18-2856

United States Court of Appeals for the Second Circuit

In Re: UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, an agency within the United States Department of Commerce, RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau.

UNITED STATES DEPARTMENT OF COMMERCE,

Petitioners,

v.

STATE OF NEW YORK,

Respondents.

(caption continues inside front cover)

On Petition for a Writ of Mandamus to the United States District Court for the Southern District of New York

BRIEF AND ADDENDUM FOR GOVERNMENT RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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WILBUR L. ROSS, in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, an agency within the United States Department of Commerce, RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau,

Petitioners,

v.

STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF IOWA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, COMMONWEALTH OF VIRGINIA, STATE OF VERMONT, STATE OF WASHINGTON, CITY OF CHICAGO, ILLINOIS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, UNITED STATES CONFERENCE OF MAYORS, CITY OF SEATTLE, WASHINGTON, CITY OF PITTSBURGH, COUNTY OF CAMERON, STATE OF COLORADO, CITY OF CENTRAL FALLS, CITY OF COLUMBUS, COUNTY OF EL PASO, COUNTY OF MONTEREY, COUNTY OF HIDALGO,

Respondents.

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PRELIMINARY STATEMENT

Defendants—the U.S. Department of Commerce (Commerce), Secretary of Commerce Wilbur Ross, Jr. (the Secretary), the Bureau of the Census (Bureau), and Ron Jarmin—filed this mandamus petition to prevent a deposition of the Secretary ordered by the United States District Court for the Southern District of New York (Furman, J.) in this lawsuit challenging defendants' decision to modify the decennial census to include a question about citizenship status.

In response to an earlier mandamus petition, this Court recently upheld the district court's finding that defendants' bad faith and improper conduct warranted limited discovery, including depositions of agency officials. This Court observed that, among other issues, such discovery would shed light on whether the Secretary had publicly provided "a pretextual legal justification for adding the citizenship question" (Add14). The district court has now found that the Secretary possesses unique first-hand knowledge on this issue (among others) that cannot be obtained from other sources. Because defendants fail to show that the district court clearly abused its discretion in reaching this conclusion, the Court should deny mandamus relief.

Much of defendants' current mandamus petition improperly seeks to relitigate the threshold question that this Court already resolved in the prior mandamus proceeding: namely, whether the district court clearly abused its discretion in allowing additional discovery *at all* due to defendants' bad faith and improper conduct. Because this Court's previous ruling is the law of the case, the Court should decline to entertain defendants' efforts to resurrect their meritless objections to the district court's threshold discovery ruling.

On the specific question of whether the district court clearly abused its discretion in ordering Secretary Ross's deposition, this Court should deny mandamus relief given the district court's careful factual findings and responsible management of the proceedings below. As the district court reasonably found, and defendants do not seriously dispute, the Secretary was directly and personally involved to an extraordinary degree in the months-long project to add a citizenship question to the decennial census. But despite plaintiffs' best efforts to pin down the actual basis for the Secretary's decision and to obtain a comprehensive picture of all information directly or indirectly considered by him, there remain obvious and significant gaps in the record. The district court did

not clearly abuse its discretion in determining that the Secretary's deposition was essential to filling those gaps. Indeed, multiple high-level officials at Commerce have testified that the Secretary—and the Secretary alone—possesses critical information about the precise nature and timing of his decision to add a citizenship question.

This Court should thus deny mandamus relief and allow the Secretary's deposition to proceed.

STATEMENT OF THE CASE

A. Factual Background

1. The Constitution requires an "actual Enumeration" of the population once every ten years to count "the whole number of persons in each State." U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. This enumeration indisputably 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 "decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs." Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997). The enumeration directly affects the apportionment of Representatives to Congress among

the States, the allocation of electors to the Electoral College, the division of congressional electoral districts within each State, and the apportionment of state and local legislative seats. *See* U.S. Const. art. I, § 2, cl. 3; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). (Second Am. Compl. ("Compl.") ¶¶ 152-56.) The federal government also relies on the census's population count to distribute hundreds of billions of dollars of funding each year to States and localities. (Compl. ¶¶ 139-150.)

Congress has assigned its constitutional duty to conduct the decennial enumeration to the Secretary of Commerce and Census Bureau. The Secretary's essential duty for the enumeration is to obtain a total-population count that is "as accurate as possible." Pub. L. 105-119, § 209(a)(6), 11 Stat. at 2481; *see Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (decisions must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population").

The Bureau conducts the required decennial enumeration principally by sending a short questionnaire to every household in the country. (Compl. ¶ 33.) To ensure the accuracy of the total-population count, the Bureau follows detailed standards to develop and test each

census question to achieve "the highest rates of response" and thus maximize data quality. (*Id.* ¶ 58; *see id.* ¶¶ 56-69, 79.)

2. The decennial census questionnaire sent to every household has not included any question related to citizenship status for more than sixty years. For nearly forty years, in both Republican and Democratic administrations, the Bureau has vigorously opposed adding any such question based on its concern that including a citizenship question would drive down response rates by certain groups, such as noncitizens and immigrants, thereby undermining the accuracy of the person-by-person headcount.[1] *New York v. Department of Commerce*, 315 F. Supp. 3d 766, 782-85 (S.D.N.Y. 2018). (Compl. ¶¶ 39-55, 84-91.)

