No. 18-557

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR GOVERNMENT RESPONDENTS

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QUESTIONS PRESENTED

In a lawsuit challenging agency decision-making under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*., it is well established that courts may authorize discovery beyond the administrative record, including deposition testimony, where a strong showing of bad faith or improper conduct by an agency raises significant doubt about whether the agency has fully and accurately disclosed the true basis of its challenged decision. Applying these settled principles to the extraordinary facts presented here, the district court authorized limited discovery after finding that the U.S. Department of Commerce had provided neither the real reason that it decided to add a question about citizenship status to the decennial census questionnaire, nor a complete account of the deliberative process that led to this decision. The district court separately authorized a deposition of the Secretary of Commerce—which this Court subsequently stayed—given his unique, first-hand knowledge about the agency's decision-making process. The district court recently issued a final decision on the merits and vacated as moot its order authorizing a deposition of the Secretary. The questions presented are:

1. Whether this Court should dismiss the writ of certiorari as improvidently granted.

2. Whether the district court acted within its discretion in authorizing limited discovery beyond the agency's proffered administrative record, where extraordinary circumstances raised significant doubts about whether the agency had provided the whole record or an accurate account of its decision-making.

3. Whether the district court acted within its discretion in authorizing a four-hour deposition of the Secretary under the exceptional circumstances presented here, including the Secretary's possession of unique, first-hand knowledge relevant to respondents' claims and unavailable from another source.

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INTRODUCTION

In June 2018, New York State, seventeen other States, sixteen other governmental entities, and the U.S. Conference of Mayors (respondents) sued under the Administrative Procedure Act (APA) to invalidate the decision by the Department of Commerce to add a question about citizenship status to the decennial census. The United States District Court for the Southern District of New York (Furman, J.) granted limited discovery beyond the administrative record based on respondents' "strong showing of bad faith" by petitioners—the Department of Commerce; Secretary of Commerce Wilbur Ross, Jr.; the Bureau of the Census; and the Bureau Director—and later authorized the deposition of the Secretary as part of that discovery. The district court found that discovery was warranted because petitioners had proffered both a patently deficient administrative record and an inaccurate and incomplete explanation of the rationale for the decision to add a citizenship question. The United States Court of Appeals for the Second Circuit declined to issue writs of mandamus to block these pretrial discovery orders. This Court then stayed the Secretary's deposition, otherwise allowed the case to proceed, and granted certiorari on the narrow question whether the Second Circuit should have ordered mandamus relief.

This Court should dismiss the writ of certiorari as improvidently granted or affirm the decisions below. The Court should dismiss the writ because of a significant intervening event. On January 15, the district court entered final judgment, vacating the Secretary's decision and rendering the current proceeding moot or, at best, pointless. The district

court held that the administrative record alone established that the Secretary's decision violated the APA in multiple, independent ways. And the court accordingly vacated as moot its order authorizing the Secretary's deposition. There is now no meaningful relief that petitioners can obtain through this interlocutory appeal that would not be available in an appeal from final judgment.

Moreover, if the Court does not dismiss the writ, it should affirm. The Second Circuit correctly concluded that petitioners had failed to satisfy the stringent standards for mandamus relief. Contrary to petitioners' characterization, the court authorized limited discovery here not to probe the Secretary's subjective thoughts, but rather to uncover objective facts about the information, factors, and rationales that the Secretary directly or indirectly relied on in reaching his decision. That discovery was authorized by the well-established principles that an agency must disclose the whole record of its deliberations to a reviewing court, and that a court may authorize limited discovery upon a strong preliminary showing that the agency acted in bad faith by not being forthcoming about its decision-making.

Applying these principles to the rare and extraordinary facts presented here, the district court reasonably found that petitioners' misleading administrative record and public narrative of their decision-making raised sufficiently serious concerns about the completeness and reliability of the record to warrant limited discovery. The district court also reasonably authorized a four-hour deposition of the Secretary based on his deep personal involvement in the unusual process that led to his decision to add a citizenship question, and respondents' inability to obtain a

comprehensive picture of the information he considered absent his testimony.

STATEMENT

A. The Decennial Census

1. The Constitution requires an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. This enumeration must count all residents, regardless of citizenship status. *Federation for Am. Immigration Reform v. Klutznick* (*FAIR*), 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). The enumeration affects the apportionment of representatives to Congress among the States, the allocation of electors to the Electoral College, the division of congressional districts within each State, the apportionment of state and local legislative seats, and the distribution of hundreds of billions of dollars of federal funding. *See* U.S. Const. art. I, § 2, cl. 3; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). (Second Am. Compl. (Compl.) ¶¶ 139-156, S.D.N.Y. ECF:214.)

Congress has delegated the task of conducting the decennial enumeration to the Secretary of Commerce and the Census Bureau. The Secretary must obtain a total-population count that is "as accurate as possible, consistent with the Constitution" and the law. Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2481 (1997).

2. The Bureau conducts the required decennial enumeration principally by sending a short questionnaire to every household. This questionnaire has not included any question related to citizenship status for more than sixty years. For nearly forty years, the Bureau has vigorously opposed adding any such

question based on its concern that doing so "will inevitably jeopardize the overall accuracy of the population count" by depressing response rates from certain populations, including noncitizens and immigrants. *FAIR*, 486 F. Supp. at 568; *see New York v. Department of Commerce*, 315 F. Supp. 3d 766, 782-85 (S.D.N.Y. 2018).

Although the Bureau has requested citizenship information through other means, such requests have gone to many fewer individuals, most recently through a process separate from the decennial enumeration, and thus have not raised similar concerns. Until 2000, the Bureau requested such information through a "long-form" census questionnaire—a list of questions sent each decade to one of every six households. In 2005, the Bureau replaced the long-form questionnaire with the American Community Survey (ACS), a list of questions sent annually to one of every thirty-six households. Because the ACS and long-form questionnaire differ substantially from the decennial census, testing used for those requests for information "cannot be directly applied to a decennial census environment." U.S. Census Bureau, 2018 End-To-End Census Test—Peak Operations 22-23 (Jan. 23, 2018).

B. The Decision to Add a Citizenship Question

1. In a March 2018 memorandum, the Secretary announced that he had decided to add a citizenship question to the 2020 census questionnaire sent to every household (Pet. App. 136a-151a)—contravening the Bureau's long-held opposition to such a question. The memorandum explained that the Secretary had "initiated" his consideration of whether to add a citizenship question in response to a December 2017 letter by the Department of Justice (DOJ) requesting

citizenship data to help enforcement of the Voting Rights Act (VRA). (Pet. App. 136a.) But this description of the Secretary's decision-making process was misleadingly incomplete. In fact, the Secretary and his staff had engaged in an extensive "deliberative process" for months before receiving DOJ's letter (Pet. App. 134a), with little to no discussion of a VRA-enforcement rationale.

That deliberative process began around February 2017, "[s]oon after [Ross's] appointment as Secretary of Commerce," with the Secretary engaging in "various discussions" with "senior Administration officials" about potentially adding a citizenship question. (Pet. App. 134a.) For example, in the spring of 2017, the Secretary spoke with then–White House Chief Strategist Stephen Bannon about the citizenship question. (J.A. 103, 286.) At Bannon's urging, the Secretary spoke with Kris Kobach, then the Kansas Secretary of State, who asked the Secretary to add a citizenship question as an "essential" tool to resolve "the problem" of counting noncitizens for congressional apportionment.[1] (J.A. 103, 112-113.) Neither Bannon nor Kobach suggested that adding a citizenship question would assist VRA enforcement. (*See* J.A. 112-113.)

Throughout spring 2017, the Secretary pressed his staff to move forward with the addition of a citizenship question to the census. In May 2017, for example, the Secretary asked his staff member Earl Comstock "why nothing [has] been done in response to my months old request that we include the citizenship question."

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[1] No such problem exists. The Constitution requires that all inhabitants, including noncitizens, be counted for congressional apportionment. *See Evenwel*, 136 S. Ct. at 1128-29.

(J.A. 107.) Comstock replied that Commerce would "get that in place." (J.A. 107.) But Comstock had come to believe that Commerce could not add the question on its own, without a request from another federal agency. (J.A. 336-337; Dep. of Earl Comstock 181, 266-267, S.D.N.Y. ECF:490-2.) Accordingly, Comstock reached out to officials at both DOJ and the Department of Homeland Security (DHS) to ask whether either agency would request the addition of a citizenship question. Both agencies declined. (J.A. 128.) The officials from DOJ and DHS who spoke to Comstock were involved with immigration-related matters, not voting-rights enforcement. (J.A. 374.)[2]

Following DOJ's and DHS's rebuffs, Comstock asked James Uthmeir, Senior Counsel to Commerce's General Counsel, to investigate "how Commerce could add the [citizenship] question to the Census itself," without a request for the question from another federal agency. (J.A. 128.) At around this time, Comstock and other staff members discussed whether noncitizens are included in the census enumeration for purposes of congressional apportionment. (*See* J.A. 110.) These communications did not mention the VRA.

During August and September 2017, the Secretary repeatedly requested and received updates from his staff regarding the citizenship question. (J.A. 114-128.) He also inquired again whether DOJ would request the citizenship question, stating that he would

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[2] *See* DOJ, Press Release, Attorney General Sessions Announces Appointment of James McHenry as Director of the Executive Office of Immigration Review (Jan. 10, 2018); Will Racke, *DOJ Gains Another Immigration Hawk as Ex-Sessions Staffer Joins Former Boss*, Daily Caller, Oct. 27, 2017.

"call the AG." (J.A. 115.) Uthmeir and other Commerce staff provided the Secretary with a written memorandum and multiple briefings on the matter.[3] (J.A. 114-127.) In communications about briefing materials that were sent to the Secretary, Uthemeir shared his "recommendation on execution," stating that "our hook" was, "[u]ltimately, we do not make decisions on how the [citizenship] data will be used for apportionment." (Addendum to Br. for Gov't Resps. (Add.) 70 (quotation marks omitted).)

