No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

STATE OF NEW YORK, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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(Additional Caption Listed on Inside Cover)

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

NEW YORK IMMIGRATION COALITION, ET AL.

QUESTIONS PRESENTED

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

2. Whether, in an action seeking to set aside agency action under the APA, 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—without a strong showing 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) 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 Steven Dillingham, in his official capacity as the Director of the United States Census Bureau.

Respondents are 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).

Respondents also 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).

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Director of the United States Census Bureau, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion and order of the district court (Pet. App. 1a-353a) is not yet published in the Federal Supplement

but is available at 2019 WL 190285. A prior opinion of the district court (Pet. App. 354a-436a) is reported at 315 F. Supp. 3d 766. A prior opinion and order of the district court (Pet. App. 437a-451a) is reported at 333 F. Supp. 3d 282. A prior order of the district court (Pet. App. 452a-455a) is not published in the Federal Supplement but is available at 2018 WL 5260467. A prior oral order of the district court (Pet. App. 456a-538a) is unreported.

JURISDICTION

The judgment of the district court was entered on January 15, 2019. The government filed a notice of appeal on January 17, 2019 (Pet. App. 539a). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted at Pet. App. 540a-545a.

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).

Exercising that delegated authority, the Secretary of Commerce, Wilbur L. Ross, Jr., determined that the 2020 decennial census questionnaire should include a question requesting citizenship information. Pet. App. 548a-563a. Questions about citizenship or country of birth (or both) have been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and have been (and continue to be) asked on the annual American Community Survey (ACS) questionnaire, sent to approximately one in 38 households, since the ACS's inception in 2005. *Id.* at 361a-368a. The decennial census includes many demographic questions, including about sex, Hispanic origin, race, and relationship status. See *id.* at 26a-27a. Individuals who receive the census questionnaire are required by law to answer fully and truthfully all of the questions. 13 U.S.C. 221.

2. The Secretary explained the reasons for reinstating the citizenship question to the decennial census in a March 26, 2018 memorandum. Pet. App. 548a-563a. The Secretary's decision and memorandum responded to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). *Id.* at 564a-569a. The Gary Letter stated that citizenship data is "critical" to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. V 2017), and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data." Pet App. 565a; see *id.* at 567a-568a. DOJ thus "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." *Id.* at 569a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau" that included "legal, program, and policy considerations," Pet. App. 548a-549a, 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: do nothing; reinstate the citizenship question to the decennial census; or rely solely on federal administrative records to estimate citizenship data in lieu of reinstating the citizenship question. *Id.* at 551a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider, and he ultimately adopted, a fourth option: reinstating a citizenship question to the decennial census while also using federal and state administrative records (*i.e.*, a combination of the second and third options). *Id.* at 555a. The Secretary concluded that this option "will provide DOJ with the most complete and accurate CVAP data in response to its request." *Id.* at 556a.

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for noncitizens. Pet. App. 552a-554a, 556a-559a. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up * * * operations," *id.* at 552a, he concluded from his discussions with Department of Commerce personnel, Census Bureau leadership, and outside parties that, to the best of everyone's knowledge, there was an insufficient empirical basis to conclude that reinstating a citizenship question would, in fact, materially affect response rates. *Id.* at 552a-554a (reviewing the available data); *id.* at 557a. The Secretary further 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." *Id.* at 562a.

3. 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, some households associated with noncitizens 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. To prove their claims, 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, "prefa-

[1] Challenges to the Secretary's decision also have 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). Bench trials are ongoing in all four cases.

tory to" the government's production of the administrative record. 18-cv-2921 D. Ct. Doc. 150, at 9 (May 18, 2018).

b. At a July 3, 2018 hearing, the district court granted respondents' request for extra-record discovery over the government's objections. Pet. App. 521a-528a. The court concluded that respondents had made a sufficiently "strong showing of bad faith," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), to warrant extra-record discovery. See Pet. App. 526a. Following that order, the government supplemented the administrative record with thousands of pages of documents, including materials reviewed and created by direct advisors to the Secretary, and even including materials created by indirect advisors that were shared with the direct advisors.

