No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

—v.—

STATE OF NEW YORK, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS NEW YORK IMMIGRATION COALITION, ET AL.

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QUESTIONS PRESENTED

1. Whether the district court correctly found that the Secretary of Commerce's decision to add a citizenship question to the Decennial Census was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act and the Census Act.

2. Whether extra-record discovery to probe the mental processes of the decisionmaker—including the deposition of the Secretary—was proper in light of plaintiffs' equal protection claim and evidence of pretext and bad faith, and in any event need not be decided given the district court's merits decision "based exclusively on … the Administrative Record," and vacatur of its order compelling the Secretary's testimony.

3. Whether the Secretary of Commerce's decision to add a citizenship question to the Decennial Census violated the Enumeration Clause of the U.S. Constitution, art. I, § 2, cl. 3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

In ordering the addition of a citizenship question to the census questionnaire, Commerce Secretary Wilbur Ross overruled the unanimous objection of the Census Bureau, which warned that it would have "an adverse impact … on the accuracy and quality of the 2020 Census." J.A.109. He also ignored the Bureau's conclusion that adding the question would disserve the Secretary's ostensible purpose, by generating less accurate information about citizenship than would be available without it. J.A.105, 159. "Based exclusively on the materials in the official 'Administrative Record,'" the district court found multiple "classic, clear-cut" Administrative Procedure Act (APA) violations, each of which independently justified setting aside the Secretary's decision. Pet. App. 10a.

Most importantly, the district court found that the Secretary's decision rested on two factual predicates, both directly contradicted by the Administrative Record. The Secretary reasoned (1) that the Census Bureau could not determine whether asking a citizenship question would affect census response rates, and (2) that asking the question would result in "more complete and accurate" citizenship information for the Department of Justice (DOJ). Pet. App. 555a, 557a. But the Administrative Record established that asking the question: (1) would "harm[] the quality of the census count," J.A.105, because it would cause a "decline in overall self-response" to the 2020 Census, especially among noncitizens; and (2) would produce "substantially less accurate citizenship status data than are available from administrative sources," J.A.105.

For much the same reason, the district court also found that the Secretary's decision violated the Census Act's obligation "'to acquire and use'" administrative records for data collection, instead of "'direct inquiries,'" to "'the maximum extent possible.'" Pet. App. 263a (quoting 13 U.S.C. § 6(c)). Because the Administrative Record established that the Secretary could actually get better citizenship information from government records alone, Section 6(c) precluded him from using a "direct inquiry" on the census to do so.

The court found further that the Secretary violated the APA by failing to consider a substantial legal obstacle to sharing with DOJ the very "full count" block-level citizenship information the Secretary sought to obtain: the Bureau's statutorily mandated confidentiality protocols. Pet. App. 297a-300a.

"Perhaps most egregiously," the Secretary's rationale was pretextual. Pet. App. 331a. He decided to add the question "well before" he even considered his stated rationale: DOJ's request for better data to enforce the Voting Rights Act (VRA). He sought to conceal that fact in his memorandum announcing the decision, and in testimony to Congress. Commerce, not DOJ, came up with the VRA enforcement rationale, and DOJ now concedes that it does not need a citizenship question to enforce the VRA. Pet. App. 94a, 313a. APA review requires agencies to set forth their actual reasons for acting; the Secretary instead did all he could to obscure them.

The stakes could not be higher. The Census Bureau's "best analysis" is that the question would reduce 2020 Census responses by 6.5 million people.

Pet. App. 143a, 152a. The district court made factual findings—unchallenged by defendants—that this would damage the distributive accuracy of the census so severely that Arizona, California, Florida, Illinois, New York, and Texas face an "impending" or "substantial risk of losing a seat" in the House of Representatives, Pet. App. 175a, and numerous states would "lose funds from several federal programs," Pet. App. 205a-206a.

"All of the relevant evidence before Secretary Ross—*all* of it—demonstrated that using administrative records [alone] would actually produce more accurate block-level [citizenship] data than adding a citizenship question." Pet. App. 290a. Because the Secretary's decision rests on the opposite conclusion absent support in the Administrative Record, it is arbitrary and capricious and contrary to law. The APA requires reasoned decisionmaking by administrative agencies; this decision flunks that test.

STATEMENT OF THE CASE

A. The Decennial Census and the Citizenship Question

"The Constitution confers upon Congress the responsibility to conduct an 'actual Enumeration' of the American public every 10 years, with the primary purpose of providing a basis for apportioning political representation among the States." *Wisconsin v. City of New York*, 517 U.S. 1, 24 (1996). The census must include all "persons" regardless of citizenship status, U.S. Const. art. I, § 2, cl.3, and is the "linchpin of the federal statistical system," *Department of Commerce*

v. U.S. House of Representatives, 525 U.S. 316, 341 (1999) (quotation marks and citation omitted). Census data are used "in dispensing funds through federal programs to the States"—more than $900 billion annually, Pet. App. 178a—and by States for "drawing intrastate political districts." *Wisconsin*, 517 U.S. at 5-6.

Many households do not respond to the census; consequently, "[s]ome segments of the population are 'undercounted' to a greater degree than are others, resulting in a phenomenon termed the 'differential undercount.'" *Id.* at 7. "Since at least 1940, the Census Bureau has thought" that it undercounts "some racial and ethnic minority groups … to a greater extent than it does whites." *Id.* Recognizing this as a "significant problem," it has "devoted substantial effort toward achieving [its] reduction." *Id*.

That effort has included the Commerce Department's consistent opposition to including a citizenship question on the Decennial Census questionnaire. Before the 1980 Census, it argued that "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate," and therefore, "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count." *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) ("*FAIR*"). Before the 1990 Census, the Bureau opposed legislation to "add[] a citizenship question" because it would make "[t]he census … less accurate." *Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm.*

on Post Office & Civ. Serv., 101st Cong. 44 (1989). And Census Directors appointed by presidents from both parties recently warned this Court that a citizenship question would "frustrate the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats." Br. of Former Directors of the U.S. Census Bureau as Amici Curiae *25, *Evenwel v. Abbott*, No. 14-940, 2015 WL 5675832.

For decades, the government has therefore collected citizenship data from only a "sample of the population." Pet. 3. It did so previously through the "long form," a decennial sample survey that asked "a small subset of the population subsidiary census questions." *Utah v. Evans*, 536 U.S. 452, 468 (2002). Congress now requires the Bureau to collect citizenship data through the American Community Survey (ACS), which samples approximately two percent of households annually. 52 U.S.C. § 10503(b)(2)(A). While the "actual Enumeration" for apportionment cannot be corrected using statistical sampling, *see House of Representatives*, 525 U.S. at 343, sample surveys like the ACS can be statistically "adjust[ed] … for survey nonresponse," J.A.120-21.

B. The Statutory and Administrative Framework Governing the Census

Congress directs the Commerce Secretary to "take a decennial census of population," and authorized the Secretary to collect "other … information as necessary," 13 U.S.C. § 141(a), limiting that discretion in several specific ways. In particular, the 1976 Census Act "constrain[ed] the Secretary's authority" in order to "address[] concerns that the Bureau was

requiring the citizenry to answer too many questions in the decennial census," which can harm response rates. Br. for Respondents 37 n.50, 40, *House of Representatives*, No. 98-404, 1998 WL 767637 (citation omitted).

The 1976 Act required the Secretary to use alternative data sources instead of adding questions to the Decennial Census whenever possible. First, it transformed Section 195 of the Census Act from "a provision that *permitted* the use of sampling for purposes other than apportionment into one that *required* that sampling be used for such purposes if 'feasible.'" *House of Representatives,* 525 U.S. at 341. Similarly, Section 6(c) now directs that "the Secretary shall acquire and use" records from other governmental entities "instead of conducting direct inquiries" of the population, "[t]o the maximum extent possible." 13 U.S.C. § 6(c). The 1976 Act "emphasize[d] the Congress' desire that such authority be used whenever possible in the dual interests of economizing and reducing respondent burden." H.R. Conf. Rep. 94-1719, 94th Cong., 2nd Sess., 1976 WL 14025 (1976), at *10.

The 1976 amendments also require advance notice before the Secretary may add questions to the census. Section 141(f) requires the Secretary to submit two reports to Congress—one "not later than 3 years before the appropriate census date," identifying "subjects proposed to be included," and another "not later than 2 years before the appropriate census date," identifying "questions proposed," 13 U.S.C. § 141(f)(1)-(2). The Secretary may amend either report only if "new circumstances exist which

necessitate that the subjects … or questions … be modified." 13 U.S.C. § 141(f)(3) (emphasis added).

The Secretary's authority over the census is further constrained by various standards. The Office of Management and Budget (OMB) Statistical Policy Directives, adopted in 2006, require data-collection design that "achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost." J.A.654, 658. And the Census Bureau Statistical Quality Standards, adopted in 2010 as directed by OMB, 67 Fed. Reg. 38467 (June 4, 2002), require pretesting of new census questions, subject to narrow exceptions not applicable here. J.A.626-630.

C. The Secretary's Decision to Add a Citizenship Question

In March 2017, the Secretary submitted a report to Congress pursuant to 13 U.S.C. § 141(f)(1), titled "Subjects Planned for the 2020 Census and American Community Survey." J.A.160. "The list of subjects did not include citizenship status." Pet. App. 33a. One year later, on March 26, 2018, the Secretary reversed course and issued a memorandum directing the addition of a citizenship question to the 2020 census.

The Secretary's memorandum purported to respond to a December 12, 2017 DOJ letter, requesting the inclusion of a citizenship question. DOJ's letter asserted that the question would produce a "full count" of citizenship data at the census block level—purportedly "critical to the Department's enforcement of Section 2 of the Voting Rights Act"—rather than "estimates" with a margin of error. Pet. App.

564a, 568a. The Secretary's decisional memorandum stated: "[F]ollowing receipt of the DOJ request, I set out to take a hard look at the request … so that I could make an informed decision on how to respond … [and] immediately initiated a comprehensive review process." Pet. App. 548a. The Secretary contemporaneously testified to Congress that DOJ "initiated the request," that his decision "respond[ed] *solely*" to DOJ, and that he was "not aware" of any discussions concerning the question between Commerce and the White House. Pet. App. 72a (emphasis added).

