Supreme Court, U.S.
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No. 18A-455

IN THE SUPREME COURT OF THE UNITED STATES

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

# APPLICATION TO EXPAND THE STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY AND FOR EXPEDITION

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PARTIES TO THE PROCEEDING

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

Respondent in this Court is the United States District Court for the Southern District of New York. Respondents also include the State of New York; the State of Connecticut; the State of Delaware; the District of Columbia; the State of Illinois; the State of Iowa; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of North Carolina; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Vermont; the State of Washington; the City of Chicago, Illinois; the City of New York; the City of Philadelphia; the City of Providence; the City and County of San Francisco, California; the United States Conference of Mayors; the City of Seattle, Washington; the City of Pittsburgh; the County of Cameron; the State of Colorado; the City of Central Falls; the City of Columbus; the County of El Paso; the County of Monterey; and the County of Hidalgo (collectively plaintiffs in the district court in No. 18-cv-2921, and real

parties in interest in the court of appeals in Nos. 18-2652 and 18-2856). Respondents further include the New York Immigration Coalition; CASA de Maryland, Inc.; the American-Arab Anti-Discrimination Committee; ADC Research Institute; and Make the Road New York (collectively plaintiffs in the district court in No. 18-cv-5025, and real parties in interest in the court of appeals in Nos. 18-2659 and 18-2857).

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Acting Director of the United States Census Bureau, respectfully applies to expand the stay previously entered in this case to include a stay of a trial in this matter, currently scheduled to begin on November 5, 2018, pending disposition of the government's concurrently filed petition for a writ of mandamus or, in the alternative, certiorari. The government respectfully requests an immediate administrative stay of trial pending the Court's consideration of this application. The government also respectfully requests expedited consideration of its petition.

STATEMENT

1. This application arises from a pair of consolidated cases challenging the decision by Secretary of Commerce Wilbur L. Ross, Jr. to reinstate to the decennial census a question asking about citizenship, as had been asked of at least a sample of the population on every decennial census from 1820 to 2000 (except in 1840). See 315 F. Supp. 3d 766, 776-777. Finding respondents to have made a "strong showing" that Secretary Ross acted in "bad faith" in reinstating the question, the district court in a series of orders permitted respondents to seek discovery outside the administrative record to probe the Secretary's mental processes, and eventually compelled the depositions of two high-level Executive Branch officials: Acting Assistant Attorney General (AAG) John M. Gore and Secretary Ross himself. See Pet. App. 9a-23a, 24a-27a, 93a-100a.

2. On October 22, 2018, this Court entered a stay of the district court's September 21 order compelling the deposition of Secretary Ross. 18A375 slip op. 1. The stay was to remain in effect "through October 29, 2018 at 4 p.m.," unless the government "file[d] a petition for a writ of certiorari or a petition for a writ of mandamus with respect to the stayed order by or before October 29, 2018 at 4 p.m.," in which case "the stay will remain

in effect until disposition of such petition by this Court."* Ibid. The Court denied the government's application to stay the district court's orders compelling the deposition of Acting AAG Gore and allowing discovery beyond the administrative record, but made clear that this denial "does not preclude the applicants from making arguments with respect to those orders." Ibid.

Justice Gorsuch, joined by Justice Thomas, would have taken "the next logical step and simply stay[ed] all extra-record discovery pending [this Court's] review." 18A375 slip op. 3. Among the reasons "weighing in favor of a more complete stay" was "the need to protect the very review [this Court] invite[s]." Ibid. Justice Gorsuch observed that "[o]ne would expect the Court's order today would prompt the district court to postpone the scheduled trial and await further guidance. After all, that is what normally happens when we grant certiorari or indicate that we are likely to do so in a case where trial is imminent." Ibid.

