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

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is no evidence that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

PARTIES TO THE PROCEEDING

Petitioners (defendants in the district court, and mandamus petitioners in the court of appeals) are the United States Department of Commerce; Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce; the United States Census Bureau, an agency within the United States Department of Commerce; and Ron S. Jarmin, in his capacity as the Director of the United States Census Bureau.

Respondent in this Court is the United States District Court for the Southern District of New York. Respondents also include the State of New York; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Illinois; the State of Iowa; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of North Carolina; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Vermont; the State of Washington; the City of Chicago, Illinois; the City of New York; the City of Philadelphia; the City of Providence; the City and County of San Francisco, California; the United States Conference of Mayors; the City of Seattle, Washington; the City of Pittsburgh; the County of Cameron; the State of Colorado; the City of Central Falls; the City of Columbus; the County of El Paso; the County of Monterey; and the County of Hidalgo (collectively plaintiffs in the district court in No. 18-cv-2921, and real parties in interest in the court of appeals in Nos. 18-2652 and 18-2856). Respondents further include the New York Immigration Coalition; CASA de Maryland, Inc.; the American-Arab Anti-Discrimination Committee; ADC Research Institute; and Make the Road

New York (collectively plaintiffs in the district court in No. 18-cv-5025, and real parties in interest in the court of appeals in Nos. 18-2659 and 18-2857).

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PETITION FOR A WRIT OF MANDAMUS

The Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Acting Director of the United States Census Bureau, respectfully petitions for a writ of mandamus to the United States District Court for the Southern District of New York. In the alternative, the Solicitor General respectfully requests that the Court treat this petition as a petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in this case denying mandamus relief.

OPINIONS BELOW

The oral order of the district court (App. 28a-110a) is unreported. The written order of the district court (App. 24a-27a) is not published in the Federal Supplement but is available at 2018 WL 5260467. The opinion and order of the district court (App. 9a-23a) is not yet reported in the Federal Supplement but is available at 2018 WL 4539659. The orders of the court of appeals (App. 1a-4a; 5a-8a) are unreported.

JURISDICTION

The orders of the district court were entered on July 3, August 17, and September 21, 2018. The orders of the court of appeals were entered on September 25 and October 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1651 or, in the alternative, 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted at App. 130a-133a.

STATEMENT

1. The Constitution requires that an "actual Enumeration" of the population be conducted every ten years to apportion Representatives in Congress among the States, and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. The Census Act, 13 U.S.C. 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," and "authorize[s] [him] to obtain such other census information as necessary." 13 U.S.C. 141(a). The United States Census Bureau assists the Secretary in the performance of this responsibility. See 13 U.S.C. 2, 4. The Act directs that 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." 13 U.S.C. 5. Nothing in the Act directs the content of the questions that are to be included in the decennial census.

2. With the exception of 1840, decennial censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through

1950 specifically requested citizenship information. 315 F. Supp. 3d 766, 776-777.

Citizenship-related questions continued to be asked of some respondents after the 1950 Census. In 1960, the Census Bureau asked 25% of the population for the respondent's birthplace and that of his or her parents. 315 F. Supp. 3d at 777-778. Between 1970 and 2000, the Census Bureau distributed a detailed "long form" questionnaire to a sample of the population (one in five households in 1970, one in six thereafter) in lieu of the "short form" questionnaire sent to the majority of households. See *id.* at 778. The long-form questionnaire included questions about the respondent's citizenship or birthplace, while the short form did not. *Ibid.*

Beginning in 2005, the Census Bureau began collecting the more extensive long-form data—including citizenship data—through the American Community Survey (ACS), which is sent yearly to about one in 38 households. 315 F. Supp. 3d at 778-779. Replacing the decennial long-form census with the yearly ACS enabled the 2010 census to be a "short-form-only" census. The 2020 census will also be a "short-form-only" census. The ACS will continue to be distributed each year, as usual, to collect additional data, and will continue to include a citizenship question.

Because the ACS collects information from only a small sample of the population, it produces annual estimates only for "census tract[s]" and "census-block groups." See U.S. Census Bureau, *Geography*, www.census.gov/geo/reference/webatlas/blocks.html. The decennial census attempts a full count of the people in each State and produces population counts as well as counts of other, limited information down to the smallest geographic level, known as the "census block." *Ibid.* As in

past years, the 2020 census questionnaire will pose a number of questions beyond the total number of individuals residing at a location, including questions regarding sex, Hispanic origin, race, and relationship status.

3. On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire and setting forth his reasons for doing so. App. 136a-151a. The Secretary issued the memorandum in response to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). App. 152a-157a.

The Gary Letter stated that block-level citizenship data would be useful to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. IV 2016), for several reasons, including that the decennial census questionnaire would provide more granular citizenship voting age population (CVAP) data than the ACS surveys. App. 152a-157a. Accordingly, DOJ "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." App. 152a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau," App. 136a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau initially presented three alternatives, one of which was simply to add the citizenship question to the decennial census. App. 139a-143a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option: reinstating a citizenship question on the decennial census while also using federal and state administrative records. App. 143a. Ultimately, the Secretary concluded that this fourth option would provide DOJ

with the most complete and accurate CVAP data. App. 143a-144a.