c. On July 26, 2018, the district court dismissed respondents' Enumeration Clause claims because the "nearly unbroken practice" of Congress's including or authorizing questions about citizenship, along with the "longstanding historical practice of asking demographic questions generally," meant that asking about citizenship "is not an impermissible exercise of the power granted by the Enumeration Clause to Congress." Pet. App. 418a-419a; see *id.* at 408a-424a. 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 371a-391a; that respondents' claims were not barred by the political question doctrine, *id.* at 391a-398a; that the content of the census questionnaire was not committed to the Secretary's discretion by law, *id.* at 398a-408a; and that respondents' allegations, accepted as true,

stated a plausible claim of intentional discrimination, *id.* at 425a-434a.

d. On August 17, 2018, the district court entered an order compelling the deposition testimony of then-Acting Assistant Attorney General (AAG) for DOJ's Civil Rights Division, John M. Gore.[2] Pet. App. 452a-455a. 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." *Id.* at 453a.

e. On September 21, 2018, the district court entered an order compelling the deposition of Secretary Ross himself. Pet. App. 437a-451a. The court recognized that court-ordered depositions of high-ranking governmental officials are highly disfavored, but nonetheless concluded that "'exceptional circumstances'" existed that "compel[led] the conclusion that a deposition of Secretary Ross is appropriate." *Id.* at 438a-439a (citations 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.'" *Id.* at 444a, 446a (citation omitted).

4. On October 22, 2018, this Court granted a stay as to the September 21 order compelling Secretary Ross's deposition, to "remain in effect until disposition of" a "petition for a writ of certiorari or a petition for a writ of

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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.

mandamus," as long as it was filed "by or before October 29, 2018 at 4 p.m." 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.*

The government filed a petition for a writ of mandamus or, in the alternative, for a writ of certiorari before the Court's deadline. See 18-557 Pet. On November 16, the Court treated the petition as a petition for a writ of certiorari and granted it, ordering expedited briefing and scheduling oral argument for February 19, 2019. The government moved the district court and the court of appeals to stay further trial proceedings in light of this Court's grant of the government's petition. Both courts declined to stay further trial proceedings. 18-cv-2921 D. Ct. Doc. 544 (Nov. 20, 2018); 18-2856 C.A. Doc. 93 (Nov. 21, 2018). On November 26, 2018, the government lodged a letter with this Court suggesting that it reconsider staying trial proceedings. Meanwhile, Acting AAG Gore was deposed on October 26, trial commenced on November 5, and closing arguments were delivered on November 27.

5. On January 15, 2019, the district court entered an opinion and order memorializing its findings of fact and conclusions of law. Pet. App. 1a-353a. Determining that the Secretary's decision violated the APA, the court vacated the Secretary's decision to reinstate the citizenship question to the 2020 decennial census and enjoined the Secretary from reinstating the question "based on [his] March 26, 2018 memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum." *Id.* at 346a.

a. The district court first held that most respondents had Article III standing. Pet. App. 194a-239a. The court concluded that some private respondents had associational standing because some of their members "receive funds from federal programs that distribute those funds on the basis of census data." *Id.* at 198a. The court reasoned that if census data were inaccurate as a result of adding the citizenship question, those members could potentially suffer monetary injury. The court also concluded that the alleged "degradation in data quality" could injure all respondents. *Id.* at 208a-219a. The court further determined that respondents New York and Illinois each alleged an impending injury-in-fact because each faced a "substantial risk" of losing at least one congressional seat in the 2020 decennial census. *Id.* at 202a. The court rejected the government's argument that these and other purported injuries would not be fairly traceable to the inclusion of a citizenship question on the decennial census form because each would materialize, if at all, only because of the independent and unlawful actions of third parties. *Id.* at 226a-239a.

b. The district court then held that the Secretary's decision was "not in accordance with law," 5 U.S.C. 706(2)(A), because it violates 13 U.S.C. 6(c) and 141(f)(1).