But the Secretary's timeline misrepresented the decisionmaking process. In truth, the Secretary set out to add a citizenship question to the census long before the DOJ request; lobbied DHS and DOJ to ask for the question; and concocted the VRA rationale as the purported basis for DOJ's request.

On June 21, 2018, after this lawsuit was filed, the Secretary issued a "supplemental memorandum" revealing that he first considered adding a citizenship question not in response to the DOJ request, but "soon after" his appointment in February 2017, for reasons he did not specify. Pet. App. 546a-547a. The Administrative Record revealed that—contrary to his statements to Congress—the Secretary discussed adding a citizenship question in April 2017[1] with then-White House advisor Steve Bannon, and, at Bannon's direction, with then-Kansas Secretary of State Kris Kobach, who advised that the question's absence on the census "leads to the problem that

[1] *See* Dist. Ct. Doc. 379-1, at 3.

aliens … are still counted for congressional apportionment purposes." J.A.186.

The supplemented Administrative Record also revealed that on May 2, 2017—seven months before the DOJ letter—the Secretary wrote his aides that he was "mystified why nothing ha[d] been done in response to [his] months old request that we include the citizenship question." J.A.276. In response, Commerce Policy Director Earl Comstock promised that "[o]n the citizenship question we will get that in place," and that he would "work with Justice to get them to request" it. J.A.276. After months of unsuccessful lobbying of both first DOJ and then DHS to request the question, the Secretary personally intervened with the Attorney General, Pet. App. 82a-91a, and "inquired whether [DOJ] would support … a citizenship question" based on "the Voting Rights Act" as a rationale, Pet. App. 546a. DOJ's December 12 letter followed. Pet. App. 564a-569a.

None of this was mentioned in the Secretary's congressional testimony or decisional memorandum. The full picture came to light only after the agency supplemented the Administrative Record with more than 11,000 pages it had initially withheld. The district court concluded that the Secretary's "first version of events, set forth in the initial Administrative Record, the Ross Memo, and his congressional testimony, was materially inaccurate." Pet. App. 74a.

D. The Secretary's Disregard of the Administrative Record

The Secretary made his decision in the face of unequivocal evidence in the Administrative Record that adding a citizenship question "harms the quality of the census count, and would [provide DOJ with] substantially less accurate citizenship status data than are available from administrative sources," such as the Social Security Administration. J.A.105.

In his decisional memorandum, the Secretary asserted that "no one provided evidence that" a citizenship question "would materially decrease response rates." Pet. App. 557a. That "[w]as simply untrue." Pet. App. 285a-286a. Based on multiple empirical analyses, the Census Bureau had unambiguously advised that the question would have "an adverse impact on self-response" and "on the accuracy and quality of the 2020 Census." J.A.109.

The Secretary also stated in his decisional memorandum that a citizenship question is "necessary to provide complete and accurate data in response to the DOJ request." Pet. App. 562a. But that was untrue as well. The Bureau had offered the Secretary three "alternatives" for producing block-level citizenship data: (A) deploying "Census Bureau statistical experts" to perform "sophisticated modeling" with existing ACS data, J.A.107-108; (B) "adding a citizenship question to the 2020 census," J.A.105; or (C) "link[ing]" census respondents to existing governmental "administrative records," J.A.116.

The Census Bureau's memoranda explained that citizenship data gathered through a census

question would be "of suspect quality," J.A.158, because noncitizens "inaccurately mark 'citizen' about 30 percent of the time" on Census Bureau sample surveys, Pet. App. 555a. The Bureau concluded that, in contrast, using "reliable federal administrative records"—which are "verified" based on legal documents concerning citizenship status—"better meets DOJ's stated uses, is comparatively far less costly than [adding a citizenship question], and does not harm the quality of the census count." J.A.105.

The Census Bureau delivered its analyses to the Secretary in December 2017 and January 2018. Pet. App. 42a. The Secretary's senior aides then posed a series of follow-up questions for the Bureau to answer for the Secretary. Question 31 asked: "What was the process that was used in the past to get questions added to the decennial Census or do we have … a precedent … established?" Pet. App. 107a. The Bureau responded:

> The Census Bureau follows a well-established process when adding or changing content on the census or ACS to ensure the data fulfill legal and regulatory requirements established by Congress. Adding a question or making a change to the Decennial Census or the ACS involves extensive testing, review, and evaluation. This process ensures the change is necessary and will produce quality, useful information for the nation.

Pet. App. 107a-108a. Later, in curating the Administrative Record, Commerce officials outside the

Census Bureau, without the Bureau's knowledge, rewrote the Bureau's answer. They deleted the Bureau's description of the "well-established process" involving "extensive testing" for adding a census question, and substituted a statement that the "Bureau did not fee[l] bound by past precedent." Pet. App. 108a-09a; J.A.142. The Bureau was never consulted or informed about the misrepresentation. Pet. App. 109a.

Around the same time that the Census Bureau communicated its recommendation to the Secretary, the Acting Census Director contacted DOJ and shared its assessment that "the best way" to provide citizenship data would be through administrative records, and "suggest[ed] a meeting of Census and DOJ technical experts to discuss the details." J.A.264-265. But the Attorney General personally vetoed the meeting. J.A.1110-1111; Pet. App. 96a-99a.

Ultimately, the Secretary directed the Census Bureau to adopt a fourth alternative: compiling citizenship data from a combination of administrative records *and* responses to a citizenship question ("Alternative D"). He speculated that doing so "may eliminate the need" to impute citizenship for people lacking records, and that "citizenship data provided to DOJ will be more accurate with the question than without it." Pet. App. 556a, 562a.

But in a March 1, 2018 memorandum, J.A.151-159, the Bureau had told him precisely the opposite, that Alternative D:

- "would not 'help fill the … gaps'" in available records, because millions of respondents would not answer the question, and many

others would answer incorrectly, J.A.157-158; and

- would result in "poorer quality citizenship data" than using administrative records alone, J.A.159.

There was no evidence in the Administrative Record to the contrary. Pet. App. 290a.

The Secretary nonetheless adopted Alternative D. In doing so, he also ignored evidence before him that the Census Bureau cannot fulfill DOJ's request for "full count" citizenship data at the level of individual census blocks, instead of the "estimates" with a "margin of error" that DOJ had always used previously. Pet. App. 568a. That is because the Bureau applies "disclosure avoidance" protocols to ensure the confidentiality of census responses pursuant to 13 U.S.C. § 9(a)(2), and therefore can provide DOJ *only with estimates* of citizenship at the block level—even if a citizenship question is added to the census. Pet. App. 297a-299a.

E. Proceedings Below

Plaintiffs are five organizations suing on behalf of themselves and their thousands of members who would be affected by the undercount that adding a citizenship question to the census would cause.

Following a bench trial, the district court held that the decision to add a citizenship question to the 2020 census presented "a veritable smorgasbord of classic, clear-cut APA violations." Pet. App. 9a-10a. The court first held that plaintiff organizations had associational standing, because plaintiffs' members would be harmed by the undercount caused by the question, Pet. App. 196a-200a; and also standing "to

pursue … claims in their own right," Pet. App. 219a-225a, because they had been forced "to divert organizational resources away from their core missions and towards combating the negative effects of the citizenship question," Pet. App. 221a (applying *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

On the merits, the court found that the Secretary's decision was "not in accordance with law," 5 U.S.C. § 706(2)(A), because it violated Sections 6(c) and 141(f) of the Census Act. Pet. App. 261a-262a. The court found that the Secretary's decision ran "counter to … the evidence before the agency" in "a startling number of ways," Pet. App. 285a, and "'failed to consider' several 'important aspect[s] of the problem,'" Pet. App. 294a (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Further, the court found that the Secretary failed to justify "dramatic departure[s]" from standards "that have long governed administration of the census," Pet. App. 300a, and that the rationale the agency offered for its decision was "clear[ly]" pretextual, Pet. App. 311a. Finally, the district court concluded that plaintiffs did not prove their Fifth Amendment claim. Pet. App. 334a-335a.[2]

[2] The court previously dismissed plaintiffs' Enumeration Clause claim. The organizational plaintiffs agree that the Enumeration Clause constitutes an alternative basis for affirmance and adopt the arguments of the government plaintiffs.

SUMMARY OF ARGUMENT

The district found multiple, independent, "clear-cut APA violations," "[b]ased exclusively on the materials in the official 'Administrative Record,'" Pet. App. 10a, and set aside the Secretary's decision. Defendants offer no compelling reason to disturb that judgment.

I. No "speculation" is required to find that Plaintiffs have standing. Br. 18. The Secretary's decision will—according to defendants' own analysis—cause approximately 6.5 million people not to respond to the census. J.A.1008. The resulting undercount would indisputably harm plaintiffs: states in which plaintiffs' members reside risk losing House seats and substantial federal funding for programs on which plaintiffs' members rely. Under *House of Representatives*, 525 U.S. 316, it does not matter that these injuries will occur only because people refrain from answering the census. All that matters is that the Secretary's decision will *in fact* result in injury. There is no dispute that it will.

II. This Court applies a "strong presumption that Congress intends judicial review of agency discretion," *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 670 (1986), and there is no indication that Congress sought to exempt census questions from ordinary APA review. Nothing in the Census Act or APA forecloses review of the Secretary's decisions. And this Court already held that the same language in the Census Act does not commit the actions of an agency head to his absolute discretion. *Bell v. New Jersey*, 461 U.S. 773, 791-92 (1983).

III. The district court correctly found multiple APA violations. Pet. App. 10a. Affirmance is required if the record supports any one of them.

A. The Secretary's decision is directly contradicted by the Administrative Record. His decision expressly depended on two propositions: that a citizenship question would not "decrease [census] response rates"; and that combining responses to a citizenship question with administrative records on citizenship would yield "more accurate" data. Pet. App. 557a, 562a. Both were flatly contradicted by the Census Bureau's analyses in the Administrative Record, which unequivocally demonstrated: (1) that adding a citizenship question "harms the quality of the census count," J.A.105; and (2) that the Secretary's proposal to use both administrative data and a citizenship question would contaminate "reliable federal administrative records" with "suspect quality" responses to a citizenship question, "result[ing] in poorer quality" citizenship information than relying on administrative records alone. J.A.117, 158-159. While the Secretary may disagree with the conclusions of his technical experts, he cannot do so absent any evidence contradicting these findings.

