No. 18-557

# In the Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

*ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

**APPENDIX TO THE PETITION FOR A WRIT OF MANDAMUS**


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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 18-2856, 18-2857

IN RE: UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, UNITED STATES CENSUS BUREAU, AN AGENCY WITHIN THE UNITED STATES DEPARTMENT OF COMMERCE, RON S. JARMIN, IN HIS CAPACITY AS THE DIRECTOR OF THE U.S. CENSUS BUREAU, PETITIONERS

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Filed: Oct. 9, 2018

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Present: WALKER, JR., JOHN M., LOHIER, JR., RAYMOND J., Circuit Judges, and PAULEY III, WILLIAM H.,[*] District Judge.

Petitioners have filed petitions for a writ of mandamus to stay or preclude the deposition of Commerce Secretary Wilbur L. Ross in two consolidated district court cases. Upon due consideration, it is hereby ORDERED that the mandamus petitions are DENIED. The stay of the District Court's order compelling the deposition of Commerce Secretary Wilbur L. Ross will remain in place for 48 hours to allow the parties to seek

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[*] Judge William H. Pauley III, of the United States District Court for the Southern District of New York, sitting by designation.

relief from the Supreme Court and will thereafter by LIFTED.[1]

Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). "We issue the writ only in 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'" *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (quoting *Cheney*, 542 U.S. at 380). To obtain mandamus relief, a petitioner must show that (1) it has "no other adequate means to attain the relief [it] desires," (2) "the writ is appropriate under the circumstances," and (3) the "right to issuance of the writ is clear and indisputable." *Id.* (quoting *Cheney*, 542 U.S. at 380-81).

"[W]e have expressed reluctance to issue writs of mandamus to overturn discovery rulings," and will do so only "when a discovery question is of extraordinary significance or there is an extreme need for reversal of the district court's mandate before the case goes to judgment." *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (internal quotation marks omitted). "Because the writ of mandamus is such an extraordinary remedy, our analysis of whether the petitioning party has a clear and indisputable right to the writ is necessarily more deferential to the district court than our review on direct appeal." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108-09 (2d Cir. 2013) (internal quotation marks omitted).

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[1] A prior panel of this Court previously denied the petition relating to the deposition of Acting Assistant Attorney General John Gore. *See* September 25, 2018 Order in Nos. 18-2652 & 18-2659.

This Court has held that a "high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking official action, including the manner and extent of his study of the record and his consultation with subordinates." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). This is so because "high-ranking government officials . . . have greater duties and time constraints than other witnesses." *Id.* (internal quotation marks omitted). But we have acknowledged that such depositions, though generally disfavored, may be appropriate if the official has "unique first-hand knowledge related to the litigated claims," or "the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.*

The District Court's order requiring the deposition of Secretary Ross does not amount to "a judicial usurpation of power or a clear abuse of discretion." *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d at 35 (quoting *Cheney*, 542 U.S. at 380). We find that the District Court did not clearly abuse its discretion in authorizing extra-record discovery based on a preliminary showing of "bad faith or improper behavior." The District Court, which is intimately familiar with the voluminous record, applied controlling case law and made detailed factual findings supporting its conclusion that Secretary Ross likely possesses unique firsthand knowledge central to the Plaintiffs' claims. As the District Court noted, deposition testimony by three of Secretary Ross's aides indicated that only the Secretary himself would be able to answer the Plaintiffs' questions. We also find no clear abuse of discretion in ordering Secretary Ross's deposition rather than an alternative,

such as interrogatories or a deposition under Fed. R. Civ. P. 30(b)(6). *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 n.2 (2d Cir. 2003) ("district courts have . . . typically treated oral depositions as a means of obtaining discoverable information that is preferable to written interrogatories").

Accordingly, the request for a writ of mandamus to quash the order requiring the deposition of Secretary Ross is denied. However, a stay of the deposition will remain in place for 48 hours to allow either party to seek relief from the Supreme Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ CATHERINE O'HAGAN WOLFE
[SEAL OMITTED]

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 18-2652, 18-2659

IN RE: UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, UNITED STATES CENSUS BUREAU, AN AGENCY WITHIN THE UNITED STATES DEPARTMENT OF COMMERCE, RON S. JARMIN, IN HIS CAPACITY AS THE DIRECTOR OF THE U.S. CENSUS BUREAU, PETITIONERS

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Filed: Sept. 25, 2018

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Present: LEVAL, PIERRE, N., POOLER, ROSEMARY S., and WESLEY, RICHARD, C., Circuit Judges.

Petitioners seek a writ of mandamus directing the halt of discovery in two consolidated district court cases. Upon due consideration, it is hereby ORDERED that the mandamus petitions are DENIED, and the stay of the district court's order compelling the deposition of Acting Assistant Attorney General John Gore is LIFTED.

Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). "We issue the writ only in 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.'" *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014)

(quoting *Cheney*, 542 U.S. at 380). To obtain mandamus relief, a petitioner must show that (1) it has "no other adequate means to attain the relief [it] desires," (2) "the writ is appropriate under the circumstances," and (3) "the 'right to issuance of the writ is clear and indisputable.'" *Id.* (alteration in original) (quoting *Cheney*, 542 U.S. at 380-81). "Because the writ of mandamus is such an extraordinary remedy, our analysis of whether the petitioning party has a 'clear and indisputable' right to the writ is necessarily more deferential to the district court than our review on direct appeal." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108-09 (2d Cir. 2013).

We assume without deciding that Petitioners do not have another "adequate means to attain the relief" they seek, and that the writ would be "appropriate under the circumstances" if Petitioners were entitled to it. *See Cheney*, 542 U.S. at 380-81 (internal quotation marks omitted). However, mandamus is not warranted here because Petitioners have not persuaded us that their "right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks omitted). The district court's discovery orders do not amount to "a judicial usurpation of power or a clear abuse of discretion." *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d at 35 (quoting *Cheney*, 542 U.S. at 380).

The district court applied controlling case law and made careful factual findings supporting its conclusion that the initial administrative record was incomplete and that limited extra-record discovery was warranted. *See Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (stating that, "[d]espite the general 'record rule,'" extra-record discovery "may be appropriate when there has been a strong showing in support of a claim of bad

faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice"). We cannot say that the district court clearly abused its discretion in concluding that plaintiffs made a sufficient showing of "bad faith or improper behavior" to warrant limited extra-record discovery. *See id.*

Nor did the district court clearly abuse its discretion in ordering the deposition of Acting Assistant Attorney General Gore given his apparent authorship of the December 2017 Department of Justice letter. *See Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (holding that, "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition—for example, that the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means"). We find no clear abuse of discretion in the district court's determination that Acting Assistant Attorney General Gore's deposition is warranted because he "possesses relevant information that cannot be obtained from another source" related to plaintiffs' allegations that the Secretary used the December 2017 Department of Justice letter as a pretextual legal justification for adding the citizenship question. Addendum at 2; *New York v. U.S. Dep't of Commerce*, 18-CV-2921 (JMF), 18-CV-5025 (JMF), 2018 WL 4279467, at *4 (S.D.N.Y. Sept. 7, 2018).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ CATHERINE O'HAGAN WOLFE
[SEAL OMITTED]

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

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Filed: Sept. 21, 2018

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**OPINION AND ORDER**

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FURMAN, JESSE M., United States District Judge:

In these consolidated cases, familiarity with which is assumed, Plaintiffs bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). Now pending is a question that has loomed large since July 3, 2018, when the Court authorized extra-record discovery on the ground that Plaintiffs had "made a strong preliminary or *prima facie* showing that they will find material beyond the Administrative Record indicative of bad faith." (Docket No. 205 ("July 3rd Tr."), at 85). That question, which is the sub-

ject of competing letter briefs, is whether Secretary Ross himself must sit for a deposition. (*See* Docket No. 314 ("Pls.' Letter"); Docket No. 320 ("Defs.' Letter"); Docket No. 325 ("Pls.' Reply")). Applying well-established principles to the unusual facts of these cases, the Court concludes that the question is not a close one: Secretary Ross must sit for a deposition because, among other things, his intent and credibility are directly at issue in these cases.

The Second Circuit established the standards relevant to the present dispute in *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013). In that case, the Circuit observed that courts had long held "that a high-ranking government official should not—absent exceptional circumstances —be deposed or called to testify regarding the reasons for taking official action, 'including the manner and extent of his study of the record and his consultation with subordinates.'" *Id.* at 203 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)). "High-ranking government officials," the Court explained, "are generally shielded from depositions because they have greater duties and time constraints than other witnesses. If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation." *Id.* (internal quotation marks and citation omitted). Joining several other courts of appeals, the Circuit thus held that "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition." *Id.* The Court then proffered two *alternative* examples of showings that would satisfy the "exceptional circumstances" standard: "that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary in-

formation cannot be obtained through other, less burdensome or intrusive means." *Id.* (emphasis added).[1]

Those standards compel the conclusion that a deposition of Secretary Ross is appropriate. First, Secretary Ross plainly has "unique first-hand knowledge related to the litigated claims." 731 F.3d at 203. To prevail on their claims under the APA, Plaintiffs must show that Secretary Ross "relied on factors which Congress had not intended [him] to consider, . . . [or] offered an explanation for [his] decision that runs counter to the evidence before the agency." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As Defendants themselves have conceded (*see* Docket No. 150, at 15), one way Plaintiffs can do so is by showing that the stated rationale for Secretary Ross's decision was not his *actual* rationale. Indeed, the Supreme Court has long held that the APA requires an agency decisionmaker to "disclose the basis of its" decision, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (internal quotation marks omitted), a requirement that would be for naught if the agency could conceal the *actual* basis for its decision, *see also FTC v. Sperry & Hutchinson Co*, 405 U.S. 233, 248-49 (1972). To prevail on their other claim—under the Due Process clause—Plaintiffs must show that an "invidious

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[1] Defendants argue that where, as here, the high-ranking official in question is a member of the President's Cabinet, the "hurdle is exceptionally high." (Defs.' Letter at 1). That argument, however, finds no support in *Lederman*. In any event, even if an "exceptionally high" standard did apply here, the result would be the same given the Court's findings below.

discriminatory purpose" was a "motivating factor" in Secretary Ross's decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). That analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he specific sequence of events leading up the challenged decision," the "administrative history [including] . . . contemporary statements by members of the decisionmaking body," and even direct testimony from decisionmakers "concerning the purpose of the official action." *Id.* at 266-68. If that evidence establishes that the stated reason for Secretary Ross's decision was not the real one, a reasonable factfinder may be able to infer from that and other evidence that he was "dissembling to cover up a discriminatory purpose." *New York*, 315 F. Supp. 3d at 809 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).

Notably, in litigating earlier discovery disputes, Defendants all but admitted that Plaintiffs' claims turn on the intent of Secretary Ross himself. For instance, in litigating the propriety of Defendants' invocation of the deliberative process privilege, Defendants contended that Plaintiffs should not receive materials prepared by Secretary Ross's subordinates because such materials would not shed light on Plaintiffs' "claims that the ultimate decisionmaker's decision"—that is, *Secretary Ross's* decision—"was based on pretext." (Docket No. 315, at 3). And in seeking to preclude a deposition of the Acting Assistant Attorney General for Civil Rights—the purported ghostwriter of the DOJ letter—Defendants argued vigorously that "[t]he relevant question" in these cases "is whether *Commerce's* stated reasons for reinstating the citizenship question were pretextual."

(Docket No. 255, at 2 (emphasis in original)). As Defendants put it: "*Commerce* was the decision-maker, not DOJ. . . . [T]herefore, *Commerce's* intent is at issue not DOJ's." (*Id.* (emphases added)). In a footnote, Defendants went even further, asserting that "[t]he sole inquiry should be whether *Commerce* actually believed the articulated basis for adopting the policy." (*Id.* at 2 n.1 (emphasis added)). Undoubtedly, Defendants deliberately substituted the word "Commerce" for "Secretary Ross" knowing full well that Plaintiffs' request to depose him was coming down the pike. But given that Secretary Ross himself "was the decision-maker" and that it was he who "articulated" the "basis for adopting the policy," the significance of Defendants' own prior concessions about the centrality of the "decision-maker's" intent cannot be understated.

Indeed, in the unusual circumstances presented here, the concededly relevant inquiry into "Commerce's intent" could not possibly be conducted without the testimony of Secretary Ross himself. Critically, that is not the case merely because Secretary Ross made the decision that Plaintiffs are challenging—indeed, that could justify the deposition of a high-ranking government official in almost every APA case, contrary to the teachings of *Lederman*. Instead, it is the case because Secretary Ross was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree. *See, e.g.*, *United States v. City of New York*, No. 07-CV-2067 (NGG) (RLM), 2009 WL 2423307, at *2-3 (E.D.N.Y. Aug. 5, 2009) (authorizing the Mayor's deposition where his congressional testimony "suggest[ed] his direct involvement in the events at issue"). By his own admission, Secretary Ross "began considering . . . whether to reinstate a citizen-

ship question" shortly after his appointment in February 2017 and well before December 12, 2017, when the Department of Justice ("DOJ") made a formal request to do so. (Docket No. 189-1). In connection with that early consideration, Secretary Ross consulted with various "other governmental officials"—although precisely with whom and when remains less than crystal clear. (*Id.*; *see also* Docket Nos. 313, 319). Additionally, Secretary Ross manifested an unusually strong personal interest in the matter, demanding to know as early as May 2017—seven months before the DOJ request—why no action had been taken on his "months old request that we include the citizenship question." (Docket No. 212, at 3699).[2] And he personally lobbied the Attorney General to submit the request that he "then later relied on to justify his decision," *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4279467, at *4 (S.D.N.Y. Sept. 7, 2018) (*see also* Docket Nos. 314-4, 314-5), and he did so despite being told that DOJ "did not want to raise the question," (Docket No. 325-1). Finally, as the Court has noted elsewhere, *see New York*, 315 F. Supp. 3d at 808, he did all this—and ultimately mandated the addition of the citizenship question—over the strong and continuing opposition of subject-matter experts at the Census Bureau. (*See* Docket No. 325-2, at 5; Docket No. 173, at 1277-85, 1308-12).[3]

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[2] Docket No. 212 is Defendants' notice of the filing of supplemental materials. Given the volume of those materials, Defendants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip.

[3] Docket No. 173 is Defendants' filing of (the first part of) the Administrative Record. Given the volume of those materials, Defend-

The foregoing record is enough to justify the relief Plaintiffs seek, but a deposition is also warranted because Defendants—and Secretary Ross himself—have placed the credibility of Secretary Ross squarely at issue in these cases. In his March 2018 decision memorandum, for example, Secretary Ross stated that he "*set out* to take a hard look" at adding the citizenship question "[*f*]*ollowing receipt*" of the December 2017 request from DOJ. (A.R. 1313 (emphases added)). Additionally, in sworn testimony before the House of Representatives, Secretary Ross claimed that DOJ had "*initiated* the request for inclusion of the citizenship question," *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (2018), at 2018 WLNR 8951469, and that he was "responding *solely* to the Department of Justice's request," *Hearing on F.Y. 2019 Dep't of Commerce Budget: Hearing Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 9 (2018), at 2018 WLNR 8815056 ("*Mar. 20, 2018 Hearing*") (emphases added). The record developed thus far, however, casts grave doubt on those claims. (*See, e.g.*, Docket No. 189-1 (conceding that Secretary Ross and his staff "inquired whether the Department of Justice . . . would support, *and if so would request*, inclusion of a citizenship question" (emphasis added)); *see* July 3rd Tr. 79-80, 82-83). *See also New York*, 315 F. Supp. 3d at 808-09. Equally significant, Secretary Ross testi-

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ants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20[CERTIFICATION-INDEX-DOCUMENTS]%206.8.18.pdf.

fied under oath that he was "not aware" of any discussions between him and "anyone in the White House" regarding the addition of the citizenship question. *Mar. 20, 2018 Hearing* at 21 ("Q: Has the President or anyone in the White House discussed with you or anyone on your team about adding this citizenship question? A: I'm not aware of any such."). But there is now reason to believe that Steve Bannon, then a senior advisor in the White House, was among the "other government officials" whom Secretary Ross consulted about the citizenship question. (*See* Docket Nos. 314-1, 314-3).

In short, it is indisputable—and in other (perhaps less guarded) moments, Defendants themselves have not disputed—that the intent and credibility of Secretary Ross himself are not merely relevant, but central, to Plaintiffs claims in this case. It nearly goes without saying that Plaintiffs cannot meaningfully probe or test, and the Court cannot meaningfully evaluate, Secretary Ross's intent and credibility without granting Plaintiffs an opportunity to confront and cross-examine him. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). Indeed, the Supreme Court and the Second Circuit have observed in other contexts that "where motive and intent play leading roles" and "the proof is largely in [Defendants'] hands," as are the case here, it is critical that the relevant witnesses be "present and subject to cross-examination" so "that their credibility and the weight to be given their testimony can be appraised." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *see DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002) ("Live testimony is espe-

cially important . . . where the factfinder's evaluation of witnesses' credibility is central to the resolution of the issues."); *cf. Goldberg*, 397 U.S. at 269 ("[W]here credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.").

Separate and apart from that, Plaintiffs have demonstrated that taking a deposition of Secretary Ross may be the only way to fill in critical blanks in the current record. Notably, Secretary Ross's three closest and most senior advisors who advised on the citizenship question—his Chief of Staff, the Acting Deputy Secretary, and the Policy Director/Deputy Chief of Staff—testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs claims. (*See, e.g.*, Pls.' Letter, Ex. 6, at 85 ("You would have to ask [Secretary Ross]."), 101 (same), 209 (same), 210 (same); *id.* Ex. 8, at 111-13 (same)). Among other things, no witness has been able to—or presumably could—testify to the substance and details of Secretary Ross's early conversations regarding the citizenship question with the Attorney General or with interested third parties such as Kansas Secretary of State Kris Kobach. (*See* Pls.' Letter, Ex. 6, at 82-86, 119-20, 167-68; *id.* Ex. 7 at 57-58; *id.* Ex. 8 at 205-07). No witness has been able to identify to whom Secretary Ross was referring when he admitted that "other senior Administration officials . . . raised" the idea of the citizenship question before he began considering it. (*See* Pls.' Letter, Ex. 6 at 101; *id.* Ex. 7 at 71-73; *id.* Ex. 8 at 111-13). And despite an allegedly diligent investigation—including "consultation" of an unknown nature and extent with Secretary Ross himself (Sept. 14, 2018 Conf. Tr. 16)—Defendants have not been able to identify precisely to whom Secretary Ross spoke

about the citizenship question, let alone when, in the critical months before DOJ's December 2017 letter, (*see id.*). At a minimum, Plaintiffs are entitled to make good-faith efforts to refresh Secretary Ross's recollections of these critical facts and to test the credibility of any claimed lack of memory in a deposition. Indeed, there is no other way they could do so.

In sum, for the foregoing reasons, it is plain that "exceptional circumstances" are present here, both because Secretary Ross has "unique first-hand knowledge related to the litigated claims" *and* because "the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman*, 731 F.3d at 203. In arguing otherwise, Defendants contend that this Court's review of Secretary Ross's decision must be limited to the administrative record. (Defs.' Letter 2). But that assertion ignores Plaintiffs' due process claim, in which they plausibly allege that an invidious discriminatory purpose was a motivating factor in the challenged decision. *See New York*, 315 F. Supp. 3d at 808-11. Evaluation of that claim requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including, in appropriate circumstances, "the testimony of decisionmakers." *Id.* at 807, 808 (internal quotation marks omitted). Defendants' assertion also overlooks that the testimony of decisionmakers can be required even under the APA. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), for example, the Supreme Court made clear that the APA requires a "thorough, probing, in-depth review" of agency action, including a "searching and careful" inquiry into the facts. *Id.* at 415-16. And where there is "a strong showing of bad faith or improper behavior," that permits a court to "require the admin-

istrative officials who participated in the decision to give testimony explaining their action." *Id.* As the Court held on July 3rd, that is the case here. (*See* July 3rd Tr. 82-84). "If anything, the basis for that conclusion appears even stronger today." *New York*, 2018 WL 4279467, at *3.

Defendants also contend that the information Plaintiffs seek can be obtained from other sources, such as a Rule 30(b)(6) deposition of the Department of Commerce, interrogatories, or requests for admission. (Defs.' Letter 3). But that contention is unpersuasive for several reasons. First, none of those means are adequate to test or evaluate Secretary Ross's credibility. Second, none allows Plaintiffs the opportunity to try to refresh Secretary Ross's recollection if that proves to be necessary (as seems likely, *see* Sept. 14, 2018 Conf. Tr. 16) or to ask follow-up questions. *See Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (authorizing the deposition of a high-ranking official, in lieu of further written discovery, in part because a deposition "has the advantage of allowing for immediate follow-up questions by plaintiffs' counsel"). Third, Plaintiffs have already pursued several of these options, yet gaps in the record remain. (*See* Docket Nos. 313, 319; Sept. 14, 2018 Conf. Tr. 14-16). And finally, to adequately respond to additional interrogatories, prepare a Rule 30(b)(6) witness, or respond to requests for admission, Defendants would have to burden Secretary Ross anyway. "Ordering a deposition at this time is a more efficient means" of resolving Plaintiffs' claims "than burdening the parties and the [Secretary] with further rounds of interrogatories, and, possibly, further court rulings and appeals." *City of New York*, 2009 WL 2423307, at *3.