Section 6(c) of the Census Act requires the Secretary to "acquire and use information available from" federal and state administrative records "[t]o the maximum extent possible" "instead of conducting direct inquiries" on the census form, but only if doing so is "consistent with the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. 6(c). The district court found that the Secretary violated subsection (c) because

his March 26, 2018 decisional memorandum did not cite the provision. Pet. App. 265a-267a. The court rejected the government's argument that the Secretary in fact considered all of the factors listed in subsection (c) in his memorandum, even though he did not cite the provision. *Id.* at 267a-270a. Instead, the court deemed the Secretary to have "misunderstood his own options" because, in the court's view, reinstating the citizenship question and using federal and state administrative records "would produce *less accurate citizenship data*" than relying only on the administrative records. *Id.* at 269a-270a.

Section 141(f)(1) of the Census Act requires the Secretary to submit a report to Congress containing "the subjects proposed to be included" and "the types of information to be compiled" in the census to the appropriate congressional committees at least three years before the census date. 13 U.S.C. 141(f)(1). Section 141(f)(2) requires a similar report containing "the questions proposed to be included" in the census at least two years before the census date. 13 U.S.C. 141(f)(2). Secretary Ross timely submitted both reports; although the first report did not include citizenship as a "subject" area, the second report did include the proposed citizenship question. See Pet. App. 272a-273a. The district court nevertheless concluded that Secretary Ross violated subsection (f)(1) by not including citizenship as a "subject" in a report to Congress. The court rejected the government's argument that the contents of the Secretary's reports to Congress under Section 141(f) are not judicially reviewable. See *id.* at 276a-283a.

c. The district court further held that the Secretary's decision was arbitrary and capricious because his decisional memorandum included what the court viewed

as inaccuracies, and because the Secretary failed to consider "important aspect[s] of the problem," Pet. App. 294a (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (brackets in original). An example of the inaccuracies was the Secretary's statement that adding the question is "no additional imposition" for millions of households containing citizens or lawful immigrants; in the court's view, "common sense" dictates that adding the question would impose "an additional burden—one question's worth, per person, per household—on every respondent." *Id.* at 286a-287a. An example of an "important aspect" the court thought that the Secretary failed to consider was "whether it was necessary to respond to DOJ's request at all." *Id.* at 294a (citation omitted).

In the district court's view, the Secretary also had failed to comply with various statistical quality standards, including OMB Statistical Policy Directive Number 2, which requires the Census Bureau to "'design and administer' the census 'in a manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost.'" Pet. App. 304a (citation omitted). According to the court, the Secretary's decision to use *both* administrative records *and* a decennial census question to gather citizenship data, instead of administrative records alone, was not the "best" balance of benefits and costs. *Id.* at 302a-305a (citation omitted).

d. The district court also concluded that the Secretary violated the tenet of administrative law that "the grounds upon which the . . . agency acted be clearly disclosed." Pet. App. 311a-312a (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943)). In the court's

view, it was "clear that Secretary Ross's rationale was pretextual" and thus not the "real reason for his decision," *id.* at 311a, because the Secretary had "made the decision [to add the citizenship question] months before DOJ sent its letter," *id.* at 118a (¶ 167) (emphasis omitted). The court so found based on language in a few internal emails. For example, Secretary Ross sent a May 2017 email asking about his "'*months old request* that we include the citizenship question,'" *id.* at 118a (¶ 168) (citation omitted); but because the Secretary did not refer to it as a "'months old' request to *analyze* inclusion of the question," the email showed prejudgment. *Id.* at 119a (¶ 168).

e. The district court rejected respondents' equal-protection claim, finding no evidence of any discriminatory animus on the Secretary's part. Pet. App. 331a-334a. Although the court stated that respondents might have found such evidence if they had been able to obtain "sworn testimony from Secretary Ross himself," it held they had in effect waived their right to that testimony by "decid[ing] to press ahead to trial rather than waiting to see if the Supreme Court eventually lifts the stay" of Secretary Ross's deposition. *Id.* at 334a-335a.

f. As a remedy, the district court vacated the Secretary's decision to reinstate the citizenship question to the 2020 decennial census and remanded to the agency. The court also enjoined the Secretary "from adding a citizenship question to the 2020 census questionnaire based on Secretary Ross's March 26, 2018 memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum." Pet. App. 346a. The injunction operates nationwide. *Id.* at 347a-350a. Finally, the court vacated its September

21, 2018 order compelling the deposition of Secretary Ross as moot. *Id.* at 353a.