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[1] Although the Bureau has requested citizenship information through other means aside from the decennial census questionnaire, its requests have gone only to a limited number of individuals. Until 2000, the Bureau requested such information through a "long-form" questionnaire, i.e., a list of questions sent to one of every six households. In 2005, the Bureau replaced the long-form questionnaire with the American Community Survey (ACS), which contains more than forty-five questions and is sent annually to one of every thirty-six households. The substantial differences between these more limited information requests and the decennial census mean that testing used for the ACS or long-form questionnaire "cannot be directly applied to a decennial census environment." U.S. Census Bureau, Supporting Statement A-2018 End-To-End Census Test – Peak Operations 22-23 (Jan. 23, 2018).

For example, the Bureau has represented that questions "to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because such questions "are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *FAIR*, 486 F. Supp. at 568. The Bureau repeatedly reaffirmed these warnings in congressional testimony, explaining that a census question about immigration status or citizenship "could seriously jeopardize the accuracy of the census." *Census Equity Act: Hr'g Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 43-45 (1989). Bureau directors appointed by presidents of both political parties have agreed. (Compl. ¶¶ 43-47, 80.) Indeed, as recently as April 2018, defendant Jarmin, the current Director of the Census Bureau, acknowledged that asking for citizenship status would have a deterrent effect on response rates that "would largely be felt" by immigrant and Hispanic populations. (*Id.* ¶ 80.)

3. In March 2018, Secretary Ross publicly announced that he had decided to add a citizenship question to the 2020 census questionnaire sent to every household, in contravention of the Bureau's long-held view

that such a question would undermine the accuracy of the enumeration. The Secretary issued this decision even though many experts, including the Bureau's Chief Scientist, had informed the Secretary that doing so would "harm the quality of the census count." (Gov't Resps. Addendum ("GRA") 75; GRA110 ("inclusion of a citizenship question…is very likely to reduce the self-response rate"); GRA172 (Chief Scientist explaining that adding citizenship question is not a good idea).) The Secretary also added the citizenship question even though the Bureau had not subjected the question to the rigorous testing procedures normally required before changing the census questionnaire. (Compl. ¶¶ 64-69.)

In a March 2018 memorandum publicly announcing this decision, the Secretary claimed that he had "initiated" and "set out to take a hard look" at adding a citizenship question "[f]ollowing the receipt" of a Department of Justice letter, dated December 12, 2017, asserting that DOJ needed person-by-person citizenship data to enforce the Voting Rights Act's prohibition against diluting the voting power of minority groups. (Add184, Add193-195; *see* Add184 (Secretary's staff "began a thorough assessment" of citizenship question after receipt of DOJ letter.) The Secretary reiterated in congressional testimony that DOJ had

"initiated the request for inclusion of the citizenship question," *Hearing on Recent Trade Actions: Hr'g Before the H. Comm. on Ways & Means* ("*March 22 Hr'g*"), 115th Cong. p.51 (Mar. 22, 2018), (unofficial transcript 2018 WLNR 8951469), and that Commerce's decision-making process was "responding *solely* to [DOJ's] request" for citizenship data, *Hearing on F.Y. 2019 Dep't of Commerce Budget: Hr'g Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the H. Comm. on Appropriations* ("*March 20 Hr'g*"), 115th Cong. video 36:20 (Mar. 20, 2018) (unofficial transcript 2018 WLNR 8815056) (emphasis added).

The Secretary soon drastically altered his version of events, making clear that key parts of his initial rationale for adding the citizenship question were false. Contrary to the Secretary's assertions in his March 2018 memorandum and in his congressional testimony, DOJ's letter *did not* initiate the Secretary's consideration of adding a citizenship question. To the contrary, the Secretary began pushing to add such a question many months before DOJ sent its letter; and it was the Secretary who approached DOJ about the issue, not the other way around. (Add192.)

As the Secretary admitted in a supplemental decision memorandum issued in June 2018, after this lawsuit had been filed, and after

defendants had filed the administrative record, he began considering the citizenship question "[s]oon after [his] appointment as Secretary" in February 2017—almost a year before the DOJ letter—because "senior Administration officials had previously raised" the issue. (Add192.) For example, in early 2017, at the direction of then–White House Chief Strategist Stephen Bannon, the Secretary spoke with Kris Kobach, who urged the Secretary to add a citizenship question as an "essential" tool to resolve "the problem" of noncitizens being counted for purposes of congressional apportionment.[2] (GRA23-24.) Kobach's email made no mention of the VRA.

When the Secretary's staff failed to move as quickly as he preferred, the Secretary repeatedly and personally intervened to ensure that Commerce would add a citizenship question—including by finding some cover rationale to justify this determination. For example, in May 2017, the Secretary pressed his chief policy advisor, Earl Comstock, about why

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[2] There is no such problem. The Supreme Court upheld the constitutional mandate to count all inhabitants, including noncitizens, for congressional apportionment in 1964, *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964), and reaffirmed the validity of that practice for state legislative redistricting in 2016, *Evenwel*, 136 S. Ct. at 1128-29.

