No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

—v.—

STATE OF NEW YORK, ET AL.,
Respondents.

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

NYIC RESPONDENTS' MOTION FOR LIMITED REMAND

JOHN A. FREEDMAN
DAVID P. GERSCH
DAVID J. WEINER
ELISABETH S. THEODORE
R. STANTON JONES
DANIEL F. JACOBSON
SAMUEL F. CALLAHAN
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001

PERRY M. GROSSMAN
CHRISTOPHER DUNN
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

DALE E. HO
Counsel of Record
ADRIEL I. CEPEDA DERIEUX
JONATHAN TOPAZ
CECILLIA D. WANG
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2693
dho@aclu.org

DAVID D. COLE
SARAH BRANNON
DAVIN M. ROSBOROUGH
CERIDWEN CHERRY
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005

Counsel for Respondents New York Immigration Coalition, et al.

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Plaintiffs-Respondents New York Immigration Coalition, et al. ("Plaintiffs"), file this Conditional Motion to Issue a Limited Remand.

New evidence, discovered after oral argument, reveals that Defendants' Voting Rights Act (VRA) rationale for adding a citizenship question to the 2020 Decennial Census was concocted by a longtime partisan redistricting strategist who had concluded that adding a citizenship question would facilitate redistricting methods "advantageous to Republicans and Non-Hispanic Whites." D. Ct. ECF No. 595-1, Ex. D at 9. New evidence further establishes that the same redistricting specialist, Dr. Thomas Hofeller, wrote a portion of an early Justice Department draft letter articulating the VRA rationale for adding the question. We now know Department of Commerce Secretary Wilbur Ross's "trusted adviser" on census issues, Mark Neuman, handed Dr. Hofeller's draft to DOJ official John Gore at a meeting arranged by Commerce's General Counsel. This new evidence casts in a new light the fact that the Secretary was aware of this meeting and requested an update about it afterwards. AR 2482 (Pls.' Ex. 52).

These revelations cut to the heart of this case. They show that Commerce failed to discharge its "responsibility [under the Administrative Procedure Act] to explain the rationale"—the *real* rationale—for its decision to add a citizenship question. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 (1986). And the new evidence strongly suggests that Commerce's real rationale was the diametric opposite of its stated reason: not to protect minority voting rights through better enforcement of the VRA, but to facilitate a partisan advantage in redistricting and to dilute the

electoral influence of voters of color. This new evidence thus underscores the pretextual basis for Commerce's decision and suggests an unconstitutional, racially discriminatory motive.

Last week, the district court acknowledged that Plaintiffs' allegations are "serious" after reviewing Plaintiffs' motion for an order to show cause and Defendants' response. D. Ct. ECF No. 606 at 4:10–11. But the district court concluded that—"absent some mandate from the Supreme Court itself"—the court "lack[s] jurisdiction" to address their relevance to the merits or to permit further merits-related discovery. *Id.* at 4:1–5, 7:8–9. It directed Plaintiffs to file a motion for sanctions and set briefing to finish August 2, 2019. D. Ct. ECF No. 605.

For the reasons previously presented, this Court should affirm. But if not, the Court should order a limited remand to allow "exploration of where the truth lies" in light of new evidence that "flatly contradict[s] the tale [that] unfolded ... in the District Court." *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 239–41 (1957) (vacating writ of certiorari and remanding to district court). Such a limited remand would permit an inquiry and fact-finding into whether Dr. Hofeller's partisan and racially discriminatory motives for adding a citizenship question were shared by, or should otherwise be imputed to, relevant Commerce officials, including the Secretary.

There is time for a limited remand. Defendants' own witness testified that the census questionnaire can be finalized without additional congressional appropriations as late as October 31, 2019. *See* J.A.905–06. While this case should be resolved

expeditiously, it should not be decided hastily when "new evidence casts the darkest shadow upon the truthfulness of" witnesses' representations. *Shotwell Mfg. Co.*, 355 U.S. at 240. Given the "massive and lasting consequences" of the once-in-a-decade census, Pet. App. 11a–12a, it is imperative that this case be decided on the basis of a complete and accurate record.

If this Court does not affirm, it should withhold judgment until the serious issues raised by the newly discovered evidence are probed by the district court, after which the Court can issue a decision based on the complete record.