6. After the district court entered a final judgment, respondents moved this Court to dismiss the writ of certiorari in No. 18-557 as improvidently granted. The Court removed the case from the February argument calendar and suspended the briefing schedule pending further order. The government responded to the motion earlier this week that the Court should defer consideration of the motion while it considers this petition for a writ of certiorari before judgment.

REASONS FOR GRANTING THE PETITION

A. The Questions Presented Warrant This Court's Immediate Review

This Court has jurisdiction to review "[c]ases in the courts of appeals * * * [b]y writ of certiorari * * * *before or* after rendition of judgment or decree." 28 U.S.C. 1254(1) (emphasis added). "An application * * * for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment." 28 U.S.C. 2101(e). Certiorari before judgment is appropriate when "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

This case satisfies that standard. It involves an issue of imperative public importance: the decennial census. As the district court correctly recognized, the decennial census "is a matter of national importance" with "massive and lasting consequences," and it "occurs only once a decade, with no possibility of a do-over." Pet. App. 11a-12a. The district court also correctly recognized that "time is of the essence" because the government

must finalize the decennial census questionnaire for printing by the end of June 2019. *Id.* at 12a. Both the government and respondents thus need a final resolution of the issues presented in this case by that date.

It is exceedingly unlikely that the parties could obtain full review in both the court of appeals and this Court by the end of June. Even highly expedited briefing and decision in the court of appeals likely would leave insufficient time for petition- and merits-stage briefing, argument, and decision in this Court this Term. Accordingly, as a practical matter, a writ of certiorari before judgment is likely the only way to protect this Court's opportunity for plenary review.

The issues presented in this case also merit this Court's review. This Court already has granted review of the second question presented, involving the propriety of the district court's orders expanding discovery beyond the administrative record and compelling the depositions of high-ranking Executive Branch officials, including Secretary Ross. See No. 18-557.

The first question presented also merits this Court's review. The judgment below takes the unprecedented step of striking a demographic question from the decennial census and thereby preventing the Secretary of Commerce from exercising his delegated powers to "take a decennial census * * * in such form and content as he may determine." 13 U.S.C. 141(a). In entering its order, the district court necessarily decided several subsidiary "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). As far as the government is aware, the district court is the first court ever to find or hold that:

- state and local governments and private associations have standing to challenge the inclusion of a question on the decennial census form (as opposed to the method of tabulating data for reapportionment after completion of the census, cf., *e.g.*, *Utah* v. *Evans*, 536 U.S. 452, 460-461 (2002));
- state and local governments and private associations have standing to challenge the inclusion of a question on the decennial census based on the possibility that unidentified third parties might unlawfully refuse to fill out the census form or to answer the question;
- a decision by the Secretary of Commerce, explained in a formal memorandum, to add a question to the decennial census form is irrational;
- compliance with the requirements in 13 U.S.C. 141(f) for reports by the Secretary of Commerce to Congress about the census is judicially reviewable;
- a report by the Secretary of Commerce to Congress about the census violates 13 U.S.C. 141(f);
- the grant of powers to the Secretary of Commerce in 13 U.S.C. 6 to obtain federal and state administrative records also creates judicially reviewable duties;
- a decision by the Secretary of Commerce to obtain federal and state administrative records under 13 U.S.C. 6(a) and (b) and *also* ask a question on the decennial census violates 13 U.S.C. 6(c);[3] and a court

[3] The district court appears to be the first court to cite, let alone find a violation of, 13 U.S.C. 6(c) in a published or electronically available decision since the provision's enactment, see Act of Oct. 17, 1976, Pub. L. No. 94-521, § 5(a), 90 Stat. 2460: a time span covering five decennial censuses (including 2020).

> may enjoin the Secretary of Commerce from adding a demographic question to the decennial census because he supposedly had additional reasons—not identified by the court—for wanting to add the question.