Two final points warrant emphasis. First, the Court's conclusion that Plaintiffs are entitled to depose Secretary Ross is not quite as unprecedented as Defendants suggest. To be sure, depositions of agency heads are rare—and for good reasons. But courts have not hesitated to take testimony from federal agency heads (whether voluntarily or, if necessary, by order) where, as here, the circumstances warranted them. *See, e.g.*, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 & n.1 (D.D.C. 1999) (reaching a decision after a trial at which the Secretary of the Interior testified—shortly after being held in civil contempt for violating the Court's discovery order); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 316 F. Supp. 754, 760 nn.12 & 36 (D.D.C. 1970) (deposition and trial testimony required from the Secretary of Transportation), *rev'd on other grounds sub nom. D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 768-69 (D.D.C. 1984) (requiring a deposition of the head of the United States Information Agency); *Union Sav. Bank of Patchogue, N.Y. v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962) (compelling a deposition of the Comptroller of the Currency); *see also Volpe*, 459 F.2d at 1237-38 (approving of the district court's decision to require the Secretary's testimony).

Courts have also permitted testimony from former agency heads about the reasons for official actions taken while they were still in office. *See, e.g.*, *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428, 431 (2015) (Secretary of the Treasury and Chair of the Federal Reserve), *vacated in part on other grounds*, 856 F.3d 953 (Fed. Cir. 2017); *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 372 (1996) (Secretary of Defense). And, contrary to Defendants' suggestion that authorizing a

deposition of Secretary Ross "would have serious repercussions for the relationship between two coequal branches of government" (Defs.' Letter 1 (internal quotation marks omitted)), the Supreme Court has made clear that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions," do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). If separation-of-powers principles do not call for a federal court to refrain from exercising "its traditional Article III jurisdiction" even where exercising that jurisdiction may "significantly burden the time and attention" of *the President*, *see id.* at 703, they surely do not call for refraining from the exercise of this Court's jurisdiction here.[4]

Second, in the final analysis, there is something surprising, if not unsettling, about Defendants' aggressive efforts to shield Secretary Ross from having to answer questions about his conduct in adding the citizenship question to the census questionnaire. At bottom, limitations on depositions of high-ranking officials are rooted in the notion that it would be contrary to the public

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[4] It bears mentioning that Secretary Ross has testified several times on the subject of this litigation before Congress—a co-equal branch not only of the Executive, but also of the Judiciary. (*See* Pls.' Reply 3 n.6). Although congressional testimony, and preparation for the same, undoubtedly impose serious burdens on Executive Branch officials, even high-ranking Executive Branch officials must comply with subpoenas to testify before Congress. *See Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 106-07 (D.D.C. 2008). The obligation to give testimony in proceedings pending before an Article III court, where necessary, is of no lesser importance.

interest to allow litigants to interfere too easily with their important duties. *See Lederman*, 731 F.3d at 203. The fair and orderly administration of the census, however, is arguably the Secretary of Commerce's most important duty, and it is critically important that the public have "confidence in the integrity of the process" underlying "this mainstay of our democracy." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment). In light of that, and the unusual circumstances presented in these cases, the public interest weighs heavily in favor of both transparency and ensuring the development of a comprehensive record to evaluate the propriety of Secretary Ross's decision. In short, the public interest weighs heavily in favor of granting Plaintiffs' application for an order requiring Secretary Ross to sit for a deposition.

That said, mindful of the burdens that a deposition will impose on Secretary Ross and the scope of the existing record (including the fact that Secretary Ross has already testified before Congress about his decision to add the citizenship question), the Court limits the deposition to four hours in length, *see, e.g.*, *Arista Records LLC v. Lime Grp. LLC*, No. 06-CV-5936 (GEL), 2008 WL 1752254, at *1 (S.D.N.Y. Apr. 16, 2008) ("A district court has broad discretion to set the length of depositions appropriate to the circumstances of the case."), and mandates that it be conducted at the Department of Commerce or another location convenient for Secretary Ross. The Court, however, rejects Defendants' contention that the deposition "should be held only after all other discovery is concluded," (Defs.' Letter 3), in no small part because the smaller the window, the harder it will undoubtedly be to schedule

the deposition. Finally, the Court declines Defendants' request to "stay its order for 14 days or until Defendants' anticipated mandamus petition is resolved, whichever is later." (*Id.*). Putting aside the fact that Defendants do not even attempt to establish that the circumstances warranting a stay are present, *see New York*, 2018 WL 4279467, at *1 (discussing the standards for a stay pending a mandamus petition), the October 12, 2018 discovery deadline is rapidly approaching and Defendants themselves have acknowledged that time is of the essence, *see id.* at *3. Moreover, the deposition will not take place immediately; instead, Plaintiffs will need to notice it and counsel will presumably need to confer about scheduling and other logistics. In the meantime, Defendants will have ample time to seek mandamus review and a stay pending such review from the Circuit.

The Clerk of Court is directed to terminate Docket No. 314.

SO ORDERED.

Dated: Sept. 21, 2018
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

**APPENDIX D**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

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No. 18-CV-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

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Filed: Aug. 17, 2018

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**ORDER**

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FURMAN, JESSE M., United States District Judge:

Two discovery-related letter motions filed by Plaintiffs in these actions remain pending, in whole or in part: one filed on August 10, 2018, seeking an order compelling Defendants to make John Gore, Acting Assistant Attorney General for Civil Rights, available for deposition, (18-CV-2921, Docket No. 236); and another filed on August 13, 2018, seeking an order compelling De-

fendants to produce "materials erroneously withheld" from the Administrative Record, (18-CV-2921, Docket No. 237).[1] Defendants responded in letters dated August 15, 2018. (18-CV-2921, Docket Nos. 250, 255; *see also* 18-CV-2921, Docket Nos. 253-54).

Upon review of the parties' letters and applicable case law, the Court sees no need for a conference at this time. First, the Court grants Plaintiffs' letter motion for an order compelling Defendants to make Acting Assistant Attorney General Gore available for deposition. Given the combination of AAG Gore's apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census and the Court's prior rulings—namely, its oral ruling of July 3rd concerning discovery, (18-CV-2921, Docket No. 207), and its Opinion of July 26th concerning Defendants' motions to dismiss (18-CV-2921, Docket No. 215, at 60-68)—his testimony is plainly "relevant," within the broad definition of that term for purposes of discovery. *See, e.g.*, *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at *2 (S.D.N.Y. Nov. 16, 2016) ("Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." (internal quotation marks omitted)). Moreover, given Plaintiffs' claim that AAG Gore "ghostwrote DOJ's December 12, 2017 letter requesting addition of the citizenship question," (Docket No. 236, at 1), the Court concludes that AAG Gore possesses relevant information that cannot be obtained from another source. *See Marisol A. v. Giu-*

[1] Plaintiffs' August 13th letter also sought other relief, which the Court addressed in an Order entered on August 14, 2018. (18-CV-2921, Docket No. 241).

*liani*, No. 95-CV-10533 (RJW), 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998).

Further, the Court is unpersuaded that compelling AAG Gore to sit for a single deposition would meaningfully "hinder" him "from performing his numerous important duties," let alone "unduly burden" him or the Department of Justice (18-CV-2921, Docket No. 255, at 3), which is the relevant standard under Rule 45 of the Federal Rules of Civil Procedure. *See, e.g.*, *Pisani v. Westchester Cty. Health Care Corp.*, No. 05-CV-7113 (WCC), 2007 WL 107747, at *2 (S.D.N.Y. Jan. 16, 2007) (denying a Rule 45 motion to quash subpoena, but recognizing that "special considerations arise when a party attempts to depose a high level government official"). And finally, any applicable privileges can be protected through objections to particular questions at a deposition; they do not call for precluding a deposition altogether. *See, e.g.*, *In re Application of Chevron Corp.*, 749 F. Supp. 2d 135, 141 (S.D.N.Y. 2010) (denying motion to quash subpoenas and directing parties to make their specific objections during the deposition).

Second, Plaintiffs' request for an order compelling "production of materials erroneously withheld" is denied without prejudice. (18-CV-2921, Docket No. 237). Although the Court previously characterized Plaintiffs' allegations as "troubling" (18-CV-2921, Docket No. 241), it accepts Defendants' representations (backed by declarations from two relevant officials at the Department of Commerce) that they have now "taken all proper and reasonable steps to ensure that the administrative record and supplemental materials are complete," (18-CV-2921, Docket No. 250, at 2). If or when Plaintiffs have reason to believe otherwise, they may renew

their letter motion in accordance with the Court's Individual Rules and Practices for Civil Cases and its Order of July 5th. (18-CV-2921, Docket No. 199). But there is no basis for relief now.

For the foregoing reasons, Plaintiffs' letter motion of August 10th is GRANTED to the extent it seeks an order compelling Defendants to make AAG Gore available for a deposition, and their letter motion of August 13th is DENIED to the extent it seeks an order compelling Defendants to produce "materials erroneously withheld." The Clerk of Court is directed to terminate 18-CV-2921, Docket Nos. 236 and 237, and 18-CV-5025, Docket Nos. 81 and 82.

SO ORDERED.

Dated: Sept. 21, 2018
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

**APPENDIX E**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18 Civ. 2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

---

No. 18 Civ. 5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

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New York, N.Y.
July 3, 2018
9:30 a.m.

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**ARGUMENT**

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Before: FURMAN, HON. JESSE M., District Judge

APPEARANCES

FOR THE PLAINTIFFS:

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
BY: MATTHEW COLANGELO
AJAY P. SAINI
ELENA S. GOLDSTEIN

and

ARNOLD & PORTER KAYE SCHOLER
BY: JOHN A. FREEDMAN

and

LAW OFFICE OF ROLANDO L. RIOS
BY: ROLANDO L. RIOS

FOR THE DEFENDANTS:

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
BY: BRETT SHUMATE
KATE BAILEY
JEANNETTE VARGAS
STEPHEN EHRLICH

[3] (Case called)

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from New York for the state and local government plaintiffs.

One housekeeping matter, your Honor, if I may. The plaintiffs intended to have two lawyers oppose the Justice Department's motion to dismiss; Mr. Saini ar-

gue the standing argue and Ms. Goldstein argue the remaining 12(b)(1) and 12(b)(6) arguments; and then I will argue the discovery aspect of today's proceedings. And I may ask my cocounsel from Hidalgo County, Texas, Mr. Rios, to weigh in briefly on one particular aspect of expert discovery that we intend to proffer. So with the Court's indulgence, we may swap counsel in and out between those arguments.

THE COURT: Understood. Thank you.

MS. GOLDSTEIN: Elena Goldstein also from New York for the plaintiffs.

MR. SAINI: Ajay Saini also from New York for the plaintiffs.

MR. FREEDMAN: Good morning, your Honor.

John Freedman from Arnold & Porter for the New York Immigration Coalition plaintiffs.

MR. RIOS: Rolando Rios for the Cameron and Hidalgo County plaintiffs, your Honor.

MR. SHUMATE: Good morning, your Honor.

[4] Brett Shumate from the Department of Justice on behalf of the United States. I'll be handling the motion to dismiss augment today. My colleague, Ms. Vargas, will be handling the discovery argument.

MS. VARGAS: Good morning, your Honor.

Jeannette Vargas with the U.S. Attorney's Office for the Southern District of New York.

MS. BAILEY: Kate Bailey with the Department of Justice on behalf of the United States.

MR. EHRLICH: Stephen Ehrlich from the Department of Justice on behalf of defendants.

THE COURT: Good morning to everybody.

Just a reminder and request that everybody should speak into the microphones. First of all, the acoustics in this courtroom are a little bit subpar. Second of all we're both on CourtCall so counsel who are not local can listen in and also, I don't know if there are folks in the overflow room, but in order for all of them to hear it's important that everybody speak loudly, clearly, into the microphone.

Before we get to the oral argument a couple housekeeping matters on my end. First, I did talk to judge Seeborg following his conference I think it was last Thursday in the California case. He mentioned that there is some new cases since the initial conference in this matter, perhaps in Maryland. Does somebody want to update me about that and tell [5] me what the status of those cases may be.

MS. BAILEY: There is an additional case that's been filed in Maryland, Lupe v. Ross.

THE COURT: What was the plaintiff's name?

MS. BAILEY: Lupe. L-U-P-E. That case has just been filed and a schedule has not been set yet but it is before Judge Hazel, same as the case that was already filed in Maryland.

THE COURT: And that raises a citizenship question challenge?

MS. BAILEY: Yes, your Honor.

THE COURT: Are there any other cases aside from that?

MS. BAILEY: No, your Honor.

THE COURT: All right. Any objection to my potentially at some point reaching out to Judge Hazel?

MS. BAILEY: No, your Honor.

THE COURT: All right.

I have one minor disclosure, which is that there were a number of amicus briefs filed in this case, one of which was filed on behalf of several or a number of members of Congress, one of whom was Congresswoman Maloney. My 14-year-old daughter happened to intern for her primary campaign for about a week and two days earlier this month. I did consider whether I should either reject the amicus brief or if it would warrant anything beyond that, and I did not—I decidedly did not; [6] that disclosing it would suffice.

I should mention that my high school son is going to be starting as a Senate Page next week. I don't think that's affiliated with any particular senator but since several senators were on that brief as well I figured I'd mention it, but suffice it to say that their responsibilities are commensurate with their ages. Don't tell them I said that. They did not do anything in the census and will not.

All right. Finally, briefing in the New York Immigration Coalition case is obviously continuing. The government filed its brief last Friday. Plaintiffs will be filing their opposition by July 9. And reply is due July 13.

Per my order of the 27th, June 27th that is, and the plaintiffs' letter of June 29, I take it everybody's un-

derstanding is that that briefing is going to focus on arguments and issues specific to that case, and essentially the government has already incorporated by reference its arguments, to the extent they're applicable, from the states case and the plaintiffs will not be responding separately to that.

MR. FREEDMAN: That's correct, your Honor.

THE COURT: And suffice it to say that my ruling in the states case will apply to that case to the extent that there are common issues.

Any other preliminary matters? Otherwise, I'm prepared to jump into oral argument and we'll go from there.

[7] All right. So let's do it then. I think the best way to proceed is I'm inclined to start with standing, then go to—folks should not be using that rear door but I'll let my deputy take care of that.

Start with standing and then I'll hear first from defendants as the moving parties and then plaintiffs can respond. And then I want to take both the political question doctrine and the APA justiciability together. I recognize that there are discrete issues and arguments but, nevertheless, there is some thematic overlap. And then, finally, I want to take up the failure to state a claim under the enumeration clause. Candidly, I want to focus primarily on that. So in that regard I may move you a little quickly through the first preliminary arguments.

So Mr. Shumate, let me start with you and focus on standing in the first instance.

Use this microphone actually.

MR. SHUMATE: Good morning, your Honor. May it please the Court, Brett Shumate for the United States.

Congress directed the Secretary of Commerce to conduct the census in such form and content as he may determine. For the 2020 census, Commerce decided to reinstate the question about citizenship on the census questionnaire. That questionnaire already asks a number of demographic questions about race, Hispanic origin, and sex. As far back as 1820 and [8] as most recently as 2000 Commerce asked a question about citizenship on the census questionnaire.

THE COURT: Let me just make you cut to the chase because I got the preliminaries, I've read the briefs, I'm certainly familiar with the history, I'm familiar with your overall argument.

On the question of standing, let me put it to you bluntly, why is your argument not foreclosed by the Second Circuit's decision in Carey v. Klutznick?

MR. SHUMATE: It's not foreclosed by Carey, your Honor, because the injury in this case, the alleged injury is not fairly traceable to the government. Instead, the injury that's alleged here is the result of the independent action of third parties to make a choice not to respond to the census in violation of a legal duty to do so. That was not at issue in the Carey case. The Carey case is also distinguishable on—

THE COURT: So you make two distinct arguments with respect to standing. The first is that there is no injury in fact; and the second is that there is no traceability.

Is the injury in fact argument foreclosed by Carey v. Klutznick?

MR. SHUMATE: No, it's not, your Honor, for two reasons. Carey was a post-census case. So the injury there was far more concrete than it is here. Here, we're two years out from the census and the injuries that are alleged here are [9] quit speculative. They depend on a number of speculative links in the chain of causation that he we didn't have in Carey v. Klutznick.

First we have to speculate first about why people might not respond to the census. They might not respond for a number of reasons. Paragraphs 47 to 53 of the plaintiffs' complaint point to a number of different reasons: Distress to the government, political climate, a number of different things. But even assuming there is an increase in the—a decrease in the initial response rate, it's speculative whether the Census Bureau's extensive efforts to follow up, what they call nonresponse follow-up operations, will fail.

THE COURT: Can I consider those efforts in deciding this question? Are those in the complaint? Am I not limited to the allegations in the complaint?

It seems to me that you're relying pretty heavily on records and issues outside of the complaint. That may well be appropriate at summary judgment and, as many of the cases you've cited are, in fact, on summary judgment. So why is that appropriate for me to look at and consider at this stage?

MR. SHUMATE: Your Honor, on a 12(b)(1) motion to dismiss the Court can consider evidence outside the pleadings for purposes of establishing its jurisdiction.

Even if you limit the allegations to the complaint, paragraph 53 makes no allegation that the Census Bureau's [10] extensive efforts that they intend to

implement to follow up with individuals who may not respond to the census initially will fail.

And then, finally, the third element of that speculative chain of causation is that it's speculative whether any undercount that results will be material in a way that will ultimately affect the plaintiffs. As they acknowledge, there are very complex formulas to determine apportionment and federal funding. And we just don't know at this point whether any undercount will be sufficient to cause them to have an injury in 2020.

In Carey it was very different. It was in the census year. There were already preliminary estimates that the census figures were inaccurate because the Census Bureau was including or using inaccurate address lists in New York City. So it was—there was a far stronger and tighter causal nexus between the alleged injury and the government's action in that case. And that case also didn't involve a question on the citizenship—a question on the census form.

THE COURT: You seem to reject the substantial risk standard, citing the footnote in Clapper and suggest that it's limited to Food and Drug Administration type cases.

What's your authority for that proposition and don't the cases that are cited in the Clapper footnote stand for the proposition that it's not so limited?

[11] MR. SHUMATE: Your Honor, I think under either standard the plaintiffs' claims will fail. I think the substantial risk test involves—the cases that I have seen it will have involved cases involving risk of Food and Drug enforcement, or cases where there's a risk

that the government may institute prosecution, something like that.

The far more accepted test is certainly impending injury. Either test, the plaintiffs can't show that there's a substantial risk that their injuries will ultimately occur because of these speculative chain of inferences that they have to rely on to tie the addition of a question on a form to their ultimate injury here, which is a loss of federal funding.

THE COURT: Are not they basing that inference on statements of the government itself and former and current government officials?

In other words, the government itself has said that adding a citizenship question will depress response rates. They've alleged in the complaint that there are states and counties and cities that have a high incidence of immigrants and it, therefore, would seem to follow that it would be particularly depressed in those states.

At this stage in the proceedings, doesn't it demand too much to expect them to be able to prove concretely what the actual differential response rate is going to be and what the concrete implications of that are going to be?

[12] MR. SHUMATE: Your Honor, they don't have to prove it concretely. But those allegations that they're pointing to only go to the initial response rate.

There's always been an undercount in the census in terms of the initial response rate. I think in the 2010 census it was 63 percent of the individuals responded to the initial census questioning. So I think that's what the individuals—the Census Bureau are referring to, that there may be a drop in the initial response rate. But there are no allegations that the Census Bureau's

follow-up operations, which are quite extensive, that those will fail. The only allegation that they pointed to, I think it is paragraph 53 of the complaint that says because of the reduced initial response rate, the Census Bureau will have to hire additional enumerators to follow up with those individuals. But it is entirely speculative whether those efforts will fail. It's also speculative, even assuming those efforts fail, whether the undercount will be material in a way that ultimately affects the plaintiffs. Because this is a pre-census case, it's not like Carey where there, like I said earlier, there were already preliminary figures suggesting that the Census Bureau had an inaccurate count in New York City.

THE COURT: Let me ask you about traceability. Why is that argument not foreclosed by the Circuit's decision last Friday in the NRDC v. NHTSA case. I don't know if you've seen it, but the Court held that—rejected an argument by the [13] government that the connection between the potential industry compliance and the agency's imposition of coercive penalties intended to induce compliances too indirect to establish causation and proceeds to say: As the case law recognizes, it is well settled that for standing purposes petitioners need not prove a cause-and-effect relationship with absolute certainty. Substantial likelihood of the alleged commonality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties to the agency's conduct.

MR. SHUMATE: I think the key is the language that you read about coercive effect. There is no coercive effect here by the government. In fact, the government is attempting to coerce people to respond to

the census. There's a statute that requires individuals to respond to the census.

At the most what the plaintiffs have alleged is that the government's addition of the citizenship question will encouraged people not to respond to the census, even though there may be a small segment of the population who would otherwise respond not for—putting aside the citizenship question. This is a lot more like the Simon case from 1976, which involved hospitals—the IRS revenue ruling that granted favorable tax treatment to hospitals. The allegation in that case was that the government's decision was encouraging the hospitals to deny access to indigents to hospital services. And the Court said no, the injury in that case is not fairly [14] traceable to the government's action, even though it may have encouraged the hospitals to deny access, because it was fairly traceable to the independent decisions of third parties, the hospitals themselves.

That's exactly what we have here. We have an independent decision by individuals not to respond to the census. Moreover, that independent decision is unlawful because there's a statute that makes individuals—it requires individuals to respond to the census.

THE COURT: Why does that matter? I think you made an effort to distinguish Rothstein on that ground, or at least the ground that the defendant's conduct in that case was allegedly unlawful and it's not here. I would think for standing purposes that that's more a merits consideration than a standing question. For standing purposes, it's really just a question of whether plaintiffs can establish injury that resulted from some conduct of the defendants, in other words, injury and

causation. What does it matter if conduct is unlawful, unlawful, or not?