"nothing [has] been done in response to my *months old* request that we include the citizenship question." (GRA20 (emphasis added).) Comstock responded by reaching out to both DOJ and the Department of Homeland Security to see if either agency would request a citizenship question, but both agencies declined. (GRA35.) Similarly, in August and September, the Secretary repeatedly demanded updates from his staff on whether they had accomplished his goal of adding the citizenship question. (GRA25-33.) The Secretary then reached out to Attorney General Jeff Sessions, leading to a set of communications between both the cabinet officers and their staff—the substance of which is still unknown—that culminated in DOJ's December 2017 letter. (GRA41-44.)

Throughout this process, the Secretary and his staff never informed the Census Bureau about the Secretary's decision to add a citizenship question. (GRA174-176.) When the Bureau's professional staff received DOJ's December 2017 request for citizenship data, they sought to meet with DOJ's technical experts to discuss the best way to provide that data, and specifically noted that adding a citizenship question would *not* provide the accurate citizenship data that DOJ wanted. (GRA71-72.) Even though such meetings are routine—and sensible, given the

Bureau's expertise over demographic data collection (*see* GRA168-171)—senior DOJ officials rejected the invitation to attend a meeting (GRA99). The Secretary then forged ahead with adding the citizenship question over the strong objections of the Bureau's professional staff, who repeatedly informed him that adding a citizenship question would undermine the accuracy of the decennial enumeration and thus fail to provide the block-level citizenship data that DOJ claimed to need (GRA111 (citizenship question "would result in poorer citizenship data")).

B. This Lawsuit

1. Initial proceedings

Plaintiff States and local governments filed suit in April 2018, alleging that the Secretary's decision to add a citizenship question was arbitrary and capricious, in violation of the Administrative Procedure Act (APA); contrary to law, in violation of the APA; and a violation of the Enumeration Clause. In May 2018, defendants filed a motion to dismiss the complaint, which plaintiffs opposed.

In June 2018, defendants purported to file the complete administrative record of all materials considered by the Secretary in deciding to add the citizenship question. A few weeks later, on June 21,

defendants supplemented the record to add the Secretary's supplemental decision memorandum, which admitted for the first time—and in conflict with his initial explanation—that he had pursued a citizenship question long before DOJ drafted or submitted its letter. (Add192.) The parties then filed letters to address the administrative record and discovery.

2. The order allowing limited discovery

In July 2017, the district court authorized three categories of limited discovery. (Add94-95.) First, the court held that the administrative record was patently deficient and ordered defendants to complete the record during discovery. (Add96-99.) The court emphasized that defendants had failed to provide *any* documents predating DOJ's December 2017 letter—even though the Secretary had conceded that he began pursuing the citizenship question long before that date. (Add97.)

Second, the court authorized limited expert discovery to aid the court in adjudicating certain complex issues. (Add104-105.)

Third, the court authorized certain additional discovery based on the irregularity of the record that defendants had produced and a strong showing of "bad faith or improper behavior." (Add99.) The court identified several factors that, taken together, justified this additional discovery,

including: (a) the Secretary's admission that he had been pursuing the citizenship question *before* DOJ submitted the December 2017 letter; (b) the Bureau's failure to conduct its normal testing procedures; (c) credible allegations that the Secretary had overruled the strong objections of the Bureau's professional staff, who warned that the question would "'harm the quality of the census count'"; and (d) prima facie evidence that the Secretary's stated rationale—to support DOJ's enforcement of the VRA—was pretextual. (Add99-100.)

The court strictly limited further discovery. The court authorized discovery only from Commerce and DOJ, generally prohibiting discovery from other third parties. The court limited all plaintiffs to ten fact-witness depositions. (Add103-104.) And the court limited the duration of discovery, ordering completion of all discovery by October 12, and setting intermediate deadlines. (Add105-106.) As the court explained, "time is of the essence here given that the clock is running on census preparations." (Add94.) Throughout the two months of discovery that followed, defendants did not seek a single protective order to further limit discovery.

3. The decision on the motion to dismiss

Shortly after issuing its discovery order, the court denied defendants' motion to dismiss in part and granted it in part. The court concluded that plaintiffs had plausibly alleged their standing, and that sufficient legal standards existed to review the Secretary's decision under the APA. (Add130-159.) The court thus authorized plaintiffs to move forward with their APA claims because defendants had not challenged the sufficiency of those allegations. (Add118.) The court dismissed plaintiffs' Enumeration Clause claim for failure to state a claim. (Add159-173.) Defendants did not seek to certify an interlocutory appeal of the motion-to-dismiss order.

4. The order approving Gore's deposition

In August 2018, the district court compelled the deposition of John Gore, who had written DOJ's December 2017 letter. The court found that Gore's testimony would bear directly on the reasonableness of the Secretary's decision. (Add15-17.)

5. This Court's order denying defendants' first mandamus petition

In September 2018, nearly two months after discovery began, defendants filed a petition for mandamus relief to halt all further discovery and to quash Gore's deposition.

On September 25, 2018, this Court denied the petition. (Add13-14.) The Court determined that the district court had not clearly erred in ordering "limited extra-record discovery" based on both "its conclusion that the initial administrative record was incomplete" and its determination that plaintiffs had "made a sufficient showing of 'bad faith or improper behavior'" by defendants. (Add14.)

