No. 18A375

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

REPLY IN SUPPORT OF RENEWED APPLICATION FOR A STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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The Secretary of Commerce reinstated a citizenship question on the decennial census, as was asked of all recipients from 1820 to 1950 (except for 1840), and as was asked of a sample of the population through 2000. If included, the citizenship question will be one of several demographic questions (including ones inquiring about race, gender, and relationship status) on the decennial census form sent to every household. Respondents nevertheless object to the Secretary's reasonable decision to add a citizenship question back to the decennial census on the ground that some people in some households with aliens who are unlawfully present might refuse to answer the question, despite their legal obligation to do so.

The speculative possibility of illegal third-party conduct cannot effectively veto otherwise lawful government action. But

at a minimum, respondents' claims in this lawsuit under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., must be evaluated based on the "administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam). And they certainly do not justify an intrusive fishing expedition involving the depositions of high-ranking government officials, including a Cabinet Secretary, to probe the Secretary's mental processes when he decided to reinstate the citizenship question. See United States v. Morgan, 313 U.S. 409, 422 (1941); Morgan v. United States, 304 U.S. 1, 18 (1938).

Respondents contend that they are entitled to extra-record discovery because they have made a "strong showing of bad faith or improper behavior," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), but they fundamentally misunderstand what is required to show such bad faith. Their entire argument, from the first page to the last, rests on an assertion that Secretary of Commerce Wilbur L. Ross, Jr.'s stated reasons for his decision were pretextual because he might already have been predisposed to reinstate the citizenship question before the Department of Justice (DOJ) sent its December 12, 2017 letter. Even if that were true, it would be insufficient to show "bad faith" because it does not establish that Secretary Ross had unalterably prejudged the issue, acted on the basis of any legally

forbidden motive, or did not actually believe his stated rationale. Even respondents' legally insufficient assertions of pretext and predisposition are tenable only by taking their own allegations of impropriety as true, drawing all inferences in their favor, and accepting their unfair caricatures of the Secretary's actions. This contravenes the presumption of regularity that courts must give to Executive Branch action. See United States v. Armstrong, 517 U.S. 456, 464 (1996); cf. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

Nor do respondents offer any arguments beyond those the district court articulated (Appl. App. (App.) 6a) showing "exceptional circumstances" to justify deposing high-level government officials, including Secretary Ross. Critically, they still have not explained why the information they seek is unavailable from other sources or from alternatives to depositions; instead, they inaccurately assert that the government's proposed alternatives already had been unsuccessfully tried.

Finally, respondents' claim that the government waited too long to challenge this improper discovery is meritless. The government acted promptly to stop the depositions of Secretary Ross and Acting Assistant Attorney General (AAG) John M. Gore, and consistently objected to the extra-record discovery that opened the door to those depositions, although the government reluctantly

complied when that discovery was limited to document production and depositions of lower-ranking officials. "In light of the drastic nature of mandamus * * * , the Government cannot be faulted for attempting to resolve the dispute through less drastic means." Cheney v. United States Dist. Court, 542 U.S. 367, 379 (2004).

ARGUMENT

A stay pending disposition of the government's forthcoming petition for a writ of mandamus or a writ of certiorari is justified because this Court is likely to reverse the court of appeals' decision or directly grant mandamus relief.[1] In the alternative, and to avoid repetitive filings, the Court could construe the government's stay application as that petition for a writ of mandamus or a writ of certiorari.

1. The government's right to mandamus relief is clear and indisputable. See Appl. 22-38. Nothing in respondents' submissions casts doubt on that conclusion.

[1] Contrary to respondents' assertions (Resp. of N.Y. Immigration Coal. et al. in Opp. (NYIC Br.) 58-59; Resp. of Gov't Pls. (State Br.) 17 n.2), there is no bar to a stay pending a petition for a writ of certiorari from a denial of mandamus relief in federal court. See Stephen M. Shapiro et al., Supreme Court Practice § 17.7, at 885 (10th ed. 2013). And at any rate the government intends to file, or in the alternative requests that this Court construe the stay application as, a petition for a writ of mandamus.