B. For similar reasons, the decision also violates the Census Act, which requires the use of administrative records instead of "direct inquiries," to "the maximum extent possible." 13 U.S.C. § 6(c). The Administrative Record is clear: citizenship data gathered through administrative records alone would be more accurate than the Secretary's proposal, and therefore "best meets DoJ's stated uses." J.A.105. Choosing a "direct inquiry" over those records when

the records would yield better data was contrary to law. And by failing to propose citizenship to Congress as a subject "3 years before the … census," the Secretary's decision separately violated Section 141(f) of the Census Act.

C. The Secretary also failed to consider that the Census Bureau's disclosure avoidance protocols—adopted pursuant to its statutory obligation to preserve the confidentiality of census responses—*prohibit* it from fulfilling the Secretary's ostensible purpose: to provide the DOJ with "full count" citizenship data at the level of individual census blocks. Pet. App. 297a-300a, 568a. Nor did he meaningfully consider whether "better" citizenship data is actually "necessary" to enforce the VRA, where the Administrative Record and 54 years of successful VRA enforcement without a citizenship question, disprove that notion.

D. The Secretary's decision also "dramatic[ally] depart[ed] from the standards and practices … govern[ing] administration of the census," which required pretesting of new questions. Pet. App. 300a-303a. The citizenship question is not exempt from pretesting by virtue of its inclusion on the ACS, because, with 30 percent of noncitizens wrongly marking "citizen," it had not "performed adequately" there. Pet. App. 555a, J.A.627.

E. Perhaps "most egregiously," Pet. App. 311a, the Secretary's decision was pretextual. In his decisional memorandum and congressional testimony, the Secretary portrayed his

decisionmaking process as "initiated"[3] by DOJ and "responding solely to [DOJ's] request";[4] and that he was "not aware" of any discussions about this issue with the White House.[5] Pet. App. 72a. These statements were false. The Administrative Record revealed that the Secretary's decision was made "well before" he even considered the issue of VRA enforcement, Pet. App. 313a, for reasons that he has never publicly specified. And the Secretary went to extraordinary lengths to conceal and misrepresent his reasons for acting. Defendants' response—that agencies can make decisions for reasons that are completely different from those they publicly disclose, Br. 41-42—violates the transparency in decisionmaking that is a hallmark purpose of the APA, and would prevent meaningful judicial review.

F. Finally, defendants argue that, notwithstanding all of the above APA violations, because the census has asked about citizenship in the past, "it simply cannot be arbitrary" to do so now. Br. 28. But there is no entrenchment exception to APA review. And if there were, it would compel affirmance. For decades, Commerce has recognized that a "differential undercount" of racial and ethnic minorities threatens census accuracy, and has thus

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[3] *Hearing on Recent Trade Actions Before the H. Comm. on Ways and Means*, 115th Cong., 2d Sess. (Mar. 22, 2018), 2018 WLNR 8951469.

[4] *Hearing to Consider FY2019 Budget Request for Dep't of Commerce Programs Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the House Comm. on Appropriations*, 115th Cong., 2d Sess., (Mar. 20, 2018), 2018 WLNR 8815056.

[5] *Id.*

firmly opposed a census citizenship question. The Census Bureau deems its "best" estimate—that the question will deter 6.5 million people from responding—"conservative," given the current immigration enforcement environment. J.A.761-762, 821, 1005, 1008. And the presence of the question in 1950 is irrelevant on its face to the question whether the Secretary's VRA rationale was arbitrary and capricious; the VRA was enacted in 1965. Likewise, the Census Act provision requiring the use of administrative data in lieu of census questions whenever possible was enacted in 1976. And the Census Bureau's pretesting requirement was adopted in 2010. J.A.618. The Secretary cannot "rely simply on the [distant] past." *Shelby Cty. v. Holder*, 570 U.S. 529, 553 (2013). Rather, he must offer "a reasoned explanation … for disregarding facts and circumstances that underlay" the Census Bureau's consistent practice over the last 70 years. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2126 (2016). He has not.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

The district court correctly held that plaintiff organizations have standing based on injuries—both to their members and themselves—caused by the addition of a citizenship question to the census. Pet. App. 194a-239a. Defendants do not dispute that these injuries will occur. But they contend that because the injuries involve "unlawful third-party action," Br. 18—the millions of people deterred by a citizenship question from responding to the census—standing is absent. That argument has no basis in

precedent or logic. The actions of intervening third parties sometimes cut against standing where they make an injury or its remedy speculative. But there is no speculation necessary here: defendants do not dispute that adding the question will exacerbate the undercount.

Defendants' own "best" "conservative estimate" is that adding a citizenship question will reduce census responses by at least 5.8% among non-citizen households, approximately 6.5 million people. J.A.761-762, 821, 826-827, 1005, 1008. The district court made factual findings—unchallenged by defendants—that "[t]he Census Bureau's [nonresponse follow-up] operations will not remedy th[at] decline[]," which will thus "translate into an incremental net differential undercount of people who live in [noncitizen] households in the 2020 census." Pet. App. 169a.

Defendants also do not contest the district court's findings that the question will cause a "certainly impending" or "substantial risk" that: several states in which plaintiffs' members live (Arizona, California, Illinois, New York, and Texas) will lose a House seat, Pet. App. 175a; and those states and others will lose funds for federal programs, upon which specific plaintiffs' members rely, Pet. App. 180a-184a. Nor do defendants contest that the Secretary's action has *already* injured plaintiffs, by forcing them to divert hundreds of thousands of dollars "to address the effects of a citizenship question" on census participation. Pet. App. 187a.

Accordingly, no "speculation" is needed to conclude that plaintiffs have been and will be further

injured by the Secretary's decision, or that the district court's injunction will remedy that harm. Where, as here, government action influences third party conduct "in such a manner as to produce causation and permit redressability," a plaintiff has standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Indeed, this Court has already found standing based on predicted injuries arising from individuals' refusal to comply with the legal obligation to respond to the census. In *House of Representatives*—unmentioned by defendants in their discussion of standing—this Court held that an Indiana resident had standing to challenge the Census Bureau's use of sampling, which would change the projected "net undercount rate," and thereby cause Indiana to lose a House seat. 525 U.S. at 330. The sampling, and therefore plaintiffs' injury, would occur only if some people "unlawfully refuse to … return the census form." Br. 17. Yet this Court found standing to sue.

Citing *Bennett v. Spear*, 520 U.S. 154 (1997), defendants argue that a citizenship question will not "coerce anyone" into failing to respond to the census. Br. 18. But *Bennett* held that "injury produced by *determinative or* coercive effect" on a third party suffices for standing. *Id.* at 169 (emphasis added). Here, defendants do not dispute that adding a citizenship question will have a "determinative" effect on millions who will not respond, thus causing harm to plaintiffs. Pet. App. 139a-173a. Where third-party conduct is involved in the chain of causation resulting in injury, traceability requires only that a "defendant's actions constrained or *influenced*" such conduct. *Carver v. City of New York*, 621 F.3d 221,

226 (2d Cir. 2010) (emphasis added); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113-14 (D.C. Cir. 1990) (finding standing where fuel economy standards influence automobile production).

Defendants object that plaintiffs' injuries result from "unlawful" action, because the law requires everyone to respond to the census. Br. 18. That argument is foreclosed by *House of Representatives*. And while the fact that a course of conduct is unlawful may sometimes make it speculative that parties will engage in it, that is not so here. Defendants routinely spend millions of dollars to address the public's failure to respond to the census, and they themselves predict that millions more people will be induced by the citizenship question not to respond. In these circumstances, the fact that the triggered conduct is unlawful does nothing to dispel the certainty that it will occur. *Cf. Attias v. Carefirst, Inc.*, 865 F.3d 620, 627-30 (D.C. Cir. 2017) (standing where company's negligence permitted unlawful hacking); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 21 (D.D.C. 2010) (standing where bank permitted terrorist organizations to use its funds).[6]

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[6] Nor does it matter that some deterred from responding may fear illegal acts by the government. Br. 18. Even if "the public reaction which underlies all the alleged harm … is an irrational one," that is "irrelevant" for Article III causation purposes. *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). All that matters is that the challenged action will *in fact* cause the relevant change in third-party behavior, resulting in injury to plaintiffs. *Id.* And, separate from fears of government malfeasance, defendants' decision to add a citizenship question

Finally, defendants claim that finding standing here would permit anyone philosophically opposed to a census question to "manufacture" injuries by boycotting the census. Br. 19-20. Plaintiffs' standing, however, arises not from self-inflicted injuries, but from the "determinative effect" of the Secretary's actions on more than 6 million people who will not respond if a citizenship question is asked. And plaintiffs' diversion of resources is not a manufactured injury; the Bureau acknowledged that it relies heavily on outreach by "trusted partners" including plaintiffs, whose work has been made "more difficult" by the citizenship question. Pet. App. 187a-193a, 221a-222a; J.A.933-934.

In sum, the defendants concede that the challenged action will cause millions not to respond, and that this will redound to plaintiffs' detriment. Nothing more is required for standing.

II. THE DECISION TO ADD A QUESTION TO THE CENSUS IS NOT COMMITTED TO AGENCY DISCRETION.

The Secretary's decision to add a citizenship question to the census is reviewable agency action. This Court applies a "strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670. Exceptions are "rare" and reserved for actions "traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation or a decision not to reconsider a final action," *Weyerhaeuser Co. v.*

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to produce block-by-block citizenship data will, by itself, deter census participation. J.A.519-20, 544.

U.S. Fish & Wildlife Service, 139 S. Ct. 361, 370 (2018) (internal citations omitted), or where a statute clearly commits unfettered discretion to the agency through its language or structure, *see Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

Defendants have not rebutted the strong presumption of APA reviewability here. Under the Census Act, Congress directed the Secretary to administer the census subject to its constitutional duty to ensure an actual enumeration, and pursuant to specific statutory mandates. Congress gave no indication that it intended to abrogate the ordinary constraints imposed by the APA, and imposed additional specific limitations on the Secretary's discretion.