In late August 2017, Commerce sought again to enlist DOJ to request the citizenship question. In response, then–Attorney General Sessions discussed the issue with John Gore, then Acting Assistant Attorney General for the Civil Rights Division, who became DOJ's point person on the matter. (J.A. 376-384.) Although DOJ had already declined to request the question, an advisor to Sessions reassured the Secretary's Chief of Staff that DOJ could "do whatever you all need us to do." (J.A. 135.) The record does not indicate that VRA enforcement was discussed.

Gore then wrote a letter—dated December 12, 2017, and signed by Arthur Gary, General Counsel of DOJ's Justice Management Division, who was not responsible for VRA enforcement—requesting that Commerce add a citizenship question to the decennial census questionnaire. (*See* Pet. App. 152a-157a; J.A. 388.) That letter claimed that the question would allow the Bureau to collect block-level citizenship data that DOJ could use to enforce the VRA's prohibition on diluting the voting power of minority groups. (Pet. App. 152a-157a.)

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[3] Petitioners have withheld this memorandum based on a claim of privilege.

DOJ's letter conspicuously failed to disclose the active role that Commerce had played in generating DOJ's request. As Gore later admitted, none of the DOJ components with principal responsibility for enforcing the VRA had requested the addition of a citizenship question; instead, Gore drafted the DOJ letter solely in response to the Secretary's request that DOJ seek the addition of a citizenship question. (J.A. 373-376, 380-382.) Moreover, in drafting the letter, Gore relied principally on Commerce's written work product and oral advice, rather than the expertise of DOJ staff with VRA-enforcement experience. For example, Gore spoke to Uthmeier and relied on both the memorandum Uthemeir had sent to the Secretary and a handwritten note from Uthmeier containing further information about the citizenship question. (J.A. 386-387.) Gore also consulted directly with Marc Neuman, an outside advisor to the Secretary on census-related issues. (J.A. 105, 155; Dep. of John Gore 437-438, S.D.N.Y. ECF:491-2.) By contrast, Gore admitted that only a single career official with VRA-enforcement experience commented on the letter, and did so only on an early draft. (J.A. 389.) And Gore drafted the letter without knowing whether a citizenship question would result in citizenship data more accurate than the data already used by DOJ to enforce the VRA, and without discussing that issue with Commerce. (J.A. 390-392.)

2. Throughout this process, the Secretary and his staff never informed the Census Bureau about the Secretary's decision to add a citizenship question or his extensive efforts to convince another federal agency to request the question. (J.A. 437-446.) Unaware of the months of deliberations that had already occurred, the Bureau conducted its own

"review [of] all possible ways to address" DOJ's request. (J.A. 177.)

In January 2018, John Abowd, the Bureau's Chief Scientist, and his team of experts provided the Secretary with a memorandum analyzing the effects of adding a citizenship question to the decennial census questionnaire. The memorandum informed the Secretary that adding a citizenship question would be "very costly," would "harm the quality of the census count" by depressing the response rate (primarily from households containing one or more noncitizens), and would generate "substantially less accurate citizenship status data" than the data obtainable from administrative records. (J.A. 181.) The memorandum thus recommended that Commerce use administrative records rather than a citizenship question to provide DOJ with the citizenship data that it was requesting. (J.A. 197-198.) In February 2018, Abowd met with the Secretary to discuss the Bureau's conclusions. (J.A. 504-505.)

Around this time, the Bureau's staff invited DOJ's technical experts to meet to discuss the best way to obtain the citizenship data that DOJ had requested. (J.A. 175-177.) Ron Jarmin, the Acting Director of the Census Bureau, informed DOJ of the Bureau's conclusion that using administrative records to gather citizenship data would produce "higher quality data produced at lower cost" compared with adding a citizenship question to the census. (J.A. 177.) Sessions directed DOJ officials not to meet with the Bureau staff. (J.A. 393-397, 474-475.) Accordingly, in February 2018, Arthur Gary informed Jarmin that the December 2017 letter "fully describes [DOJ leadership's] request" and that DOJ did "not want to meet." (J.A. 227.)

In early March 2018, Abowd and his team provided the Secretary with a memorandum analyzing the effects of using *both* a citizenship question *and* administrative records to generate citizenship data. The memorandum informed the Secretary that this approach would "have all the negative cost and quality implications" of adding the citizenship question while still "result[ing] in poorer quality citizenship data than" relying on administrative records alone. (J.A. 244.)

3. The Secretary declined to follow the Census Bureau's conclusions. Instead, on March 26, 2018, he issued a memorandum publicly announcing his decision to add a citizenship question to the decennial census. (Pet. App. 136a-150a.)

The March 2018 memorandum represented that the Secretary "began a thorough assessment" of whether to add a citizenship question "[f]ollowing receipt" of DOJ's December 2017 letter requesting block-level citizenship data to enforce the VRA. (Pet. App. 136a-137a.) DOJ's request, the Secretary claimed, "initiated a comprehensive review process" by Commerce to give the Secretary "all facts and data relevant to the question." (Pet. App. 136a.) In testimony before Congress, the Secretary reiterated that DOJ had "initiated the request for inclusion of the citizenship question," *H.R. Hearing on Recent Trade Actions* (*H.R. March 22 Hr'g*), 115th Cong. (Mar. 22, 2018) (2018 WLNR 8951469), and that Commerce was "responding solely to [DOJ's] request," *H.R. Hearing on F.Y. 2019 Dep't of Commerce Budget* (*H.R. March 20 Hr'g*), 115th Cong. (Mar. 20, 2018) (2018 WLNR 8815056).

These descriptions were misleading. The March 2018 memorandum failed to disclose that the Secretary had begun considering the citizenship question nearly a year before DOJ's letter, omitting any mention of the extensive deliberations over this issue by the Secretary, his staff, and other individuals. The memorandum also failed to disclose that DOJ had *not* submitted the December 2017 letter on its own initiative, as the Secretary's public statements suggested; instead, Secretary and his staff had approached DOJ to ask that it "request[] inclusion of a citizenship question." (Pet. App. 134a.)

The March 2018 memorandum also identified several reasons for the Secretary's decision that were plainly contradicted by the evidence before him. For example, the memorandum asserted that "limited empirical evidence exists about whether adding a citizenship question would decrease response rates" (Pet. App. 145a), even though the Bureau's substantial empirical testing had shown that adding a citizenship question would significantly decrease response rates and thereby harm the accuracy of the census count. The memorandum also asserted that Commerce could provide the "most complete and accurate" citizenship data to DOJ by using *both* a citizenship question *and* administrative records (Pet. App. 144a), even though the Bureau had concluded that this approach would provide *less* complete and *less* accurate citizenship data than using administrative records alone. The Secretary further asserted that the citizenship question was sufficiently "well tested" (Pet. App. 138a), even though the questionnaire including the citizenship question had not undergone any of the extensive testing required for even a minor alteration to the questionnaire.

C. Procedural History

1. Initial proceedings

In April 2018, respondents filed their complaint, alleging that the Secretary's decision to add a citizenship question was arbitrary and capricious and contrary to law, in violation of the APA; and unconstitutional under the Enumeration Clause. (*See* S.D.N.Y. ECF:1; *see also* Compl. ¶¶ 178-197.)

On June 8, 2018, petitioners purported to file the complete administrative record of all materials the Secretary had considered in deciding to add the citizenship question. But petitioners' administrative record contained scarcely *any* documents from before DOJ sent its December 2017 letter, even though the Secretary had been extensively considering the citizenship question long before DOJ's letter. The only decision memorandum in the initial administrative record—the March 2018 memorandum—also failed to disclose any of the Secretary's extensive pre–December 2017 efforts to add the citizenship question.

On June 21, 2018, petitioners supplemented their administrative record "without explanation" (Pet. App. 96a), adding a half-page supplemental decision memorandum in which the Secretary revealed for the first time—in conflict with his initial explanation—that he and his staff had engaged in an extensive "deliberative process" about the citizenship question for nearly a year before DOJ's letter (Pet. App. 134a). The supplemental memorandum also made public, for the first time, that the Secretary had solicited the December 2017 letter from DOJ. (Pet. App. 134a.) Despite these admissions, the supplemental memorandum offered no details about the months-long deliberation by the Secretary and his staff or about

their collaboration with DOJ to produce the December 2017 letter. Moreover, petitioners continued to assert that their initial administrative record was complete, though it contained essentially no documents about these pre–December 2017 activities. (*See* Pet. App. 87a-89a.)

2. The district court's July 3 order allowing limited discovery

On July 3, the district court authorized three categories of limited discovery, subject to strict limitations on both scope and duration. (Pet. App. 95a-103a.)

First, the court ordered petitioners to complete the deficient administrative record. (Pet. App. 95a-98a.) The court explained that "the absence of virtually any documents predating DOJ's December 2017 letter was hard to fathom" even without the Secretary's supplemental decision memorandum, and was "inconceivable" given the Secretary's admission that his decision-making had begun nearly a year before DOJ's letter. (Pet. App. 97a.)

Second, the court authorized limited expert discovery to aid the court in adjudicating complex issues that are commonplace in census-related challenges. (Pet. App. 102a-103a.)

Third, the court allowed certain additional discovery based on the irregularity of the record petitioners had produced and a strong showing of "bad faith or improper behavior." (Pet. App. 98a (quotation marks omitted).) The court found that the Secretary's eleventh-hour admission in the June 2018 memorandum that he had been pursuing the citizenship question long before DOJ's December 2017 letter showed that he "had provided false explanations of his

reasons for, and the genesis of, the citizenship question" in both his March 2018 decision memorandum and congressional testimony. (Pet. App. 124a; *see* Pet. App. 98a-99a.) The Secretary's misleading account was troubling not only for its falsity but also for its strong suggestion that his stated rationale—to help DOJ enforce the VRA—was manufactured to cover a decision that he had already made "before he reached out to [DOJ]." (Pet. App. 98a; *see* Pet. App. 123a-124a.)

