought a stay of either of those rulings. Thus, granting a stay here would not even provide Defendants with the relief they seek. *Cf., e.g.*, *V.S. v. Muhammad*, No. 07-CV-1281 (DLI) (JO), 2009 WL 936711, at *1 (E.D.N.Y. Apr. 3, 2009) (finding a claim of irreparable harm suspect because the party claiming harm "will be subject to discovery, including giving deposition testimony and providing documents"

regardless of the relief sought).

The Court could deny Defendants' motion for a stay of discovery altogether on that basis alone, but the other factors to be considered compel the same conclusion. First, Defendants do not come close to demonstrating a likelihood of success on the merits. They contend that the Court failed to apply the correct legal standard and erred in inferring bad faith "primarily from" the timing of Secretary Ross's decision relative to the DOJ letter (*see* Defs.' Ltr. 2), but Defendants are wrong on both counts. First, in its July 3rd oral decision, the Court indisputably articulated and applied the correct legal standard, to wit that "a court may allow discovery beyond the record where 'there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers.'" (July 3 Oral Arg. Tr. 82 (quoting *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997))). In fact, it is Defendants who get the legal standard wrong, insisting that the Court could not authorize extra-record discovery without "a strong demonstration that Secretary Ross did not actually believe his stated rationale for reinstating a citizenship question." (Defs.' Ltr. 2). Notably, however, the only authority Defendants cite for that proposition is *National Security Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) — a non-binding decision regarding the Freedom of Information Act and the deliberative-process privilege that has literally nothing to do with the issue here.[2]

Second and in any event, Defendants badly mischaracterize the basis for the Court's finding of potential bad faith. The Court did not rely "primarily" on the relationship in time between Secretary Ross's decision and the DOJ letter. Instead, the Court relied on several considerations that, taken together, provided a "strong showing . . . of bad faith." (July 3 Oral

[2] Defendants implicitly concede the inaptness of the D.C. Circuit's decision by citing it using the "*cf.*" signal, but even that understates the case's irrelevance to the matter at hand.

Arg. Tr. 82 (quoting *Nat'l Audubon Soc'y*, 132 F.3d at 14)). Those considerations included: (1) Secretary Ross's June 21, 2018 supplemental memorandum (Docket No. 189-1), in which he suggested that he had "already decided to add the citizenship question before he reached out to the Justice Department"; (2) allegations that Secretary Ross "overruled senior Census Bureau career staff, who had concluded . . . that reinstating the citizenship question would be very costly and harm the quality of the census count"; (3) claims that the Census Bureau "deviated significantly from standard operating procedures in adding the citizenship question"; and (4) Plaintiffs' *prima facie* showing that Secretary Ross's stated justification was pre-textual. (July 3 Oral Arg. Tr. 82-83 (internal quotation marks and brackets omitted)). Taken together, those considerations provided the Court with a solid basis to conclude that Plaintiffs had made a sufficient showing of bad faith to warrant extra-record discovery. *See, e.g.*, *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231, 233 (E.D.N.Y. 2006) (authorizing extra-record discovery where there was evidence that the agency decisionmakers had made a decision and, only then, took steps "to find acceptable rationales for the decision"; where "senior level personnel . . . overruled the professional staff"; and where the decisionmaking process was "unusual" in various respects). If anything, the basis for that conclusion appears even stronger today. (*See* Pls.' Opp'n 2 n.1).

Finally, given the importance of the census and the need for a timely resolution of Plaintiffs' claims, staying discovery altogether will substantially injure both Plaintiffs and the public interest. As noted, Defendants themselves agree that there is a strong interest in resolving Plaintiffs' claims quickly given the need to prepare for the 2020 census. (*See* Docket No. 103, at 4-5 (noting that "the Census Bureau has indicated in its public planning documents that it intends to start printing the physical 2020 Census questionnaire by May 2019" and that Ron Jarmin,

Acting Director of the Census Bureau and a Defendant here, "testified under oath before Congress . . . that the Census Bureau would like to 'have everything settled for the questionnaire this fall'" and "wants to resolve this issue 'very quickly'")). Staying discovery altogether would plainly make it difficult, if not impossible, to meet that goal. More broadly, there is a strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner — and, relatedly, that it is conducted in a manner that "bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment); *see id.* ("The open nature of the census enterprise and the public dissemination of the information collected are closely connected with our commitment to a democratic form of government."). Those interests weigh heavily against any delay and in favor of discovery to ensure an adequate record for the Court to review Defendants' decision to add the citizenship question.