The Court also determined that the district court had not clearly erred in finding that exceptional circumstances warranted Gore's deposition. Noting that Gore wrote the DOJ letter that the Secretary said he relied on to justify adding the citizenship question, the Court found no clear error in the district court's conclusion that Gore possessed unique, first-hand knowledge about a relevant issue—namely, whether "the Secretary used the December 2017 Department of Justice letter as a pretextual legal justification for adding the citizenship question." (Add14.)

C. The Current Mandamus Proceeding

In September 2018, the district court granted plaintiffs' motion to compel the Secretary's deposition. Applying the well-established principles set forth in *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013), to the unusual facts of this case, the court found that "exceptional circumstances" warranted a short, four-hour deposition of the Secretary. (Add1-2.)

First, the court concluded that the Secretary "plainly has 'unique first-hand knowledge related'" to issues that are central to plaintiffs' APA claims. (Add2 (quoting *Lederman*, 731 F.3d at 203).) As the court explained (and as defendants had previously conceded), the Secretary's decision would be arbitrary and capricious if his "stated rationale" for adding the citizenship question—namely, DOJ's December 2017 letter claiming to need block-level citizenship data to enforce the VRA—"was not his *actual* rationale." (Add3.) The court further noted that defendants had essentially admitted that the Secretary has unique personal knowledge given their insistence that the Secretary "was the decision-maker" whose actual intent and reasons for adding the citizenship question are at issue. (Add3-4.)

The court further found that the Secretary has important first-hand knowledge because he was "personally and directly involved" in the "unusual process" that led to his decision (Add4)—a process that had already raised significant questions about whether the Secretary's stated rationale for adding the citizenship question was pretext (Add3). As the court explained, the Secretary had begun considering whether to add the citizenship question in February 2017, nearly a year before DOJ's letter, based on personal consultations about the citizenship question with "senior Administration officials" (Add8) whose identities remain unclear (Add6.) The Secretary also "manifested an unusually strong personal interest" in adding the citizenship question, "demanding to know as early as May 2017—seven months before the DOJ request—why no action had been taken on his 'months old request'" to include the question. (Add5.) And the Secretary "personally lobbied the Attorney General to submit" the DOJ letter despite knowing that DOJ had already declined to request citizenship data from the Bureau. (Add5.)

Second, the district court concluded that taking the Secretary's deposition was the "only way to fill in critical blanks in the current record." (Add7.) As the court explained, each of the Secretary's three most

senior advisors had repeatedly testified that the Secretary "was the only person who could provide" certain critical information. (Add7.) For example, they testified that only the Secretary would be able to provide the names of the senior administration officials who first raised the citizenship question, the content of the Secretary's conversations with Kris Kobach and the Attorney General, and the Secretary's actual reasons for adding the citizenship question. (Add7-8.)

Third, the district court rejected defendants' contention that plaintiffs were required to pursue other discovery routes, such as interrogatories or requests for admission, before taking the Secretary's deposition. The court emphasized that plaintiffs had "already pursued several of these options, yet gaps in the record remain." (Add9; *see* Add8 (noting that plaintiffs' interrogatories had not resulted in defendants providing the names of senior Administration officials who first suggested adding the citizenship question).) And the court explained that, in any event, a short deposition of the Secretary would be more efficient and less burdensome than other discovery routes given the limited time remaining until the close of discovery on October 12, and the

need to resolve this litigation quickly because of defendants' deadlines to prepare for the census. (Add8-9.)

Finally, to further guard against imposing any undue burden on the Secretary, the district court limited the deposition to four hours and required that it take place at a location convenient for the Secretary. (Add12.)

This mandamus petition followed.

ARGUMENT

DEFENDANTS DO NOT SATISFY THE STRINGENT STANDARDS TO OBTAIN THE EXTRAORDINARY RELIEF OF MANDAMUS TO QUASH THE DEPOSITION OF THE SECRETARY

Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary cases." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013). To be entitled to such relief, defendants must show that the "right to issuance of the writ is clear and undisputable," *In re Roman Catholic Diocese of Albany, N.Y. Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (per curiam), because the district court's order "amount[ed] to a judicial usurpation of power or a clear abuse of discretion," *Range v. 480-486 Broadway, LLC*, 810 F.3d 108, 113 (2d Cir. 2015) (per curiam). Because defendants challenge a discovery order, they must satisfy an even higher

bar: mandamus is available only if the "discovery question is of extraordinary significance or there is extreme need for reversal." *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (quotation marks omitted). Defendants' petition does not present any such circumstances.

A. This Court Should Reject Defendants' Attempt to Relitigate the Finding of Bad Faith That This Court Recently Upheld.

This Court recently upheld the district court's finding that "plaintiffs made a sufficient showing of 'bad faith and improper behavior' to warrant limited extra-record discovery," including depositions. (Add14.) The Court declined to disturb the district court's finding that the Secretary's initial accounts of his decision to add the citizenship question appeared to be untrue. (*See* Add96-97.) And this Court further found no clear error in the district court's determination that the Secretary's extraordinary reversal of his public explanation for adding a citizenship question, along with other evidence, raised serious questions about whether "the Secretary used the December 2017 Department of Justice letter as a pretextual legal justification for adding the citizenship question." (Add14.)