Any one of these questions likely would merit this Court's review; together, they surely do. Indeed, to the government's knowledge, this is the first time the judiciary has ever dictated the contents of the decennial census questionnaire. Cf. Pet. App. 416a (acknowledging that lower courts have, until now, "universally rejected" challenges to the census questionnaire "as meritless," and citing cases).

Absent certiorari before judgment, the court of appeals likely would have the final say on these critical issues given the June 2019 deadline for finalizing the census form. In light of the immense nationwide importance of the decennial census, if the district court's ruling is to stand, it should be this Court that reviews it. This Court previously has granted certiorari before judgment to promptly resolve important and time-sensitive disputes. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952); *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942); cf. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.20, at 287-288 (10th ed. 2013) (collecting cases where "[t]he public interest in a speedy determination" warranted certiorari before judgment). The government respectfully submits that the Court should follow the same course here.

B. The Decisions Below Are Incorrect

The district court decided "important federal question[s] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Secretary Ross reinstated to the decennial census a wholly unremarkable demographic question about citizenship. Questions about citizenship or country of birth (or both) have been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and have been (and continue to be) asked of a sample of the population on annual ACS surveys since the ACS's inception in 2005.

Respondents assert that some people in households with noncitizens (or ties to them) might refuse to answer the question despite their legal obligation to do so; that Secretary Ross's decision to ask the question despite this possibility was driven by secret motives, including animus against racial minorities; that the risk of any resulting undercount is fairly traceable to the government's action rather than to the individual or household's unlawful refusal to fill out and return the census questionnaire; and that the risk of undercount is sufficient to render merely *asking* the question arbitrary and capricious, notwithstanding that VRA enforcement efforts rely on citizenship data.

Accepting respondents' novel theory, the district court made two overarching errors: it ordered discovery beyond the administrative record to probe Secretary Ross's mental processes, and it ultimately enjoined the reinstatement of the citizenship question to the decennial census. Both are contrary to this Court's precedents.

1. The district court erred in enjoining the Secretary from reinstating the citizenship question to the decennial census.

a. The district court's holding that both private respondents and the state and local governmental respondents have standing to challenge the inclusion of a demographic question on the decennial census contravenes this Court's precedent requiring plaintiffs to demonstrate a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). The alleged injuries here either are too conjectural or hypothetical—such as the future loss of a congressional seat through reapportionment, Pet. App. 201a-204a, or the future loss of funds under government grants, *id.* at 204a-208a—or are not sufficiently concrete and particularized—such as the alleged harm from the "degradation in data quality" of the census results, *id.* at 208a.

Nor are the alleged injuries "fairly traceable" to the government's actions. *Spokeo*, 136 S. Ct. at 1547. None of the injuries will materialize if there is not a substantial undercount as a result of the citizenship question's presence on the census form; but such an undercount would be attributable only to the actions of individuals who *unlawfully* refuse to fill out or return the census form, see 13 U.S.C. 221(a), and who are then able to evade the government's extensive follow-up efforts. This Court has repeatedly "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). That reluctance should apply with even more force when the independent actions are unlawful.

Even setting aside Article III standing, the Secretary's decision about what questions to include on the decennial census questionnaire is not subject to judicial review under the APA. The APA bars judicial review of any action that "is committed to agency discretion by law." 5 U.S.C. 701(a)(2). Such actions are unreviewable because "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)). That perfectly describes this case. The Constitution "vests Congress with virtually unlimited discretion in conducting" the decennial census, and Congress in turn "has delegated its constitutional authority over the census" to the Secretary. *Wisconsin* v. *New York*, 517 U.S. 1, 19, 23 (1996). Neither the Constitution nor the Census Act provides any standard by which to judge the lawfulness of including (or excluding) a given question on the census form; to the contrary, the statute simply instructs the Secretary to "take a decennial census * * * in such form and content as he may determine," 13 U.S.C. 141(a), with no "meaningful standard" to guide that determination, *Webster*, 486 U.S. at 600.

