Session 402 | Who Counts? The 2020 Census and the Citizenship Question

The United States Supreme Court’s 2019 decision in Department of Commerce v. State of New York (No. 18-966) reviewed Commerce Secretary Wilbur Ross’s decision to add a citizenship question to the 2020 Census. The questions presented in the case were whether Secretary Ross’s decision—which the district court found ignored or never considered key data and evidence counseling against such action—violated the Administrative Procedure Act and the Enumeration Clause of the U.S. Constitution. The case thus raised whether Secretary Ross’s stated justification—to better enforce the Voting Rights Act—was pretextual. Amici, including the Fred T. Korematsu Center, Norman Mineta, and Sharon Sakamoto, filed a brief supporting the Respondents. Their brief drew attention to the Executive Branch’s use of individual responses to the 1940 Census for the purpose of identifying and incarcerating Japanese Americans during World War II. As we approach the 2020 decennial census, this panel will explore the impact of the Supreme Court’s decision finding Secretary Ross’s decision to be “contrived,” as well as the historical, legal, political, and social implications of “who counts” and why it matters.

Moderator:
Julius Chen, Akin Gump Strauss Hauer & Feld LLP

Speakers:
Robert Chang, Seattle University School of Law; Fred T. Korematsu Center for Law and Equality
Sharon Sakamoto, Attorney
Arshi Siddiqui, Akin Gump Strauss Hauer & Feld LLP
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Panelists

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Julius Chen
• Partner, Supreme Court & Appellate Litigation, Akin Gump Strauss Hauer & Feld LLP

Speakers:
Robert Chang
• Professor of Law, Seattle University School of Law
• Executive Director, Fred T. Korematsu Center for Law and Equality

Sharon Sakamoto
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Arshi Siddiqui
• Partner, Public Law & Policy, Akin Gump Strauss Hauer & Feld LLP
Overview

- Background / History of Census
- The 2020 Census and the Citizenship Question
- The Census Litigation
- The Aftermath
- Post-Mortem

What Is the Census?

- **The Enumeration Clause** – U.S. Const. art. I, § 2, cl. 3 (amend. XIV, § 2, cl. 1)
  Congress must carry out an “actual Enumeration” of the population every ten years “in such Manner as [Congress] shall by Law direct” in order to apportion Members of the House of Representatives among the States “according to their respective Numbers”

- **The Census Act** – 13 U.S.C. § 141(a)
  Delegates to the Commerce Secretary the responsibility to conduct census “in such form and content as he may determine,” and “authorize[s] [him] to obtain such other census information as necessary”

- **Presidential Proclamations** – 1910 Census Proclamation (U.S. Census Bureau)
  “The sole purpose of the census is to secure general statistical information . . . . There need be no fear that any disclosure will be made regarding any individual person or his affairs”
Why Does The Census Matter?

• Determines the apportionment of representatives to Congress among the states
• Affects division of congressional, state, and local legislative districts within each state
• Affects distribution of billions of dollars of federal funds
• Used in drafting legislation, urban and regional planning, business planning, and academic and social studies

The Census In Practice

• 1960-2000 – All households received “short form” questionnaire; a smaller fraction of households received “long-form” questionnaire
  • Short-form – asks only a handful of questions (no citizenship question)
  • Long-form – asks about more detailed demographic information (including citizenship question)
• 2010 Census – Administered exclusively through “short form” questionnaire; “long-form” questionnaire phased out with advent of the annual American Community Survey, used to collect demographic data about population (but not for apportionment)
• Self-Response & Follow-up Procedures
  • Most households self-respond to census questionnaire
  • For non-responding households, Census Bureau conducts extensive follow-up, including: (i) in-person visits; (ii) review of administrative records; and (iii) collection of information from a “proxy” (e.g., neighbor/landlord)
Historical Misuse Of Census Data

- Despite assurances that no harm would result from responding to census, the federal government has breached the public’s trust on several occasions throughout history.
- Notable examples occurred during height of WWII:
  - 1942 – Census Bureau disclosed 1940 census data on whereabouts of Japanese Americans to the War Department.
  - 1943 – Census Bureau disclosed 1940 census data to Treasury Department on Japanese Americans residing in Washington, D.C. metro area.

The Citizenship Question

Why Does It Matter?
- Depressed Response Rates
- Inaccurate Results
- Apportionment of Congressional Seats
- Redistricting / Gerrymandering
- Misuse of Data
- Increased Census Costs
- Misallocation of Resources

- A state or locality may, consistent with the Equal Protection Clause, draw legislative districts based on total population rather than total number of voting-age citizens.
- Amicus Brief of Former Directors of the Census Bureau – citizenship question would “invariably lead to a lower response rate to the Census in general” and “frustrate the Census Bureau’s ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats.”
The 2020 Census Litigation

How Was the Question Added?

- **March 2017**: Secretary Ross submits report to Congress that does not include citizenship question

- **April 2017 - March 2018**: Secretary Ross initiates internal inquiries with DOJ and DHS regarding addition of citizenship question; he is warned by Census Bureau’s chief scientist (John Abowd) that a citizenship question “harms the quality” of the census

- **March 20, 2018**: In testimony before Congress, Secretary Ross says adding a citizenship question was “solely” in response to a DOJ request and that he was unaware of any discussions about the question with the White House

- **March 26, 2018**: Secretary Ross announces decision to add a citizenship question and directs the Census Bureau to match responses with existing government records

- **March 29, 2018**: The Census Bureau sends a report of the questions it plans to ask for the 2020 census to Congress, including the new citizenship question approved by Secretary Ross

The 2020 Census Litigation

**Courts**

- **U.S. District Courts**
  - Judge Jesse Furman, Southern District of New York (ACLU + NY States)
  - Judge Richard Seeborg, Northern District of California (California + Cities)
  - Judge George Hazel, District of Maryland (Individual + Institutional Plaintiffs)

- **U.S. Supreme Court**

- **What about the U.S. Courts of Appeals?**
  - “Cert Before Judgment”
  - June 30, 2019 “Printing Deadline”
The 2020 Census Litigation

**Claims**

- Administrative Procedure Act, 5 U.S.C. § 706(2)
  - Addition of citizenship question is contrary to law and arbitrary and capricious

- Enumeration Clause, U.S. Const. art. I, § 2, cl. 3 & amend XIV, § 2
  - Addition of citizenship question will deter participation in census and impedes constitutionally mandated “actual Enumeration”

- Equal Protection Clause, U.S. Const. amend. V
  - Addition of citizenship question was driven by discriminatory intent toward minorities and immigrant communities of color

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The 2020 Census Litigation

**U.S. Supreme Court Proceedings: SDNY Case**

- *Discovery Stage*: Court granted “cert before judgment” on Judge Furman’s order compelling extra-record discovery and depositions of Secretary Ross and Acting Assistant AG, stayed deposition of Secretary Ross, but otherwise allowed proceedings to continue in district court

- *Merits Stage*: Court granted “cert before judgment” on Judge Furman’ decision on merits enjoining citizenship question based on APA claim

- *Post Argument Developments*:
  - Plaintiffs asked Court for limited remand to district court based on discovery that Dr. Thomas Hofeller concocted citizenship question to create structural electoral advantage for “Republicans and Non-Hispanic Whites”
  - Government asked Court to address Equal Protection Clause claim (in light of Fourth Circuit remand to District of Maryland for further factfinding based on Dr. Hofeller files)
The 2020 Census Litigation

U.S. Supreme Court Opinion

- **Judgment:** (5-4) Affirmed in part, reversed in part, and remanded
  - Majority: Chief Justice John Roberts (joined by liberal bloc)
-
- **Holding:** Secretary Ross’s asserted basis for adding citizenship question—to better enforce the Voting Rights Act (VRA)—was pretextual and thus violated the APA
-
- **Reasoning:**
  - Secretary Ross began taking steps to reinstate question a week into his tenure, with no hint that he was concerned about VRA enforcement
  - DOJ actions suggest it was more interested in helping the Commerce Department than in securing citizenship data
  - The stated reason for citizenship question “seems to have been contrived”

The 2020 Census Litigation

U.S. Supreme Court Opinion

- **Other Features of Opinion**
  - *Article III Standing* – at least some plaintiffs satisfy
  - *Enumeration Clause* – no violation in light of broad congressional authority over census
  - *APA (reviewability)* – Commerce Secretary’s decision to reinstate citizenship question is reviewable under APA
  - *APA (arbitrary and capricious review)* – no violation because Secretary’s decision was supported by sufficient evidence and reasonable explanation
  - *Census Act* – no violation because Secretary complied with statutory requirements, and any potential violation was harmless
  - *Equal Protection* – no ruling
## The 2020 Census Litigation

### Justices’ Votes By Issue

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<th>Breyer</th>
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### The Aftermath

- DOJ lawyers initially inform district court that 2020 census would be printed without citizenship question.
- Days later, President Trump tweeted “we are absolutely moving forward” on citizenship question.
- DOJ lawyers then reverse course and inform district court that they “have been instructed to examine whether there is a path forward consistent with the Supreme Court’s decision that would allow us to include the citizenship question on the census.”
- DOJ lawyers withdraw and are replaced by other attorneys.
- President Trump relents and says he will gather citizenship data by other means.
Post-Mortem

Legal Implications

• No formal citizenship question on 2020 census
  • Census Bureau still asks about citizenship on other forms
  • E.g., 2019 Census Test, ACS

• APA pretext rationale likely sui generis
  • Limits holding to “these unusual circumstances”

• Preservation of Supreme Court’s institutional credibility and legitimacy

• Lasting Damage to Federal Government’s Credibility Before Courts
  • Solicitor General’s representations about deadline
  • Motion for sanctions against government lawyers

Post-Mortem

Political Implications

• States with higher noncitizen populations (CA, FL, TX) likely to gain / preserve at least one congressional seat

• Is the damage already done?
  • California set aside $187 million for outreach to counteract fear and mistrust built by proposed addition of census question

• Thwarts efforts by states to use citizen-based redistricting

• House votes (230-198) to hold AG Barr and Wilbur Ross in contempt of Congress

• Political “loss” for Trump Administration
Post Mortem

**Historical Implications**

- Stark parallels to disturbing period in our Nation’s history when census was weaponized against immigrant communities of color
- Supreme Court barely avoided repeating past mistakes by razor-thin margin (1 vote)
- Census litigation emphasizes continuing importance of the coordinated efforts of immigrant and civil rights groups in combating attacks on representative democracy
SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF COMMERCE ET AL. v. NEW YORK ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18–966. Argued April 23, 2019—Decided June 27, 2019

In order to apportion congressional representatives among the States, the Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct,” Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census “in such form and content as he may determine.” 13 U. S. C. §141(a). The Secretary is aided by the Census Bureau, a statistical agency in the Department of Commerce. The population count is also used to allocate federal funds to the States and to draw electoral districts. The census additionally serves as a means of collecting demographic information used for a variety of purposes. There have been 23 decennial censuses since 1790. All but one between 1820 and 2000 asked at least some of the population about their citizenship or place of birth. The question was asked of all households until 1950, and was asked of a fraction of the population on an alternative long-form questionnaire between 1960 and 2000. In 2010, the citizenship question was moved from the census to the American Community Survey, which is sent each year to a small sample of households.

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a citizenship question on the 2020 census questionnaire at the request of the Department of Justice (DOJ), which sought census block level citizenship data to use in enforcing the Voting Rights Act (VRA). The Secretary’s memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action before he chose a fourth option that combined two of the proposed options: reinstate a citizen-
Syllabus

ship question on the decennial census, and use administrative records from other agencies, e.g., the Social Security Administration, to provide additional citizenship data. The Secretary “carefully considered” the possibility that reinstating a citizenship question would depress the response rate, the long history of the citizenship question on the census, and several other factors before concluding that “the need for accurate citizenship data and the limited burden of the question” outweighed fears about a lower response rate.

Here, two separate suits filed in Federal District Court in New York were consolidated: one filed by a group of States, counties, cities, and others, alleging that the Secretary’s decision violated the Enumeration Clause and the requirements of the Administrative Procedure Act; the other filed by non-governmental organizations, adding an equal protection claim. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. In June 2018, the Government submitted the Commerce Department’s “administrative record”—materials that Secretary Ross considered in making his decision—including DOJ’s letter requesting reinstatement of the citizenship question. Shortly thereafter, at DOJ’s urging, the Government supplemented the record with a new memo from the Secretary, which stated that he had begun considering the addition of a citizenship question in early 2017 and had asked whether DOJ would formally request its inclusion. Arguing that the supplemental memo indicated that the record was incomplete, respondents asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of additional materials that confirmed that the Secretary and his staff began exploring reinstatement of a citizenship question shortly after his 2017 confirmation, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to make the request. The court also authorized discovery outside the administrative record, including compelling a deposition of Secretary Ross, which this Court stayed pending further review. After a bench trial, the District Court determined that respondents had standing to sue. On the merits, it ruled that the Secretary’s action was arbitrary and capricious, based on a pretextual rationale, and violated the Census Act, and held that respondents had failed to show an equal protection violation.

Held:

1. At least some respondents have Article III standing. For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must “present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” Davis v.
Syllabus

Federal Election Comm'n, 554 U. S. 724, 733. The District Court concluded that the evidence at trial established a sufficient likelihood that reinstating a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which would cause them to be undercounted and lead to many of the injuries respondents asserted—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources. For purposes of standing, these findings of fact were not so suspect as to be clearly erroneous. Several state respondents have shown that if noncitizen households are undercounted by as little as 2%, they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm. Pp. 8–11.

2. The Enumeration Clause permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. That conclusion follows from Congress’s broad authority over the census, as informed by long and consistent historical practice that “has been open, widespread, and unchallenged since the early days of the Republic.” NLRB v. Noel Canning, 573 U. S. 513, 572 (Scalia, J., concurring in judgment). Pp. 11–13.

3. The Secretary’s decision is reviewable under the Administrative Procedure Act. The APA instructs reviewing courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U. S. C. §706(2)(A), but it makes review unavailable “to the extent that” the agency action is “committed to agency discretion by law,” §701(a)(2). The Census Act confers broad authority on the Secretary, but it does not leave his discretion unbounded. The §701(a)(2) exception is generally limited to “certain categories of administrative decisions that courts traditionally have regarded as ‘committed to agency discretion,’ ” Lincoln v. Vigil, 508 U. S. 182, 191. The taking of the census is not one of those areas. Nor is the statute drawn so that it furnishes no meaningful standard by which to judge the Secretary’s action, which is amenable to review for compliance with several Census Act provisions according to the general requirements of reasoned agency decisionmaking. Because this is not a case in which there is “no law to apply,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 410, the Secretary’s decision is subject to judicial review. Pp. 13–16.

4. The Secretary’s decision was supported by the evidence before him. He examined the Bureau’s analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizen-
Syllabus

ship data from administrative records to fill in the gaps. He then weighed the value of obtaining more complete and accurate citizenship data against the uncertain risk that reinstating a citizenship question would result in a materially lower response rate, and explained why he thought the benefits of his approach outweighed the risk. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census. Pp. 16–20.

5. The District Court also erred in ruling that the Secretary violated two particular provisions of the Census Act, §6(c) and §141(f). Section 6’s first two subsections authorize the Secretary to acquire administrative records from other federal agencies and state and local governments, while subsection (c) requires the Secretary, to the maximum extent possible, to use that information “instead of conducting direct inquiries.” Assuming that §6(c) applies, the Secretary complied with it for essentially the same reasons that his decision was not arbitrary and capricious: Administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. The Secretary also complied with §141(f), which requires him to make a series of reports to Congress about his plans for the census. And even if he had violated that provision, the error would be harmless because he fully informed Congress of, and explained, his decision. Pp. 20–23.

6. In order to permit meaningful judicial review, an agency must “disclose the basis” of its action. Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 167–169. A court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U. S. 519, but it may inquire into “the mental processes of administrative decisionmakers” upon a “strong showing of bad faith or improper behavior,” Overton Park, 401 U. S., at 420. While the District Court prematurely invoked that exception in ordering extra-record discovery here, it was ultimately justified in light of the expanded administrative record. Accordingly, the District Court’s ruling on pretext will be reviewed in light of all the evidence in the record, including the extra-record discovery.

It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. Yet viewing the evidence as a whole, this Court shares the District Court’s conviction that the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ’s request for improved citizenship
data to better enforce the VRA. Several points, taken together, reveal a significant mismatch between the Secretary's decision and the rationale he provided. The record shows that he began taking steps to reinstate the question a week into his tenure, but gives no hint that he was considering VRA enforcement. His director of policy attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Office of Immigration Review before turning to the VRA rationale and DOJ's Civil Rights Division. For its part, DOJ's actions suggest that it was more interested in helping the Commerce Department than in securing the data. Altogether, the evidence tells a story that does not match the Secretary's explanation for his decision. Unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived. The reasoned explanation requirement of administrative law is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. The explanation provided here was more of a distraction. In these unusual circumstances, the District Court was warranted in remanding to the agency. See Florida Power & Light Co. v. Lorion, 470 U. S. 729, 744. Pp. 23–28.


ROBERTS, C. J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III, IV–B, and IV–C, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined; with respect to Part IV–A, in which THOMAS, GINSBURG, BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined; and with respect to Part V, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which GORSUCH and KAVANAUGH, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 18–966

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS v. NEW YORK, ET AL.

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

[June 27, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision on constitutional and statutory grounds. We now decide whether the Secretary violated the Enumeration Clause of the Constitution, the Census Act, or otherwise abused his discretion.

I

A

In order to apportion Members of the House of Representatives among the States, the Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct.” Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census “in such form and content as he may determine.” 13 U. S. C. §141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§2, 21.
Opinion of the Court

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. *Wisconsin v. City of New York*, 517 U. S. 1, 5–6 (1996). The census additionally serves as a means of collecting demographic information, which “is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies.” *Baldrige v. Shapiro*, 455 U. S. 345, 353–354, n. 9 (1982). Over the years, the census has asked questions about (for example) race, sex, age, health, education, occupation, housing, and military service. It has also asked about radio ownership, age at first marriage, and native tongue. The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies. §§221, 8(b), 9(a).

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. Between 1820 and 1950, the question was asked of all households. Between 1960 and 2000, it was asked of about one-fourth to one-sixth of the population. That change was part of a larger effort to simplify the census by asking most people a few basic demographic questions (such as sex, age, race, and marital status) on a short-form questionnaire, while asking a sample of the population more detailed demographic questions on a long-form questionnaire. In explaining the decision to move the citizenship question to the long-form questionnaire, the Census Bureau opined that “general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory
requirement for annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it needed.” Dept. of Commerce, Bureau of Census, 1960 Censuses of Population and Housing 194 (1966).1

In 2010, the year of the latest census, the format changed again. All households received the same questionnaire, which asked about sex, age, race, Hispanic origin, and living arrangements. The more detailed demographic questions previously asked on the long-form questionnaire, including the question about citizenship, were instead asked in the American Community Survey (or ACS), which is sent each year to a rotating sample of about 2.6% of households.

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population. See, e.g., Federation of Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 568 (DC 1980) (“[A]ccording to the Bureau[,] any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count”); Brief for Former Directors of the U. S. Census Bureau as Amici Curiae in Evenwel v. Abbott, O. T. 2014, No. 14–940, p. 25 (inquiring about citizenship would “invariably lead to a lower response rate”).

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at

1The annual alien registration requirement was repealed in 1981. See §11, 95 Stat. 1617 (1981).
the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)—specifically the Act’s ban on diluting the influence of minority voters by depriving them of single-member districts in which they can elect their preferred candidates. App. to Pet. for Cert. 548a. DOJ explained that federal courts determine whether a minority group could constitute a majority in a particular district by looking to the citizen voting-age population of the group. According to DOJ, the existing citizenship data from the American Community Survey was not ideal: It was not reported at the level of the census block, the basic component of legislative districting plans; it had substantial margins of error; and it did not align in time with the census-based population counts used to draw legislative districts. DOJ therefore formally requested reinstatement of the citizenship question on the census questionnaire. Id., at 565a–569a.

The Secretary’s memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. The first was to continue to collect citizenship information in the American Community Survey and attempt to develop a data model that would more accurately estimate citizenship at the census block level. The Secretary rejected that option because the Bureau “did not assert and could not confirm” that such ACS-based data modeling was possible “with a sufficient degree of accuracy.” Id., at 551a.