STAY OF THE AAG GORE ORDER

Although Defendants' motion for a stay of the AAG Gore Order arguably presents a closer question, it too falls short. First, for the reasons discussed above, Plaintiffs and the public have a strong interest in ensuring that this case proceeds without unnecessary delay and that there is an adequate record for the Court to evaluate the lawfulness of Defendants' decision to add the citizenship question to the census questionnaire. Second, once again, Defendants inexplicably delayed in seeking relief. The Court entered the Order compelling the deposition of AAG Gore on August 17, 2018, yet Defendants waited two full weeks, until August 31, 2018, to file their motion for a stay. Even then, they filed their motion at 6 p.m. on the eve of a three-day weekend, with only six business days — two of which are religious holidays during which the Court is unavailable — before the AAG Gore deposition. To the extent that Defendants claim

allowing the deposition to proceed would result in irreparable harm, therefore, "the irreparability is a product of [their] own delay. This is a delaying tactic that is inequitable to the [Plaintiffs] and to the courts as well." *Hirschfeld*, 984 F.2d at 39 (internal quotation marks omitted). On top of all that, Defendants' claim that a deposition of AAG Gore would be uniquely and irreparably burdensome is belied by the fact that, as Defendants themselves point out, "Plaintiffs have [already] deposed six high-ranking Commerce and Census Bureau officials." (Defs.' Ltr. 3). More broadly, the burdens of discovery, including depositions of government officials, are not inherently irreparable — particularly where, as here, the Court has taken various steps to limit the scope of discovery and to protect any relevant privileges. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 180-81 (D.D.C. 2008).

Finally, and in any event, Defendants fail to show a likelihood of success on the merits of their mandamus petition. Quoting *Lederman v. New York City Department of Parks and Recreation*, 731 F.3d 199 (2d Cir. 2013), for the proposition that "judicial orders compelling testimony of high-ranking officials are highly disfavored and are justified only under 'exceptional circumstances,'" Defendants contend that the Court erred in concluding that there was a need to compel AAG Gore's testimony. (Defs.' Ltr. 3). Significantly, however, in opposing Plaintiffs' motion to compel AAG Gore's testimony, Defendants did not make that argument, let alone cite *Lederman*; instead, they relied exclusively on the standard set forth in Rule 45 of the Federal Rules of Civil Procedure. (*See* Docket No. 255). That may well constitute a formal waiver, but it *certainly* weighs against the likelihood of mandamus. *See, e.g.*, *In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133, 1135 (4th Cir. 1992) ("[F]ailure to raise [an] issue . . . in the face of the [petitioner's] admitted knowledge of the importance of the question to its case, can only weigh against its present petition for the extraordinary writ of mandamus.").

And in any event, the Court's decision was consistent with, if not compelled by, *Lederman*. Notably, the *Lederman* Court provided two *alternative* examples of showings that would satisfy that standard: "that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.* (emphasis added). Consistent with those examples, the Court found that a deposition of AAG was appropriate. "Given the combination of AAG Gore's apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census and the Court's prior rulings," the Court explained, "his testimony is plainly 'relevant,' within the broad definition of that term for purposes of discovery." (Gore Order 1). And "given Plaintiffs' claim that AAG Gore 'ghostwrote DOJ's December 12, 2017 letter requesting addition of the citizenship question,'" — a claim that Defendants have conspicuously not disputed — he "possesses relevant information that cannot be obtained from another source." (*Id.* at 1 (citing *Marisol A. v. Giuliani*, No. 95-CV-10533 (RJW), 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998)).