"[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991). Much of defendants' new mandamus petition disregards this well-settled principle by improperly seeking to relitigate the question that this Court already resolved—namely, whether discovery beyond the administrative record is warranted *at all* given defendants' bad faith and improper conduct. This Court should reject defendants' attempts to reopen this question.

In particular, defendants repeat the same argument made in their prior mandamus petition (Pet. for Writ of Mandamus 16-18, No. 18-2652, (2d Cir. Sept. 7, 2018), ECF#1-2) that the Secretary's decision to add a citizenship question should be evaluated based solely on "the reasons the Secretary gave for making his decision" and the administrative record he elected to produce to support that rationale (Pet. for Writ of Mandamus ("Pet.") 21; *id.* 18-19). But this default "record rule" does not apply when there has been a showing of bad faith or improper conduct, as the district court previously found (Add99-102, Add202-203) and this Court declined to disturb (Add14). Such a showing warrants discovery beyond the

administrative record, including depositions of high-level officials, precisely because it calls into question the accuracy and comprehensiveness of the agency's public justification, and requires further inquiry to determine whether the agency's stated rationale for a decision is a pretext masking its actual rationale. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 230-36 (E.D.N.Y. 2006); *New York v. Salazar*, 701 F. Supp. 2d 224, 240-43 (N.D.N.Y. 2010), *aff'd*, 2011 WL 1938232 (N.D.N.Y. 2011). Because this Court has already held that the district court did not clearly err in finding bad faith sufficient to warrant limited discovery into the Secretary's decision-making process, the Court should reject defendants' attempt to relitigate "[t]he premise of the district court's order" (Pet. 17).[3]

Defendants also argue that, even after discovery is opened based on bad faith, plaintiffs must make some *additional* showing of bad faith to

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[3] Defendants improperly challenge the district court's ruling on plaintiffs' standing and the justiciability of their claims. (Pet. 30-31.) These issues are simply not at issue here, and defendants' arguments are meritless in any event, for the reasons given by the district court. (Add129-159.)

establish "exceptional circumstances" to depose high-level officials such as the Secretary. That argument mistakenly conflates the threshold bad-faith showing (which authorizes additional discovery in the first instance) with the exceptional-circumstances test (which determines when such discovery may include the deposition of high-level officials). Contrary to defendants' arguments, once a district court has appropriately opened discovery based on bad faith, *Lederman*'s exceptional-circumstances test does not require some further demonstration of a high-level official's bad faith or improper conduct to warrant his deposition. Rather, the factors underlying the exceptional-circumstances test determine whether a particular official's unique, personal knowledge about matters directly relevant to a litigated issue warrants some interference with his official duties to provide testimony. In other words, the test turns on the relevance and importance of the official's testimony—not on whether his actions demonstrate any bad faith. That this mandamus proceeding concerns a different deposition from the one this Court previously considered thus provides no basis for revisiting the bad-faith finding that this Court already upheld.

In any event, none of defendants' arguments comes close to establishing that this Court committed "clear error" less than a week ago in declining to disturb the district court's finding of bad faith and improper conduct. *United States v. Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002). To counter the district court's finding that the Secretary appeared to mislead the public and Congress in his initial justification for adding a citizenship question, defendants assert that the Secretary merely *omitted* relevant information from his March 2018 decision memorandum, and carefully parse the Secretary's extended testimony before Congress to assert that he at most "used imprecise language" that, "[r]ead in context," should not be interpreted as intentionally misleading. (Pet. 22-24.) But defendants' strained reading of the Secretary's words is simply not plausible—and comes nowhere close to showing that the district court clearly abused its discretion in coming to a contrary conclusion about the truthfulness of the Secretary's public statements.

For example, defendants misconstrue the Secretary's congressional testimony in arguing that he was simply responding appropriately to specific questions. What the testimony shows instead is that the Secretary repeatedly and explicitly raised DOJ's December 2017 letter as

the sole factor that initiated his decision to add the citizenship question—a misleading statement given his nearly year-long pursuit of a citizenship question before DOJ's letter and his direct role in manufacturing that letter. When asked whether Commerce "plans to include the citizenship question on the 2020 census," the Secretary testified that DOJ "*initiated* the request for inclusion of the citizenship question." *March 22 Hr'g*, *supra*, p.51 (emphasis added). When questioned on the legitimacy of the VRA-enforcement rationale given the paucity of recent VRA-enforcement actions brought by DOJ, the Secretary emphasized that "the Justice Department is the one *who made the request of us*." *Hearing on the F.Y. 2019 Funding Request for the Commerce Dep't: Hr'g Before the S. Appropriations Comm*, 115th Cong. video 1:35 (May 10, 2018) (emphasis added) (unofficial transcript 2018 WL 2179074). And when asked whether any political party had requested the citizenship question, the Secretary explicitly stated that "[w]e are responding *solely* to the Department of Justice's request"—which he described as "a very big and very controversial request." *March 20 Hr'g*, *supra*, at 36:20 (emphasis added).

What these statements did (and were intended to) convey was that the Secretary 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 his own role in instigating DOJ's letter and his months-long push for a citizenship question. Contrary to defendants' characterization now, nothing whatsoever in the Secretary's statements gave any indication that DOJ's letter initiated only some later, "formal" stage of the Secretary's decision-making process. (*See* Pet. 22 n.2.) And contrary to defendants' contention (Pet. 22), the Secretary's strategic omission of his considerable pre-December 2017 actions *did* make his statements to the public and Congress deeply misleading by presenting DOJ, rather than the Secretary, as the motivating force for the decision to add a citizenship question.