Respondents' and the district court's focus on the accuracy of the census does not supply the relevant standard. As the Seventh Circuit has explained, the complete absence of "guidelines for an accurate decennial census" from the Constitution, the Census Act, and the APA strongly suggests "that these enactments do not create justiciable rights" to any particular level of census accuracy. *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1417, cert. denied, 506 U.S. 953 (1992). "So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in

a case like this." *Ibid.* That same reasoning applies equally here.

b. The district court erred in deeming the Secretary's decision to reinstate a citizenship question arbitrary and capricious. A question asking about citizenship or country of birth (or both) has a long pedigree on the decennial census; indeed 2010 was the first decennial census in *170 years* in which such a question did *not* appear on any decennial census form. As the Secretary observed, "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." Pet. App. 561a. The United States itself continues to ask about citizenship on the ACS. Even the United Nations recommends asking about citizenship on a census. *Ibid.* In light of this uniform and widely accepted practice, Secretary Ross's decision to reinstate a citizenship question to the decennial census was hardly "irrational," *id.* at 285a n.65, and the court's reasons for concluding otherwise do not withstand scrutiny.

i. The district court found that Secretary Ross's "explanations for his decision were unsupported by, or even counter to, the evidence before the agency." Pet. App. 285a. Specifically, the district court found "most significant" the fact that "Secretary Ross's own stated 'priorit[y]' was to 'obtain[] *complete and accurate data*.'" *Id.* at 289a (citation omitted; brackets in original). The court concluded, however, that using administrative records alone would result in more complete and accurate data than using administrative records *and* adding the question to the census, as the Secretary desired. See *id.* at 290a-291a. But under APA

arbitrary-and-capricious review, "a court is not to substitute its judgment for that of the agency." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). Nor may a court set aside agency action—in particular, a determination about the "form and content" of the decennial census, 13 U.S.C. 141(a)—merely because the decisionmaker "overruled the views of some of his subordinates." *Wisconsin*, 517 U.S. at 23.

Secretary Ross acknowledged his subordinates' view that self-responses on the census can be less accurate than imputing citizenship data from administrative records, Pet. App. 554a-555a, but deemed that risk to be outweighed by the potential benefits of asking the citizenship question on the decennial census, concluding that it could provide data, unavailable today, to help improve the accuracy of the imputation from administrative records in the future, *id.* at 556a. The Secretary thus came to the "judgment" that combining administrative records with a direct question on the census "will provide DOJ with the most complete and accurate CVAP data." *Ibid.* A court may disagree with that judgment, but may not substitute its own (or that of the decisionmaker's subordinates) under the APA.

ii. The district court also erred in concluding that Secretary Ross failed to consider important aspects of the problem. Most significantly, the court questioned whether more granular CVAP data was "necessary" for DOJ's VRA enforcement efforts. Pet. App. 295a. Yet again, the court improperly "substitute[d] its judgment for that of the agency." *Fox Television Stations*, 556 U.S. at 513 (citation omitted). Despite the district court's belief that DOJ would not benefit from the more granular census citizenship data (as compared to the less granular data from the ACS), Pet. App. 295a-299a,

DOJ itself provided at least four reasons why it would. First, DOJ "already use[s] the total population data from the census" in redistricting efforts, so using estimated citizenship data from the ACS surveys "means relying on two different data sets, the scope and level of detail of which vary quite significantly." *Id.* at 567a. Second, ACS estimates "do not align in time with the decennial census data." *Id.* at 568a. Third, ACS estimates are just that—estimates, and "the margin of error increases as the sample size * * * decreases." *Ibid.* Fourth, the decennial census questionnaire would provide more granular citizenship voting age population (CVAP) data than the ACS surveys—down to the smallest "census block" level, instead of the "census block group" level. *Ibid.* "Having all of the relevant population and citizenship data available in one data set * * * would greatly assist the redistricting process." *Ibid.* Despite acknowledging DOJ's reasons in its findings of fact, see Pet. App. 41a (¶ 4), the district court did not directly address them in its conclusions of law. And the district court entirely overlooked the submissions of States confirming that citizenship data from the census would be useful for their own VRA and redistricting efforts. See, *e.g.*, Administrative Record (A.R.) 1079-1080 (Louisiana), 1155-1157 (Texas), 1161-1162 (Alabama), 1210-1211 (Oklahoma, Kansas, Michigan, Indiana, Nebraska, South Carolina, Arkansas, Georgia, Kentucky, Tennessee, Mississippi, Florida, and West Virginia).[4]