Accordingly, this Court has entertained several challenges to the Commerce Secretary's census decisions. *See, e.g., Utah*, 536 U.S. at 452; *House of Representatives*, 525 U.S. at 316; *Wisconsin*, 517 U.S. at 1. As this Court has held, at minimum, the Secretary must act in a manner bearing "a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin*, 517 U.S. at 20. "The census is intended to serve the constitutional goal of equal representation," which "is best served by the use of a Manner that is most likely to be complete and accurate." *House of Representatives*, 525 U.S. at 348 (Scalia, J., concurring in part). Defendants offer no reason why a reviewing court cannot evaluate whether decisions about the questions on the census are "arbitrary, capricious, an abuse of discretion" or "not in accordance with law." 5 U.S.C. § 706(2)(A).

Defendants point to a single phrase to support their contention that the Secretary has unfettered discretion to draft the census in whatever way he chooses, even arbitrarily and capriciously. Section 141(a), they note, directs the Secretary to "take a decennial census of population … in such form and content as he may determine." But that language does not stand alone, and must be read in conjunction with other statutory constraints in Sections 6(c), 141(a), 141(f), and 195, discussed *infra*. Moreover, this Court has already held that the phrase "may determine" does *not* signal Congress's intent to confer unreviewable authority on an agency head. *See Bell*, 461 U.S. at 791-92 (decisions under statute permitting adjustments for overpayments "as the Secretary may determine" are "subject to judicial review," including under 5 U.S.C. § 706); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) (decisions under statute providing that agency "may correct any military record" when it "considers it necessary" "are subject to judicial review").

The two cases on which defendants rely are so plainly distinguishable that they only underscore that defendants have not overcome the strong presumption of reviewability. *Webster v. Doe* involved the CIA Director's personnel decision, under a statute that provided that the Director "*may*, *in his discretion*" terminate employees "*whenever he shall deem* such termination necessary *or advisable*." 486 U.S. 592, 594 (1988) (emphasis added). "No language equivalent to 'deem ... advisable' exists in the census statute." *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring). Congress understandably did not want courts reviewing the nation's spymaster's hiring decisions,

and said so. *Webster*, 486 U.S. at 600 (statute "exudes … deference" to the CIA). While the CIA's work carries imperatives of secrecy and national security, the census does not. To the contrary, "[t]he open nature of the census enterprise and [] public dissemination of the information collected are closely connected with our commitment to a democratic form of government." *Franklin*, 505 U.S. at 818 (Stevens, J., concurring).

Heckler v. Chaney, 470 U.S. 821 (1985), held that "an agency's refusal to take requested enforcement action" is presumptively unreviewable, largely because reviewing *inaction* would require judging whether the agency had wisely chosen to conserve its resources against a potentially infinite array of opportunity costs. *Id.* at 831. By contrast, the Court explained, an agency's affirmative act "provides a focus for judicial review," and "at least can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832. The Secretary's "affirmative act" to put a citizenship question on the census is not "peculiarly within [his] expertise," and can be measured against the standards set by Congress under the APA and Census Act. *Id.* at 831.[7]

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[7] The same distinction explains *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir. 1992). *See* Br. 23-24, 27. *Tucker* distinguished the Census Bureau's decision *not* to make a statistical adjustment to census results, which the Seventh Circuit held nonreviewable, from the "judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense," which would present "a different case." 958 F.2d at 1418.

This is not one of the "rare circumstances" where relevant statutes afford "no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser*, 139 S. Ct. at 370. As this Court has held, the Secretary's "broad" grant of authority under Section 141(a) "is informed … by the narrower and more specific" provisions of the Act, which constrain the Secretary's authority, such as Section 195, which "requires the Secretary to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census." *House of Representatives*, 525 U.S. at 339.

Similarly, Section 6(c) directs that "the Secretary shall acquire and use" administrative records from other governmental entities, "instead of conducting direct inquiries" of the population, "[t]o the maximum extent possible." 13 U.S.C. § 6(c). This directive is anything but discretionary: it "command[s] that the Secretary not add additional questions to the census … where administrative records would suffice." Pet. App. 265a. *Cf. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-88, (1976) (interpreting NEPA mandate that agencies comply with Act "to the fullest extent possible" as "neither accidental nor hyperbolic," but "a deliberate command" that agencies comply unless there is "a clear and unavoidable conflict in statutory authority").[8]

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[8] Section 141(f) further constrains the Secretary's authority to obtain "other census information." It requires the Secretary to report to Congress "not later than 3 years before the appropriate census date" identifying "subjects proposed to be included … in such a census." 13 U.S.C. § 141(f)(1). The

Section 6(c)'s command to use administrative records whenever possible comports with Section 141(a), which authorizes the Secretary to obtain "other" information aside from the enumeration, but only "as necessary." Reading Sections 6(c) and 141(a) together, the Census Act authorizes the collection of information through census inquiries only where "necessary," *and* where it is not possible to gather such information from the government's administrative records.[9]

Defendants' reliance on a 1973 House Report—for a bill that did not even advance out of committee—is unavailing. The quoted language is inconsistent with the final 1976 report, which made clear Congress' intent to limit the Secretary's discretion to add questions to the census, by

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Secretary may amend that report only where "*new* circumstances … *necessitate* that the subjects, types of information, or questions contained in reports so submitted be modified." *Id.* § 141(f)(3) (emphasis added). The provision sets a judicially enforceable point at which, absent changed circumstances, the Secretary cannot alter questionnaire subjects.

[9] Defendants argue that "necessary" means merely "convenient." Br. 22. But when Congress authorizes an agency to act only where "necessary," the agency must apply "*some* limiting standard, rationally related to the goals of the Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999). Nothing in this language rebuts the "strong presumption" of reviewability. *Bowen*, 476 U.S. at 670. Moreover, the very case defendants cite does not find that the matter is committed to agency discretion, but exercises APA review. *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 423 (1992) (deferring to agency's interpretation of "required" to mean "useful," but still reviewing the evidentiary basis of the agency's decision).

"direct[ing] the Secretary of Commerce to acquire and use to the greatest extent possible statistical data available from other sources in lieu of making direct inquiries," to "reduc[e] respondent burden," H.R. Conf. Rep. 94-1719, 94th Cong., 2nd Sess. 1976, 1976 WL 14025, at *10. As Congress subsequently explained, its goal was to "constrain[] the Secretary's authority," in order to "address[] concerns" that there were "too many questions in the decennial census." Br. for Respondents 37 n.50, 40, *House of Representatives*, 525 U.S. 316 (citing H.R. Rep. No. 94-944, at 5 (1976)).

Defendants conceded that under their reading of the Census Act, a Secretary's decision to add questions into, e.g., "whether and how many guns people owned," or "who [they] voted for" would be unreviewable, regardless of their effect on response rates. Pet. App. 480a, 497a. Indeed, even a "question that is intended to and will have the predictable effect of depressing the count" of voters associated with only one political party could not be reviewed. Pet. App. 480a-481a. That reading gives the Secretary complete, unreviewable license to subordinate the constitutional duty of an actual enumeration to the collection of *any* "other" information he thinks "convenient." Br. 22. Nothing in the Census Act provides "clear" congressional intent to compel such a result. *See Webster*, 486 U.S. at 603.

III. THE SECRETARY'S DECISION WAS ARBITRARY AND CAPRICIOUS.

In adding a citizenship question to the census, the Secretary violated the APA in multiple ways. The two principal predicates underlying his decision

were contradicted by, and had no support in, the Administrative Record beyond his own assertions. He violated statutory dictates that required him to gather information through government records—and not census questions—"to the maximum extent possible," and to provide Congress advance notice of census topics. 13 U.S.C. §§ 6(c), 141(f). He failed to consider another statutory constraint that would preclude him from achieving his professed goal. He departed from established standards without adequate explanation. And the only rationale he advanced for his decision was pretextual. Any *one* of these shortcomings is sufficient to invalidate his action. Defendants can prevail only if they can show the district court erred in each of these findings.

A. The Decision Was Contrary to the Evidence in the Administrative Record.

Agency action that rests on explanations "run[ning] counter to the evidence" is arbitrary and capricious. *State Farm*, 463 U.S. at 43. The district court properly found that the Secretary's decision contradicted the Administrative Record in "a startling number of ways." Pet. App. 285a. The Secretary's decision to combine responses to a citizenship question with data from administrative records ("Alternative D") rested on two key assertions: that "no one provided evidence" that "a citizenship question … would materially decrease response rates"; and that mixing responses to a citizenship question with administrative records would produce "more accurate" citizenship data. Pet. App. 557a, 562a.

Both predicates for the Secretary's decision were refuted by the unequivocal evidence in the Administrative Record, showing that adding a citizenship question "harms the quality of the census count," J.A.105; and that "Alternative D would result in poorer quality citizenship data" than relying exclusively on administrative records, J.A.159. No evidence in the Administrative Record was to the contrary. The district court did not "second guess" anyone, but merely followed settled law to hold that because the predicates for the Secretary's decision were contradicted and unsupported by the Administrative Record, the decision is arbitrary and capricious.

1. The decision was contrary to unequivocal evidence in the Administrative Record that a citizenship question would damage the accuracy of the census.

In his decisional memorandum, the Secretary asserted "no one provided evidence" that "a citizenship question … would materially decrease response rates." Pet. App. 557a. As the district court found, that "[w]as simply untrue." Pet. App. 285a-286a. The Administrative Record is "rife with both quantitative and qualitative evidence … demonstrating that" the question would "materially reduce response rates among immigrant and Hispanic households." Pet. App. 286a (citing J.A.105-06, 301-02, 308-11, 365-66). The Secretary could only conclude otherwise by misstating the evidence in the Administrative Record at every turn.

The Record contained several empirical analyses by the Census Bureau, including a

comparison of response rates for the census (which does not include a citizenship question) and for the "long form" and ACS (which did). That evidence established that all households "have lower self-response rates" on surveys featuring a citizenship question, but "the decline in self-response for noncitizen households was … greater than the decline for citizen households." J.A.110. Thus adding the question would have "an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census." J.A.109.