a. Respondents have not made "a strong showing of bad faith or improper behavior," as required to seek discovery outside the administrative record. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). They devote a significant portion of their briefs to reciting a litany of facts and inferences that, they claim, support the district court's conclusion that Secretary Ross's stated reasons for reinstating a citizenship question to the decennial census were pretextual. For example, they claim that Secretary Ross's supplemental memorandum contradicts his initial memorandum, which supposedly said that he never considered the citizenship question before the December 12, 2017 request from the DOJ. Resp. of N.Y. Immigration Coal. et al. in Opp. (NYIC Br.) 2, 8-10, 25-27, 29-32, 34-35, 40; Resp. of Gov't Pls. (State Br.) 2-3, 6-8, 24-26, 29-30. They further claim that the Secretary lied in his testimony to Congress. NYIC Br. 2, 9-10, 26-27; State Br. 7, 24-26. And they claim that the Secretary's communications with other people about the citizenship question were nefarious, and that these individuals' motives can be imputed to the Secretary. NYIC Br. 4-5, 10-11, 47-48; State Br. 7-9, 21-22, 25, 32-35.

As the government has explained (Appl. 25-27), all of this fundamentally misses the point. The question for bad-faith purposes is not whether Secretary Ross favored a particular outcome before considering and deciding whether to reinstate a citizenship

issue. See Jagers v. Federal Crop Ins. Corp., 758 F.3d 1179, 1185 (10th Cir. 2014); Air Transport Ass'n of Am., Inc. v. National Mediation Bd., 663 F.3d 476, 488 (D.C. Cir. 2011). Nor is the question whether, in addition to the reasons he gave, Secretary Ross had other reasons supporting his decision. See Jagers, 758 F.3d at 1185. To the contrary, Secretary Ross acted in bad faith only if he had unalterably prejudged the issue, acted on the basis of a legally forbidden motive, or did not sincerely believe his principal stated rationale: that reinstating a citizenship question would assist the DOJ with enforcement of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 et seq. Respondents make no creditable showing -- and the district court did not find -- that Secretary Ross did any of those things. As a matter of law, therefore, respondents have not made any showing, let alone a strong one, of bad faith.

Even taken on its own terms, respondents' effort to impute bad faith at every turn is not how courts should approach the question of extra-record discovery. The Secretary's supplemental memorandum did not change the Secretary's rationale or otherwise contradict his original memorandum. The original memorandum understandably focused on the formal process that began with DOJ's formal request letter. See App. 117a-124a. It is unremarkable that the memorandum did not discuss the informal intra- and inter-agency deliberations that preceded the formal process. Such

informal deliberations are routine, and agency decision documents rarely if ever discuss them. In light of this litigation and respondents' allegations of bad faith, the supplemental memorandum provided "further background and context" about the informal process that preceded the formal one. Id. at 116a. The only way to view the two memoranda as contradictory is to ignore this context, to take respondents' speculative allegations in their complaints as true (and draw all inferences in their favor), and to presume bad faith on Secretary Ross's part.

As the government has explained (Appl. 24-25), that misconstrues what a "strong showing of bad faith" requires. Overton Park, 401 U.S. at 420. For one thing, it requires a "showing," not merely allegations. Moreover, drawing inferences of bad faith in respondents' favor contravenes the presumption of regularity that courts must give to Executive Branch action. United States v. Armstrong, 517 U.S. 456, 464 (1996); cf. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Tellingly, in 96 combined pages of briefing, respondents do not even attempt to address this principle of judicial review of executive action, or to explain how the district court's assumptions and inferences complied with it. Indeed the court seemed to go out of its way to adopt the most uncharitable reading possible of the Secretary's memoranda and testimony to Congress, rather than giving the Secretary the

benefit of the doubt, as the presumption of regularity requires. See App. 8a-10a.

Similarly offensive to the presumption of regularity is respondents' suggestion that the motives of other individuals -- based on their purportedly "long record of seeking to reduce immigration" -- can be imputed to Secretary Ross or somehow contaminated his decisionmaking. NYIC Br. 11; see id. at 48; State Br. 7-8, 13, 32-34. Even assuming these third parties wanted to reinstate the citizenship question based on improper bias, there is no basis for imputing those motives to the Secretary. Nor is there any basis to conclude that Secretary did not sincerely believe the rationale he provided in his decisional memorandum: to assist DOJ in its VRA enforcement efforts. See App. 117a-124a.