The district court's other examples of "important aspects" that Secretary Ross supposedly failed to consider are even further afield. For example, the court faulted Secretary Ross for failing to consider "whether

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

it was necessary to respond to DOJ's request at all." Pet. App. 294a. But a Cabinet Secretary does not lightly ignore a formal request from another department, particularly when the request concerns one of the agency's core missions. And it is hardly unusual for one department to rely on the expertise of the other—here, for the Department of Commerce to rely on DOJ's assertion that more granular citizenship data would be useful to its VRA enforcement efforts. More to the point, it cannot possibly be *arbitrary and capricious* for a Cabinet Secretary to pay respectful attention to such formal requests.

iii. The district court concluded that Secretary Ross's decision was arbitrary and capricious for the further reason that he failed to comply with various statistical policies, most notably Statistical Policy Directive No. 2 from the Office of Management and Budget. Pet. App. 300a-305a. According to the court, that directive "mandates that the Census Bureau 'design and administer' the census 'in a manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost.'" *Id.* at 304a (citation omitted). Secretary Ross's decision to use administrative records *and* reinstate the citizenship question to the decennial census "did not constitute 'the *best* balance'" of these factors, in the court's view. *Ibid.* (citation omitted). Once again, the court improperly "substitute[d] its judgment for that of the agency." *Fox Television Stations*, 556 U.S. at 513 (citation omitted). Secretary Ross undertook a "thorough review of the legal, program, and policy considerations," and concluded that the benefits of reinstating a citizenship question to the decennial census would outweigh the costs. Pet. App. 562a. That

judgment is entitled to deference under arbitrary-and-capricious review. See *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.").

c. The district court further erred in finding the Secretary's decision to be "not in accordance with law" under the APA, 5 U.S.C. 706(2)(A), on the ground that the Secretary violated both 13 U.S.C. 6(c), which requires the Secretary to use administrative records in lieu of "direct inquiries" "consistent with the kind, timeliness, quality and scope of the statistics required," and 13 U.S.C. 141(f)(1), which requires the Secretary to submit a report to Congress containing "the subjects proposed to be included" in the census.

The district court concluded that the Secretary violated Section 6(c) primarily because his decisional memorandum "nowhere mentions, considers, or analyzes his statutory obligation" under that provision, and "[a]gency action taken in ignorance of applicable law is arbitrary and capricious." Pet. App. 266a. But this Court has never held that an agency's mere failure to cite a statutory provision, even while complying with its strictures, renders the agency action arbitrary and capricious under the APA. Nor do the lower-court cases on which the district court relied (*id.* at 266a-267a) so hold; instead, those cases merely reiterate the unremarkable principle that an agency may not "apply the *wrong* law," *Caring Hearts Pers. Home Servs., Inc.* v. *Burwell*, 824 F.3d 968, 970 (10th Cir. 2016) (emphasis added). The Secretary's decisional memorandum explained why administrative records alone would not satisfy the kind,

timeliness, quality, and scope requirements of the citizenship data that DOJ requested. Pet. App. 554a-556a. That was sufficient to satisfy Section 6(c).

The district court also erred in holding that Section 141(f) was judicially reviewable. That section requires the Secretary to make periodic reports about the census *to Congress*. 13 U.S.C. 141(f)(1), (2), and (3). If the reports are deficient, it is a matter for Congress to address—not the courts. See *Guerrero* v. *Clinton*, 157 F.3d 1190, 1197 (9th Cir. 1998) (adequacy of statutorily required report to Congress from the Office of Insular Affairs not reviewable); *NRDC* v. *Hodel*, 865 F.2d 288, 317 (D.C. Cir. 1988) (same, for statutorily required reports to Congress from the Secretary of the Interior). As the D.C. Circuit has explained, the adequacy of reports submitted to Congress is generally not judicially reviewable because "it is most logically for the recipient of the report to make that judgment and take what it deems to be the appropriate action." *NRDC*, 865 F.2d at 319. The district court distinguished *NRDC* and *Guerrero* on the ground that the reports in those cases were "purely informational." Pet. App. 277a (citation omitted). But the Section 141(f) reports, too, are purely informational: although the Census Act requires the reports, *nothing* in the Census Act conditions the Secretary's broad discretion to "take a decennial census * * * in such form and content as he may determine" on his providing a complete report under Section 141(f)(1). 13 U.S.C. 141(a).

