No. 18-

Case Nos. 18-CV-5025 (JMF) (S.D.N.Y)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau, Petitioners.

PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
AND EMERGENCY MOTION FOR STAY
PENDING CONSIDERATION OF THIS PETITION

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INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the halt of discovery the district court has authorized in these cases challenging the decision of Secretary of Commerce Wilbur Ross to ask a citizenship question on the decennial census, or at a minimum to quash the deposition the district court has ordered of the Acting Assistant Attorney General for the Department of Justice's Civil Rights Division, John Gore. Because plaintiffs have noticed a deposition of Acting Assistant Attorney General Gore for September 12, 2018, we also ask this Court to issue an immediate administrative stay of the order compelling the deposition, as a stay pending this Court's consideration of this important mandamus petition is necessary to preclude a significant breach of inter-branch comity. The district court denied the government's motion for a stay on September 7, 2018.[1]

Even setting aside that the Secretary of Commerce's eminently reasonable decision merely to ask a question about citizenship status on the decennial census should not be subject to judicial review under the Administrative Procedure Act (APA)—given the discretion vested in the Secretary by the Census Act and the

[1] The government attempted to file this petition on September 5 but was informed by the Clerk's office on September 7 that it needed to be refiled under two separate docket numbers and with service to the district court judge.

absence of any statutory standards that would guide judicial review—the Supreme Court and this Court have stressed that review should focus on "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); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). If "the record before the agency does not support the agency action . . . or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course . . . is to remand to the agency for additional investigation or explanation." *State of New York Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 493 (2d Cir. 1994) (omissions in original) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

The district court has not heeded this guidance. The government has filed an administrative record containing approximately 1,300 pages and a supplemental production containing over 11,000 pages. The district court has not attempted to ascertain whether that record supports the agency's action, and instead it has authorized wide-ranging discovery. Although the government strenuously objected to this course, it has provided another approximately 10,000 pages in discovery in the last two months and even has submitted to the depositions of senior Census Bureau and Department of Commerce officials.

The district court has now expanded that discovery to compel the deposition of the Acting Assistant Attorney General of the Department of Justice's Civil Rights Division. Judicial orders compelling the testimony of high-ranking government

officials are justified only under "exceptional circumstances," *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2013), and no such circumstances exist here.

As a threshold matter, the district court's theory for permitting any discovery at all rests on its mistaken invocation of a narrow exception to the general rules precluding discovery in reviewing agency action. That exception applies where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers." *National Audubon Soc'y*, 132 F.3d at 14. As discussed below, the court committed clear legal error in concluding that plaintiffs had met this demanding standard. The court stressed that there is evidence suggesting that the Secretary wanted to reinstate a citizenship question before he asked the Department of Justice whether inclusion of a citizenship question would provide data that enhances enforcement of the Voting Rights Act, and relied on its affirmative response in reinstating a citizenship question. Assuming this conclusion is correct, it is not improper or even uncommon for an agency head to favor a particular outcome prior to full consideration and final decision on an issue, or to discuss with other government officials possible legal and factual justifications for that preferred course of action. There is no bad faith where the decisionmaker ultimately believes the rationale on which he chooses to rest the agency action, whether or not the decisionmaker was inclined to pursue that course in the first instance for additional reasons.

Perhaps just as importantly, even accepting the flawed premise of the order permitting any discovery, the district court further erred in compelling the deposition of the head of a major Division of the Department of Justice. Acting Assistant Attorney General Gore was not the decisionmaker for the challenged action, and the district court did not and could not find that he or anyone else in the Department of Justice acted in bad faith in the course of the Department's submission of its views concerning whether the addition of a citizenship question to the decennial census would be useful to enforcement of the Voting Rights Act. There can be no basis for interrogating him about the Department's position, which is set forth in a reasoned letter included in the materials that are part of the administrative record. As courts have frequently recognized, exercise of their mandamus authority is proper to preclude depositions of high-ranking officials such as Acting Assistant Attorney General Gore.