The Secretary discounted this comparative analysis, claiming that "the [Census] Bureau attributed th[e] difference to the greater outreach and follow-up associated with" the Decennial Census, Pet. App. 553a, and the ACS being "much longer than the census questionnaire," Br. 30. These assertions were untrue: the Census Bureau did not attribute the difference to either of these factors, but rather explained that its analysis *controlled* for differences between the census and the ACS, and that "the *only difference* … in [its] studies was the presence of at least one noncitizen in noncitizen households." J.A.111 (emphasis added).

The Secretary also asserted that "differential nonresponse rates to the citizenship question are 'comparable to nonresponse rates for other questions.'" Br. 30 (quoting Pet. App. 553a). But here, too, the Administrative Record showed otherwise. The Census Bureau found that "nonresponse rates for the citizenship question are *much greater* than … comparable rates for other demographic variables like sex, birthdate/age, and race/ethnicity." J.A.110 (emphasis added). The

Bureau also warned the Secretary that Hispanics were nine times more likely than whites to stop answering the ACS altogether once they came across the citizenship question, J.A.112—a fact that he simply ignored.

Defendants argue that the Secretary could disregard that evidence because it was not "definitive." Br. 30. But the Census Bureau's technical experts are scientists, not psychics. Their memoranda reflected their best scientific judgment, and contained "the *only* quantitative evidence in the Administrative Record on the effect of the citizenship question on response rates." Pet. App. 286a. Defendants' lone trial witness, Census Chief Scientist Dr. John Abowd, confirmed that the Bureau's memoranda reflected "the best analysis" "[w]ith available data" of the effect of a citizenship question, J.A.823, and that "the Census Bureau agrees" "that the balance of evidence available suggests that adding a citizenship question to the 2020 census would lead to a lower self-response rate" among noncitizens, J.A.808.[10] And "there [was] no

[10] Defendants did not appeal the district court's consideration of their own expert's testimony for the purpose of explaining technical information in the Administrative Record; they challenge only the court's consideration of extra-record discovery concerning the Secretary's "mental processes." Pet. i. Extra-record expert evidence is both proper and routinely considered where "necessary to explain technical terms or complex subject matter involved" in the agency decision at issue. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988). Explanatory testimony is therefore commonplace in census-related litigation. *See, e.g.*, *Utah*, 536 U.S. at 466-68 (describing expert testimony on whether the Bureau's practice of "imputation" constitutes "sampling"); *Massachusetts v. Mosbacher*, 785 F. Supp. 230, 245 n.13, 254-55 (D. Mass. 1992)

evidence in the Administrative Record supporting a conclusion that addition of the citizenship question will *not* harm the response rate." Pet. App. 286a.

The Secretary's memorandum misrepresented the evidence in other ways. It stated that Christine Pierce, Senior Vice President for the survey firm Nielsen, told him it "had added questions" to surveys "on sensitive topics such as … immigration status … without any appreciable decrease in response rates," and that "no empirical data existed on the impact of a citizenship question." Pet. App. 552a. But these were all "material[] mischarateriz[ations]." Pet. App. 109a. Dr. Pierce testified that she never "state[d] that Nielsen had added 'questions concerning immigration status … without any appreciable decrease in response rates'"; "did not say … no empirical data existed on the impact of a citizenship question'"; and instead "told Secretary Ross unequivocally that [she] was concerned that a citizenship question would negatively impact self-response rates." J.A.530-531; *see also* Pet. App. 109a-112a. And the district court identified other material mischaracterizations of the Administrative Record by the Secretary regarding the burden imposed by the question on all respondents, the effect of its placement on the census questionnaire, and the cost of its implementation. *See* Pet. App. 286a-289a.

Finally, defendants assert that the Secretary "acknowledged the risk" that a citizenship question "would depress response rates," Br. 30, but ultimately made a "policy-laden balancing" decision,

(describing expert testimony regarding apportionment formula), *rev'd on other grounds*, *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

Br. 31, to prioritize "complete and accurate" citizenship data over the risk of "some impact on [census] responses," Pet. App. 562a. But the Secretary expressly rested his decision on a conclusion, contrary to the Administrative Record, that the Census Bureau could not determine whether the question would reduce census responses. A single throwaway "even if" sentence, without more, "d[oes] not come close to satisfying the agency's duty under the Administrative Procedure Act" to actually assess burdens and benefits. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730-32 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). Even assuming that the Secretary's "policy decision" were permissible, it cannot rest on factual predicates unequivocally contradicted by his own experts' findings throughout the Administrative Record.

2. The decision was contrary to unequivocal evidence in the Administrative Record that a citizenship question would not produce more complete and accurate citizenship data.

The second key assertion underlying the Secretary's decision was his "'judgment' that [using administrative records and] adding the question to the census 'will provide DOJ with the most complete and accurate [citizenship] data in response to its request.'" Pet. App. 289a-290a. This, too, was directly contrary to the findings of Census Bureau scientists—who unlike the Secretary, are experts in statistics—that Alternative D "would result in poorer quality citizenship data than [relying exclusively on administrative records]," J.A.159, while using

administrative records *alone* "best meets DoJ's stated use," J.A.105.

The Bureau's analysis in the Administrative Record indicated that adding a citizenship question provides no marginal benefit, and actually *damages* citizenship data quality, for two main reasons. It reduces census response rates, impairing the Bureau's ability to use administrative records—the highest quality citizenship information available. And because it is highly inaccurate for people who lack citizenship records, it produces unreliable data for those who answer the question, while corrupting the Bureau's imputation model for those who do not.

The Secretary's contention that Alternative D would provide "more complete and accurate" citizenship data, Pet. App. 556a—the ostensible justification for asking the question—was directly contrary to the Administrative Record, in four respects.

First, although the Secretary asserted that Alternative D "would maximize the Census Bureau's ability to match the decennial census responses with administrative records," Pet. App. 555a-556a, the Census Bureau told him this was not true. Indeed, defendants have conceded that under Alternative D, "the number of people whose citizenship information cannot be 'linked' to federal administrative records would increase" by approximately one million. Br. 32. Because adding a citizenship question would reduce census self-responses, Alternative D would force the Bureau to count more people through less accurate methods, including "proxy" responses from neighbors and landlords, and people so enumerated are harder to link to administrative records.

Pet. App. 53a-58a; J.A.157-158. Thus, the record established that Alternative D would *impede* the Census Bureau's ability to use administrative records on citizenship—the most accurate citizenship data available. Pet. App. 56a (citing J.A.150).

Second, although the Secretary asserted that Alternative D would help fill the "gaps" in citizenship administrative records, Br. 46, the Administrative Record showed that this was wrong: Alternative D would generate *less accurate* data, thereby directly undermining its ostensible purpose. There are an estimated 22 million people for whom administrative citizenship data is unavailable, but who are expected to respond to the citizenship question. Br. 33. The Census Bureau, however, warned that these responses would often be inaccurate, J.A.117-120, as noncitizens who answer citizenship questions on Census Bureau sample surveys "inaccurately mark 'citizen' about 30 percent of the time," Pet. App. 555a. The Bureau explained that many noncitizens "have a strong incentive to provide an incorrect answer," meaning "survey-collected citizenship data may not be reliable for many of the people falling in the gaps in administrative data." J.A.157. By contrast, the Bureau recommended that, without a citizenship question, it can use a more accurate process of "imputation"—"inferring" characteristics based on "a nearby sample," *Utah*, 536 U.S. at 458. The Bureau's analysis in the Administrative Record stated that "an accurate model can be developed and deployed for this purpose," based on "high-quality administrative data." J.A.146, 157.

Defendants argue that, "of the 22 million additional responses, just under 500,000 … will be

inaccurate." Br. 33. But as Dr. Abowd explained, this would still be "less accurate than … modeling … citizenship status." J.A.882, *see also* J.A.873. And the fact that "most" people answer a citizenship question correctly is unremarkable: most census respondents are citizens, and "the vast majority of citizens … correctly report their status when asked a survey question." J.A.117. But the stated aim of the citizenship question is not to get correct answers "most" of the time—it is to accurately *distinguish* noncitizens among the majority-citizen population and locate them in individual census blocks, which requires high accuracy rates for *each* respondent category.

To illustrate: assume that 90 out of 100 students did their homework and 10 did not; but when asked, 99 say they did (all 90 who actually did their homework, and 9 of the 10 who didn't). The question would have an impressive sounding overall accuracy rate of 91%. But it is wrong as to 90% of negligent students and useless for identifying them, much less which classroom they are in. The task here similarly requires a high rate of accuracy for each respondent group, and the Census Bureau concluded that imputation would do better than a citizenship question, because "citizenship status responses are systematically biased for a subset of noncitizens." J.A.148.

Third, the Secretary asserted that Alternative D "may eliminate the need for the Census Bureau to have to impute an answer for millions of people." Pet. App. 556a. But once again, the Administrative Record directly contradicted this assertion. The Bureau stated that Alternative D "does not solve the

[imputation] problem." J.A.159. Indeed, defendants concede that the Bureau would still have to impute citizenship for at least 13.8 million people. Br. 33; *see also* J.A.147. The Secretary asserted that Alternative D will "improve the quality of imputation," Br. 33, but that assertion had no basis in the Administrative Record. Defendants admit that the Census Bureau concluded that "using administrative records alone would be preferable because the modeling or imputation process ... will in the aggregate *be less accurate if the citizenship question is asked*." Br. 34 (emphasis added). Without a citizenship question, the Administrative Record established, "missing citizenship data would be imputed from a more accurate source," Pet. App. 291a—"high-quality administrative data," J.A.157—rather than from an amalgamation of administrative and survey data contaminated by "suspect quality" responses to a citizenship question, J.A.158.

Fourth, the Census Bureau informed the Secretary that Alternative D would result in 9.5 million people whose census responses would conflict with administrative records—that is, people who say that they are a citizen but whose social security records say otherwise. Pet. App. 56a (citing J.A.150). While defendants now assert that "nothing prevents the Census Bureau, in the event of such conflicts," from using administrative record data "instead of the self-response data," Br. 34, the Administrative Record established the contrary, namely that "Census Bureau practice is to use self-reported data," J.A.147. In any event, the Secretary never addressed this issue, much less endorsed the argument belatedly advanced by counsel. "[A] court may uphold agency action only on the grounds that the agency

invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015).