The Secretary also observed that collecting citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. App. 138a. The Secretary therefore found, and the Census Bureau confirmed, that "the citizenship question has been well tested." *Ibid.* He further confirmed with the Census Bureau that census-block-level citizenship data is not available from the ACS. *Ibid.*

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for noncitizens. App. 140a-142a, 144a-147a. While the Secretary agreed that a "significantly lower response rate by noncitizens could reduce the accuracy of the decennial census and increase costs for nonresponse follow up * * * operations," he concluded that "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially" as a result of reinstating a citizenship question. App. 140a. Based on his discussions with outside parties, Census Bureau leadership, and others within the Department of Commerce, the Secretary determined that, to the best of everyone's knowledge, there is limited empirical data on how reinstating a citizenship question might affect response rates. App. 140a-142a, 145a. So despite the hypothesis "that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." App. 142a. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder outreach in an effort to mitigate any impact on response rates of including a citizenship question. App. 147a.

The Secretary also emphasized that "[c]ompleting and returning decennial census questionnaires is required by Federal law," meaning that concerns regarding a reduction in response rates were premised on speculation that some will "violat[e] [a] legal duty to respond." App. 150a. In light of these considerations, the Secretary concluded that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns." *Ibid.*

A few months later, Secretary Ross issued a supplemental memorandum to clarify the informal procedures that led to the Gary Letter and his initial memorandum. App. 134a-135a. The Secretary explained that, "[s]oon after [his] appointment," he "began considering various fundamental issues" regarding the 2020 Census, including whether to reinstate a citizenship question. App. 134a. As part of the Secretary's deliberative process, he and his staff "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 the enforcement of [the] Voting Rights Act." *Ibid.* The result was the Gary Letter, which then triggered the Department of Commerce's formal "hard look." App. 136a.

4. a. Respondents (plaintiffs below) are governmental entities (including States, cities, and counties) and non-profit organizations. The operative complaints allege that the Secretary's action violates the Enumeration Clause; is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; and denies equal protection by discriminating against racial minorities. See 18-cv-5025 Compl. ¶¶ 193-212;

18-cv-2921 Second Am. Compl. ¶¶ 178-197.[1] All of the claims rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, 13 U.S.C. 221, some households containing at least one noncitizen may be deterred from doing so (and those households will disproportionately contain racial minorities). Respondents maintain that Secretary Ross's stated reasons in his memorandum are pretextual, and that his decision was driven by secret reasons, including animus against minorities.

Respondents announced their intention to seek extra-record discovery before the administrative record had been filed. At a May 9, 2018 hearing, respondents asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery, was thus justified, "prefatory to" the government's production of the administrative record. 18-cv-2921 D. Ct. Doc. 150, at 9.

b. At a July 3 hearing, the district court granted respondents' request for extra-record discovery over the government's objections. App. 93a-100a. The court concluded that respondents had made a sufficiently strong showing of bad faith to warrant extra-record discovery. App. 98a. The court offered four reasons to support this

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[1] Challenges to the Secretary's decision have also been brought in district courts in California and Maryland. See *California* v. *Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); *Kravitz* v. *United States Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *City of San Jose* v. *Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *La Union Del Pueblo Entero* v. *Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018).

determination. First, the Secretary's supplemental memorandum "could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to [DOJ]; that is, that the decision preceded the stated rationale." *Ibid.* Second, the record submitted by the Department of Commerce "reveals that Secretary Ross overruled senior Census Bureau career staff," who recommended against adding a question. App. 98a-99a. Third, the Secretary used an abbreviated decisionmaking process in deciding to reinstate a citizenship question, as compared to other instances in which questions had been added to the census. App. 99a. Fourth, respondents had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question—that it would aid DOJ in enforcing the VRA—was "pretextual" because DOJ had not previously suggested that citizenship data collected through the decennial census was needed to enforce the VRA. App. 99a-100a.

Following that order, the government supplemented the administrative record with over 12,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary. The government also produced additional documents in response to discovery requests, including nearly 11,000 pages from the Department of Commerce and more than 14,000 pages from DOJ. This Office is informed that those totals have since risen to more than 21,000 pages from the Department of Commerce and more than 128,000 pages from DOJ. Respondents have also deposed several senior Census Bureau and Department of Commerce officials, including the Acting Director of the Census Bureau and the Chief of Staff to the Secretary. Although the government strongly objected to the bad-faith finding and

subsequent discovery, it initially chose to comply rather than seek the extraordinary relief of mandamus.

c. On July 26, the district court dismissed respondents' Enumeration Clause claims. See 315 F. Supp. 3d at 799-806. The court did not dismiss respondents' APA and equal protection claims, concluding that respondents had alleged sufficient facts to demonstrate standing at the motion-to-dismiss stage, *id.* at 781-790; that respondents' claims were not barred by the political question doctrine, *id.* at 790-793; that the conduct of the census was not committed to the Secretary's discretion by law, *id.* at 794-799; and that respondents' allegations, accepted as true, stated a plausible claim of intentional discrimination, *id.* at 806-811.

d. On August 17, the district court entered an order compelling the deposition testimony of the Acting Assistant Attorney General (AAG) for the Department of Justice's Civil Rights Division, John M. Gore.[2] App. 24a-27a. The court concluded that Acting AAG Gore's testimony was "plainly 'relevant'" to respondents' case in light of his "apparent role" in drafting the Gary Letter, and concluded that he "possesses relevant information that cannot be obtained from another source." App. 25a.