Indeed, as far as the government is aware, it would be unprecedented for a Department of Justice officer of Acting Assistant Attorney General Gore's rank to be compelled to sit for a deposition in litigation challenging another agency's action or, in fact, in any context other than employment-related litigation. This Court should not allow this case to become the first such intrusion into the Department of Justice, and

it at least should stay the deposition while it gives this mandamus petition the careful consideration it is due.[2]

STATEMENT

A. Background

1. The Constitution requires that an "actual enumeration" of the population be conducted every 10 years in order to allocate 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 delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. § 141(a), and "authorize[s] [him] to obtain such other census information as necessary," *id.* The Bureau of the Census assists the Secretary in the performance of this responsibility. *See id.* §§ 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." *Id.* § 5. Nothing in the Act directs the content of the questions that are to be included on the decennial census questionnaire.

[2] The government has asked the district court to stay Acting Assistant Attorney General Gore's deposition while this mandamus petition is pending. The district court has not yet ruled on the government's motion.

2. As the district court explained in greater detail below, with the exception of 1840, censuses from 1820 to 1880 asked for citizenship or birthplace in some form, and decennial censuses from 1890 through 1950 specifically requested citizenship information. Opinion And Order, No. 18-cv-2921 (JMF) (S.D.N.Y. July 26, 2018) (Add. 100-69), Add. 107-09.

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 birthplace of the respondent and his or her parents, although naturalization status was not requested. Add. 109-10. Between 1970 and 2000, the Census Bureau distributed a detailed questionnaire, known as the "long-form questionnaire," to a sample of the population. Add. 110-11. The long-form questionnaire included questions about the respondent's citizenship or birthplace. *Id.* The "short-form questionnaire," sent to the majority of households, did not ask for birthplace or citizenship status in those years. *Id.*

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. Add. 110-111. The replacement of the long-form questionnaire 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 sample of the population, it produces annual estimates only for census tracts and census block groups. The decennial census attempts a full count of the population and produces population counts as well as counts of other, limited information (such as race) down to the smallest level, known as the "census block."[3] 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.

B. The Reinstatement of a Citizenship Question in the 2020 Census

On March 26, 2018, the Secretary of Commerce issued a memorandum reinstating a citizenship question on the 2020 Census questionnaire. Memorandum to Karen Dunn Kelley, Under Secretary for Economic Affairs, from the Sec'y of Commerce on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018) ("Ross Memo") (Add. 170-77). The Secretary's reasoning is set out in that memorandum and in a supplemental memorandum issued on June 21, 2018. *See* Add. 170-177, 178. 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. Add. 178. As part of the Secretary's deliberative process, he and his staff "consulted with Federal

[3] *See* https://www.census.gov/geo/reference/webatlas/blocks.html.

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." *Id.*

In a December 17, 2017, letter, the Department of Justice responded that citizenship data is important to the Department's enforcement of Section 2 of the Voting Rights Act and that the decennial census questionnaire would provide census-block-level citizenship voting age population ("CVAP") data that are not currently available from the ACS surveys (which provide data only at the larger census block group level). Letter from Arthur Gary, General Counsel, Department of Justice, to Ron Jarmin, performing the nonexclusive duties of the Director, U.S. Census Bureau, (Dec. 12, 2017) ("Gary Letter") (Add. 179-81). Accordingly, the Department of Justice explained that having citizenship data at the census block level will permit more effective enforcement of the Act. *Id.*

After receiving the Department of Justice's letter, the Secretary asked the Census Bureau to evaluate the best means of providing the data identified in the letter, and the Census Bureau initially presented three alternatives. Add. 171-73. After reviewing those alternatives, the Secretary asked the Census Bureau to consider a fourth option as well. Add. 173. Ultimately, the Secretary concluded that this fourth option, under which a citizenship question would be reinstated on the decennial census, would provide the Department of Justice with the most complete and accurate CVAP data. Add. 174.

The Secretary also observed that, as detailed above, collection of citizenship data in the decennial census has a long history and that the ACS has included a citizenship question since 2005. Add. 171. The Secretary therefore found that "the citizenship question has been well tested." *Id.* He also confirmed with the Census Bureau that census-block-level citizenship data are not available using the annual ACS. *Id.*

The Secretary considered but rejected concerns that reinstating a citizenship question on the decennial census would negatively impact the response rate for noncitizens. Add. 172-75. 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," 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 reinstatement of a citizenship question. Add. 172. 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, limited empirical data exists on how reinstatement of a citizenship question might impact response rates on the 2020 census. Add. 172, 174. The Secretary also emphasized that "[c]ompleting and returning decennial census questionnaires is required by Federal law," thus concerns regarding a reduction in response rates were premised on speculation that some will "violat[e] [a] legal duty to respond." Add. 176. Thus, "while there is widespread belief among many parties that

adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." Add. 173; *see also* Add. 174-75. The Secretary further explained that the Census Bureau intends to take steps to conduct respondent and stakeholder-group outreach in an effort to mitigate the impact on response rates, if any, of including a citizenship question. Add. 175. 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." Add. 176.

