No. 18-2856

Case No. 18-CV-2921 (JMF) (S.D.N.Y)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau, Petitioners.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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The federal government has asked this Court to issue a writ of mandamus to quash the deposition the district court has ordered of Secretary of Commerce Wilbur Ross in these cases challenging the Secretary's decision to reinstate a citizenship question on the decennial census. A judicial order compelling the testimony of a Cabinet Secretary raises significant separation-of-powers concerns and is therefore permissible only in the rarest of circumstances. As the government explained in its mandamus petition, the various reasons the district court gave for compelling Secretary Ross's testimony fall far short of establishing that this is the exceptional case in which the mandated deposition of a sitting Cabinet Secretary is justified. Mandamus relief is therefore warranted.

1. In arguing to the contrary, plaintiffs do not acknowledge the extraordinary nature of a judicial order compelling the testimony of a Cabinet Secretary or grapple meaningfully with the great weight of authority concluding that such orders are improper. *See, e.g.*, *In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010) (issuing a writ of mandamus to preclude testimony of EPA Administrator); *In re McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015) (issuing writ of mandamus to preclude deposition of EPA Administrator); *In re United States*, 542 F. App'x 944 (Fed. Cir. 2013) (issuing writ of mandamus to preclude deposition of the Chairman of the Federal Reserve Board); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (issuing writ of mandamus to preclude deposition of the Vice President's chief of staff); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (issuing writ of mandamus to preclude testimony of Attorney General

and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (issuing writ of mandamus to preclude testimony of three FDIC Board members); *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (issuing writ of mandamus to preclude testimony of the Commissioner of the FDA); *United States Board of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (issuing writ of mandamus to preclude deposition of members of the Board of Parole).

Indeed, although plaintiffs assert that the district court's order was not "novel," Private.Pls.Br. 15, and even go so far as to suggest it involved nothing more than the "application of an established legal standard . . . to a particular set of facts," *id.* at 15, plaintiffs do not cite a single case in which a court has compelled the testimony of a Cabinet Secretary under circumstances remotely akin to those presented here—i.e., a situation in which the basis for the challenged administrative action is set forth in detailed memoranda, the government has provided a voluminous administrative record in support of that action, and plaintiffs have undertaken extensive discovery. Plaintiffs cite only the same small set of district court cases cited by the district court, *see* Govt.Pls.Br.27; Private.Pls.19. As we explained in petition, the unique circumstances that justified the compelled testimony of an agency head in those cases are not applicable here. Petn. 25-26. In the one case, from nearly a half-century ago, in which a district court ordered the compelled testimony of a Cabinet Secretary, it did so only because the relevant agency decisions (which the Secretary of Transportation made himself) "were not committed to writing at the time they were made," and thus

"it was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions." *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754, 760 n.12 (D.D.C. 1970). And even under those circumstances, the court limited the Secretary's interrogation to questions about "the actions [the Secretary] took, and the materials which he considered" and did not permit inquiry into "his mental process in considering th[o]se materials." *Id.* The other two cases, which involved the compelled testimony of an agency head but not a Cabinet Secretary, similarly limited the required depositions to questions about "facts," *American Broadcasting Companies v. USIA*, 599 F. Supp. 765, 769 (D.D.C. 1994), and "procedural actions taken," *Union Savings Bank v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962), and did not allow questions designed to probe "the workings of [the agency head's] mind," *id.*; *Am. Broadcasting Companies*, 599 F. Supp. at 769 (deposition would not probe the agency head's "deliberative thought process" or "why his or his agency's statutory discretion was exercised in a particular manner").

2. Plaintiffs also fail to explain how deposing Secretary Ross will provide them with information that will materially advance their claims. *See, e.g.*, *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (the compelled deposition of a high-ranking Executive Branch official is permissible only where the information sought is "necessary and . . . cannot otherwise be obtained"). As their submissions indicate, plaintiffs have detailed knowledge of the process that culminated in the Secretary's