The court also relied on other factors that, considered together, further supported its preliminary finding of pretext and bad faith. (Pet. App. 98a-100a.) For example, the court observed that the Secretary's decision-making had departed from normal procedures, including forgoing the Bureau's normal testing process. (Pet. App. 99a.) The court also noted documentary evidence showing that the Secretary had disregarded the empirical conclusions of the Bureau's professional staff, who had warned that adding the citizenship question would "'harm the quality of the census count'" and would not provide more accurate citizenship data to DOJ. (Pet. App. 99a.)

3. The district court's decision on the motion to dismiss

Shortly after issuing the July 3 discovery order, the district court denied petitioners' motion to dismiss in part and granted it in part. The court concluded that respondents had plausibly alleged standing and that sufficient legal standards existed to review the Secretary's decision under the APA. 315 F. Supp. 3d at 781-90, 793-98. The court thus allowed respondents' APA claims to proceed. *Id.* at 811. The court dismissed respondents' Enumeration Clause claim for failure to state a claim. *Id.*

4. The discovery that resulted from the district court's order

After the district court issued its July 3 order, the parties participated in limited discovery. Much of that discovery is not at issue because petitioners have not challenged it here.

For example, petitioners supplemented their initial, deficient administrative record with 12,000 pages of documents—most of which concerned the previously undisclosed deliberations that the Secretary and his staff engaged in before December 2017. Through document discovery, petitioners also produced an additional 16,000 pages of documents from Commerce, many of which also concerned the pre–December 2017 deliberations and some of which petitioners later stipulated to include in the administrative record. None of this discovery is challenged here.

The parties also engaged in expert and other discovery to create a factual record on respondents' standing; on highly technical matters that often arise in census-related disputes; and on background information that would help the district court evaluate whether Commerce had considered all relevant factors, ignored an important aspect of the problem, or deviated from established agency practices. This discovery is also not at issue here because petitioners conceded that the district court may properly consider any extra-record evidence to address respondents' standing (J.A. 541-542), and did not challenge expert discovery in any of their mandamus petitions.

The remaining discovery—the only evidence challenged here—sought to confirm or fill gaps in the information, factors, and rationales that the Secretary directly or indirectly considered in deciding to add the

citizenship question. For example, respondents sought the identities of the officials and third parties referenced in the Secretary's supplemental decision memorandum to determine what information they had provided the Secretary or his staff. (J.A. 275-277.)

Respondents also deposed Commerce and Bureau officials, primarily to obtain additional details about the pre–December 2017 deliberations that petitioners had concealed. To that end, witnesses testified about when they discussed the citizenship question, with whom they spoke, and the information they relied on or transmitted. (J.A. 324, 330-335, 339-355, 431-435.)

Commerce officials also testified about their communications with DOJ leading to the December 2017 letter that the Secretary later invoked as his rationale for adding the citizenship question. For instance, Comstock explained his earlier outreach to DOJ (as well as DHS) to enlist a request to add the citizenship question. (J.A. 339-345, 366-371.) And petitioners produced documents that shed light on the collaboration between Commerce and DOJ to prepare the December 2017 letter; the factual basis, or lack thereof, for DOJ's assertions in that letter; and communications within DOJ and between DOJ and Commerce about the citizenship question and the December 2017 letter. (*See* Plaintiffs' Final Ex. List, PX-196-PX-200; PX-202-PX-219; PX-623-PX-651, S.D.N.Y. ECF:539-1.)

The depositions shed additional light on the Bureau's response to DOJ's December 2017 request for citizenship data. For example, Ron Jarmin, then the Acting Director of the Census Bureau, testified that the Bureau's staff usually discusses data requests with the requesting agency. (J.A. 447-464.) But he

testified that, in this instance, DOJ refused to participate in such a meeting, even though Jarmin explained to DOJ that the Bureau had other means to provide citizenship data that would be more accurate than any data generated by a citizenship question. (J.A. 456-463.)

5. The Second Circuit's denial of petitioners' first mandamus petition

After engaging in discovery under the July 3 order for more than two months, petitioners refused to allow respondents to depose Gore. On August 17, the district court granted respondents' motion to compel Gore's deposition. (Pet. App. 24a-27a.)

Petitioners then sought mandamus relief from the Second Circuit to quash Gore's deposition and halt further extra-record discovery. Petitioners represented that they were not challenging the July 3 order's requirement that petitioners "supplement the administrative record" or its authorization of "expert discovery on collateral matters," such as respondents' standing (Defs. Reply Br. (Reply) 17, No. 18-2652, *In re U.S. Dep't of Commerce* (2d Cir. Sept. 21, 2018), ECF:56.) Petitioners also declined to seek "retrospective relief" from discovery that was already complete. (*Id.*)

The Second Circuit denied mandamus relief. The Second Circuit explained that the district court had not plainly erred given the "careful factual findings supporting its conclusion that the initial administrative record was incomplete and that limited extra-record discovery was warranted" based on a strong preliminary "showing of bad faith or improper behavior." (Pet. App. 6a-7a (quotation marks omitted).) The Second Circuit also concluded that the district

court had not clearly abused its discretion in authorizing Gore's deposition given his unique knowledge about the Secretary's potential use of the December 2017 letter "as a pretextual legal justification for adding the citizenship question." (Pet. App. 7a.)

6. The district court's September 21 order authorizing the Secretary's deposition

On September 21, the district court granted respondents' motion to compel the Secretary's deposition, finding that "exceptional circumstances" warranted the deposition. (Pet. App. 9a-11a (quotation marks omitted).)

First, the court found that the Secretary "has unique first-hand knowledge related" to respondents' claims because he was "personally and directly involved" in the "unusual process" leading to his decision. (Pet. App. 11a, 13a (quotation marks omitted).) And, the court explained, petitioners had conceded that the Secretary's decision would be arbitrary and capricious if his "stated rationale" for adding the citizenship question was pretext—i.e., his given rationale "was not his *actual* rationale." (Pet. App. 11a.)

Second, the district court found that taking the Secretary's deposition was "the only way to fill in critical blanks in the current record." (Pet. App. 17a.) As the court explained, each of the Secretary's three most-senior advisors had testified that the Secretary "was the only person who could provide" certain critical information—including the contents of conversations about the citizenship question that had occurred before December 2017. (Pet. App. 17a-18a.)

Third, the court found that other discovery routes would not yield the same information or be less

burdensome. (Pet. App. 19a, 22a-23a.) To prevent undue burdens on the Secretary, the court limited the deposition to four hours and required that it take place at a location convenient for the Secretary. (Pet. App. 22a.)

7. The Second Circuit's denial of petitioners' second mandamus petition

Petitioners sought mandamus relief from the Second Circuit to overturn the district court's September 21 order. The Second Circuit denied the petition because the district court, "which is intimately familiar with the voluminous record, applied controlling case law and made detailed factual findings supporting its conclusion[s]." (Pet. App. 3a.)

8. Further pretrial proceedings

Petitioners then asked this Court to stay any remaining discovery, including the depositions of the Secretary and Gore, pending their filing of a petition for mandamus or certiorari. This Court stayed only the Secretary's deposition and declined to stay the July 3 order authorizing extra-record discovery or the August 17 order authorizing Gore's deposition. 139 S. Ct. 16, 16-17 (2018). Justice Gorsuch, joined by Justice Thomas, dissented in part, explaining that he would have stayed all three pretrial-discovery orders. *Id.* at 17-18.

The day after this Court declined to stay discovery except the Secretary's deposition, petitioners again asked the district court to stay all then-remaining discovery and the trial pending resolution of their petition to this Court. (S.D.N.Y. ECF:397.) The district court declined to issue any stay, as did the Second Circuit. On November 2, this Court likewise denied

petitioners' application for a stay. 139 S. Ct. 452 (2018). Gore's deposition took place on October 16.

9. The trial and the post-trial decision

The district court conducted an eight-day trial. Much of the trial was conducted through documentary submissions. The live testimony consisted largely of expert testimony addressing respondents' standing and complex issues that often arise in census-related disputes.

On January 15, 2019, the district court issued findings of fact and conclusions of law, and entered final judgment vacating the Secretary's decision to add a citizenship question to the 2020 decennial census, enjoining petitioners from adding a citizenship question to the 2020 census unless they cure the legal defects identified in the court's opinion, and remanding the matter to the Secretary for further proceedings. (Add. 277.)

First, given the issuance of the final judgment, the court vacated as moot its September 21 order authorizing the Secretary's deposition. (Add. 277.)

Second, the court decided the scope of its review, i.e., what evidence it could properly consider for particular purposes. The court concluded that, as petitioners had conceded, it could consider the administrative record for any purpose (*see* Add. 8, 208), and could consider extra-record evidence to determine respondents' standing (Add. 103). To resolve whether petitioners had violated the APA by acting contrary to law, the court concluded that it could not consider extra-record evidence. The court also ruled that it could not consider extra-record evidence to resolve whether the Secretary's decision was arbitrary and

capricious, except to the limited extent that extra-record material illuminated technical matters or showed that the Secretary had failed to consider important factors. (Add. 202-203, 206.) And the court determined that while it could properly consider extra-record material to decide whether the Secretary's decision was pretextual, it did not need to do so because it "would reach the same conclusions" based solely on the administrative record. (Add. 207.)

Third, the court determined that the government respondents had standing. As the court explained, the evidence demonstrated that adding a citizenship question would significantly and disproportionally depress the rates at which noncitizens and Hispanics respond to the census questionnaire. (Add. 111-120.) Accordingly, the citizenship question would likely cause a disproportionate undercount of noncitizens and Hispanics and thereby cause government respondents to lose political representation or federal funding. Adding a citizenship question will also harm the accuracy and quality of census data overall—which will injure respondents that rely on accurate census data to allocate resources. (Add. 159-173.)