C. Procedural Background

1. The plaintiffs in these two cases are governmental entities (including states, cities, and counties) as well as several non-profit organizations.[4] They claim that the Secretary's action violates the Enumeration Clause of the Constitution, various statutes and regulatory requirements; is arbitrary and capricious under the Administrative Procedure Act; and denies equal protection by discriminating against racial minorities. All of their claims rest on the speculative premise that reinstating a citizenship question will reduce the response rate to the census because,

[4] Challenges to the Secretary's decision have also been brought in district courts in Maryland and the Northern District of California. *See Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041-GJH (D. Md.) (filed April 11, 2018); *La Union del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md.) (filed May 31, 2018); *California v. Ross*, No. 18-cv-1865 (N.D. Cal.) (filed March 26, 2018); *City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal.) (filed April 17, 2018).

notwithstanding the legal duty to answer the census, 13 U.S.C. § 221, some members of households containing aliens without lawful status may be deterred from doing so (and those individuals will be disproportionately minorities).

2. Plaintiffs announced their intention to seek discovery even before the administrative record had been filed. At a pre-trial conference held on May 9, 2018, plaintiffs 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. Transcript, Dkt. No. 150 (S.D.N.Y. May 18, 2018), No. 18-cv-2921 (JMF), at 9-10.

At a hearing on July 3, 2018, the district court granted plaintiffs' request for extra-record discovery over the government's strong objections. Add. 80-92. The court concluded that plaintiffs had made a sufficiently strong showing of bad faith or improper behavior to warrant extra-record discovery. Add. 85. The court offered four reasons to support this determination. First, the court stated that 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 the Department of Justice; that is, that the decision preceded the stated rationale." *Id.* Second, the court noted that the record submitted by the Department "reveals that Secretary Ross overruled senior Census Bureau staff," who recommended against adding a question. Add. 85-86. Third, plaintiffs had alleged that the Secretary used an abbreviated

decisionmaking process in deciding to add a citizenship question, as compared to other instances in which questions had been added to the census. Add. 86. And fourth, the court found that plaintiffs had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question—that it would aid the Department of Justice in enforcing Section 2 of the Voting Rights Act—was "pretextual," given that the Department of Justice had not previously suggested that citizenship data collected through the decennial census was needed to enforce the Voting Rights Act. Add. 86-87.

3. Following that order, the Department supplemented the administrative record with over 11,000 pages of documents, including materials reviewed and created by direct advisors to the Secretary. *See* Dkt. Nos. 212, 216, 222, No. 18-cv-2921 (JMF). The government also produced additional documents in response to discovery requests, including nearly 10,000 pages from the Department of Commerce, and over 2,500 pages from the Department of Justice. Plaintiffs have also deposed several senior Census Bureau and Commerce Department officials, including the Acting Director of the Census Bureau and the Chief of Staff to the Secretary.[5]

4. On July 26, 2018, the district court entered an order granting the government's motions to dismiss plaintiffs' Enumeration Clause claim. Add. 145-159.

[5] Plaintiffs have challenged the government's discovery responses on numerous grounds, leading to additional litigation on ancillary discovery matters. *See, e.g.*, Dkt. Nos. 201, 203, 220, 228, 237, No. 18-cv-2921 (JMF).

The district court denied the government's motion to dismiss plaintiffs' APA and equal protection claims, concluding that plaintiffs had alleged sufficient facts to demonstrate standing at the motion to dismiss stage, Add. 115-30; that plaintiffs' claims were not barred by the political question doctrine, Add. 131-36; that the conduct of the census was not committed to the Department's discretion by law, Add. 137-44; and that plaintiffs' allegations, accepted as true, stated a plausible claim of intentional discrimination sufficient to support their equal protection claim, Add. 159-67.