On September 7, 2018, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, asking to quash Acting AAG Gore's deposition. See 18-2652 C.A. Pet. for Writ of Mandamus. The government also sought to halt further extra-record discovery because that discovery was

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[2] On October 11, 2018, the Senate confirmed Eric S. Dreiband as Assistant Attorney General for the Civil Rights Division. Mr. Gore was, however, the Acting AAG at all times relevant to this dispute.

based on the same erroneous bad-faith finding underlying the deposition order. On September 25, the court of appeals denied the petition, explaining that it could not "say that the district court clearly abused its discretion in concluding that [respondents] made a sufficient showing of 'bad faith or improper behavior' to warrant limited extra-record discovery," including Acting AAG Gore's deposition. App. 7a. On October 2, 2018, the Second Circuit declined to stay Acting AAG Gore's deposition or other discovery. 18-2652 C.A. Doc. 74.

e. Meanwhile, respondents moved for an order compelling the deposition of Secretary Ross, and, on September 21, the district court entered an order compelling the deposition and denying a stay pending mandamus. App. 9a-23a. The court recognized that court-ordered depositions of high-ranking government officials are highly disfavored, but nonetheless concluded that "'exceptional circumstances'" existed that "compel[led] the conclusion that a deposition of Secretary Ross is appropriate." App. 10a-11a (citation omitted). The court reasoned that exceptional circumstances were present because, in the court's view, "the intent and credibility of Secretary Ross" were "central" to respondents' claims, and Secretary Ross has "'unique first-hand knowledge'" about his reasons for reinstating a citizenship question that cannot "'be obtained through other, less burdensome or intrusive means.'" App. 16a, 18a (citation omitted).

In concluding that Secretary Ross's deposition was necessary, the district court rejected the government's contention that the information respondents sought could be obtained from other sources, including a deposition under Federal Rule of Civil Procedure 30(b)(6), interrogatories, or requests for admission. App. 19a. The

court found these alternatives unacceptable because they would not allow respondents to assess Secretary Ross's credibility or to ask him follow-up questions. *Ibid.* The court also believed that a deposition would be a more efficient use of the Secretary's time, because additional interrogatories, depositions, or requests for admissions would also burden the Secretary. *Ibid.*

On September 27, 2018, the government filed a petition for a writ of mandamus (and request for an interim stay) with the Second Circuit, asking to quash Secretary Ross's deposition. See 18-2856 C.A. Pet. for Writ of Mandamus. The government also sought a stay to preclude the depositions of Secretary Ross and Acting AAG Gore and to preclude further extra-record discovery pending this Court's review. *Id.* at 31-32. On October 9, the court of appeals denied the petition, holding that the district court had not clearly abused its discretion in finding that "only the Secretary himself would be able to answer the Plaintiffs' questions." App. 3a.

5. In the meantime, on October 3, 2018, the government filed a stay application in this Court, No. 18A350, pending disposition of all further proceedings, including the government's forthcoming petition for a writ of mandamus or, in the alternative, certiorari. On October 5, Justice Ginsburg denied the stay without prejudice, "provided that the Court of Appeals will afford sufficient time for either party to seek relief in this Court before the depositions in question are taken." 18A350 Docket. Acting AAG Gore's deposition had been set to begin at 9 a.m. on October 10, and Secretary Ross's on October 11. The government therefore renewed its stay request in the Second Circuit. 18-2856 C.A. Doc. 44 (Oct. 5, 2018). On October 9, the court of appeals stayed Secretary Ross's deposition for only 48 hours, App. 4a, and

Acting AAG Gore's deposition for only 36 hours, 18-2652 C.A. Doc. 81 (Oct. 9, 2018).

Accordingly, the government renewed its stay application in this Court, No. 18A375, on October 9, 2018. Justice Ginsburg entered an administrative stay that same day. On October 22, 2018, the Court granted a stay as to the September 21 order compelling Secretary Ross's deposition, to "remain in effect until disposition of [this] petition," as long as it was filed "by or before October 29, 2018 at 4 p.m." (which it was). 18A375 slip op. 1. The Court denied a stay as to Acting AAG Gore's deposition and further extra-record discovery into Secretary Ross's mental processes, but did "not preclude the [government] from making arguments with respect to those orders." *Ibid.*

Justice Gorsuch, joined by Justice Thomas, would have "take[n] the next logical step and simply stay[ed] all extra-record discovery pending [this Court's] review" because the depositions and the extra-record discovery all "stem[] from the same doubtful bad faith ruling." 18A375 slip op. 3. Justice Gorsuch also expressed concern about "the need to protect the very review [this Court] invite[s]." *Ibid.* "One would expect that the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance. After all, that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent." *Ibid.*

On October 26, 2018, however, both the district court (App. 111a-129a) and the Second Circuit (18-2856 C.A. Doc. 75) denied the government's motion to stay the November 5 trial date. Among other reasons, the district court faulted the government because it had been "given the opportunity to file a summary judgment motion" in

a September 30 order, but "elected not to file such a motion." App. 112a. The September 30, 2018 order stated that "the [c]ourt remains *firmly convinced* that a trial will be necessary" and that "it seems *quite clear* from the existing record that there will be genuine disputes of material fact precluding summary judgment." 18-cv-2921 Docket entry No. 363 (emphases added). Accordingly, the court said that although it would "not bar [the government] from making a motion for summary judgment," the government "would be far better off devoting [its] time and resources to preparing [its] pre-trial materials than to preparing summary judgment papers." *Ibid.*

Acting AAG Gore was deposed on October 26, 2018.