STATEMENT OF THE CASE

1. Following a bench trial, the district court held that the decision to add a citizenship question to the 2020 census presented several "classic, clear-cut APA violations." Pet. App. 9a–10a. Among the "multiple independent ways" in which the Secretary's decision failed the APA, *id.* at 9a, the district court explained that the decision ran "counter to … the evidence before the agency," *id.* at 285a. The Secretary's stated purpose for adding a citizenship question was "obtaining complete and accurate data" on citizenship. *Id.* at 292a. However, the district court concluded that "all relevant evidence in the Administrative Record establishe[d] that adding a citizenship question to the census will result in *less* accurate and *less* complete … data." *Id.* at 290a.

2. The district court also found that it was "clear" that the rationale given to support the decision—to facilitate DOJ enforcement of the VRA—was pretextual. Pet. App. 311a. The court relied on evidence in the Administrative Record showing the

Secretary "made the decision to add the citizenship question well before DOJ requested its addition"; that communications prior to receipt of that letter lacked "mention … of VRA enforcement"; and that the DOJ letter immediately followed the Secretary's "personal outreach to [the] Attorney General." *Id.* at 313a. This evidence, the district court concluded, indicated that the Secretary set out to add a citizenship question to the 2020 Census and invoked the VRA as a *post hoc* rationale.

3. On February 15, 2019, this Court granted Defendants' request for certiorari before judgment. The Court heard oral argument on April 23, 2019.

4. Just weeks ago, through discovery in an unrelated lawsuit in North Carolina state court, new evidence was uncovered that bears directly on the central issues in this case.

The new evidence reveals that Dr. Hofeller played a significant, previously undisclosed role in orchestrating the addition of the citizenship question and its VRA rationale. Specifically, new evidence shows that: (1) Dr. Hofeller had concluded in a 2015 study that adding a citizenship question to the 2020 Decennial Census was necessary to enable the use of citizenship population, rather than total population, in redistricting, and that switching to citizenship population for redistricting would disadvantage Latino communities and be "advantageous to Republicans and Non-Hispanic Whites," D. Ct. ECF Nos. 595 at 2 (citing ECF No. 595-1, Ex. D; (2) in August 2017, Dr. Hofeller ghostwrote part of a draft DOJ letter to Commerce articulating the VRA rationale for DOJ to request the citizenship question, D. Ct. ECF No. 595 at 3 (citing ECF No. 595-1, Exs.

G–H); (3) in October 2017, the Secretary's "trusted" "expert advisor" on census issues, Mark Neuman, handed Dr. Hofeller's draft to John Gore at a meeting arranged by Commerce's General Counsel, *id.* at 1–3, and about which the Secretary was aware, AR 2482 (Pls.' Ex. 52); and (4) witnesses concealed these facts through false or misleading testimony and representations, D. Ct. ECF No. 595 at 1–3.

5. The new evidence indicates that Mr. Neuman offered false testimony in deposition on at least three critical points.

First, Neuman claimed that he was not "part of the drafting process of the [DOJ] letter" requesting the addition of a citizenship question, *id.* at 114:15–21, and that he did not rely on Dr. Hofeller for "expertise on the Voting Rights Act" in connection with the citizenship question. D. Ct. ECF Nos. 595 at 1–2 & 595-1, Ex. B at 142:3–23. But Mr. Gore has disclosed—in a congressional interview following final judgment—that Neuman gave him "a draft letter that would request reinstatement of [a] citizenship question" in or around October 2017. D. Ct. ECF Nos. 595 at 2 & 595-1, Ex. F at 4. And the newly discovered documents reveal that this initial draft contains verbatim a paragraph authored by Dr. Hofeller in August 2017, which sets forth the Government's publicly-stated VRA enforcement rationale. D. Ct. ECF No. 595 at 3; *compare* D. Ct. ECF No. 595-1, Ex. G, *with id.*, Ex. H.

Second, Neuman denied that an October 2017 meeting between him and Gore was about a "letter from DOJ regarding the citizenship question." D. Ct. ECF No. 595-1, Ex. B at 114:15–21, 273:10–21. But when Neuman met with Gore at the behest of

Commerce's General Counsel, he gave Gore the aforementioned draft DOJ letter requesting a citizenship question on the Census. The evidence thus also contradicts Gore's deposition testimony in this case that he was the one who wrote the initial draft of the DOJ letter.

Third, Neuman testified that Dr. Hofeller advised him that adding the question would "maximize[]" representation for the "Latino community." D. Ct. ECF No. 595 at 1–2 & 595-1, Ex. B at 142:3–23. But the new evidence indicates that Dr. Hofeller concluded the opposite: that adding a citizenship question to the 2020 Census was necessary to facilitate a redistricting strategy that "would be advantageous to Republicans and Non-Hispanic Whites," and would "provoke a high degree of resistance from Democrats and the major minority groups in the nation." D. Ct. ECF No. 595-1, Ex. D at 9.