Fourth, the court ruled that the Secretary's decision "violated the APA in multiple independent ways." (Add. 8.) The decision was contrary to law because it violated two statutes: one requiring the Secretary to acquire citizenship data using administrative records under the circumstances presented here, 13 U.S.C. § 6; and another requiring the Secretary to make and report certain findings before altering the topics on the census questionnaire, 13 U.S.C. § 141(f). (Add. 207-224.) The decision was also arbitrary and capricious because the Secretary had provided explanations that ran counter to the evidence

before him, failed to consider important aspects of the problem, and failed to justify extensive departures from required standards and procedures. (Add. 225-245.) The court further concluded that the Secretary's decision violated the APA because it was pretextual—i.e., based on factors other than the VRA-enforcement rationale he had given. The court explained that the administrative record alone proved that the Secretary had decided to add the citizenship question "for reasons entirely unrelated to VRA enforcement well before he persuaded DOJ" to send its December 2017 letter. (Add. 251; *see* Add. 247-248.) The court noted that extra-record evidence further confirmed its finding of pretext. (Add. 246-247, 252.)

Finally, the court rejected the private plaintiffs' Fifth Amendment equal protection claim, finding insufficient evidence to conclude that a discriminatory purpose motivated petitioners' decision to add the citizenship question. (Add. 262.)

SUMMARY OF ARGUMENT

Entry of final judgment by the district court has rendered this interlocutory appeal moot and eliminated any possibility of petitioners obtaining relief here that they could not obtain through an appeal from the final judgment. The Court should accordingly dismiss the writ of certiorari as improvidently granted. If the Court does not dismiss the writ, it should affirm the Second Circuit's denials of mandamus relief because the court of appeals correctly held that petitioners failed to identify any "clear and indisputable" right to overturn the district court's discovery orders. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004).

I. Given entry of final judgment, the Court should dismiss the petition as improvidently granted or, alternatively, affirm the decisions below. Petitioners contend that the court of appeals should have issued writs of mandamus quashing the Secretary's deposition and precluding the district court from considering certain extra-record evidence. But the district court has now vacated as moot its order authorizing the Secretary's deposition, and ruled that the administrative record alone proves that the Secretary's decision to add a citizenship question violated the APA in multiple independent ways. There is thus no live controversy over the Secretary's deposition or the district court's consideration of extra-record evidence for this Court to review. Petitioners may raise any remaining objections to the district court's nondispositive references to extra-record material in its merits opinion on appeal from final judgment.

II.A. In any event, petitioners have not shown that the court of appeals erred in finding that there was no clear and indisputable right to mandamus relief here. Petitioners' objections to the orders under review rest on a fundamental mischaracterization of the limited scope and nature of the discovery at issue. Contrary to petitioners' characterization, the district court did not order discovery to "probe the subjective mental processes of" the Secretary (Br. for Petitioners (Br.) 19). Rather, the court ordered discovery to uncover objective facts about the information, factors, and rationales that the Secretary directly or indirectly considered, based on the court's serious concern that petitioners had engaged in bad faith by not fully or accurately disclosing the "whole record" that the APA requires, 5 U.S.C. § 706.

1. Properly understood, the district court's orders are unexceptionable applications of the well-settled principle that limited discovery, including testimony from agency officials, may be appropriate in an APA case where the reviewing court has good reason to question whether the agency has accurately and completely disclosed its decision-making process—such as when an agency produces an administrative record with glaring deficiencies, appears to have concealed information that it directly or indirectly considered, offers a pretextual rationale for its decision, or departs drastically from its usual decision-making processes. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Under such circumstances, a court cannot meaningfully review an agency's action under the APA without limited discovery to ensure that the court has received a full and accurate account of the agency's deliberations. The extra-record evidence actually produced below confirms that discovery here was intended to provide the district court with an accurate and comprehensive understanding of Commerce's decision-making process.

2. The district court reasonably found that there were serious doubts about the completeness and reliability of petitioners' proffered administrative record and given rationale for adding the citizenship question—DOJ's purported need for citizenship data to enforce the VRA.

In particular, petitioners have not shown that the district court abused its discretion in finding that that the Secretary appeared to have given the public, the court, and Congress an inaccurate and incomplete explanation of his decision to add a citizenship question. Specifically, the Secretary represented that his decision was precipitated solely by DOJ's December

2017 letter, and deferred to DOJ's independent expertise in VRA enforcement. But as petitioners later acknowledged, the Secretary and his staff had already been deliberating over adding a citizenship question for more than nine months before receiving DOJ's letter, and they had actually solicited that letter from DOJ. The district court reasonably found that these extraordinary circumstances raised substantial doubts about whether petitioners had produced or would produce a reliable account of the information, factors, and rationales on which the Secretary based his decision.

Petitioners claim that there was no reason for them to disclose their deliberations before receiving DOJ's letter in December 2017 because those deliberations were part of some "informal" process. But merely labeling deliberations as "informal" does not shield them from public scrutiny when, as here, petitioners' engagement with the issue before December 2017 was serious, substantive, and material to the Secretary's final decision.

B. Although the district court has now vacated as moot its order authorizing the Secretary's deposition, the district court's order was reasonable when made and not a clear abuse of discretion warranting mandamus relief. The court followed controlling case law that allows parties to depose high-level officials in exceptional circumstances, such as when the official has unique first-hand knowledge, or information that cannot be obtained through less burdensome tools.

The Secretary's deposition was warranted under the case law the district court applied. The Secretary was heavily involved in the unusual process leading up to the decision to add a citizenship question. The

Secretary's subordinates could not fill gaps in the record, explaining that only the Secretary could provide the information they lacked. And preparing for and participating in a four-hour deposition would not have imposed any undue burden on the Secretary.

ARGUMENT

I. Given the District Court's Intervening Entry of Final Judgment, This Court Should Dismiss the Writ as Improvidently Granted or Affirm the Decisions Below

The Court should dismiss the writ of certiorari as improvidently granted or affirm the decisions below because the district court's post-trial ruling and final judgment have rendered the issues presented moot or, at minimum, made any mandamus relief even more impractical and inappropriate than it was before.

1. Petitioners' request for mandamus relief to quash the Secretary's deposition is moot, and the Court lacks subject matter jurisdiction to consider it. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013). In its post-trial opinion, the district court vacated its order authorizing the Secretary's deposition because final judgment foreclosed the "possibility" of reopening the record to "tak[e] Secretary Ross's testimony." (Add. 277.) Because the order that petitioners seek to quash is no longer in force, this Court should dismiss the writ of certiorari to avoid "expounding on law in the absence of" any live controversy over the Secretary's deposition. *Already, LLC*, 568 U.S. at 90.

The mootness exception for issues capable of repetition yet evading review does not apply here.

First, there is no "reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quotation marks omitted). The Secretary will not face another deposition in this proceeding. And although other courts considering the addition of the citizenship question have ordered extra-record discovery (Br. 44-45), they have not ordered the Secretary's deposition, and we are informed that discovery in those cases has already concluded. Moreover, as petitioners admit, a court-ordered deposition of a high-ranking Executive official is exceedingly rare and "justified only in extraordinary instances." Pet. 25 (quotation marks omitted). Whether any particular official's testimony might be warranted under the circumstances of a particular case is thus "highly dependent on specific facts unlikely to be duplicated in the future," 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.8.1 n.2 (Westlaw Sept. 2018).

Second, even if there were a risk that the Secretary would again be ordered to be deposed, that order would not likely evade review. To the contrary, in this litigation, the Secretary obtained meaningful review by the district court, the Second Circuit, and this Court, which ultimately stayed the deposition and granted a writ of certiorari to review the district court's order on the merits. There is thus no basis to apply the exception to mootness here.

2. Final judgment has also rendered moot petitioners' request for mandamus relief to bar the district court from considering extra-record evidence, or at least made any such relief inappropriate under the circumstances.

Given the district court's determination that the administrative record alone proved that the Secretary's decision violated the APA in multiple ways, petitioners cannot obtain any relief through mandamus that is not also available through appeal from final judgment. Far from relying on any "evidence of [the] Secretary's mental processes in its analysis" (Br. 44), the district court ruled that it did not need to rely on *any* extra-record evidence related to the bad-faith finding to reach its decision. (*See* Add. 206-207). And if petitioners object to the court's nondispositive references to extra-record evidence in its post-trial ruling, petitioners may raise that objection on appeal from final judgment and obtain all the relief that could be provided here. Indeed, it makes far more sense for any scope-of-review issues to be resolved on appeal from final judgment, rather than on interlocutory review of a discovery order. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (mandamus is not "a substitute for appeal").

II. Petitioners Do Not Satisfy the Stringent Requirements for a Writ of Mandamus

Mandamus is "a drastic and extraordinary remedy" reserved for "really extraordinary causes." *Cheney*, 542 U.S. at 380 (quotation marks omitted). To obtain such relief, petitioners must establish that (a) they have a "clear and indisputable" right to relief; (b) they have "no other adequate means to attain" relief; and (c) "the writ is appropriate under the circumstances." *Id.* at 380-81 (quotation marks omitted) The Second Circuit properly concluded that petitioners failed to satisfy these demanding standards.

A. The District Court Did Not Abuse Its Discretion in Authorizing Limited Discovery Based on Its Finding of Bad Faith or Improper Behavior.

Petitioners argue that the district court improperly granted discovery here to "probe the subjective mental processes" of Secretary Ross, and assert that the court should have confined its review solely to "the record supplied by the agency." Br. 19. Petitioners' framing does not accurately convey the nature or limited scope of the discovery at issue here.