B. The District Court Did Not Abuse Its Discretion in Finding that Exceptional Circumstances Warrant the Secretary's Deposition.

As this Court has squarely held, a high-ranking official may be "deposed or called to testify regarding the reasons for taking official action, including the manner and extent of his study of the record and his consultation with subordinates," if either of two "exceptional

circumstances" exists: "the official has unique first-hand knowledge related to the litigated claims," or "the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman*, 731 F.3d at 203 (quotation marks omitted). When either of these exceptional circumstances is present, "courts have not hesitated to take testimony" from cabinet members and other federal agency heads, as the district court correctly observed. (Add10.) *See, e.g.*, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 33 (D.D.C. 1999) (Secretary of the Interior), a*ff'd*, 240 F.3d 1081 (D.C. Cir. 2001); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 316 F. Supp. 754, 760 n.12 & 773 n.36 (D.D.C. 1970) (Secretary of Transportation), *rev'd on other grounds*, 459 F.2d 1231 (D.C. Cir. 1971).[4] Here, the district court did not severely abuse its discretion in finding that "exceptional circumstances" warrant the Secretary's deposition. (Add2.)

[4] *See also American Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 768-69 (D.D.C. 1984) (director U.S. Information Agency); *Union Sav. Bank of Patchogue, N.Y. v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962) (Comptroller).

1. The district court did not clearly err in finding that the Secretary has unique first-hand knowledge relevant to plaintiffs' legal claims.

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. (Add4.) Indeed, the Secretary doggedly pursued his objective to add the citizenship question for many months before DOJ sent its December 2017 letter, and before the Secretary was even aware of the VRA-enforcement rationale that he later purported to adopt. For example:

- The Secretary began considering the addition of a citizenship question after he was appointed in February 2017, nearly a year before DOJ's letter, because "senior Administration officials had previously raised" the issue. (Add192.) The record still does not reflect the names of these officials, or whether they or the Secretary expressed any concern about VRA enforcement.

- Sometime in early 2017, at the direction of then–White House Chief Strategist Stephen Bannon, the Secretary spoke with Kris Kobach, who urged the Secretary to add a citizenship question as an "essential" tool to resolve "the problem" of noncitizens being counted for congressional apportionment. (GRA16, GRA23-24.) Kobach's email made no mention of the VRA.

- In March 2017, the Secretary's chief policy advisor, Earl Comstock, responded to the Secretary's "question on the census" by discussing whether the census's total-population count must include noncitizens. The email did not discuss the VRA. (GRA13-15.)

- In May 2017, still seven months before DOJ's letter, the Secretary demanded to know why no action had been taken on his "*months old request*" to include the citizenship question. (GRA18 (emphasis added).) This demand set off a flurry of activity among the Secretary's staff, including discussions about the legal basis for counting "illegal immigrants" in the census. (GRA20-22.)

- In August and early September 2017, the Secretary sent multiple emails to his staff demanding updates, briefings, and meetings about adding the citizenship question. Although one of these emails references DOJ and offers to call the Attorney General (GRA25), none of them mentions the VRA (GRA25-34).

- On September 8, 2017, the Secretary received a memorandum from Comstock explaining his failed efforts to find an agency to sponsor the citizenship question. Comstock explained that he had previously reached out to DOJ and the Department of Homeland Security, but both agencies declined to request the citizenship question. The memorandum stated that, since then, the Secretary's staff had been working on "how Commerce could add the question to the Census itself." (GRA35.)

- In mid-September 2017, the Secretary spoke directly to the Attorney General about the citizenship question. The record does not reflect any details about this conversation, including whether the Secretary and Attorney General discussed the VRA. (GRA43-44.)

- Gore then drafted DOJ's letter. (GRA41-42, GRA56.)

In light of the Secretary's nearly year-long, personal involvement in pushing for a citizenship question before receiving DOJ's letter, the district court did not clearly err in finding that the Secretary has first-

hand knowledge about key facts that go to the core of plaintiff's' claims, including the Secretary's actual rationale for adding the citizenship question and the information that he "directly or indirectly" considered, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). The Secretary has information about *when* he actually decided to add the citizenship question, including whether he made that decision many months before receiving DOJ's letter, as evidence indicates. (GRA17-18, GRA25, GRA29, GRA44, GRA53.) The Secretary has extensive personal knowledge about *why* he actually decided to add the citizenship question, including whether he in fact based his decision on DOJ's letter, or instead on other, still-unacknowledged factors. The Secretary's deposition will thus allow the district court to evaluate whether the Secretary's purported reliance on DOJ's request for citizenship data was pretextual.