3. On October 26, 2018, the district court denied the government's motion to stay the impending November 5 trial date. App., infra, 1a-15a.

a. The district court faulted the government because it had been "given the opportunity to file a summary judgment motion" in

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* The government is simultaneously filing a petition for a writ of mandamus or, in the alternative, certiorari by that deadline.

a September 30, 2018 order, but had "elected not to file such a motion." Id. at 1a; see also id. at 14a. The September 30 order -- entered in response to the government's motion to resolve the case on summary judgment, rather than at trial -- stated that "the [c]ourt remains firmly convinced that a trial will be necessary" and that "it seems quite clear from the existing record that there will be genuine disputes of material fact precluding entry of summary judgment." 18-cv-2921 Docket entry No. 363 (emphases added). Accordingly, the court said that although it would "not bar [the government] from making a motion for summary judgment," the government "would be far better off devoting [its] time and resources to preparing [its] pre-trial materials than to preparing summary judgment papers." Ibid. And the court reiterated that whether or not the parties filed summary judgment motions, the "November 5th trial date" would "remain in effect." Ibid. Given the court's direction that moving for summary judgment would be futile, the government instead devoted itself to preparing for trial.

b. In addition to faulting the government for not filing a summary judgment motion, the district court held that the government had not satisfied the traditional stay factors. See App., infra, 3a-15a.

i. The district court thought the government had not shown a likelihood of irreparable harm because it "remain[s] free to

argue at trial that the Court should disregard all evidence outside the administrative record." App., infra, 3a. The court said it had "directed the parties to differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record." Ibid. And the court said it "anticipates differentiating along similar lines in any findings of fact and conclusions of law that it enters." Ibid. The court also did not find irreparable the burdens of participating in a trial focusing on a Cabinet Secretary's mental processes, even if the trial were later reversed on appeal for having been improper. See id. at 4a-6a.

ii. The district court further held that the government had not shown a likelihood of success on the merits. The court acknowledged that this Court's "October 22, 2018 Order suggests that th[is] Court may rule that [the district court] erred in its September 21, 2018 Order authorizing a deposition of Secretary Ross," an outcome the district court deemed "regrettable." App., infra, 6a-7a & n.4. But because Secretary Ross has not yet been deposed, the court discounted the government's likelihood of success because a government victory "will have no effect on the existing record, which presently lacks Secretary Ross's deposition testimony." Id. at 7a. The court also predicted that this Court "is unlikely to disturb" the July 3 order authorizing extra-record discovery "in advance of [the district court's] consideration of

the merits" because discovery "will be complete when [the government] file[s] [its] petition with the Supreme Court." Id. at 8a. And the district court reiterated the reasons it gave in its July 3 order, id. at 10a-11a, concluding that "there is nothing unusual with [its] decision to allow extra-record discovery." Id. at 11a.

iii. Finally, the district court determined that staying the November 5 trial date would substantially injure the other parties and the public interest. App., infra, 11a-14a. Noting the Census Bureau's desire to begin printing the questionnaire in May 2019, the court concluded that "[a]waiting prophylactic guidance from the Supreme Court -- which may not come for months and may not come at all -- would make it difficult, if not impossible, to meet that goal." Id. at 12a. The district court also noted its "congested" trial calendar. Id. at 13a. The court concluded by remarking that "piecemeal appeals would undermine the independence of the district judge," and thus it would proceed with trial without waiting for this Court's resolution of the government's petition. Id. at 15a.

4. The Second Circuit declined to stay the trial in an unreasoned summary order. App., infra, 16a.

ARGUMENT

"One would expect that" this Court's staying Secretary Ross's deposition and "expressly invit[ing] the government to seek review of all of the district court's orders allowing extra-record discovery" "would prompt the district court to postpone the scheduled trial and await further guidance." 18A375 slip op. 3 (opinion of Gorsuch, J.). The district court instead has confirmed that, absent an expansion of the existing stay by this Court, next week's trial will move forward as planned -- even as this Court considers whether such a trial is legally improper. The government respectfully submits that delaying an extraordinary trial into the subjective motives of a Cabinet Secretary is warranted pending consideration of the government's simultaneously filed petition and further proceedings in this Court.

The government therefore respectfully requests that the Court expand its previously entered stay to delay the two-week trial, currently set to start on November 5, pending disposition of the government's petition for a writ of mandamus or, in the alternative, certiorari. The government also respectfully requests that consideration of its petition for a writ of mandamus or certiorari be expedited. All parties have an interest in speedy resolution of this case. The most efficient path forward is to stay the trial and resolve the question whether the district court must confine its review of the Secretary's decision to the

administrative record, while leaving sufficient time for the district court to conduct its review followed by prompt appellate review.