In challenging the Court's decision, Defendants suggest that the Court was required to consider whether there were "less burdensome means" to obtain the information in AAG Gore's possession. (Defs.' Ltr. 3). As *Lederman* makes clear, however, where a court finds that the relevant government official "has unique first-hand knowledge related to the litigated claims," it need not make a separate finding "that the necessary information cannot be obtained through other, less burdensome or intrusive means." 731 F.3d at 202. In any event, the Court did make the latter finding here, as it expressly concluded that "AAG Gore possesses relevant information *that cannot be obtained from another source*." (Gore Order 2 (emphasis added)). More broadly, although Defendants are correct that "[t]he decision Plaintiffs challenge" in these cases "was

made by the Secretary of Commerce, not the Department of Justice," it does not follow — as Defendants contend — that the information possessed by AAG Gore is "irrelevant to assessing the Commerce Secretary's reasons for adopting a citizenship question." (Defs.' Ltr. 3). Among other things, AAG Gore's testimony is plainly relevant to whether Secretary Ross "made a decision and, only thereafter took steps 'to find acceptable rationales for the decision.'" (July 3 Oral Arg. Tr. 82 (quoting *Tummino*, 427 F. Supp. 2d at 233)). It is also relevant to whether Secretary Ross's stated rationale — that reinstating the citizenship question was necessary to enforce the Voting Rights Act — was pre-textual. After all, Defendants themselves concede that "any requests for citizenship data with a Voting Rights Act enforcement rationale would naturally come from the head of the Civil Rights Division," (Docket No. 236, Ex. 5, at 50), and Secretary Ross has disclosed that it was he who "inquired whether the Department of Justice . . . would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act," (Docket No. 189). Put simply, a deposition of the person who apparently wrote the memorandum that Secretary Ross himself requested and then later relied on to justify his decision to add the citizenship question is highly relevant "to assessing the Commerce Secretary's reasons." (Defs.' Ltr. 3).

CONCLUSION

For the foregoing reasons, Defendants' motion for a stay of discovery is DENIED in its entirety. The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 292 and 18-CV-5025, Docket No. 116.

SO ORDERED.

Dated: September 7, 2018
New York, New York

JESSE M. FURMAN
United States District Judge

From: Comstock, Earl (Federal) [redacted]
Sent: 5/2/2017 2:19:11 PM
To: Wilbur Ross [redacted]
CC: Herbst, Ellen (Federal) [redacted]
Subject: Re: Census

I agree Mr Secretary.

On the citizenship question we will get that in place. The broad topics were what were sent to Congress earlier this year as required. It is next March -- in 2018 -- when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss.

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross [redacted] wrote:
>
[redacted] Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [redacted]
> Sent from my iPhone

From: Wilbur Ross PII
Sent: 8/10/2017 7:38:25 PM
To: Comstock, Earl (Federal) PII
Subject: Re: Census Matter

I would like to be briefed on Friday by phone. I probably will need an hour or so to study the memo first.we should be very careful,about everything,whether or not it is likely to end up in the SC. WLR

Sent from my iPad

> On Aug 9, 2017, at 10:24 AM, Comstock, Earl (Federal) < PII > wrote:
>
> PREDECISIONAL AND ATTORNEY-CLIENT PRIVILEGED
>
> Mr. Secretary - we are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday, and we can do the briefing whenever you are back in the office. Since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.
>
> Earl
>
> On 8/8/17, 1:20 PM, "Wilbur Ross" < PII > wrote:
>
> Not Responsive / Deliberative
Not Responsive / Deliberative Were you on the call this morning about Census? They seem dig in about not sling the citizenship question and that raises the question of where is the DoJ in their analysis ? If they still have not come to a conclusion please let me know your contact person and I will call the AG.
Wilbur Ross
>
> Sent from my iPhone
>
>> On Aug 8, 2017, at 10:52 AM, Comstock, Earl (Federal) < PII > wrote:
>>
>> Not Responsive / Deliberative
>
>

September 8, 2017

To: Secretary Wilbur Ross

Fr: Earl Comstock

Re: Census Discussions with DoJ

In early May Eric Branstad put me in touch with Mary Blanche Hankey as the White House liaison in the Department of Justice. Mary Blanche worked for AG Sessions in his Senate office, and came with him to the Department of Justice. We met in person to discuss the citizenship question. She said she would locate someone at the Department who could address the issue. A few days later she directed me to James McHenry in the Department of Justice.