REASONS FOR GRANTING THE PETITION

Secretary Ross reinstated to the decennial census a wholly unremarkable question asking about citizenship —as had been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and as has been (and continues to be) asked of a small sample of the population on annual ACS surveys for the last 13 years. Respondents speculate that some people in some households with unlawfully present aliens might refuse to answer the question (despite their legal obligation to do so) and that Secretary Ross's decision to ask the question despite this speculative possibility was driven by secret motives, including animus against racial minorities. On this novel theory, the district court ordered discovery outside the administrative record to probe Secretary Ross's mental processes when he made his decision, including by compelling the depositions of Secretary Ross and other high-ranking Executive Branch officials.

The district court's orders defy decades of settled law establishing that in a challenge to agency action,

"the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). And the orders defy equally well settled law establishing that plaintiffs challenging agency action may not probe the subjective mental processes of the agency decisionmaker, especially by compelling his testimony. *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941) (*Morgan II*). Although this Court has recognized a narrow exception where the plaintiffs make "a strong showing of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), the district court clearly erred in applying that exception here.

Accordingly, the Court should issue a writ of mandamus to the district court, ordering it to (1) halt the deposition of Commerce Secretary Ross; (2) exclude from its consideration the extra-record discovery that has already been produced, including Acting AAG Gore's testimony; and (3) confine its review of the Secretary's decision to the administrative record. A court may issue a writ of mandamus when (1) the petitioner's "right to issuance of the writ is 'clear and indisputable' "; (2) "no other adequate means [exist] to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380-381 (2004)) (brackets in original). Each of those prerequisites for mandamus relief is met here.

The district court's rationale for its "highly unusual" orders, 18A375 slip op. 2 (opinion of Gorsuch, J.), is that there is strong evidence that Secretary Ross acted in

bad faith because, whether or not the reasons in the administrative record are objectively valid, he allegedly had secret motives in deciding to reinstate the citizenship question. But as long as the Secretary sincerely believed the grounds on which he formally based his decision, and did not irreversibly prejudge the decision or act on a legally forbidden basis, any additional subjective reasons or motives he might have had do not constitute bad faith. The district court thus has no authority to review the Secretary's decision on anything but the administrative record. And because the district court and the court of appeals have refused to reconsider or even stay the orders compelling extra-record discovery—indeed, the district court has, contrary to what "[o]ne would expect," *id.* at 3, thus far refused even to stay the two-week trial set to begin on November 5—mandamus is the only adequate and appropriate means to give the government relief.

In the alternative, the Court could construe this petition as a petition for a writ of certiorari, grant the writ, and reverse the court of appeals' refusal to grant mandamus relief. If the Court so chooses, the government respectfully requests that this petition be resolved without an additional round of duplicative briefing and the delay that would entail. All parties agree that finalizing the decennial census questionnaire is time-sensitive, and so the district court's review of respondents' challenges should occur only once, thereby leaving sufficient time for appellate review. It is thus important to resolve as soon as possible whether the district court's review should take the form of a trial, with extra-record evidence into the Secretary's mental processes, or whether the court should resolve respondents' claims solely on the administrative record.

A. The Government's Right To Mandamus Relief Is Clear And Indisputable

1. The district court clearly and indisputably erred in allowing discovery beyond the administrative record to probe the Secretary's mental processes

"This Court has recognized, ever since *Fletcher* v. *Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). In part for that reason, "[t]he APA specifically contemplates judicial review" only on the basis of "the record the agency presents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); see *Camp*, 411 U.S. at 143. This Court has "made it abundantly clear" that APA review focuses on the "contemporaneous explanation of the agency decision" that the agency rests upon. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 549 (1978) (citing *Camp*, 411 U.S. at 143).

Accordingly, courts must "confin[e] * * * review to a judgment upon the validity of the grounds upon which the [agency] itself based its action." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). The agency decision must be upheld if the record reveals a "rational" basis supporting it. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Conversely, if the record supplied by the agency is inadequate to support the agency's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.*, 470 U.S. at 744. Either way, "the focal point for judicial review should

be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142. The administrative record is hardly sparse; it comprises "all documents and materials directly or *indirectly* considered by agency decisionmakers and includes evidence contrary to the agency's position." *Thompson* v. *United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted).[3]

This Court has recognized a narrow exception to the general rule prohibiting discovery beyond the administrative record if there is "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. Respondents did not make this "strong showing" here. In nevertheless allowing extra-record discovery into the Secretary's mental processes, the district court made two critical errors.

a. The district court improperly "assum[ed] the truth of the allegations in [respondents'] complaints," App. 100a, and drew disputed inferences in respondents' favor. That approach is deeply misguided. It is inconsistent with the requirement that plaintiffs make a "strong showing"—not just an allegation that passes some minimum threshold of plausibility—before taking the extraordinary step of piercing the administrative record to examine a decisionmaker's mental processes. *Overton Park*, 401 U.S. at 420. It is inconsistent with the presumption of regularity, which requires courts to presume that executive officers act in good faith. See

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[3] As the district court recognized (App. 101a), respondents cannot evade these principles by pointing to their constitutional claims because the APA governs those claims too. See 5 U.S.C. 706(2)(B) (providing cause of action to "set aside agency action" "contrary to constitutional right"); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