1. The district court's reasons for refusing to stay the trial pending proceedings in this Court are unpersuasive. At the outset, the district court faulted the government for not filing a summary judgment motion. According to the court, the government "w[as] given the opportunity to file a summary judgment motion arguing that the Court's review should be limited to the administrative record and that trial was therefore unnecessary. (See Docket No. 363)." App., infra, 1a. In the court's view, by "elect[ing] not to file such a motion," the government had "thereby conced[ed], as a procedural matter, that a trial is appropriate." Ibid.

The government did not file a summary judgment motion because the district court made plain that it would be a futile exercise. "Docket No. 363," a September 30 order, was entered in response to the government's motion to resolve the case on cross-motions for summary judgment based on the administrative record, rather than by trial. 18-cv-2921 D. Ct. Doc. 333 (Sept. 18, 2018). In its order, the court said it "remains firmly convinced that a trial will be necessary to resolve the claims in this case." 18-cv-2921 Docket entry No. 363 (emphasis added). The court added that "it seems quite clear from the existing record that there will be

genuine disputes of material fact precluding entry of summary judgment." Ibid. (emphasis added). The court therefore concluded that "it would be far more efficient * * * to proceed directly to trial" and that the government "would be far better off devoting [its] time and resources to preparing [its] pre-trial materials than to preparing summary judgment papers." Ibid. "That said," the court noted, it would "not bar Defendants from making a motion for summary judgment if they wish to spend their time and resources preparing one." Ibid.

The district court's September 30 order left little doubt that the court intended to proceed to trial, and thus the government's decision not to file a summary judgment motion -- during the same time it was seeking relief in the Second Circuit and in this Court -- was in no way a "conce[ssion], as a procedural matter, that a trial is appropriate." App., infra, 1a; cf. Cheney v. United States Dist. Court, 542 U.S. 367, 379 (2004) ("active litigation posture" belies a claim of "'sle[eping] upon [one's] rights'") (citation omitted). And at any rate, the district court reiterated that, whether or not the parties filed summary judgment motions, "[a]ll other dates and deadlines -- including the November 5th trial date -- remain in effect." 18-cv-2921 Docket entry No. 363. So it is unclear how or why the government's decision not to move for summary judgment would have affected the trial date or be grounds to deny a stay of the trial now.

2. The district court also erred in analyzing the stay factors.

A stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation, brackets, and internal quotation marks omitted).

a. The first factor for a stay pending the disposition of a petition for a writ of mandamus, and the first two factors for a stay pending the disposition of a petition for a writ of certiorari, are readily met here. This Court has already determined that the government has satisfied these factors, at least with respect to the deposition of Secretary Ross. 18A375 slip op. 1; see id. at 3 (opinion of Gorsuch, J.) ("Today, the Court signals that it is likely to grant the government's

petition."). And this Court "expressly invite[d] the government to seek review of all of the district court's orders allowing extra-record discovery, including those authorizing the depositions of other senior officials." Id. at 3 (opinion of Gorsuch, J.). Accordingly, and as further explained in the government's simultaneously filed petition, there is a fair prospect that this Court would grant the government's petition for a writ of mandamus or (equivalently) find that the court of appeals erred in denying the government's petitions for writs of mandamus.

The district court's contrary conclusion does not withstand scrutiny. The court acknowledged that this Court's order staying Secretary Ross's deposition meant the government had already shown a likelihood of success on the merits. App., infra, 6a-7a. Yet the district court gave that likelihood of success no weight because the court could simply hold the trial without the Secretary's testimony. Id. at 7a. But the order compelling Secretary Ross's deposition and the order authorizing extra-record discovery both "stem[] from the same doubtful bad faith ruling." 18A375 slip op. 3 (opinion of Gorsuch, J.). So this Court's ultimate ruling on the propriety of Secretary Ross's deposition is likely to bear on the propriety of extra-record discovery in general, and a likelihood of success on the former thus deserves at least some weight in evaluating the likelihood of success on the latter. That is all the more true given that this Court

"expressly invite[d] the government to seek review of all of the district court's orders allowing extra-record discovery." Ibid.