The Secretary also has personal knowledge about another factual issue that is central to plaintiffs' claims and directly relevant to whether the Secretary's stated rationale is pretextual: namely, the Secretary's decision to abandon the well-established procedures that the Bureau typically follows when engaged in the momentous task of modifying the decennial census. For example, evidence shows that the Secretary

pushed to add a citizenship question throughout 2017 without even notifying, let alone obtaining expert input from, the Bureau's professional staff (GRA174-176); and that he personally intervened in September 2017 after DOJ initially declined to submit a request for person-by-person citizenship data (GRA1-11, GRA44.) After receiving DOJ's letter, the Secretary also forged ahead with adding the citizenship question over the strong objections of his professional staff, who informed him that adding the question would actually *undermine* VRA enforcement by "harm[ing] the quality of the census count" (GRA75), and that the Bureau could provide the block-level citizenship data requested by DOJ *without* adding a citizenship question (GRA75-76, GRA1312; *see* GRA72 (defendant Jarmin stating that using administrative records would "result in higher quality data produced at lower cost"). Given the Secretary's direct and personal involvement in the decision to disregard the pointed warnings about the poor quality of the data that would result from adding a citizenship question, his deposition will shed light on whether his stated objective to provide accurate data to DOJ for VRA enforcement purposes was pretextual.

Defendants do not seriously dispute the Secretary's direct and personal involvement in the decision to add a citizenship question. But they argue that the Secretary's personal involvement, including his direct conversations with various officials and outside stakeholders, was not "improper." (Pet. 21.) This argument is a red herring. As explained (*supra* at 21-27), the relevant question under *Lederman* is not whether a high-level official acted improperly or in bad faith, but rather whether his personal involvement means that he has "unique first-hand knowledge related to [plaintiffs'] claims"—a standard that the district court correctly applied here. (Add8 (quoting 731 F.3d at 203); *see* Add4-5.)

Defendants also miss the mark in asserting (Pet. 13, 17) that a deposition of the Secretary is unnecessary because his "intent and credibility" are irrelevant in this APA proceeding. This Court has already recognized that one of the critical facts to be decided is whether "the Secretary used the December 2017 Department of Justice letter as a pretextual legal justification for adding the citizenship question" (Add14). The district court did not clearly abuse its discretion in finding that the Secretary himself possesses unique first-hand hand knowledge relevant to this factual question. The Secretary plainly knows whether

he actually aimed to provide DOJ with citizenship data for VRA enforcement, or was instead pursuing a different, unstated objective, such as excluding noncitizens from the population counts used for congressional apportionment. And determining whether the Secretary's stated rationale was the same as his actual rationale necessarily turns in part on the Secretary's credibility. Indeed, evidence suggesting that the Secretary's stated reason for adding the citizenship question was pretextual may lead a reasonable factfinder to infer "that he was dissembling to cover up a discriminatory" or other improper purpose. (Add3 (quotation marks omitted.)

Defendants are also incorrect in arguing (Pet. 28-30) that the Secretary's deposition is unnecessary because plaintiffs will be able to depose a DOJ official, John Gore, to determine the legitimacy and reasonableness of DOJ's claim to need citizenship data for VRA enforcement. Even putting aside the fact that defendants continue to object to Gore's deposition as well, the question of pretext still requires the Secretary's deposition because, as defendants have repeatedly acknowledged, "Secretary Ross was the decisionmaker" whose stated justification for adding the citizenship question is at issue here. Pet. for

Writ of Mandamus 23, No. 18-2652, ECF#1-2 (2d Cir. Sept. 7, 2018); *see* Letter 2, No. 18-cv-2921 (Aug. 15, 2018), S.D.N.Y. ECF#255 ("relevant question…is whether Commerce's stated reasons for reinstating the citizenship question were pretextual").) While the legitimacy and reasonableness of DOJ's request for citizenship data will certainly shed light on whether the Secretary's reliance on DOJ's request was pretextual, the Secretary's deposition is still necessary to provide the complete picture of whether the "*the Secretary* used [DOJ's] letter as a pretextual legal justification for adding the citizenship question." (Add14 (emphasis added).)

2. The district court did not clearly err in finding that the information that the Secretary possesses cannot be obtained from another source.

The district court did not plainly abuse its discretion in concluding that the critical information that the Secretary possesses "cannot be obtained through other, less burdensome or intrusive means." (Add2 (quoting *Lederman*, 731 F.3d at 203).) To ensure that the Secretary would not sit for a deposition until plaintiffs had exhausted other reasonable discovery mechanisms, the district court appropriately declined to authorize the Secretary's deposition at the outset of discovery. (Add104.)

Since then, plaintiffs have diligently sought to obtain the information they need about the Secretary's decision-making process without testimony from the Secretary, including by submitting interrogatories and requests for admissions, and taking the depositions of the Secretary's three most senior advisors. Despite these extensive efforts, "critical blanks in the current record" remain that only a deposition of the Secretary will fill. (Add7.)

Indeed, during key moments of their deposition testimony, 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. (Add7.) For example, the Secretary's advisors professed ignorance about any details regarding the "senior Administration officials" whom the Secretary consulted in deciding to add a citizenship question, and repeatedly insisted that the Secretary alone possessed such information:

- When the Secretary's Chief of Staff, Wendy Teramoto, was asked for the names of the senior administration officials, she responded: "I have no idea." "You would have to ask Secretary Ross." (GRA159.)

- The Secretary's Acting Deputy Secretary, Karen Dunn Kelley, testified that she did not know "who those senior administration officials were" and had "never asked" the Secretary about "where he got the idea to add a citizenship question." (GRA178.)