MR. SHUMATE: It matters, your Honor, because the test is that the injury must be fairly traceable to the government's conduct; not the independent actions of third parties. And it is not fair to attribute to the government the unlawful decisions of third parties not to respond to a lawful question.

You mentioned the Rothstein case. That case was [15] fundamentally different. That involved funding terror. That is fundamentally different than adding a question to the census questionnaire. And it's fair to assume that there would be a causal relationship between giving money to terrorists and the terrorists' acts themselves.

THE COURT: But the question is simply whether the independent acts of third parties intervening break the chain of causation such that it's no longer fairly traceable. I think in that—just looking at it from that perspective, what does it matter whether the conduct on either side is legal or not legal? It's just a simple question of whether it causes injury and whether it's fairly traceable.

I mean, in other words where—can you point me to any Supreme Court case or Second Circuit case that says that whether—that the standing inquiry turns on whether the acts of either the defendant or the intervening third parties are lawful or unlawful?

MR. SHUMATE: There are cases. I believe it's the O'Shea case from the Supreme Court that says in the context of mootness, which is another related judicial review doctrine, that we assume that parties follow

the law. And so here we should assume that individuals would respond to the census consistent with their legal duty.

Let me put it this way. If everybody in America responded to the census consistent with their legal duty, would [16] the plaintiffs have any reason to complain about the citizenship question? Of course not because there would be no undercount at all. Every person in America would be counted. They would have no reason to complain about the citizenship question or any fear of an undercount or loss of federal funding or apportionment.

Put it another way, as the Court did in Simon. If the Court were to strike the citizenship question from the census questionnaire, would that address or redress all the plaintiffs' fear of an injury? Probably not because, as they acknowledge, there's always an undercount in a census and individuals will not respond to the census questionnaire for a variety of reasons.

THE COURT: Well it would redress the injury to the extent that it is fairly traceable to the citizenship question.

MR. SHUMATE: But it is not fairly traceable to the citizen question. And the Simon Court talked about the chain, the speculative chain of inferences that you had to reach in that case to trace the injury from the government's action to the ultimate injury. And here there are at least three steps in the chain of causation. I've talked about them already. I don't need to repeat them.

THE COURT: Let me ask you one final question on that front and then I'll hear from the plaintiffs on standing.

You rely pretty heavily on the Supreme Court's [17] decision in Clapper and the chain of causation or the chain of inferences that the Court found inadequate there. Isn't there a fundamental difference between that setting and this in the sense that the plaintiffs there were individuals and essentially needed to prove that they themselves had been subjected to surveillance and it was that inquiry that required the multiple levels of inferences that the Court found inadequate?

Here, particularly in the states case where the plaintiffs are states and cities and counties and the like, we're talking about an aggregate plaintiff. So there is no need to prove that a particular person didn't respond or is not likely to respond to the census in light of question. The question is just, on an aggregate level, will it depress the rates and on that presumably one can look at the Census Bureau's own history and studies and the like. Why is that not fundamentally different and make it a different inquiry than the one that was made in Clapper?

MR. SHUMATE: Certainly the injuries alleged in Clapper and this case are different but the standing principles are not. They still have to allege an injury that is not speculative, that is concrete certainly, or at least substantial risk that that injury will occur. Now this arises in a different context, to be sure, but still they have alleged an injury that is speculative at this point, and it is not [18] fairly traceable to the government because of the independent action of the third parties that are necessary for that action to occur. As I said earlier, it's not fair to attribute to the government actions of third parties that violate a statute that the government is attempting to coerce people to respond

to the census. So it is not fair to attribute to the government their failure to respond when the government is merely adding a question to the form itself.

THE COURT: Let me hear from the plaintiffs on the standing, please. If you could just for the record make sure your repeat your names.

MR. SAINI: Your Honor, Ajay Saini from the State of New York for the plaintiffs.

THE COURT: Proceed.

MR. SAINI: Your Honor, the plaintiffs intend to make two points here today. First, that the injuries that they have alleged are not speculative and, in fact, the plaintiffs' action here, the inclusion of citizenship question on the 2020 census, creates a substantial risk of an undercount and poses a serious threat to plaintiffs' funding levels as well as apportionment and representational interests; and our second point that the plaintiffs' injuries are in fact fairly traceable to the defendants' actions.

THE COURT: Does your argument depend on my accepting that the substantial risk standard is still alive and not [19] inconsistent with certainly impending.

MR. SAINI: No, your Honor. We believe that there are immediate injuries that have occurred here. We have alleged that at paragraph 53 and—52 and 53 in which we state that the announcement of the citizenship question has an immediate deterrent effect and is already causing individuals to choose not to, in anticipation of the census, not cooperate. But that said, the substantial risk standard was affirmed just two years ago in Susan B. Anthony List v. Driehaus and as a result—

by the Supreme Court, and as a result the substantial risk standard is available here.

Your Honor the plaintiffs' injuries here are not speculative. First and foremost, the plaintiffs have shown that there is a substantial risk that an undercount will occur and the statements by the defendants over the last 40 years, the repeated determination by the Census Bureau that a citizenship question will, in fact, increase nonresponse, and not only increase nonresponse, but those determinations also include in the statements that a citizenship question would deter cooperation with enumerators going door to door seeking to count nonresponsive households is sufficient to find that there is a substantial risk of undercounting here.

The defendants have mischaracterized paragraph 53 of our complaint. We have, in fact, alleged that typical forms of nonresponse follow-up will be ineffective at capturing [20] individuals who are intimidated by the citizenship question. And the typical form of nonresponse follow-up there is the use of enumerators going door to door. And, again, Census Bureau's longstanding determinations on this serve as sufficient proof to show that, in fact, the nonresponse follow-up operations —that there is a substantial risk that they will be effective. In addition, your Honor this is—we are still at the beginning stage of this litigation and to the extent that we need to determine whether or not some unspecified nonresponse follow-up operations will somehow reduce potential undercount, that would require further factual development at later stages of the litigation.

THE COURT: Your view is that, therefore, I cannot or should not consider the government's announced procedures and plans on that front?

MR. SAINI: You need not consider it, your Honor, but even if you were to consider it these unspecified allegations regarding nonresponse follow-up would not be enough to defeat the plaintiffs' claim that there is, in fact, a substantial risk of an undercount here.

THE COURT: What's your answer to the argument that there are multiple other steps in the chain of inferences that are required for you to intervene including, for example, that it will affect the counts in your geographic jurisdiction disproportionately given the complex formulas at issue here for [21] apportionment, for funding, etc., essentially it's too speculative to know whether and to what extent it will have an effect and that ultimately you also need to prove that it has a material effect on those?

MR. SAINI: Your Honor, first we would note that we are at the pleading stage here so we do not need to determine with certainty the exact level of injury that we expect to suffer, if we do intend to provide further factual development in the form of expert and fact discovery to help further elucidate the injuries that we expect to result.

But more importantly, your Honor, there is plenty of case law relating to—from here in the Second Circuit relating to the viability of funding harms from undercounts such as in Carey v. Klutznick, for instance, the Court recognized that funding harms were sufficient to establish Article III standing on the basis of plaintiffs' State and City of New York's claims that an

undercount would affect their federal formula grants. And, similarly, the Sixth Circuit found in the City of Detroit v. Franklin that undercounting would affect potential funding under the Community Development Block Grant Program which we also have alleged in our complaint.

The last thing to note here—

THE COURT: Can I ask you a question. Mr. Shumate's argument is that Carey is different because it's a post-census [22] case and not a pre-census case and in that regard it didn't involve the same degree of speculation with respect to there being an undercount. What's your answer to that?

MR. SAINI: Our answer to that, your Honor, is, again, plaintiffs here—the defendants here have repeatedly recognized that a citizenship question will impair the accuracy of the census both by driving down response rates but also by deterring cooperation with enumerators. That specific fact of government acknowledgment that this causal connection exists and that there's a substantial likelihood that a citizenship question will result in undercounts is significant here.

In addition, we have also pointed to, in the complaint at paragraphs 50 and 51, the results of pretesting conducted by the Census Bureau which shows unprecedented levels of immigrant anxiety. That pretesting also reveals that immigrant households, noncitizen households are increasingly breaking off interviews with Census Bureau officials. The results of that pretesting show that not only is there a substantial likelihood of an undercount here but there's a substantial

likelihood of a serious undercount here. That's more than enough for plaintiffs to meet their burden.

THE COURT: And presumably those allegations are relevant to the question of whether the in-person enumerator follow-up would suffice to address any disparity; is that correct?

[23] MR. SAINI: Yes, your Honor.

THE COURT: Can you turn to the question of traceability and address that. The language in the cases suggest that the intervening acts of third parties don't necessarily break the chain of causation if there is a coercive or determinative effect. I think the government's argument here is that there is no coercive effect. In fact, to the extent that the government coerces anything, it coerces people to respond to the census because it's their lawful obligation to do so.

So why is that not compelling argument?

MR. SAINI: Your Honor, the courts have repeatedly acknowledged, including the Second Circuit just last week in NRDC v. NHTSA that the government's acknowledgment of a causal connection between their action and the plaintiffs' injury is sufficient to find that the defendants' injury—the plaintiffs' injury is fairly traceable to the defendants' conduct and that case law is sufficient to address this particular point.

With respect to the illegality point that the defendants have brought up here, we would point first to Rothstein which shows that the illegal intervening actions of a third party do not break the line of causation.

In addition, your Honor, while we haven't cited this in our papers because this point was first brought up

and [24] explored in a reply brief, there are a line of cases relating to data breaches, including in the D.C. Circuit, Attias v. CareFirst, in which plaintiffs' injuries related to identity theft, were fairly traceable to a company's lack of consumer information data security policies in spite of the intervening illegal action of the third parties, namely the hackers stealing that confidential information.

THE COURT: Can you give me that citation?

MR. SAINI: I can give that to you—it's in my bag, so I will give that to you shortly. Apologize about that.

THE COURT: All right. Very good. Why don't you wrap up on standing and we'll turn to the political question and APA question.

MR. SAINI: One last note on standing, your Honor. The plaintiff need only show that one city, state, or county within their coalition has Article III standing to satisfy the Article III requirement for the entire coalition. As a result, it's more than plausible to include that at least one of the cities, states and counties that we have alleged harms for related to funding and apportionment are likely and substantial—at a substantial risk of harm here.

THE COURT: All right. Thank you.

MR. SAINI: Thank you, your Honor.

THE COURT: Mr. Shumate, back to you. Mr. Saini can look for that cite in the meantime.

[25] Talk to me about political question and the APA and, once again, my question to you is why are those arguments not foreclosed by Carey v. Klutznick?

MR. SHUMATE: Your Honor, even assuming the plaintiffs have standing the case is not reviewable for two reasons: One, the political question doctrine, the second—

THE COURT: You have to slow down a little bit.

MR. SHUMATE: The APA is not reviewable because this matter is committed to the agency's discretion.

With respect to Carey, again, that case did not involve the addition of the question on the census questionnaire. There was very little analysis of the political question doctrine in that case. So it's hard to view that case as foreclosing the arguments we're making here.

THE COURT: But I don't understand you to be arguing that the decision with respect to the questions on the questionnaire is a political question and other aspects of the census are not political questions, or is that your argument? And to the extent that is your argument, where do you find support for that in the text of the enumeration clause?

MR. SHUMATE: So our argument is that the manner of conducting the census is committed to Congress, and Congress has committed that to the Secretary of Commerce. So to be sure there have been cases reviewing census decisions but those have been decisions involving how to count, who to count, things [26] like that, should we use imputation—

THE COURT: Isn't that the manner in which the census is conducted?

MR. SHUMATE: No. Those go squarely to the question of whether there's going to be a person-by-person headcount of every individual in America. That

is the actual enumeration. So in those cases there was law to apply. There was a meaningful standard. Is there going to be an actual enumeration?

This case is fundamentally different. This doesn't implicate those issues how to count, who to count. It implicates the Secretary's information gathering functions that are pre-census itself. And there is simply no case that addresses that question or decides—or says that it's not a political question.

THE COURT: Can you cite any case that has projected challenges to the census on the political question grounds?

MR. SHUMATE: No, there haven't been any cases like this one where a plaintiff is challenging the addition of a question to the census questionnaire itself. There have been cases—

THE COURT: You're telling me in the two hundred plus years of the census and the pretty much every ten-year cycle of litigation arising over it there has never been a challenge to the manner in which the census has been conducted; this is the [27] first one?

MR. SHUMATE: There has never been a challenge like this one to the addition of a question on the census questionnaire.

THE COURT: So it is specific to the addition of a question then.

MR. SHUMATE: Right. Right. So there have been cases—

THE COURT: In other words, that's the level on which I should look at whether it's a political question

and the question—literally adding the question is itself a political question. That's your argument?

MR. SHUMATE: Right. You don't need to go any further than that. Because our argument is that the Secretary's choice, or Congress's choice of which questions to ask on the census questionnaire is a political question. It is a value judgment and a policy judgment about what statistical information the government should collect. And there are no judicially manageable standards that the court can apply to decide whether that's a reasonable choice or not.

THE COURT: Why isn't the standard, and this becomes relevant to the issues we'll discuss later, why isn't the standard the one from the Supreme Court's decision in Wisconsin v. City of New York that it has to be reasonably related to the accomplishment of an actual enumeration? Why is that not the [28] standard and why is that not judicially manageable?

MR. SHUMATE: Because that case implicated the actual enumeration question. So there is a standard as to decide whether the Secretary's actions are intended to count every person in America. But that's not this case.

THE COURT: Isn't that the ultimate purpose of the census?

MR. SHUMATE: That is the ultimate purpose of the census, but the manner of conducting the census itself, the information-gathering function in particular is a political question. There is simply no law that the Court can find in the Constitution to decide whether the government should collect this type of information or that type of information.

THE COURT: So is it your argument that if the Secretary decided to add a question to the questionnaire that asks who you voted for in the last presidential election, that that would be unreviewable by a court?

MR. SHUMATE: It would be reviewable by Congress but not a court. That demonstrates why this is a political question, because Congress has reserved for itself the right to review the questions.

Two years before the census the Secretary has to submit the questions to Congress. If Congress doesn't like the questions, the Congress can call the Secretary to the Hill and berate him over that; or they can pass a statute and say no, [29] we're going to ask these questions. That's how the census used to be conducted. It used to be that statutory decision about which questions to ask on the census. But Congress has now delegated that discretion to the Secretary. But ultimately it is still a political question about the manner of conducting the census that is committed to the political branches.

THE COURT: What if the Secretary added a question that was specifically designed to depress the count in states that—we live in a world of red states and blue states. Let's assume for the sake of argument that the White House and Congress are both controlled by the same party. Let's call it blue for now. And let's assume that the Secretary adds a question that is intended to and will have the predictable effect of depressing the count in red states and red states only. Again, don't resist the hypothetical. Your argument is that that's reviewable only by Congress and even if Congress, even if there's a political breakdown and basically

Congress is not prepared to do anything about that question, that question is not reviewable by a court?

MR. SHUMATE: Correct. Because it is a decision about which question to ask. It wouldn't matter what the intent was behind the addition of the question. It's fundamentally different than a question, like the courts have reviewed in other cases, about who to count, how to count, things like that, should we count overseas federal employees. That's a [30] judicially manageable question. We can decide whether those individuals should be counted or not. It's different than whether sampling procedures should be allowed because it implicates the count itself. This is the pre-count information-gathering function that is committed to the political branches.

THE COURT: A lot of your argument turns on accepting that the plaintiffs' challenges to the manner in which the census is conducted as opposed to the enumeration component of the clause. Isn't the gravamen of the plaintiffs' claim here that by virtue of adding the question it will depress the count and therefore interfere with the actual enumeration required by the clause?

MR. SHUMATE: They're trying to make an actual enumeration claim, but their factual allegations don't implicate that clause of the Constitution at all because what they're challenge is the manner in which the Secretary conducts the information-gathering function delegated to him by Congress.

So there is no allegation in the complaint, for example, that the Secretary had not put in place procedures to count every person in America. I think they would have

to concede that the Secretary has those procedures in place and intends to count every person in America.

Now they argue that—I will get to this later—[31] they argue that the question will depress the count itself. But that would lead down a road where they can—plaintiffs could challenge the font of the form itself, the size of the form, whether it should be put on the internet, or the other questions on the form itself: Race, sex, Hispanic origin. These are matters that are committed to the Secretary's discretion for himself.

THE COURT: That may be committed to his discretion but that's a different question than whether they're completely unreviewable by a court, correct?

In other words, it may well be that there's a place for courts to review the decisions of the Secretary but giving appropriate deference to those decisions? Isn't that a fundamental distinction?

MR. SHUMATE: That is correct, your Honor. Even if you assume that it is not a political question, the court would still—should grant significant deference to the Secretary if the court gets to the enumeration clause claim.

THE COURT: Let's talk about the APA argument and whether it's committed to the discretion of the agency by law.

Can you cite any authority for the proposition that a census decision is so committed or is your point that this case has never—this is an issue of first impression effectively?

MR. SHUMATE: The later point, your Honor. This is a question of first impression. However, Web-

ster v. Doe, a [32] Supreme Court case, involved similar statutory language. I'll read that language. It said—

THE COURT: How do you square that with Justice Stevens' concurring opinion in Franklin where he essentially distinguished Webster on several grounds?

MR. SHUMATE: He did not get a majority of the Court, your Honor, so it wouldn't be controlling.

THE COURT: I understand that. I'm not controlled by it. But on the merits, tell me why he is not right.

In other words, the language in Webster was deemed advisable. That's not the language here. The structure of the Act at issue in Webster and the purpose of the Act, namely national security, implicated fairly significant considerations that are absent here. Here, there's an interest in transparency and the like that was absent or the exact opposite in Webster.

MR. SHUMATE: I respectfully disagree. To be sure, Webster involved national security where the courts have historically deferred significantly to the political branches. But so have courts also deferred to political branches when it comes to the census. The Wisconsin case from the Supreme Court makes that quite clear.

THE COURT: But holds that it's reviewable.

MR. SHUMATE: A case involving the actual enumeration question, not a case involving the Secretary's [33] information-gathering function.

And I think we need to focus on the specific language of the statute itself, which was not involved—not at issue in Franklin, did not involve a question about what questions to ask on the form.

The statute here says: Congress has delegated to the Commerce the responsibility to conduct a census, quote, in such form and content as he may determine.

THE COURT: Slow down.

MR. SHUMATE: Such form and content as he may determine. As he may determine. That is very similar to the language in Webster, that he deems advisable.

So there is simply nothing in the statute itself that a court can point to, to decide whether it's reasonable to ask one question or another because the statute says he has—the Secretary himself has the discretion to decide the form and content of the census questionnaire itself.

THE COURT: I take it that language was added to the statute in 1976; is that right?

MR. SHUMATE: I'm sorry. I don't understand.

THE COURT: That language was added to the statute in 1976?

MR. SHUMATE: I think the statute I'm pointing to is a 1980 statute, Section 141 of the census, because it says the Secretary shall conduct the census in 1980 and years—so [34] perhaps—

THE COURT: Probably passed before 1980.

MR. SHUMATE: Right. Right.

THE COURT: Is there anything in the legislative history that you're aware of that suggests that Congress intended to render the Secretary's decisions on that score totally unreviewable?

MR. SHUMATE: I'm not aware of any legislative history, your Honor, on this question about whether

courts should be permitted to review the Secretary's choice of which questions to ask on the census.

THE COURT: All right. Very good. Anything else on these two points? Otherwise I'll hear from plaintiffs.

MR. SHUMATE: I don't think so, your Honor.

THE COURT: All right. Thank you.

Good morning.

MS. GOLDSTEIN: Good morning, your Honor.

Elena Goldstein for the plaintiffs. Before I begin, your Honor, I do have that citation that my colleague referenced. Attias v. CareFirst, Inc. That is 865 F.3d 620.

THE COURT: Thank you.

MS. GOLDSTEIN: That was from 2017.

THE COURT: You may proceed.

MS. GOLDSTEIN: Thank you, your Honor.

Before I get to the heart of defendants' arguments, I [35] want to address this decision that they've made to get very granular with respect to the question, with respect to the exact conduct of the Secretary here.

The defendants contend repeatedly that this is a case of first impression and that no case has ever challenged a question on the census. That fact highlights the extreme and outlandish nature of defendants' conduct here.

If you look at the wide number of census cases that are out there, that I know we've all been looking at, there's a common theme. And the common theme is that the Census Bureau and the Secretary aim for accuracy.

If you look at the Wisconsin case, there the Secretary determined not to adjust the census using a post-enumeration survey had some science on his side. The Court says the Secretary is trying to be more accurate, has some science, we will defer. Utah v. Evans is similar. The determination to use a type of statistic known as hot-deck imputation, the Secretary says we're trying to be more accurate, we will defer.

This case turns that factual predicate on its head and in a most unusual way. Instead of the Secretary aiming for accuracy, the Secretary here has acknowledged that he's actually moving in the opposite direction.

THE COURT: So let's say I agree with you. Why under the language of the clause and the language of the statute is that not a matter for Congress to deal with?

[36] Congress has required the Secretary to report to Congress the questions that he intends to ask sufficiently in advance of the census that Congress could act, that the democratic process could run its course. Why is that not the answer instead of having a court intervene?