I spoke several times with James McHenry by phone, and after considering the matter further James said that Justice staff did not want to raise the question given the difficulties Justice was encountering in the press at the time (the whole Comey matter). James directed me to Gene Hamilton at the Department of Homeland Security.

Gene and I had several phone calls to discuss the matter, and then Gene relayed that after discussion DHS really felt that it was best handled by the Department of Justice.

At that point the conversation ceased and I asked James Uthmeier, who had by then joined the Department of Commerce Office of General Counsel, to look into the legal issues and how Commerce could add the question to the Census itself.

To: Wilbur Ross [redacted]
From: Davidson, Peter (Federal)
Sent: Tue 11/28/2017 12:53:51 AM
Importance: Normal
Subject: Re: Census. Questions
Received: Tue 11/28/2017 12:53:52 AM

I can brief you tomorrow...no need for you to call. I should have mentioned it this afternoon when we spoke.

Sent from my iPhone

On Nov 27, 2017, at 7:23 PM, Wilbur Ross <[redacted]> wrote:

> Census is about to begin translating the questions into multiple languages and has let the printing contact. We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved. WLR
>
> Sent from my iPhone

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	No. 1:18-cv-5025 (JMF)

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR EXPEDITED PRODUCTION OF DOCUMENTS AND FIRST SET OF INTERROGATORIES TO DEFENDANTS UNITED STATES DEPARTMENT OF COMMERCE AND WILBUR ROSS

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these initial objections and responses to Plaintiffs' First Set of Requests for Expedited Production of Documents and First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. Defendants object to Instructions 4, 5, and 6 to the extent they imply any obligation outside of the scope of Federal Rules of Civil Procedure 26(b)(5) or 34 and the corresponding Local Civil Rules, and on the ground that they are unduly burdensome. In particular, Defendants will not "identify each PERSON or organization having knowledge of the factual basis, if any, upon which the objection, privilege, or other ground is asserted," because such a request has no basis in Rules 26(b)(5) or 34. Concerning privileged material, Defendants reserve the right to create a categorical privilege log as contemplated by Local Civil Rule 26.2(c) and the associated Committee Note. Additionally, documents created by or communications sent to or from litigation counsel (including

Request for Production No. 9. All DOCUMENTS and COMMUNICATIONS that Defendants plan to introduce into evidence at trial.

Objections: Defendants object to this request on the ground that it is premature at this stage of the case, while discovery is still ongoing.

Response: Subject to and without waiving the above objection, Defendants refer Plaintiffs to the complete administrative record upon which the Secretary of Commerce based his decision to reinstate a question concerning citizenship on the 2020 Decennial Census, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF), and the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF).

OBJECTIONS AND RESPONSES TO INTERROGATORIES

Interrogatory No. 1. With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

a. the "senior Administration officials" who "previously raised" reinstating the citizenship question;
b. the "various discussions with other government officials about reinstating a citizenship question to the Census";
c. the consultations Secretary and his staff participated in when they "consulted with Federal governmental components";
d. the date on which the "senior Administration officials" who "previously raised" reinstating the citizenship question first raised this subject; and
e. all PERSONS with whom the "senior Administration officials had previously raised" reinstating the citizenship question.

Objections: Defendants object to this interrogatory because it has five discrete subparts. This interrogatory therefore constitutes five interrogatories for purposes of the limit of 25 interrogatories. *See* Fed. R. Civ. P. 33(a)(1).

Defendants further object to subparts b., c., and d. of this interrogatory insofar as they exceed the scope of information a party may seek at this stage of the litigation pursuant to Local Civil Rule 33.3(a). Consistent with this Local Civil Rule 33.3(a), Defendants construe subparts b.

and c. as requesting only the identities of individuals, and Defendants object to subpart d. as requesting information outside the scope of Local Civil Rule 33.3(a).

Defendants further object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case. Specifically, Defendants object to subpart e. as overbroad and vague, as it sweeps in private conversations with any individual, without scope, that "senior Administration officials had previously raised" reinstating the citizenship question.

Defendants further object to the interrogatory to the extent that it purports to require the identification of the date, location, participants, and subject of any meetings involving the Executive Office of the President. *See Cheney v. U.S. District Court*, 542 U.S. 367, 388 (2004).