The second option was to reinstate a citizenship question on the decennial census. The Bureau predicted that doing so would discourage some noncitizens from responding to the census. That would necessitate increased “non-response follow up” operations—procedures the Bureau uses to attempt to count people who have not responded to the census—and potentially lead to a less accurate count of the total population.
Option three was to use administrative records from other agencies, such as the Social Security Administration and Citizenship and Immigration Services, to provide DOJ with citizenship data. The Census Bureau recommended this option, and the Secretary found it a “potentially appealing solution” because the Bureau has long used administrative records to supplement and improve census data. \textit{Id.}, at 554a. But the Secretary concluded that administrative records alone were inadequate because they were missing for more than 10% of the population.

The Secretary ultimately asked the Census Bureau to develop a fourth option that would combine options two and three: reinstate a citizenship question on the census questionnaire, and also use the time remaining until the 2020 census to “further enhance” the Bureau’s “administrative record data sets, protocols, and statistical models.” \textit{Id.}, at 555a. The memo explained that, in the Secretary’s judgment, the fourth option would provide DOJ with the “most complete and accurate” citizen voting-age population data in response to its request. \textit{Id.}, at 556a.

The Secretary “carefully considered” the possibility that reinstating a citizenship question would depress the response rate. \textit{Ibid.} But after evaluating the Bureau’s “limited empirical evidence” on the question—evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to “determine definitively” whether inquiring about citizenship in the census would materially affect response rates. \textit{Id.}, at 557a, 562a. He also noted the long history of the citizenship question on the census, as well as the facts that the United Nations recommends collecting census-based citizenship information, and other major democracies such as Australia, Canada, France, Indonesia, Ireland, Germany, Mexico, Spain, and the United Kingdom inquire about citizenship in their censuses. Altogether,
the Secretary determined that “the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.” *Id.*, at 557a.

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. They alleged that the Secretary’s decision violated the Enumeration Clause of the Constitution and the requirements of the Administrative Procedure Act. The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. They added an equal protection claim. The District Court consolidated the two cases. Both groups of plaintiffs are respondents here.

The Government moved to dismiss the lawsuits, arguing that the Secretary’s decision was unreviewable and that respondents had failed to state cognizable claims under the Enumeration Clause and the Equal Protection Clause. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. 315 F. Supp. 3d 766 (SDNY 2018).

In June 2018, the Government submitted to the District Court the Commerce Department’s “administrative record”: the materials that Secretary Ross considered in making his decision. That record included DOJ’s December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ’s urging, the Gov-
ernment supplemented the record with a new memo from the Secretary, “intended to provide further background and context regarding” his March 2018 memo. App. to Pet. for Cert. 546a. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ “would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act.” Ibid. According to the Secretary, DOJ “formally” requested reinstatement of the citizenship question after that inquiry. Ibid.

Respondents argued that the supplemental memo indicated that the Government had submitted an incomplete record of the materials considered by the Secretary. They asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 420 (1971). The court also granted that request, authorizing expert discovery and depositions of certain DOJ and Commerce Department officials.
In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ’s Civil Rights Division. We granted the Government’s request to stay the Secretary’s deposition pending further review, but we declined to stay the Acting AAG’s deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and issued findings of fact and conclusions of law on respondents’ statutory and equal protection claims. After determining that respondents had standing to sue, the District Court ruled that the Secretary’s action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act. On the equal protection claim, however, the District Court concluded that respondents had not met their burden of showing that the Secretary was motivated by discriminatory animus. The court granted judgment to respondents on their statutory claims, vacated the Secretary’s decision, and enjoined him from reinstating the citizenship question until he cured the legal errors the court had identified. 351 F. Supp. 3d 502 (SDNY 2019).

The Government appealed to the Second Circuit, but also filed a petition for writ of certiorari before judgment, asking this Court to review the District Court’s decision directly because the case involved an issue of imperative public importance, and the census questionnaire needed to be finalized for printing by the end of June 2019. We granted the petition. 586 U. S. ___ (2019). At the Government’s request, we later ordered the parties to address whether the Enumeration Clause provided an alternative basis to affirm. 586 U. S. ___ (2019).

II

We begin with jurisdiction. Article III of the Constitu-
tion limits federal courts to deciding “Cases” and “Controversies.” For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue. The doctrine of standing “limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong” and “confines the federal courts to a properly judicial role.” *Spokeo, Inc. v. Robins*, 578 U. S. ___, ___ (2016) (slip op., at 6). To have standing, a plaintiff must “present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” *Davis v. Federal Election Comm’n*, 554 U. S. 724, 733 (2008).

Respondents assert a number of injuries—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources—all of which turn on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count. Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted. These are primarily future injuries, which “may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U. S. 149, 158 (2014) (internal quotation marks omitted).

The District Court concluded that the evidence at trial established a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead to many of respondents’ asserted injuries. For purposes of standing, these findings of fact were not so suspect as to be clearly erroneous.

We therefore agree that at least some respondents have
Article III standing. Several state respondents here have shown that if noncitizen households are undercounted by as little as 2%—lower than the District Court’s 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm.

The Government contends, however, that any harm to respondents is not fairly traceable to the Secretary’s decision, because such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census. The chain of causation is made even more tenuous, the Government argues, by the fact that such intervening, unlawful third-party action would be motivated by unfounded fears that the Federal Government will itself break the law by using noncitizens’ answers against them for law enforcement purposes. The Government invokes our steady refusal 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), particularly speculation about future unlawful conduct, *Los Angeles v. Lyons*, 461 U. S. 95, 105 (1983).

But we are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential. The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau’s theory that the discrepancy is likely attributable at least in part to noncitizens’ reluctance to answer a citizenship question. Respondents’ theory of standing
thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties. Cf. Bennett v. Spear, 520 U. S. 154, 169–170 (1997); Davis, 554 U. S., at 734–735. Because Article III “requires no more than de facto causality,” Block v. Meese, 793 F. 2d 1303, 1309 (CADC 1986) (Scalia, J.), traceability is satisfied here. We may therefore consider the merits of respondents’ claims, at least as far as the Constitution is concerned.

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary’s decision. The text of that clause “vests Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’” and Congress “has delegated its broad authority over the census to the Secretary.” Wisconsin, 517 U. S., at 19. Given that expansive grant of authority, we have rejected challenges to the conduct of the census where the Secretary’s decisions bore a “reasonable relationship to the accomplishment of an actual enumeration.” Id., at 20.

Respondents ask us to evaluate the Secretary’s decision to reinstate a citizenship question under that “reasonable relationship” standard, but we agree with the District Court that a different analysis is needed here. Our cases applying that standard concerned decisions about the population count itself—such as a postcensus decision not to use a particular method to adjust an undercount, id., at 4, and a decision to allocate overseas military personnel to their home States, Franklin v. Massachusetts, 505 U. S. 788, 790–791 (1992). We have never applied the standard to decisions about what kinds of demographic information to collect in the course of taking the census. Indeed, as the District Court recognized, applying the “reasonable relationship” standard to every census-related decision “would
lead to the conclusion that it is unconstitutional to ask any demographic question on the census” because “asking such questions bears no relationship whatsoever to the goal of an accurate headcount.” 315 F. Supp. 3d, at 804–805. Yet demographic questions have been asked in every census since 1790, and questions about citizenship in particular have been asked for nearly as long. Like the District Court, we decline respondents’ invitation to measure the constitutionality of the citizenship question by a standard that would seem to render every census since 1790 unconstitutional.

We look instead to Congress’s broad authority over the census, as informed by long and consistent historical practice. All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. See id., at 801. Since 1820, it has sought, or permitted the Secretary to seek, information about citizenship in particular. Federal courts have approved the practice of collecting demographic data in the census. See, e.g., United States v. Moriarity, 106 F. 886, 891 (CC SDNY 1901) (duty to take a census of population “does not prohibit the gathering of other statistics, if ‘necessary and proper,’ for the intelligent exercise of other powers enumerated in the constitution”). While we have never faced the question directly, we have assumed that Congress has the power to use the census for information-gathering purposes, see Legal Tender Cases, 12 Wall. 457, 536 (1871), and we have recognized the role of the census as a “linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country,” Department of Commerce v.
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That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that “has been open, widespread, and unchallenged since the early days of the Republic.” NLRB v. Noel Canning, 573 U. S. 513, 572 (2014) (Scalia, J., concurring in judgment); see also Wisconsin, 517 U. S., at 21 (noting “importance of historical practice” in census context). In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. We need not, and do not, decide the constitutionality of any other question that Congress or the Secretary might decide to include in the census.

IV

The District Court set aside the Secretary’s decision to reinstate a citizenship question on the grounds that the Secretary acted arbitrarily and violated certain provisions of the Census Act. The Government contests those rulings, but also argues that the Secretary’s decision was not judicially reviewable under the Administrative Procedure Act in the first place. We begin with that contention.

A

The Administrative Procedure Act embodies a “basic presumption of judicial review,” Abbott Laboratories v. Gardner, 387 U. S. 136, 140 (1967), and instructs reviewing courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U. S. C. §706(2)(A). Review is not available, however, “to the extent that” a relevant statute precludes it, §701(a)(1), or the agency action is “committed to agency discretion by law,” §701(a)(2). The Government
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argues that the Census Act commits to the Secretary’s unreviewable discretion decisions about what questions to include on the decennial census questionnaire.

We disagree. To be sure, the Act confers broad authority on the Secretary. Section 141(a) instructs him to take “a decennial census of population” in “such form and content as he may determine, including the use of sampling procedures and special surveys.” 13 U. S. C. §141. The Act defines “census of population” to mean “a census of population, housing, and matters relating to population and housing,” §141(g), and it authorizes the Secretary, in “connection with any such census,” to “obtain such other census information as necessary,” §141(a). It also states 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.” §5. And it authorizes him to acquire materials, such as administrative records, from other federal, state, and local agencies in aid of conducting the census. §6. Those provisions leave much to the Secretary’s discretion. See Wisconsin, 517 U. S., at 19 (“Through the Census Act, Congress has delegated its broad authority over the census to the Secretary.”).

But they do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the §701(a)(2) exception for action committed to agency discretion “quite narrowly, restricting it to ‘those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U. S. __, __ (2018) (slip op., at 12) (quoting Lincoln v. Vigil, 508 U. S. 182, 191 (1993)). And we have generally limited the exception to “certain categories of administrative decisions
that courts traditionally have regarded as ‘committed to agency discretion,’” \textit{id.}, at 191, such as a decision not to institute enforcement proceedings, \textit{Heckler v. Chaney}, 470 U. S. 821, 831–832 (1985), or a decision by an intelligence agency to terminate an employee in the interest of national security, \textit{Webster v. Doe}, 486 U. S. 592, 600–601 (1988).

The taking of the census is not one of those areas traditionally committed to agency discretion. We and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking. See, \textit{e.g.}, \textit{Department of Commerce}, 525 U. S. 316; \textit{Wisconsin}, 517 U. S. 1; \textit{Carey v. Klutznick}, 637 F. 2d 834 (CA2 1980).

Nor is the statute here drawn so that it furnishes no meaningful standard by which to judge the Secretary’s action. In contrast to the National Security Act in \textit{Webster}, which gave the Director of Central Intelligence discretion to terminate employees whenever he “deem[ed]” it “advisable,” 486 U. S., at 594, the Census Act constrains the Secretary’s authority to determine the form and content of the census in a number of ways. Section 195, for example, governs the extent to which he can use statistical sampling. Section 6(c), which will be considered in more detail below, circumscribes his power in certain circumstances to collect information through direct inquiries when administrative records are available. More generally, by mandating a population count that will be used to apportion representatives, see §141(b), 2 U. S. C. §2a, the Act imposes “a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.” \textit{Franklin}, 505 U. S., at 819–820 (Stevens, J., concurring in part and concurring in judgment).

The Secretary’s decision to reinstate a citizenship question is amenable to review for compliance with those and other provisions of the Census Act, according to the general requirements of reasoned agency decisionmaking.
Because this is not a case in which there is “no law to apply,” Overton Park, 401 U. S., at 410, the Secretary’s decision is subject to judicial review.

B

At the heart of this suit is respondents’ claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary’s exercise of discretion under the deferential “arbitrary and capricious” standard. See 5 U. S. C. §706(2)(A). Our scope of review is “narrow”: we determine only whether the Secretary examined “the relevant data” and articulated “a satisfactory explanation” for his decision, “including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43 (1983) (internal quotation marks omitted). We may not substitute our judgment for that of the Secretary, ibid., but instead must confine ourselves to ensuring that he remained “within the bounds of reasoned decisionmaking,” Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U. S. 87, 105 (1983).

The District Court set aside the Secretary’s decision for two independent reasons: His course of action was not supported by the evidence before him, and his stated rationale was pretextual. We focus on the first point here and take up the question of pretext later.

The Secretary examined the Bureau’s analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He considered but rejected the Bureau’s recommendation to use administrative records alone. As he explained, records are lacking for about 10% of the population, so the Bureau would still need to estimate citizenship for millions of voting-age
people. Asking a citizenship question of everyone, the Secretary reasoned, would eliminate the need to estimate citizenship for many of those people. And supplementing census responses with administrative record data would help complete the picture and allow the Bureau to better estimate citizenship for the smaller set of cases where it was still necessary to do so.

The evidence before the Secretary supported that decision. As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau’s estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

The Bureau explained that the “relative quality” of the citizenship data generated by each approach would depend on the “relative importance of the errors” in each, but it was not able to “quantify the relative magnitude of the errors across the alternatives.” App. 148. The Bureau nonetheless recommended using administrative records alone because it had “high confidence” that it could develop an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available, and it thought the resulting citizenship data would be of superior quality. Id., at 146, 158–159. But when the time came for the Secretary to make a decision, the model did not yet exist, and even if it had, there was no way to gauge its relative accuracy. As the Bureau put it, “we will most likely never possess a fully adequate
truth deck to benchmark” the model—which appears to be bureaucratic for “maybe, maybe not.” *Id.*, at 146. The Secretary opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

The District Court overruled that choice, agreeing with the Bureau’s assessment that its recommended approach would yield higher quality citizenship data on the whole. But the choice between reasonable policy alternatives in the face of uncertainty was the Secretary’s to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency.

The Secretary then weighed the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households. In the Secretary’s view, that risk was difficult to assess. The Bureau predicted a 5.1% decline in response rates among noncitizen households if the citizenship question were reinstated. It relied for that prediction primarily on studies showing that, while noncitizens had responded at lower rates than citizens to the 2000 short-form and 2010 censuses, which did not ask about citizenship, they responded at even lower rates than citizens to the 2000 long-form census and the 2010 American Community Survey, which did ask about citizenship. The Bureau thought it was reasonable to infer that the citizenship question accounted for the differential decline in noncitizen re-

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2Several months after the Secretary made his decision, the Bureau updated its prediction to 5.8%, the figure the District Court later relied on in its standing analysis. See 351 F. Supp. 3d 502, 579 (SDNY 2019).
sponses. But, the Secretary explained, the Bureau was unable to rule out other causes. For one thing, the evidence before the Secretary suggested that noncitizen households tend to be more distrustful of, and less likely to respond to, any government effort to collect information. For another, both the 2000 long-form census and 2010 ACS asked over 45 questions on a range of topics, including employment, income, and housing characteristics. Noncitizen households might disproportionately fail to respond to a lengthy and intrusive Government questionnaire for a number of reasons besides reluctance to answer a citizenship question—reasons relating to education level, socioeconomic status, and less exposure to Government outreach efforts. See App. to Pet. for Cert. 553a–554a, 557a–558a.

The Secretary justifiably found the Bureau’s analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstituting a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census.

JUSTICE BREYER would conclude otherwise, but only by subordinating the Secretary’s policymaking discretion to the Bureau’s technocratic expertise. JUSTICE BREYER’s analysis treats the Bureau’s (pessimistic) prediction about response rates and (optimistic) assumptions about its data modeling abilities as touchstones of substantive reasonableness rather than simply evidence for the Secretary to consider. He suggests that the Secretary should have deferred to the Bureau or at least offered some special justification for drawing his own inferences and adopting his own assumptions. But the Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options. And the evidence before
the Secretary hardly led ineluctably to just one reasonable course of action. It called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty. The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so. It is not for us to ask whether his decision was “the best one possible” or even whether it was “better than the alternatives.” *FERC v. Electric Power Supply Assn.*, 577 U. S. ___, ___ (2016) (slip op., at 30). By second-guessing the Secretary’s weighing of risks and benefits and penalizing him for departing from the Bureau’s inferences and assumptions, JUSTICE BREYER—like the District Court—substitutes his judgment for that of the agency.

C

The District Court also ruled that the Secretary violated two particular provisions of the Census Act, §6(c) and §141(f).

Section 6 has three subsections. Subsections (a) and (b) authorize the Secretary to acquire administrative records from other federal agencies and from state and local governments. Subsection (c) states:

“To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in

3 The full text of subsections (a) and (b) provides:

“(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

“(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.” 13 U. S. C. §6.
subsection (a) or (b) of this section instead of conducting direct inquiries.” 13 U. S. C. §6(c).

The District Court held, and respondents argue, that the Secretary failed to comply with §6(c) because he opted to collect citizenship data using direct inquiries when it was possible to provide DOJ with data from administrative records alone.

At the outset, §6(c) may not even apply here. It governs the Secretary’s choices with respect to “statistics required.” The parties have assumed that phrase refers to census-related data that the Secretary wishes to acquire, but it may instead refer to particular kinds of statistics that other provisions of the Census Act actually do require the Secretary to collect and publish. See, e.g., §41 (“The Secretary shall collect and publish statistics concerning [cotton and cotton production].”); §61 (“The Secretary shall collect, collate, and publish monthly statistics concerning [vegetable and animal oils and the like].”); §91 (“The Secretary shall collect and publish quarterly financial statistics of business operations, organization, practices, management, and relation to other businesses.”). If so, §6(c) would seem to have nothing to say about the Secretary’s collection of census-related citizenship data, which is not a “statistic” he is “required” to collect.

Regardless, assuming the provision applies, the Secretary complied with it, for essentially the same reasons that his decision was not arbitrary and capricious. As he explained, administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. He thus could not, “consistent with” the kind and quality of the “statistics required,” use administrative records instead of asking about citizenship directly. Respondents’ arguments to the contrary rehash their disagreement with the Secretary’s policy judgment about which approach would yield the most complete and accu-
We turn now to §141(f), which requires the Secretary to report to Congress about his plans for the census. Paragraph (1) instructs him to submit, at least three years before the census date, a report containing his “determination of the subjects proposed to be included, and the types of information to be compiled,” in the census. Paragraph (2) then tells him to submit, at least two years before the census date, a report containing his “determination of the questions proposed to be included” in the census. Paragraph (3) provides:

“[A]fter submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, [he shall submit] a report containing the Secretary’s determination of the subjects, types of information, or questions as proposed to be modified.”

The Secretary timely submitted his paragraph (1) report in March 2017. It did not mention citizenship. In December 2017, he received DOJ’s formal request. Three months later, in March 2018, he timely submitted his paragraph (2) report. It did propose asking a question about citizenship.

The District Court held that the Secretary’s failure to mention citizenship in his March 2017 report violated §141(f)(1) and provided an independent basis to set aside his action. Assuming without deciding that the Secretary’s compliance with the reporting requirement is for courts—rather than Congress—to police, we disagree. The Secretary’s March 2018 report satisfied the requirements
of paragraph (3): By informing Congress that he proposed to include a citizenship question, the Secretary necessarily also informed Congress that he proposed to modify the original list of subjects that he submitted in the March 2017 report. Nothing in §141(f) suggests that the same report cannot simultaneously fulfill the requirements of paragraphs (2) and (3). And to the extent paragraph (3) requires the Secretary to explain his finding of new circumstances, he did so in his March 2018 memo, which described DOJ’s intervening request.

In any event, even if we agreed with the District Court that the Secretary technically violated §141(f) by submitting a paragraph (2) report that doubled as a paragraph (3) report, the error would surely be harmless in these circumstances, where the Secretary nonetheless fully informed Congress of, and explained, his decision. See 5 U. S. C. §706 (in reviewing agency action, “due account shall be taken of the rule of prejudicial error”).

V

We now consider the District Court’s determination that the Secretary’s decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency.

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must “disclose the basis” of its action. Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 167–169 (1962) (internal quotation marks omitted); see also SEC v. Chenery Corp., 318 U. S. 80, 94 (1943) (“[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.”).