6. This new evidence bears directly on Plaintiffs' APA pretext claim. Dr. Hofeller was the preeminent Republican redistricting specialist of the last 30 years; his job was to create districts that favored Republicans. Evidence that the Commerce Secretary's "trusted" "expert advisor" on census matters—who, in Defendants' words, was functioning "analogously to an agency employee," D. Ct. ECF No. 451 at 3—funneled the VRA rationale from Dr. Hofeller to DOJ is strong evidence that Commerce knew that the VRA rationale was pretextual. And the fact that the VRA rationale was authored by a person who had previously concluded that adding a citizenship question would enable redistricting strategies that would *dilute* minority voting rights is

also highly significant to the intentional discrimination claim raised by Plaintiffs in this case.

REASONS THE COURT SHOULD ORDER A LIMITED REMAND IF IT DOES NOT AFFIRM

If this Court does not affirm, it should issue a limited time-bound remand to the district court to engage in expedited factfinding and, if appropriate, to make supplemental findings on these issues to the extent that they implicate the ultimate merits of this appeal.

Although there is no dispute that this case should be resolved expeditiously, the trial record indicates that it is not necessary for the case to be decided this month. The record indicates that 2020 Census forms can be finalized without additional congressional appropriations as late as October 31, 2019. Defendants have asserted that the forms must be "finalize[d] ... for printing by the end of June 2019." Pet. for Cert. Before J. 13–14. But Defendants' own witness testified at trial that—while the end of June 2019 is the current date on which "the final artwork" for the questionnaire "is due at the printers"—with "exceptional resources, the final date for locking down the content of the census questionnaire is October 31, 2019," J.A.905–06.[1]

Given the feasibility of commencing the printing of census forms as late as October 31, 2019, this

[1] In response to the Petition for Certiorari Before Judgment, Respondents agreed that, if certiorari were granted, immediate review would be appropriate in light of "impending deadlines," but also expressly noted the Government's testimony indicating that the questionnaire could be finalized as late as "October 31." NYIC Resp'ts' Resp. to Pet. for Cert. Before J. 36–37.

Court need not decide this case on a record that omits or conceals critical facts about the true process and reasons for adding a citizenship question. As Defendants have acknowledged, "the decennial census 'is a matter of national importance' with 'massive and lasting consequences,'" which "'occurs only once a decade, with no possibility of a do-over.'" Pet. for Cert. Before J. 13 (quoting Pet. App. 11a–12a).

The new evidence does more than just cast doubt on the truthfulness of Messrs. Neuman and Gore's sworn testimony. It indicates that Commerce understood that adding a citizenship question would enable redistricting methods harmful to voters of color, and that Commerce knew that the VRA rationale was a pretext for that real motivation: *i.e.*, that the purpose of adding a citizenship question was not to protect minority voting rights, but to dilute them. It is difficult to conceive of a more significant "violat[ion of] the public trust." Pet. App. 14a.

The new evidence shows that:

- the first known draft of the VRA rationale for requesting a citizenship question was authored by Dr. Hofeller, D. Ct. ECF No. 595 at 3 (citing D. Ct. ECF No. 595-1, Ex. H), who had previously concluded that the question was necessary to facilitate a redistricting strategy "advantageous to Republicans and Non-Hispanic Whites," D. Ct. ECF No. 595 at 2 (citing D. Ct. ECF No. 595-1, Ex. D);
- Dr. Hofeller's VRA rationale appears *verbatim* in a draft letter of DOJ's request.

D. Ct. ECF No. 595 at 3, *compare* D. Ct. ECF No. 595-1 Ex. G, *with id.*, Ex. H;

- this draft letter was transmitted to DOJ by the Commerce Secretary's trusted advisor, Mr. Neuman, at a meeting arranged by the General Counsel of the Commerce Department, D. Ct. ECF No. 595 at 2–3, D. Ct. ECF No. 595-1 Ex. F at 4;

While Defendants have argued throughout this case that there is "no evidence … that the Secretary disbelieved" that a citizenship question would facilitate VRA enforcement, Pet. Br. 43,[2] the Secretary was aware of and closely monitored the meeting between Neuman and DOJ, *see* AR 2482 (Pls.' Ex. 52)—and the newly-revealed documents show that it was at this meeting that Neuman passed the Hofeller draft to Gore.