5. On August 10, plaintiffs filed a motion to compel the deposition testimony of John Gore, Acting Assistant Attorney General for the Department of Justice's Civil Rights Division. Dkt. No. 236, No. 18-cv-2921 (JMF). Plaintiffs asserted that AAG Gore's deposition was necessary given his alleged involvement in the drafting of the Gary Letter to Secretary Ross. *Id.* at 1.

On August 17, the district court entered an order compelling AAG Gore's testimony. Order, No. 18-cv-2921 (JMF) (S.D.N.Y. Aug. 17, 2018) (Add. 1-3). The court concluded that Gore's testimony was "plainly 'relevant'" to plaintiffs' case in light of his "apparent role" in drafting the Gary Letter, and summarily concluded that he "possesses relevant information that cannot be obtained from another source." Add. 2.

ARGUMENT

I. The Court Should Exercise Its Mandamus Authority to Correct Orders That Disregard Established Principles of Judicial Review of Agency Decisions.

A. Mandamus Review Is Appropriate.

Although a writ of mandamus is an extraordinary remedy, it "has been used 'both at common law and in the federal courts . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.'" *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (alteration in original) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This Court has recognized that "mandamus provides a logical method by which to supervise the administration of justice within the Circuit" in cases in which "a discovery order present[s] an important question of law." *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987); *see also In re Nielsen*, No. 17-3345, Dkt. No. 171, at 1 (2d Cir. Dec. 17, 2017) (mandamus is appropriate where a petition raises "a discovery question … of extraordinary significance") (quoting *In re City of New York*, 607 F.3d at 939).

Recognizing the important considerations of inter-branch comity implicated when a plaintiff seeks to compel the testimony or presence of high-ranking officials, the courts of appeals have regularly exercised their mandamus authority to preclude such testimony. *See, e.g., In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010) (issuing a writ of mandamus to preclude required testimony of EPA Administrator); *In re McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015) (issuing writ of mandamus to

preclude deposition of EPA Administrator); *In re United States*, 542 F. App'x 944 (Fed. Cir. 2013) (issuing writ of mandamus to preclude deposition of the Chairman of the Federal Reserve Board); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (issuing writ of mandamus to preclude deposition of the Vice President's chief of staff); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (issuing writ of mandamus to preclude testimony of Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (issuing writ of mandamus to preclude testimony of three members of the Board of the FDIC); *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (issuing writ of mandamus to preclude testimony of the Commissioner of the FDA); *United States Board of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (issuing writ of mandamus to preclude deposition of members of the Board of Parole); *cf. Bacon v. Department of Housing and Urban Development*, 757 F.2d 26 5, 269 (Fed. Cir. 1985) (affirming order precluding deposition of the Secretary of the Department of Housing and Urban Development). Similarly, the Ninth Circuit issued a writ of mandamus to quash an order requiring the Assistant Attorney General for the Department of Justice's Tax Division to appear at a settlement conference. *United States v. U.S. Dist. Court for Northern Mariana Islands*, 694 F.3d 1051, 1059-62 (9th Cir. 2012). And as noted, the government is unaware of *any* instance of an Assistant Attorney General being compelled to sit for a deposition in a regulatory challenge such as this.

B. The Court Should Vacate the Orders, Which Constitute Clear and Significant Error, and Direct the District Court to Quash Discovery and the Deposition of Acting Assistant Attorney General Gore.

1. The conduct of this litigation upends fundamental principles of judicial review of agency action. In agency review cases, "[t]he APA specifically contemplates judicial review on the basis of the agency record." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The Supreme Court has emphasized that it is "not the function of the court to probe the mental processes" of the agency decisionmaker in conducting administrative review. *United States v. Morgan*, 304 U.S. 1, 18 (1938) (*Morgan I*). "Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*). "[A]gency officials should be judged by what they decided, not for matters they considered before making up their minds." *National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014).