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.
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Third, a court may not reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons. See Jagers v. Federal Crop Ins. Corp., 758 F. 3d 1179, 1185–1186 (CA10 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”). Relatedly, a court may not set aside an agency’s policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration’s priorities. Agency policymaking is not a “rarified technocratic process, unaffected by political considerations or the presence of Presidential power.” Sierra Club v. Costle, 657 F. 2d 298, 408 (CADC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Finally, we have recognized a narrow exception to the general rule against inquiring into “the mental processes of administrative decisionmakers.” Overton Park, 401 U. S., at 420. On a “strong showing of bad faith or improper behavior,” such an inquiry may be warranted and may justify extra-record discovery. Ibid.

The District Court invoked that exception in ordering extra-record discovery here. Although that order was
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premature, we think it was ultimately justified in light of the expanded administrative record. Recall that shortly after this litigation began, the Secretary, prodded by DOJ, filed a supplemental memo that added new, pertinent information to the administrative record. The memo disclosed that the Secretary had been considering the citizenship question for some time and that Commerce had inquired whether DOJ would formally request reinstatement of the question. That supplemental memo prompted respondents to move for both completion of the administrative record and extra-record discovery. The District Court granted both requests at the same hearing, agreeing with respondents that the Government had submitted an incomplete administrative record and that the existing evidence supported a prima facie showing that the VRA rationale was pretextual.

The Government did not challenge the court’s conclusion that the administrative record was incomplete, and the parties stipulated to the inclusion of more than 12,000 pages of internal deliberative materials as part of the administrative record, materials that the court later held were sufficient on their own to demonstrate pretext. The Government did, however, challenge the District Court’s order authorizing extra-record discovery, as well as the court’s later orders compelling depositions of the Secretary and of the Acting Assistant Attorney General for DOJ’s Civil Rights Division.

We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred (which did not include the
deposition of the Secretary himself). We accordingly review the District Court’s ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court’s view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question “well before” receiving DOJ’s request, and did so for reasons unknown but unrelated to the VRA. 351 F. Supp. 3d, at 660.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court’s conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ’s request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his
tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary’s Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to “find the best rationale.” *Id.*, at 551. The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ’s Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ’s Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ’s interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau’s offer to discuss alternative ways to meet DOJ’s stated need for improved citizenship data, further suggesting a lack of interest on DOJ’s part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary’s telling, Commerce was simply acting on a routine data request from another agency. Yet the
Opinion of the Court

materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are “not required to exhibit a naïveté from which ordinary citizens are free.” United States v. Stanchich, 550 F.2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. See Florida Power & Light Co. v. Lorion, 470 U. S. 729, 744 (1985). We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.
Opinion of the Court

*  *  *

The judgment of the United States District Court for the Southern District of New York is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*
Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

No. 18–966

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS
v. NEW YORK, ET AL.

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

[June 27, 2019]

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, concurring in part and dissenting in part.

In March 2018, the Secretary of Commerce exercised his broad discretion over the administration of the decennial census to resume a nearly unbroken practice of asking a question relating to citizenship. Our only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision. The Court correctly answers these questions in the affirmative. Ante, at 11–23. That ought to end our inquiry.

The Court, however, goes further. For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency’s otherwise adequate rationale. Echoing the din of suspicion and distrust that seems to typify modern discourse, the Court declares the Secretary’s memorandum “pretextual” because, “viewing the evidence as a whole,” his explanation that including a citizenship question on the census would help enforce the Voting Rights Act (VRA) “seems to have been contrived.” Ante, at 23, 26, 28. The Court does not hold that the Secretary merely had additional, unstated reasons for reinstating the citizenship question. Rather, it holds that the Secretary’s stated rationale did not factor at all into his decision.
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The Court’s holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA).

Unable to identify any legal problem with the Secretary’s reasoning, the Court imputes one by concluding that he must not be telling the truth. The Court therefore upholds the decision of the District Court—which, in turn, was transparently based on the application of an administration-specific standard. App. to Pet. for Cert. 527a (crediting respondents’ allegations that “the current Department of Justice has shown little interest in enforcing the” VRA (emphasis added)).

The law requires a more impartial approach. Even assuming we are authorized to engage in the review undertaken by the Court—which is far from clear—we have often stated that courts reviewing agency action owe the Executive a “presumption of regularity.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). The Court pays only lip service to this principle. But, the evidence falls far short of supporting its decision. The Court, I fear, will come to regret inventing the principles it uses to achieve today’s result. I respectfully dissent from Part V of the opinion of the Court.1

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1 JUSTICE KAVANAUGH and I join Parts I, II, III, and IV of the opinion.
As the Court explains, federal law directs the Secretary of Commerce to “take a decennial census.” 13 U. S. C. §141(a); see U. S. Const., Art. I, §2, cl. 3; Amdt. XIV, §2; ante, at 1–2. The discretion afforded the Secretary is extremely broad. Subject only to constitutional limitations and a handful of inapposite statutory requirements, the Secretary is expressly authorized to “determine the inquiries” on the census questionnaire and to conduct the census “in such form and content as he may determine.” §§5, 141(a); see ante, at 14–16, 20–23. Prior census questionnaires have included questions ranging from sex, age, and race to commute, education, and radio ownership. And between 1820 and 2010, every decennial census questionnaire but one asked some segment of the population a question related to citizenship. The 2010 census was the first since 1840 that did not include any such question.

In March 2018, the Secretary issued a memorandum reinstating a citizenship question on the 2020 census. He explained that the Department of Justice (DOJ) had formally requested reinstatement of the question because the data obtained would help enforce §2 of the VRA. He further explained that the question had been well tested in light of its extensive previous use, that he had consulted with the Census Bureau on the proposal, and that his final
decision incorporated feedback from the Bureau. He recognized that staff at the Bureau believed that better data could be obtained through modeling and reliance on existing records, but he disagreed with that assessment, explaining that the data was inconclusive and that he thought it preferable to ask the question directly of the entire population. Respondents brought suit, seeking judicial review of the Secretary’s decision under the APA, 5 U. S. C. §706.

II

As relevant here, the APA requires courts to “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” §706(2)(A). We have emphasized that “[r]eview under the arbitrary and capricious standard is deferential.” National Assn. of Home Builders v. Defenders of Wildlife, 551 U. S. 644, 658 (2007); see Glickman v. Wileman Brothers & Elliott, Inc., 521 U. S. 457, 466, n. 8 (1997). It requires the reviewing court to determine whether the agency “‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.’” FCC v. Fox Television Stations, Inc., 556 U. S. 502, 513 (2009). We have described this as a “‘narrow’ standard of review” under which the reviewing court cannot “‘substitute its judgment for that of the agency,’ and should ‘uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.’” Id., at 513–514 (citation omitted); accord, Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43 (1983).
Part IV–B of the opinion of the Court correctly applies this standard to conclude that the Secretary’s decision survives ordinary arbitrary-and-capricious review. That holding should end our inquiry.

But the opinion continues. Acknowledging that “no particular step” in the proceedings here “stands out as inappropriate or defective,” even after reviewing “all the evidence in the record . . ., including the extra-record discovery,” ante, at 26, the Court nevertheless agrees with the District Court that the Secretary’s rationale for reinstating the citizenship question was “pretex[ual]—that is, that the real reason for his decision was something other than the sole reason he put forward in his memorandum, namely enhancement of DOJ’s VRA enforcement efforts.” 351 F. Supp. 3d 502, 660 (SDNY 2019); see ante, at 28.

According to the Court, something just “seems” wrong. Ibid.

This conclusion is extraordinary. The Court engages in an unauthorized inquiry into evidence not properly before us to reach an unsupported conclusion. Moreover, each step of the inquiry offends the presumption of regularity we owe the Executive. The judgment of the District Court should be reversed.

A

Section 706(2) of the APA contemplates review of the administrative “record” to determine whether an agency’s “action, findings, and conclusions” satisfy six specified standards. See §§706(2)(A)–(F). None instructs the Court to inquire into pretext. Consistent with this statutory text, we have held that a court is “ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.” Ante, at 23

and “procedur[al]” requirements, and is otherwise “in accordance with law”).
Opinion of THOMAS, J.

(citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U. S. 519, 549 (1978)); see SEC v. Chenery Corp., 318 U. S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based”). If an agency’s stated findings and conclusions withstand scrutiny, the APA does not permit a court to set aside the decision solely because the agency had “other unstated reasons” for its decision, such as “political considerations” or the “Administration’s priorities.” Ante, at 24.

Unsurprisingly, then, this Court has never held an agency decision arbitrary and capricious on the ground that its supporting rationale was “pretextual.” Nor has it previously suggested that this was even a possibility. Under “settled propositions” of administrative law, ante, at 23, pretext is virtually never an appropriate or relevant inquiry for a reviewing court to undertake.

Respondents conceptualize pretext as a subset of “arbitrary and capricious” review. It is far from clear that they are correct. But even if they were, an agency action is not arbitrary or capricious merely because the decisionmaker has other, unstated reasons for the decision. Ante, at 24. Nor is an agency action arbitrary and capricious merely because the decisionmaker was “inclined” to accomplish it before confirming that the law and facts supported that inclination. In re Dept. of Commerce, 586 U. S. ___, ___ (2018) (GORSUCH, J., concurring in part and dissenting in part) (slip op., at 2).

Accordingly, even under respondents’ approach, a showing of pretext could render an agency action arbitrary and capricious only in the infinitesimally small number of cases in which the administrative record establishes that an agency’s stated rationale did not factor at all into the decision, thereby depriving the action of an adequate
supporting rationale. This showing is extremely difficult to make because the administrative record will rarely, if ever, contain evidence sufficient to show that an agency’s stated rationale did not actually factor into its decision. And we have stated that a “strong showing of bad faith or improper behavior” is necessary to venture beyond the agency’s “administrative findings” and inquire into “the mental processes of administrative decisionmakers.” Overton Park, 401 U. S., at 420. We have never before found Overton Park’s exception satisfied, much less invalidated an agency action based on “pretext.”

Undergirding our arbitrary-and-capricious analysis is our longstanding precedent affording the Executive a “presumption of regularity.” Id., at 415; see United States v. Chemical Foundation, Inc., 272 U. S. 1, 14–15 (1926). This presumption reflects respect for a coordinate branch of government whose officers not only take an oath to

4We do not have before us a claim that information outside the administrative record calls into question the legality of an agency action based on an unstated, unlawful bias or motivation (e.g., a claim of religious discrimination under the Free Exercise Clause). But to the extent such a claim is viable, the analysis would have nothing to do with the arbitrary-and-capricious review pressed by respondents. See §§706(2)(A)–(C) (addressing agency actions that violate “constitutional” or “statutory” requirements, or that “otherwise [are] not in accordance with law”).

5Insofar as Overton Park authorizes an exception to review on the administrative record, it has been criticized as having “no textual grounding in the APA” and as “created by the Court, without citation or explanation, to facilitate Article III review.” Gavoor & Platt, Administrative Records and the Courts, 67 U. Kan. L. Rev. 1, 44 (2018); see id., at 22 (further arguing that the exception was “neither presented by the facts of the case nor briefed by the parties”). The legitimacy and scope of the exception—which by its terms contemplates only “administrative officials who participated in the decision . . . giving] testimony explaining their action,” Overton Park, 401 U. S., at 420—is an important question that may warrant future consideration. But because the Court’s holding is incorrect regardless of the validity of the Overton Park exception, I will apply it here.
support the Constitution, as we do, Art. VI, but also are
charged with “faithfully execut[ing]” our laws, Art. II, §3.
See United States v. Morgan, 313 U. S. 409, 422 (1941)
(presumption of regularity ensures that the “integrity of
the administrative process” is appropriately respected). In
practice, then, we give the benefit of the doubt to the
agency.

B

The Court errs at the outset by proceeding beyond the
administrative record to evaluate pretext. Respondents
have not made a “strong showing of bad faith or improper
behavior.” Overton Park, supra, at 420.

The District Court’s initial order granting extra-record
discovery relied on four categories of evidence:

“evidence that [the Secretary] was predisposed to re-
instate the citizenship question when he took office;
that the [DOJ] hadn’t expressed a desire for more de-
tailed citizenship data until the Secretary solicited its
view; that he overruled the objections of his agency’s
career staff; and that he declined to order more test-
ing of the question given its long history.” Dept. of
Commerce, 586 U. S., at ___ (slip op., at 2).

None of this comes close to showing bad faith or improper
behavior. Indeed, there is nothing even “unusual about a
new cabinet secretary coming to office inclined to favor a
different policy direction, soliciting support from other
agencies to bolster his views, disagreeing with staff, or
cutting through red tape.” Ibid. Today all Members of the
Court who reach the question agree that the District
Court abused its discretion in ordering extra-record dis-
covery based on this evidence. Ante, at 25 (“We agree with
the Government that the District Court should not have
ordered extra-record discovery when it did”).

Nevertheless, the Court excuses the error because, in its
view, “the new material that the parties [later] stipulated should have been part of the administrative record . . . largely justified such extra-record discovery as occurred.” Ibid. Given the requirement that respondents make a “strong showing” of bad faith, one would expect the Court to identify which “new material” supported such a showing. It does not. Nor does the Court square its suggestion that some of the extra-record discovery was not “justified” with its consideration of “all . . . the extra-record discovery.” Ante, at 25–26. Regardless, I assume that the Court has in mind the administrative-record materials that the District Court would later rely on to establish pretext:

“evidence that [the Secretary] had made the decision to add the citizenship question well before DOJ requested its addition in December 2017; the absence of any mention, at all, of VRA enforcement in the discussions of adding the question that preceded the [DOJ] Letter; unsuccessful attempts by Commerce Department staff to shop around for a request by another agency regarding citizenship data; and [the Secretary’s] personal outreach to Attorney General Sessions, followed by the [DOJ] Letter; not to mention the conspicuous procedural irregularities that accompanied the decision to add the question.” 351 F. Supp. 3d, at 661 (citations omitted).

This evidence fails to make a strong showing of bad faith or improper behavior. Taken together, it proves at most that the Secretary was predisposed to add a citizenship question to the census and took steps to achieve that end before settling on the VRA rationale he included in his memorandum. Perhaps he had reasons for adding the citizenship question other than the VRA, but by the Court’s own telling, that does not amount to evidence of bad faith or improper behavior. Ante, at 24; see Dept. of Commerce, supra, at ___ (slip op., at 2).
The Court thus errs in relying on materials outside the record to support its holding. And the Court does not claim that the evidence in the administrative record alone would prove that the March 2018 memorandum was a pretext. Given the presumption of regularity, the evidence discussed above falls far short of establishing that the VRA rationale did not factor at all into the Secretary’s decision.

C

Even if it were appropriate for the Court to rely on evidence outside the administrative record, that evidence still fails to establish pretext. None of the evidence cited by the Court or the District Court comes close to showing that the Secretary’s stated rationale—that adding a citizenship question to the 2020 census questionnaire would “provide . . . data that are not currently available” and “permit more effective enforcement of the [VRA],” App. to Pet. for Cert. 548a—did not factor at all into his decision.

Once again, the evidence cited by the Court suggests at most that the Secretary had “other unstated reasons” for reinstating the citizenship question. Ante, at 24. For example, the Court states that the Secretary’s Director of Policy “initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review.” Ante, at 27. But this hardly shows pretext. It simply suggests that the Director believed that citizenship information could be useful in tackling problems related to national security and illegal immigration—a view that would also explain why the Secretary might not have been “considering VRA enforcement” early on. Ibid.; see also American Community Survey, Why We Ask: Place of Birth, Citizenship and Year of Entry (2016) (explaining that inquiries about “place of birth, citizenship, and year of entry” provide statistics that are “essential for agencies and policy mak-
ers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination”), https://www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf (as last visited June 25, 2019).

The Court emphasizes that the VRA rationale for the citizenship question originated in the Department of Commerce, and suggests that DOJ officials unthinkingly fell in line after the Attorney General was looped into the process. See ante, at 27. But the Court ignores that the letter was drafted by the then-Acting Assistant Attorney General for Civil Rights and reviewed by five other DOJ attorneys, including the Chief of the DOJ’s Voting Section. 351 F. Supp. 3d, at 554–556. Given the DOJ’s multilayer review process and its explanation for requesting citizenship data, the Court’s suggestion that the DOJ’s letter was inadequately vetted or improperly “influence[d]” by the Department of Commerce is entirely unsupported. Ante, at 27. In any event, none of this suggests, much less proves, that the Secretary harbored an unstated belief that adding the citizenship question would not help enforce the VRA, or that the VRA rationale otherwise did not factor at all into his decision. It simply suggests that a number of executive officials agreed that adding a citizenship question would support VRA enforcement.

The Court’s other evidence is even further afield. The Court thinks it telling that the DOJ’s letter included “a specific request that Commerce collect the [citizenship] data by means of reinstating a citizenship question on the census,” rather than a more open-ended “entreaty for better citizenship data.” Ibid. I do not understand how the specificity of the DOJ’s letter bears on whether the Secretary’s rationale was pretextual—particularly since the letter specifically explained why “census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in [VRA] litiga-
tion” than existing data. App. to Pet. for Cert. 568a; see id., at 567a–568a. Unless the Court is now suggesting that agency correspondence must comply with the Court’s subjective, unsupported view of what “might” constitute a “typical request from another agency,” ante, at 27, the specificity of the DOJ’s letter is irrelevant. The Court also points to the DOJ’s decision not to meet with the Census Bureau “to discuss alternative ways to meet DOJ’s stated need for improved citizenship data.” Ibid. But the Court does not explain how the DOJ’s refusal bears on the Secretary’s rationale. Besides, it is easy to understand why DOJ officials would not be interested in meeting with the Census Bureau. The meeting would have been with career employees whose acknowledged purpose was to talk the DOJ out of its request. See 351 F. Supp. 3d, at 557. Having already considered the issue and explained the rationale behind the request, it seems at least plausible that the DOJ officials believed such a meeting would be unproductive.

In short, the evidence cited by the Court establishes, at most, that leadership at both the Department of Commerce and the DOJ believed it important—for a variety of reasons—to include a citizenship question on the census.

The Court also fails to give credit where it is due. The Secretary initiated this process inclined to favor what he called “Option B”—that is, simply “add[ing] a citizenship question to the decennial census.” App. to Pet. for Cert. 552a. But the Census Bureau favored “Option C”—relying solely on “administrative records” to supply the information needed by the DOJ. Id., at 554a. The Secretary considered this view and found it a “potentially appealing solution,” ibid., but concluded that it had shortcomings. Rather than revert to his original inclination, however, he “asked the Census Bureau to develop a fourth alternative, Option D, which would combine Options B and C.” Id., at 555a. And he settled on that solution. Whatever one
thinks of the Secretary’s choice, his willingness to change his mind in light of the Bureau’s feedback belies the idea that his rationale or decisionmaking process was a pretext.

The District Court’s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 567–572, 660–664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web. Cf. id., at 662 (inferring “from the various ways in which [the Secretary] and his aides acted like people with something to hide that they did have something to hide”). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary’s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census.

Finally, if there could be any doubt about this conclusion, the presumption of regularity resolves it. Where there are equally plausible views of the evidence, one of which involves attributing bad faith to an officer of a coordinate branch of Government, the presumption compels giving the benefit of the doubt to that officer.

III

The Court’s erroneous decision in this case is bad enough, as it unjustifiably interferes with the 2020 census. But the implications of today’s decision are broader. With today’s decision, the Court has opened a Pandora’s box of pretext-based challenges in administrative law.

Today’s decision marks the first time the Court has ever invalidated an agency action as “pretextual.” Having
taken that step, one thing is certain: This will not be the last time it is asked to do so. Virtually every significant agency action is vulnerable to the kinds of allegations the Court credits today. These decisions regularly involve coordination with numerous stakeholders and agencies, involvement at the highest levels of the Executive Branch, opposition from reluctant agency staff, and—perhaps most importantly—persons who stand to gain from the action’s demise. Opponents of future executive actions can be expected to make full use of the Court’s new approach.

The 2015 “Open Internet Order” provides a case in point. In 2015, the Federal Communications Commission (FCC) adopted a controversial order reclassifying broadband Internet access service as a “telecommunications service” subject to regulation under Title II of the Communications Act. See In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5618 (2015). According to a dissenting Commissioner, the FCC “flip-flopped” on its previous policy not because of a change in facts or legal understanding, but based on “one reason and one reason alone. President Obama told us to do so.” Id., at 5921 (statement of Comm’r Pai). His view was supported by a 2016 congressional Report in which Republican Senate staff concluded that “the FCC bent to the political pressure of the White House” and “failed to live up to standards of transparency.” Majority Staff Report, Senate Committee on Homeland Security and Governmental Affairs, Regulating the Internet: How the White House Bowled Over FCC Independence, 114th Cong., 1st Sess., 29 (Comm. Print 2016). The Report cited evidence strikingly similar to that relied upon by the Court here—including agency-initiated “meetings with certain outside groups to support” the new result, id., at 3; “apparen[t] . . . concern from the career staff that there was insufficient notice to the public and affected stakeholders,” id., at 4; and “regula[r] communicatio[n]” between the FCC Chair-
man and “presidential advisors,” id., at 25.