United States v. *Armstrong*, 517 U.S. 456, 464 (1996); cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). And it is inconsistent with principles of inter-Branch comity, which caution against imputing bad faith to officials of a coordinate Branch—particularly a Senate-confirmed, Cabinet-level constitutional officer. See *Cheney*, 542 U.S. at 381. Instead, as discussed below, the court seemed to go out of its way to adopt the most uncharitable reading possible of the Secretary's actions.

b. The district court also fundamentally misunderstood what a showing of "bad faith or improper behavior" requires in this context. That high standard is not triggered even if an agency decisionmaker favors a particular outcome before fully considering and deciding an issue, or has additional reasons for the decision beyond the ones expressly relied upon. Were that enough to constitute "bad faith," extra-record review would be the rule rather than the rare exception. Instead, an "extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification." 18A375 slip op. 2 (opinion of Gorsuch, J.). Allegations of mere pretext, therefore, are insufficient; for as long as the decisionmaker sincerely believes the stated grounds on which he ultimately bases his decision, and does not irreversibly prejudge the decision or act on a legally forbidden basis, neither initial inclinations nor additional subjective motives constitute bad faith or improper bias. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F.3d 1179, 1184-1185 (10th Cir. 2014) ("subjective hope" that factfinding would support a desired outcome does not "demonstrate improper bias on the part of agency decisionmakers"). The court continues to misunderstand this point, repeatedly conflating "pretext" with

"bad faith" in its most recent order declining to stay the November 5 trial date. App. 123a-124a.

The court relied on four circumstances that do not, individually or taken together, constitute a "strong showing" of bad faith or improper behavior entitling respondents to venture beyond the administrative record to probe the Secretary's mental processes. And in its latest order denying a stay of trial, the district court added a fifth—that the Secretary "provided false explanations of his reasons," App. 124a—that is similarly infirm.[4]

i. The district court concluded that Secretary Ross's supplemental memorandum "could be read to suggest" that the Secretary had already decided to add the citizenship question before he reached out to DOJ. App. 98a. But the memorandum, fairly read, says only that the Secretary "*thought* reinstating a citizenship question *could be* warranted," and so reached out to DOJ and other officials to ask if they would support it. App. 134a (emphases added). That does not indicate prejudgment; it simply shows that the Secretary was leaning in favor of adding the question at the time. "[T]here's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, [and] soliciting support from other agencies to bolster his views." 18A375 slip op. 2 (opinion of Gorsuch, J.). As the D.C. Circuit has explained in a related context, it "would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future actions."

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[4] The district court also cited several cases that, in its view, demonstrate that lower courts routinely order discovery beyond the administrative record in APA cases. App. 117a, 124a. If so, that is all the more reason for this Court to intervene.

Air Transp. Ass'n of Am., Inc. v. *National Mediation Bd.*, 663 F.3d 476, 488 (2011) (citation omitted); see *Jagers*, 758 F.3d at 1185.

Rather, to make a strong showing of prejudgment, respondents should have to show that the Secretary "act[ed] with an 'unalterably closed mind'" or was "'unwilling or unable' to rationally consider arguments." *Mississippi Comm'n on Envtl. Quality* v. *EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam) (citation omitted). Neither has been shown here. Nothing in Secretary Ross's memoranda (or any other document) suggests that Secretary Ross would have asserted the VRA-enforcement rationale had DOJ disagreed or, conversely, that DOJ's request made the Secretary's decision a *fait accompli*. To the contrary, after the Secretary received the Gary Letter, he "initiated a comprehensive review process led by the Census Bureau." App. 136a. There is no basis to conclude that this process was a sham or that Secretary Ross had an unalterably closed mind and could not or would not consider new evidence and arguments.

Nor did the Secretary's supplemental memorandum change the Secretary's rationale or otherwise contradict his original memorandum. The original memorandum understandably focused on the *formal* decision-making process that began with DOJ's formal request letter. See App. 136a-151a. It is unremarkable that the memorandum did not discuss the *informal* intra- and inter-agency deliberations that preceded the formal process. Such informal deliberations are routine, and agency decision documents rarely if ever discuss them. In light of this litigation and respondents' allegations of bad faith, the supplemental memorandum provided "further background and context" about the informal process that preceded the formal one. App. 134a. The only

way to view the two memoranda as contradictory is to ignore this context, to take respondents' speculative allegations in their complaints as true and draw all inferences in their favor, and (in circular fashion) to presume bad faith on Secretary Ross's part.

ii. The district court also relied on the fact that "Secretary Ross overruled senior Census Bureau career staff," who recommended against reintroducing a citizenship question. App. 98a-99a. But "the mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." *Wisconsin* v. *City of New York*, 517 U.S. 1, 23 (1996). Indeed, "there's nothing unusual about a new cabinet secretary['s] * * * disagreeing with staff." 18A375 slip op. 2 (opinion of Gorsuch, J.). That is particularly true where, as here, the Secretary explained why he disagreed with the proposals favored by the staff. Besides, the ultimate issue is one of policy—whether the benefits of reinstating the question outweigh the potential costs—and it is solely the Secretary, not his staff, "to whom Congress has delegated its constitutional authority over the census." *Wisconsin*, 517 U.S. at 23. It was thus clear legal error to treat overruling career staff as an indicium of bad faith.