d. Finally, the district court's conclusion that Secretary Ross's decision was pretextual also was erroneous. The court improperly relied in part on extra-record evidence to support its conclusion, see Pet. App. 313a-314a, and its only finding based on the administrative

record was that the Secretary "had made the decision to add the citizenship question well before DOJ requested its addition," *id.* at 313a. That finding was clearly erroneous, for the Secretary did not commence the agency's "hard look" or add the question until *after* DOJ had made the request. In any event, because the Secretary actually believed the rationale in his decisional memorandum, it does not matter whether he had additional reasons for supporting reinstatement of the citizenship question. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014). After all, "there'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.).

The district court failed to apply these basic legal principles, instead asserting that "there is no basis in the record to conclude that Secretary Ross 'actually believe[d]' the rationale he put forward." Pet. App. 320a (citation omitted). That, too, is clearly erroneous: the Secretary's formal decisional memorandum itself expressly relies on the VRA-enforcement rationale set forth by DOJ. It also turns the presumption of regularity that attaches to Executive Branch action, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), on its head; for it was *respondents'* (*i.e.*, plaintiffs') burden to show that the Secretary disbelieved his stated rationale—not the government's burden to prove the opposite.

2. Long before entry of final judgment, the district court erred in ordering discovery outside the administrative record to probe Secretary Ross's mental pro-

cesses, including by compelling the depositions of Secretary Ross and other high-ranking Executive Branch officials.[5] Those 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). 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 committed clear legal error in applying that exception here.

The district court's rationale for its "highly unusual" orders, 18A375 slip op. 2 (opinion of Gorsuch, J.), was that there is strong evidence that Secretary Ross acted in bad faith because, whether or not the reasons in the

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[5] Although the district court said it relied only on evidence in the administrative record in reaching its ultimate decision on the merits, the propriety of its orders compelling extra-record discovery is not moot. The court made extensive findings of fact based on extra-record evidence, *e.g.*, Pet. App. 78a-117a, 121a, 124a-129a, and it relied on extra-record evidence to bolster its findings and conclusions of law, *e.g.*, *id.* at 293a n.68; 313a-314a. Accordingly, as the government explained in its response to the motion to dismiss the writ of certiorari in No. 18-557, respondents could attempt to rely on the extra-record evidence as an alternative grounds for affirmance, so there remains a live controversy over the propriety of that extra-record evidence.

administrative record are objectively valid, he allegedly had secret motives in deciding to reinstate the citizenship question. But as long as the Secretary 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. And given the absence of strong evidence that the Secretary did *not* believe the basis for his decision, or that he *had* irreversibly prejudged the issue or acted on a legally forbidden basis, the district court had no authority to order extra-record discovery, much less to compel the deposition of Secretary Ross himself, to probe the Secretary's mental processes. See generally Gov't Br. in 18-557.

C. The Court Should Order Expedited Petition- And Merits-Stage Briefing So That It Can Consider And Decide This Case This Term

As noted above, the Census Bureau must finalize the census forms by the end of June 2019 to print them on time for the 2020 decennial census. Therefore, if the Court were to grant certiorari before judgment, the case would need to be briefed, argued, and decided this Term. Accordingly, as further explained in a motion for expedition filed concurrently with this petition, the government respectfully requests the Court to enter an expedited briefing schedule at both the petition and merits stages. Such expedited briefing would allow an orderly resolution of this important case in this Court and would avoid the need for review through emergency stays from the court of appeals regardless of how that court rules. Specifically, if the Court grants the petition following either the February 15 or the February 22 conference, it should order expedited merits-stage

briefing so that the case can be heard either at the end of the Court's regularly scheduled April sitting or at a special sitting in May.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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