Under the malleable standard applied by the Court today, a serious case could be made that the Open Internet Order should have been invalidated as “pretextual,” regardless of whether any “particular step in the process stands out as inappropriate or defective.” Ante, at 26. It is enough, according to the Court, that a judge believes that the ultimate rationale “seems to have been contrived” when the evidence is considered “as a whole.” Ante, at 26, 28.

Now that the Court has opened up this avenue of attack, opponents of executive actions have strong incentives to craft narratives that would derail them. Moreover, even if the effort to invalidate the action is ultimately unsuccessful, the Court’s decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction. The Court’s decision could even implicate separation-of-powers concerns insofar as it enables judicial interference with the enforcement of the laws.

In short, today’s decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only.

* * *

Because the Secretary’s decision to reinstate a citizenship question on the 2020 census was legally sound and a reasoned exercise of his broad discretion, I respectfully dissent from Part V of the opinion of the Court.
I join Parts I, II, IV–A, and V of the Court’s opinion (except as otherwise indicated in this opinion). I dissent, however, from the conclusion the Court reaches in Part IV–B. To be more specific, I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary’s decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).

There is no serious dispute that adding a citizenship question would diminish the accuracy of the enumeration of the population—the sole constitutional function of the census and a task of great practical importance. The record demonstrates that the question would likely cause a disproportionate number of noncitizens and Hispanics to go uncounted in the upcoming census. That, in turn, would create a risk that some States would wrongfully lose a congressional representative and funding for a host of federal programs. And, the Secretary was told, the
adverse consequences would fall most heavily on minority communities. The Secretary decided to ask the question anyway, citing a need for more accurate citizenship data. But the evidence indicated that asking the question would produce citizenship data that is less accurate, not more. And the reason the Secretary gave for needing better citizenship data in the first place—to help enforce the Voting Rights Act of 1965—was not convincing.

In short, the Secretary’s decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal. The Secretary thus failed to “articulate a satisfactory explanation” for his decision, “failed to consider . . . important aspect[s] of the problem,” and “offered an explanation for [his] decision that runs counter to the evidence,” all in violation of the APA. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). These failures, in my view, risked undermining public confidence in the integrity of our democratic system itself. I would therefore hold that the Secretary’s decision—whether pretextual or not—was arbitrary, capricious, and an abuse of discretion.

**I**

**A**

Three sets of laws determine the legal outcome of this case. First, the Constitution requires an “actual Enumeration” of the “whole number of persons in each State” every 10 years. Art. I, §2, cl. 3; Amdt. 14, §2. It does so in order to “provide a basis for apportioning representatives among the states in the Congress.” *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982); see also Art. I, §2, cl. 3. The inclusion of this provision in the Constitution itself underscores the importance of conducting an accurate census.

Second, the Census Act contains two directives that constrain the Secretary’s ability to add questions to the census. Section 195 says that the Secretary “shall, if he considers it feasible,” authorize the use of statistical “sampling” in collecting demographic information. That means the Secretary must, if feasible, obtain demographic information through a survey sent to a sample of households, rather than through the short-form census questionnaire to which every household must respond. The other relevant provision, §6(c), says that “[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available” from administrative sources “instead of conducting direct inquiries.” (Emphasis added.) These provisions, taken together, reflect a congressional preference for keeping the short form short, so that it does not burden recipients and thereby discourage them from responding.

Third, the APA prohibits administrative agencies from making choices that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U. S. C. §706(2)(A). We have said that courts, in applying this provision, must decide “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 416 (1971). The agency must have “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U. S., at 43. An agency ordinarily fails to meet this standard if it has “failed to consider an important aspect of the problem, offered an explanation for its decision that runs
counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Ibid.

Courts do not apply these principles of administrative law mechanically. Rather, they take into account, for example, the nature and importance of the particular decision, the relevance and importance of missing information, and the inadequacies of a particular explanation in light of their importance. The Federal Government makes tens of thousands, perhaps millions, of administrative decisions each year. And courts would be wrong to expect or insist upon administrative perfection. But here, the Enumeration Clause, the Census Act, and the nature of the risks created by the agency’s decision all make clear that the decision before us is highly important to the proper functioning of our democratic system. It is therefore particularly important that courts here not overlook an agency’s (1) failure to consider serious risks of harm, (2) failure to explain its refusal to minimize those risks, or (3) failure to link its conclusion to available evidence. My view, like that of the District Court, is that the agency here failed on all three counts.

B

A brief history of how the census has worked over the years will help the reader understand some of the shortcomings of the Secretary’s decisionmaking process. The Framers wrote into the Constitution a mandate to conduct an “actual Enumeration” of the population every 10 years. Art. I, §2, cl. 3. They did so for good reason. The purpose of the census is to “provide a basis for apportioning representatives among the states in the Congress,” Baldridge, 455 U. S., at 353, ensuring that “comparative state political power in the House . . . reflect[s] comparative population,” Evans, 536 U. S., at 477. The Framers required an actual count of every resident to “limit political chicanery”
and to prevent the census count from being “skewed for political . . . purposes.” *Id.*, at 500 (THOMAS, J., concurring in part and dissenting in part).

Throughout most of the Nation’s history, the Federal Government used enumerators, often trained census takers, to conduct the census by going door to door. The enumerators would ask a host of questions, including place of birth, citizenship, and others. But after the 1950 census, the Bureau began to change its approach. Post-census studies revealed that the census had failed to count more than 5 million people and that the undercount disproportionately affected members of minority groups. See M. Anderson, *The American Census: A Social History* 201–202 (1988); Brief for Historians and Social Scientists as Amici Curiae 15. Studies showed that statistical sampling would produce higher quality data. Anderson, *American Census*, at 201.

Beginning with the 1960 census, the Bureau consequently divided its questioning into a short form and a long form. The short form contained a list of questions—a short list—that the census would ask of every household. That list included basic demographic questions like sex, age, race, and marital status. The short form did not include, and has never included, a question about citizenship. See *ibid.*; Dept. of Commerce, U. S. Census Bureau, *Measuring America: The Decennial Censuses From 1790 to 2000*, p. 128 (2002). By way of contrast, the long form set forth a host of questions that would be asked of only a sample of households. In 1960, the long form was sent to one in every four households; in subsequent years, it was sent to approximately one in every six. See 351 F. Supp. 3d 502, 520 (SDNY 2019). And it was more recently replaced by the American Community Survey (ACS), which is sent to approximately 1 in 38 households each year. The long form (and now the ACS) has often included a question about citizenship.
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In 1970, the Census Bureau made another important change to the census. It significantly reduced its reliance upon in-person enumerators. See Anderson, supra, at 206. Instead, it sent nearly all households a questionnaire by mail. Most households received the short form, and a small sample received the long form. Instructions on the form told each household to fill out the questionnaire and return it to the Census Bureau by mail. Enumerators would follow up with households that did not return the questionnaire.

To maximize accuracy and minimize cost, the Bureau tried to bring about the highest possible “self-response” rate, i.e., to encourage as many households as possible to respond by mail. For that reason, it tried to keep the short form as short as possible. And it consistently opposed placing a citizenship question on that form. It feared that adding a question about citizenship would “inevitably jeopardize the overall accuracy of the population count,” partly because of added response burden but also because, as it explained, noncitizens faced with a citizenship question would be less likely to respond due to fears of “the information being used against them.” Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 568 (DC 1980).

Likely for similar reasons, Congress amended the Census Act in 1976, enacting the two statutory provisions to which I previously referred. These two provisions, 13 U. S. C. §6(c) and §195, together encourage the Secretary not to ask demographic questions on the short form if the information can be obtained either through the long form or through administrative records.

II

With this statutory and historical background, we can more easily consider the agency decision directly under review. That decision “reinstate[s] a citizenship question
on the 2020 decennial census.” App. to Pet. for Cert. 549a–550a (Memorandum from Wilbur L. Ross, Jr., Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs (Mar. 26, 2018)). The agency’s decision memorandum provided one and only one reason for making that decision—namely, that the question was “necessary to provide complete and accurate data in response to” a request from the Department of Justice (DOJ). Id., at 562a. The DOJ had requested the citizenship question for “use [in] . . . determining violations of Section 2 of the Voting Rights Act.” Id., at 548a.

The decision memorandum adds that the agency had not been able to “determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns.” Id., at 562a. The Secretary’s decision thus rests upon a weighing of potentially adverse consequences (diminished responses and a less accurate census count) against potentially offsetting advantages (better citizenship data). In my view, however, the Secretary did not make reasonable decisions about these potential costs and benefits in light of the administrative record.

A

Consider first the Secretary’s conclusion that he was “not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness.” Ibid. Insofar as this statement implies that adding the citizenship question is unlikely to affect “responsiveness” very much (or perhaps at all), the evidence in the record indicates the contrary.

1

The administrative record includes repeated Census
Bureau statements that adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire. See App. 105, 109–112, 158. The Census Bureau’s chief scientist said specifically that adding the question would have “an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census.” *Id.*, at 109. And the chief scientist backed this statement up by pointing to “[t]hree distinct analyses.” *Ibid.*

The first analysis compared nonresponse rates for the short-form census questionnaire (which did not include a citizenship question) to nonresponse rates for the ACS (which did). Obviously, more people fail to respond to the ACS than to the short form. Yet taking into account the fact that the nonresponse rate will be greater for the ACS than for the short form, the Bureau found that the difference between the two is yet greater for noncitizen households than for citizen households (by 5.1%, according to the Bureau). *Id.*, at 111. This led the Bureau to say that it was a “reasonable inference” that the presence of the citizenship question accounted for the difference. *Ibid.*

The Bureau conducted two additional studies, both analyzing data from the ACS. One study looked at response rates for particular questions on the ACS. It showed that the “no answer” rate for the citizenship question was “much greater than the comparable rates” for other census questions (for example, questions about age, sex, race, and ethnicity). *Id.*, at 110. And it showed that the “no answer” rate for the citizenship question was significantly higher among Hispanics. *Id.*, at 109–110. The last study examined “break-off” rates, *i.e.*, the rate at which respondents stopped answering the questionnaire upon reaching a particular question. It found that Hispanics were significantly more likely than were non-Hispanics to stop answering at the point they reached the citizenship question. *Id.*, at 112. Together, these two
studies provided additional support for the Census Bureau’s determination that the citizenship question is likely to mean disproportionately fewer responses from noncitizens and Hispanics than from others. *Ibid.*

Putting numbers upon these study results, the Census Bureau estimated that adding the question to the short form would lead to 630,000 additional nonresponding households. *Id.*, at 114. That is to say, the question would cause households covering more than 1 million additional people to decline to respond to the census. When the Bureau does not receive a response, it follows up with in-person interviews in an effort to obtain the missing information. The Bureau often interviews what it calls “proxies,” such as family members and neighbors. But this followup process is subject to error; and the error rate is much greater than the error rate for self-responses. *Ibid.* The Bureau thus explained that lower self-response rates “degrade data quality” by increasing the risk of error and leading to hundreds of thousands of fewer correct enumerations. *Id.*, at 113–115. The Bureau added that its estimate was “conservative.” *Id.*, at 115. It expected “differences between citizen and noncitizen response rates and data quality” to be “amplified” in the 2020 census “compared to historical levels.” *Ibid.* Thus, it explained, “the decrease in self-response for citizen households in 2020 could be much greater than the 5.1 percentage points [it] observed during the 2010 Census.” *Id.*, at 115–116. Its conclusion in light of this evidence was clear. Adding the citizenship question to the short form was “very likely to reduce the self-response rate” and thereby “har[m] the quality of the census count.” *Id.*, at 105, 158.

The Census Bureau’s analysis received support from other submissions. Several States pointed out that noncitizens and racial minorities had been undercounted in every prior census. Administrative Record 1091–1092. They also drew attention to recent surveys indicating that
noncitizens had significant concerns about the confidentiality of census responses. \textit{Ibid.} Former directors of the Census Bureau wrote that adding the citizenship question so late in the process “would put the accuracy of the enumeration and success of the census in all communities at grave risk.” \textit{Id.}, at 1057. The American Sociological Association and Census Scientific Advisory Committee echoed these warnings. See \textit{id.}, at 787, 794–795. On the other hand, the Secretary received submissions by other groups that supported adding the question. See, \textit{e.g.}, \textit{id.}, at 1178–1179, 1206, 1276. But as far as I can tell (or as far as the arguments made here and in the District Court inform the matter), none of these latter submissions significantly added to, or detracted from, the Census Bureau’s submissions in respect to the question’s likely impact on response rates.

2

The Secretary’s decision memorandum reached a quite different conclusion from the Census Bureau. The memorandum conceded that “a lower response rate would lead to . . . less accurate responses.” App. to Pet. for Cert. 556a. But it concluded that neither the Census Bureau nor any stakeholders had provided “definitive, empirical support” for the proposition that the citizenship question would reduce response rates. \textit{Id.}, at 554a. The memorandum relied for that conclusion upon a number of considerations, but each is contradicted by the record.

The memorandum first pointed to perceived shortcomings in the Census Bureau’s analysis of nonresponse rates. It noted that response rates are generally lower overall for the long form and ACS than they are for the short form. \textit{Id.}, at 552a–554a. But the Bureau explained that its analysis accounted for this consideration, see App. 111, and no one has given us reason to think the contrary. The Secretary also noted that the Bureau “was not able to
isolate what percentage of [the] decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey.” App. to Pet. for Cert. 554a. But the Bureau said attributing the decline to the citizenship question was a “reasonable inference,” App. 111, and again, nothing in the record contradicted the Bureau’s judgment. And later analyses have borne out the Bureau’s judgment that the citizenship question contributes to the decline in self-response. See, e.g., id., at 1002–1006, 1008 (August 2018 Census Bureau study).

The memorandum next cast doubt on the Census Bureau’s analysis of the rate at which people responded to particular questions on the ACS. It noted that the “no answer” rate to the citizenship question was comparable to the “no answer” rate for other questions on the ACS, including educational attainment, income, and property insurance. App. to Pet. for Cert. 553a. But as discussed above, the Bureau found it significant that the “no answer” rate for the citizenship question was “much greater” than the “no answer” rate for the other questions that appear on the short form—that is, the form on which the citizenship question would appear. App. 110, 124. The Secretary offered no reason why the demographic variables to which he pointed provided a better point of comparison.

Finally, the memorandum relied on information provided by two outside stakeholders. The first was a study conducted by the private survey company Nielsen, in which questions about place of birth and time of arrival had not led to any appreciable decrease in the response rate. App. to Pet. for Cert. 552a. But Nielsen, which in fact urged the Secretary not to add the question, stated that its respondents (unlike census respondents) were paid to respond, and it is consequently not surprising that they did so. Administrative Record 1276. The memorandum also cited statements by former Census Bureau
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officials suggesting that empirical evidence about the question’s potential impact on response rates was “limited.” App. to Pet. for Cert. 558a–559a; see also id., at 552a. But there was no reason to expect the former officials to provide more extensive empirical evidence as to a citizenship question when they were not privy to the internal Bureau analyses on this question. And, like Nielsen, the former officials strongly urged the Secretary not to ask the question. See Administrative Record 1057.

The upshot is that the Secretary received evidence of a likely drop in census accuracy by a number somewhere in the hundreds of thousands, and he received nothing significant to the contrary. The Secretary pointed out that the Census Bureau’s information was uncertain, i.e., not “definitive.” But that is not a satisfactory answer. Few public-policy-related statistical studies of risks (say, of many health or safety matters) are definitive. As the Court explained in State Farm, “[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.” 463 U. S., at 52. But an agency confronted with this situation cannot “merely recite the terms ‘substantial uncertainty’ as a justification for its actions.” Ibid. Instead, it “must explain the evidence which is available” and typically must offer a reasoned explanation for taking action without “engaging in a search for further evidence.” Ibid.

The Secretary did not do so here. He did not explain why he made the decision to add the question without following the Bureau’s ordinary practice of extensively testing proposed changes to the census questionnaire. See App. 624–630, 641 (discussing testing process); see also, e.g., Brief for Former Census Bureau Directors as Amici Curiae 17–21 (discussing prior examples of questions that the Bureau decided not to add after many years of pretest-
ing). Without that testing, the Secretary could not treat the Bureau's expert opinions and its experience with the relevant surveys as worthless merely because its conclusions were not precise. The Bureau's opinions were properly considered as evidence of likelihoods, probabilities, or risks.

As noted above, the consequences of mistakes in the census count, of even a few hundred thousand, are grave. Differences of a few thousand people, as between one State and another, can mean a loss or gain of a congressional seat—a matter of great consequence to a State. See 351 F. Supp. 3d, at 594. And similar small differences can make a large difference to the allocation of federal funds among competing state programs. Id., at 596–597; see also Baldrige, 455 U. S., at 353–354, n. 9. If near-absolute certainty is what the Secretary meant by “definitive,” that insistence would itself be arbitrary in light of the constitutional and statutory consequences at stake. And if the Secretary instead meant that the evidence does not indicate a serious risk of a less accurate count, that conclusion does not find support in the record.

B

Now consider the Secretary's conclusion that, even if adding a citizenship question diminishes the accuracy of the enumeration, “the value of more complete and accurate data derived from surveying the entire population outweighs . . . concerns” about diminished accuracy. App. to Pet. for Cert. 562a (emphasis added). That conclusion was also arbitrary. The administrative record indicates that adding a citizenship question to the short form would produce less “complete and accurate data,” not more.

1

The Census Bureau informed the Secretary that, for about 90% of the population, accurate citizenship data is
available from administrative records maintained by the Social Security Administration and Internal Revenue Service. App. 146. The Bureau further informed the Secretary that it had “high confidence” that it could develop a statistical model that would accurately impute citizenship status for the remaining 10% of the population. *Ibid.* The Bureau stated that these methods alone—using existing administrative records for 90% of the population and statistical modeling for the remaining 10%—would yield more accurate citizenship data than also asking a citizenship question. *Id.*, at 159. How could that be so? The answer is somewhat technical but readily understandable.

*First,* consider the 90% of the population (about 295 million people) as to whom administrative records are available. The Government agrees that using these administrative records would provide highly reliable information about citizenship, because the records “require proof of citizenship.” *Id.*, at 117. By contrast, if responses to a citizenship question were used for this group, the Census Bureau predicted without contradiction that about one-third of the noncitizens in this group who respond would answer the question untruthfully, claiming to be citizens when they are not. *Id.*, at 147. Those incorrect answers—about 9.5 million in total—would conflict with the administrative records on file for those noncitizens. And what would the Census Bureau do with the conflicting data? If it accepts the answer to the citizenship question as determinative, it will have less accurate data. If it accepts the citizenship data from administrative records as determinative, asking the question will have served no purpose.

Thus, as to 295 million people—the overwhelming majority of the population—asking the citizenship question would at best add nothing at all. I say “at best” because, for one thing, the Census Bureau informed the Secretary that asking the question would produce 1 million more
people who could not be linked to administrative records, which in turn would require the Census Bureau to resort to a less accurate source of citizenship data for these people. See id., at 147–149; see also 351 F. Supp. 3d, at 538–539. For another, the policy of the Census Bureau has always been to use census responses rather than administrative records in cases where the two conflict. App. 147. In this case, that practice would mean accepting 9.5 million inaccurate responses even though accurate administrative records are available. See ibid. The Census Bureau could perhaps change that practice, but the Secretary’s decision memorandum said nothing about the matter. It did not address the problem.

Second, consider the remaining 10% of the population (about 35 million people) for whom the Government lacks administrative records. The question here is which approach would yield the most “complete and accurate” citizenship data for this group—adding a citizenship question or using statistical modeling alone? To answer this question, we must further divide this group into two categories—those who would respond to the citizenship question if it were asked and those who would not.