For these reasons, "under the APA, discovery rights are significantly limited." *Sharkey v. Quarantillo*, 541 F.3d 75, 92 n.15 (2d Cir. 2008); *see Nat'l Audobon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) ("Generally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision."). Rather than permit wide-ranging discovery, "the task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id.*; *see also*

Estate of Landers v. Leavitt, 545 F.3d 98, 113 (2d Cir. 2009) (as revised) (holding that interrogatories could not be considered because the court "must uphold or set aside the agency's action on the grounds that the agency has articulated"). "The validity of the [decisionmaker's] action must . . . stand or fall on the propriety of [his] finding." *Camp v. Pitts*, 411 U.S. 138, 143 (1973). If the agency's action "is not sustainable on the administrative record made," then the administrative "decision must be vacated and the matter remanded to [the agency] for further consideration." *Id.*

2. The district court's orders requiring discovery and the deposition of Acting Assistant Attorney General Gore, in particular, contravene these principles. *See In re City of New York*, 607 F.3d at 943 (a party's right to mandamus relief is "clear and indisputable" where, among other things, a district court "bases its ruling on an erroneous view of the law"). While an exception to the "general 'record rule'" may be made "where there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers," *National Audubon Soc'y*, 132 F.3d at 14, the district court's order here rests on a fundamental misunderstanding of what constitutes "bad faith" in the context of administrative decisionmaking.

As discussed above, the Supreme 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*, 435 U.S. 519, 549 (1978) (citing *Camp*, 411 U.S. at 143); *SEC v. Chenery Corp.* 318 U.S. 80, 88 (1943) (courts must "confine[] . . . review to a judgment upon the validity of the grounds

upon which the [agency] itself based its action"), and the decision must be upheld if the record reveals a "rational" basis supporting it, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). In light of these fundamental principles of deference to an agency's objective explanation, the type of "bad faith" necessary to authorize extra-record discovery under the APA requires a strong demonstration that the Commerce Secretary did not actually believe his stated rationale for reinstating a citizenship question. *See Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion"). Absent such a showing, the Commerce Secretary "should be judged by what [he] decided, not for matters [he] considered before making up [his] mind[]." *National Sec. Archives*, 752 F.3d at 462.

The district court neither articulated that legal standard nor made such a factual finding. Instead, the court stated four reasons for believing that this is the rare case in which discovery is proper to explore the mental processes of the decisionmaker. First, the Secretary "thought reinstating a citizenship question could be warranted" before contacting the Department of Justice, and it is therefore possible "that the decision preceded the stated rationale." Add. 85. Second, "Secretary Ross overruled senior Census Bureau staff," who recommended against reintroducing a citizenship question. Add. 85-86. Third, plaintiffs alleged that the Secretary used an abbreviated decisionmaking process in deciding to reintroduce a citizenship question, because

Commerce did not "spend[] considerable resources and time . . . testing the proposed changes." Add. 86. Fourth, in the court's view, plaintiffs had made "a prima facie showing" that the Secretary's stated justification for reinstating a citizenship question was "pretextual," because the Department of Justice had not previously suggested that citizenship data collected through the decennial census was needed to enforce the Voting Rights Act. Add. 86-87.

The district court relied on these factors again in denying a stay, but, contrary to the court's understanding, these factors are legally irrelevant to a proper determination of bad faith. It is not improper, or indeed uncommon, for agency decisionmakers to favor a particular outcome prior to full consideration of the issue, and it is entirely appropriate for a decisionmaker to confer with other government officials to evaluate whether his favored course of action makes sense and on what legal and factual basis it might be pursued. In making such decisions, agency decisionmakers routinely overrule their subordinates, and it has never been thought that in fulfilling their responsibilities they thereby act in bad faith. Indeed, as the Supreme Court observed in a case in which the Secretary of Commerce overruled the recommendations of the Census Bureau, "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 N.Y.*, 517 U.S. 1, 23 (1996). With respect to the length of the decisionmaking process, the Secretary gave a reasoned explanation for his decision to reinstate a citizenship question without additional

testing. *See* Add. 176 (explaining that because the question "is already included on the ACS" it "has already undergone the . . . testing required for new questions"). And the district court's doubts as to the Department of Justice's need for reinstatement of a citizenship question do not call into question the sincerity of the Commerce Secretary's stated rationale, particularly because the Department of Justice explained its reasoning. Add. 179-81. Indeed, contemporaneous emails produced in response to the district court's discovery order only reinforce the conclusion that Commerce officials sincerely believed "that DOJ has a legitimate need for the question to be included." Add. 182.