As a threshold matter, although petitioners purport to object to *any* discovery outside the administrative record that they initially produced, much of that discovery is not at issue here because petitioners have either accepted or failed to contest that discovery—including petitioners' supplementation of their initial administrative record (Pet. App. 97a), expert discovery on a broad range of topics (Pet. App. 102a-103a), and discovery into respondents' standing (J.A. 541-542). Petitioners' considered decision not to object to this discovery precludes them from asking this Court for any relief regarding the evidence produced. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

As to the remaining discovery authorized by the district court's finding of bad faith, petitioners misstate the nature and basis of that extra-record evidence. Petitioners argue that the district court ordered this discovery "to probe the Secretary's mental processes," and assert that such discovery was improper because respondents did not make a strong showing that the Secretary harbored illegitimate "secret motives." Br. 19. But contrary to petitioners' characterization, the

purpose of the discovery ordered by the district court was not to divine the Secretary's inner thoughts, but rather to uncover objective facts about the decision-making process that should have been disclosed from the outset as part of the "whole record" that the APA requires agencies to produce. *See* 5 U.S.C. § 706. The documentary and deposition evidence that petitioners actually provided in response to the district court's orders confirm that this discovery was intended to reveal the complete picture of the processes, information, and rationales that led to the agency's decision—not to uncover the Secretary's personal views.

Because petitioners have misconceived the nature of the discovery at issue in this appeal, they have also failed to correctly identify the well-settled principles that authorized discovery outside the administrative record here. As this Court has held, discovery (including deposition testimony) may be appropriate in an APA case when "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence." *Overton Park*, 401 U.S. at 420. The relevant question here is thus not, as petitioners have asserted (*see* Br. 23), whether there was prima facie evidence that the Secretary acted with *subjective* bad faith—i.e., harbored illegitimate subjective beliefs that could call into question even facially legitimate actions. Rather, it is whether the district court had reason to doubt that petitioners acted in good faith by fully and accurately disclosing their rationale for adding a citizenship question and all materials directly or indirectly considered by the relevant decision-makers. Because the district court had ample basis for questioning whether petitioners had produced a complete and accurate representation of their deliberative process, there is no basis for

mandamus relief against the court's carefully reasoned discovery orders.

1. Discovery outside the administrative record is warranted when there has been bad faith or improper behavior in an agency's disclosure of its decision-making process to the reviewing court.

a. As petitioners acknowledge (Br. 22), it is well-settled that courts may order discovery beyond the administrative record in APA cases when there has been "a strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S. at 420. But petitioners take too narrow a view of what may constitute "bad faith or improper behavior" under this standard.

Contrary to petitioners' arguments, discovery may be warranted not only when there has been a strong showing that the decision-maker acted with *subjective* bad faith in rendering the agency action under review, but also when there are concerns that the agency has not provided a complete or accurate account of its decision-making to the reviewing court—or, even worse, that the agency has proffered a pretextual rationale that does not reflect the true basis for its decision. This distinct ground for discovery derives from the undisputed principle that effective judicial review of agency action requires the agency to disclose the "whole record" of its decision-making. 5 U.S.C. § 706; *see Overton Park,* 401 U.S. at 419. As petitioners have conceded, this statutorily required whole record must divulge all of the information and factors "'directly or *indirectly*'" considered by the agency. *See* Pet. 17 (quoting *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). And the agency must further disclose the actual rationale for its action

so that the reviewing court may understand "the basis on which the [agency] exercised its expert discretion," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962), and "the real object or objects sought" by its action, S. Comm. on the Judiciary 20 (Comm. Print June 1945) (revised text and comments on APA). *See also* S. Rep. No. 79-752, at 15 (1945) (APA legislative history explaining that agency must "with reasonable fullness explain the actual basis and objectives" of its rules).

Under the "presumption of regularity [that] attaches to the actions of Government agencies," *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), a court will ordinarily assume that an agency has complied with its disclosure obligations and will accordingly limit its review to the agency's proffered rationale and record. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). But the presumption that an agency has disclosed the whole record in good faith is rebutted if there is reason to believe that the agency has instead provided "a fictional account of the actual decision-making process," *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (per curiam), or has otherwise failed to fully "disclose the factors that were considered," *Overton Park*, 401 U.S. at 420. When there is a strong showing that an agency has engaged in such "bad faith or improper behavior," effective judicial review is impossible without further inquiry into the agency's decision-making process, including document discovery or testimony by "the administrative officials who participated in the decision." *Id.* As the district court here correctly explained, "once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency" and has "no reason . . . to presume" that the agency

will forthrightly disclose its deliberative process on its own. (Pet. App. 122a (quotation marks omitted).)

Courts have routinely ordered discovery beyond the administrative record when there are serious doubts about the accuracy and comprehensiveness of the agency's proffered record and rationale. For example, courts have relied on glaring or obvious gaps in the administrative record as indicia of bad faith that may warrant extra-record discovery. *See Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (per curiam) (bad faith warranted discovery when "the Government purposefully withheld negative documents"); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (discovery warranted where "the so-called 'record' looks complete on its face . . . but there is a subsequent showing of impropriety in the process"); *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (Kennedy, J.) (discovery may be permitted "when serious gaps would frustrate challenges to the agency's action").[4] Courts have also relied on evidence that the agency's proffered rationale was pretextual—i.e., the stated basis for the agency's decision was not the actual reason that the agency acted. *See, e.g.*, *Woods Petroleum Corp. v. United States Dep't of Interior*, 18 F.3d 854, 859-60 (10th Cir. 1994) (setting aside agency action because "sole reason" for action was "to provide a pretext" for agency's "ulterior motive"), *adhered to*

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[4] *See also Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) ("strong suggestion that the record before the Court was not complete" when record omitted documents that must have been consulted); *NRDC, Inc. v. Train*, 519 F.2d 287, 291-92 (D.C. Cir. 1975) (omission of documents warranted discovery into whether further records were withheld).

on reh'g en banc, 47 F.3d 1032 (10th Cir. 1995); *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) (questioning legitimacy of agency's safety concerns). And courts have relied on evidence that the agency departed from its usual decision-making processes because such departures may indicate that the agency's process for compiling and disclosing the bases for its decision-making was unreliable. *See Tummino*, 427 F. Supp. 2d at 228-29, 233-34; *L-3 Commc'ns Integrated Systems, L.P. v. United States*, 91 Fed. Cl. 347, 352-53, 356 (2010).

There is thus no basis for petitioners' contention (Br. 23) that the only factors that may support a bad-faith finding are evidence that the decision-maker subjectively disbelieved the stated grounds for the decision, irreversibly prejudged the decision, or was otherwise driven by some legally forbidden motive. To be sure, such evidence may support a finding of *subjective* bad faith that would also warrant discovery. *See Latecoere Int'l, Inc. v. United States Dep't of Navy*, 19 F.3d 1342, 1356-57 (11th Cir. 1994). But these factors are not the exclusive means by which a party may show bad faith; a party may also show that an agency failed to fully and honestly disclose its decision-making process to the reviewing court.[5]

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[5] The cases relied on by petitioners do not say otherwise. Contrary to petitioners' assertion (Br. 23), neither *Jagers v. Federal Crop Insurance Corp.*, 758 F.3d 1179 (10th Cir. 2014), nor *Air Transport Association of America v. National Mediation Board*, 663 F.3d 476 (D.C. Cir. 2011), purported to limit the factors that can constitute bad faith under *Overton Park*. *Jagers* did not consider *Overton Park* at all; it merely recognized that agency action may be set aside if "the agency predetermined th[e] result." 758 F.3d at 1184-85. And *Air Transport* held only that an

b. Contrary to petitioners' assertions (Br. 19-20), allowing additional discovery based on concerns about the agency's deficient disclosures does not constitute an illegitimate inquiry into the decision-maker's "subjective mental processes." Instead, such discovery is directed at the same purpose that the "whole record" requirement serves: revealing the complete picture of the processes, information, and rationales that led to the agency's decision. Additional discovery is warranted to uncover these *objective* facts when a court has reason to believe that they are absent from the administrative record that the agency has produced in a particular case. Such discovery is thus not an intrusive and irrelevant "inquiry into the mental processes of administrative decisionmakers," but rather a legitimate attempt to discern the true basis for an agency's determination—the essential predicate for meaningful judicial review of any administrative action. *Overton Park*, 401 U.S. at 420.

In particular, petitioners are wrong to suggest that a finding of pretext as a basis for extra-record discovery necessarily depends on some threshold showing about the relevant decision-maker's subjective thoughts. As the district court correctly explained below, an agency action is based on pretext if "the stated rationale for [the] decision was not [the] *actual* rationale" (Pet. App. 11a). *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (pretext exists if "the proffered reason was not the true reason" for the decision (quotation marks omitted)). But contrary to

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agency official's "unalterably closed mind" may suffice to support discovery under *Overton Park*, without intimating that such a showing was the exclusive means to obtain discovery. 663 F.3d at 487-88 (quotation marks omitted).

petitioners' position, determining an agency's actual rationale does not turn on whether the final decision-maker subjectively believed the stated rationale; rather, the relevant question is whether the agency's stated rationale is consistent with the course of the agency's deliberative process. The objective facts relevant to this inquiry include the timing of the agency's decision, the factors considered or discussed by the relevant decision-makers and their subordinates, and the plausibility of the agency's stated rationale. And this inquiry helps a court determine whether the agency's deliberative process in fact considered and was driven by the grounds stated in the agency's final decision, or whether other, undisclosed factors and rationales played a sufficiently material role in the decision-making that limited discovery is necessary to unveil the actual nature of the agency's deliberations and the true basis of its final decision.

Such discovery fits comfortably with well-settled rules about the contours of the whole record and the relevant agency decision in APA cases. For example, it is undisputed that the record produced by an agency may not unilaterally "withhold evidence unfavorable to [the agency's] case," *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984), or otherwise skew the public record in its favor, *see Environmental Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 659-60 (D.D.C. 1978). Instead, the agency must disclose not only the evidence that supports its decision, but also all "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *see* S. Rep. No. 79-752, at 214 ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by

one party, since other evidence may weaken or even indisputably destroy that case.”). This rule thus requires an agency to fully disclose the *actual* factors that it considered during its deliberations. But such disclosure is not thereby an improper attempt to uncover a decision-maker’s “secret motives,” subjective leanings, or personal philosophy (Pet. Br. 19). Rather, it provides a complete picture of the evidence actually relied on by the agency—including aspects that may cut against the agency’s preferred narrative or outcome.