iii. The district court further concluded that respondents' "allegations suggest that [the government] deviated significantly from standard operating procedures in adding the citizenship question" because it did not conduct "any testing at all." App. 99a. But, as Secretary Ross explained, the citizenship question "has already undergone the * * * testing required for new questions" because the question "is already included on the ACS." App. 148a. Therefore, "the citizenship question *has* been well tested." App. 138a (emphasis added);

see 18A375 slip op. 2 (opinion of Gorsuch, J.) (remarking that "there's nothing unusual about * * * cutting through red tape"). The court's crediting respondents' allegations was thus clearly erroneous.

iv. The district court concluded that respondents had made "a prima facie showing" of "pretext[]" because DOJ had never previously "suggested that citizenship data collected as part of the decennial census * * * would be helpful let alone necessary to litigating [VRA] claims." App. 99a. But from 1970 to 2000 DOJ *did* rely on such data from the decennial census (from the long-form questionnaire) to enforce the VRA. App. 154a. And the court never engaged with the reasons set forth in the Gary Letter for why census citizenship data would be more appropriate for VRA enforcement than ACS data, including that the latter does "not align in time with the decennial census data" used for redistricting and requires "relying on two different data sets." App. 155a-156a. Contemporaneous emails produced in response to the court's discovery order only reinforce the conclusion that Department of Commerce officials sincerely believed "that DOJ has a legitimate need for the question to be included." App. 158a.

The bare fact that respondents *alleged* that "the current Department of Justice has shown little interest in enforcing the [VRA]," App. 99a, neither establishes a prima facie case of *Secretary Ross's* bad faith nor calls into question DOJ's commitment to enforce the VRA. Cf. *Armstrong*, 517 U.S. at 464 (presumption of good faith applies to Executive Branch officials). As DOJ explained in the Gary Letter, block-level citizenship data would be useful to enforce Section 2 of the VRA, which prohibits "vote dilution" by state and local officials en-

gaged in redistricting. App. 153a. Because redistricting cycles are tied to the census and the next cycle of redistricting will not begin until after the census is taken, there is little Section 2 enforcement to be undertaken at this time. Besides, DOJ's conclusion that block-level citizenship data would be useful in enforcing Section 2 remains true regardless of whether the current administration will have the opportunity to use the information collected.

v. In its latest order denying a stay of trial, the district court also said that extra-record discovery was justified because Secretary Ross "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." App. 124a; see App. 15a (compelling the Secretary's deposition because his credibility was "squarely at issue in these cases"). But none of the statements is false, and the court's uncharitable inferences to the contrary ignore the context of these statements and violate the presumption of regularity. *Armstrong*, 517 U.S. at 464.

For example, contrary to the district court's characterization, the Secretary in his March 2018 memorandum did not say he "'set out to take a hard look' *at adding the citizenship question* 'following receipt'" of the Gary Letter. App. 15a (emphasis altered; brackets and citation omitted). The Secretary actually said he "set out to take a hard look *at the request*" following receipt of DOJ's request. App. 136a (emphasis added). The Secretary never said that he had not previously considered whether to reinstate a citizenship question, or that he had not had informal discussions with other agencies or government officials before he received DOJ's formal request.

Similarly, the Secretary's March 20 statement to Congress that he was "responding *solely* to the Department of Justice's request," App. 15a (quoting 2018 WLNR 8815056), was actually in answer to a question asking whether he was also responding to requests *from third parties*. See 2018 WLNR 8815056.[5] And the Secretary's admittedly imprecise March 22 statement that DOJ "'initiated the request for inclusion of the citizenship question,'" App. 15a (quoting 2018 WLNR 8951469), was in response to a question about whether the Department of Commerce planned to include a citizenship question on the 2020 census, not a question about the Secretary's decision-making process. See 2018 WLNR 8951469.[6] The statement was immediately followed by an acknowledgment that he had been communicating with "quite a lot of parties on both sides of th[e] question" and that he "ha[d] not made a final decision, as yet," on this "very important and very complicated question." *Ibid.*

Only by ignoring the context of these statements and eliding the presumption of regularity could the district court find that the Secretary "provided false explanations." App. 124a. Besides, even if the Secretary inaccurately suggested that DOJ initiated the informal request, it does not in any way establish that the Secretary *disbelieved* that adding a citizenship question

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[5] *Hearing to Consider FY2019 Budget Request for Department of Commerce Programs Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the House Comm. on Appropriations*, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8815056.

[6] *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel and Aluminum Before the House Comm. on Ways and Means*, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8951469.

would be useful in VRA enforcement, or that he acted on a legally forbidden basis in adding the question.

2. The district court clearly and indisputably erred in compelling the deposition of Secretary Ross

Beyond improperly finding that respondents had made a "strong showing of bad faith," *Overton Park*, 401 U.S. at 420—thereby opening the doors to discovery into Secretary Ross's mental processes—the district court exacerbated its error by compelling the deposition of Secretary Ross himself.

a. "[A] district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding." *In re USA*, 624 F.3d 1368, 1376 (11th Cir. 2010). So said this Court in *Morgan II*, 313 U.S. at 421-422. Instead, as this Court and lower courts applying *Morgan II* and its predecessor, *Morgan* v. *United States*, 304 U.S. 1 (1938) (*Morgan I*), have recognized, compelling the testimony of high-ranking government officials is justified only in "extraordinary instances." *Arlington Heights*, 429 U.S. at 268; accord, *e.g.*, *Lederman* v. *New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *In re United States*, 542 Fed. Appx. 944, 948 (Fed. Cir. 2013); *In re USA*, 624 F.3d at 1376; *Bogan* v. *City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). That strict limitation on the compelled testimony of high-ranking officials is necessary because such orders raise significant "separation of powers concerns." *In re USA*, 624 F.3d at 1372 (citation omitted); see *Arlington Heights*, 429 U.S. at 268 & n.18. As *Morgan II* emphasized, administrative decisionmaking and judicial processes are "collaborative instrumentalities of justice and the appropriate independence of each

should be respected by the other." 313 U.S. at 422. "Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *Ibid.* (citation omitted).