Response:

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory:

1.a. Defendants have not to date been able to identify individuals responsive to subpart a. Defendants' investigation is continuing, and Defendants will supplement this response as appropriate.

1.b. Subject to and without waiving the above objections: Mary Blanche Hanky, James McHenry, Gene Hamilton, John Gore, Danielle Cutrona, Jefferson Sessions, Kris Kobach, Steve Bannon, and Wilbur Ross.

1.c. Subject to and without waiving the above objections: Mary Blanche Hanky, James McHenry, Gene Hamilton, John Gore, Danielle Cutrona, Jefferson Sessions, Kris Kobach, Steve Bannon, and Wilbur Ross.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

Interrogatory No. 2. Please IDENTIFY all persons involved in drafting, commenting on, or approving ROSS' March 26, 2018 memorandum.

Objections: Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative process privilege.

Defendants further object to this interrogatory as vague and ambiguous with respect to the term "approving," as the Secretary alone approved the decision and memorandum. Defendants further object to this interrogatory as vague and ambiguous with respect to the term "commenting on."

Response:

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory: John Abowd, Earl Comstock, Peter Davidson, Jessica Freitas, Ron Jarmin, Christa Jones, Karen Dunn Kelley, Enrique Lamas, James Uthmeier, Victoria Velkoff, Michael Walsh, and Attorneys at the Department of Justice.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	No. 1:18-cv-5025 (JMF)

DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS UNITED STATES DEPARTMENT OF COMMERCE AND WILBUR ROSS

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these supplemental objections and responses to Plaintiffs' First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross, as modified by Plaintiffs' counsel by email dated August 27, 2018.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

Interrogatory No. 1. With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

a. the "senior Administration officials" who "previously raised" reinstating the citizenship question;
b. the "various discussions with other government officials about reinstating a citizenship question to the Census";
c. the consultations Secretary and his staff participated in when they "consulted with Federal governmental components";
d. the date on which the "senior Administration officials" who "previously raised" reinstating the citizenship question first raised this subject with SECRETARY ROSS or with COMMERCE; and
e. all PERSONS with whom, to the knowledge of COMMERCE and SECRETARY ROSS, the "senior Administration officials had previously raised" reinstating the citizenship question.

Objections:

Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative-process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case.

Response:

After conducting a diligent search, Defendants do not distinguish among the terms used synonymously in the Secretary's Supplemental Memorandum: "senior Administration officials," "other government officials," and officials at other "Federal governmental components". In order to respond as fully as possible to this interrogatory, Defendants therefore will construe subparts a, b, and c, as coextensive and will identify, as a single group, the individuals within the executive branch but outside the Department of Commerce who, before the December 12, 2017 Department of Justice letter, and as referenced in the Secretary's Supplemental Memorandum, either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act. In accordance with that interpretation, and subject to and without waiving the above objections, Defendants identify the following individuals:

> Mary Blanche Hankey, James McHenry, Gene Hamilton, Danielle Cutrona, John Gore and Jefferson Sessions. Although Kris Kobach is not a "government official" within the meaning of the Supplemental Memorandum, the Defendants identify him nonetheless for

the sake of completeness. Lastly, the Defendants cannot confirm that the Secretary spoke to Steve Bannon regarding the Citizenship Question. However, since the current Administrative Record indicates that Mr. Bannon was attempting to put Mr. Kobach in touch with the Secretary, the Defendants are also listing Mr. Bannon for the sake of completeness.

With respect to Interrogatory 1, subparagraphs a, d, and e, as reflected in the Administrative Record, Secretary Ross discussed the possible reinstatement of a citizenship question on the 2020 decennial census with Attorney General Sessions in August 2017. In addition, it is possible that the two had an additional discussion concerning this issue, and although the date of that conversation is unknown, Defendants believe it took place earlier in 2017.

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: August 30, 2018

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch

/s/ Kate Bailey
KATE BAILEY
GARRETT COYLE
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Tel.: (202) 514-9239
Email: kate.bailey@usdoj.gov

Counsel for Defendants

CERTIFICATION OF EARL COMSTOCK

I certify under penalty of perjury that the foregoing supplemental response to Plaintiffs' Interrogatory No. 1 is true and correct to the best of my knowledge, information, belief, understanding, or recollection, with the understanding that the Department of Commerce is continuing to research its responses to Plaintiffs' interrogatories and reserves the right to further supplement its responses.