Respondents, like the district court, do not engage with the merits of DOJ's stated rationale. Neither respondents nor the district court offer any basis to dispute DOJ's conclusions that the current citizenship data (from annual surveys sent to only small samples of the population) "do[] not yield the ideal data for [DOJ's] purposes" in VRA enforcement and that more granular citizenship data "would greatly assist the redistricting process." App. 126a-127a. Instead, they argue only that adding a citizenship question to the decennial census will be ineffective to obtain reliable data for DOJ's purposes. See NYIC Br. 35-36; State Br. 9, 27-28. But that is an argument that the decision to reinstate

a citizenship question is arbitrary and capricious on the merits -- in other words, a garden-variety APA challenge that must be decided on the administrative record. See Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam).

Even the appellate cases respondents cite (NYIC Br. 24-25; State Br. 22) for the proposition that they can go outside the record to evaluate a decisionmaker's bias or pretext actually seemed to limit their review to the administrative record. See, e.g., Woods Petroleum Corp. v. United States Dep't of Interior, 18 F.3d 854, 858-860 (10th Cir. 1994); United States Lines, Inc. v. Federal Mar. Comm'n, 584 F.2d 519, 542 (D.C. Cir. 1978).[2] And those courts of appeals have since made clear that simply favoring a particular course of action at the outset does not demonstrate bad faith, improper bias, or prejudgment on the part of a

[2] To the extent United States Lines remanded to expand the record to include ex parte communications, it is inapposite. The government does not here challenge the district court's orders about the scope of the administrative record or discovery into collateral issues like standing. Cf. NYIC Br. 54 n.7. The government objects only to "discovery beyond the administrative record" on the merits of respondents' challenge to the agency action. Appl. 40. Moreover, contrary to the state and municipal respondents' contention (State Br. 23), the district court did not rely on the purported incompleteness of the original administrative record in finding bad faith; nor would it be proper to do so. The government's decision to exclude pre-decisional deliberative materials from the administrative record is consistent with the government's longstanding position and is well supported by case law. See, e.g., San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n, 789 F.2d 26, 44-45 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).

decisionmaker. See Jagers, 758 F.3d at 1185-1186; Air Transport, 663 F.3d at 488; see also Appl. 25-27.

b. The failure to make a "strong showing of bad faith" in particular dooms respondents' bid to depose Secretary Ross and Acting AAG Gore.[3] Like the district court, respondents emphasize the Secretary's personal involvement "to an unusual degree" in the decision to reinstate the citizenship question, and his overruling of staff on the desirability and effectiveness of adding the question to the decennial census. App. 8a. As the government has explained (Appl. 27, 33-34), neither is sufficient to establish bad faith.

High-level officials are "personally" involved in a whole host of agency decisions -- and in fact might be expected to be "unusual[ly]" involved in decisions of great importance, such as decisions about the decennial census. Being personally involved, even to an "unusual degree," in an important agency decision cannot be sufficient to expose a high-level official to the disruption of being deposed in APA litigation. See Cheney v. United States Dist. Court, 542 U.S. 367, 386 (2004). The district court's rationale, if taken seriously, would compel the unwilling depositions of high-

[3] Yesterday afternoon, the Senate confirmed Eric S. Dreiband as Assistant Attorney General for the Civil Rights Division. Mr. Gore was, however, the Acting AAG at all times relevant to this dispute. Once AAG Dreiband assumes office, Mr. Gore will be the Principal Deputy AAG.

level government officials, including Cabinet Secretaries, in nearly every APA case challenging agency action of sufficient magnitude.

It is equally irrelevant as a legal matter that Secretary Ross disagreed with his staff. See Appl. 27. The Secretary -- to whom Congress and the President have delegated constitutional authority over the census -- bears ultimate responsibility for agency decisions. Wisconsin v. City of New York, 517 U.S. 1, 23 (1996). It makes no difference whether he overrules just a few of his subordinates or whether, as respondents claim, the Secretary's subordinates "were unanimous" in opposing reinstatement of the citizenship question. NYIC Br. 33. Either way, it is "of no moment in any judicial review of his decision." Wisconsin, 517 U.S. at 23.