Similarly, this Court has consistently warned against giving credence to “*post hoc* rationalizations for agency action.” *Burlington Truck Lines*, 371 U.S. at 168. While this rule typically arises when an agency attempts to revise its position during litigation, the underlying principle relevant here is that judicial review under the APA must be premised on the actual grounds “considered by the agency,” *U.S. Lines, Inc. v. Federal Mar. Comm’n*, 584 F.2d 519, 533 (D.C. Cir. 1978), rather than some rationale that “does not reflect the agency’s fair and considered judgment,” *Auer v. Robbins*, 519 U.S. 452, 462 (1997). If there are substantial concerns that the agency has offered a pretextual rationale to justify a decision that it actually made earlier for different reasons, then judicial review on the basis given by the agency alone would essentially be a fictional exercise, instead of a legitimate, searching inquiry into whether the agency considered the relevant factors and reasonably justified its decision based on the evidence before it. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983).

Discovery to obtain such full disclosure is especially important where, as here, the agency

engages in informal decision-making. In such proceedings, there is no express statutory definition of the administrative record, no opportunity for interested parties to place information and arguments before the agency, and no requirement that the agency maintain a written record or refrain from ex parte communications. *Cf.* 5 U.S.C. §§ 553(c), 556(d)-(e) (providing protections in rule-making and adjudicatory proceedings). In such cases, it is even more critical that a court be able to authorize limited discovery if there is reason to question the agency's administrative record or public explanation. Otherwise, the court would be powerless to obtain all the information it needs to conduct the "thorough, probing, in-depth review" of agency action that the APA mandates, *Overton Park*, 401 U.S. 415.

c. The extra-record evidence obtained under the district court orders here confirms that the purpose of the discovery petitioners challenge was to provide a full and accurate disclosure of petitioners' deliberations and the actual basis of their final decision, not to uncover the Secretary's personal beliefs or "subjective mental processes" (Br. 19). Indeed, petitioners themselves recently acknowledged that the deposition testimony that they object to here "focus[ed] *almost exclusively* on the *decision-making process* undertaken by" Commerce. (Mot. in Limine 5 (emphasis added), S.D.N.Y. ECF:408.)

To that end, discovery confirmed or filled gaps about the timing, context, and basis of petitioners' lengthy deliberations over whether to add the citizenship question. For instance, document discovery and deposition testimony confirmed when the Secretary began to ask his staff to implement a citizenship question, who was involved in the decision-making

during the critical pre–December 2017 period, the meetings and briefings in which they participated, and the information they provided to the Secretary for his direct or indirect consideration. See *supra* at 15-16.

Discovery also revealed previously undisclosed details about the interactions between Commerce and DOJ—interactions that rendered less plausible petitioners' narrative that the Secretary had decided to add the citizenship question in March 2018 based solely on DOJ's purported need for more accurate citizenship data, rather than many months before December 2017 based on other factors and rationales. For example, discovery revealed that Gore had drafted DOJ's December 2017 letter solely because of the Secretary's request for DOJ to do so and based on written work product and advice from the Secretary and his staff. See *supra* at 8.

As demonstrated by these examples, the purpose of discovery here was not to uncover what the Secretary personally believed, but rather to reveal when the Secretary made his decision and what he and other relevant officials did and did not consider during the nearly year-long deliberations over whether and how to add a citizenship question. Petitioners' characterization of this discovery as an inquiry into the Secretary's "subjective mental processes" (Br. 19) thus cannot be squared with the actual course of proceedings below.

2. The district court did not abuse its discretion in finding bad faith and improper behavior warranting further discovery here.

a. Petitioners' mistaken characterization of the extra-record evidence at issue has led them to propose the wrong test to evaluate whether the district court abused its discretion in ordering discovery beyond the administrative record. On the assumption that the administrative record was complete and that it accurately reflected the true basis of the Secretary's decision, petitioners assert that the district court could not order additional discovery into the Secretary's mental processes unless respondents made a strong showing that the Secretary's "initial inclinations" or "additional subjective motives" would by themselves call into question an otherwise facially legitimate decision (Br. 24). But it is that threshold assumption of completeness and accuracy that the district court questioned and that served as the basis for the discovery ordered here. Because petitioners have not identified any severe abuse of discretion in the district court's "careful factual findings" (Pet. App. 6a) about the unreliability of the administrative record and the pretextual nature of petitioners' proffered rationale for adding the citizenship question, there is no basis for the extraordinary remedy of mandamus. (*See* Pet. App. 3a, 7a, 93a-100a.)

First, the district court reasonably relied on the extraordinary fact that the Secretary initially gave the public, the court, and even Congress an inaccurate and incomplete explanation of his deliberative process, raising substantial questions about whether the court could rely on petitioners to produce an honest accounting of the factors and rationales on which the Secretary

based his decision. When the Secretary first announced his decision in March 2018, he misleadingly stated that he and his staff "initiated" and "began" their consideration of the citizenship question only *after* receiving DOJ's December 2017 letter. (Pet. App. 136a-137a.) He persisted with this same misleading explanation in congressional testimony, repeatedly identifying DOJ's December 2017 letter as the sole factor that precipitated Commerce's deliberative process. *See, e.g.*, *H.R. March 20 Hr'g*, *supra* (Commerce was "responding solely to the Department of Justice's request"); *S. Hearing on F.Y. 2019 Funding Request for Commerce* (*S. May 10 Hr'g*), 115th Cong. (May 10, 2018) (2018 WL 2179074) ("Justice Department is the one who made the request of us"). And petitioners reinforced the same narrative by certifying an administrative record that lacked "virtually any documents predating DOJ's December 2017 letter" (Pet. App. 97a), thereby suggesting both that the Secretary's decision-making process had begun only after that letter was received and that his decision had been based principally on DOJ's request.

But this account was not accurate, as the Secretary's June 2018 supplemental decision memorandum later revealed. In fact, the Secretary, not DOJ, initiated the process to add a citizenship question—long before the Secretary was aware of DOJ's purported need for more accurate citizenship data to enforce the VRA. The Secretary's staff had been working on the Secretary's request to add a citizenship question for months before DOJ sent its December 2017 letter. (J.A. 107.) And it was the Secretary and his staff who approached DOJ and then worked closely with DOJ officials (including Gore) to draft a letter that would make it appear as though

DOJ had independently initiated a request for citizenship data. (*See* Pet. App. 134a.)

This extraordinary reversal strongly supports the discovery ordered by the district court. The fact that the Secretary initially concealed the earlier deliberations by him and his staff about adding a citizenship question raised substantial doubts about whether petitioners had forthrightly and comprehensively disclosed *all* the materials considered "throughout the agency review process," *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). These doubts were reinforced by petitioners' continued refusal to provide the court and respondents with any deliberative materials predating DOJ's December 2017 letter, even after admitting that the Secretary and his staff had begun evaluating the citizenship question much earlier (Pet. App. 97a). And it was particularly troubling that petitioners had not fully described the active role of the Secretary and his staff in soliciting and crafting DOJ's December 2017 letter—a level of involvement that strongly suggested that the Secretary's reliance on the DOJ letter as the root cause of his decision to add a citizenship question was a pretextual and post hoc explanation for a decision already made. *See, e.g.*, *Tummino*, 427 F. Supp. 2d at 231-33; *New York v. Salazar*, 701 F. Supp. 2d 224, 242 (2010), *aff'd*, 2011 WL 1938232 (N.D.N.Y. Mar. 8, 2011).

Second, and relatedly, the district court also had reasonable grounds to question whether DOJ's December 2017 letter was itself a good-faith request for accurate citizenship data to assist VRA enforcement. The letter conspicuously omitted any mention of the fact that the VRA-enforcement rationale originated with the Secretary and his staff

rather than independently with DOJ, and failed to disclose the close collaboration between DOJ and Commerce to draft the letter. The author of the letter, John Gore, further admitted that he did not know and had never conducted a serious inquiry into whether a citizenship question would actually provide DOJ with more accurate citizenship data. (J.A. 390-392.) And rather than collaborating with the Bureau, DOJ officials inexplicably refused to meet with the Bureau's experts to discuss the Bureau's concern that adding a citizenship question would *not* produce the accurate block-level citizenship data that DOJ had requested, and that there were better, alternative means to obtain such data. (J.A. 175-177, 227, 474-475.) These undisclosed circumstances conflict with the narrative in DOJ's letter—one repeated in the Secretary's March 2018 decision memorandum—that the citizenship question would advance DOJ's interest in VRA enforcement. Contrary to petitioners' arguments (Br. 35-36), the questionable nature of DOJ's request bears on the Secretary's decision-making, given the Secretary's direct role in producing that letter and his subsequent reliance on that letter as the sole justification for adding a citizenship question.

Third, the district court also reasonably identified additional factors that, taken together, further confirmed the serious doubts about whether petitioners had accurately and comprehensively disclosed the basis for their decision to add the citizenship question. For example, as the district court explained (Pet. App. 99a), the Secretary overruled the unchallenged conclusion of the Bureau's Chief Scientist that adding a citizenship question would "harm[] the quality of the census count" and produce "substantially less accurate citizenship status data than are available from"

administrative records, despite the absence of any countervailing evidence in the record (J.A. 181). (*See* J.A. 244 (using citizenship question and administrative records "would result in poorer quality citizenship data" than using administrative records alone).) Moreover, petitioners drastically departed from standard agency procedures, including the rigorous testing procedures that the Bureau typically uses to ensure that even minor alterations to the census questionnaire will not harm the quality of the data collected. (Pet. App. 99a.) Petitioners' open disregard of the one-sided evidence showing that adding a citizenship question would produce *less* accurate citizenship data than obtaining that data from administrative records—thus undermining rather than promoting DOJ's VRA-enforcement rationale—raised substantial questions about whether the stated rationale of obtaining accurate citizenship data accurately reflected the true basis for the Secretary's decision. *See Tummino*, 427 F. Supp. 2d at 233; *Inforeliance Corp. v. United States*, 118 Fed. Cl. 744, 747-48 (2014).