MS. GOLDSTEIN: Your Honor, defendants confuse the grant of authority to Congress for a grant of sole and unreviewable authority. They draw this—there's a vast number of cases out there that are holding, as the Court has noted, that these census cases are not, in fact, political questions. So in order to distinguish between all of those cases and this one case that defendants argue is not justiciable defendants proffer this novel distinction between the manner of the headcount and the headcount itself. But that distinction is a false dichotomy that collapses on further review. In many

cases, including this one, the manner of the headcount absolutely impacts the obligation to count to begin with. In this case plaintiffs have specifically alleged that defendants' decision to demand citizenship information from all persons will reduce the accuracy of the enumeration. That is, in defendant's effective parlance, a counting violating. And it's easy to think of many other examples in which the manner of the headcount is absolutely bound up in the headcount obligation itself. For example, the decision, as defendants point out, between Times New Roman and Garamond font, likely [37] within the government's discretion. But the decision to put the questionnaire in size two Garamond font that's unreadable, for example, on the questionnaire, that would be certainly a decision that would impact the accuracy of the enumeration. The decision to send out all the questionnaires in French would impact the accuracy of the enumeration.

THE COURT: Right. But not every problem warrants or even allows for a judicial solution, right. Indeed the Supreme Court said as much last week in some cases, like why is the remedy there not Congress stepping in and taking care of that problem, mandating that it be distributed in 17 languages instead of one, mandating that it be in twelve-point font, etc.

Why is a court to supervise, at that level of granularity, the Secretary's conduct that is committed to him by statute?

MS. GOLDSTEIN: Your Honor, defendants' political question argument depends on this manner versus headcount distinction. They acknowledge that everything else courts can review, not review on that granular level but review under Wisconsin to affirm that the

Secretary's decision bears a reasonable relationship to the accomplishment of an enumeration.

Courts do not analyze cases in this fashion. The starting point, as the Court has recognized, is Carey. This is a case that is, I think by any fair reading, a manner case. It involved the adequacy of address registers. It [38] involved the adequacy of enumerators going out. The Court there holds squarely that this is not a political question.

And looking at even Wisconsin, your Honor, the Court there recognized that the Secretary's discretion to not adjust the census in that case arises out of the manner language of the statute.

Virtually every court to consider this issue has held the fact that Congress has authority over the census does not mean that that is sole or unreviewable authority.

THE COURT: What is the judicially manageable standard to use?

The defendants throw out some hypotheticals as to whether it would constitute a violation of the—let me put it differently.

Is the standard the pursuing accuracy standard that you articulate in your brief and to some extent you've articulated here?

MS. GOLDSTEIN: Yes, your Honor.

I think that the baseline standard is the standard in Wisconsin, that defendants are obligated to take decisions that bear a reasonable relationship to the accomplishment of an actual enumeration, and accomplishing an actual enumeration means trying to get that count done, which means pursuing accuracy. Whatever the

outer limits of that decision may be, [39] your Honor, it is not taking decisions that affirmatively undermine that enumeration.

THE COURT: So defendants cite a number of hypotheticals in their reply brief, for example, the question of whether to hire 550 as opposed to 600,000 in-person enumerators; the question of whether to put it in 12 languages versus 13 languages.

Is it your position that those aren't reviewable but presumably acceptable on the merits or—I mean what's your position on those?

MS. GOLDSTEIN: Yes, your Honor.

The vast majority of those kinds of decisions made by the Secretary are well within the bound of the discretion that's laid out in Wisconsin. But as you push those examples further, the decision to send 500 enumerators versus 450, clearly within the Secretary's discretion. Both accomplish an actual enumeration and are calculated to do so.

But the decision to send no enumerators or no enumerators to a particular state, that begins to look more questionable as to whether or not that decision would bear a reasonable relationship to accomplish an enumeration and, under defendants', theory would be entirely unreviewable.

THE COURT: Turning to the APA question, I think you rely in part on the mandatory language in some places in the census act. There is no question that the Act mandates that [40] the Secretary do X, Y, and Z but the relevant clause here would seem to be the permissive one, namely, in such form and content as he may determine.

So why are the mandatory aspects of the Act even relevant to the question of whether it's committed to agency discretion?

MS. GOLDSTEIN: Your Honor, with respect to the plain language of the Census Act, I would argue that Section 5 which directs the Secretary to determine the question—the mandatory language directs the Secretary to determine the questions and inquiries on the census is more specific than the form and content language that even arguably is permissive in Section 141.

In addition, as plaintiffs have noted in that their papers, there are multiple sources for law to apply in this case, both from those mandatory requirements of the Census Act from the constitutional purposes undergirding the census, the Constitution and the Census Act, and the wide array of administrative guidance out there dictating specifically how the Census Bureau has and does add questions to the decennial questionnaire. In light of that mosaic of law, there is no question that the vast majority of courts to consider this question have concluded that challenges to the census are reviewable, that there is law to apply.

THE COURT: And to the extent that you rely on the [41] Census Bureau's own guidance, don't those policy statements have to be binding in order to provide law to apply?

MS. GOLDSTEIN: No, your Honor. The starting point here—so defendants are arguing that there is no law to apply at all. And the Second Circuit in the Salazar case makes very clear that the Court can look to informal agency guidance to determine whether or not there is law to apply.

In Salazar the Court was looking to dear-colleague letters that no one alleged gave rise to a finding of a private right of action. But at the same time those dear-colleague letters, in conjunction with other law out there, formed the basis for agency practices and procedures that departures therefrom could be judged to be arbitrary or capricious.

So, too, in this case. Plaintiffs have identified a wide arrange of policies and practices and procedural guidance dictating the many testing requirements that questions are typically held to and required to go through prior to being added to the decennial census the defendants have entirely ignored here. I'm happy to distinguish the cases that defendants have cited if the Court would like me to continue on this.

THE COURT: No. I think I'd like to turn to the enumeration clause issue at this point.

Mr. Shumate, you're back up.

MR. SHUMATE: Thank you, your Honor.

[42] THE COURT: Do you agree that the relevant standard comes from Wisconsin is the reasonably related or reasonable relationship to the accomplishment of an actual enumeration that that is the guiding standard here?

MR. SHUMATE: I think that would be the guiding standard in a case involving a question over whether the Secretary has procedures in place to conduct an actual enumeration, but that is not this case. This is a case involving the information-gathering function that takes place during the census. And there is no standard to apply.

THE COURT: What is the authority—Ms. Goldstein just argued that it's a false dichotomy and a false distinction that you're trying to draw between the manner and the enumeration. I mean it seems to me that there is some—it's hard to draw that—a clear distinction in the sense that clearly the manner in which the Secretary conducts the census will determine, in many instances, whether it actually is an accurate actual enumeration.

So are there cases that you can point to that draw that distinction and indicate that it is as bright line as you're suggesting?

MR. SHUMATE: I can't, your Honor, because frankly there hasn't been a case like this one involving the facial challenge to the addition of a question itself. But even assuming that is the standard, there's nothing in the [43] Constitution that forecloses the Secretary from asking this questions on the census questionnaire. There is no allegation that the Secretary doesn't have procedures in place to conduct person-by-person headcount in the United States. And as the Secretary said in his memo at pages one and eight, he intends, again, procedures in place to make every effort to conduct a complete and accurate census. So they're not challenging the procedures themselves. They're not challenging the follow-up operations. They're just challenging the addition of a question itself.

THE COURT: What about the hypothetical that the Secretary decides to send in-person enumerators only to states in certain regions of the country. Why would that not be a violation of the enumeration clause?

MR. SHUMATE: I think that would be, first of all, a very different case, but there may be a valid claim there if the Secretary had not put in place procedures to count every person in the United States.

THE COURT: Procedures sounds an awful lot like manner, no? In other words, why is that not a manner case as well that ultimately goes to the enumeration?

MR. SHUMATE: Because it implicates the count itself. It's not the questions on the form itself that are used to collect the information to count itself. So it's a fundamentally different situation.

[44] But, again, they don't have those allegations in the complaint here that the number of enumerators are insufficient. The only challenge here is to the addition of a question itself.

We can't ignore the fact that this question has been asked repeatedly throughout our history, as early as 1820 and as most recently as the 2000 census. And as the Wisconsin Court made clear, history is fundamentally important in a census case because the government has been doing this since 1790.

THE COURT: I take it your view is I can consider that history on a 12(b)(6) motion because there are undisputed facts, essentially historical facts.

MR. SHUMATE: Historical facts that take judicial notice of the fact that the question has been asked repeatedly throughout history.

THE COURT: Why does history not cut in both directions in the sense that the question was abandoned from the short-form census since 1950; in other

words, for the last 68 years it has not been a part of the census.

MR. SHUMATE: It has been part of the long-form census which went to one in six households, and those households didn't get the short form. So under their view it was unconstitutional for the government to send the long-form census to one in six houses, it was unconstitutional for the [45] government to ask this question in 1950 and in 1820, and that cannot possibly be right.

Let me address their point about the standard is accuracy, the Secretary has to do everything to pursue accuracy. That can't possibly be the standard. It's a made-up standard. It doesn't come from the cases. And it's simply unworkable.

On this question of the font on the form itself. There's nothing for the court to evaluate to decide whether that would be a permissible choice or not. It would give rise to courts second guessing everything that the Secretary does to collect the information for the census. And that's—it's simply not a case where the allegations implicate the procedures that are in place to count every person in America; instead this is case implicating the information-gathering function.

THE COURT: Now in United States v. Rickenbacker, Justice Marshall, for whom this courthouse is named, wrote that, "The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively. The questions contained in the household questionnaire related to important federal concerns such as housing,

labor and health and were not unduly broad or sweeping in their scope."

[46] Now admittedly that was in the context of a Fourth Amendment challenge to a criminal prosecution of someone who refused to respond to the census. But why is that not the relevant standard here?

It seems to me that the census's dual purpose, I think, has always been about getting an accurate count for purposes of allocating seats in the House of Representatives, but from time immemorial it seems that it also was used to collect data on those living in this country and that that has been deemed an acceptable, indeed, important function of it.

So why is that not a sensible standard to apply here?

MR. SHUMATE: Your Honor, it may be. But if that's the standard, there is no reason that the addition of a citizenship question would run afoul of that standard.

Again, the question has been asked repeatedly.

THE COURT: First of all, two questions. One is doesn't that provide a judicially manageable standard? Again, recognizing the deference of it to the Secretary on his judgments with respect to it, but at least it is a standard against which the Secretary's judgments can be measured, no?

MR. SHUMATE: I don't know where that standard comes from, your Honor. It certainly doesn't come from—

THE COURT: Thurgood Marshall.

MR. SHUMATE: That doesn't come from the Constitution, because the Constitution simply says the man-

ner of conducting [47] the census. The plaintiffs are right. That's not the standard that the plaintiffs are pressing. They're pressing the standard that the Secretary has to do everything to pursue accuracy. And if that's right, then the plaintiff can claim that the questions about race and sex and Hispanic origin are also unconstitutional.

THE COURT: But you don't make the argument that that's the relevant standard to apply in your brief?

MR. SHUMATE: No, your Honor. The standard to apply, if there is one, is actual enumeration. And the plaintiffs haven't made any allegations that the Secretary does not have procedures in place to conduct an actual enumeration.

THE COURT: And the purposes for which the question was added, obviously in the Administrative Record the stated purpose was to enforce—help enforce the Voting Rights Act. Are there additional purposes that would justify addition of the question and, relatedly, are those purposes somewhere in the record?

MR. SHUMATE: Your Honor, the standard rationale was the one provided by the Secretary in his memorandum. If we ever get to the APA claim, that would be the basis on which the Court would review the reasonableness of his decision.

But in terms of the constitutional claim, plaintiffs have to show, notwithstanding all the significant deference that the Secretary is entitled to, that the addition of this [48] question violates the Constitution. But, again, there is no suggestion here that the Secretary does not have procedures in place to count every person in America, and it can't be the standard that

anything that might cause an undercount would be somehow unconstitutional, because that would call into question many other questions on the form, and it would ignore the long history that this question has been asked on the census.

THE COURT: And I guess—what if the political climate in our country was such that the administration was thought to be very anti gun, let's say, and there were perceived threats to gun ownership, thoughts that the administration and the federal government would seize people's guns, and that administration proposed adding a question to the census about whether and how many guns people owned. Do you think that would not violate the enumeration clause?

MR. SHUMATE: It would not violate the clause, and Congress could provide a remedy and pass a statute and say this is not a question that should be asked on the census. It wouldn't be for a court to decide this question is bad, this one is good. That is something that is squarely committed to the political branches to decide.

THE COURT: Who is handling this for the plaintiffs?

Ms. Goldstein again. All right.

Tell me why the Thurgood Marshall standard shouldn't apply here.

[49] MS. GOLDSTEIN: Your Honor, even if the Thurgood Marshall standard would apply, as I can address in a moment, this question would still violate it. But the Supreme Court in Wisconsin, a more recent case, has made clear the standards that the Court uses to assess the Secretary's decisionmaking authority with respect to the census and that is whether or not the Secretary's decisions bear a reasonable relationship

to the accomplishment of an actual immigration keeping in mind the constitutional purposes of the census.

THE COURT: Tell me, measured against that standard, why asking any demographic questions on the census would pass muster, in other words, presumably asking about race, about sex, about all sorts of questions that have long been on the census, I mean they certainly don't—they're not reasonably related to getting an accurate count because they don't do anything to advance that purpose and they presumably, to the extent they have any effect, it is to depress the count if only because people view filling out the form as more of a pain.

So how would any of those questions pass muster under that test?

MS. GOLDSTEIN: Your Honor, this is not an ordinary demographic question.

THE COURT: That's not my question though. In other words, based on the test that you are articulating wouldn't any demographic question on the questionnaire fail?

[50] MS. GOLDSTEIN: Absolutely not, your Honor. Ordinary questions which are subject to extensive testing procedures that are precisely designed in order to assess and minimize and deal with any impacts to accuracy likely do, when they emerge from the end point of that testing, bear a reasonable relationship to the accomplishment of an actual enumeration. The Secretary is permitted under Wisconsin to privileged distributional accuracy over numerical accuracy. So if adding a gender question or a race question brings down the count a certain percent, there is no suggestion that

that is disproportionately impacting certain groups as defendant Jarmin has acknowledged with respect to this situation.

THE COURT: What about sexuality? Could the Secretary ask about sexuality in the interests of getting public health information, perhaps?

MS. GOLDSTEIN: Your Honor, I think to answer that question we would need to wait and see the procedures that the Census Bureau puts that question to, for example, with respect to the race and ethnicity question that the Secretary looked at for nearly a decade subjecting it to focus group testing cognitive testing, all sorts of testing to assess the impact on accuracy.

Now to the extent that a sexuality question had a disproportionate impact that the Secretary acknowledged and recognized and decided to take an action to reduce the accuracy [51] of the census nonetheless, that may well state a claim. But the vast majority of decisions that the Secretary may make will not.

Now in this case—there may be hard cases out there, your Honor, but this case is an easy case.

THE COURT: And is the standard an objective one, I assume? If one doesn't like at the intent of the Secretary or the government in adding the question, presumably it's an objective test of whether it's reasonably related to the goal of an actual enumeration.

MS. GOLDSTEIN: That is correct, your Honor.

However, defendants acknowledged recognition of the deterrent effect of this question certainly is good evidence that this will, in fact, undermine the enumeration

and does not reasonably relate it to accomplishing enumeration.

THE COURT: But because it's objective evidence. In other words, let's assume for the sake of argument that the question was added by the Secretary to suppress the count in certain jurisdictions—I'm not suggesting that that is the case but let's assume—is that relevant to whether it states a claim under the enumeration clause.

MS. GOLDSTEIN: No, your Honor, but it may be well relevant to the claim under the APA.

THE COURT: Go back to the Thurgood Marshall standard and tell me why that should not be the relevant standard here. [52] It seems to me, as I mentioned to Mr. Shumate, that the census has long had essentially a dual purpose. On the one hand, it is intended to get an actual enumeration and count the number of people in our country for purposes of representation. On the other hand, it has long been accepted that it's a means by which the government can collect data on residents of the country. So why is—it seems to me that the questions on the questionnaire are more tethered to that later purpose and if that's the case there is a little bit of a mismatch in measuring the acceptability of a question against whether it's reasonably related to the first goal.

MS. GOLDSTEIN: Your Honor, plaintiffs are to some extent hampered on this because defendants have not proffered the standard or argued it.

THE COURT: They say there is no standard which is why it's a political question.

MS. GOLDSTEIN: But the end of that sentence that you read by Justice Marshall made clear that even on that standard of gathering additional demographic data that there are questions that are unduly broad in scope.

Now here what we are alleging, that the Secretary of Commerce has made a decision that reverses decades of settled position that the Census Bureau recognizes that this specific question will reduce the accuracy of the enumeration; in their words from 1980, will inevitably jeopardize the accuracy of the [53] count, where defendants themselves have recognized that this may have, as defendant Jarmin indicated, important impacts in immigrant and Hispanic communities against this particular historical and cultural moment where this administration's anti immigration policy—

THE COURT: Let me ask you a question about that and try and get at what role that plays in the argument. Let's assume for the sake of that argument that the prior administration had added the citizenship question in a different climate. New administration comes in, whether it's this one or some other one, that is perceived to be very anti immigrant. Does the existence of the question suddenly become unconstitutional because the political climate has changed?

MS. GOLDSTEIN: I think that the starting point in this case is significant. The starting point is a reversal of decades of the settled position. The starting point is without a single test or even explanation as to why that position is being changed. The starting point is a recognition that it will impair accuracy. I think if this is a long-standing question, this has been on the census, that might be a different situation.

Just to address defendants' contention that the historical practice weighs in favor of them, I think setting aside that I do think that this is a merits question, this gets [54] the merits wrong. This question has not been asked of all respondents since 1950. It, instead, has been relegated to the longer form instrument where the citizenship demand is one of many questions. On the ACS it can be statistically adjusted. Failure to answer does not bring a federal employee to your door, knocking on it, demanding to know if you are a citizen.

THE COURT: How can it be constitutional to include it on a long-form questionnaire and not on a short-form questionnaire? In other words, how can the constitutionality of whether the question is proffered or asked turn on the length of the questionnaire?

MS. GOLDSTEIN: The question before the Court is whether or not the decision that was made several months ago to add this question to the long-form questionnaire that goes to all households, whether or not that question is constitutional. The question of whether or not it was constitutional in 1970 I believe when it was—when the world was different, when it was originally on the long form is not before the court. The question has not been—has been asked on the ACS since 2005.

Now defendants' allegations that the ACS is effectively the same thing as the census I think really belie or ignore the allegations in plaintiffs' complaint. The Census Bureau has for decades repeatedly resisted calls to move the question from the ACS to the census precisely because while the question may perform on the ACS it does not perform on the [55] census because it undermines the accuracy of that instrument.

THE COURT: Why, measured against the reasonable relation standard that you're pressing, would the mere use of the long-form questionnaire, why wouldn't that be unconstitutional?

In other words, I think that the response rate of those who receive the long-form questionnaire is significantly lower than the response rate of those who receive the short-form questionnaire. On your argument wouldn't that be unconstitutional under the enumeration clause?

MS. GOLDSTEIN: Your Honor, I think that just the lack of testing and the conduct with respect to this decision alone makes this decision distinguishable. With respect to the change in the long-form questionnaire, with respect to the ACS, with respect to those other demographic questions, they went through considered detailed procedures designed to assess and to minimize impacts on accuracy. Those tests, those procedures were entirely ignored here. And that alone distinguishes the Secretary's conduct.

THE COURT: All right. Thank you very much.

That concludes the argument on the motion to dismiss. Let me check with the court reporter whether we need a break or not.

She is willing to proceed so I am as well.

Why don't we hear from plaintiffs on discovery since [56] they're the moving parties on that front. I think the papers are fairly adequate for me to address most of the issues on this front. In that regard I don't intend to have a lengthy oral argument but I don't want to deprive you of your moment in the sun, Mr. Colangelo.

MR. COLANGELO: Thank you, your Honor.

Good morning. Matthew Colangelo from New York for the state and local government plaintiffs. I'll make two key points regarding the record. First is that the record the United States has prepared here is deficient on its face and should be completed. It deprives the Court of the opportunity to review the whole record as it's obligated to do under Section 706 of the APA. And the second broad argument I'll make is that the plaintiffs have, even once the record is completed, we anticipate the need for extra record discovery in light of the evidence of bad faith, the complicated issues involved in this case and, of course, the constitutional claim.

So turning to the first argument, as I've mentioned, the APA requires the Court to review the whole record. In Dopico v. Goldschmidt the Second Circuit—

THE COURT: Can I ask you a threshold question, which is why I shouldn't hold off until I've decided the motion to dismiss in light of the Supreme Court's decision in the DACA litigation arising out of California.

MR. COLANGELO: The circumstances in the DACA [57] litigation, your Honor, were extremely different and distinguishable from the circumstances here. The Court in that case pointed out that the United States had made an extremely strong showing of the overbroad nature of the discovery request. I believe the solicitor general's reply on cert to the Supreme Court mentioned that they would be obligated to review and produce 1.6 million records. So it was against the backdrop of that extremely broad production request that the Court said that it might make—the Court directed the district court to stay its discovery order until it

resolved the threshold questions. Nobody is requesting 1.6 million records here, your Honor.

THE COURT: How do I know that since the question of what you're requesting is not yet before me.

MR. COLANGELO: I think, among other reasons, your Honor, you know that because the United States hasn't made any contention at all that there's anything near the size of that record that's being withheld in this case as they did in the DACA litigation.

There are, to use the language from Dopico, there are a number of conspicuous absences from the record presented here and we would draw your attention to four in particular.

The first is that with the exception of background materials, there is essentially nothing in the record that predates the December 2017 request from the Justice Department. [58] There is no record at all of communications with other federal government components. The new supplemental memo that the Secretary added to the record just twelve days ago now discloses for the first time that over the course of 2017 the Secretary and his senior staff had a series of conversations with other federal government components. None of those records are anywhere in the Administrative Record that the United States produced.