decision to reinstate a citizenship question on the decennial census. *See, e.g.*, Private.Pls.Br. 2-3, 5-8; Govt.Pls.Br. 6-11, 28-29. They know, for example, that Secretary Ross had considered reinstating a citizenship question before he received the Department of Justice's December 2017 letter, that he first considered reinstating a citizenship question early in his tenure as Commerce Secretary; that he discussed the reinstatement of a citizenship question with the Attorney General before the Department of Justice requested that such a question be re-implemented; that he asked the Department of Justice if it would find citizenship data useful and would request it; that senior personnel at the Census Bureau recommended against adding a citizenship question; and that Commerce did not undertake any renewed testing of the effect that reinstating a citizenship question to the decennial census would have on response rates. Plaintiffs are also aware of the discussions Secretary Ross had with his closest aides regarding the reinstitution of a citizenship question, *see, e.g.*, Govt.Pls.Br. 29, with the discussions those aides had with one another and with others, *see, e.g., id.*; Private.Pls.Br. 18, and with Secretary Ross's congressional testimony, *see, e.g.,* Govt.Pls.Br. 7-8. In the federal government's view, none of this is germane. But Plaintiffs nowhere explain how, in light of the wealth of information plaintiffs already possess and have shared with the district court, Secretary Ross's deposition will materially enhance the district court's ability to assess the reasonableness and lawfulness of the Secretary's decision, even under their own theory of the case.

Although plaintiffs identify three purported gaps in the administrative record that they hope to fill through Secretary Ross's deposition, the insignificance of those gaps illustrates how little is to be gained from the Secretary's deposition. Plaintiffs argue (Private.Pls.Br. 17) that Secretary Ross's deposition will provide details about his conversations with the Attorney General and with third parties such as Kansas Secretary of State Kris Kobach. But the substantive views of third parties, including Kris Kobach and the Department of Justice, are already in the record, *see* Petn. 21, and there is no reason to think that those third parties expressed markedly different views in specific conversations with the Secretary. Plaintiffs likewise fail to explain why it is so critical that they determine which "other senior Administration officials" Secretary Ross was referring to in his supplemental memorandum. *See* Private.Pls.Br. 17. If it was somehow improper for Secretary Ross to speak with senior Administration officials about reinstating a citizenship question (and it was not), it would presumably make no difference who those individuals were. And it is similarly unclear why plaintiffs need to know "the precise persons Secretary Ross spoke with about the citizenship question 'in the critical months before DOJ's December 2017 letter.'" *See id.* They already know, for example, that he spoke with the Attorney General during that time, and that his staff spoke with Department of Justice personnel, including Acting Assistant Attorney General Gore. *See, e.g.*, Govt.Pls.Br. 10. Plaintiffs are also aware of communications and discussions the Secretary had with his aides during the summer and fall of 2017. *See, e.g.*, *id.* It is difficult to

fathom how knowing what additional persons, if any, Secretary Ross spoke to about reinstating a citizenship question in the fall of 2017 would affect the district court's ability to assess the merits of plaintiffs' Administrative Procedure Act and constitutional claims, even under plaintiffs' proposed analysis.

Moreover, there is no reason why these purported gaps in the record could not be filled through means other than Secretary Ross's compelled deposition, if they were, for some reason, thought to be significant. *See In re Cheney*, 544 F.3d at 314 ("The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere."); *In re United States*, 197 F.3d at 314 ("If other persons can provide the information sought, discovery will not be permitted against [a high-ranking government] official."); *In re FDIC*, 58 F.3d at 1060 ("We think it will be the rarest of cases ... in which exceptional circumstances can be shown where the testimony is available from an alternate witness."). The details of the Secretary's conversations with third parties, the names of the "other senior Administration officials" to whom Secretary Ross referred in his supplemental memoranda, and the names of the "precise persons" Secretary Ross spoke with in the fall of 2017 is information that could presumably be acquired through interrogatories or requests for admission. And if the information were not available through such alternate methods, there is no reason to think Secretary Ross would be able to provide it through live testimony.

In sum, compelling the deposition of a Cabinet Secretary is an extraordinary action for a federal court to take, and plaintiffs entirely fail to establish that this is the very rare instance in which such a deposition may be permitted. Plaintiffs possess extensive knowledge of the circumstances that culminated in the Secretary's decision to reinstate a citizenship question on the decennial census. Whatever minimal information they might gain from deposing the Secretary is not likely to impact materially their challenges to the Secretary's actions. The deposition should be quashed.

CONCLUSION

For the foregoing reasons and for the reasons stated in the government's petition for writ of mandamus, this Court should grant the petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because it contains 1,702 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished automatically by the appellate CM/ECF system on all other counsel.

s/ Gerard Sinzdak
GERARD SINZDAK