Petitioners are incorrect in contending that the district court could not order discovery without a showing that the Secretary "did not actually believe" the VRA-enforcement rationale or was acting with "an unalterably closed mind" (Br. 24, 34). What supported discovery here was not some inconsistency between the Secretary's subjective beliefs and his stated rationale, but rather (i) the omission of a critical phase of the decision-making process—namely, the months of deliberation before DOJ's December 2017 letter; and (ii) the mischaracterization of the origin, nature, and importance of DOJ's letter itself and the VRA-enforcement rationale that it offered. In other words,

the district court ordered discovery based on an objective inquiry into the timing of the Secretary's decision, the factors considered or discussed by the Secretary and his subordinates, and the plausibility of the Secretary's stated rationale. (Pet. App. 98a-100a.) The basis of the district court's discovery ruling was thus whether the Secretary's stated rationale—deference to DOJ's need for accurate citizenship data for VRA enforcement—accorded with these objective facts about the course of the agency's deliberative process, not whether the Secretary personally believed in the rationale he was providing to the public.[6]

Moreover, in light of the district court's detailed factual findings, petitioners are simply wrong in asserting (Br. 24) that the court "conflat[ed] mere allegations" with the requisite strong showing of bad faith. The district court relied on multiple sources of documentary evidence suggesting that petitioners were withholding information and that DOJ's purported need for more accurate citizenship data was not the Secretary's actual reason for adding the citizenship question. That evidence included petitioners' deficient administrative record, the Secretary's own public statements and supplemental decision memorandum, and internal documents from both Commerce and DOJ. Given this evidence, the district court acted within its discretion in authorizing limited discovery to uncover the same type of information about agency decision-making that the administrative

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[6] The district court's recent decision on the merits also concluded that the Secretary's stated rationale was pretextual based on the same objective factors, without relying on facts about the Secretary's subjective thoughts. (Add. 94-102, 245-253.)

record is supposed to provide: when the Secretary reached his decision, what information he relied on in making that determination, and the actual reason he decided to add the citizenship question.

b. To counter the district court's finding that the Secretary appeared to have misled the public, the court, and Congress in his initial justification for adding a citizenship question, petitioners assert that the Secretary merely *omitted* relevant information from his March 2018 decision memorandum, and parse that memorandum and the congressional testimony to assert that his language should not be interpreted as misleading. But the very fact that the Secretary's statements persistently failed to disclose substantial and material portions of the decision-making process—including months of deliberations before DOJ's December 2017 letter and Commerce's role in instigating and collaborating over that letter—itself supports the district court's finding that the Secretary had not been fully candid. (Pet. App. 96a-97a.)

In any event, petitioners' strained reading of the Secretary's statements is implausible, and comes nowhere close to showing that the district court clearly abused its discretion in reaching a contrary conclusion about the truthfulness of the Secretary's public statements. For example, petitioners argue (Br. 25-26) that the Secretary was forthcoming in his March 2018 decision memorandum because he stated that he began to review only DOJ's "request" for a citizenship question, rather than the general issue of whether to add a citizenship question, after receiving DOJ's December 2017 letter (Pet. App. 136a). But the memorandum's language is not so narrow. The memorandum falsely states that Commerce "*initiated* a comprehensive review" and that the "Office of the Secretary

began a thorough assessment" only after receiving DOJ's letter (Pet. App. 136a, 137a (emphases added)), when in fact the Secretary and his staff had begun a serious "deliberative process" months earlier, as the Secretary later admitted (Pet. App. 134a). Moreover, the memorandum asserted that the Secretary had himself "set out to take a hard look" at DOJ's rationale only after receiving the December 2017 letter (Pet. App. 136a), without disclosing the direct role that the Secretary and his staff had played in instigating and producing that letter. With these statements, the Secretary plainly implied that Commerce's consideration of whether to add a citizenship question began after receiving DOJ's letter and not beforehand.

Petitioners' parsing of the Secretary's statements to Congress fares no better. Petitioners assert (Br. 26-31) that the Secretary was simply responding accurately to specific questions. But the Secretary was not in fact so restrained. He repeatedly raised DOJ's letter for the specific purpose of making it appear as though DOJ had sent that letter independently, rather than at Commerce's behest. For example, when asked "whether the Department of Commerce plans to include the citizenship question in the 2020 census," the Secretary volunteered that "[t]he Department of Justice, as you know, initiated the request for inclusion of the citizenship question." *H.R. March 22 Hr'g*, *supra*. Likewise, when asked whether the "Commerce Department, itself, is not supportive of adding [the citizenship] question," the Secretary claimed that Commerce was still considering "the Department of Justice request." *H.R. March 20 Hr'g*, *supra*. As these examples show, irrespective of the specific question he was asked, the Secretary repeatedly chose to reframe the issue to focus on

DOJ's letter, even when asked about *Commerce's role* in adding the citizenship question. What those statements conveyed was that Commerce was merely deferring to DOJ's independent judgment about the need for citizenship data in an area of DOJ expertise—a façade that allowed the Secretary to disguise Commerce's role in instigating DOJ's letter and pushing for a citizenship question.

Petitioners' contention (Br. 27) that context makes the Secretary's statements technically true misses the mark. Petitioners argue, for instance, that the Secretary's testimony that Congress was responding "solely to the Department of Justice's request" was meant only to signal that Commerce had not been responding to a request by a political party. *See id.* Even if literally true, the statement that Commerce was responding "solely" to DOJ was misleading, given Commerce's extensive deliberative process in the months preceding the letter. And in any event, context shows that that the Secretary continued to refer to "the Department of Justice request" even when discussing *Commerce's* views on the citizenship question, apart from any discussion of a political party's involvement. *H.R. March 20 Hr'g*, *supra.*

c. Petitioners are also incorrect in asserting that the Secretary's public statements and petitioners' initial administrative record properly omitted information about a purportedly "informal" process that occurred before DOJ's December 2017 letter, while disclosing a "formal" process that occurred after that letter. Br. 31. Nothing in the underlying statutes, administrative processes, or record supports this asserted distinction between "formal" and "informal" processes. And even if there were some basis to apply such labels here, there is no basis whatsoever for

petitioners' suggestion that they were entitled to shield from public or judicial scrutiny what they are now calling their "informal" deliberations.

Nothing in the APA supports petitioners' attempt to separate an "informal" from a "formal" phase of the Secretary's decision-making. Formal decision-making under the APA is a statutorily defined procedure that requires a hearing and other protections to ensure that the administrative record on review is complete. *See* 5 U.S.C. § 556(d)-(e). There is no dispute that petitioners followed none of those procedures here: rather, the Secretary's entire process, both before and after DOJ's December 2017 letter, constituted informal decision-making under the APA.

Other statutes and agency procedures also undermine petitioners' assertion that DOJ's December 2017 letter marked some transition from "informal" to "formal" decision-making, or otherwise rendered their omission of pre–December 2017 events non-misleading. There is an established, formal process for federal agencies to request that the Census Bureau add new questions for data collection on the ACS or decennial census questionnaire, but that process ended in June 2016, eighteen months before DOJ's letter, without DOJ making any such request. (*See* J.A. 87-96.) Similarly, there is a formal statutory deadline for the Secretary to notify Congress that an upcoming decennial census will include new topics, but that deadline expired in March 2017, approximately nine months before the December 2017 letter, without the Secretary providing the requisite notice of his intent to add a question about citizenship status. *See* 13 U.S.C. § 141(f)(1). (*See* J.A. 107, 478-482.) Finally, the Census Bureau has established formal procedures for considering and testing any potential

changes to the census questionnaire, but those procedures were well underway before DOJ sent its December 2017 letter. (*See* Am. Decl. of John H. Thompson ¶ 49, S.D.N.Y. ECF:516-1.) In other words, petitioners' attempt to portray DOJ's December 2017 letter as initiating some sort of separate "formal" review process is entirely unmoored from actual, well-established formal processes that apply to changes to the decennial census questionnaire.

Even if there were some basis to describe petitioners' deliberations before December 2017 as "informal," that label would not by itself excuse petitioners from complying with their disclosure obligations under the APA. The "whole record" rule does not distinguish between purportedly "informal" and "formal" deliberations. And the record in this case shows that there was nothing truly "informal" about the pre–December 2017 process: among other activities, the Secretary ordered meetings, calls, and briefings on his "months old request" to add a citizenship question (J.A. 107; *see* J.A. 114-115, 124); received written memoranda and other materials related to his request (*see* J.A. 114, 128); and spoke to the White House Chief Strategist, the Kansas Secretary of State, and the Attorney General (J.A. 103, 111-113, 138, 286).

Ultimately, petitioners may not shield a large portion of the Secretary's decision-making from public scrutiny or judicial review simply by labeling it "informal"—particularly when the pre–December 2017 process indisputably generated critical information about when the Secretary decided to add a citizenship question and what information, factors, and rationales he relied on in reaching that decision. Indeed, courts have consistently rejected similar

attempts to exempt portions of agency decision-making from review through formalistic distinctions that have no grounding in the APA's "whole record" requirement, concluding instead that agencies must disclose *all* information obtained "throughout the agency review process," *Bar MK Ranches*, 994 F.2d at 739. If the rule were otherwise, any agency could withhold information from the public record simply by calling a portion of its process "informal"—even if that information might "weaken or even indisputably destroy" the agency's position, S. Rep. No. 79-752, at 214. The district court thus acted well within its discretion in concluding that the Secretary's public statements, together with petitioners' administrative record, misleadingly omitted important and material information about Commerce's decision-making. (*See* Pet. App. 88a, 96a.)

d. The district court also did not abuse its discretion in concluding that the concerns it identified about the completeness and accuracy of the whole record could not be satisfied merely by ordering petitioners to complete the administrative record. *See* Br. 40. Petitioners' initial record was not only missing information that could be filled by ordering its completion, but also presented a deeply misleading narrative of the decision-making process. Having already received an essentially fictional account of the agency's process, the district court had "lost its reason to trust the agency" and thus had "no reason . . . to presume" that petitioners would provide a fully accurate account of the process on their own even if ordered to do so. (Pet. App. 122a (quotation marks omitted).)