Dated: September 5, 2018

Earl Comstock

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	No. 1:18-cv-5025 (JMF)

DEFENDANTS' SECOND SUPPLEMENTAL RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS UNITED STATES DEPARTMENT OF COMMERCE AND WILBUR ROSS

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these second supplemental objections and responses to Plaintiffs' First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross, as modified by Plaintiffs' counsel by email dated August 27, 2018.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

Interrogatory No. 1. With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

a. the "senior Administration officials" who "previously raised" reinstating the citizenship question;
b. the "various discussions with other government officials about reinstating a citizenship question to the Census";
c. the consultations Secretary and his staff participated in when they "consulted with Federal governmental components";
d. the date on which the "senior Administration officials" who "previously raised" reinstating the citizenship question first raised this subject; and
e. all PERSONS with whom the "senior Administration officials had previously raised" reinstating the citizenship question.

Objections:

Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative-process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case.

Response:

After conducting a diligent search, Defendants do not distinguish among the terms used synonymously in the Secretary's Supplemental Memorandum: "senior Administration officials," "other government officials," and officials at other "Federal governmental components." In order to respond as fully as possible to this interrogatory, Defendants therefore will construe subparts a, b, and c, as coextensive and will identify, as a single group, the individuals within the executive branch but outside the Department of Commerce who, before the December 12, 2017 Department of Justice letter, and as referenced in the Secretary's Supplemental Memorandum, either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act. In accordance with that interpretation, and subject to and without waiving the above objections, Defendants identify the following individuals.

Mary Blanche Hankey, James McHenry, Gene Hamilton, Danielle Cutrona, John Gore, and Jefferson Sessions. Although Kris Kobach is not a "government official" within the meaning of the Supplemental Memorandum, the Defendants identify him

nonetheless for the sake of completeness. Secretary Ross recalls that Steven Bannon called Secretary Ross in the Spring of 2017 to ask Secretary Ross if he would be willing to speak to then-Kansas Secretary of State Kris Kobach about Secretary Kobach's ideas about a possible citizenship question on the decennial census. The Defendants therefore are also listing Mr. Bannon for the sake of completeness. In addition, Secretary Ross discussed the possible reinstatement of a citizenship question on the 2020 decennial census with Attorney General Sessions in the Spring of 2017 and at subsequent times.

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: October 11, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
KATE BAILEY
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Counsel for Defendants

CERTIFICATION OF EARL COMSTOCK

I certify under penalty of perjury that the foregoing second supplemental response to Plaintiffs' Interrogatory No. 1 is true and correct to the best of my knowledge, information, belief, understanding, or recollection, with the understanding that the Department of Commerce is continuing to research its responses to Plaintiffs' interrogatories and reserves the right to further supplement its responses.

Dated: October 11, 2018

Earl Comstock

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

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

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.

Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of Arnold & Porter, 601 Massachusetts Avenue NW, Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:08 a.m., when were present on behalf of the respective parties:

A Michael Walsh, I know I did. I don't recall if I discussed with David or not.

Q Anyone else?

A I likely talked to James Uthmeier.

Q Anyone else outside --

A Peter Davidson.

Q I'm sorry. Please answer.

A No. Peter Davidson. But those would have been the likely candidates. Again, I don't recall the exact discussions.

Q This was two months ago, correct?

A Correct.

Q Did you discuss the draft of this memo with anybody outside the Office of the General Counsel at Commerce?

A Other than when the Secretary signed it, no.

Q Okay. Tell me who you discussed it with when the Secretary signed it?

A The Secretary.

Q And what did you discuss with him when he signed it?

A Mr. Secretary, the Justice Department recommends that we file this supplemental memo, and so we recommend you sign it.

Q And did he read it when you showed it to him?

A I believe he did, yes.

Q Had you shown it to him before that conversation?

A I -- I don't know.

Q Do you know if OGC had shown it to him before that conversation?

A It's entirely possible, yes.

Q Do you know if the Justice Department showed it to him before that conversation?