Second, again with the exception of the December 2017 memo, the United States hasn't produced anything at all reflecting the Justice Department's decision where, as here, the heart of the Secretary's rationale for asking about citizenship, according to his March decision memo, was the supposed need to better enforce sections of the Voting Rights Act. It's just not

reasonable to believe that there are no other records that he directly or indirectly considered in the course of reaching his decision. In fact, the Secretary testified to Congress under oath that we had a lot of conversations with the Justice Department. If that's the case, those conversations ought to be included in the record.

The third key category of materials that are conspicuously omitted include records of the stakeholder outreach that the Secretary did conduct over the course of—earlier this year. The Secretary's decision memo says he reached out to about two dozen stakeholders. Other than what [59] appear to be undated, after-the-fact post hoc summaries that somebody somewhere prepared of those calls, there is no information at all about how those 24 stakeholders were selected; why, for example, was the National Association of Home Builders one of the stakeholders that the Secretary elected to reach out to here. The government has omitted the Secretary's briefing materials. All of these records are records that are necessary to help understand the government's decision.

And then the final category of materials conspicuously omitted are the materials that support Dr. Abowd's conclusion that adding this question would be costly and undermine the accuracy of the count. Dr. Abowd is the Census Bureau's chief scientist. Obviously materials that he relied on in reaching that adverse conclusion are materials that the Secretary indirectly considered and that body of evidence should be included in the record as well.

THE COURT: Why don't you briefly speak to the bad faith argument and then I want to address the question of scope and what should and shouldn't be

permitted if I allow discovery. I don't know if that's you or Mr. Rios who is planning to address that.

MR. COLANGELO: I can address scope and then I will turn to Mr. Rios to address one aspect of our anticipated expert discovery, your Honor.

[60] On bad faith, your Honor, we think there are at least five indicia of bad faith here, more than enough —more than enough certainly singularly to justify expanding the record but in collection we think they make an overwhelming case.

THE COURT: List them quickly if you don't mind.

MR. COLANGELO: Why don't I focus on two. First is the tremendous political pressure that was brought to bear on the Commerce Department and the Census Bureau. The record that the Justice Department presented discloses what appear to be four telephone calls between Kris Kobach and the Commerce Secretary or his senior staff on this question at a time that the Commerce Secretary now admits he was considering how to proceed on this question. The Justice Department's only response in the paper they filed with the Court is that that appears to be isolated or unsolicited and quite frankly, your Honor, that's just not credible. The Commerce Secretary and the senior staff had four telephone calls with an adviser to the President and Vice-President on election law issues on the exact question that the Secretary now acknowledges he was then considering. Mr. Kobach presented to the Secretary proposed language to this question that matches nearly verbatim the language that the Secretary ultimately decided to add to the census questionnaire and yet the only conclusion one can draw is that it was

isolated, incidental and immaterial contact. That's just not a reasonable position to take without exploring [61] more of the record.

The second argument that I'll mention briefly, that the shifting chronology here that the Commerce Department has presented we think also presents a strong case of bad faith. The March decision memo explicitly describes the Commerce Department's consideration of this question as being in response to the requests they received from the Justice Department. The Secretary's more or less contemporaneous sworn testimony to Congress repeats that point several times. In at least three different congressional hearings he uses language like we are responding only to the Justice Department; as you know, Congressperson, the Justice Department initiated this request; and then just twelve days ago the Commerce Secretary supplemented the record and disclosed that, in fact, the Commerce Department recruited the Justice Department to request this question, which certainly suggests that the Commerce Department knew where it wanted to go and was trying to build a record to support it. The rest of the arguments are set out in our papers, your Honor.

THE COURT: So talk to me about what the scope of discovery that you're seeking is and why I shouldn't, if I authorize it at all, severely constrain it.

MR. COLANGELO: Well, your Honor, I think we're actually looking for quite tailored discovery here and I think we can stagger it, I think as an initial—

[62] THE COURT: It's grown from three or four depositions at the initial conference to twenty.

MR. COLANGELO: Fair enough, your Honor. But at the initial conference we didn't have the Administrative Record that disclosed the role of Mr. Kobach at the instruction of Steve Bannon. We didn't known that Wendy Teramoto, the Secretary's chief of staff, had a series of e-mails and several phonecalls with Mr. Kobach at the exact same time they were now considering this question.

So, respectfully, our blindfolded assessment of what we might need has expanded slightly, but I still think it's a reasonable and reasonably tailored request. And so I would say a couple of things.

First, I think the Justice Department ought to complete the record by including the materials that are conspicuously omitted and that they acknowledge exist and they ought to do that in short order and at the same time ought to present a privilege log so that we can assess, without guessing, what their claims of privilege are and why those claims are or are not defensible.

I think once we have completed the administrative record, I think there is additional discovery, particularly in the nature of testimonial evidence, some third-party discovery, of course, Mr. Kobach, the campaign, Mr. Bannon, potentially some others. I think it's critical that we get evidence from [63] the Department of Justice because the Department of Justice ostensibly was the basis for the Secretary's decision, and then expert testimony, which we can turn to in a moment.

THE COURT: And then talk to me about Mr. Kobach, Mr. Bannon. First of all, wouldn't it suffice, if I authorize discovery, to allow you to seek that discovery from the Commerce Department and/or the Justice De-

partment alone? In other words, the relevance of whatever input they gave is what impact it had on the decision-makers at Commerce and that can be answered by discovery through Commerce alone. I'm not sure it warrants or necessitates expanding to third parties and then, second to that, Mr. Bannon is a former White House adviser and that implicates a whole set of separate and rather more significant issues, namely separation of powers issues, and executive privilege issues, and so forth. Why should I allow you to go there?

MR. COLANGELO: A couple of reasons, your Honor. First of all I do think we can table the question. I'm not prepared to concede that he we don't need third-party discovery. It may well be the only way that we can understand the basis for the Secretary's decision. But I do think we can table it to see, especially if we can do it quickly, what the actual completed record looks like and what other documents and potentially other testimonial evidence may disclose. And we certainly wouldn't be seeking to take third-party depositions [64] next week.

And I appreciate the concerns, obviously, about executive privilege. But we do have the separate—two separate issues here. One is that the Secretary has testified to Congress that he was not aware at all of any communications from anyone in the White House to anyone on his team. So if it now turns out that that congressional testimony may have omitted input from Mr. Bannon, I think we would want to discuss the opportunity to seek further explication of what exactly happened.

And then the final reason why I'm not prepared to concede that this additional evidence may not be necessary is the involvement of political access here is prob-

lematic for the Commerce Department's decision in a way that might not arise in an ordinary policy judgment case for two reasons. First, it's not consistent with the Secretary's presentation of his decision in his decision memo; but second, the Census Bureau is a statistical agency that is governed by the White House's own procedures that govern how statistical agencies ought to operate and among the core tenets of those procedures is independence and autonomy from political actors. So to the extent that there was undue political involvement in the decision here, we think that it probably does bear somewhat heavily on the Court's ability to assess the record.

But I don't disagree that we can stagger it. I'm just [65] not prepared to concede now that we won't need it.

THE COURT: Let me hear from Mr. Rios briefly and then I'll here from Mr. Shumate—excuse me, not Mr. Shumate.

Go ahead.

MR. RIOS: May it please the Court, your Honor, Rolando Rios on behalf of the plaintiffs. My brief comments, your Honor, are addressed to the need for discovery on an Article I claim. My clients, Hidalgo and Cameron Counties, are on the southernmost Texas border between Mexico and the United States. It is the epicenter of the hysterical anti immigrant rhetoric from the federal government. McAllen and Brownsville are the county seats. It is a microcosm, your Honor, of what is going on across the country in the Latino community. Quite frankly, the minority community across the country is traumatized by the federal government's actions.

THE COURT: Mr. Rios, I don't mean to cut you off but if you could get to the expert discovery point that you want to make.

MR. RIOS: Yes, your Honor. The general comments that I have is that based on their own expert's testimony that the citizenship question will increase the nonresponsiveness I feel it's important that expert testimony to update that data based on the present environment is essential. Your Honor, the importance of census data is lost sometimes here. I've been practicing voting rights law for 30 years. And, quite frankly, [66] census data is the gold standard that the federal courts use to adjudicate the allocation of judicial power—I mean electorial power and political power and federal resources. So this citizenship question is designed to tarnish that gold standard and basically deny our clients the political power that they're entitled to and also federal funds.

THE COURT: Thank you very much. Let me hear from Ms. Vargas I think it is.

MR. FREEDMAN: Your Honor, do you want to hear from us before the defendants or—

THE COURT: I didn't realize that you wished to have a word.

MR. FREEDMAN: Sorry, your Honor.

THE COURT: Sure. That makes more sense, that order. Go ahead.

MR. FREEDMAN: Your Honor, John Freedman for the NYIC plaintiffs. I could add additional points to what the state did on why the record needs to be supplemented. I could point to additional gaps. A

lot of those are covered in our letter. I could point to additional evidence why expansion of the record is appropriate and layout bad faith. But I think, again, I think that's covered in the letter.

THE COURT: OK.

MR. FREEDMAN: I do think it is worth emphasizing that we have an additional constitutional claim, equal protection [67] claim, that we believe entitles us to discovery. The basis for that is Rule 26 to start with, which says that we have the right to conduct discovery to any issue that's relevant. Certainly, the equal protection claim has elements that are not and do not overlap with the APA claim, including intent and impact and the history into the decision. We think that under the Supreme Court precedence, Webster v. Doe, we are entitled to conduct discovery and that there is a parallel APA claim.

THE COURT: It strikes me that the Supreme Court's decision In re United States, the DACA litigation, counsel is cautioned in allowing discovery before a court has considered threshold issues. I think the state's case is a little different in the sense that I have heard oral argument and have already gotten full briefing on those issues and in that regard can weigh that in the balance. But obviously the motion in your case is not yet fully submitted.

MR. FREEDMAN: It will be soon.

THE COURT: It will be soon. That is true.

MR. FREEDMAN: I think with respect to our case we can argue it now, you can take it under advisement until there is a ruling. I also think there's an important distinction in the way the DACA case was handled

in terms of supplementing the administrative record and that can be going on while the government has already put forward a record that is manifestly deficient. Their work you can provide guidance to them to how [68] they supplement it while the motion is under consideration. I think that that's permitted under how the Supreme Court ruled in the DACA case.

THE COURT: Anything else?

MR. FREEDMAN: I do want—just on scope. Obviously, you were asking questions about scope and how to control it. I think that the constitutional precedence we would cite Webster v. Doe on intent of decision-makers. All counsel have active involvement of the court in making sure discovery is tailored. We do have tailored discovery in mind. We weren't here at the May 4 conference obviously. We've always been approaching this as, because we have additional elements on our intentional discrimination claim, that we have additional things that we'd like to be able to prove, that under Arlington Heights we are entitled to prove. That's part of the reason why the deposition list is a little bit longer.

I also do think it would be helpful to get guidance from the Court on the question of the supplementation of Administrative Record. In particular, we cited cases in our letter spelling out that it's the obligation of the Agency, not just merely the Secretary, to produce records that are under consideration. We think that the Court should provide guidance that the whole record should include materials prior to December 12 and the pre-decisional determination to reach out to other agencies and have them sponsor the question. In many [69] ways looking at that prehistory, there's a parallel

between this case and what happened in Overton Park which is the seminal Supreme Court case here where the Court was hamstrung by its ability to review the case because all that the Department of Transportation had produced was effectively a post-litigation record. And I think you could look at what the Department has done here as a similar or analogous circumstance that they made a decision that they wanted to have this question. They had a response, then they said we're now on the clock, it's now time to start building our record, and that's what we're going to produce, and we don't have the real record before us.

THE COURT: Thank you.

Let me hear from Ms. Vargas and then we'll proceed.

Ms. Vargas, tell me why the supplemental memo or addition to the Administrative Record alone doesn't give rise to the need for discovery here. It seems that the ground has shifted quite dramatically; that initially in both the Administrative Record and in testimony the Secretary's position was that this was requested by the Department of Justice and lo and behold in a supplemental memo of half a page without explanation it turns out that that's not entirely the case. So doesn't that point to the need for discovery?

MS. VARGAS: Your Honor, there is nothing inconsistent between the supplemental memo and the original memo. The [70] original memo addresses a particular point in time. There is a receipt of the DOJ letter. It's uncontested that it was received on a particular date. At that point, as the Secretary said in his original memo, we gave a hard look, after we received the formal request from the Department of Justice, and

then he details the procedures and the analysis that he started at that point in time.

THE COURT: First of all, isn't it material to know that that letter was generated by a request from the Secretary himself as opposed to at least the misleading suggestion that it was from the Department of Justice without invitation?

MS. VARGAS: Your Honor, I resist the suggestion that it was misleading as an initial matter.

THE COURT: That's my question. Isn't it misleading or at least isn't there a basis to conclude that it's misleading and therefore an entitlement for the plaintiffs to probe that?

MS. VARGAS: No, your Honor. It's not misleading. It simply starts at a particular point in time and it goes forward. It doesn't speak whatsoever to the process that preceded the receipt of the DOJ memo and that's because the Administrative Record does not include internal deliberations, the consultative process, or the internal discussions that happen inter-agency or intra-agency. That's very settled law. It's black letter [71] administrative law that what is put on the administrative record is the decisional document and the informational basis for that decision but not the discussions that precede that or that go along with it. That has been the decisions of the Second Circuit, the D.C. Circuit en banc in San Luis Obispo. All of those courts speak to the fact that the internal conversations, the process documents, are not part of the administrative record and so, therefore, they wouldn't normally be disclosed. All the things that precede a decision internally, the processes, the discussions, none of that would

normally be part of an administrative record and it wouldn't normally be part of a decisional document. Normally when an agency issues a decision it doesn't go through: And then we had this discussion, and then there was this discussion and they arrive at—

THE COURT: But it does include the underlying data that the decision-maker considered or that those advising the decision-maker considered and how can it possibly be that the Secretary began conversations about this shortly after he was confirmed and there is literally virtually nothing in the record between that date and December 12 or whatever the date is that the letter arrives from the Department of Justice? It just—doesn't that—

MS. VARGAS: Data is a different matter, your Honor. The underlying information and data we believe is included and there is—there is some allegation that the data that the [72] Census Bureau relied upon in generating analyses of the DOJ request was not included in the Administrative Record.

Now the summary of that analysis, in fact, is included in the Administrative Record. It is in the Abowd—two different Abowd memos that are part of the Administrative Record.

Raw data itself, the raw census data from which that analysis is generated is protected by law. It's confidential—

THE COURT: I don't mean the data but the analyses of those who are advising the Secretary on whether this is a good idea or bad idea.

MS. VARGAS: Well to the extent they are discussing pros and cons, analysis, recommendations, all of that would fall within the deliberative process privilege.

THE COURT: Why should that not be on a privilege log?

MS. VARGAS: Because, your Honor, courts have routinely held that privilege logs are not required in APA cases precisely because these documents are not part—

THE COURT: Didn't the Second Circuit say exactly the opposite in the DACA litigation out of the Eastern District?

MS. VARGAS: Respectfully no, your Honor, it did not. I believe you're talking about the Nielsen slip order in which they denied a writ of mandamus. So, first of all, we're talking about a denial of a writ of mandamus which, of course, [73] is reviewing the district court decision under an exceedingly high standard, whether or not there are extreme circumstances warranting overturning the district court's decision. Obviously, of course, it's also not a published opinion but an order of the court, it's nonbinding. But on the merits I do not believe that the Second Circuit stated that privilege logs are required. If you look at the district court order that's being reviewed in that case, the District Court had decided that on the facts of that case a privilege log was required because it had found that the government had acted in bad faith. So there was—it wasn't binding that in every APA case privilege logs are required. The District Court had said that in constructing the administrative record the agency had not included all of the documents that were directly or indirectly before the decision-maker. And in that specific circumstance

where there had been that history, it said that we are not affording the normal presumption of regularity to the government and it was going to require a privilege log. And the Second Circuit did not grant writ of mandamus to overturn that decision.

But it doesn't stand for a broader proposition that in all APA cases privilege logs are required. The vast weight of authority is, in fact, to the contrary. Because these documents are not part of an administrative record in the first place, you don't log them; just as in civil discovery, if a [74] document is not responsive to a document request, you don't put it on a privilege log. The same principle applies in this case.

THE COURT: All right. Anything else you want to say?

MS. VARGAS: Yes, your Honor. I did want to address a couple of points on the scope of discovery, particularly expert discovery. They are trying to take advantage of an exception that doesn't really apply to have broad expert discovery in a case when the Second Circuit in Sierra Club has specifically said it is error for a district court in an APA case to allow experts to opine and to challenge the propriety of an agency decision.

THE COURT: Well, the way I read Sierra Club it doesn't speak to whether expert discovery should be authorized in the first instance. It speaks to the deference owed to the agency and whether a court can rely on an expert—expert evidence in order to supplant or disregard the agency's opinion. But that's a merits question. It's not a question pertaining to discovery.

MS. VARGAS: I disagree, your Honor. I think what the Second Circuit said is that expert discovery

—extra record, expert discovery for the purposes of challenging the agency's expert analysis is absolutely error and should not be allowed because of the fact that record review in an APA case under Supreme Court precedent, Camp v. Pitts, it must be confined to [75] the record.

THE COURT: What if the bad faith exception applies?

MS. VARGAS: Well the bad faith exception, of course, is a separate exception. Specific to the expert point.

THE COURT: But my question is that if I find that the presumption of regularity has been rebutted and the bad faith exception applies, does that not open the door to expert discovery, putting aside the ultimate question of whether and to what extent I could rely on that expert discovery or evidence in terms of evaluating the Secretary's decision?

MS. VARGAS: No, your Honor. Because the exceptions for the record review rule are to be narrowly construed. So to the extent that your Honor found that there was bad faith, which we obviously contest and don't believe extra record discovery is appropriate here, but if the Court were to find that, then the discovery had to be narrowly tailored to the points on which you found that there was some allegation of bad faith. So, for example, if there was a very specific issue that your Honor thought needed to be developed that perhaps could be ordered but it wouldn't open the door up to make this just a regular civil litigation under Rule 26 with broad discovery allowed on all claims on all issues and any expert discovery they wanted. It

doesn't open the door that wide. It just has to be narrowed to the specific point on which you find. But, of course, the government does not concede, it does [76] not believe that discovery would be appropriate in this case.

THE COURT: I understand.

MS. VARGAS: Thank you, your Honor.

THE COURT: All right. I was largely prepared to rule on the discovery question based on the papers and nothing I've heard from counsel has altered my view so I am prepared to give you my ruling on that front.

In doing so, I am of course mindful of the Supreme Court's decision In re United States, 138 S. Ct. 443 (2017) (per curiam), holding in connection with lawsuits challenging the rescission of DACA that the district court should have resolved the government's threshold arguments before deciding whether to authorize discovery—on the theory that the threshold arguments, "if accepted, likely would eliminate the need for the district court to examine a complete Administrative Record." That is from page 445 of that decision. I do not read that decision, however, to deprive me of the broad discretion that district courts usually have in deciding whether and when to authorize discovery despite a pending motion to dismiss; indeed, the Supreme Court's decision was expressly limited to "the specific facts" of the case before it. That's from the same page. More to the point, several considerations warrant a different approach here. First, unlike the DACA litigation, this case does not arise in the immigration and national security context, where the [77] Executive Branch enjoys broad, indeed arguably broadest authority. Second, time is of the essence here given that the clock is running on

census preparations. If this case is to be resolved with enough time to seek appellate review, whether interlocutory or otherwise, it is essential to proceed on parallel tracks. Third, and most substantially, unlike the DACA litigation, defendants' threshold argument here are fully briefed, at least in the states' case. See Regents of University of California v. U.S. Department of Homeland Security, 279 F. Supp. 3d 1011, at 1028 (N.D. Cal. 2018) discussing the procedural history of the DACA litigation and making clear that the motion to dismiss was not filed at the time that discovery was authorized. Although I reserve judgment on those threshold arguments, and I should make clear that I am reserving judgment on the motion to dismiss at this time, I am sufficiently confident, having read the parties' briefs and heard the oral argument today that the state and city plaintiffs' claims will survive, at least in part, to warrant proceeding on the discovery front. Moreover, I hope to issue a decision on the threshold issues in short order. So in the unlikely event that I do end up dismissing plaintiffs' case in its entirety, it is unlikely that defendants will have been heavily burdened in the interim.

With that, let me turn to the three broad categories of additional discovery that plaintiffs in the two cases have [78] sought in their letters of June 26, namely, a privilege log for all materials withheld from the record on the basis of privilege; completion of the previously filed Administrative Record; and extra record discovery. See docket no. 193 in the states' case, that is plaintiffs' letter in that case. For reasons I will explain, I find that plaintiffs have the better of the argument on all three fronts. I will address each in turn

and then turn to the scope and timing of discovery that I will allow.

The first issue whether defendants need to produce a privilege log is easily resolved. Put simply, defendants' arguments are, in my view, squarely foreclosed by the Second Circuit's December 17, 2017 rejection of similar arguments In re Nielsen. That is docket no. 17-3345 (2d Cir. December 27 or 17, I think, 2017). That is the DACA litigation pending in the Eastern District of New York. I recognize, of course, that that was —it arises in a mandamus petition and it is unpublished, but I think the reasons articulated by the Court of Appeals counsel for the production of a privilege log here. If anything, the justifications for requiring production of a privilege log are stronger here as the underlying documents do not implicate matters of immigration or national security and the burdens would appear to be substantially less significant or at least defendants have not articulated a particularly onerous burden. Moreover, whereas the defendants in Nielsen [79] had at least identified some basis for asserting privilege, namely the deliberative process privilege, defendants here, at least until the argument a moment ago, did not provide any such basis. See the states' letter at page two, note three. Accordingly, defendants must produce a privilege log identifying with specificity the documents that have been withheld from the Administrative Record and, for each document, the asserted privilege or privileges.