Start with the category of about 22 million people who would answer a citizenship question if it were asked. Would their answers regarding citizenship be more accurate than citizenship data produced by statistical modeling? The Census Bureau said no. That is because many of the noncitizens in this group would answer the question falsely, resulting in an estimated 500,000 inaccurate answers. See id., at 148. And those who answer the question falsely would be commingled, perhaps randomly, with those who answer it correctly, thereby casting doubt on the answers of all 22 million, with no way of knowing which answers are correct and which are false. By contrast, the Bureau believed that it could develop a statistical model that would produce more accurate citizenship
data than these census responses. The Bureau therefore informed the Secretary that it could do better. As the Bureau’s chief scientist explained, although “[o]ne might think” that asking the question “could help fill the . . . gaps” in the administrative records, the data did not support that assumption. *Id.*, at 157. Instead, he explained, responses to the citizenship question “may not be reliable,” which “calls into question their ability to improve upon” the Bureau’s statistical modeling process. *Ibid.*

Next, turn to the more than 13 million remaining people who would not answer the citizenship question even if it were asked. As to this category, the Census Bureau would *still need to use statistical modeling* to obtain citizenship data, because there would be no census response to use instead. Hence, asking the citizenship question would add nothing at all as to this group. To the contrary, as the Government concedes, asking the question would *reduce* the accuracy of the citizenship data for this group, because the relatively inaccurate answers to the citizenship question would diminish the overall accuracy of the Census Bureau’s statistical model. See Brief for Petitioners 34 (conceding that the Census Bureau model will be “highe[r] quality” without the question than with it); 351 F. Supp. 3d, at 640 (explaining that asking the question would “corrupt[t] . . . the data generated by extrapolating from self-responses through imputation”).

In sum, in respect to the 295 million persons for whom administrative records exist, asking the question on the short form would, at best, be no improvement over using administrative records alone. And in respect to the remaining 35 million people for whom no administrative records exist, asking the question would be no better, and in some respects would be worse, than using statistical modeling. The Census Bureau therefore told the Secretary that asking the citizenship question, even in addition to using administrative records, “would result in poorer
quality citizenship data” than using administrative records alone, and would “still have all the negative cost and quality implications” of asking the citizenship question. App. 159. I could find no evidence contradicting that prediction.

2

If my description of the record is correct, it raises a serious legal problem. How can an agency support the decision to add a question to the short form, thereby risking a significant undercount of the population, on the ground that it will improve the accuracy of citizenship data, when in fact the evidence indicates that adding the question will harm the accuracy of citizenship data? Of course it cannot. But, as I have just said, I have not been able to find evidence to suggest that adding the question would result in more accurate citizenship data. Neither could the District Court. After reviewing the record in detail, the District Court found that “all of the relevant evidence before Secretary Ross—all of it—demonstrated that using administrative records ... would actually produce more accurate [citizenship] data than adding a citizenship question to the census.” 351 F. Supp. 3d, at 650.

What consideration did the Secretary give to this problem? He stated simply that “[a]sking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer,” which “may eliminate the need for the Census Bureau to have to impute an answer for millions of people.” App. to Pet. for Cert. 556a. He therefore must have assumed, sub silentio, exactly what the Census Bureau experts urged him not to assume—that answers to the citizenship question would be more accurate than statistical modeling. And he ignored the undisputed respects in which asking the question would make the existing data less accurate. Other
than his assumption, the Secretary said nothing, absolutely nothing, to suggest a reasoned basis for disagreeing with the Bureau’s expert statistical judgment.

The Government now maintains that the Secretary reasonably discounted the Census Bureau’s recommendation because it was based on an untested prediction about the accuracy of its model. But this is not a case in which the Secretary was presented with a policy choice between two reasonable but uncertain options. For one thing, the record is much less uncertain than the Government acknowledges. Although it is true that the Census Bureau at one point told the Secretary that it could not “quantify the relative magnitude of the errors across the alternatives at this time,” App. 148, it unequivocally stated that asking the question “would result in poorer quality citizenship data” than omitting it, id., at 159 (emphasis added). Thus, even if the Bureau could not “quantify” the relative accuracy of the options, it could and did conclude that one option was likely more accurate than the other. Even in the face of some uncertainty, where all available evidence indicates that one option is better than the other, it is unreasonable to choose the worse option without explanation.

For another thing, to the extent the record reflects some uncertainty regarding the accuracy of the Census Bureau’s statistical model, that is because the model needed to be “developed and tested” before it could be employed. Id., at 146. But the Secretary made his decision before any such development or testing could be completed. Having decided to make an immediate decision rather than wait for testing, the Secretary could not dismiss the Bureau’s prediction about the inadvisability of that decision on the ground that the prediction reflected likelihoods, probabilities, and risks rather than certainties.

Finally, recall that the Census Act requires the Secretary to use administrative records rather than direct
inquiries to “the maximum extent possible.” 13 U. S. C. §6(c). That statutory requirement highlights what should be obvious: Whether adding a citizenship question to the short form would produce more accurate citizenship data is a relevant factor—indeed, a critically important factor—that the Secretary was required to consider. Here, the Secretary did not adequately explain why he rejected the evidence that adding the question would yield less accurate data. He did not even acknowledge that the Census Act obliged him to use administrative records rather than asking a question to the extent possible. And he did not explain how obtaining citizenship data that is no better or worse than the data otherwise available could justify jeopardizing the accuracy of the census count.

In these respects, the Secretary failed to consider “important aspect[s] of the problem” and “offered an explanation for [his] decision that runs counter to the evidence before the agency.” *State Farm*, 463 U. S., at 43.

C

The Secretary’s failure to consider this evidence—that adding the question would harm the census count in the interest of obtaining less accurate citizenship data—provides a sufficient basis for setting the decision aside. But there is more. The reason that the Secretary provided for needing more accurate citizenship information in the first place—to help the DOJ enforce the Voting Rights Act—is unconvincing.

The Secretary stated that adding the citizenship question was “necessary to provide complete and accurate data in response to the DOJ request.” App. to Pet. for Cert. 562a. The DOJ’s request in turn asserted that the citizenship data currently available from the ACS was not “ideal” for enforcing the Voting Rights Act. *Id.*, at 567a. One of the DOJ’s principal complaints was that ACS data is reported for *groups* of census blocks rather than for each
census block itself. The DOJ letter stated that adding a citizenship question could provide it with individual block-by-block data which, the DOJ maintained, would allow it to better enforce the Voting Rights Act’s protections for minority voters. *Id.*, at 568a.

This rationale is difficult to accept. One obvious problem is that the DOJ provided no basis to believe that more precise data would in fact help with Voting Rights Act enforcement. Congress enacted the Voting Rights Act in 1965—15 years after the census last asked every household about citizenship. Actions to enforce the Act have therefore *always* used citizenship data derived from sampling. Yet I am aware of no one—not in the Department of Commerce proceeding, in the District Court, or in this Court—who has provided a single example in which enforcement of the Act has suffered due to lack of more precise citizenship data. Organizations with expertise in this area tell us that asking the citizenship question will not help enforce the Act. See, e.g., Brief for NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae 30−36. Rather, the question will, by depressing the count of minority groups, hurt those whom the Act seeks to help. See, e.g., Brief for Leadership Conference on Civil and Human Rights et al. as Amici Curiae 21−29.

Another problem with the Secretary’s rationale is that, even assuming the DOJ needed more detailed citizenship data, there were better ways of obtaining the needed data. The Census Bureau offered to provide the DOJ with data using administrative records, which, as I have pointed out, are likely just as accurate, if not more accurate, than responses to a citizenship question. The Census Bureau offered to provide this data at the census block level, which would resolve each of the DOJ’s complaints about the existing ACS data. See Administrative Record 3289. But the Secretary rejected this alternative without explaining why it would not fully respond to the DOJ’s re-
quest. That failure was particularly problematic given that the Census Act requires the Secretary to use other methods of obtaining demographic information if at all possible. See §§6(c), 195.

Normally, the Secretary would be entitled to place considerable weight upon the DOJ's expertise in matters involving the Voting Rights Act, but there are strong reasons for discounting that expertise here. The administrative record shows that DOJ's request to add a citizenship question originated not with the DOJ, but with the Secretary himself. See Administrative Record 3710. The Voting Rights Act rationale was in fact first proposed by Commerce Department officials. See ibid. DOJ officials, for their part, were initially uninterested in obtaining more detailed citizenship data, App. 414, and they agreed to request the data only after the Secretary personally spoke to the Attorney General about the matter, see Administrative Record 2651. And when the acting director of the Census Bureau proposed alternative means of obtaining better citizenship data, DOJ officials declined to meet to discuss the proposal. See id., at 3460.

Taken as a whole, the evidence in the administrative record indicates that the Voting Rights Act rationale offered by the Secretary was not just unconvincing, but pretextual. And, as the Court concludes, further evidence outside the administrative record but present in the trial record supports the finding of pretext. See Part V, ante. Among other things, that evidence reveals that the DOJ official who wrote the letter agreed that adding the question “is not necessary for DOJ’s VRA enforcement efforts.” App. 1113. And that official further acknowledged that he did not “know whether or not [citizenship] data produced from responses to the citizenship question . . . will, in fact, be more precise than the [citizenship] data on which the DOJ is currently relying for purposes of VRA enforcement.” Id., at 1102.
The Court explains, and I agree, that a court normally should not “reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons.” Ante, at 24. But in this case, “the evidence tells a story that does not match the explanation the Secretary gave for his decision.” Ante, at 27. This evidence strongly suggests that the Secretary’s stated rationale was pretextual. I consequently join Part V of the Court’s opinion (except insofar as it concludes that the Secretary’s decision was reasonable apart from the question of pretext). And I agree that the pretextual nature of the Secretary’s decision provides a sufficient basis to affirm the District Court’s decision to send the matter back to the agency.

* * *

I agree with the Court that the APA gives agencies broad leeway to carry out their legislatively delegated duties. And I recognize that Congress has specifically delegated to the Secretary of Commerce the authority to conduct a census of the population “in such form and content as he may determine.” §141(a). But although this delegation is broad, it is not without limits. The APA supplies one such limit. In an effort to ensure rational decisionmaking, the APA prohibits an agency from making decisions that are “arbitrary, capricious, [or] an abuse of discretion.” 5 U. S. C. §706(2)(A).

This provision, of course, does not insist that decisionmakers think through every minor aspect of every problem that they face. But here, the Secretary’s decision was a major one, potentially affecting the proper workings of our democratic government and the proper allocation of hundreds of billions of dollars in federal funds. Cf. ante, at 10. Yet the decision was ill considered in a number of critically important respects. The Secretary did not give adequate consideration to issues that should have been
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central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with. The Secretary’s failures in considering those critical issues make his decision unreasonable. They are the kinds of failures for which, in my view, the APA’s arbitrary and capricious provision was written.

As I have said, I agree with the Court’s conclusion as to pretext and with the decision to send the matter back to the agency. I do not agree, however, with several of the Court’s conclusions concerning application of the arbitrary and capricious standard. In my view, the Secretary’s decision—whether pretextual or not—was arbitrary, capricious, and an abuse of his lawfully delegated discretion. I consequently concur in the Court’s judgment to the extent that it affirms the judgment of the District Court.
It is a sign of our time that the inclusion of a question about citizenship on the census has become a subject of bitter public controversy and has led to today’s regrettable decision. While the decision to place such a question on the 2020 census questionnaire is attacked as racist, there is a broad international consensus that inquiring about citizenship on a census is not just appropriate but advisable. No one disputes that it is important to know how many inhabitants of this country are citizens.\(^1\) And the most direct way to gather this information is to ask for it in a census. The United Nations recommends that a census inquire about citizenship,\(^2\) and many countries

\(^1\)As a 2016 Census Bureau guidance document explained, obtaining citizenship statistics is “essential for agencies and policy makers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination.” Dept. of Commerce, Census Bureau, American Community Survey, Why We Ask: Place of Birth, Citizenship and Year of Entry, www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf (all Internet materials as last visited June 25, 2019).

Asking about citizenship on the census also has a rich history in our country. Every census, from the very first one in 1790 to the most recent in 2010, has sought not just a count of the number of inhabitants but also varying amounts of additional demographic information. In 1800, Thomas Jefferson, as president of the American Philosophical Society, signed a letter to Congress asking for the inclusion on the census of questions regarding “‘the respective numbers of native citizens, citizens of foreign birth, and of aliens’” “‘for the purpose . . . of more exactly distinguishing the increase of population by birth and immigration.’” C. Wright, History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 19 (1900). In 1820, John Quincy Adams, as Secretary of State, was responsible for conducting the census, and consistent with the 1820 Census Act, he instructed the marshals who were charged with gathering the information to ask about citizenship. In 1830, when Martin Van Buren was Secretary of State, a question about citizenship was again included. With the exception of the census of 1840, at least some portion of the population was asked a question about citizenship as part of the census through 2000, after which the question was moved to the American Community Survey, which is sent to only a small fraction of the population. All these census inquiries do so.3

3 See, e.g., Brief for Petitioners 29 (“‘[O]ther 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”’ (quoting App. to Pet. for Cert. 561a)).


5 See Dept. of Commerce, Census Bureau, History: 1830 Census Questionnaire, https://www.census.gov/history/www/through_the_decades/questionnaires/1830_2.html.
were made by the Executive pursuant to congressional authorization. None were reviewed by the courts.

Now, for the first time, this Court has seen fit to claim a role with respect to the inclusion of a citizenship question on the census, and in doing so, the Court has set a dangerous precedent, both with regard to the census itself and with regard to judicial review of all other executive agency actions. For the reasons ably stated by JUSTICE THOMAS, see ante, p. ___ (opinion concurring in part and dissenting in part), today’s decision is either an aberration or a license for widespread judicial inquiry into the motivations of Executive Branch officials. If this case is taken as a model, then any one of the approximately 1,000 district court judges in this country, upon receiving information that a controversial agency decision might have been motivated by some unstated consideration, may order the questioning of Cabinet officers and other high-ranking Executive Branch officials, and the judge may then pass judgment on whether the decision was pretextual. What Bismarck is reputed to have said about laws and sausages comes to mind. And that goes for decisionmaking by all three branches.

To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. Of course, we may determine whether the decision is constitutional. But under the considerations that typically guide this Court in the exercise of its power of judicial review of agency action, we have no authority to decide whether the Secretary’s decision was rendered in compliance with the Administrative Procedure Act (APA).

I

The APA authorizes judicial review of “agency action”
taken in violation of law, 5 U. S. C. §§706(2)(A)–(D), but §701(a)(2) of the APA bars judicial review of agency actions that are “committed to agency discretion by law.” Although we have characterized the scope of §701(a)(2) as “‘narrow,’” Heckler v. Chaney, 470 U. S. 821, 830 (1985), there are circumstances in which it applies. And while our cases recognize a strong presumption in favor of judicial review of agency action, see, e.g., Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U. S. ___, ___ (2018) (slip op., at 11), this “is ‘just’ a presumption,” and like all real presumptions, it may be (and has been) rebutted, Lincoln v. Vigil, 508 U. S. 182, 190 (1993).6

In considering whether the general presumption in favor of judicial review has been rebutted in specific cases, we have identified factors that are relevant to the inquiry: whether the text and structure of the relevant statutes leave a court with any “‘meaningful standard against which to judge the agency’s exercise of discretion,’” Webster v. Doe, 486 U. S. 592, 600 (1988) (quoting Heckler, supra, at 830); whether the matter at hand has traditionally been viewed as committed to agency discretion, see ICC v. Locomotive Engineers, 482 U. S. 270, 282 (1987); whether the challenged action manifests a “general unsuitability” for judicial review because it involves a “complicated balancing of a number of factors,” including judgments regarding the allocation of agency resources or matters otherwise committed to another branch, Heckler, supra, at 831–832; and whether judicial review would produce “disruptive practical consequences,” Southern R.

6 Because the §701(a)(2) analysis dictates whether APA review may be had, JUSTICE BREYER’s assertion that the APA “supplies [a] limit” on the Secretary’s otherwise “broad” delegation, ante, at 22 (opinion concurring in part and dissenting in part), mistakenly assumes the answer to the reviewability question. Cf. Heckler v. Chaney, 470 U. S. 821, 828 (1985) (“[B]efore any review at all may be had, a party must first clear the hurdle of §701(a)”):
I start with the question whether the relevant statutory provisions provide any standard that courts can apply in reviewing the Secretary’s decision to restore a citizenship question to the census. The provision that directly addresses this question is 13 U. S. C. §141(a), the statute that vests the Secretary with authority to administer the decennial census. This provision gives the Secretary unfettered discretion to include on the census questions about basic demographic characteristics like citizenship. It begins by providing that the Secretary

“shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys.” Ibid. (emphasis added).

The two phrases I have highlighted—“census of population” and “in such form and content as he may determine”—are of immediate importance. A “census of popu-
lation” is broader than a mere head count. The term is defined as “a census of population . . . and matters relating to population.” §141(g) (emphasis added). Because this definition refers to both “a census of population” and “matters relating to population,” the latter concept must include more than a “census of population” in the strict sense of a head count. And it seems obvious that what this additional information must include is the sort of basic demographic information that has long been sought in the census. So the statute clearly authorizes the Secretary to gather such information.

The second phrase, “in such form and content as he may determine,” specifies how this information is to be gathered, namely, by a method having the “form and content” that the Secretary “may determine.” In other words, this is left purely to the Secretary’s discretion. A clearer and less restricted conferral of discretion is hard to imagine.

It is instructive to compare this delegation of authority to the statutory language at issue in one of our most well-known §701(a)(2) cases, Webster v. Doe, 486 U.S. 592. There, the relevant statute allowed termination of a Central Intelligence Agency employee whenever the Director “shall deem such termination necessary or advisable in the interests of the United States.” Id., at 600 (internal quotation marks omitted and emphasis deleted). Reasoning that the statute’s “shall deem” standard “fairly exudes deference to the Director,” the Court concluded that the text of the statute “appear[ed] . . . to foreclose the application of any meaningful judicial standard of review.” Ibid.

The §141(a) language discussed above is even more sweeping than that of the statute in Webster. Unlike the Census Act, the statute in Webster placed a condition on the Director’s action—in particular, the requirement that he terminate an employee only after concluding that doing so would further the “interests of the United States.” No such condition applies to the Secretary’s determination
about the form and content of the decennial census, a fact that distinguishes the statute at issue here from others this Court has found to fall outside §701(a)(2) and thus within courts' power to review. See, e.g., Weyerhaeuser Co., 586 U. S., at ___ (slip op., at 10) (statute conditioning agency power to exclude land from critical habitat designation on agency's consideration of “‘economic impact’” of designation and “‘determin[ation] that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat’”).

B

Those arguing in favor of judicial review contend that the §141(a) language that I have discussed so far is limited by language that follows immediately after. That part of §141(a) states:

“In connection with any such census [i.e., the decennial “census of population”], the Secretary is authorized to obtain such other census information as necessary.” (Emphasis added.)

This means, it is argued, that information about citizenship may be obtained by means of the census only if that is “necessary.” But this argument is clearly wrong. The information that must be “necessary” (whatever that means in this context) is “other census information.” That refers to information other than that obtained in the “census of population,” and as explained, the term “census of population” includes not just a head count but other “matters relating to population,” a category that encompasses basic demographic information such as citizenship. Accordingly, this argument is definitively refuted by the text of §141. And although it is not necessary to look beyond that text, it is worth noting that this argument, if accepted, would require that the term “necessary” be given a less than strictly literal meaning; otherwise, it would
run contrary to the broad delegation effected by the first portion of §141(a) by making it all but impossible for the Secretary to include on the census anything other than questions relating to the number of persons living at a particular address. That would be so because it will often not be “necessary” to obtain this information via the census rather than by some other means.

C

Another argument in favor of review relies on 13 U. S. C. §195, which states:

“Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.”

JUSTICE BREYER, for example, interprets this provision to mean that “the Secretary must, if feasible, obtain demographic information through a survey sent to a sample of households, rather than through the short-form census questionnaire to which every household must respond.” Ante, at 3 (opinion concurring in part and dissenting in part). Under that reading of §195, it is asserted, the provision sets forth a judicially reviewable limit on the Secretary’s authority to obtain information through direct inquiries.

This argument fails to take into account that the current version of §195 was enacted as part of the same Act of Congress that included the present version of §141 and that the two provisions are both parts of a unified scheme regarding the use of sampling. Section 141, a provision concerned exclusively with the census, addresses the use

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8See 90 Stat. 2459.
of sampling in that particular context. I previously quoted the relevant language, but I repeat it now so that it is clearly in mind. Section 141(a) provides that the Secretary

“shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys.” (Emphasis added.)

What this means is that the Secretary, in conducting the “census of population,” has discretion to choose the form and content of the vehicles used in that project, and among the methods that he may employ, if he sees fit, are sampling and special surveys.