Against all this, defendants hypothesize a new principle of data science: two sources of data are always better than one. Br. 32. But it is common sense that causing an undercount of millions of noncitizens will not make the Bureau's citizenship data "more accurate and complete." *Id.* And it does not "def[y] logic," *id.*, to rely on a single accurate source of data, rather than to contaminate it with biased information from another source. Defendants' own witness confirmed the Administrative Record evidence that:

- "using administrative records and not including a citizenship question on the census would best meet DOJ's stated uses," J.A.862; and
- "the Census Bureau did not recommend alternative D," because it "would result in poorer quality citizenship data" than relying exclusively on administrative records, J.A.865.

Dr. Abowd also confirmed that these conclusions were communicated to the Secretary at a pre-decisional meeting in February 2018. J.A.862. He further emphasized that the Census Bureau's conclusion remains that Alternative D is "worse for the Census Bureau's goal of conducting an accurate 2020 census," and "worse for the Department of Justice's goal of having accurate block-level [citizenship] data." J.A.941; *see also* J.A.865-866. No contrary view was expressed in the Administrative Record or at trial.

In short, the district court correctly concluded that the linchpin of the Secretary's decision was directly contradicted by *all* the evidence in the Administrative Record. "Agency action based on a factual premise that is flatly contradicted by the agency's own record … cannot survive review under the arbitrary and capricious standard." *City of Kansas City v. Dep't. of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991). At a minimum, the Secretary failed to explain why he reached a conclusion where "the only evidence in the record available … actually supports the *opposite* conclusion[]," *Clark County v. FAA*, 522 F.3d 437, 441-42 (D.C. Cir. 2008) (Kavanaugh, J.), much less why he reversed almost 70 years of Census Bureau policy of not including the question based on two demonstrably false premises. "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

The district court's conclusion that the Secretary's decision was contrary to the Administrative Record in these fundamental respects is not a disagreement with the Secretary's policy judgment, Br. 31, but a conclusion that his reasoning was founded on demonstrably false premises. That conclusion alone is sufficient to affirm. But as the district court found, the Secretary's decision violated the APA in multiple other ways.

B. The Decision Was Contrary to Law.

The district court also correctly found that the Secretary's decision was contrary to Sections 6(c) and

141(f) of the Census Act, and was thus contrary to law.

1. The district court concluded that the Secretary's decision violated Section 6(c)'s directive to "acquire and use" administrative records "[t]o the maximum extent possible" "instead of conducting direct inquiries." 13 U.S.C. § 6(c). He "add[ed] a 'direct inquiry' to the census questionnaire when the data gained from available administrative records would have been adequate—indeed, better" than trying to mix that data with responses to a census question. Pet. App. 268a. The court's decision was not based on the Secretary's "mere failure to cite" Section 6(c) in his decisional memorandum. Br. 48. Rather, as detailed *supra*, "every relevant piece of evidence … support[ed] the conclusion that Alternative D would produce *less accurate* citizenship data than [using administrative records alone]." Pet. App. 270a. "[*N*]*one* [suggested] that Alternative D would yield more accurate citizenship data." Pet. App. 270a.

Defendants contend that the Section 6(c) does not apply because federal administrative records do not contain citizenship data for everyone. Br. 47. But citizenship information may be imputed from administrative records, and that imputation is more accurate than census responses. *See supra*. The Secretary did not "use" administrative records to the "maximum extent" possible when he substituted an inaccurate direct inquiry for accurate imputation.

It does not follow, as defendants suggest, that if Section 6(c) precludes a citizenship question, it would also preclude questions "about age, sex, race, or Hispanic origin." Br. 47. There is no evidence that

such information can be obtained through administrative records as accurately as it can be gathered through the census, let alone that such questions reduce census responses, produce inaccurate responses, or otherwise degrade the quality of census data. Citizenship survey questions are uniquely problematic, which is why every piece of evidence before the Secretary supported using administrative records alone. Indeed, while the Bureau usually prefers self-reported data from surveys, Dr. Abowd explained that, "citizenship status is one characteristic where … administrative records tend to be more accurate than survey responses." J.A.859.

The fact that, in passing the 1976 Census Act, "Congress gave no hint that it disapproved of [a] citizenship … question," Br. 46, is irrelevant. By 1976, a citizenship inquiry had not been posed to the whole population for more than 25 years. And Congress need not specifically list or exhaust every scenario where its prohibition could apply. Broad statutory language "does not demonstrate ambiguity. It demonstrates breadth." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation marks and citation omitted).

2. The district court also correctly concluded that the Secretary's decision violated 13 U.S.C. § 141(f). Pet. App. 272a-284a. The Secretary failed to disclose citizenship as a subject to be included on the 2020 census form when he submitted his (f)(1) report in March 2017. *See* Pet. App. 275a, J.A.160-184. And "there is no evidence … that Secretary Ross ever made … a finding" of "new circumstances which

necessitate" a modification," as required under 13 U.S.C. § 141(f)(3). Pet. App. 275a-276a.

This violation does not concern the "adequacy" of the Secretary's report, Br. 49, but rather the Secretary's complete failure even to attempt to discharge his obligation under Section 141(f)(3) to identify "new circumstances" that would "necessitate" a citizenship question.

Defendants describe the December 2017 DOJ request letter—which the Secretary himself initiated—as the "new circumstance" Section 141(f) calls for. Br. 52. But that asks this Court to find that the Secretary discharged his statutory obligation by *creating* a "new circumstance" *himself*. That would render Section 141(f) null. "[A]dvance consideration of the questions" is meant not only for Congress, but to ensure that the public "will not be unfairly subject to questions invading their privacy." H.R. Rep. No. 94-944, at 5 (1976); *cf. Armstrong v. Bush*, 924 F.2d 282, 291-92 (D.C. Cir. 1991) (rejecting argument that congressional oversight indicative of intent to preclude review, which "would create an enormous exception" to reviewability).

C. The Secretary Ignored Important Aspects of the Problem in Violation of the APA.

The APA instructs courts to set aside agency action when the decisionmaker "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. The district court correctly found that the Secretary failed to meaningfully consider whether a citizenship question would assist DOJ's enforcement efforts, because (1) even if a citizenship question is

added, the Bureau's statutory disclosure avoidance protocols preclude it from fulfilling DOJ's request for block-level "full count" citizenship data; and (2) even if the Bureau could provide DOJ with its requested data, the Administrative Record did not establish that such data would help DOJ enforce the VRA.

1. The Secretary failed to consider that the Census Bureau cannot fulfill DOJ's request for "full count" block-level citizenship data.

DOJ requested a census question to gather "full count" citizenship information—as opposed to "estimates" with a "margin of error"—for each "census block," Pet. App. 568a, "the smallest level at which demographic and socioeconomic data [is] available," *Bush v. Vera*, 517 U.S. 952, 1017 (1996). But the Census Bureau cannot satisfy DOJ's request, because regardless of whether there is a citizenship question on the census, the Bureau may share only citizenship *estimates* at the block level. Those are materially indistinguishable from the estimates of citizenship DOJ currently uses. The Secretary failed even to consider this obstacle to his asserted goal.

Federal law forbids the Bureau from releasing information "whereby the data furnished by any particular [respondent] … can be identified." 13 U.S.C. § 9(a)(2). Because census blocks can be very small—for example, nearly 22% of New York's census blocks contain fewer than ten persons, J.A.585, and many contain only a single individual, J.A.833, 913—the Bureau does not share block-level demographic data that reflect actual responses to the census. To satisfy its statutory confidentiality obligations, the Census Bureau applies "disclosure avoidance"

protocols that do not merely "anonymize the data," Br. 37, but *alter* demographic totals for every individual census block, Pet. App. 298a. The result is that, while demographic data for larger geographic areas remain accurate, data for each individual census block are transformed into *estimates* "with associated margins of error, rather than a true or precise 'hard count.'" Pet. App. 298a (citing J.A.920-922); *see also* J.A.912-925.

Consequently, "even with a citizenship question on the census, there would not be a single census block … where citizenship data would actually reflect the responses of the block's inhabitants to the census questionnaire." Pet. App. 298a. Such "block-level [citizenship] data would not be a "hard count," as the DOJ requested, but would continue to "be estimates, with associated margins of error"—just like the citizenship estimates derived from sample surveys that DOJ currently employs to enforce the VRA. Pet. App. 298a. Critically, neither DOJ nor the Bureau know whether block-level estimates of citizenship based on census responses will be more or less precise than the citizenship estimates that DOJ currently uses. Pet. App. 95a, 299a; J.A.922-923, 1100, 1102-1103.

The Secretary did not even address this obstacle, even though it eviscerates his sole rationale—that adding the question would provide DOJ with "full count" block-level citizenship information to better enforce the VRA. Defendants' counsel argue for the first time in their opening brief that disclosure avoidance measures would not "prevent" the data from being "usable," or impair the data's accuracy, and that any contrary suggestion is

"speculative." Br. 37-38. But it is the Secretary who must consider the issue, not his counsel after the fact. This argument was not raised below or in the petition, and is forfeited. *See United States v. Jones*, 565 U.S. 400, 413 (2012).

Counsel's belated argument also misses the point. The issue is not whether DOJ can "use" the data or whether it is "accurate"—after all, DOJ can *use* existing ACS citizenship data, which no one claims are inaccurate—but whether the citizenship question would enable the Bureau to satisfy DOJ's request for "full count" citizenship data at the block level. Pet. App. 568a. It would not. Tellingly, Defendants do not advise this Court that the Census Bureau *can*, in fact, lawfully produce "full count," block-level citizenship data to DOJ, as opposed to mere "estimates," based on responses to a citizenship question.