Conversely, the district court thought this Court was "unlikely to disturb" its orders expanding discovery outside the administrative record "in advance of this Court's consideration of the merits" because discovery "will be complete when [the government] file[s] [its] petition with the Supreme Court." App., infra, 8a. In other words, the district court appeared to reason in circular fashion that its refusing to stay the trial meant this Court would not be able to review the government's challenges "in advance" of that trial, thereby justifying the district court's decision not to stay the trial. Taken together, the district court's rationales seem to mean that the government could never demonstrate a likelihood of success to the district court's satisfaction: if the discovery has not yet occurred, the likelihood of success is irrelevant because the court can simply hold a trial without it; if the discovery has occurred, the government's challenge is in effect moot.

The district court also reiterated its original justifications for issuing the discovery orders in the first place. App., infra, 9a. But in addition to the reasons set forth in the government's petition, the cases on which the district court relied (id. at 11a) simply highlight how extraordinary its rulings are. Public Power Council v. Johnson, 674 F.2d 791 (9th Cir. 1982), for

example, expressly said that the plaintiffs "ha[d] not met th[e] burden" to make a "strong showing" of bad faith to allow extra-record discovery, but tentatively allowed other limited discovery to expand the administrative record in light of the unique statute governing the court's review. Id. at 795 (citing the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 et seq.). And in Batalla Vidal v. Duke, No. 16-cv-4756, 2017 WL 4737280 (E.D.N.Y. Oct. 19, 2017), the plaintiffs sought only documents the agency supposedly considered in making its decision -- not discovery to probe the mental processes of the decisionmaker, much less to "target cabinet-level officials." Id. at *4. Battala Vidal also involved a challenge to the DACA program -- and in a related lawsuit this Court halted a similar bid to expand the administrative record. See In re United States, 138 S. Ct. 443 (2017) (per curiam).

Finally, even assuming Tummino v. Von Eschenbach, 427 F. Supp. 2d 212 (E.D.N.Y. 2006), was correctly decided, the facts in that case underscore the weakness of respondents' showing of bad faith here. There, the FDA had delayed acting on a citizen petition for five years in an attempt to "evade[] judicial review," and a General Accounting Office report revealed that agency decisionmakers "were resting on improper concerns about * * * morality" rather than on statutorily permissible factors. Id. at 232-233. By contrast, respondents have made no plausible

allegations here (much less a strong showing) that the Secretary relied on an improper basis in his decisionmaking, let alone delayed making a decision so as to avoid judicial review.

b. There is also "a likelihood that irreparable harm will result from the denial of a stay" of the November 5 trial date. Perry, 558 U.S. at 190; see Conkright, 556 U.S. at 1402. Without a stay, there will be a full trial before the district court into the subjective motives of a sitting Cabinet Secretary, including whether the Secretary harbored secret racial animus in reinstating a citizenship question to the decennial census. The harms to the government from such a proceeding are self-evident, and if the district court determines that in its view the Secretary acted out of racial animus, that harm would not be fully (or even largely) remedied if this Court subsequently confined the district court's review to the administrative record.

The government also will be forced to expend enormous resources engaging in pretrial and trial activities that could ultimately prove to be unnecessary in whole or large part. For example, respondents have indicated that they intend to call 28 witnesses at trial, including ten expert witnesses, see 18-cv-2921 D. Ct. Doc. 386, at 1, 3 (Oct. 19, 2018), and the government conservatively estimated in the district court that it would devote more than 3000 attorney hours to pretrial and trial preparation between last Thursday and the end of the two-week trial starting

on November 5, see 18-cv-2921 D. Ct. Doc. 397, at 3-4 (Oct. 23, 2018).

The government, of course, recognizes the need to devote resources to defend its interests at trial and, in the ordinary course, does not seek extraordinary relief simply because it disagrees with a district court's case-management decisions. But the real-world costs that proceeding to trial would impose on the government, especially one probing the mental processes of a Cabinet Secretary to determine whether he harbors secret racial animus, would unavoidably distract the government, including the Commerce Department, "from the energetic performance of its constitutional duties" in a manner that warrants a stay. Cheney, 542 U.S. at 382.