Indeed, discovery ultimately showed that even petitioners' supplemented administrative record did not provide a complete and accurate account of the

Secretary's decision-making. For example, the supplemental record still omitted written briefing materials used during a September 2017 meeting about the citizenship question, which the Secretary and several of his senior aides attended. There is also little, if any, record of critical meetings and conversations involving the Secretary, including the Secretary's single meeting with the Bureau's Chief Scientist to discuss the addition of a citizenship question, and the Secretary's conversations with Kobach and the Attorney General. And discovery has demonstrated that a written summary in the administrative record inaccurately described the Secretary's conversation with the Senior Vice President of Data Science for the Nielsen Company about the addition of a citizenship question to the census—a conversation the Secretary invoked in his March 2018 decision memorandum. (*See* Add. 88-90; *see also* Summary of Conversation with Christine Pierce, Administrative Record at AR1276, https://tinyurl.com/ybdwaxjc.)

The district court's reasonable concerns about the misleading nature of petitioners' initial record and narrative also explain why it was not enough for the court to simply proceed to an adjudication on the merits and "'remand to the agency for additional investigation or explanation if the record supplied by the agency [was] inadequate to support the agency's decision'" (Br. 21 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Such a remand may be appropriate where the agency's record or explanation is so unclear that a "reviewing court simply cannot evaluate the challenged agency action." *Florida Power*, 470 U.S. at 744. But the problem here was not principally a lack of clarity. The problem was the court's well-founded concern that petitioners' record

and explanations had concealed or misdescribed a large swath of their decision-making process. The district court thus had good reason to doubt that an adjudication on the merits would lead to meaningful review of the true basis of the agency's actions.

The extreme time pressure to finalize the census questionnaire also supported the district court's decision to allow limited discovery rather than merely ordering completion of the record or remanding to the agency for further explanation. As petitioners have acknowledged and the district court has repeatedly explained, "time is of the essence" here to ensure that any appellate review of final judgment can be completed before the Bureau finalizes the questionnaire. (Pet. App. 93a-94a; J.A. 308.) Given petitioners' asserted June 2019 finalization deadline, the district court reasonably sought to obtain the complete and accurate whole record by both ordering petitioners to complete the record and authorizing limited discovery to ensure that the record was actually complete and accurate.

e. Nearly all of petitioners' remaining objections to the discovery ordered below presume the completeness and accuracy of petitioners' selected record and proffered narrative, and ignore the actual and extraordinary circumstances found by the district court. For instance, petitioners incorrectly characterize this case as one where the Secretary simply "favor[ed] a particular outcome *before* fully considering and deciding an issue" (Br. 23 (emphasis added)), and then came to "sincerely believe[ ]" his stated rationale after ordinary consultations with government officials (Br. 24).

But the district court did not err in finding these characterizations inconsistent with the evidence before

it. That evidence showed not only that the Secretary had been considering the citizenship question long before he was aware of DOJ's purported need for citizenship data to enforce the VRA, but also that petitioners had concealed the information, factors, and rationales that he was considering during that critical time. The evidence also showed that the Secretary did not merely solicit input from other government officials, but rather collaborated with them to create a misleading narrative depicting his entire decision-making as a response to DOJ's manufactured letter. The Secretary then presented that misleading account to the public, the court, and Congress, and petitioners failed to disclose the administrative records that reflected the truth. If these circumstances, "taken together, are not sufficient to make a preliminary finding of bad faith" warranting extra-record discovery, "it is hard to know what circumstances would." (Pet. App. 124a.)

B. The District Court Reasonably Found That Exceptional Circumstances Warranted the Secretary's Deposition.

Petitioners also failed to show that the district court abused its discretion in separately finding, on September 21, that exceptional circumstances warranted the Secretary's deposition.

1. The district court relied on well-accepted principles about when testimony from a high-ranking official is warranted. As petitioners concede (Br. 38), the standards set forth by the Second Circuit in *Lederman v. New York City Department of Parks & Recreation*, which the district court applied here, reflect a broad consensus that a court may order a high-level official's deposition when "exceptional

circumstances" warrant it—including when "the official has unique first-hand knowledge related to the litigated claims" or "the necessary information cannot be obtained through other, less burdensome" means. 731 F.3d 199, 203 (2d Cir. 2013), *cert. denied*, 571 U.S. 1237 (2014). Where such exceptional circumstances exist, "courts have not hesitated to take testimony" from cabinet members, federal agency heads, and even the President (Pet. App. 20a). *See Clinton v. Jones*, 520 U.S. 681, 705-06 (1997) (President); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 33 (D.D.C.) (Secretary of the Interior), *aff'd*, 240 F.3d 1081 (D.C. Cir. 1999). Indeed, the Secretary of Commerce was deposed during an earlier census-related lawsuit. (J.A. 264-271.)

This significant but attainable threshold for allowing the deposition of a high-level official disposes of the general separation-of-powers principles on which petitioners rely. *See* Br. 38-39. When exceptional circumstances exist, interbranch comity does not bar the courts from authorizing depositions of high-level officials to elicit their unique, personal knowledge about matters directly relevant to a litigated issue.

2. The court of appeals properly refused to block the Secretary's deposition under the unique circumstances here.

a. *Unique First-Hand Knowledge*: As the district court observed, the Secretary was "personally and directly involved" in nearly every aspect of the "unusual process" that led to his decision to add the citizenship question. (Pet. App. 13a.) For example, the Secretary spoke directly with then–White House Chief Strategist Stephen Bannon and Kansas Secretary of State Kris Kobach (J.A. 103, 112-113, 286); repeatedly urged his staff to pursue the citizenship question (J.A.

107, 114-127); and personally called then–Attorney General Sessions when his staff's initial efforts with DOJ had failed (J.A. 138-140).

Petitioners do not seriously dispute the Secretary's direct and personal involvement in the decision to add a citizenship question. But they argue (Br. 42) that the Secretary's personal involvement, including his conversations with various officials and outside stakeholders, was not "unusual" because high-level officials are often personally involved in important decisions and frequently consult with others. This argument mischaracterizes the district court's reasoning. What the district court found distinctive was the Secretary's personal involvement in "the *unusual process*" leading to the decision to add a citizenship question (Pet. App. 13a (emphasis added))—the same process that raised serious questions about whether petitioners' record was complete and accurate, and whether the Secretary's stated reliance on DOJ's December 2017 letter was pretextual.

Petitioners also err in characterizing the purpose of the Secretary's deposition as attempting to probe his subjective mental processes (Br. 19). As with the other discovery, the purpose of the deposition was to obtain a complete picture of the factors the Secretary actually considered and the true basis for his final decision to add a citizenship question. The district court reasonably concluded that the Secretary's unusually close personal involvement with the deliberative process here meant that his testimony could have shed light on the relevant "whole record"—particularly when petitioners' proffered administrative record included significant unexplained gaps. Moreover, contrary to petitioners' suggestion (Br. 39), the district court's reference to the Secretary's "intent

and credibility" (Pet. App. 16a) did not suggest that the court considered the Secretary's personal views to be material to the APA claims. Rather, the district court reasonably believed that the Secretary could have provide an explanation that would reconcile apparent inconsistencies between his stated rationale and the actual record of the decision-making process. The relevance of such explanation was thus to flesh out the Secretary's basis for adding a citizenship question, not to probe his inner thoughts.

b. *No Other Means to Obtain the Same Information*: The district court properly concluded that the critical information that the Secretary possesses could not have been "'obtained through other, less burdensome or intrusive means.'" (Pet. App. 18a (quoting *Lederman*, 731 F.3d at 203).) The court did not "jump[] straight to ordering" the Secretary's deposition (Br. 41), but rather declined to authorize the deposition at the outset of discovery while respondents first attempted other discovery mechanisms.

Indeed, all three of the Secretary's senior advisors "testified repeatedly that Secretary Ross was the only person who could provide certain information" concerning the material that he directly or indirectly considered or the actual rationale for his final determination. (Pet. App. 17a.) For example, the Secretary's advisors could not provide any details about the Secretary's pre–December 2017 conversations with other officials and third parties, such as Kris Kobach and then–Attorney General Sessions, even though the Secretary has now admitted that his decision-making about the citizenship question long predated DOJ's December 2017 letter (J.A. 403-408, 415, 427-429). Contrary to petitioners' unsubstantiated assertion (Br. 42-43), the contents of these

conversations bear directly on the Secretary's decision-making and respondents' legal claims because the conversations provided the Secretary with information about the citizenship question during the key pre–December 2017 period.

Nor did the district court clearly err in declining to require respondents to continue pursuing other discovery mechanisms before taking the Secretary's deposition. *See* Br. 40-41. Respondents had already pursued several such options, including interrogatories and depositions, "yet gaps in the record remain[ed]." (Pet. App. 19a.) A deposition was the quickest and most efficient way to fill the gaps in the record, since depositions allow for "immediate follow-up questions" and objections rather than protracted written exchanges. *Fish v. Kobach*, 320 F.R.D. 566, 579, *review denied*, 267 F. Supp. 3d 1297 (D. Kan. 2017).

c. *No Undue Burden*: Finally, petitioners have failed to establish that making the Secretary available for a mere four hours of deposition testimony would impose any undue burden on the Secretary or Commerce. Before this Court's stay, petitioners had provided a date on which the Secretary was available. While the Secretary is a cabinet member with important responsibilities, the district court appropriately respected his position by imposing numerous limitations on the deposition, such as restricting its duration to four hours and requiring that it take place at a location convenient for the Secretary.

CONCLUSION

The Court should affirm the Second Circuit's decisions denying mandamus.

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