While defendants complain that the district court "relied on extra-record evidence," Br. 38, this obstacle arises from federal law, and an "agency cannot simply 'close its eyes' to the existence of [a] statute." *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 516 (1983). In any event, the disclosure avoidance protocols were detailed at length in the Administrative Record. Pet. App. 297a-298a n.72; J.A.257-263, 319-321, 324-343, 345-346, 348-364, 379-380, 387. Defendants acknowledge that "the Secretary was plainly aware of them," Br. 38, and claimed that he "constructively considered" their effect, J.A.960-961. And Dr. Abowd, testified that he "discussed [disclosure avoidance] with the [S]ecretary," at a pre-decisional February 2018 meeting, and "remind[ed him] that we would be

using disclosure-avoidance procedures at the block level." J.A.925.

2. The Secretary failed to consider whether "better" citizenship data would facilitate VRA enforcement.

The Secretary also failed to meaningfully consider (or even address) whether a citizenship question would advance the single goal he gave for his decision: facilitating VRA enforcement. Pet. App. 295a. While the Secretary described the citizenship question as "necessary" to "respon[d] to the DOJ request," Pet. App. 562a, he never addressed whether the information sought was in fact *necessary for DOJ's stated purpose*. Overwhelming record evidence showed that it was not.

DOJ has enforced the VRA without a citizenship question directed to all households for the "entire fifty-four-year existence of the VRA." Pet. App. 297a. That alone lodges a "presumption … that … policies will be carried out best" if the settled policy persists. *State Farm*, 463 U.S. at 41-42. Nothing in the Administrative Record rebuts this presumption. Defendants simply assert that DOJ's past practice cannot "ossify the census." Br. 37. But DOJ's decades-old "settled course of behavior" on the VRA "embodies the agency's informed judgment that" it will most properly "carry out the policies committed to it by Congress" by "pursuing that course." *State Farm*, 463 U.S. at 41-42 (quotations omitted). Longstanding practice cannot be ignored in the absence of a compelling explanation that is missing here. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978) (quotations omitted).

Tellingly, DOJ's letter did not say that asking the question or obtaining block level data was necessary. Pet. App. 295a-296a. And DOJ has now expressly disclaimed that the question is in fact "necessary" for VRA enforcement. Pet. App. 94a-95a (citing J.A.1113). That concession accords with the Administrative Record, which is replete with evidence submitted by former DOJ personnel, organizations experienced in VRA enforcement, and 18 state attorneys general, all stressing that a citizenship question is unnecessary to administer the statute. *See, e.g.*, J.A.188-202, 211-234, 269-272. The Secretary might have a reason for disagreeing with all of these sources—but at a minimum the APA requires that he explain himself. *Vt. Yankee*, 435 U.S. at 542.

Defendants argue that the Secretary can "rely on DOJ's analysis," Br. 36, but *Commerce* supplied the VRA rationale to DOJ and prevailed upon it to make the request, Pet. App. 546a. The APA "does not permit" an agency to "dodge" its obligations "by passing the entire issue off onto a different agency." *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015). Courts cannot determine whether agency action is supported by the record if an agency can simply get another agency to assert that some fact is true, and rely on that assertion despite the lack of evidence. Nor would the record rule, confining a court's review in most cases to the evidence before the deciding agency, make any sense if a deciding agency could blindly adopt the conclusions of another agency.

The Administrative Record contains no evidence to support the reasons that DOJ offered in

its "request" letter as to why the sample-based citizenship data it has used for decades are not "ideal" for VRA enforcement. Pet. App. 564a.[11] DOJ stated that it currently must "rely[] on two different data sets"—census data for total population, and ACS for citizenship—that supposedly "do not align in time" with each other. Pet. App. 567a-568a. But defendants admitted that they do not know whether a citizenship question would avoid the problem by producing a single data set including both population and citizenship. *See* J.A.912, 964. And unrefuted testimony indicated that combining census and ACS data takes "[a] few minutes," costs much less than adding a citizenship question, and that the data sets *do* align in time. J.A.798-800.

DOJ also noted that ACS estimates are not currently reported at the granularity of individual "census block[s]," and have a "margin of error." Pet. App. 568a. But the Census Bureau advised that it can generate *block-level* citizenship data without a citizenship question, with "sophisticated modeling" in conjunction with existing ACS data,[12] or with

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[11] The cases cited in the DOJ letter did not even support its request. *See, e.g.*, *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569-70 (11th Cir. 1997) (rejecting argument that "citizenship information … based upon a sample" could not be combined with "census data … based upon the entire population."); *Barnett v. City of Chicago*, 141 F.3d 699, 702-04 (7th Cir. 1998) ("[V]erify[ing] … citizenship … would enormously complicate the decennial census and open the census-takers to charges of manipulation."); *see also* Pet. App. 296a n.71.

[12] The Census Bureau deems ACS estimates aggregated over a "five-year" period reliable for "all areas" regardless of population size, *see* J.A.797, 911, 1197-1199.

administrative records, J.A.107-109, which the Bureau advised would be "the *best way* to provide PL94 *block-level* data with citizen voting population by race and ethnicity," J.A.264-265 (emphasis added). And, as explained *supra*, regardless of how citizenship data is collected—through sampling, a census question, or administrative records—any block-level data shared by the Bureau must continue to be *estimates* with margins of error, not a "full count." Pet. App. 298a.

Defendants identify only one other piece of evidence in the Administrative Record purportedly supporting the need for a citizenship question: a handful of conclusory letters from States asserting "that citizenship data from the census would be useful for their own VRA and redistricting efforts." Br. 36-37. But the Secretary did not say he relied on *state* "redistricting efforts." And if he did rely on these letters, they only support a finding of pretext: 13 state attorneys general described a citizenship question as the "solution" to the alleged problem that "legally eligible voters … have their voices diluted or distorted" by "[n]on-citizens." Dist. Ct. Doc. 173,[13] at 1210.

D. The Secretary Violated Standard Census Bureau Practice.

The district court also correctly held that the Secretary's decision was arbitrary and capricious because "it represented a dramatic departure from

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[13] http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf (last visited Mar. 31, 2019).

the standards and practices that have long governed administration of the census"—namely, the Census Bureau's Statistical Quality Standards (SQSs) and OMB's Statistical Policy Directives (SPDs)—and the Secretary "failed to justify those departures." Pet. App. 300a. Indeed, Commerce not only failed to explain the departure, but actually rewrote a Census Bureau response to scrub from the Administrative Record the Bureau's description of its "well-established process" for adding questions to the Census. Pet. App. 106a-109a; *see also* Statement, *supra* at 11.

Defendants do not dispute that the Census Bureau's procedures—adopted in 2010 following OMB's directive to preserve the "objectivity, utility, and integrity" of data, J.A.605—mandate pretesting and refinement *before* "new questions [are] added" to the census, J.A.627. Pretesting is a critical safeguard to measure the likely effect of a proposed question and prevent exacerbation of the undercount: for example, after pretesting revealed that asking for a social security number would significantly reduce census responses, the Bureau decided not to add such a question. Pet. App. 30a.

Defendants offer four arguments to justify the failure to conduct pretesting. None are persuasive.

1. Defendants argue that because a question about citizenship or country of birth was on most "decennial census[es] from 1820 to 1950," the Secretary's decision does not depart from standard practices. Br. 2, 38-39. But the OMB and Census Bureau standards at issue were not in existence until 2006 and 2010, respectively. J.A.608, 618; Pet. App. 31a-32a. And including a citizenship question on the

"long form" and ACS sample surveys is materially different from placing one on the Decennial Census, because sample surveys can be statistically "adjust[ed] … for survey nonresponse." J.A.984.

2. Defendants argue the Secretary properly relied on the "questionnaire testing" performed when the citizenship question was added to the ACS in 2006. Br. 40. But Census SQS Sub-Requirement A2-3.3 exempts questions from pretesting only if they have "performed adequately in another survey." J.A.627. The Administrative Record demonstrated that the ACS citizenship question had *not* performed adequately, because noncitizens answer it incorrectly so frequently. Pet. App. 305a-306a, 555a. Dr. Abowd confirmed that, in his expert opinion, "I don't think the question performs adequately" on the ACS. J.A.931. The court also credited testimony from "*dozens* of experts in relevant fields" with the same view. Pet. App. 306a n.74. The question is therefore not exempt from the Bureau's pretesting requirement.

3. Defendants argue that the Bureau's Standards should not bind the Secretary. This argument was never raised below and is waived. Pet. App. 308a; *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). Moreover, the Census SQSs were adopted in response to government-wide OMB guidelines, and have been endorsed and adhered to by the Commerce Department since their adoption. *See* Pet. App. 309a; 67 Fed. Reg. 38467 (June 4, 2002). They bind the Department.

4. Defendants argue that the OMB SPDs—which mandate that an agency achieve "the best balance between maximizing data quality and

controlling measurement error while minimizing respondent burden and cost," J.A.658—provide no judicially manageable standard. They waived this argument by not raising it below as well. And "judicial review still exists to require the agency to follow procedural or substantive standards contained in its own regulations." *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 805 (D.C. Cir. 1987), *on reh'g*, 846 F.2d 1532 (D.C. Cir. 1988). Here, the district court properly found that the Secretary *ignored* these standards altogether by failing to address unequivocal Administrative Record evidence that the option he selected undermined data quality while increasing respondent burden and cost. Pet. App. 304a.

E. The Secretary's Rationale Was Pretextual.

The district court properly found that the Secretary's VRA enforcement rationale was pretextual. Pet. App. 311a-321a. Defendants respond that the Court should review only the Secretary's stated rationale, without acknowledging that it was a sham. Br. 41-42. Their position is untenable. Permitting dishonesty about the factors relied on by an agency would make it impossible for courts to review agency action under the APA. "Judicial review … will [] function accurately and efficaciously only if the [agency] indicates fully and carefully the methods by which … it has chosen to act." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

Where pretext is established, agency action must be set aside, because the agency has not disclosed "the methods by which … it has chosen to

act," *id.*, a point defendants conceded below. *See* Pet. App. 259a (defense counsel: "[if] the state[d] reason were not the real reason … the decision would not be rational for the stated reason"); *accord Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (decision arbitrary and capricious where pretext for ulterior motive); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) ("fictional account of the actual decisionmaking process" is "perforce … arbitrary"). This Court has never held that APA review is restricted to a pretextual rationale created to mask the agency's actual reasons for decision.