c. Nor have respondents established any "exceptional circumstances" to warrant deposing Secretary Ross or Acting AAG Gore. As the government has explained (Appl. 22-38), the district court erred in allowing respondents to probe the Secretary's mental processes in this APA case. The state and municipal respondents now seem to agree: they concede that such discovery is improper. State Br. 29-30. They insist, however, that they seek to depose Secretary Ross "to determine the actual basis and rationale for the Secretary's" decision, not to probe his mental processes. Id. at 29. But the only reason to seek extra-record discovery,

including the depositions at issue, is to probe the Secretary's credibility, as the district court itself explained. App. 13a. If respondents merely want the "actual basis and rationale for the Secretary's" decision, that is readily supplied by documentary evidence in the administrative record. Those documents necessarily supply the sole "basis and rationale" for agency decisionmaking. SEC v. Chenery Corp. 318 U.S. 80, 88 (1943).[4]

The district court also did not sufficiently consider whether there are alternatives to deposing high-level officials such as Secretary Ross. Appl. 32-33. In an effort to rehabilitate the court's failure, respondents claim that they "had already tried [alternative] options and they hadn't worked." NYIC Br. 49; see State Br. 35-36. This is misleading. In an effort "to resolve the dispute through less drastic means," Cheney, 542 U.S. at 379, the government offered additional interrogatories and requests for admission from Secretary Ross himself, or a witness under Federal Rule of Civil Procedure 30(b)(6) -- none of which had "already" been tried. App. 13a. And the district court did not reject these alternatives because they had already been attempted, but because they would not allow respondents to "test or evaluate Secretary

[4] Private respondents suggest that they have an "alternative, non-APA justification" to depose Secretary Ross based on their constitutional claims. NYIC Br. 45. But the APA governs respondents' constitutional claims too, as even the district court recognized. See Appl. 24 n.2.

Ross's credibility," to "try to refresh Secretary Ross's recollection," or to "ask follow-up questions." Ibid.

d. Finally, respondents repeatedly invoke the government's supposed delay in seeking relief from the July 3, 2018 order compelling extra-record discovery. See NYIC Br. 16-18, 21, 54-56; State Br. 19. The government objected to that order at every turn, but complied with it until the district court compelled the deposition of an Acting AAG and, ultimately, the deposition of a Cabinet Secretary. At that point, the government acted promptly to quash the orders. None of this indicates that the government "slept on its rights." Cheney, 542 U.S. at 379. It is commonplace for parties to comply with court orders, even ones that might be improper or unlawful, rather than seek mandamus relief at every juncture. "In light of the drastic nature of mandamus * * * , the Government cannot be faulted for attempting to resolve the dispute through less drastic means." Ibid.

Even assuming the government was somehow tardy in challenging the July 3 order, it would have no bearing on the government's challenge to the court's subsequent orders compelling the depositions of Secretary Ross and Acting AAG Gore. And the propriety of the July 3 order goes directly to the propriety of the depositions. If the district court erred at the threshold in authorizing extra-record discovery, there is no basis to probe Secretary Ross's mental processes when he decided to reinstate the

citizenship question.[5] See, e.g., In re Cheney, 544 F.3d 311, 313 (D.C. Cir. 2008) (per curiam) ("[M]andamus may be warranted where valid threshold grounds" could "obviate the need for intrusive discovery against" high-ranking officials.).

2. As the government has explained (Appl. 39-40), mandamus relief is appropriate under the circumstances, no other adequate means exist for relief, and the government would suffer irreparable harm absent a stay. Private respondents disagree because if the government prevails on the merits, "the Court can simply decline to consider those [extra-record] documents" and "exclude the testimony" of Secretary Ross and Acting AAG Gore. NYIC Br. 58. But that ignores the plainly irreparable harm that comes from forcing high-ranking officials to prepare for and attend depositions and, potentially, trial, and compelling agency staff to continue to respond to discovery requests. See Cheney, 542 U.S. at 386. And it overlooks the balance of harms on the other side, which are minimal. Indeed respondents cannot suffer any harm, much less irreparable harm, from being denied discovery they have no right to obtain in the first place.

Respectfully submitted.

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[5] When the government disclaimed "'retrospective relief' for any discovery already turned over," State Br. 14 (citation omitted), it surrendered only its right to claw back the documents should their production later be deemed improper under the APA. The government did not concede that respondents could prospectively use such extra-record documents at a trial.

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