Second, plaintiffs seek an order directing the government to complete the Administrative Record. Although an agency's designation of the Administrative Record is generally afforded a presumption of regularity,

that presumption can be rebutted where the seeking party shows that "materials exist that were actually considered by the agency decision-makers but are not in the record as filed." Comprehensive Community Development Corp. v. Sebelius, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012). Plaintiffs have done precisely that here.

In his March 2018 decision memorandum produced in the Administrative Record at page 1313, Secretary Ross stated that he "set out to take a hard look" at adding the citizenship question "following receipt" of a request from the Department of Justice on December 12, 2017. Additionally, in sworn testimony before the House Ways and Means Committee, of which I can take judicial notice, see, for example, Ault v. J. M. Smucker Company, 2014 WL 1998235 at page 2 (S.D.N.Y. May 15, [80] 2014), Secretary Ross testified under oath that the Department of Justice had "initiated the request for inclusion of the citizenship question." See the states' letter at page four. It now appears that those statements were potentially untrue. On June 21, this year, without explanation, defendants filed a supplement to the Administrative Record, namely a half-page memorandum from Secretary Ross, also dated June 21, 2018. That appears at docket no. 189 in the states' case. In this memorandum, Secretary Ross stated that "soon after" his appointment as Secretary, which occurred in February of 2017, almost ten months before the request from the Department of Justice, he "began considering" whether to add the citizenship question and that "as part of that deliberative process," he and his staff "inquired whether the department of justice would support, and if so would request, inclusion of a citizenship question." In other words, it now appears that the idea of adding the citizenship question originated with

Secretary Ross, not the Department of Justice and that its origins long predated the December 2017 letter from the Justice Department. Even without that significant change in the timeline, the absence of virtually any documents predating DOJ's December 2017 letter was hard to fathom. But with it, it is inconceivable to me that there aren't additional documents from earlier in 2017 that should be made part of the Administrative Record.

[81] That alone would warrant an order to complete the Administrative Record. But, compounding matters, the current record expressly references documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record. For example, Secretary Ross claims that "additional empirical evidence about the impact of sensitive questions on the survey response rates came from the Senior Vice-President of Data Science at Nielsen." That's page 1318 of the record. But the record contains no empirical evidence from Nielsen. Additionally, the record does not include documents relied upon by subordinates, upon whose advice Secretary Ross plainly relied in turn. For example, Secretary Ross's memo references "the department's review" of inclusion of the citizenship question, and advice of "Census Bureau staff." That's pages 1314, 1317, and 1319. Yet the record is nearly devoid of materials from key personnel at the Census Bureau or Department of Commerce—apart from two memoranda from the Census Bureau's chief scientist which strongly recommend that the Secretary not add a citizenship question. Pages 1277 and 1308. The Administrative Record is supposed to include "materials that the agency decision-maker indirectly or constructively considered." Batalla Vidal

v. Duke, 2017 WL 4737280 at page 5 (E.D.N.Y. October 19, 2017).

Here, for the reasons that I've stated, I conclude that the current Administrative Record does not include the [82] full scope of such materials. Accordingly, plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded.

Finally, I agree with the plaintiffs that there is a solid basis to permit discovery of extra-record evidence in this case. To the extent relevant here, a court may allow discovery beyond the record where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." National Audubon Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without intimating any view on the ultimate issues in this case, I conclude that plaintiffs have made such a showing here for several reasons.

First, Secretary Ross's supplemental memorandum of June 21, which I've already discussed, could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale. See, for example, Tummino v. von Eschenbach, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) authorizing extra-record discovery where there was evidence that the agency decision-makers had made a decision and, only thereafter took steps "to find acceptable rationales for the decision." Second, the Administrative Record reveals that Secretary Ross overruled senior Census Bureau career staff, who had concluded —and this is at page [83] 1277 of the record—that reinstating the citizenship question would be "very costly"

and "harm the quality of the census count." Once again, see Tummino, 427 F. Supp. 2d at 231-32, holding that the plaintiffs had made a sufficient showing of bad faith where "senior level personnel overruled the professional staff." Third, plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question. Specifically, plaintiffs allege that, before adopting changes to the questionnaire, the Census Bureau typically spends considerable resources and time—in some instances up to ten years—testing the proposed changes. See the amended complaint which is docket no. 85 in the states' case at paragraph 59. Here, by defendants' own admission—see the amended complaint at paragraph 62 and page 1313 of the Administrative Record—defendants added an entirely new question after substantially less consideration and without any testing at all. Yet again Tummino is instructive. See 427 F. Supp. 2d at 233, citing an "unusual" decision-making process as a basis for extra-record discovery.

Finally, plaintiffs have made at least a prima facie showing that Secretary Ross's stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act —was pretextual. To my knowledge, the Department of Justice and [84] civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims. See the states case docket no. 187-1 at 14; see also paragraph 97 of the amended complaint. On top of that, plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act

casts further doubt on the stated rationale. See paragraph 184 of the complaint which is docket no. 1 in the Immigration Coalition case. Defendants may well be right that those allegations are "meaningless absent a comparison of the frequency with which past actions have been brought or data on the number of investigations currently being undertaken," and that plaintiffs may fail "to recognize the possibility that the DOJ's voting-rights investigations might be hindered by a lack of citizenship data." That is page 5 of the government's letter which is docket no. 194 in the states case. But those arguments merely point to and underscore the need to look beyond the Administrative Record.

To be clear, I am not today making a finding that Secretary Ross's stated rationale was pretextual —whether it was or wasn't is a question that I may have to answer if or when I reach the ultimate merits of the issues in these cases. Instead, the question at this stage is merely whether— [85] assuming the truth of the allegations in their complaints—plaintiffs have made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith. See, for example, Ali v. Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For the reasons I've just summarized, I conclude that the plaintiffs have done so.

That brings me to the question of scope. On that score, I am mindful that discovery in an APA action, when permitted, "should not transform the litigation into one involving all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial

review; i.e., review the decision of the agency under Section 706." That is from Ali v. Pompeo at page 4, citing cases. I recognize, of course, that plaintiffs argue that they are independently entitled to discovery in connection with their constitutional claims. I'm inclined to disagree given that the APA itself provides for judicial review of agency action that is "contrary to" the Constitution. See, for example, Chang v. USCIS, 254 F. Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if plaintiffs are correct on that score, it is well within my authority under Rule 26 to limit the scope of discovery.

Mindful of those admonitions, not to mention the separation of powers principles at stake here, I am not [86] inclined to allows as much or as broad discovery as the plaintiffs seek, at least in the first instance. First, absent agreement of defendants or leave of Court, of me, I will limit plaintiffs to ten fact depositions. To the extent that plaintiffs seek to take more than that, they will have to make a detailed showing in the form of a letter motion, after conferring with defendants, that the additional deposition or depositions are necessary. Second, again absent agreement of the defendants or leave of Court, I will limit discovery to the Departments of Commerce and Justice. As defendants' own arguments make clear, materials from the Department of Justice are likely to shed light on the motivations for Secretary Ross's decision—and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision. At this stage, however, I am not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that that influence would be evidenced in Commerce

Department materials and witnesses themselves. Further, to the extent that plaintiffs would seek discovery from the White House, including from current and former White House officials, it would create "possible separation of powers issues." That is from page 4 of the slip opinion in the Nielsen order. Third, although I suspect there will be a strong case for allowing a [87] deposition of Secretary Ross himself, I will defer that question to another day. For one thing, I think it should be the subject of briefing in and of itself. It raises a number of thorny issues. For another, I'm inclined to think that plaintiffs should take other depositions before deciding whether they need or want to go down that road and bite off that issue recognizing, among other things, that defendants have raised the specter of appellate review in the event that I did allow it. At the same time, I want to make sure that I have enough time to decide the issue and to allow for the possibility of appellate review without interfering with an expeditious schedule. So on that issue I'd like you to meet and confer with one another and discuss a timeline and a way of raising the issue, that is to say, when it is both ripe but also timely and would allow for an orderly resolution.

So with those limitations, I will allow plaintiffs to engage in discovery beyond the record. Further, I will allow for expert discovery. Expert testimony would seem to be commonplace in cases of this sort. See, for example, Cuomo v. Baldrige, 674 F. Supp. 1089 (S.D.N.Y. 1987). And as I indicated in my colloquy with Ms. Vargas, I do not read Sierra v. United States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985), to "prohibit" expert discovery as defendants suggestion. That case, in my view, speaks the deference that a court ulti-

mately owes the agency's own expert analyses, but it does not speak to [88] the propriety of expert discovery, let alone clearly prohibit such discovery, let alone do so in a case where, as I have just done so, a finding of bad faith and a rebuttal of the presumption of regularity are at issue.

That leaves only the question of timing. I recognize that you proposed schedules without knowing the scope of discovery that I would permit. I would like to set a schedule today. In that regard, would briefly hear from both sides with respect to the schedule. Alternatively, I could allow you to meet and confer and propose a schedule in writing if you think that that would be more helpful. Let me facilitate the discussion by throwing out a proposed schedule which is based in part on your letters and modifications that I've made to the scope of discovery.

First, by July 16, I think defendants should produce the complete record as well as a privilege log and initial disclosures. I recognize that Rule 26(a)(1)(B)(i) exempts from initial disclosure "an action for review on an administrative record" but in light of my decision allowing extra-record discovery I do not read that exception to apply.

Then I would propose that by September 7, plaintiffs will disclose their expert reports.

By September 21, defendants will disclose their expert reports, if any.

By October 1, plaintiffs will disclose any rebuttal [89] expert reports.

And fact an expert discovery would close by October 12, 2018.

Plaintiffs also propose that the parties would then be ready for trial on October 31. My view is it's premature to talk about having a trial. For one thing, it may well end up making sense to proceed by way of summary judgment rather than trial. For another thing, I don't know if we need to build in time for Daubert motions or other pretrial motions that would require more than 19 days to brief and for me to decide. I would be inclined, instead, to schedule a status conference for sometime in September to check in on where things stand, making sure that things are proceeding apace and get a sense of what is coming down the pike and decide how best to proceed. Having said that, I think it would make sense for you guys to block time in late October and November in the event that I do decide a trial is warranted. Again, I am mindful that my word is not likely to be the final one here and I want to make sure that all sides have an adequate opportunity to seek whatever review they would need to seek after a final decision.

So that's my ruling. You can respond to my proposed schedule. I'd be inclined to set it today but if you think you need additional time.

MR. FREEDMAN: Your Honor, John Freedman. Just one clarification. I think it was clear from what you said but in [90] terms of the number of depositions you meant ten collectively between the two cases, not ten per case?

THE COURT: Correct. And they would be cross-designated or cross-referenced in both cases. Correct.

MR. FREEDMAN: Understood, your Honor.

THE COURT: And, again, I don't mean to suggest that you will get more, but that's not—I did invite you to make a showing with specificity for why additional depositions would be needed. If it turns out that it is warranted, I'm prepared to allow it but, mindful of the various principles at stake and the limited scope of review under the APA, I think that it makes sense to rein discovery in in a way that it wouldn't be a standard civil action.

So, thoughts?

MR. COLANGELO: Your Honor, for the state and local government plaintiffs, we have no concerns at all.

THE COURT: Microphone, please.

MR. COLANGELO: For the state and local government plaintiffs, we have no concerns at all with the various deadlines that the Court has set out. Thank you.

MR. FREEDMAN: Your Honor, for the NYIC plaintiffs we concur. We think that it sets an appropriately expedited schedule that will resolve the issues in time and we appreciate the expedited consideration.

THE COURT: All right. Defendants.

[91] MS. BAILEY: Your Honor, I have a couple clarifying questions. As far as the proposed July 16 deadline, you say completing the record would that be the same deadline you envision for the privilege log?

THE COURT: Yes.

MS. BAILEY: We would ask that the schedule we have already set in other actions, that we have a little bit more time for that initial deadline. We have a num-

ber of briefs and an argument coming up that same week. Could we push that back until a bit later in July?

THE COURT: And when you say "that," meaning the deadline for initial disclosures, completing the record, and the log or only a part of those?

MS. BAILEY: Yes, your Honor. All—it would make sense I think to do them all together. But it would—we'd like to move that a little later in July.

THE COURT: Well I don't want to move it too much later in July because it will backup everything else. Why don't I give you until July 23. I would imagine that that would not materially affect the remainder of the schedule and would give you an extra week. Next.

MS. BAILEY: Thank you, your Honor.

One other point. In the conference before Judge Seeborg, Judge Seeborg, as your Honor is aware, he reserved the issue of deciding whether discovery was warranted. But as I [92] understand it, he strongly indicated that he thought that—if discovery is warranted in different actions, that the plaintiffs should coordinate between those actions and asked for the views of the parties on how that coordination should take place. So he didn't ultimately rule on that but we agree that coordinate between parties, if discovery is ordered in the other cases, is warranted.

THE COURT: I agree wholeheartedly. And Judge Seeborg knows as well, I did talk to him, as I mentioned. He indicated that he had reserved judgment but indicated that he, I think, would probably be ruling on or before August 10, I think; and that it was his view that if discovery were to go forward, it should be coordinated with discovery here if I were to allow it.

I agree. Ultimately I don't see why any of the folks who would be subjected to a deposition should be deposed twice in multiple actions. How to accomplish that, I don't have a settled idea on at the moment, but I would think that either you all should go back to Judge Seeborg and say in light of Judge Furman's decision we're prepared to proceed here or at least enter some sort of stipulation in that action that would allow for participation of counsel in the depositions—I'm open to suggestions. I mean I think that counsel in all of these cases having a conversation and figuring out an orderly way to proceed is probably sensible. I will call Judge Hazel [93] but I imagine that all of the judges involved will be of the view that depositions should only be taken once and certainly if they are depositions of upper level officials those are definitely only going to happen once. So I think coordination is going to be necessary.

Another component of that is that I imagine there may be discovery disputes in this case, and I don't have a brilliant idea for how those get resolved, whether they get resolved by me, by Judge Seeborg, or by Judge Hazel if discovery is allowed there. I think for now they should come to me because I'm the one and only judge who has ruled on the issue. But in the event that the other judges do authorize discovery, we probably need an orderly system to resolve those issues. I don't want it to be like a child who goes to mom and doesn't get the answer that he wants and then goes to dad for reconsideration. So I think you all should give some thought to that. Again, I don't think it needs to be resolved right now because Judge Seeborg has reserved judgment on it, but I will give it some thought, as I imagine he will, and we'll talk about it.

Anything you all want to say on that score?

MR. COLANGELO: Your Honor, for the state and local government plaintiffs, I would just add that we have no objection to coordinating with plaintiffs in other cases on the timing of depositions or on their participation, if warranted. [94] Our key concern was in not having the latest decided case be the right limiting step. We think the appropriate course is the one you've taken. So assuming it's on the schedule that your Honor has proposed, we have no objection to other—to coordinating with other plaintiffs on deposition schedules in particular.

THE COURT: I don't intend to wait for the other courts. I'm sure that they will be proceeding expeditiously in their own cases, but I am trying to get this case resolved in a timely fashion and in that regard don't plan to wait. So it behooves all of you to get on the phone with one another and figure out some sort of means of coordinating. You can look—I have a coordination order in the GM MDL that might provide a model and that allows for counsel in different cases to participation in depositions. This is not an MDL but there are some similarities. You may want to consider that. I'm sure there are other contexts in which these issues have arisen and you may want to look at models.

What I propose is why don't you submit a joint letter to me from all counsel in these cases, let's say within two weeks after you've had an opportunity to both confer with one another and confer with counsel in the other cases, and submit a joint letter to me with some sort of proposal. And if you can agree upon an order that would apply and ensure smooth coordination, all the better; and if not, you can tell me what

[95] your counterproposals are and I'll consider it at that time. All right.

MS. BAILEY: Thank you, your Honor.

THE COURT: Very good. Anything else?

MR. COLANGELO: Nothing for us, your Honor.

THE COURT: I wanted to just give you one heads-up. I noted from the states and local governments' letter there is an attachment which is a letter with respect to the Touhy issues in the case. As it happens, I have another case where that or some of the issues raised in that letter are actually fully submitted before me in an APA action case called Koopman v. U.S. Department of Transportation, 18 CV 3460. That matter is fully submitted. I can't and won't make any promises to you with respect to when I will issue a decision in it but it may speak to some of the issues raised in the states and local governments' letter. So you may want to keep an eye out for it.

With that—

MS. VARGAS: Your Honor, I do believe that we have—we are not going to be resting on a former employee issue which I believe is the issue in the Koopman litigation. So I don't believe that will implicate the issues that are at play in that case.

THE COURT: Good. Good to know. Thank you for letting me know. Then you don't need to look for it unless you [96] have some strange desire to read Judge Furman decisions.

On that score let me say I will try to issue a decision on the motion to dismiss in short order. I don't want to give myself a deadline. That's one prerogative of

being in my job. But I do hope that I'll get it out in the next couple weeks. And it's been very helpful, the argument this morning was very helpful, and counsel did an excellent job and your briefing is quite good as well as the amicus briefing. So I appreciate that. I will reserve judgment. I wish everybody a very happy Fourth of July. We are adjourned.

(Adjourned)

**APPENDIX F**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

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Filed: Oct. 26, 2018

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**OPINION AND ORDER**

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FURMAN, JESSE M., United States District Judge:

In these consolidated cases, Plaintiffs bring claims under the Administrative Procedure Act ("APA") and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). In an oral ruling on July 3, 2018, the Court found that Plaintiffs had made a "strong showing" of pretext or bad faith on the part of agency decision-makers and, applying well-established precedent, thus authorized discovery beyond the administrative record. (Docket No. 207 ("July 3rd Tr."), at 76-89). Significantly, however, the Court did not rule, and has not yet ruled, on whether or to what extent any such

extra-record materials can or should be considered in making a final ruling on Plaintiffs' claims. That is largely because the parties have not yet asked the Court to do so. Defendants were given the opportunity to file a summary judgment motion arguing that the Court's review should be limited to the administrative record and that trial was therefore unnecessary. (*See* Docket No. 363). But they elected not to file such a motion—thereby conceding, as a procedural matter, that a trial is appropriate. That trial is scheduled to begin in six business days, on November 5, 2018—a date that the Court set, in no small part, because Defendants themselves insist that resolution of Plaintiffs' claims "is a matter of some urgency" given the need to finalize the census preparations. (Docket No. 397 ("Gov't Stay Mot."), at 4).

Remarkably, despite the foregoing, Defendants now seek a stay of the trial and related pre-trial submissions (most of which are due today and therefore presumably done already) pending resolution of a forthcoming petition to the Supreme Court for writs of mandamus and certiorari. (*See id.*). Even more remarkably, although they filed their motion for a stay only three nights ago and this Court made clear less than two days ago that it would issue a written ruling in short order (Oct. 24, 2018 Pretrial Conf. Tr. ("Oct. 24th Tr.") 19), Defendants are already seeking the very same relief from the Second Circuit. (Docket No. 402). Their request is based primarily on an October 22, 2018 Order from the Supreme Court, denying Defendants' application to stay two of this Court's prior Orders (namely, its July 3, 2018 Order authorizing extra-record discovery, (*see* July 3rd Tr. 76-89) and its August 17, 2018 Order authorizing a deposition of Acting Assistant Attorney General John

Gore (*see* Docket No. 261)) and staying, at least temporarily, a third Order (namely, the Court's September 21, 2018 Order authorizing a deposition of Secretary Ross, *see New York v. United States Dep't of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4539659 (S.D.N.Y. Sept. 21, 2018)). *See In re Dep't of Commerce*, No. 18A375, 2018 WL 5259090 (U.S. Oct. 22, 2018). "Any order granting the government's petition," Defendants argue, "would substantially affect the further proceedings in this Court, including whether extra-record discovery would be permissible or whether review would take place on the administrative record." (Gov't Stay Mot. 2).

In other circumstances, the Court might well agree —albeit, only as an exercise of its discretion over case management—that the Supreme Court's Order warrants hitting the pause button and postponing trial, as the Supreme Court's resolution of Defendants' forthcoming petition could bear on this Court's analysis of the merits. But Defendants' own "urgen[t]" need for finality calls for sticking with the trial date. (Gov't Stay Mot. 4). And, in light of the all-too-familiar factors relevant to the question whether a stay should be granted pending mandamus, *see New York v. United States Dep't of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4279467, at *1 (S.D.N.Y. Sept. 7, 2018), Defendants are certainly not entitled to a stay.

**A. Defendants Fail to Show the Likelihood of Irreparable Harm**

First and foremost, Defendants fall far short of establishing a "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Significantly,

Defendants do not claim harm here from the Court's decision to allow extra-record discovery, and for good reason: Putting aside the possible deposition of Secretary Ross, discovery will end before Defendants file their petition with the Supreme Court. (Docket No. 401).[1] Nor do they claim that, absent a stay, the argument they seek to press before the Supreme Court—that Plaintiffs' claims should be resolved on the administrative record alone—would become moot. That too is for good reason, as Defendants remain free to argue at trial that the Court should disregard all evidence outside the administrative record and, if unsuccessful, can argue on appeal that the Court erred in considering extra-record evidence. Moreover, the Court has directed the parties to differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record. (Oct. 24th Tr. 16). The Court anticipates differentiating along similar lines in any findings of fact and conclusions of law that it enters. It follows that, if the Court rules against Defendants on the basis of extra-record materials and a higher court holds that the Court should not have considered those materials, Defendants would be able to get complete relief. Put simply, a stay is not necessary "to protect" Supreme Court review. *In re Dep't of Commerce*, 2018 WL 5259090 at *2 (Gorsuch, J., concurring in part and dissenting in part). The Supreme Court can conduct that review, as in the usual case, after final judgment.