As a practical matter, requiring high-ranking officials to appear for depositions also threatens to "disrupt the functioning of the Executive Branch." *Cheney*, 542 U.S. at 386. High-ranking government officials "have 'greater duties and time constraints than other witnesses.'" *Lederman*, 731 F.3d at 203 (citation omitted). As a result, "[i]f courts did not limit the[] depositions [of high-ranking officials], such officials would spend 'an inordinate amount of time tending to pending litigation.'" *Ibid.* (citation omitted). The threat to inter-Branch comity is particularly acute where, as here, the district court orders a Cabinet Secretary's deposition expressly to test the Secretary's credibility and to probe his deliberations with other Executive Branch officials. See App. 13a-17a.

b. The district court clearly erred in concluding that "exceptional circumstances" justify Secretary Ross's deposition. App. 10a (citation omitted). The court's "exceptional circumstances" finding was based on its conclusion that "the intent and credibility of Secretary Ross himself" are "central" to respondents' claims. App. 16a. That conclusion was erroneous for the reasons above: in a challenge to an agency decision, it is "not the function of the court to probe the mental processes of the Secretary." *Morgan II*, 313 U.S. at 422 (quoting *Morgan I*, 304 U.S. at 18).

The district court purported to find an exception to this rule in *National Association of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007). The court

reasoned that, to prevail on their APA claims, respondents "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.'" App. 11a (quoting *Home Builders*, 551 U.S. at 658) (brackets in original). The court then concluded that, because Secretary Ross was the decisionmaker, his deposition would aid respondents in making that showing. App. 13a. But *Home Builders* does not suggest that APA plaintiffs may look beyond the stated reasons for the agency's decision and the administrative record to prove their claims, let alone that they should be permitted to depose a Cabinet Secretary to probe his mental processes. To the contrary, the Court emphasized that courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Home Builders*, 551 U.S. at 658 (citations omitted). Here, the path Secretary Ross took to his decision to reinstate a citizenship question can readily be discerned from his decisional memorandum, his supplemental memorandum, and the extensive administrative record.

c. Nor did the district court properly evaluate whether respondents could obtain the information they sought by other means. "The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere." *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam). To date, the Department of Commerce has given respondents thousands of pages of materials, including materials reviewed and created by the Secretary's most senior advisers, among other discovery responses. And respondents have deposed a number of senior Census

Bureau and Department of Commerce officials. Respondents are well aware of the circumstances that led to the decision to reinstate a citizenship question. Secretary Ross's deposition is unlikely to add any material details, all the more so because much of his testimony likely would be privileged. See *Arlington Heights*, 429 U.S. at 268 (decisionmaker's testimony "frequently will be barred by privilege").

The district court barely paused to consider whether these materials satisfied respondents' informational demands. Nor did the court ask whether "the Secretary can prepare formal findings * * * that will provide an adequate explanation for his action" as an alternative to direct testimony. *Overton Park*, 401 U.S. at 420. The court refused to consider *any* alternative to deposing the Secretary—such as interrogatories, requests for admission, or a Rule 30(b)(6) deposition, all of which the government offered—because none would allow respondents to probe the Secretary's credibility or ask follow-up questions. See App. 19a.

d. Instead, the district court jumped straight to ordering a deposition on the ground that Secretary Ross had "unique first-hand knowledge" about his intent in reinstating a citizenship question. App. 11a (citation omitted). But none of the court's rationales withstands scrutiny.

i. The district court asserted that Secretary Ross was "personally and directly involved" in the decision to reinstate a citizenship question "to an unusual degree." App. 13a. Yet the court did not explain how Secretary Ross's direct participation in the decision to reinstate a citizenship question was "unusual." It is not at all exceptional for an agency head to participate actively in an agency's consideration of a significant policy decision—

particularly one that concerns, as the court described it, one of the agency head's "most important dut[ies]." App. 22a. Nor is it "unusual" that Secretary Ross informally consulted with staff and DOJ before DOJ sent its formal request. For these reasons, courts have rejected the notion that a decisionmaker's personal involvement in the decision qualifies as an exceptional circumstance in this context. *In re United States*, 542 Fed. Appx. at 946 (rejecting plaintiffs' assertion that a high-ranking official's "personal involvement in the decision-making process" provided a basis for deposing that official); *In re FDIC*, 58 F.3d 1055, 1061 (5th Cir. 1995) (that three directors of the FDIC were the only "persons responsible for making the [challenged] decision" did not justify their depositions).

ii. The district court likewise erred in concluding that Secretary Ross's testimony was needed "to fill in critical blanks in the current record." App. 17a. The court identified those "blanks" as "the substance and details of Secretary Ross's early conversations" with "the Attorney General," "interested third parties such as Kansas Secretary of State Kris Kobach," and "'other senior Administration officials.'" *Ibid.* (citation omitted). But the details of Secretary Ross's consultations with other people have no bearing on the legality of his decision to reinstate the citizenship question. "[T]he fact that agency heads considered the preferences (even political ones) of other government officials concerning how th[eir] discretion should be exercised does not establish the required degree of bad faith or improper behavior." *In re FDIC*, 58 F.3d at 1062; see *Sierra Club* v. *Costle*, 657 F.2d 298, 408-409 (D.C. Cir. 1981).