A I don't believe the Justice Department came over to meet with them.

Q Did you talk with anyone other than the Secretary or your colleagues from the Office of General Counsel about this memo before June 21st?

A Not that I recall.

Q Did you discuss with it Karen Dunn Kelley?

Do you see that?

A Yes.

Q Okay. So before May 2, 2017, you had not had any discussions with the Department of Justice about the citizenship question, right?

A Not to my knowledge.

Q What did you do to arrange a meeting with DOJ staff to discuss?

A I asked Eric Branstad for a name over at DOJ, and he provided me the name of Mary -- Mary Jane [sic] Hankey I think it was, whom I then contacted.

Q Okay. Your email refers to the court cases to illustrate that DOJ has a legitimate need for the question to be included.

A That's what it says, yes.

Q What were the other needs that you had talked about for including the citizenship question?

A I don't recall.

Q Okay. And by legitimate need, were you concerned that other needs that didn't come from

MR. GARDNER: Objection. Mischaracterizes the witness's previous testimony.

THE WITNESS: My previous testimony was the Department of Justice sent to the Department of Commerce, from the Justice Department to the Office of General Counsel, a draft document suggesting that the Secretary needed to sign this. That document was reviewed by the Office of General Counsel and myself, edits were made, the document produced, and the Secretary then signed it.

BY MR. GERSCH:

Q Yeah. My question was a little different.

My understanding of your testimony this morning was you recommended that the Secretary sign this supplemental memorandum based on advice you received from the Department of Justice; is that correct?

MR. GARDNER: Objection. Mischaracterizes the witness's previous testimony.

THE WITNESS: Once again, the

Department of Justice, who are our counsel, suggested that a supplemental memorandum was needed. This was not something Department of Commerce generated. This was something the Department of Justice, as our counsel, recommended be provided. Following up on that advice, we worked on the document and then had the Secretary sign it. We were following advice of counsel.

BY MR. GERSCH:

Q Well, again, I'm not sure I've got an answer to my question.

My understanding -- well, I'll put it -- without respect to what you testified to this morning, is it correct that you advised the Secretary to sign the supplemental memorandum based, in part, on advice from the Department of Justice?

A Again, I'm not sure I'm following the logic of your question. But, once again, this document was produced initially by the Department of Justice, who sent it to the Department of Commerce with the recommendation

that the Secretary, for purposes of this litigation, needed to submit this supplemental memorandum.

So we reviewed it, made a few edits, and then we had the Secretary sign it. We were following the advice of our counsel. I'm not sure which part of that answer you're not following.

Q I just asked whether part of the basis for your advice to the Secretary to sign it was the advice you got from the Department of Justice?

A Obviously.

Q Thank you.

Did you talk to the Department of Justice about why it was a good idea for the Secretary to sign this memorandum?

A No.

Q Did anyone?

A You'd have to ask our Office of General Counsel.

Q And it's your testimony that you had no dealings with the Department of Justice about this memorandum?

A That's correct.
Q Okay.
MR. GERSCH: Let's take our short break here.
MR. GARDNER: How long?
MR. GERSCH: Ten minutes or so.
VIDEOGRAPHER: This is the end of Media Unit Number 4. The time on the video is 1:58 p.m. We are off the record.
(Off the record.)
VIDEOGRAPHER: This begins Media Unit 4. The time on the video is 2:14 p.m. We are on the record.
BY MR. GERSCH:
Q Mr. Comstock, we're back on the record. Before the break, I was asking some questions about 2018. Now I want to go back to 2017.
A Okay.
Q You with me?
A I'm with you.
Q All right. I want to go back to the spring of 2017 when Secretary Ross requests the

inclusion of a citizenship question on the census. At that point in time, the Department of Justice had made no request to Commerce for the addition of a citizenship question, correct?

A That's correct.

Q And they certainly hadn't asked -- withdrawn.

The Department of Justice certainly hadn't asked Commerce to add a citizenship question because of the VRA. That's also correct; isn't it?

A Well, they didn't ask us to add a citizenship question at that point. So speculating as to why they would ask is irrelevant.

Q I'm not asking you to speculate. The one thing we can be sure of is they didn't ask about the VRA is because they didn't ask at all?