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[1] Defendants clarified on the record at the conference held on October 24, 2018, that—despite language in their letter motion to the contrary (*see* Gov't Stay Mot. 2 (asking the Court to "stay all extra-record discovery"))—they are *not* actually seeking a stay of extra-record discovery. (Oct. 24th Tr. 18-19).

So what do Defendants cite as their irreparable harm in the absence of a stay? They complain that, without a stay, they "will be forced to expend enormous resources engaging in pretrial and trial activities that may ultimately prove to be unnecessary." (Gov't Stay Mot. 3).[2] But it is black-letter law that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see New York*, 2018 WL 4279467, at *2 (collecting cases). Throughout the nation, litigants in federal district courts understand that, with certain well-established and narrow exceptions not applicable here, *see, e.g.*, *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 905 n.5 (2015) (discussing the "narrow scope" of the collateral-order doctrine), everything that happens in those courts—up to and including trial—"retains its interlocutory character as simply a step along the route to final judgment," *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546

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[2] Defendants complain that one of the costs of going to trial is "the substantial monetary expenditure on travel and hotel stays for approximately twelve attorneys and professional staff for a two-week trial in New York City." (Gov't Stay Mot. 4). That is an extraordinary complaint separate and apart from the fact that such costs do not constitute irreparable harm for the reasons discussed in the text. There are dozens of highly qualified lawyers and professional staff in the Civil Division of the United States Attorney's Office for the Southern District of New York—the office that normally represents the Government in this District. The Court can only speculate why the lawyers from that Office withdrew from their representation of Defendants in these cases. (*See* Docket Nos. 227, 233). Whatever the reasons for that withdrawal, however, a party should not be heard to complain about harms of its own creation.

(1949)). In other words, spending resources on trial first and seeking appellate review later is the overwhelming norm, not the exception—"even though the entry of an erroneous order may require additional expense and effort on the part of both litigants and the district court." *Parkinson v. Apr. Indus., Inc.*, 520 F.2d 650, 654 n.3 (2d Cir. 1975). Far from a nationwide epidemic of irreparable harm, that is precisely how the federal court system is supposed to work. *See, e.g.*, *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-04 (1999) (describing the "several salutatory purposes" of the "final judgment rule").[3]

When pressed on that point at oral argument, Defendants asserted a new theory of harm not advanced in their written motion: some sort of dignitary harm flowing from the Court's "scrutiny" of "an executive branch agency." (Oct. 24th Tr. 12-14). But that novel theory of harm fails for several reasons. First, the decisions of executive branch agencies are not immune from scrutiny by the federal courts; indeed, the APA expressly invites such scrutiny. *See* 5 U.S.C. §§ 702, 705; *Sackett v. EPA*, 566 U.S. 120, 128 (2012); *see also, e.g.*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (discussing the "'strong presumption' favoring judicial review of administrative action" and collecting cases); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835) (Marshall, C.J.) ("It would excite some surprise

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[3] Defendants also cite the prospect of three current or former "high-level agency officials" being called as witnesses at trial as a form of potentially irreparable harm. (Gov't Stay Mot. 4). That argument is moot, however, as the witnesses are not subject to subpoena, and the Court yesterday denied Plaintiffs' motion seeking leave to present their testimony by live video transmission or to conduct *de bene esse* depositions. (Docket No. 403).

if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the citizen] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist . . . ."). Second, whether these cases proceed to trial or not, there is no dispute that Defendants' decision to add a citizenship question to the 2020 census will be subject to "scrutiny" by this Court and others; the only disputes between the parties concern the scope of evidence the Court may consider in applying that scrutiny and the degree of deference owed by the Court to Defendants' decision.

And third, although trials in APA cases are—as Defendants emphasize—"unusual" (Oct. 24th Tr. 13), they are far from unprecedented. Courts have subjected executive agencies to trials in APA cases where, as here, there are colorable claims of bad faith or pretext, *see, e.g.*, *Buffalo Cent. Terminal v. United States*, 886 F. Supp. 1031, 1045-48 (W.D.N.Y. 1995), or competing expert testimony, *see, e.g.*, *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1090, 1093 (S.D.N.Y. 1987). In fact, it is not even unprecedented for courts to hold trials to resolve APA challenges to the administration of the census! *See, e.g.*, *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993), *vacated*, 34 F.3d 1114 (2d Cir. 1994), *rev'd sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Cuomo*, 674 F. Supp. at 1091; *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded for a new trial*, 653 F.2d 732 (2d Cir. 1981). Notably,

Defendants cannot cite a single other instance in which the Government has sought the writ of mandamus, a form of extraordinary relief, to halt such "scrutiny." (Oct. 24th Tr. 13-14). It is the Government's conduct in this case, not the Court's review, that is "highly unusual, to say the least." *In re Dep't of Commerce*, 2018 WL 5259090, at *1 (Gorsuch, J., concurring in part and dissenting in part).

**B. Defendants Fail to Show a Likelihood of Success on the Merits of Any Question that Would Justify a Stay of Trial**

Defendants' failure to show the likelihood of irreparable harm is, by itself, fatal to their stay application, but they also fail to show that a likelihood of success on the merits warrants a stay of trial. *See Hollingsworth*, 558 U.S. at 190. To be sure, the Supreme Court's October 22, 2018 Order suggests that that Court may rule that this Court erred in its September 21, 2018 Order authorizing a deposition of Secretary Ross.[4] But that prospect alone does not warrant delaying the trial at Defendants' request. If the Supreme Court vacates this Court's September 21, 2018 Order before, during, or after trial, it will have no effect on the existing record, which presently lacks Secretary Ross's deposition

[4] In the Court's view, that result would be regrettable, as Secretary Ross's testimony is essential to fill gaps in, and clarify, the existing record. *See New York*, 2018 WL 4539659, at *2-3. In fact, one might have thought that Secretary Ross himself would have been *eager* to testify, if only to clear up the record. Given that, and given the importance of the census, "there is something surprising, if not unsettling, about Defendants' aggressive efforts to shield Secretary Ross from having to answer questions about his conduct." *Id.* at *5.

testimony. And, however unlikely it may be, *but compare, e.g.*, *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1303 (1991) (Scalia, J.) (in chambers) (granting a stay pending a petition for certiorari based in part on the prediction that "a grant of certiorari" was "probable"), *with Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 502 U.S. 981 (1991) (mem.) (denying certiorari), if the Supreme Court allows a deposition of Secretary Ross before this Court enters final judgment, the transcript of that deposition can presumably be added to the trial record. In any event, it is Plaintiffs who bear the burden of proof in these cases, *see, e.g.*, *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005), and Plaintiffs who seek to secure Secretary Ross's deposition to meet that burden. Despite that, Plaintiffs are content to take their chances and proceed to trial knowing that, even if the Supreme Court ultimately lifts the stay and allows a deposition of Secretary Ross, it may be too late for them to benefit in these cases. Thus, while the likelihood of success on the merits of Defendants' challenge to this Court's September 21, 2018 Order justifies the already existing stay of *that* Order, it does not justify a stay of *trial*.

Perhaps recognizing that, Defendants confidently predict that the Supreme Court is likely to opine that this Court erred in authorizing extra-record discovery in the first place. (Gov't Stay Mot. 2-3). But they base that prediction almost exclusively on the *dissent* from the Supreme Court's Order. (*See id.* at 1-3). It should go without saying that the dissent did not carry the day in the Supreme Court; instead, it represents the views of only two Justices. More to the point, there is nothing in the Supreme Court's Order itself that supports Defendants' confident prediction. Admittedly, the Su-

preme Court's Order states that "[t]he denial of the stay with respect to" the July 3, 2018 Order "*does not preclude* the applicants from making arguments with respect to" that Order. *In re Dep't of Commerce*, 2018 WL 5259090 at *1 (emphasis added). But it is rather aggressive to read that language as an "invit[ation]," as Defendants do. (Gov't Stay Mot. 3). After all, if one person says to another "you are not precluded from attending my party," the latter would be hard pressed to describe the expression as an "invitation."[5] In any event, even if the Supreme Court's language could reasonably be read as an invitation, it is rank speculation to infer from that invitation that the Supreme Court is likely to hold, in the present interlocutory posture no less, that this Court erred in authorizing extra-record discovery.

In fact, for several reasons, the Court concludes that the Supreme Court is *unlikely* to disturb the July 3, 2018 Order in advance of this Court's consideration of the merits. First, that Order pertained to discovery, which—apart from the possible deposition of Secretary Ross—will be complete when Defendants file their peti-

[5] The language at issue is more reasonably construed as a reaffirmation of the uncontroversial proposition that "[a] denial of a stay is not a decision on the merits of the underlying legal issues." *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam). Because Defendants invited the Supreme Court to treat their stay application as a petition for mandamus (or certiorari), *see* Renewed App. for Stay 40, No. 18A375 (U.S. Oct. 9, 2018), the Supreme Court had good reason to clarify that its disposition of the stay application did not extend to those alternative requests.

tion with the Supreme Court. (*See* Docket No. 401).[6] Second, Defendants' suggestion that this Court's July 3, 2018 Order somehow licensed a burdensome intrusion into the workings of the Executive Branch is overblown. The Court was careful to observe "that discovery in an APA action, when permitted, should not transform the litigation into one involving all the liberal discovery available under the federal rules" and should instead be limited to what is "necessary to effectuate the Court's judicial review." (July 3rd Tr. 85 (internal quotation marks omitted)). On that basis, the Court sharply curtailed the discovery Plaintiffs could conduct. (*See id.* at 85-87 (limiting Plaintiffs to ten depositions and limiting discovery, absent agreement or leave of Court, to the Departments of Commerce and Justice)).[7] Moreover, Defendants' cries of intrusion and

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[6] The deposition of Mr. Gore is taking place today and, thus, will be over before Defendants seek, let alone obtain, Supreme Court review. (*See* Docket No. 398, at 1).

[7] True to its word, the Court strictly policed what Defendants were required to disclose during discovery. (*See, e.g.*, Oct. 24th Tr. 21-23, 30-39 (denying or effectively denying several of Plaintiffs' open discovery demands); Docket No. 403 (denying Plaintiffs' motion to take *de bene esse* depositions or reopen depositions to address newly disclosed documents); Docket No. 369 (partially denying, on deliberative-process-privilege grounds, Plaintiffs' motion to compel production of documents); Docket No. 361 (partially denying, on attorney-client-privilege grounds, Plaintiffs' motion to compel documents); Docket No. 366, at 17 (denying Plaintiffs' motions to compel interrogatory responses); Docket No. 323 (memorializing a ruling from the bench partially denying Plaintiffs' motion to compel production of documents and to respond to interrogatories); Docket No. 303 (denying Plaintiffs' motion for leave to seek third-party discovery from Kris Kobach); Docket No. 261, at 3 (denying Plaintiffs' motion to compel documents "erroneously withheld" from the administrative record); Docket No. 204 (denying Plaintiffs' motion

burden ring hollow in light of their own conduct. Rather than seek immediate review of the Court's July 3, 2018 Order authorizing extra-record discovery, they waited *nearly two full months*—until extra-record discovery was substantially complete—before seeking a stay and any form of appellate review. *See New York*, 2018 WL 4279467, at *2.

Finally, the Court's decision to authorize extra-record discovery was, and remains, well founded. For starters, although judicial review of agency action is generally limited to the administrative record, *see, e.g.*, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), it is well established that "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers," *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). The "bad faith" exception "is logical because once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency. There is no reason, then, to presume that the record is complete, and justice is served only by going beyond the record to ascertain the true range of information before the agency." James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 Envtl. L. 1301, 1308 (2008). More importantly, the exception was spawned by the Supreme Court itself, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977), and has been adopted by

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to shorten Defendants' time to respond to discovery requests and for additional deposition time)).

every Court of Appeals in the country, *see* Saul, 38 Envtl. L. at 1308-09 & n.57. Indeed, Defendants do not dispute —and have never disputed—that "bad faith" can justify extra-record discovery. (*See, e.g.*, Docket No. 194, at 4 (conceding that there is a "bad faith" exception to the "record rule")). And nothing in the Supreme Court's October 22, 2018 Order casts doubt on the well-established exception.

Notably, even the Justices who dissented from the Supreme Court's Order seem to accept that there is a "bad faith" exception to the record rule. *See In re Dep't of Commerce*, 2018 WL 5259090 at *1-2 (Gorsuch, J., concurring in part and dissenting in part). Instead, they take issue with this Court's conclusion that Plaintiffs made a sufficient preliminary showing to trigger that exception. *See id.* The Court respectfully disagrees. This Court's conclusion that Plaintiffs had made such a showing was not based on a finding that Secretary Ross "c[ame] to office inclined to favor a different policy direction, solicit[ed] support from other agencies to bolster his views, disagree[d] with staff, or cut[] through red tape." *Id.* at *1. Such circumstances, even taken together, would not be exceptional. Instead, the Court's conclusion was based on a combination of circumstances that were, taken together, most exceptional: (1) Secretary Ross's own admission that he had "already decided to add the citizenship question before he reached out to the Justice Department" to request the question; (2) evidence that he had "overruled senior Census Bureau career staff, who had concluded . . . that reinstating the citizenship question would be very costly and harm the quality of the census count"; (3) indications that the Census Bureau had "*deviated significantly* from standard operating procedures in

adding the citizenship question"; and (4) Plaintiffs' *prima facie* showing that Secretary Ross's stated justification was pre-textual. (July 3rd Tr. 82-83 (emphasis added) (internal quotation marks and brackets omitted)). Most significant, the Court found reason to believe that Secretary Ross had provided false explanations of his reasons for, and the genesis of, the citizenship question—in both his decision memorandum and in testimony under oath before Congress. (July 3rd Tr. 79-80).

If those circumstances, taken together, are not sufficient to make a preliminary finding of bad faith that would warrant extra-record investigation, it is hard to know what circumstances would—short of an agency head's outright confession that his reasons were pretextual (in which case, of course, there would be no need for discovery). In fact, circumstances far short of those present in these cases have been found by other courts to justify discovery beyond the administrative record. *See, e.g.*, *Pub. Power Council v. Johnson*, 674 F.2d 791, 794-95 (9th Cir. 1982); *Batalla Vidal v. Duke*, No. 16-CV-4756 (NGG), 2017 WL 4737280, at *3-5 (E.D.N.Y. Oct. 19, 2017); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231-33 (E.D.N.Y. 2006). Thus, there is nothing unusual with this Court's decision to allow extra-record discovery and—in light of Defendants' election not to move for summary judgment—to adjudicate Plaintiffs' claims of bad faith and pretext through a trial.

### C. Issuance of a Stay Would Injure Plaintiffs and Harm the Public Interest

In short, Defendants fail to carry their burden on either of the first two, and "most critical," factors in the analysis of whether a stay is warranted. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Court could stop there, *see id.* at 435, but the third and fourth factors—"whether issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies," *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012)—also weigh heavily against a stay. As noted, Defendants have repeatedly insisted, and insist even now, that the resolution of Plaintiffs' claims "is a matter of some urgency." (Gov't Stay Mot. 4; *see* Docket No. 103, at 4-5 (noting that "the Census Bureau has indicated in its public planning documents that it intends to start printing the physical 2020 Census questionnaire by May 2019" and that Ron Jarmin, Acting Director of the Census Bureau and a Defendant here, "testified under oath before Congress . . . that the Census Bureau would like to 'have everything settled for the questionnaire this fall'" and "wants to resolve this issue 'very quickly'")). Awaiting prophylactic guidance from the Supreme Court—which may not come for months and may not come at all—would make it difficult, if not impossible, to meet that goal.[8] More broadly, as the Court has noted previ-

[8] Thus, Defendants are wrong in arguing, based on the dissent from the Supreme Court's October 22, 2018 Order, that Plaintiffs "'would suffer no hardship from being temporarily denied that which they very likely have no right to at all.'" (Gov't Stay Mot. 4 (quoting *In re Dep't of Commerce*, 2018 WL 5259090, at *2 (Gorsuch, J., concurring in part and dissenting in part)). Plaintiffs'

ously, "there is a strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner—and, relatedly, that it is conducted in a manner that 'bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.'" *New York*, 2018 WL 4279467, at *3 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)). Those interests weigh heavily against any delay and in favor of making an adequate record for this Court to render an initial decision—and for higher courts to then review that decision without any risk that those courts would conclude that a remand to develop the record would be in order.

In their pending motion before the Second Circuit, Defendants contend that a stay of trial would not prevent resolution of Plaintiffs' claims before the census questionnaires have to be printed. (Motion for Stay ("2d Cir. Stay Mot."), at 9, Docket No. 68, No. 18-2856 (2d Cir. Oct. 25, 2018); *see also* Oct. 24th Tr. 11-12). The Court does not share their confidence. There is no telling when the Supreme Court will issue a decision on Defendants' forthcoming petition. It could do so in days; or it could take months. If the Supreme Court's decision does not affect this Court's plan to proceed with a trial, the Court would then have to reschedule trial—no small task given the upcoming holidays, the parties' schedules (including two trials in parallel cases pending in other districts scheduled in January), and

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hardship is the risk that the census forms are printed before they have an opportunity to fully adjudicate their claims.

the Court's own congested calendar.[9] If the Supreme Court's decision makes clear that Plaintiffs' claims should be resolved by summary judgment rather than trial, the parties will need to prepare extensive motion papers. In either case, it will take time for this Court to issue a written ruling and enter final judgment. And whatever this Court decides, the losing parties will almost certainly appeal to the Second Circuit and, in turn, to the Supreme Court. It would be hard enough for that normally lengthy process to run its course by next May or June—when the census questionnaires are apparently scheduled to be printed (*see* Docket No. 103, at 4-5; Oct. 24th Tr. 11)— if these cases proceed to trial on November 5, 2018. Granting a stay of indefinite duration could make a timely final decision next to impossible.

* * * *

In short, as prudent as it might be under other circumstances to await further guidance from the Supreme Court, there are good reasons not to do so here and instead to proceed to trial as scheduled. Time is of the essence. At bottom, Defendants are seeking a preemptive ruling from the Supreme Court on a decision that this Court has not yet even made—namely, what evi-

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[9] At present, the Court has two other trials scheduled for December and another two trials scheduled for January. Moreover, the second one in January is a bellwether trial in the *General Motors LLC Ignition Switch Litigation*, which is slated to last several weeks, would be difficult to reschedule, and which will likely involve dozens of pretrial motions. Thus, the fact that the *other* district courts overseeing challenges to Secretary Ross's decision "have scheduled trials to begin in January," as Defendants note in their motion to the Second Circuit (2d Cir. Stay Mot. 9), says nothing about this Court's ability to render a timely decision.

dence the Court may consider in ruling on the merits—thereby seeking to disrupt "the appropriate relationship between the respective courts." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Making matters worse, Defendants have not yet even formally asked the Court to make a decision on that issue. They elected not to do so in the form of a summary judgment motion, and thus conceded, as a procedural matter, that trial is appropriate. And, perhaps most importantly, Defendants suffer no substantive, cognizable harm whatsoever in proceeding to trial as scheduled. They can make, and thus preserve, any argument they want about the scope of what this Court may consider in rendering a decision. And if they are unsuccessful before this Court, they can seek review of this Court's final judgment from the Second Circuit and, if necessary, the Supreme Court—as they could in any other case.

Put simply, the pending challenge to this Court's Order authorizing a deposition of Secretary Ross notwithstanding, Defendants provide no basis to deviate from the well-established and well-justified procedures that have generally been applied in federal courts for generations—whereby district courts decide cases in the first instance, followed by an appeal by the losing party, on a full record, to the court of appeals and, thereafter, a petition to the Supreme Court. Defendants may yet have their day to argue the merits in the Supreme Court. But for many salutary reasons, that day should not come before this Court has decided the merits in the first instance. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) ("[The final judgment rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law

and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration." (internal quotation marks and citation omitted)).

Accordingly, Defendants' motion for a stay of trial and associated deadlines is DENIED. The Clerk of Court is directed to terminate Docket No. 397.

SO ORDERED.

Dated: Oct. 26, 2018
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

## APPENDIX G

1. U.S. Const. Art. I, § 2, Cl. 3 provides in pertinent part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * * . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

* * * * *

2. 5 U.S.C. 706 provides:

**Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 13 U.S.C. 2 provides:

**Bureau of the Census**

The Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.

4. 13 U.S.C. 4 provides:

**Functions of Secretary; regulations; delegation**

The Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and duties, and may delegate the performance of such functions and duties and the authority to issue such rules and regulations to such officers and

employees of the Department of Commerce as he may designate.

5. 13 U.S.C. 5 provides:

**Questionnaires; number, form, and scope of inquiries**

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

6. 13 U.S.C. 141(a) provides:

**Population and other census information**

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

7. 13 U.S.C. 221 provides:

**Refusal or neglect to answer questions; false answers**

(a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary, or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his know-

ledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100.

(b) Whoever, when answering questions described in subsection (a) of this section, and under the conditions or circumstances described in such subsection, willfully gives any answer that is false, shall be fined not more than $500.

(c) Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.