Section 195 is not a census-specific provision, but it does have one (important) thing to say specifically about the census: It prohibits the use of sampling “for the determination of population for purposes of apportionment of Representatives in Congress.” In this one way, it qualifies the Secretary’s discretion regarding the “form and content” of the vehicles used in conducting the “census of population.” And that is what we meant in Department of Commerce v. United States House of Representatives, 525 U. S. 316, 338 (1999), when we said that §141(a)’s “broad grant of authority . . . is informed . . . by the narrower and more specific §195.” Otherwise, the text of §195 does not deal specifically with the census. It addresses all the many information-gathering activities conducted by the Commerce Department, and as to these, it says that the Secretary shall use sampling if he deems it “feasible.”

If §195 were read to mean that no information other than a head count can be sought by means of a census questionnaire unless it is not “feasible” to get that information by sampling, then there would be little if anything left of the broad discretion “to use sampling techniques”
“Feasible” means “capable of being done, executed, or effectuated.” Webster's Third New International Dictionary 831 (1961), and it is not clear that the gathering of any core demographic information is not “capable of being done” by sampling. So if that were what §195 means, then Congress, in the same Act, would have given the Secretary discretion to use sampling in the census “as he may determine” but also compelled him to use sampling in almost all instances. That is no way to read the provisions of a single Act. A law’s provisions should be read to work together. See A. Scalia & B. Garner, Reading Law 180 (2012) (“The provisions of a text should be interpreted in a way that renders them compatible, not contradictory”). See also, e.g., Parker Drilling Management Services, Ltd. v. Newton, 587 U. S. ___, ___–___ (2019) (slip op., at 5–6); Star Athletica, L. L. C. v. Varsity Brands, Inc., 580 U. S. ___, ___–___ (2017) (slip op., at 6–7); Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U. S. 89, 108 (2010). And if there is tension between a specific provision, like §141’s instruction regarding the use of sampling in the decennial census, and a general one, like §195’s directive regarding the use of sampling in all data-collection activities, the specific provision must take precedence. Cf. NLRB v. SW General, Inc., 580 U. S. ___, ___ (2017) (slip op., at 14).

When §§141 and 195 are read in this way, it is easy to see how they fit together. In using the census to gather information “relating to population” for any use other than the actual enumeration, the Secretary may use sampling “as he may determine.” In conducting all the Department’s efforts to collect data by other means, he may authorize the use of sampling if he thinks that is “feasible.” The upshot for present purposes is that §195 does not require the “counterintuitive result” of barring the Secretary from including on the census questionnaire the kinds of basic demographic questions that have been

D

One additional provision, 13 U. S. C. §6(c), requires close consideration. This provision, which was enacted in 1976 in the same Act as §§141(a) and 195, has three subsections. Subsection (a) provides that the Secretary may call on other components of the Federal Government to obtain information that is “pertinent to” the Department’s work. Subsection (b) authorizes the Secretary to “acquire, by purchase or otherwise” from state and local governments and private sources “such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.” Finally, subsection (c) provides:

“To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting

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Section 6 states:

“(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

“(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

“(c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries.”
The District Court interpreted subsection (c) to mean that the Secretary must turn to another federal agency or outside source for demographic information (rather than seeking the information on the census) unless doing so would not be “possible” or “consistent with the kind, timeliness, quality and scope of the statistics required.” This argument fails for reasons similar to those that sank the §195 argument just discussed. Section 6(c) is not a census-specific provision but instead applies generally to all the Commerce Department’s information-gathering activities. If it is read to apply to the “census of population,” it cannot be reconciled with §141(a), which, as noted, broadly authorizes the Secretary to use that vehicle for obtaining information “relating to population,” i.e., core demographic information. If §6(c) applied to the gathering of such information, it would make it hard to justify the inclusion of any demographic questions on the census, even though this has been done since 1790. (Is it not possible to get information about age and sex, for example, from any outside source (or combination of sources), even if the Department offers to acquire it from a private source by purchase?) Reading §6(c) to mean what the District Court thought would turn it into the proverbial elephant stuffed into a mouse hole. Section 6(c), however, is a decidedly mouse-like provision. It was enacted with no fanfare and no real explanation, and remained in the shadows, vir-

10 The most respondents can muster are snippets from the legislative history of the 1976 Census Act indicating that §6(c) was enacted to decrease the Secretary’s use of “direct inquiries” in the interest of “reducing respondent burden.” H. R. Rep. No. 94–1719, p. 10 (1976). Even accepting that premise, it simply raises the same question just discussed—namely, whether Congress’s desire to reduce respondent burden, as reflected by §6(c), yields to the Secretary’s broad authorization in §141(a) to “determine” the “form and content” of any direct inquiries on the census. Cf. id., at 11 (characterizing §141 as a “provi-
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...tually unused and unnoticed, for more than 40 years.

E

Respondents and the Court cite two other provisions in support of reviewability, but neither has anything to do with the issue of putting a citizenship question on the census. In determining whether statutory provisions include standards that could provide a basis for judicial review, it is necessary to focus on the precise claims at issue, see, e.g., Webster, 486 U. S., at 601–602 (distinguishing between statutory and constitutional claims); Locomotive Engineers, 482 U. S., at 277–279 (parsing claims under different prongs of reopener statute); Heckler, 470 U. S., at 836 (rejecting as “irrelevant” to the agency decision at issue two statutory provisions that were argued to provide “law to apply”). And when viewed in this way, the remaining statutory provisions cited in support of reviewability are of no value.

Respondents point to §141(b), which requires the Secretary to complete the tabulation of total population by States “within 9 months after the census date” and then to report the results to the President. That provision sets out an easily administered deadline, and it has nothing to do with the content of the census questionnaire.

Respondents also claim that §141(f) is relevant to the question of judicial review, but that provision concerns congressional review. It directs the Secretary to report to Congress, at specified times, the subjects and questions that he intends to include on the census. According to respondents, the Secretary’s compliance with those requirements is judicially reviewable, and that, they contend, takes the Secretary’s decision to include a citizenship question out from under §701(a)(2).

Respondents fundamentally misunderstand the signifi-

sio[n] directly related to decennial . . . census”).
cance of congressional reporting requirements in evaluating whether a particular agency action is subject to judicial review. Congressional reporting requirements are “legion in federal law,” Natural Resources Defense Council, Inc. v. Hodel, 865 F. 2d 288, 317 (CADC 1988), and their purpose is to permit Congress to monitor and, if it sees fit, to correct Executive Branch actions to which it objects. When a congressional reporting requirement “[l]ack[s] a provision for judicial review,” compliance “by its nature seems singularly committed to congressional discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements.” Id., at 318. In other words, it is Congress, not the Judiciary, that is best situated to determine whether an agency’s responses to Congress are sufficient and, if not, to “take what it deems to be the appropriate action.” Id., at 319.

In that respect, §141(f) actually cuts against judicial review. The Constitution gives Congress the authority to “direct” the “Manner” in which the census is conducted, and by imposing the §141(f) reporting requirements, Congress retained some of that supervisory authority. It did not transfer it to the courts.11

Respondents protest that congressional review may not

11It is notable that Congress, pursuant to its supervisory authority, has in some cases limited the particular demographic characteristics about which the Secretary may require information through census questionnaires. In §221(c), for example, Congress has dictated that “no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.” Similarly, in a series of appropriation Acts, Congress has specified that “none of the funds provided in this or any other Act for any fiscal year may be used for the collection of census data on race identification that does not include ‘some other race’ as a category.” 123 Stat. 3115, note following 13 U. S. C. §5. Those examples highlight that when Congress wishes to limit the Secretary’s authority to require responses to particular demographic questions, it “knows precisely how to do so.” Limelight Networks, Inc. v. Akamai Technologies, Inc., 572 U. S. 915, 923 (2014).
be enough to guard against a Secretary’s abuses, especially when the party in control of Congress stands to benefit. But that complaint simply expresses disagreement with the Framers’ choice to vest power over the census in a political body, cf. *Baldrige v. Shapiro*, 455 U. S. 345, 347–348 (1982) (“Under [the] Constitution, responsibility for conducting the decennial census rests with Congress”), and the manner in which Congress has chosen to exercise that power, see *Wisconsin v. City of New York*, 517 U. S. 1, 19 (1996) (Congress has delegated its “virtually unlimited discretion” in conducting the census to the Secretary). In any event, the ability to press constitutional challenges to the Secretary’s decisions, see n. 7, *supra*, answers many of the examples in respondents’ parade of horribles.

In short, the relevant text of §141(a) “fairly exudes deference” to the Secretary. *Webster*, 486 U. S., at 600. And no other provision of law cited by respondents or my colleagues provides any “meaningful judicial standard” for reviewing the Secretary’s selection of demographic questions for inclusion on the census. *Ibid.*

III

In addition to requiring an examination of the text and structure of the relevant statutes, our APA §701(a)(2) cases look to whether the agency action in question is a type that has traditionally been viewed as committed to agency discretion or whether it is instead one that “federal courts regularly review.” *Weyerhaeuser Co.*, 586 U. S., at ___ (slip op., at 12). In cases where the Court has found that agency action is committed to agency discretion by law, an important factor has been the absence of an established record of judicial review prior to the adoption of the APA. See *Heckler*, 470 U. S., at 832–833 (agency nonenforcement); *Locomotive Engineers*, 482 U. S., at 282 (agency decision not to reopen final decision based on material error); *Lincoln*, 508 U. S., at 192 (agency use of lump-sum
Here, there is no relevant record of judicial review. We are confronted with a practice that reaches back two centuries. The very first census went beyond a mere head count and gathered additional demographic information, and during virtually the entire period prior to the enactment of the APA, a citizenship question was asked of everyone. Notably absent from that long record is any practice of judicial review of the content of the census. Indeed, this Court has never before encountered a direct challenge to a census question. App. to Pet. for Cert. 416a. And litigation in the lower courts about the census is sparse and generally of relatively recent vintage.

Not only is this sort of history significant in all §701(a)(2) cases, see Locomotive Engineers, supra, at 282, but we have previously stressed the particular “importance of historical practice” when it comes to evaluating the Secretary’s authority over the census. Wisconsin, supra, at 21; see also ante, at 13 (opinion of the Court). Moreover, where the relevant question is not whether review may be had at all, but rather the branch with the authority to exercise review, the absence of any substantial record of judicial review is especially revealing. See, e.g., NLRB v. Noel Canning, 573 U. S. 513, 525 (2014) (it is “neither new nor controversial” that “longstanding practice of the government can inform our determination of what the law is” (internal quotation marks and citation omitted)); United States v. Midwest Oil Co., 236 U. S. 459, 473 (1915) (“in determining . . . the existence of a power, weight [is] given to . . . usage”). Thus, the absence of any real tradition of judicial review of decisions regarding the content of the census counsels against review in this case.

In an attempt to show that there is no relevant “tradition of nonreviewability,” Locomotive Engineers, supra, at 282, respondents contend that this Court has recently engaged in review of the “conduct of the census,” Brief for
Government Respondents 26–27. But in none of the cases they cite did the Court address an APA challenge to the content of census questions. 12  Some involved constitutional claims about enumeration and apportionment. See Franklin v. Massachusetts, 505 U. S. 788, 790, 801 (1992) (constitutional challenge to “method used for counting federal employees serving overseas” as part of “reapportionment determination”); Wisconsin, 517 U. S., at 20 (constitutional challenge to Secretary’s decision not to adjust count). Others concerned enforcement of statutes with specific directives. See Department of Commerce, 525 U. S., at 343 (holding that §195 bars use of “sampling” to reach actual enumeration for apportionment); Utah v. Evans, 536 U. S. 452, 464–465 (2002) (considering whether statistical method violated §195’s bar on use of “sampling” in apportionment enumeration). According to respondents, these cases mean that all the Secretary’s census-related decisions are suitable for judicial review and thus fall outside of §701(a)(2), and the Court apparently agrees, rejecting the Government’s §701(a)(2) argument in part because “[w]e and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking.” Ante, at 15.

This argument misses the point of §701(a)(2). The question under that provision is whether the challenged action “is committed to agency discretion by law,” not whether a different action by the same agency is reviewable under the APA, much less whether an action taken by the same agency can be challenged under the Constitution. Take the example of Heckler v. Chaney, supra, where the Court considered whether a particular Food and Drug

12 The same can be said for the lower court cases on which respondents rely. See, e.g., Brief for Government Respondents 26, and n. 6 (collecting cases, none of which “involved the census questionnaire” or the Secretary's selection of questions).
Administration (FDA) decision was reviewable under the APA. Many FDA actions are subject to APA review, see, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U. S. 609, 627 (1973), but that did not prevent the Heckler Court from holding that the particular FDA decision at issue there fell within §701(a)(2). See also, e.g., Heckler, supra, at 836–837.

Respondents and some of their amici contend that the Secretary's decision is at least amenable to judicial review for consistency with the APA's reasoned-explanation requirement. See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43 (1983) (describing requirement). Thus, the argument goes, even if no statute sets out a standard that can be used in reviewing the particular agency action in question, a court may review an agency's explanation of the reasons for its action and set it aside if the court finds those reasons to be arbitrary or irrational.

This argument would obliterate §701(a)(2). Even if a statute expressly gave an agency absolute, unrestricted, unfettered, unlimited, and unqualified discretion with respect to a particular decision, a court could still review the agency's explanation of the reasons for its decision. That is not what §701(a)(2) means. As we put it previously in answering a similar argument against application of §701(a)(2), it is "fals[e]" to suggest "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." Locomotive Engineers, 482 U. S., at 283. That is because when an action "is committed to agency discretion by law," the Judiciary has no role to play, even when an agency sets forth "an eminently 'reviewable' proposition." Id., at 282–283.

IV

In sum, neither respondents nor my colleagues have been able to identify any relevant, judicially manageable
limits on the Secretary’s decision to put a core demographic question back on the census. And without an “adequate standard of review for such agency action,” id., at 282, courts reviewing decisions about the “form and content” of the census would inevitably be drawn into second-guessing the Secretary’s assessment of complicated policy tradeoffs,\textsuperscript{13} another indicator of “general unsuitability” for judicial review. \textit{Heckler, supra}, at 831.

Indeed, if this litigation is any indication, widespread judicial review of the Secretary’s conduct of the census will usher in an era of “disruptive practical consequences,” and this too weighs against review. \textit{Seaboard Allied Milling Corp.}, 442 U. S., at 457. Cf. \textit{Tucker v. United States Dept. of Commerce}, 958 F. 2d 1411, 1418 (CA7 1992) (expressing doubt about “both the provenance and the practicability” of allowing judicial review of census-related decisions).

Respondents protest that the importance of the census provides a compelling reason to allow APA review. See also \textit{ante}, at 22–23 (opinion of BREYER, J.). But this argument overlooks the fact that the Secretary is accountable in other ways for census-related decisionmaking.\textsuperscript{14} If the Secretary violates the Constitution or any applicable statutory provision related to the census, his action is

\textsuperscript{13}In determining how the census is to be conducted, the Secretary must make decisions about a bevy of matters, such as the best way to count particular persons or categories of persons with an adequate degree of accuracy (e.g., by face-to-face interviews, telephone calls, questionnaires to be mailed back, contacts with neighbors, or use of existing records); the use of follow up procedures and other quality control measures; which persons should be included in which households; and issues concerning where a person should be enumerated. These and countless other factors may affect whether an individual receives or responds to the census questionnaire.

\textsuperscript{14}Since the time Secretary Ross publicly announced his intent to add the citizenship question, “Congress has questioned the Secretary about his decision in public hearings on several occasions.” Brief for Petitioners 50 (collecting examples).
reviewable. The Secretary is also accountable to Congress with respect to the administration of the census since he has that power only because Congress has found it appropriate to entrust it to him. And the Secretary is always answerable to the President, who is, in turn, accountable to the people.

* * *

Throughout our Nation’s history, the Executive Branch has decided without judicial supervision or interference whether and, if so, in what form the decennial census should inquire about the citizenship of the inhabitants of this country. Whether to put a citizenship question on the 2020 census questionnaire is a question that is committed by law to the discretion of the Secretary of Commerce and is therefore exempt from APA review. The District Court had the authority to decide respondents’ constitutional claims, but the remainder of their complaint should have been dismissed.

I join Parts I, II, III, IV–B, and IV–C15 of the opinion of the Court. I do not join the remainder, and insofar as the Court holds that the Secretary’s decision is reviewable under the APA, I respectfully dissent.

15Although I would hold that the Secretary’s decision is not reviewable under the APA, in the alternative I would conclude that the decision survives review under the applicable standards. I join Parts IV–B and IV–C on that understanding.
In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

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

BRIEF FOR THE PETITIONERS

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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.
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In the Supreme Court of the United States

No. 18-966

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

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

BRIEF FOR THE PETITIONERS

OPINIONS BELOW


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 petition for a writ of certiorari before judgment was filed
on January 25, 2019. The petition was granted on February 15, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

**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., made a determination to request citizenship information on the 2020 decennial census questionnaire. Pet. App. 548a-563a. Questions about citizenship or country of birth (or both) were asked of everyone on all but one decennial census from 1820 to 1950, and of a substantial portion of the population on every decennial census (on the so-called “long form” questionnaire) from 1960 through 2000. A citizenship question also has been 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, race, Hispanic origin, 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, and the government must keep individual answers confidential. 13 U.S.C. 9(a) and 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), that more granular citizenship data “would greatly assist” DOJ, and that “the decennial census questionnaire is the most appropriate vehicle for collecting that data.” Pet. App. 565a, 568a; 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.

Although the Secretary previously had been considering the issue, see Pet. App. 546a, after receiving DOJ’s formal request he “initiated a comprehensive review process led by the Census Bureau” that included “legal, program, and policy considerations,” id. at 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 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 [citizenship] 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,” *id.* at 552a, he observed that the available evidence, including the Census Bureau’s analysis, did not provide “definitive, empirical support” concerning the magnitude of any reduction, *id.* at 554a; see *id.* at 552a-554a (reviewing the available evidence).

Ultimately, the Secretary concluded as a matter of policy 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.” Pet. App. 562a. “The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.” *Ibid.*

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, capricious, and not in accordance with law under the Administrative Procedure
Act (APA), 5 U.S.C. 701 et seq.; and denies equal pro-
tection 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 alleged 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 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. 18-cv-2921 D. Ct. Doc. 150, at 9 (May 18, 2018). At a July 3, 2018 hearing, the district court granted respondents’ request for extra-record discovery. 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.

b. On July 26, 2018, the district court dismissed respondents’ Enumeration Clause claims because the

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 Dept’ 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 have concluded in all of those cases.
“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, among other things, that respondents had alleged sufficient facts to demonstrate standing at the motion-to-dismiss stage, id. at 371a-391a; the content of the census questionnaire was not committed to the Secretary’s discretion by law, id. at 398a-408a; and respondents’ allegations, accepted as true, stated a plausible claim of intentional discrimination, id. at 425a-434a.

c. On August 17, 2018, the district court entered an order compelling the deposition of then-Acting Assistant Attorney General (AAG) for DOJ’s Civil Rights Division, John M. Gore, Pet. App. 452a-455a, and on September 21 the court entered an order compelling the deposition of Secretary Ross himself, id. at 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 (citation omitted). 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 mandamus.” 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. 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. 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 issued an opinion and order memorializing its findings of fact and conclusions of law, and entered judgment for respondents. Pet. App. 1a-353a.

   a. The district court held that most respondents had Article III standing. Pet. App. 194a-239a. The court concluded that some respondents had associational standing, and that all respondents had standing in their own right, based on four possible theories of injury—diminished political representation; loss of governmental funding; a degradation in the quality of census data; and diversion of resources—all of which are premised on the citizenship question’s presence leading to an inaccurate census tally. Id. at 200a-225a. But the court rejected respondents’ alleged injury from a loss of pri-
vacy, since it rested on “pure speculation” that the government “will not comply with its legal obligations to ensure the privacy of” census responses. *Id.* at 226a.

The district court rejected the government’s argument that respondents’ purported injuries would not be fairly traceable to the government’s decision to reinstate the citizenship question to the decennial census because each would materialize, if at all, only because of the independent, unlawful actions of third parties. Pet. App. 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 or 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 administrative records “would produce less accurate citizenship data” than relying only on the federal 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” 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 Section 141(f) by not including citizenship as a “subject” in a report to Congress. The court rejected the government’s arguments that the contents of those informational reports are not judicially reviewable and that the Secretary had, in any event, complied with Section 141(f) by identifying citizenship as a question, which necessarily alerted Congress that it was a “subject” too. See id. at 276a-283a.

c. The district court further held that the Secretary’s decision was arbitrary and capricious because the Secretary’s reasons contradicted the available evidence, the Secretary overlooked important aspects of the problem, and the Secretary departed from standard Census Bureau procedures. Pet. App. 284a-311a. Although the court purported to base its findings solely on evidence in the administrative record, it also purported to bolster its findings based on extra-record evidence. Id. at 260a-261a.