While vacatur of an agency action may be appropriate in rare circumstances where a final decisionmaker has prejudged an issue, to obtain discovery on such a theory, plaintiffs must make a strong showing that the decisionmaker "act[ed] with an 'unalterably closed mind' and [was] 'unwilling or unable' to rationally consider arguments." *Air Transport Ass'n of Am., Inc. v. National Mediation Bd.*, 663 F.3d 476, 486-88 (D.C. Cir. 2011). The district court did not make such a finding here, nor would it remotely be supported by the facts of this case. Nothing in the record suggests that Secretary Ross was unwilling or unable to rationally consider the arguments for and against reinstating the question. *See Air Transport Ass'n of Am.*, 663 F.3d at 487 (denying discovery into a National Mediation Board order despite accusations that the Board improperly coordinated its rulemaking with unions, and

despite a letter from dissenting Board members asserting "that the Board's behavior gave 'the impression' of prejudgment.").

The district court identified only one case in which a court concluded that extra-record discovery was justified in light of an agency's bad faith. Add. 85 (citing *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006)). In that case, the evidence of bad faith differed markedly from the evidence the district court relied on here. In allowing discovery in *Tummino*, the district court emphasized that the agency's five-year delay in deciding the plaintiff's citizen petition "alone raise[d] questions about . . . good faith," particularly because the agency "[b]y its inaction . . . ha[d] evaded judicial review of its decisionmaking." *Id.* at 232. The court also relied on "the unanimous conclusion of [a] joint advisory committee" contradicting the agency's reasoning, specific "statements of some senior decisionmakers" indicating "that the real reason" for the agency's inaction rested on "matters . . . beyond the mandate of the agency," and a report issued by the General Accountability Office finding that the agency's "decisionmaking processes were unusual in . . . significant respects." *Id.* at 232-33. None of those same factors are present here. Most importantly, the Secretary issued his final decision in a formal memorandum, and there can be no claim that the agency has acted in a procedurally improper manner.

Indeed, the administrative record here provides a more than adequate basis on which to evaluate the decision challenged in this case.[6]

3. Even accepting the mistaken premises of the district court's reasoning in allowing any discovery, it was clear error to compel the testimony of the Acting Assistant Attorney General. Depositions of high-ranking government officials are justified only under "exceptional circumstances," *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2013), both because it is "not the function of [a] court to probe the mental processes" of agency decisionmakers, *Morgan II*, 313 U.S. at 422, and because such officials have "greater duties and time constraints than other witnesses," *Lederman* 731 F.3d 199 at 203 (2d. Cir. 2013). Such orders all raise significant "separation of powers concerns." *In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010).

There are no "exceptional circumstances" that would warrant the deposition of the Assistant Attorney General for the Department of Justice's Civil Rights Division, a Senate-confirmed official who heads one of only seven litigating divisions at the Department of Justice. The district court concluded that an order compelling Acting Assistant Attorney General Gore's testimony was justified in light of his "apparent

[6] The district court expressly declined to rest its discovery order on plaintiffs' constitutional claim, explaining "that the APA itself provides for judicial review of agency action that is 'contrary to' the Constitution." Add. 88 (citing *Change v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017)). That reasoning was correct, and plaintiffs' constitutional challenges provide no independent justification for discovery here.

role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the census[.]" Add. 2. For this reason, the court stated, his testimony was "plainly 'relevant'" to plaintiff's claims, "within the broad definition of that term for purposes of discovery." *Id.* But the fact that a high-ranking official's testimony might be in some way "relevant" to a plaintiff's claims when the term "relevant" is given its broadest possible meaning does not come close to satisfying the "exceptional circumstances" standard. Given the breadth of the definition, compelled testimony of high-ranking government decisionmakers would be routine instead of exceptional.

Indeed, deposing Acting Assistant Attorney General Gore will achieve no legitimate purpose. For example, if the purpose of the deposition is to explore the extent to which the census information will in fact assist enforcement of the Voting Rights Act, the deposition plainly contravenes the rule that review is limited to the administrative record. After reviewing the record, were the district court to conclude that the extent of the data's usefulness was crucial to its ruling and that the existing record is insufficient, the proper course would be to remand or permit supplementation of the record. Alternatively, if the purpose of the deposition is to demonstrate bad faith, it is equally improper. Secretary Ross was the decisionmaker, not Acting Assistant Attorney General Gore. Moreover, at no point in this litigation has the district court found that the Department of Justice acted in bad faith in recommending that a citizenship question be added to the census, and plaintiffs have

provided no basis to believe that the reasons the Department of Justice gave for supporting the reinstatement of a citizenship question did not represent the Department's views. In addition, Acting Assistant Attorney General Gore's testimony on such topics is likely to be protected by privilege, rendering a deposition focused on topics particularly improper and futile.[7]