The proper focus of a court's review of Secretary Ross's decision is on the reasons the Secretary gave for

making that decision. That some stakeholders might have had other reasons for supporting the reinstatement of a citizenship question that they shared with the Secretary is of no consequence. And it affirmatively contradicts the presumption of regularity and inter-Branch comity to impute any alleged biases of these third parties to Secretary Ross. See *Armstrong*, 517 U.S. at 464; see also *Cheney*, 542 U.S. at 381. In any event, the administrative record does reflect the substantive views of the stakeholders who communicated with Secretary Ross and the Department of Commerce, including Secretary Kobach and DOJ. See, *e.g.*, App. 152a-157a (Gary Letter); Administrative Record 763-764 (emails from Secretary Kobach); *id.* at 765-1276 (additional communications).[7] And to the extent respondents seek information about the Secretary's deliberations with other government officials, those discussions likely are privileged, rendering the Secretary's deposition both improper and futile. See *Arlington Heights*, 429 U.S. at 268 (decisionmaker's testimony "frequently will be barred by privilege").

B. No Other Adequate Means Exist To Attain Relief

Absent review on mandamus, the district court's orders will effectively be unreviewable on appeal from final judgment. Secretary Ross will be forced to prepare for and attend a deposition, which cannot be undone, and the government will have to prepare for and participate in a trial with extensive evidence concerning Secretary Ross's mental processes. The government thus has "no other adequate means" of protecting its interests aside from this petition. *Perry*, 558 U.S. at 190 (citation omitted).

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[7] A link to the administrative record, which is publicly available, is in 18-cv-2921 D. Ct. Doc. 173 (June 8, 2018).

To be sure, the government might be able to raise some of the arguments asserted in this petition following a trial in the event the district court enters a judgment in favor of respondents. But an appellate reversal at that point would hardly provide an "adequate" means of relief for the irreversible burdens of preparing for and being deposed, and preparing for and participating in a two-week trial to resolve an issue that under bedrock principles of administrative law should be resolved solely on the administrative record. *Cheney*, 542 U.S. at 380 (citation omitted); see, *e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (granting mandamus where appeal after final judgment would not provide an "adequate" means of obtaining relief), cert. denied, 135 S. Ct. 1163 (2015); *In re Justices of Supreme Court of P.R.*, 695 F.2d 17, 20-25 (1st Cir. 1982) (Breyer, J.) (same); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3932 (3d ed. 2012 & Supp. 2018) (citing similar cases).

Moreover, if the court of appeals or this Court were to rule in the government's favor following a trial, the judgment would have to be vacated and the district court would have to redo its analysis of the legality of Secretary Ross's order, this time on the administrative record alone. That sequence of events could potentially leave insufficient time for orderly appellate review before the decennial census questionnaire needs to be finalized.[8] It is thus in all parties' interest that the dis-

[8] The district court's proposed solution—to conduct *two* proceedings in parallel, one based on the administrative record and one a trial with evidence into Secretary Ross's mental processes, App. 114a—would impose all of the same harms on the government and would be needlessly complex. As explained in the government's

trict court review respondents' challenges to the Secretary's decision only once, and so it is critical that the question whether the district court must confine itself to the administrative record be definitively resolved *before* the court undertakes that review.

C. Mandamus Is Appropriate Under The Circumstances

As this Court has recognized, "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney*, 542 U.S. at 382. Here, a Cabinet Secretary will be forced to prepare for and attend a deposition, and government lawyers will have to prepare for and participate in a trial into the Secretary's mental processes, which will indisputably "interfer[e] with" their "ability to discharge [their] constitutional responsibilities." *Ibid.* And document discovery—especially into the Secretary's mental processes—also is intrusive and "burdens a coordinate branch in most unusual ways." 18A375 slip op. 3 (opinion of Gorsuch, J.); cf. *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam). Nor is it of any moment that the extra-record discovery and the depositions (save for Secretary Ross's) have already occurred; expeditious resolution of this petition would still foreclose Secretary Ross's deposition and avoid the need for a wasteful trial on the legality of Secretary Ross's order, which should be reviewed solely on the agency's stated reasons for its action and the objective evidence in the administrative record.

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simultaneously filed application for a stay and for expedition, the more appropriate course is for this Court to stay the trial and resolve this petition before the district court undertakes its analysis.

CONCLUSION

The Court should issue a writ of mandamus to the district court, ordering it to (1) halt the deposition of Secretary Ross; (2) exclude from its consideration the extra-record discovery that has already been produced, including Acting AAG Gore's testimony; and (3) confine its review of the Secretary's decision to the administrative record. In the alternative, the Court should treat this petition as a petition for a writ of certiorari, grant the petition, and reverse the court of appeals' decisions denying the petitions for writs of mandamus below. In the event the Court chooses to construe the petition as one for a writ of certiorari, the government respectfully requests that the Court forgo an additional round of briefing and the delay that would entail.

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