A Correct.

Q All right. And when Secretary Ross says to you in the spring, in whatever words he used, that he wants a citizenship question added to the

Q The initial impetus for putting the citizenship question on the 2020 census was not DOJ's idea; is that correct?

A That's correct.

Q It was Secretary Ross's idea, I think you've testified to that, correct?

A He was the one who asked me to investigate it, yes.

Q He told you sometime shortly after he was confirmed that he wanted the question on the 2020 census, correct?

A He asked me to explore putting it on, yes.

Q Well, he actually said he requests the question be put on the census, correct?

A That was the way he phrased it, yes.

Q You said you would make that happen, correct?

A I said I would do my best.

Q And you would get the citizenship question in place, I think was -- were your words?

A I said I would work to get that in place.

Q And he asked you several times during the year what progress you were making on this; is that correct?

A That's correct.

Q And you met with Mary Blanche Hankey at DOJ as a result of that, correct?

A Correct.

Q And you wouldn't have met with her if Secretary Ross hadn't ask you to do what you can to put this citizenship question on the census, correct?

A That's correct.

Q And the only subject that you talked to Ms. Hankey about at that meeting was the citizenship question, correct?

A No. I'm not sure that's the case.

Q What else did you talk to her about?

A I think we talked generally about what the Department of Commerce and Department of Justice overlap on, what we work on. So it was just broader conversation, but the primary focus was on the citizenship question.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, et al., :

Plaintiffs, :

vs. : Civil Action No.

UNITED STATES DEPARTMENT OF : 1:18-cv-2921-JMF

COMMERCE, et al., :

Defendants. : Volume II

- - - - - - - - - - - - - - - - - - x

CONTINUED VIDEOTAPED 30(b)(6)DEPOSITION OF:

UNITED STATES CENSUS BUREAU GIVEN BY JOHN M. ABOWD

DATE: Friday, October 5, 2018

TIME: 9:05 a.m.

LOCATION: Arnold & Porter Kaye Scholer

601 Massachusetts Avenue, N.W.

Washington, D.C.

REPORTED BY: Denise M. Brunet, RPR

Reporter/Notary

Veritext Legal Solutions

1250 Eye Street, N.W., Suite 350

Washington, D.C. 20005

population. Sound right?

A I didn't do the calculation, but I'll accept that.

Q Thanks. And the Census Bureau expects under this scenario that, under alternative C, you would not be able to link about 40.4 million people to administrative records on citizenship, correct?

A Correct.

Q So under this scenario, if you use alternative C, the Census Bureau would have to model or impute the citizenship status of about 12 percent of the population to produce the CVAP data that DOJ has requested, correct?

A Correct.

Q Now, let's talk about alternative D, which is to both include a citizenship question on the census and to rely on administrative records. Now, the Census Bureau did not recommend alternative D, correct?

A Correct.

Q And the Census Bureau still does not

marked for identification.)

BY MR. HO:

Q I want to ask you about a document, Exhibit -- that has been marked as Exhibit 27, the title of which is, Proposed content test on citizenship question. This document sets forth a proposal for two different RCTs for the citizenship question on the census, correct?

A It's one RCT with two different precisions of estimation.

Q And the RCT, as proposed here, would have taken six weeks to collect the data, correct?

A Correct.

Q And the proposal was to initiate the RCT in either November of 2018 or February of 2019, correct?

A Correct.

Q In either case, the RCT could have been completed before census forms are due to be printed, correct?

A Correct.

Q The cost of this proposal, there are two

variations on it, but it ranges from 2 million for one option to 4.1 million for the other option, correct?

A Correct.

Q Does the Census Bureau have the money to conduct either option?

A Yes.

Q This proposal was rejected by a group of decision-makers, including Dr. Lamas, Dr. Jarmin and Under Secretary Karen Dunn Kelley, correct?

A That is what I testified, yes.

Q Is it your understanding that the proposal was rejected by a different decision-maker than those three people?

A I wasn't in the conversation. I'm reporting it based on a summary given to me by Dr. Jarmin and Lamas.

Q Is it the Census Bureau's understanding that these three individuals jointly made the decision to reject the RCT proposal?

A Yes.

Q What is the Census Bureau's understanding