According to the district court, the “most significant” contradiction between the Secretary’s decision and the evidence was that “adding a citizenship question
to the census will result in less accurate and less complete citizenship data.” Pet. App. 289a-290a. The court also listed some supposed inaccuracies in the Secretary’s memorandum, see id. at 286a-289a; for example, the Secretary said that adding the question would be “no additional imposition” for millions of households containing citizens or lawful immigrants, even though, 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.

The district court also found that the Secretary failed to consider “important aspects of the problem,” Pet. App. 294a (brackets and citation omitted), including: “whether it was necessary to respond to DOJ’s request at all,” ibid.; whether “more granular [citizenship] data is ‘necessary’ for enforcement of the VRA,” id. at 295a; and whether “the Census Bureau’s confidentiality obligations [under 13 U.S.C. 9(a)] and disclosure avoidance practices” would prevent use of census citizenship data for DOJ’s purposes, id. at 297a.

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 303a (citation omitted); see *id.* at 302a-305a.

d. The district court also found “clear that Secretary Ross’s rationale was pretextual” and thus not the “real reason for his decision,” Pet. App. 311a, because the Secretary had “made the decision to add the citizenship question well before he received DOJ’s request and for reasons unrelated to the VRA,” *id.* at 313a. In the court’s view, the mere fact that the Secretary had additional reasons for his actions, or had begun to consider reinstating the citizenship question before DOJ’s formal request, was sufficient to “vacat[e] and set[] aside his decision.” *Ibid.* The court further found that the Secretary was “‘unwilling or unable to rationally consider’ arguments against the question after he received DOJ’s request,” *id.* at 318a (citation omitted), and that “there is no basis in the record to conclude that Secretary Ross ‘actually believed’ the [VRA-enforcement] rationale he put forward,” *id.* at 320 (brackets and citation omitted).

e. The district court rejected respondents’ equal-protection claim, finding they had not proved any discriminatory animus on the Secretary’s part. Pet. App. 331a-334a.

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. Finally, the court vacated its September 21, 2018 order compelling the deposition of Secretary Ross as moot. *Id.* at 353a. Respondents later withdrew their notice of the Secretary’s deposition. 18-cv-2921 D. Ct. Doc. 577 (Jan. 24, 2019).

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.

**SUMMARY OF ARGUMENT**

The district court erred in enjoining the Secretary from reinstating to the decennial census a wholly unremarkable demographic question about citizenship, which has been asked in one form or another for nearly 200 years. The court compounded its error by permitting respondents to stray outside the administrative record to challenge the Secretary’s decision.

I. A. Respondents lack Article III standing because their asserted injuries are not fairly traceable to the Secretary’s decision to reinstate the citizenship question to the decennial census. None of respondents’ alleged injuries will materialize if individuals completely and truthfully answer the census questionnaire, as required by federal law. The alleged injuries thus depend not just on third-party action, but on third-party action that is unlawful. Even worse, the unlawful third-party action is driven solely by speculative fears that the government itself will act unlawfully by using answers to the citizenship question for law-enforcement purposes. This Court has never endorsed such a capacious theory of standing, based on future illegal third-party conduct prompted by speculative fears of future

B. The Secretary’s decision to reinstate the citizenship question “is committed to agency discretion by law” and thus judicially unreviewable. 5 U.S.C. 701(a)(2). 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. City of New York*, 517 U.S. 1, 19, 23 (1996). The Census Act simply directs the Secretary to “take a decennial census * * * in such form and content as he may determine,” 13 U.S.C. 141(a), and thus vests the Secretary with the same broad discretion that the Constitution confers on Congress. As a result, the statute provides “no meaningful standard against which to judge the agency’s exercise of discretion,” *Webster v. Doe*, 486 U.S. 592, 600 (1988) (citation omitted). Also, a decision about what demographic questions to ask on the decennial census necessarily entails a “complicated balancing of a number of factors,” underscoring its “general unsuitability for judicial review.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Although the district court purported to find support for its contrary conclusion in a handful of lower-court cases, none of them involved challenges to the contents of the census form.

questions have long been a part of the decennial census despite their potential effect on response rates. And the Secretary set forth his reasons for reinstating the citizenship question in a detailed decisional memorandum, in which he evaluated four potential options for satisfying DOJ’s request for citizenship data. See Pet. App. 548a-563a. He expressly acknowledged the very concerns respondents raise here, but made the policy judgment that “the value of more complete and accurate” citizenship data “outweighs such concerns.” Id. at 562a.

Instead of evaluating that policy judgment through the deferential lens required by the APA, the district court improperly “substitute[d] its judgment for that of the agency.” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (citation omitted). The court’s “most significant” reason for overruling the Secretary’s policy choice was its conclusion that citizenship data in federal administrative records is somehow more complete and accurate than that same data plus data from the census. Pet. App. 289a. That illogical conclusion is belied by the very evidence the court relied on, which showed that asking the citizenship question would yield the citizenship information of tens of millions of individuals for whom the Bureau is currently missing data. See id. at 55a-56a.

The district court likewise erred in concluding that the Secretary failed to consider important aspects of the problem, including whether more granular citizenship data is necessary for VRA enforcement. DOJ explained why it needed such data, and it was not arbitrary and capricious for the Secretary to rely on that explanation. Cf. National Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007). The court similarly erred in concluding that the Secretary
violated various statistical directives and standards, in part because they do not bind the Secretary.

D. The district court further erred in finding the Secretary’s stated rationale pretextual. As long as an agency’s contemporaneous explanation for its action is “rational,” State Farm, 463 U.S. at 43 (citation omitted), it does not matter if the decisionmaker had other reasons for making the decision. See Jagers v. Federal Crop Ins. Corp., 758 F.3d 1179, 1186 (10th Cir. 2014). The district court thought these principles inapplicable here because of the existence of “improper ‘external political pressures,’” Pet. App. 320a (citation omitted), but an agency decisionmaker’s communicating with external stakeholders is perfectly commonplace and not a reason to set aside agency action under the APA. Sierra Club v. Costle, 657 F.2d 298, 408-410 (D.C. Cir. 1981). And nothing in the record supports the district court’s extraordinary charge that the Secretary of Commerce lied to Congress, the judiciary, and the public. Even to find mere inconsistencies, the court strained to read every statement and action of the Secretary in the worst possible light, contrary to the longstanding presumption of regularity that attaches to Executive Branch action. United States v. Armstrong, 517 U.S. 456, 464 (1996).

E. The district court further erred in concluding that the Secretary’s decision was “not in accordance with law.” 5 U.S.C. 706(2)(A). Section 6(c) of the Census Act requires a policy-laden judgment about when administrative records cannot provide data of the “kind, timeliness, quality and scope of the statistics required,” 13 U.S.C. 6(c), which is not a judicially manageable standard. Regardless, the Secretary did not violate
Section 6(c): even if used “[t]o the maximum extent possible,” ibid., federal administrative records are missing citizenship information for some 35 million people, which is why the Secretary chose to supplement that incomplete data with census data. And if the Secretary’s informational reports under Section 141(f) are deficient, that is a matter for Congress to address, not the courts. See Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 318-319 (D.C. Cir. 1988). In any event, the Secretary complied with Section 141(f) by expressly including the citizenship question in his report under Section 141(f)(2), which necessarily alerted Congress that citizenship is now also a “subject” covered by the census questionnaire.

F. The district court properly rejected respondents’ enumeration and equal-protection claims, so neither provides an alternative ground for affirmance. Demographic questions have a long tradition on the decennial census despite not being strictly necessary to conduct an “enumeration.” And respondents failed to produce any evidence that the Secretary harbored discriminatory animus.

II. The district court also erred in allowing respondents to seek, and in relying in part on, evidence outside the administrative record. Although courts may stray outside the administrative record when there is “a strong showing of bad faith or improper behavior” on the part of the agency decisionmaker, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), respondents did not make that showing here. The court’s contrary conclusion was based on precisely the same circumstances it used to bolster its erroneous findings that the Secretary’s decision was arbitrary and
capricious and pretextual. Accordingly, they fail for the same reasons.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENJOINING THE SECRETARY FROM REINSTATING THE CITIZENSHIP QUESTION TO THE 2020 DECENNIAL CENSUS

A. Respondents Lack Article III Standing

Under the familiar test for Article III standing, respondents must establish, among other things, that their alleged injuries “fairly can be traced,” i.e., are “fairly attributable,” to the Secretary’s decision to reinstate the citizenship question to the decennial census. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 44 (1976). The district court found that respondents had alleged four cognizable injuries: diminishment of political representation, loss of government funding, harm to the accuracy of census data, and diversion of resources. See Pet. App. 200a-219a. But these injuries, even if otherwise cognizable, will not occur if everyone who receives the census form fully and truthfully fills it out. Rather, the alleged injuries will materialize only if, in light of the citizenship question’s mere presence, significant numbers of people refuse to return the census form or falsely underreport the number of people in their households. Yet that result would be “fairly attributable” only to the actions of individuals who unlawfully refuse to truthfully and completely fill out and return the census form, see 13 U.S.C. 221(a), and who then are able to evade the government’s extensive follow-up efforts, see Pet. App. 19a-20a. Respondents’ alleged injuries would thus be “the result of the independent action of some third party not before the court” and therefore insufficient to support standing. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).
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, as here, the independent third-party actions are unlawful. Cf. Spencer v. Kemna, 523 U.S. 1, 15 (1998) (no standing to pursue a claim “contingent upon respondents’ violating the law” in the future). To be sure, a third party’s action injuring a plaintiff can support standing if the defendant’s conduct had a “determinative or coercive effect upon th[at] action.” Bennett, 520 U.S. at 169; see, e.g., Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) (prohibition on distribution of books deemed obscene supported standing of book publishers whose sales would suffer). But the citizenship question’s presence does not coerce anyone into declining to respond to the census questionnaire. Quite the contrary: the government coerces residents under pain of criminal penalty to fully and truthfully answer the decennial census questionnaire. 13 U.S.C. 221.

Moreover, respondents’ standing necessarily depends not only on unlawful third-party action, but on speculation that the government, too, will act unlawfully. Under respondents’ theory, the only evident reason third parties might illegally refuse to completely and truthfully respond to the census is that households containing illegal aliens may fear that the government will use their answers against them for law-enforcement purposes. But it is illegal for the Census Bureau to reveal an individual’s answers to other governmental agencies to use for such purposes, 13 U.S.C. 9, and any governmental employee who does so may be fined or imprisoned, 13 U.S.C. 214. This Court has never found
Article III standing when the alleged injury arises from speculative fears that a governmental agency or its personnel will violate the law in the future. Cf. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). Even the district court recognized that it was “pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents’ data.” Pet. App. 226a. Accordingly, the court correctly determined that such speculation was insufficient to support standing based on residents’ potential “loss of privacy” from having to answer the citizenship question. Ibid.

That logic applies with equal force to all of respondents’ alleged injuries, which would not materialize but for third parties’ speculative fears of unlawful government action (thereby leading them to act unlawfully in response). A plaintiff who “is not himself the object of the governmental action or inaction he challenges” should find it “substantially more difficult to establish” standing, not less. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (emphasis added; citations omitted); Eastern Ky. Welfare Rights Org., 426 U.S. at 44-45 (“indirectness of injury” generally “make[s] it substantially more difficult’’ to establish standing) (citation omitted). Turning this rule on its head, the district court held that even though third parties’ “pure[ly] speculat[ive]” fears of governmental misconduct are insufficient to support their own standing, Pet. App. 226a, their unlawful actions based on those speculative fears are somehow sufficient to manufacture standing for respondents.

The district court’s expansive theory of standing cannot be cabined: on the court’s logic, respondents would have standing to challenge the inclusion of any
demographic question on the decennial census as long as they could plausibly allege that residents will illegally refuse to answer the question—no matter the reason. If, for example, a group advocating a race-blind government boycotted the census because of the questions concerning race and Hispanic origin, any resulting undercount would (on this expansive theory) be deemed fairly traceable to the government’s inclusion of the questions, rather than to the third parties’ independent, unlawful decision to boycott. This Court’s cases do not permit that result. See McConnell v. FEC, 540 U.S. 93, 228 (2003) (plaintiffs lacked standing to challenge a statute permitting increased campaign contributions because plaintiffs’ “alleged inability to compete stems not from the operation of [the statute], but from their own personal ‘wish’ not to solicit or accept large contributions, i.e., their personal choice”).

The circuit-court cases on which the district court relied (Pet. App. 236a-237a) are inapposite, as they involve challenges either to the defendant’s failure to protect the plaintiff from harm in contravention of a duty to protect, see, e.g., Natural Res. Def. Council v. National Highway Traffic Safety Admin., 894 F.3d 95, 104 (2d Cir. 2018) (agency allegedly failed to impose the penalties prescribed by Congress for violating certain regulations); Attias v. CareFirst Inc., 865 F.3d 620, 629 (D.C. Cir. 2017) (insurance company allegedly did not encrypt or secure personal information, leading to a data breach), cert. denied, 138 S. Ct. 891 (2018); Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) (county clerk allegedly unlawfully published plaintiff’s Social Security number on a public website), cert. denied, 555 U.S. 1126 (2009), or to actions that actively facili-
tated third parties' unlawful conduct, see, e.g., Rothstein v. UBS AG, 708 F.3d 82, 93 (2d Cir. 2013) (bank allegedly provided financial services to terrorist groups). None supports the claim that harm resulting from unlawful third-party conduct, itself driven by speculative fears that the government will act unlawfully, is fairly attributable to the government's otherwise lawful actions.

B. The Content Of The Census Questionnaire Is Committed To Agency Discretion By Law

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.

1. The APA bars judicial review of any action that "is committed to agency discretion by law." 5 U.S.C. 701(a)(2). Action is committed to agency discretion by law when the governing "statutes are drawn in such broad terms that in a given case there is no law to apply," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (citation omitted), and thus "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. City of New York, 517 U.S. 1, 19, 23 (1996). The Secretary thus possesses the same broad discretion that the Constitution confers on Congress. Ibid. And 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 Constitution simply instructs Congress to conduct the census “in such Manner as they shall by Law direct.” U.S. Const. Art. I, § 2, Cl. 3. And the statute in turn directs the Secretary to “take a decennial census * * * in such form and content as he may determine.” 13 U.S.C. 141(a). Neither contains any “meaningful standard” to guide the Secretary’s determination. *Webster*, 486 U.S. at 600.

Indeed, the Census Act expressly confers on the Secretary the discretion not just to count the population but to “obtain such other census information as necessary.” 13 U.S.C. 141(a). In this context, “necessary” is properly interpreted as “convenient” or “useful,” not “absolutely necessary.” See *Jinks v. Richland County*, 538 U.S. 456, 462 (2003); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418–419 (1992). Any other definition would preclude the asking of any demographic question on the decennial census—contrary to the venerable and unbroken tradition of asking such questions. And Congress has consistently refused to constrict the Secretary’s discretion to ask demographic questions on the decennial census. Indeed, Section 141(a) itself was enacted to provide “greater discretion” to ask such questions on the census, including on “subjects of current national concerns.” H.R. Rep. No. 246, 93d Cong., 1st Sess. 14 (1973) (emphasis added). And even when Congress wished to protect the privacy of individuals’ religious beliefs and affiliations, it did so by removing the obligation to answer such questions on the census, 13 U.S.C. 221(c)—not by curtailing the Secretary’s discretion to ask them.

The Secretary’s discretion is thus at least as broad as that granted by the statute at issue in *Webster*, which
allowed the Director of the CIA to terminate an employee whenever the Director “‘shall deem such termination necessary or advisable in the interests of the United States,’” and which this Court concluded “foreclose[d] the application of any meaningful judicial standard of review.” 486 U.S. at 600 (citation and emphasis omitted); see Senate of State of Cal. v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992) (Census Act’s “grant of authority to the Secretary does fairly exclude deference”). As the Seventh Circuit has observed, so “nondirective” are the Constitution, the Census Act, and the APA “about how to conduct a census * * * that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.” Tucker v. United States Dep’t of Commerce, 958 F.2d 1411, 1417-1418 (1992).

The text and history of the Census Act confirm that review of the contents of the decennial census questionnaire lies with Congress, not the judiciary. The Secretary must report the planned subjects and questions on the decennial census to Congress at specified deadlines, see 13 U.S.C. 141(f), and the Secretary routinely testifies before House and Senate committees about the decennial census, see, e.g., Pet. App. 71a-73a; 18-557 Gov’t Br. at 25-31 (discussing Secretary Ross’s testimony to various congressional committees about the citizenship question’s inclusion on the 2020 decennial census). Demographic questions, including ones about sensitive topics such as race, gender, marital status, and citizenship, long have appeared on the decennial census questionnaire. See Pet. App. 15a-19a. Yet until now no court has seen fit to police the contents of the decennial census questionnaire by even entertaining an arbitrary-

Finally, that this discretion would rest solely with the political branches makes eminent sense, for deciding what questions to ask on the decennial census necessarily involves a “complicated balancing of a number of factors,” making it “unsuitabl[e]” for judicial review under the APA. *Chaney*, 470 U.S. at 831. At the margins, each additional question on the decennial census yields additional useful information in exchange for potentially lower response rates and concomitantly higher follow-up costs. Deciding whether the benefits outweigh the costs is fundamentally a policy judgment—one that Secretary Ross expressly made here. Pet. App. 562a. Congress entrusted such judgments to the Secretary’s discretion, with any review to be conducted by Congress itself. 13 U.S.C. 141(a) and (f). The Secretary’s policy judgment to reinstate the citizenship question to the 2020 decennial census is thus precisely the sort of decision that the APA makes immune from judicial second-guessing. 5 U.S.C. 701(a)(2); *Chaney*, 470 U.S. at 831; *Tucker*, 958 F.2d at 1417 (stating that the Constitution, Census Act, and APA “do not create justiciable rights” because they provide no “judicially administrable standard” for determining “how to conduct a census”).
2. The district court gave four reasons in support of its contrary conclusion. See Pet. App. 400a-408a. None has merit.

First, the district court asserted (Pet. App. 400a-401a) that Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980) (per curiam), permits APA review. But Carey—which predates this Court’s decisions in Chaney, Brotherhood of Locomotive Engineers, and Webster—concerned a challenge to the methods used by the Census Bureau to count residents in low-income areas. Id. at 836. It did not involve a challenge to the content of the census questionnaire. Accordingly, the court had no occasion to address the application of Section 141(a)’s broad grant of authority to the Secretary’s determination of the “form and content” of the census questionnaire, including the collection of any additional information he finds “necessary.”

Second, the district court invoked (Pet. App. 402a-403a) several provisions of the Census Act that it believed impose “mandatory duties” on the Secretary: 13 U.S.C. 5 and 141(a), (b), and (c). But none imposes any duties with respect to the content of the census questionnaire. Section 5 states that the Secretary “shall prepare questionnaires, and shall determine the inquiries, and the number, form and subdivisions thereof.” 13 U.S.C. 5. Far from constraining the Secretary’s discretion, Section 5 in fact reinforces the conclusion that the Secretary’s decisions concerning the content of the questionnaire are judicially unreviewable. The same is true of Section 141(a), as discussed above. And Section 141(b) and (c) merely set deadlines for the Secretary to report the population count to the President and to provide certain information to States. Neither imposes any restrictions on the content of the census questionnaire.
If anything, all of these provisions only underscore that Congress knows how to impose limitations on the Secretary’s conduct of the census—yet deliberately chose not to impose in Section 141(a) any limitations on the content of the census questionnaire.

Third, the district court relied (Pet. App. 403a-405a) on Justice Stevens’s concurring opinion in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *Franklin* involved a challenge to the method by which overseas governmental employees were allocated to States for apportionment purposes. *Id.* at 795 (majority opinion). A plurality stated that “[c]onstitutional challenges to apportionment are justiciable,” *id.* at 801 (emphasis added), but the Court had no occasion to resolve whether the APA permitted judicial review of the Secretary’s taking of the census itself. Justice Stevens’s separate opinion, which was not controlling, surmised that the APA might permit such review because the taking of the census does not implicate national-security concerns. See *id.* at 818-819 (concurring in part and in the judgment). The concurrence did not provide any basis in the APA for drawing such a distinction, and in any event rested on the mistaken premise that “[n]o language equivalent to ‘deem . . . advisable’ [as in the statute at issue in *Webster*] exists in the census statute,” and thus the Secretary does not have the same sort of discretion as the CIA Director did in *Webster*. *Id.* at 817. Four years later, however, a majority of the Court effectively rejected that view in *Wisconsin*, recognizing that the Census Act grants “virtually unlimited discretion” to the Secretary. 517 U.S. at 19.