The Court should not bless the Secretary's decision without answers to outstanding questions going to the heart of the case—all of which should have been properly reflected in the Administrative Record. Among them: Who at Commerce knew that the VRA rationale came from Dr. Hofeller? Who at Commerce asked Dr. Hofeller to spell out that rationale in a draft DOJ letter? Who at Commerce knew about Dr. Hofeller's conclusion that the citizenship question would enable redistricting that is "advantageous to Republicans and Non-Hispanic

[2] At oral argument, Defendants asserted that "there's no evidence in this record that the Secretary would have asked this question had the Department of Justice not requested it, [a]nd there's no evidence in this record that the Secretary didn't believe that the Department of Justice actually wanted this information to improve Voting Rights Act enforcement." Oral Arg. Tr. 43:6–13.

Whites"? This Court has the opportunity to allow for these issues to be further developed and made part of "the record."

To allow a more complete airing of the facts, this Court can remand for expedited factfinding on the issues raised by the new evidence to the extent that they bear directly on the merits of this appeal and permit a determination by the district court as to whether modification of the judgment below is warranted under Fed. R. Civ. P. 60(b)(2) and/or (b)(3). The district court correctly noted that, "absent some mandate from the Supreme Court itself," the district court currently "lack[s] jurisdiction … with respect to the merits of the case." D. Ct. ECF No. 606 at 4:1–5, 7:5–12. A limited time-bound remand would permit the district court in the first instance to conduct expedited discovery and consider whether the newly discovered documents warrant supplemental findings and an amended judgment. In this manner, "charges as to the integrity of the record" may "be fully aired" in the district court—"the proper forum … because of its intimate familiarity with the record and its facilities for sifting controverted facts." *Shotwell Mfg. Co.*, 355 U.S. at 245. This Court could then take up the matter promptly, upon a complete record.

This Court has vigorously guarded against the possibility of deciding a case based on false or misleading testimony or representations. *See Shotwell Mfg. Co.*, 355 U.S. at 242–43 ("It is plain that either the testimony in the District Court was untrue or [new] affidavits themselves are the product of fraud. This is a matter for the District Court to determine.… This Court cannot be asked to review the decision of the Court of Appeals until these

charges have been resolved."). With good reason: "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956).[3]

If ever there were a case that should be decided on the basis of a true and complete record, it is this one. The Decennial Census is one of the United States government's most important constitutional responsibilities, and even an appearance that the government has manipulated the census for partisan and racially discriminatory purposes would undermine public confidence in our representative democracy. This Court should not bless the Secretary's decision on this tainted record, under a shadow that the truth will later come to light.

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[3] In the alternative, the Court can also hold this appeal in abeyance pending the district court's resolution of Plaintiffs' sanctions motion. Briefing on sanctions is currently scheduled to close on August 2, 2019. D. Ct. ECF No. 605. The district court's resolution of the sanctions motion may bear on the substantive merits of this case, or may warrant dismissal of the writ of certiorari as improvidently granted. The Court may "dismiss[] the writ as improvidently granted after the case has been briefed and argued," *United States v. Williams*, 504 U.S. 36, 60 n.7 (1992) (Stevens, J., dissenting), especially if it has "taken up [a] case on the basis of a mistaken factual premise," *Boyer v. Louisiana*, 569 U.S. 238, 241 (2013) (Alito, J., concurring); *see also PFZ Props., Inc. v. Rodriguez*, 503 U.S. 257 (1992) (dismissing after oral argument); *Gibson v. Fla. Bar*, 502 U.S. 104 (1991) (same); *NAACP v. Overstreet*, 384 U.S. 118 (1966) (same).

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that their motion be granted.

Respectfully submitted,

DALE E. HO
Counsel of Record
ADRIEL I. CEPEDA DERIEUX
JONATHAN TOPAZ
CECILLIA D. WANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2693
Dho@aclu.org

DAVID D. COLE
SARAH BRANNON
DAVIN ROSBOROUGH
CERIDWEN CHERRY
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2337

JOHN A. FREEDMAN
DAVID P. GERSCH
DAVID J. WEINER
ELISABETH S. THEODORE
R. STANTON JONES
DANIEL F. JACOBSON
SAMUEL F. CALLAHAN*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000

PERRY GROSSMAN
CHRISTOPHER DUNN
NEW YORK CIVIL LIBERTIES FOUNDATION
125 Broad St.
New York, NY 1004
(212) 607-3300

**Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

Counsel for Respondents New York Immigration Coalition et al.

June 12, 2019