## APPENDIX H

UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

**Supplemental Memorandum by Secretary of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation**

This memorandum is intended to provide further background and context regarding my March 26, 2018, memorandum concerning the reinstatement of a citizenship question to the decennial census. Soon after my appointment as Secretary of Commerce, I began considering various fundamental issues regarding the upcoming 2020 Census, including funding and content. Part of these considerations included whether to reinstate a citizenship question, which other senior Administration officials had previously raised. My staff and I thought reinstating a citizenship question could be warranted, and we had various discussions with other governmental officials about reinstating a citizenship question to the Census. As part of that deliberative process, my staff and I consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act.

Ultimately, on December 12, 2017, DOJ sent a letter formally requesting that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship. My March 26, 2018, memorandum described the thorough assessment process that the Department

of Commerce conducted following receipt of the DOJ letter, the evidence and arguments I considered, and the factors I weighed in making my decision to include the citizenship question on the 2020 Census.

/s/ WILBUR ROSS
WILBUR ROSS
June 21, 2018

**APPENDIX I**

**UNITED STATES DEPARTMENT OF COMMERCE**
**The Secretary of Commerce**
Washington, D.C. 20230

To: Karen Dunn Kelley, Under Secretary for Economic Affairs

From: Secretary Wilbur Ross

Date: Mar. 26, 2018

Re: Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire

Dear Under Secretary Kelley:

As you know, on December 12, 2017, the Department of Justice ("DOJ") requested that the Census Bureau reinstate a citizenship question on the decennial census to provide census block level citizenship voting age population ("CVAP") data that are not currently available from government survey data ("DOJ request"). DOJ and the courts use CVAP data for determining violations of Section 2 of the Voting Rights Act ("VRA"), and having these data at the census block level will permit more effective enforcement of the Act. Section 2 protects minority population voting rights.

Following receipt of the DOJ request, I set out to take a hard look at the request and ensure that I considered all facts and data relevant to the question so that I could make an informed decision on how to respond. To that end, the Department of Commerce ("Department") immediately initiated a comprehensive review process led by the Census Bureau.

The Department and Census Bureau's review of the DOJ request—as with all significant Census assessments—prioritized the goal of obtaining *complete and accurate data.* The decennial census is mandated in the Constitution and its data are relied on for a myriad of important government decisions, including apportionment of Congressional seats among states, enforcement of voting rights laws, and allocation of federal funds. These are foundational elements of our democracy, and it is therefore incumbent upon the Department and the Census Bureau to make every effort to provide a complete and accurate decennial census.

At my direction, the Census Bureau and the Department's Office of the Secretary began a thorough assessment that included legal, program, and policy considerations. As part of the process, I also met with Census Bureau leadership on multiple occasions to discuss their process for reviewing the DOJ request, their data analysis, my questions about accuracy and response rates, and their recommendations. At present, the Census Bureau leadership are all career civil servants. In addition, my staff and I reviewed over 50 incoming letters from stakeholders, interest groups, Members of Congress, and state and local officials regarding reinstatement of a citizenship question on the 2020 decennial census, and I personally had specific conversations on the citizenship question with over 24 diverse, well informed and interested parties representing a broad range of views. My staff and I have also monitored press coverage of this issue.

Congress has delegated to me the authority to determine which questions should be asked on the decennial census, and I may exercise my discretion to reinstate

the citizenship question on the 2020 decennial census, especially based on DOJ's request for improved CVAP data to enforce the VRA. By law, the list of decennial census questions is to be submitted two years prior to the decennial census—in this case, no later than March 31, 2018.

The Department's review demonstrated that collection of citizenship data by the Census has been a long-standing historical practice. Prior decennial census surveys of the entire United States population consistently asked citizenship questions up until 1950, and Census Bureau surveys of sample populations continue to ask citizenship questions to this day. In 2000, the decennial census "long form" survey, which was distributed to one in six people in the U.S., included a question on citizenship. Following the 2000 decennial census, the "long form" sample was replaced by the American Community Survey ("ACS"), which has included a citizenship question since 2005. Therefore, the citizenship question has been well tested.

DOJ seeks to obtain CVAP data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected, and DOJ states that the current data collected under the ACS are insufficient in scope, detail, and certainty to meet its purpose under the VRA. The Census Bureau has advised me that the census-block-level citizenship data requested by DOJ are not available using the annual ACS, which as noted earlier does ask a citizenship question and is the present method used to provide DOJ and the courts with data used to enforce Section 2 of the VRA. The ACS is sent on an annual basis to a sample of approximately 2.6 percent of the population.

To provide the data requested by DOJ, the Census Bureau initially analyzed three alternatives: Option A was to continue the status quo and use ACS responses; Option B was placing the ACS citizenship question on the decennial census, which goes to every American household; and Option C was not placing a question on the decennial census and instead providing DOJ with a citizenship analysis for the entire population using federal administrative record data that Census has agreements with other agencies to access for statistical purposes.

**Option A** contemplates rejection of the DOJ request and represents the status quo baseline. Under Option A, the 2020 decennial census would not include the question on citizenship that DOJ requested and therefore would not provide DOJ with improved CVAP data. Additionally, the block-group level CVAP data currently obtained through the ACS has associated margins of error because the ACS is extrapolated based on sample surveys of the population. Providing more precise block-level data would require sophisticated statistical modeling, and if Option A is selected, the Census Bureau advised that it would need to deploy a team of experts to develop model-based methods that attempt to better facilitate DOJ's request for more specific data. But the Census Bureau did not assert and could not confirm that such data modeling is possible for census-block-level data with a sufficient degree of accuracy. Regardless, DOJ's request is based at least in part on the fact that existing ACS citizenship data-sets lack specificity and completeness. Any future modeling from these incomplete data would only compound that problem.

Option A would provide no improved citizenship count, as the existing ACS sampling would still fail to obtain

*actual,* complete number counts, especially for certain lower population areas or voting districts, and there is no guarantee that data could be improved using small-area modeling methods. Therefore, I have concluded that Option A is not a suitable option.

The Census Bureau and many stakeholders expressed concern that **Option B,** which would add a citizenship question to the decennial census, would negatively impact the response rate for noncitizens. A significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up ("NRFU") operations. However, neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially. In discussing the question with the national survey agency Nielsen, it stated that it had added questions from the ACS on sensitive topics such as place of birth and immigration status to certain short survey forms without any appreciable decrease in response rates. Further, the former director of the Census Bureau during the last decennial census told me that, while he wished there were data to answer the question, none existed to his knowledge. Nielsen's Senior Vice President for Data Science and the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush also confirmed that, to the best of their knowledge, no empirical data existed on the impact of a citizenship question on responses.

When analyzing Option B, the Census Bureau attempted to assess the impact that reinstatement of a citizenship question on the decennial census would have on response rates by drawing comparisons to ACS responses. How-

ever, such comparative analysis was challenging, as response rates generally vary between decennial censuses and other census sample surveys. For example, ACS self-response rates were 3.1 percentage points less than self-response rates for the 2010 decennial census. The Bureau attributed this difference to the greater outreach and follow-up associated with the Constitutionally-mandated decennial census. Further, the decennial census has differed significantly in nature from the sample surveys. For example, the 2000 decennial census survey contained only eight questions. Conversely, the 2000 "long form" sample survey contained over 50 questions, and the Census Bureau estimated it took an average of over 30 minutes to complete. ACS surveys include over 45 questions on numerous topics, including the number of hours worked, income information, and housing characteristics.

The Census Bureau determined that, for 2013-2016 ACS surveys, nonresponses to the citizenship question for non-Hispanic whites ranged from 6.0 to 6.3 percent, for non-Hispanic blacks ranged from 12.0 to 12.6 percent, and for Hispanics ranged from 11.6 to 12.3 percent. However, these rates were comparable to nonresponse rates for other questions on the 2013 and 2016 ACS. Census Bureau estimates showed similar nonresponse rate ranges occurred for questions on the ACS asking the number times the respondent was married, 4.7 to 6.9 percent; educational attainment, 5.6 to 8.5 percent; monthly gas costs, 9.6 to 9.9 percent; weeks worked in the past 12 months, 6.9 to 10.6 percent; wages/salary income, 8.1 to 13.4 percent; and yearly property insurance, 23.9 to 25.6 percent.

The Census Bureau also compared the self-response rate differences between citizen and noncitizen households' response rates for the 2000 decennial census short form (which did not include a citizenship question) and the 2000 decennial census long form survey (the long form survey, distributed to only one in six households, included a citizenship question in 2000). Census found the decline in self-response rates for noncitizens to be 3.3 percent greater than for citizen households. However, Census was not able to isolate what percentage of decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey (it contained over six times as many questions covering a range of topics). Indeed, the Census Bureau analysis showed that for the 2000 decennial census there was a significant drop in self response rates overall between the short and long form; the mail response rate was 66.4 percent for the short form and only 53.9 percent for the long form survey. So while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief.

**Option C,** the use of administrative records rather than placing a citizenship question on the decennial census, was a potentially appealing solution to the DOJ request. The use of administrative records is increasingly part of the fabric and design of modem censuses, and the Census Bureau has been using administrative record data to improve the accuracy and reduce the cost of censuses since the early 20th century. A Census Bureau analysis matching administrative records with the 2010 decennial census and ACS responses over several more recent years showed that using administra-

tive records could be more accurate than self-responses in the case of non-citizens. That Census Bureau analysis showed that between 28 and 34 percent of the citizenship self-responses for persons that administrative records show are non-citizens were inaccurate. In other words, when non-citizens respond to long form or ACS questions on citizenship, they inaccurately mark "citizen" about 30 percent of the time. However, the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population. Thus, using administrative records alone to provide DOJ with CVAP data would provide an incomplete picture. In the 2020 decennial census, the Census Bureau was able to match 88.6 percent of the population with what the Bureau considers credible administrative record data. While impressive, this means that more than 10 percent of the American population—some 25 million voting age people—would need to have their citizenship imputed by the Census Bureau. Given the scale of this number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records alone would presently provide.

I therefore asked the Census Bureau to develop a fourth alternative, **Option D,** which would combine Options B and C. Under Option D, the ACS citizenship question would be asked on the decennial census, and the Census Bureau would use the two years remaining until the 2020 decennial census to further enhance its administrative record data sets, protocols, and statistical models to provide more complete and accurate data. This approach would maximize the Census Bureau's ability to match the decennial census responses with adminis-

trative records. Accordingly, at my direction the Census Bureau is working to obtain as many additional Federal and state administrative records as possible to provide more comprehensive information for the population.

It is my judgment that Option D will provide DOJ with the most complete and accurate CVAP data in response to its request. Asking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer. This may eliminate the need for the Census Bureau to have to impute an answer for millions of people. For the approximately 90 percent of the population who are citizens, this question is no additional imposition. And for the approximately 70 percent of non-citizens who already answer this question accurately on the ACS, the question is no additional imposition since census responses by law may only be used anonymously and for statistical purposes. Finally, placing the question on the decennial census and directing the Census Bureau to determine the best means to compare the decennial census responses with administrative records will permit the Census Bureau to determine the inaccurate response rate for citizens and non-citizens alike using the entire population. This will enable the Census Bureau to establish, to the best of its ability, the accurate ratio of citizen to non-citizen responses to impute for that small percentage of cases where it is necessary to do so.

**Consideration of Impacts** I have carefully considered the argument that the reinstatement of the citizenship question on the decennial census would depress response rate. Because a lower response rate would lead to increased non-response follow-up costs and less accurate responses, this factor was an important consid-

eration in the decision-making process. I find that the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.

Importantly, the Department's review found that limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially. Concerns about decreased response rates generally fell into the following two categories—distrust of government and increased burden. First, stakeholders, particularly those who represented immigrant constituencies, noted that members of their respective communities generally distrusted the government and especially distrusted efforts by government agencies to obtain information about them. Stakeholders from California referenced the difficulty that government agencies faced obtaining any information from immigrants as part of the relief efforts after the California wildfires. These government agencies were not seeking to ascertain the citizenship status of these wildfire victims. Other stakeholders referenced the political climate generally and fears that Census responses could be used for law enforcement purposes. But no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates among those who generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement. Rather, stakeholders merely identified residents who made the decision not to participate regardless of whether the Census includes a citizenship question. The reinstatement of a citizenship question will not decrease the response rate of residents who

already decided not to respond. And no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did (although many believed that such residents had to exist). While it is possible this belief is true, there is no information available to determine the number of people who would in fact not respond due to a citizenship question being added, and no one has identified any mechanism for making such a determination.

A second concern that stakeholders advanced is that recipients are generally less likely to respond to a survey that contained more questions than one that contained fewer. The former Deputy Director and Chief Operating Officer of the Census Bureau during the George W. Bush administration described the decennial census as particularly fragile and stated that any effort to add questions risked lowering the response rate, especially a question about citizenship in the current political environment. However, there is limited empirical evidence to support this view. A former Census Bureau Director during the Obama Administration who oversaw the last decennial census noted as much. He stated that, even though he believed that the reinstatement of a citizenship question would decrease response rate, there is limited evidence to support this conclusion. This same former director noted that, in the years preceding the decennial census, certain interest groups consistently attack the census and discourage participation. While the reinstatement of a citizenship question may be a data point on which these interest groups seize in 2019, past experience demonstrates that it is likely efforts to undermine the decennial census will occur again regardless of whether the decennial

census includes a citizenship question. There is no evidence that residents who are persuaded by these disruptive efforts are more or less likely to make their respective decisions about participation based specifically on the reinstatement of a citizenship question. And there are actions that the Census Bureau and stakeholder groups are taking to mitigate the impact of these attacks on the decennial census.

Additional empirical evidence about the impact of sensitive questions on survey response rates came from the SVP of Data Science at Nielsen. When Nielsen added questions on place of birth and time of arrival in the United States (both of which were taken from the ACS) to a short survey, the response rate was not materially different than it had been before these two questions were added. Similarly, the former Deputy Director and COO of the Census during the George W. Bush Administration shared an example of a citizenship-like question that he believed would negatively impact response rates but did not. He cited to the Department of Homeland Security's 2004 request to the Census Bureau to provide aggregate data on the number of Arab Americans by zip code in certain areas of the country. The Census Bureau complied, and Census employees, including the then-Deputy Director, believed that the resulting political firestorm would depress response rates for further Census Bureau surveys in the impacted communities. But the response rate did not change materially.

Two other themes emerged from stakeholder calls that merit discussion. First, several stakeholders who opposed reinstatement of the citizenship question did not appreciate that the question had been asked in some

form or another for nearly 200 years. Second, other stakeholders who opposed reinstatement did so based on the assumption that the data on citizenship that the Census Bureau collects through the ACS are accurate, thereby obviating the need to ask the question on the decennial census. But as discussed above, the Census Bureau estimates that between 28 and 34 percent of citizenship self-responses on the ACS for persons that administrative records show are non-citizens were inaccurate. Because these stakeholder concerns were based on incorrect premises, they are not sufficient to change my decision.

Finally, I have considered whether reinstating the citizenship question on the 2020 Census will lead to any significant monetary costs, programmatic or otherwise. The Census Bureau staff have advised that the costs of preparing and adding the question would be minimal due in large part to the fact that the citizenship question is already included on the ACS, and thus the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions. Additionally, changes to the Internet Self-Response instrument, revising the Census Questionnaire Assistance, and redesigning of the printed questionnaire can be easily implemented for questions that are finalized prior to the submission of the list of questions to Congress.

The Census Bureau also considered whether non-response follow-up increases resulting from inclusion of the citizenship question would lead to increased costs. As noted above, this estimate was difficult to assess given the Census Bureau and Department's inability to determine what impact there will be on decennial cen-

sus survey responses. The Bureau provided a rough estimate that postulated that up to 630,000 additional households may require NRFU operations if a citizenship question is added to the 2020 decennial census. However, even assuming that estimate is correct, this additional ½ percent increase in NRFU operations falls well within the margin of error that the Department, with the support of the Census Bureau, provided to Congress in the revised Lifecycle Cost Estimate ("LCE") this past fall. That LCE assumed that NRFU operations might increase by 3 percent due to numerous factors, including a greater increase in citizen mistrust of government, difficulties in accessing the Internet to respond, and other factors.

Inclusion of a citizenship question on this country's decennial census is not new—the decision to collect citizenship information from Americans through the decennial census was first made centuries ago. The decision to include a citizenship question on a national census is also not uncommon. The United Nations recommends that its member countries ask census questions identifying both an individual's country of birth and the country of citizenship. *Principals and Recommendations for Population and Housing Censuses (Revision* 3), UNITED NATIONS 121 (2017). Additionally, for countries in which the population may include a large portion of naturalized citizens, the United Nations notes that, "it may be important to collect information on the method of acquisition of citizenship." *Id.* at 123. And it is important to note that other major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few.

The Department of Commerce is not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns. Completing and returning decennial census questionnaires is required by Federal law, those responses are protected by law, and inclusion of a citizenship question on the 2020 decennial census will provide more complete information for those who respond. The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.

To conclude, after a thorough review of the legal, program, and policy considerations, as well as numerous discussions with the Census Bureau leadership and interested stakeholders, I have determined that reinstatement of a citizenship question on the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request. To minimize any impact on decennial census response rates, I am directing the Census Bureau to place the citizenship question last on the decennial census form.

Please make my decision known to Census Bureau personnel and Members of Congress prior to March 31, 2018. I look forward to continuing to work with the Census Bureau as we strive for a complete and accurate 2020 decennial census.

CC: Ron Jarmin, performing the nonexclusive functions and duties of the Director of the Census Bureau

Enrique Lamas, performing the nonexclusive functions and duties of the Deputy Director of the Census Bureau

**APPENDIX J**

DEC-14-2017 17:51 P.02/04

U.S. Department of Justice
Justice Management Division
*Office of General Counsel*
*Washington, D.C. 20530*

**[Dec. 12 2017]**

**VIA CERTIFIED RETURN RECEIPT**
***7014 2120 0000 8064 4964***

Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

The Department of Justice is committed to robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections for all Americans. In furtherance of that commitment, I write on behalf of the Department to formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included in the so-called "long form" census. This data is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities

where voting rights violations are alleged or suspected. As demonstrated, below the decennial census questionnaire is the most appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable the Department of protect all American citizens' voting rights under Section 2.

The Supreme Court has held that Section 2 of the Voting Rights Act prohibits "vote dilution" by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district. See, e.g., *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023-24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negrn v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); see also *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006) (analyzing vote-dilution claim by reference to citizen voting-age population).

The purpose of Section 2's vote-dilution prohibition "is to facilitate participation . . . in our political process" by preventing unlawful dilution of the vote on the basis of race. *Campos v. City of Houston,* 113 F.3d 544, 548 (5th Cir. 1997). Importantly, "[t]he plain language of section 2 of the Voting Rights Act makes clear that its

protections apply to United States citizens." *Id.* Indeed, courts have reasoned that "[t]he right to vote is one of the badges of citizenship" and that "[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to vote." *Barnett,* 141 F.3d at 704. Thus, it would be the wrong result for a legislature or a court to draw a single-member district in which a numerical racial minority group in a jurisdiction was a majority of the total voting-age population in that district but "continued to be defeated at the polls" because it was not a majority of the citizen voting-age population. *Campos,* 113 F.3d at 548.

These cases make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected. From 1970 to 2000, the Census Bureau included a citizenship question on the so-called "long form" questionnaire that it sent to approximately one in every six households during each decennial census. See, e.g., U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Appendix B at B-7 (July 2007), *available at* https://www.census.gov/prod/cen2000/doc/sf3.pdf (last visited Nov. 22, 2017); U.S. Census Bureau, Index of Questions, *available at* https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Nov. 22, 2017). For years, the Department used the data collected in response to that question in assessing compliance with Section 2 and in litigation to enforce Section 2's protections against racial discrimination in voting.

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide at* 6, *available at* https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS Information Guide.pdf (last visited Nov. 22, 2017). The ACS is currently the Census Bureau's only survey that collects information regarding citizenship and estimates citizen voting-age population.

The 2010 redistricting cycle was the first cycle in which the ACS estimates provided the Census Bureau's only citizen voting-age population data. The Department and state and local jurisdictions therefore have used those ACS estimates for this redistricting cycle. The ACS, however, does not yield the ideal data for such purposes for several reasons:

- Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement, see *Evenwel* v. *Abbott,* 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.

- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.

- The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases. See U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey)*, *available at* https://www.census.gov/glassary/#term_Confidence intervalAmercianCommunitySurvey (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.

- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

For all these reasons, the Department believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than ACS citizenship estimates.

Accordingly, the Department formally requests that the Census Bureau reinstate into the 2020 Census a question regarding citizenship. We also request that the Census Bureau release this new data regarding citizenship at the same time as it releases the other redistricting data, by April 1 following the 2020 Census. At the same time, the Department requests that the Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic determinations made by the Bureau under Section 203 of the Voting Rights Act, 52 U.S.C. § 10503.

Please let me know if you have any questions about this letter or wish to discuss this request. I can be reached at (202) 514-3542, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

/s/ ARTHUR E. GARY
ARTHUR E. GARY
General Counsel
Justice Management Division

**APPENDIX K**

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**From:** Comstock, Earl (Federal) **[REDACTED]**

**Sent:** 5/2/2017 2:19:11 PM

**To:** Wilbur Ross **[REDACTED]**

**CC:** Herbst, Ellen (Federal) **[REDACTED]**

**Subject:** Re: Census

I agree Mr. Secretary.

On the citizenship question we will get that in place. The broad topics were what were sent to Congress earlier this year as required. It is next March—in 2018—when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DOJ has a legitimate need for the question to be included. I will arrange a meeting with DOJ staff this week to discuss.

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross <wlr@doc.gov> wrote:

>

**[REDACTED]** Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? **[REDACTED]**

> Sent from my iPhone