Moreover, deposing a high-ranking Department of Justice official is especially unnecessary given the voluminous discovery that Plaintiffs have already received. The district court justified its denial of a stay in part on the ground that the government had made available officials including the Director of the Census Bureau. But, of course, the government's cooperation cannot be a basis for expanding discovery to include officials of a different Department. *See* Add. 183-93. That the government did not previously seek mandamus relief until the court expanded discovery to include the Department of Justice in no sense militates against the

[7] In its initial order permitting discovery, the district court reasoned that "plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act" raised doubts about the Secretary's stated rationale for reinstating a citizenship question. Add. 87. The court's reasoning is deeply flawed. As the Justice Department explained in the Gary Letter, citizenship data is useful in enforcing Section 2 of the Voting Rights Act, which prohibits "vote dilution" by state and local officials engaged in redistricting. Add. 179. 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. Moreover, the Justice Department informed Secretary Ross that citizenship data would be useful for enforcement of the Voting Rights Act. That is true regardless of whether the current administration will have the opportunity to use the information collected.

urgency of the petition. Plaintiffs have to date received thousands of pages of materials from the Department of Commerce, including materials reviewed and created by the Secretary's most senior advisers. The district court nowhere explained why information about the Secretary's intent in reintroducing a citizenship question cannot be obtained through this extensive evidence, much of it involving the Secretary's closest advisers. *See Lederman*, 731 F.3d at 203 (depositions of high-ranking officials was not justified where plaintiffs failed to show "that the relevant information could not be obtained elsewhere").

The district court similarly erred in downplaying the intrusion of a deposition and attendant preparation. The court stated that it was "unpersuaded" that compelling the Acting Assistant Attorney General to sit for a "single deposition" would unduly hinder him in the performance of his duties or unduly burden the Department of Justice. Add. 2. But such logic would permit the deposition of high-ranking officials as a matter of course, as each individual case is likely to involve only a "single deposition." As this Court has explained, absent strict limits on plaintiffs' ability to depose high-ranking officials in each case, those officials will soon find themselves "spend[ing] 'an inordinate amount of time tending to pending litigation'" in the relevant case and others. *Lederman*, 731 F.3d at 203 (quoting *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007)). The district court simply disregarded the judgment of this Court and every other court of appeals to consider the intrusion effected by compelling testimony or the presence of a high-ranking official. *See supra*

pp. 14-15. This Court should not allow the unprecedented deposition of an Acting Assistant Attorney General in these circumstances.[8]

II. This Court Should Stay Acting Assistant Attorney General Gore's Deposition Pending Review of the Petition.

Because plaintiffs have noticed the deposition of Acting Assistant Attorney General Gore for September 12, 2018, the government asks that this Court issue an immediate administrative stay of his deposition pending its consideration of the mandamus petition. Absent a stay, the deposition will occur and the injury will be irremediable. A stay pending this Court's consideration will not harm plaintiffs and will not meaningfully delay the resolution of these proceedings. Plaintiffs face no imminent harm from the Secretary's decision to reinstate a citizenship question on the 2020 Census. In addition, discovery is not scheduled to conclude until October 12, and no deadlines have been set for trial or summary judgment briefing.

This Court recently granted a stay of discovery proceeding pending disposition of a petition for writ of mandamus under similar circumstances. *See In re Duke*, No. 17-3345 (2d Cir. Oct. 20, 2017) (order of Cabranes, J). A stay is likewise warranted here.

[8] The district court faulted the government for opposing the Gore deposition without stating that a court should be reluctant to permit discovery of high-ranking officials. Principles of inter-branch comity dictate such reluctance, and the district court did not conclude that the government had waived that argument.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of mandamus, and it should issue an administrative stay to preclude the deposition of the Acting Assistant Attorney General for the Civil Rights Division pending its consideration of the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 6,649 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Mark B. Stern
MARK B. STERN

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018, I electronically filed the foregoing with the Clerk of the Court by emailing the petition to newcases@ca2.uscourts.gov. The petition was served on the district court at Hon. Jesse Furman Furman_NYSDChambers@nysd.uscourts.gov

Service in compliance with Federal Rule of Appellate Procedure 21(a)(1) will be accomplished by e-mail to the following recipients:

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