By contrast, respondents would suffer little harm from a stay of the trial pending disposition of the government's petition in this Court. There is "no hardship from being temporarily denied that which they very likely have no right to at all." 18A375 slip op. 3 (opinion of Gorsuch, J.). More importantly, all parties agree that finalizing the decennial census questionnaire is somewhat time-sensitive. See App., infra, 12a. It would therefore be most efficient for the district court to hold a single proceeding to review the Secretary's decision, with a single round of appellate review. The most straightforward way to achieve that is to stay the trial pending this Court's definitive ruling on

whether the district court must confine its review to the administrative record.

The district court's proposed solution -- to hold <u>two</u> proceedings in parallel -- is the least efficient option of all and would impose substantial costs on the parties and the court system. The district court directed that the parties should "differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record." App., <u>infra</u>, 3a. And the court itself would "differentiat[e] along similar lines in any findings of fact and conclusions of law that it enters." <u>Ibid.</u> The court's solution is essentially for the parties to file two sets of briefs and the court to enter two sets of orders -- in effect, to hold two simultaneous sets of proceedings so that an appellate court can pick which one to review. <u>Id.</u> at 3a-4a.

Even assuming that it is realistic for the district court to disregard all of the improper extra-record evidence (and any conclusions based on that evidence) when trying to evaluate agency action solely on the administrative record, the court's proposal does nothing to change the enormous and irreparable costs that would be imposed on the government from a trial concerning Secretary Ross's mental processes. And it imposes additional costs on respondents and the federal court system too. Moreover, the district court's proposal would routinely justify straying outside

the administrative record to probe a decisionmaker's mental processes, on the ground that the parties can simply file multiple alternative arguments, the court can enter multiple alternative findings, and an appellate court can later sort out whether there was a strong showing of bad faith.

The district court's remaining reasons for finding no irreparable harm are unconvincing. Its assurance (App., infra, 3a) that the government "remain[s] free to argue at trial that the [district court] should disregard all evidence outside the administrative record" is hard to understand given that the court expressly said it would consider both the administrative record and extra-record evidence in effectively parallel proceedings. The court has also consistently ruled against the government on this score -- including in its September 30 order, which essentially declared it fruitless to resist a trial with extra-record evidence, and its October 26 order, which reiterated the court's certainty that extra-record evidence is proper here. And although the court did not view (id. at 4a) "litigation expense" as an irreparable injury, the government's principal concern in that regard is the thousands of hours of attorney time and the attendant distractions from official duties that a trial would entail.

Finally, the district court stated that the government "asserted a new theory of harm" coming from the mere "scrutiny" of executive action. App., infra, 5a-6a. The government recognizes

that, as the district court explained, "the APA expressly invites such scrutiny." Id. at 5a. But the question here is whether the APA invites such scrutiny based 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) (per curiam). The irreparable injury to which the government has pointed is not judicial review of the Secretary's action in the ordinary course, but the extraordinary course of creating a new record -- and holding an impending two-week trial -- to probe the mental processes of a sitting Cabinet Secretary, in the absence of any evidence that the Secretary did not believe his stated rationale or had irreversibly prejudged the issue.

3. The government also respectfully requests that the Court expedite consideration of the simultaneously filed petition for a writ of mandamus or, in the alternative, certiorari. As discussed above, all parties recognize the need to finalize the decennial census questionnaire soon, and the most efficient path forward is to stay the trial pending resolution of whether the district court must evaluate the legality of Secretary Ross's decision based solely on the administrative record, or instead may conduct a trial with live testimony and extra-record evidence probing the Secretary's mental processes. Once this Court has definitively answered that question, the district court can properly perform its task just once.

The parties also would benefit from having sufficient time after this Court's answer for the district court to reach an ultimate decision on the merits followed by prompt appellate review. Accordingly, the government respectfully requests that the Court consider and resolve the government's petition for a writ of mandamus or, in the alternative, certiorari on an expedited basis. In the event the Court chooses to construe the petition as one for a writ of certiorari, the government respectfully requests that the Court forgo an additional round of duplicative briefing and the delay that would entail.

## CONCLUSION

For the foregoing reasons, the Court should expand its previously entered stay to include a stay of the trial in this case, currently set to begin on November 5, 2018, pending disposition of the government's simultaneously filed petition for a writ of mandamus or, in the alternative, certiorari. The government also respectfully requests an immediate administrative stay pending consideration of this application, and that its petition be considered on an expedited basis.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018