STATE OF NEW YORK
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DIVISION OF APPEALS & OPINIONS
NEW YORK CITY BUREAU

November 21, 2018

Catherine O'Hagan Wolfe, Esq.
Clerk of Court, United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *In re United States Department of Commerce*, Nos. 18-2856, 18-2857

Dear Ms. Wolfe:

We write on behalf of plaintiffs-respondents in the above-captioned matters, in which defendants-petitioners again seek a stay of trial-court proceedings in lawsuits that challenge Secretary Ross's decision to modify the decennial census to include a question about citizenship status. The Court should again deny defendants' request for a stay for the reasons provided below and in the November 20 Order of the U.S. District Court for the Southern District of New York (Furman, J) denying defendants' stay request.

First, defendants' request for a stay should be denied because both this Court and the U.S. Supreme Court have already rejected nearly identical requests. Indeed, on the same day that defendants filed their certiorari petition in the Supreme Court, they sought a stay of all further trial proceedings from that Court based on essentially the same contentions they are making now—*i.e.*, that trial proceedings should be stayed because defendants are likely to succeed in obtaining an order limiting the district court's review to the administrative record. The Supreme Court rejected that stay request and did not even grant an administrative stay while it considered the petition for certiorari. Order, No. 18A455 (Nov. 2, 2018). There is no reason for this Court to reach any different result now.

Second, defendants fail to make a strong showing that they are likely to succeed on the merits of any question that would justify a stay. Defendants'

assertion that the Supreme Court will "resolve the question whether judicial review of the Secretary's actions is limited to the administrative record," Docket No. 86, at 1, is meritless because defendants did not present that question to the Supreme Court. The question on which the Supreme Court granted certiorari is narrow: "whether in an action seeking to set aside agency action under the Administrative Procedure Act . . . a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker." Pet'n for a Writ of Mandamus, *In re U.S. Dep't of Commerce, et al.*, No. 18-557 (S. Ct. filed Oct. 29, 2018). The only question before the Supreme Court's review is thus whether the district court properly authorized *specific* extra-record discovery based on a preliminary finding of bad faith. This question does not address any of the extra-record discovery that the district court authorized for distinct and allowable purposes—none of which defendants challenged in their mandamus petitions to this Court or their petition to the Supreme Court. *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (extra-record evidence to explain complex subject matter); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (extra-record evidence to evaluate whether the agency failed to consider all relevant factors). To the extent that defendants nonetheless ask the Supreme Court to go beyond the narrow question presented and confine the district court's review to the administrative record alone, there is a serious question whether they have preserved that issue given that they did not request such relief in the district court or in this Court until their recent, eleventh-hour requests to stay trial proceedings. Defendants have thus not made a strong showing that the Supreme Court will rule in their favor on the scope of the district court's review.

Third, defendants have failed to show that they will be irreparably injured absent a stay. Defendants' litigation expenses and efforts to prepare post-trial briefs by today and participate in arguments on November 27 do not constitute irreparable harm. *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 5791968, at *2 (S.D.N.Y. Nov. 5, 2018) (Amended Opinion and Order denying stay) (citing "black-letter law").

There is also no merit to defendants' contention that they are irreparably harmed by the possibility that the district court's decision on the merits will moot the discovery issue that is pending before the Supreme Court. As explained, the Supreme Court has already rejected this same argument in declining to stay trial proceedings. Moreover, defendants insist that they will not actually suffer any such harm because the Supreme Court will still be able to review the question presented in the certiorari petition and provide them with meaningful relief even if the district court issues a final judgment. Defendants cannot be irreparably harmed by an eventuality that they contend will not actually happen. In any event, defendants will not be irreparably injured even if

a final judgment were to moot the pending Supreme Court case because defendants have many effective avenues of relief remaining. The district court could still rule in defendants' favor on the scope-of-review issue they claim the Supreme Court will consider, or on the merits of plaintiffs' claims. And if the district court issues any rulings adverse to defendants, defendants may pursue the full panoply of appellate remedies from a final judgment.

Defendants make the further argument that the district court might let extra-record evidence improperly influence its judgment of the record materials. But defendants' unsupported aspersions do not overcome the well-established presumption that district courts are capable of disregarding improper evidence. *See Bic Corp. v. Far E. Source Corp.*, 23 F. App'x 36, 38-39 (2d Cir. 2001) (summary order) ("[T]he trial judge is presumed to be able to exclude improper inferences from his or her own decisional analysis"); *United States v. Am. Exp. Co.*, No. 10-CV-4496, 2014 WL 2879811, at *11 (E.D.N.Y. June 24, 2014) (same); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1077 (1991) (Rehnquist, C.J., dissenting) ("[T]rial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it"). Indeed, defendants' contention is especially meritless here, where the district court has repeatedly and clearly articulated its acute awareness of the need to differentiate between administrative record and extra-record evidence, as well as the different purposes for which extra-record evidence may be considered (such as standing), and has also repeatedly instructed the parties to distinguish between these categories of evidence in post-trial briefing.

By contrast, plaintiffs *will* be irreparably harmed by a stay. Delaying this case increases the likelihood that the very harm plaintiffs seek to prevent – the addition of a citizenship question to the census – cannot be fully adjudicated before the census forms are printed in June 2019. *New York*, 2018 WL 5791968, at *6 n.10. The imminence of the June 2019 deadline is reason to deny any stay and allow the district court to rule expeditiously. *See id.* (cataloging defendants' many representations that this case "is a matter of some urgency"). Meeting the June 2019 deadline will become harder, not easier, if the parties and courts are delayed in their task. And as the district court correctly observed, a final judgment will likely assist, rather than impede, a final resolution of this dispute by the Supreme Court by narrowing the issues and making the district court's actual scope of review concrete rather than hypothetical.

Finally, the public interest is not served by a stay. As the district court has repeatedly explained, the public has a keen interest in resolving this case quickly and transparently. Delay undermines this public interest, and ill serves the public interest of States and municipal governments that are diverting resources to try to obtain a complete enumeration and trying to plan for

adequate funding to meet the basic health and education needs of their communities.

Respectfully submitted,

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cc (via CM/ECF): all counsel of record