- The Secretary's Policy Director, Earl Comstock, likewise testified that plaintiffs would "have to ask the Secretary" about the names of the senior officials in question. (GRA122.)

The Secretary's advisors have also been unable—or unwilling—to provide any details about the Secretary's pre-December 2017 conversations with other officials and third parties, such as Kris Kobach and the Attorney General, even though the Secretary has now admitted that his deliberations about the citizenship question long predated DOJ's December 2017 letter. For example:

- Teramoto testified that she did not know the substance of the Secretary's conversations with Kobach, and could not remember her own conversation with Kobach in July 2017. (GRA24, GRA134-141, GRA165.)

- Comstock testified that he did not have any information about the substance of the Secretary's conversations with Kobach, and that he had not asked the Secretary about those conversations. (GRA123-124.)

- Teramoto claimed that she could not remember participating in the Secretary's September 2017 phone conversation with the Attorney General (GRA147, GRA163-166), even though she did participate (GRA44).

The Secretary's deposition is necessary to uncover the substance of these conversations, which took place during the critical time period before DOJ's December 2017 letter, because they would shed light on the actual rationale for the Secretary's determination and help reveal whether the Secretary used DOJ's letter as a pretextual justification for adding the citizenship question.[5]

Moreover, all three of the Secretary's senior advisors have steadfastly insisted that they cannot provide any information about the Secretary's reasons for pursuing the addition of a citizenship question for months before DOJ's letter and before he was aware of any purported need for citizenship data to enforce the VRA. For example:

- Teramoto testified that she had "no idea" why the Secretary had requested to add the citizenship question months before the Secretary or his staff first spoke to DOJ about the citizenship question. (GRA132-133.)

[5] Plaintiffs cannot obtain information about the Secretary's conversations from Kobach because the district court declined to authorize a third-party deposition of Kobach. (Order, No. 18-cv-2921 (Sept. 6, 2018), S.D.N.Y. ECF#303.) Plaintiffs have not requested a deposition of the Attorney General because a deposition of the Secretary will be more efficient given the Secretary's first-hand knowledge of other critical facts.

- Comstock testified that he did not know why the Secretary had been pushing to add the citizenship question before DOJ requested citizenship data. (GRA125-128.)
- Comstock claimed that he had never asked the Secretary about his reasons for wanting to add the citizenship question, testifying that he did not "need to know what [the Secretary's] rationale might be, because it may or may not be one that is . . . a legally valid basis." (GRA128.)
- Comstock declined to say whether the Secretary had been pursuing the citizenship question before December 2017, based on any VRA-related rationale. Comstock instead testified, "[y]ou'd have to . . . ask [the Secretary]." (GRA128.)

The Secretary's deposition is thus the only means by which the district court can obtain critical facts about the rationale that animated the Secretary's extensive efforts to add the citizenship question—facts that are central to understanding the Secretary's actual rationale, evaluating plaintiffs' claims of pretext, and ultimately determining whether the Secretary's decision was arbitrary and capricious.

Indeed, given the extent to which the Secretary has unique and important knowledge that only he can provide, this case presents circumstances more exceptional than in prior cases authorizing testimony from cabinet members or agency heads. See *supra* at 27-28. Defendants thus miss the mark (Pet. 25-26) in trying to distinguish these prior cases on the facts. Whatever specific circumstances warranted

testimony from a high-level official in those cases, none of the decisions remotely suggested that the exceptional, and indeed extraordinary, circumstances presented here would be insufficient to warrant the Secretary's testimony.[6]

Contrary to defendants' contention (Pet. 3, 13, 37), the district court did not clearly err in declining to require plaintiffs to continue pursuing other discovery mechanisms before taking the deposition of the Secretary. Plaintiffs have already pursued several of defendants' suggested options, "yet gaps in the record remain." (Add9.) For example, multiple interrogatories and depositions of other Commerce officials have failed to identify the "senior Administration officials" whom the Secretary identified as first raising the issue of the citizenship question with him. (Add8.) Requiring plaintiffs to issue further interrogatories or requests for admission, or to depose yet other Commerce officials who will also not be aware of the Secretary's decision-making process, would be less effective and more burdensome than simply deposing the Secretary

[6] Defendants rely (Pet. 14-15) on inapposite cases in which a court declined to authorize the deposition of a high-level official. None of these cases involved a threshold finding of bad faith or a high-level official who possessed first-hand knowledge unobtainable from another source.

himself. Moreover, given that discovery is scheduled to close in eight days, a deposition is the quickest and most efficient way to fill in the gaps in the Secretary's story, since depositions allow for "immediate follow-up questions" and contemporaneous objections rather than protracted exchanges of letters or motions. *Fish v. Kobach*, 320 F.R.D. 566, 579, *review denied*, 267 F. Supp. 3d 1297 (D. Kan. 2017).

Defendants have failed to establish that making the Secretary available for a single day of deposition testimony would impose any undue burden on the Secretary or Commerce. Defendants have already provided a date on which the Secretary will be available, and the petition identifies no specific conflicts that would preclude him from sitting for a deposition. 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 it to four hours and requiring that it take place at a location convenient for the Secretary.

Under the "unusual circumstances" of this case and the exceptional nature of this litigation, the district court did not clearly abuse its discretion in ordering the Secretary's deposition.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Dated: New York, New York
October 4, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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