In his decisional memorandum, the Secretary wrote that he "set out to take a hard look" at adding a citizenship question in December 2017, "[f]ollowing receipt of the DOJ request," Pet. App. 548a, for "improved … data to enforce the VRA," Pet. App. 550a. This tracked the Secretary's testimony to Congress, where he declared that the decision "respond[ed] solely to [DOJ's] request";[14] affirmed that DOJ "initiated the request" for the citizenship question, Pet. App. 72a; and stated that he was "not aware" of any discussions between the agency and the White House.[15]

All of this was untrue. The Administrative Record demonstrates, and the district court found, that it was Commerce, not DOJ, which first thought of asking a citizenship question, and then lobbied DOJ to make the request. The Administrative Record laid bare the following timeline:

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[14] 2018 WLNR 8815056.

[15] *Id.*

- in March 2017, an aide emailed the Secretary in response to "Your Question on the Census," informing him that "neither the 2000 nor the 2010 Census asked about citizenship," advising that noncitizens must by law be included in the census, and enclosing an article about "the pitfalls of counting illegal immigrants," J.A.245-246;
- in April, White House chief strategist Steve Bannon "direct[ed]" the Secretary to speak with then-Kansas Secretary of State Kris Kobach about a citizenship question, J.A.186, who subsequently told the Secretary that the lack of a citizenship question on the census "leads to the problem that aliens … are still counted for congressional apportionment purposes," J.A.186 (when that is in fact not a "problem," but a constitutional mandate);
- in May, the Secretary admonished his staff that he was "mystified why nothing ha[d] been done in response to [his] months old request" to add a citizenship question to the census, and in response, an aide promised to "get that in place" by "get[ting] Justice to request" it, J.A.276, 652;
- Commerce approached a DOJ official in charge of immigration enforcement to ask if DOJ would request a citizenship question, but DOJ declined, J.A.413-414;
- Commerce then approached a DHS official to ask if DHS would request a citizenship question, but DHS declined, J.A.413-414;

- After the Secretary had two further calls with Kobach in July, J.A.185-186, he pressed his staff for the balance of the summer to approach DOJ again, and stated if a conclusion was not soon reached "I will call the AG," J.A.281-282;
- the Secretary then personally contacted the Attorney General to secure DOJ's request, J.A.1066-1067; Pet. App. 89a-90a; and
- in November, the Secretary admonished his staff that they were "out of time," and asked to call "whoever is the responsible person at Justice," Pet. App. 93a.

The DOJ letter—which the Secretary's decisional memorandum described as beginning his decisionmaking process—came only after both DHS and DOJ turned Commerce down, and the Secretary directly intervened with the Attorney General himself. He then wrote a decisional memorandum and testified to Congress in a way that surgically omitted all of the above, and flatly denied his contact with the White House. Placing the Secretary's comments "in context," Br. 45, does not rehabilitate them, *see* 18-557 NYIC Respondents' Br. 34-37 (discussing each statement).

Extra-record discovery confirmed that the VRA rationale was retrofitted as a *post hoc* justification for the Secretary's precommitment.[16]

[16] Discovery into the Secretary's intent was proper. Defendants do not challenge that plaintiffs plausibly alleged a claim of intentional discrimination in violation of the Fifth Amendment, *see* 18-557, NYIC Respondents' Br. 53-57, and were separately entitled to discovery as to intent on that basis, *see Webster*, 486

The Secretary's chief policy aide testified that he never asked and never learned the real reason why the Secretary wanted to add the citizenship question, J.A.1280-81; that the Secretary's actual "rationale … may or may not be … legally valid," J.A.1294; but that it was his job to find a "legal rationale" for the decision," J.A.1293. Acting Assistant Attorney General Gore, who authored DOJ's request letter, admitted that a citizenship question "is not necessary for DOJ's VRA enforcement efforts," J.A.1113, and that he does not know whether the question will produce "more precise" data than what DOJ already has, J.A.1102. And when the Census Bureau offered to discuss a better means of producing block-level citizenship data that would avoid adding a citizenship question, the Attorney General personally vetoed the meeting. J.A.1110-1111.

Defendants argue that it does not matter if the Secretary "had unstated reasons for supporting a policy decision in addition to a stated reason" in the record, as long as he "actually believed" the stated rationale. Br. 11, 42. That is wrong. An agency's "responsibility [is] to explain the rationale and factual basis" for its decision. *Bowen*, 476 U.S. at 627; *see also Judulang v. Holder*, 565 U.S. 42, 53 (2011) (Court's review "involves examining the

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U.S. at 604. Courts may also authorize discovery "into the mental processes of administrative decisionmakers" upon a "strong showing of bad faith or improper behavior." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The district court did not abuse its discretion or otherwise err when it applied this standard. The Secretary's representations and the agency's actions supported a finding of bad faith. 18-557, NYIC Respondents' Br. 28-52.

reasons for agency decisions—or … the absence of such reasons"). Neither this Court's cases—nor those of lower courts that defendants cite, Br. 42—hold that the APA allows agency action to stand on pretense.

Defendants invoke the "presumption of regularity that attaches to Executive Branch action." Br. 15. But "[u]nder the [APA]," the "presumption of regularity [is] rebutted by record evidence suggesting that the decision is arbitrary and capricious." *Palantir USG, Inc. v. United States*, 904 F.3d 980, 995 (Fed. Cir. 2018) (internal quotations omitted); *see also R.H. Stearns Co. of Bos. v. United States*, 291 U.S. 54, 63 (1934). Nor does that presumption permit an agency to conceal the actual reasons for its actions. *See Fox Television Stations*, 556 U.S. at 515 (agency must "provide reasoned explanation for its action").

Defendants argue that agency action may be set aside as pretextual only if the decisionmaker acted with an "unalterably closed mind." Br. 43. That standard, however, applies not to pretext inquiries, but to whether a decisionmaker should be disqualified from rulemaking on due process grounds. *See Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015); *see also FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948). Defendants cite no case employing the "unalterably closed mind" rule to address whether a decisionmaker can act for reasons others than those he disclosed.

In sum, the Administrative Record confirms that the VRA was "not the true reason for the [relevant] decision." *Tex. Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 256 (1981). Rather, the Secretary set out to add a citizenship question to the census and invoked the VRA as a *post hoc* rationale. Perhaps the most important provisions in the APA are the sections providing for judicial review. Such review is not possible without an agency providing its rationale and explaining its reasoning. Key to this review is that the agency provide its actual reason, not a sham.

F. That The Census Long Ago Included a Different Citizenship Question Does Not Render the Secretary's Decision Lawful.

Any one of the multiple APA violations described above is sufficient to affirm the district court. Defendants nonetheless argue that adding a citizenship question to the census is rational *ipso facto*—regardless of its effect, how or why it was added, or whether it will actually fulfill its stated purpose—because similar questions appeared on some decennial questionnaires between 1820 and 1950. *See, e.g.*, Br. 28-29. That proposition has no basis in fact or law.

As an initial matter, the Secretary did not justify his decision based on the need to restore some decades-old status quo *ante*. And even if he had, "[70]-year old facts hav[e] no logical relation to the present day." *Shelby Cty.*, 570 U.S. at 554. The differential undercount that the Census Bureau now "recognize[s] … as [a] significant problem" was not understood until the mid-twentieth century. *Wisconsin*, 517 U.S. at 7. It has subsequently informed the Bureau's longstanding opposition to a citizenship question on the census. *FAIR*, 486 F.

Supp. at 568. Moreover, *nothing* in the Administrative Record speaks to the effect on census accuracy, if any, of the 1950 citizenship question—which, unlike the proposed 2020 question, was asked by an in-person enumerator only as a follow-up for people born abroad.[17] Uncontested evidence in the Administrative Record indicates that, since at least 2000, the particular question proposed for the 2020 census has depressed responses to Census Bureau sample surveys. J.A.110-111. The Bureau now estimates "conservative[ly]" that this question would cut census responses by "6.5 million additional people," Pet. App. 145a, 152a, and warns that its actual effect "could be much greater," J.A.115-16, given research showing "a higher level of concern" about immigration enforcement, Pet. App. 143a (internal quotations omitted).

The statutory and regulatory framework governing the census has also materially changed. Whatever the purpose of the citizenship question was in 1950, it could not have been enforcement of the VRA, which was not enacted until 1965. Further, Congress amended the Census Act in 1976—more than a quarter century after the census last asked about citizenship—to require the Secretary to use sampling and administrative data over direct questions whenever possible. 13 U.S.C. §§ 6, 195. And in 2010, the Census Bureau adopted procedures requiring pretesting to ensure that new questions do

[17] U.S. Census Bureau, *The 1950 Censuses—How They Were Taken* at 51, https://www2.census.gov/library/publications/decennial/1950/procedural-studies/study-02/00322994ch08.pdf (last visited Mar. 31, 2019).

not harm the count's "integrity." J.A.605, 616-618, 624-632.

Nor does the fact that the government has more recently asked about citizenship through sample surveys legitimize the Secretary's decision. Sampling is very different: while non-responses to the census can damage the accuracy of the enumeration and thus, apportionment, sample surveys like the ACS can be statistically "adjust[ed] … for survey nonresponse," J.A.120-21, and do not carry the same stakes. The Bureau has express statutory authorization to use sampling to obtain data separate from the enumeration, 13 U.S.C. § 195, and is specifically obligated to collect citizenship data through the ACS, 52 U.S.C. § 10503(b)(2)(A).

In short, "things have changed dramatically" since 1950. *Shelby Cty.*, 570 U.S. at 547. Defendants cannot "rely simply on the past." *Id.* at 553. They must instead offer "a reasoned explanation … for disregarding facts and circumstances that underlay" 70 years of "prior policy," *Encino Motorcars*, 136 S. Ct. at 2126 (internal quotations omitted), governing the census—"an important method of maintaining democracy" at the heart of "our constitutional structure," *Utah*, 536 U.S. at 510 (Thomas, J., concurring in part and dissenting in part). They have not.

CONCLUSION

For the reasons set forth above, and the Enumeration Clause grounds addressed by the New York plaintiffs, the judgment below should be affirmed.

Respectfully submitted,

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