Fourth, and again relying heavily on the concurrence in *Franklin*, the district court concluded (Pet. App. 405a) that “there are in fact judicially manageable
standards with which courts can review the Secretary’s decisions” because of the existence of case law entertaining various census-related challenges. See id. at 405a-406a (citing cases). But just because other Census Act provisions supply judicially manageable standards does not mean that Section 141(a), the provision at issue here, does. For example, Section 195, which prohibits the use of “sampling” for “the determination of population for purposes of apportionment,” 13 U.S.C. 195, is judicially enforceable because a court can determine whether the Secretary has or has not engaged in impermissible sampling. Department of Commerce v. United States House of Representatives, 525 U.S. 316, 335 (1999). By contrast, neither the Census Act nor the Constitution provides any standard to guide a court’s judgment of when the Secretary has exceeded his authority to take the decennial census “in such form and content as he may determine.” 13 U.S.C. 141(a) (emphasis added).

Tellingly, none of the cases the district court cited (Pet. App. 405a-406a) involved challenges to the Secretary’s determination of the “form” or “content” of the decennial census questionnaire under Section 141(a). Two of the cases, Philadelphia v. Klutznick, 503 F. Supp. 663 (E.D. Pa. 1980), and Utah v. Evans, 182 F. Supp. 2d 1165 (D. Utah 2001), aff’d, 536 U.S. 452 (2002), involved sampling. And the other two, City of Willacoochee v. Baldrige, 556 F. Supp. 551 (S.D. Ga. 1983), and Texas v. Mosbacher, 783 F. Supp. 308 (S.D. Tex. 1992), involved challenges to the accuracy of the census tabulation. As noted above, such challenges generally are not judicially reviewable because there is no standard by which a court could determine how accurate is accurate enough, see Tucker, 958 F.2d at 1417-1418; and in any
event, this case does not involve such a challenge. In short, none of the cited cases stands for the proposition that Section 141(a) provides a judicially manageable standard to review the Secretary’s “virtually unlimited discretion” to determine the contents of the census form. Wisconsin, 517 U.S. at 19.

C. The Secretary’s Decision Was Not Arbitrary And Capricious

Even if the Secretary’s decision were reviewable, the district court erred in concluding (Pet. App. 284a-311a) that the decision was arbitrary and capricious. 5 U.S.C. 706(2)(A).


At the threshold, it simply cannot be arbitrary and capricious—or “irrational,” as the district court put it, Pet. App. 285a n.65—to reinstate to the decennial census a question whose pedigree dates back nearly 200 years. Indeed, 2010 was the first time in 170 years that
a question about citizenship or birthplace 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.” *Id.* at 561a. The United Nations also recommends asking about citizenship on a census. *Ibid.* And the United States itself continues to ask about citizenship on the ACS, as it has since the ACS’s inception. More generally, the decennial census has always included demographic questions notwithstanding their potential impact on response rates, see *id.* at 16a-19a, including dozens of questions on the long form, which had measurably lower response rates, see *id.* at 553a. In light of the longstanding, uniform, and widely accepted practice of asking demographic questions in general and a citizenship question in particular, the Secretary’s decision to reinstate a citizenship question to the decennial census can hardly be “irrational” under any standard of review.

That conclusion is all the more obvious under the narrow and deferential standard of review that applies to agency action. Under that standard, an agency need only “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (citation omitted). Even if that explanation is “of less than ideal clarity,” courts must uphold the agency’s decision as long as “the agency’s path may reasonably be discerned.” *Ibid.* (citation omitted); see *Home Builders*, 551 U.S. at 658.

Here, the Secretary explained in his decisional memorandum (Pet. App. 548a-563a) that he had received a
formal request from DOJ to provide more granular citizenship data for VRA enforcement purposes; he evaluated the advantages and disadvantages of three options that Census Bureau personnel offered; he asked the Bureau to analyze a fourth option; and this fourth option—using citizenship data from federal administrative records and reinstating the citizenship question to the decennial census—“will provide DOJ with the most complete and accurate [citizenship] data in response to its request.” Id. at 556a. That explanation was of more than sufficient clarity to reasonably discern the rationale on which the Secretary chose to rest his decision. Home Builders, 551 U.S. at 658.

Nor did the Secretary overlook the potential downsides of reinstating the citizenship question to the decennial census. The Secretary expressly acknowledged the risk that reinstating the question would depress response rates and increase the costs of follow-up operations. Pet. App. 552a-554a, 556a-561a. Yet he also observed that “limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially.” Id. at 557a. Undertaking a “comparative analysis” between response rates to the ACS (which has always included a citizenship question) and the census is “challenging” because the ACS is so much longer than the census questionnaire. Id. at 553a. Even looking at the ACS alone, differential nonresponse rates to the citizenship question are “comparable to nonresponse rates for other questions.” Ibid. And a comparison of the relative response rates to the 2000 decennial census “short form” (which did not include a citizenship question) and long form (which did) was inconclusive. Id. at 554a. In sum, the existing data simply “did not provide definitive, empirical support for
th[e] belief” that “adding a citizenship question could reduce response rates.” *Ibid.* That was particularly so, the Secretary concluded, for individuals “who generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement,” as they would be unlikely to answer the census “regardless of whether [it] includes a citizenship question.” *Id.* at 557a.

All that said, the Secretary concluded that “even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns.” Pet. App. 562a. “The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.” *Ibid.* That policy-laden balancing was a quintessential exercise of the Secretary’s “virtually unlimited discretion” to conduct the census, *Wisconsin*, 517 U.S. at 19, and plainly was “the product of reasoned decisionmaking,” *State Farm*, 463 U.S. at 52.

2. In concluding otherwise, the district court improperly “substitute[d] its judgment for that of the agency.” *Fox Television*, 556 U.S. at 513 (citation omitted).

   a. The district court found “most significant” the fact that “Secretary Ross’s own stated ‘priority’ was to ‘obtain complete and accurate data’” on citizenship. Pet. App. 289a (brackets and citation omitted). Importantly, the court did not purport either to question this priority or to hold that the Secretary’s decision to pursue it (even at the cost of a lower self-response rate) would be arbitrary and capricious. Instead, the court attacked the premise, concluding that “all of the
relevant evidence before Secretary Ross—all of it—demonstrated that using administrative records” alone “would actually produce more accurate” citizenship data than both using administrative records and asking a citizenship question, as Secretary Ross chose to do. Id. at 290a. That conclusion not only defies logic, but betrays the court’s fundamental misunderstanding of the evidence before the Secretary—principally, a handful of internal pre-decisional memoranda from the Census Bureau to the Secretary, J.A. 104-159, on which the court “relie[d] heavily,” Pet. App. 285a n.65; see id. at 290a-293a; see also id. at 54a-58a (summarizing some of these materials). Those memoranda make clear that adding the citizenship question would, as the Secretary concluded, yield more accurate and complete citizenship data for the United States population.

According to those memoranda, citizenship information for approximately 295 million people is currently available in federal administrative records, so without a census citizenship question, the Bureau would have to “model” or impute citizenship information for some 35 million people. See Pet. App. 55a; cf. Utah v. Evans, 536 U.S. 452, 457-458 (2002) (describing older methods of imputation). With the question, the Bureau estimates that the number of people whose citizenship information cannot be “linked” to federal administrative records would increase from 35 million to 36 million, largely because some people will not return the form or not fill out the citizenship question. Pet. App. 55a-56a; see J.A. 146-147. That is why the district court concluded that citizenship data in federal administrative records alone would be more complete and accurate. See ibid.; id. at 290a-292a.
But the district court ignored evidence in those memoranda describing the advantages of reinstating the citizenship question—principally, the fact that hundreds of millions of people will answer the citizenship question, including some 22 million people for whom citizenship information would otherwise be unavailable. See Pet. App. 55a-56a; J.A. 145-150. That means the number of people for whom the Bureau would need to “model” citizenship information would reduce from 35 million to 13.8 million—an obvious improvement in data completeness and quality. Pet. App. 55a-56a. And adding the citizenship question would concomitantly increase the number of individuals for whom the government has actual (not modeled or imputed) citizenship information from 295 million to roughly 316 million—another clear benefit. See id. Moreover, that larger figure includes roughly 272 million people whose citizenship data is linked to administrative records, see id. at 56a, thereby providing valuable “comparison” data that the Bureau can use to improve the quality of imputation “for that small percentage of cases where [imputation] is necessary,” id. at 556a. The court overlooked this additional benefit, too.

The district court noted that of the 22 million additional responses, “just under 500,000” (or roughly 2%) will be inaccurate. Pet. App. 56a. The court inexplicably deemed this a “high rate” of error. Ibid. But whether it is high or low is beside the point: the Secretary acknowledged that errors would exist, see id. at 555a, but judged the benefits to outweigh the costs, see id. at 562a. The court’s rejecting that conclusion because the error rate would (in its view) be too “high” is a classic case of “substituting its judgment for that of
the agency.” *Fox Television*, 556 U.S. at 513 (citation omitted).

So too the district court’s observation that 9.5 million responses to the citizenship question will conflict with data in administrative records. Pet. App. 56a. If the administrative records truly are more accurate than self-responses, nothing prevents the Census Bureau, in the event of such conflicts, from providing DOJ the data in those records instead of the self-response data. Regardless, that is a decision about what to do with census data that already has been collected—not a reason to prohibit asking the citizenship question in the first place. In giving dispositive weight to these estimated 9.5 million records, the court once again “substitute[d] its judgment for that of the agency.” *Fox Television*, 556 U.S. at 513 (citation omitted).

To be sure, Census Bureau personnel also believed that using administrative records alone would be preferable because the modeling or imputation process (for those individuals for whom citizenship data is missing) will in the aggregate be less accurate if the citizenship question is asked. See Pet. App. 291a, 319a. Yet if the citizenship question is asked, imputation will be required for substantially fewer people—13.8 million instead of 35 million. See id. at 55a-56a. Whether to prefer an option that requires substantially less imputation over one that requires substantially more (albeit higher-quality) imputation is ultimately a policy choice—one that is left to the Secretary’s discretion. And as this Court has emphasized—in the context of the census, no less—“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*, 517 U.S.
at 23. At a minimum, given the lack of definitive empirical data on the issue, it was not arbitrary and capricious for the Secretary to reject the pessimistic views of the Bureau (and of the district court) and instead make the policy judgment that obtaining more complete and accurate citizenship data “is of greater importance than any adverse effect that may result from people violating their legal duty to respond” to the census. Pet. App. 562a.

The district court’s remaining criticisms lack force. The court disputed the Secretary’s statements that the citizenship question would be “no additional imposition” on most people; that placing the question last on the questionnaire would “minimize any impact” on response rates; and that it was “difficult to assess” the cost of increased follow-up procedures. Pet. App. 286a-289a (citations omitted). These are insubstantial quibbles. Nothing in the record indicates that a single additional question will substantially burden census respondents, and logic dictates that placing a question last will minimize (even if not eliminate) the risk that individuals will refuse to fill out the questionnaire altogether. And although the Secretary found questionable the Bureau’s estimate of follow-up costs, he concluded that “even assuming that estimate is correct,” it was within the margin of error of the allocated budget and thus not of significant concern. Id. at 561a. None of these conclusions is incorrect; and in any event all of them easily satisfy the narrow and deferential “arbitrary and capricious” standard of review under the APA, especially given the exceptionally broad discretion the Secretary wields over the census. Wisconsin, 517 U.S. at 19; State Farm, 463 U.S. at 43.
b. The district court likewise erred in concluding (Pet. App. 294a-300a) that the Secretary failed to consider important aspects of the problem.

The district court first criticized the Secretary for failing to consider “whether 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. And it is hardly unusual for one department to rely on the expertise of the other. See, e.g., City of Tacoma v. FERC, 460 F.3d 53, 75 (D.C. Cir. 2006); cf. Home Builders, 551 U.S. at 662; Massachusetts v. EPA, 549 U.S. 497, 530 (2007); Bennett, 520 U.S. at 169-170. It cannot possibly be arbitrary and capricious for a Cabinet Secretary to pay respectful attention to such formal requests.

The district court also criticized the Secretary for failing to consider whether “more granular [citizenship] data is ‘necessary’ for [VRA] enforcement.” Pet. App. 295a. Yet DOJ provided four reasons why more granular citizenship data from the census would aid its VRA enforcement efforts, including that the currently available data from the ACS did not align in time or scope with the census population data used for redistricting efforts. Id. at 567a-568a. The Secretary was entitled to rely on DOJ’s analysis; for under the APA, “the critical question is whether the action agency’s reliance was arbitrary and capricious, not whether the [other agency’s analysis] is somehow flawed.” City of Tacoma, 460 F.3d at 75. Yet the district court did not directly address any of DOJ’s reasons in its own analysis, let alone explain why they were so flawed that it was arbitrary and capricious to rely on them. See Pet. App. 295a-297a. Nor did the court even acknowledge the many 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 (AR) 1079-1080 (Louisiana), 1155-1157 (Texas), 1161-1162 (Alabama), 1210-1212 (Oklahoma, Kansas, Michigan, Indiana, Nebraska, South Carolina, Arkansas, Georgia, Kentucky, Tennessee, Mississippi, Florida, and West Virginia).\(^2\)

Instead, the district court second-guessed the necessity of DOJ's request for the sole reason that a citizenship question had not been on the short form since the VRA's enactment in 1965. Pet. App. 295a-297a. But under that logic, the Secretary could never ask any additional questions on the census to aid VRA enforcement efforts, no matter how helpful they might be. The APA does not ossify the census form or curtail the Secretary’s discretion in that manner. Just because DOJ and the States have managed to overcome the limitations of ACS citizenship data for VRA enforcement and redistricting thus far does not mean that the APA, the Census Act, or the Constitution requires the perpetuation of that state of affairs.

Finally, the district court criticized the Secretary for supposedly failing to consider “the effect of the Census Bureau’s confidentiality obligations and disclosure avoidance practices on the fitness of decennial census citizenship data for DOJ’s stated purposes.” Pet. App. 297a. To avoid disclosing personally identifiable census data, see 13 U.S.C. 9(a), the Bureau uses statistical techniques to anonymize the data, and the court speculated that these techniques would prevent the generation of accurate census-block-level citizenship data for

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\(^2\) 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).
DOJ. See Pet. App. 298a-299a. But the Secretary plainly was aware of the agency’s disclosure-avoidance obligations. See, e.g., id. at 556a (recognizing that “census responses by law may only be used anonymously and for statistical purposes”), 562a (remarking that individual census responses “are protected by law”). And nothing in the administrative record even hints that anonymization will be an obstacle to providing DOJ the citizenship data it requested. To the contrary, as the Bureau explained, anonymization is designed to shield “person-level microdata,” J.A. 135—not to prevent the generation of usable census-block-level citizenship data.

With nothing in the administrative record to support its speculation, the district court instead relied on extra-record evidence. See Pet. App. 298a-299a (citing trial transcripts and deposition excerpts). That was improper. See pp. 55-56, infra. It also was incorrect: the same expert whose testimony the court relied on (Pet. App. 298a-299a) and found “credible and persuasive,” id. at 293a n.68, testified—in response to a question from the court itself—that the Bureau’s disclosure-avoidance practices will not prevent it from providing DOJ with “accurate citizen voting-age population for within [a block-level] area.” 11/13/2018 Tr. 1037 (18-cv-2921 D. Ct. Doc. 560); see 11/14/2018 Tr. 1245 (18-cv-2921 D. Ct. Doc. 562) (opining that “disclosure avoidance at the block level” would not “impair” DOJ’s ability to use the data).

c. The district court further erred in concluding that the Secretary’s decision was arbitrary and capricious because “it represented a dramatic departure from the standards and practices that have long governed administration of the census.” Pet. App. 300a. Specifically,
the court determined that the Secretary violated OMB statistical directives and the Bureau’s internal statistical quality standards. \textit{Id.} at 302a-310a. As an initial matter, the court’s conclusion is wrong on its face: questions about citizenship or place of birth (or both) have a long pedigree on the decennial census dating back to 1820 and have been part of the ACS every year since its inception in 2005, so reinstating a citizenship question to the 2020 decennial census is not a “dramatic departure” from census “practices” at all. If anything, it represents a return to the traditional status quo. Regardless, the statistical standards the district court cited do not provide judicially manageable standards and the Secretary did not run afoul of them anyway.

The OMB directives provide no judicially manageable standards because they state only that governmental data-collection efforts should “achieve[] the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost,” Pet. App. 303a (citation omitted), and leave to the relevant agency the task of designing and implementing specific “policies, practices, and procedures” based on the “particular data needs, forms of data, and information technology” required or available at the time, 79 Fed. Reg. 71,610, 71,613 (Dec. 2, 2014). A court could not possibly police compliance with the directives without both second-guessing the agency’s judgment about what constitutes the “best balance” of the competing factors and micromanaging the agency’s choices of policies and practices to achieve that balance. And even if it could, the Secretary did not arbitrarily depart from those directives here. As discussed earlier, pp. 28-35, \textit{supra}, the Secretary reasonably concluded
that combining existing citizenship data in federal administrative records with new citizenship data from the decennial census would provide the most complete and accurate data to DOJ at an acceptable cost. See Pet. App. 548a-562a. That conclusion was amply supported by the administrative record and well within the Secretary’s “virtually unlimited discretion” to conduct the decennial census. Wisconsin, 517 U.S. at 19.

Similarly flawed was the district court’s conclusion that the Secretary unreasonably deviated from the Bureau’s internal statistical quality standards by failing to pretest the citizenship question without first obtaining a waiver. Pet. App. 305a-306a. The Bureau’s pretesting standards do not and cannot bind the Secretary, so it does not matter whether the Bureau applied for a waiver. See id. at 305a. As the Senate-confirmed head of the agency, the Secretary need not seek a waiver from his subordinates. Besides, the standards do not require pretesting when the question has “performed adequately in another survey.” Ibid. (citation omitted). Here, the Census Bureau informed the Secretary that pretesting the citizenship question was unnecessary: “Since the question is already asked on the [ACS], we would accept the cognitive research and questionnaire testing from the ACS instead of independently retesting the citizenship question.” AR 1279. It was plainly not arbitrary and capricious for the Secretary to rely on that expert assessment, particularly given the long history of the question on the decennial census and the ACS.

D. The Secretary’s Stated Rationale Cannot Be Set Aside As Pretextual

The district court found that the Secretary’s decision flunked APA review for the further reason that his
stated rationale was allegedly “pretextual”—by which the court meant “the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ’s VRA enforcement efforts.” Pet. App. 311a. Without identifying what that “real reason” supposedly was, the court concluded that the Secretary “made the decision to add a citizenship question well before he received DOJ’s request and for reasons unrelated to the VRA.” Id. at 313a.

The district court’s reasoning defies fundamental principles governing APA review of agency action. This Court has long recognized that “judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.” Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977). In part for that reason, this Court has “made it abundantly clear” that APA review must focus only on the “contemporaneous explanation of the agency decision” that the agency chooses to rest upon, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978), and that explanation must be upheld if the record reveals a “rational” basis supporting it. State Farm, 463 U.S. at 42-43. As explained above, the Secretary’s decision was amply supported by the administrative record and his memorandum is of more than sufficient “clarity” that the grounds on which he rested his decision “may reasonably be discerned.” Id. at 43 (citation omitted); Home Builders, 551 U.S. at 658.

The district court erred in concluding that, notwithstanding the Secretary’s rational contemporaneous explanation, his decision must be set aside because he had additional reasons for pursuing it. Agency action does not fail APA review merely because, as is often the case,
the agency decisionmaker had unstated reasons for supporting a policy decision in addition to a stated reason that is both rational and supported by the record. 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”). It “would eviscerate the proper evolution of policymaking were [courts] to disqualify every administrator who has opinions on the correct course of his agency’s future actions.” Air Transp. Ass’n of Am., Inc. v. National Mediation Bd., 663 F.3d 476, 488 (D.C. Cir. 2011); see Jagers, 758 F.3d at 1185. Accordingly, to set aside an agency action that is supported by a rational justification, a court must find that the decisionmaker did not believe the stated grounds on which he ultimately based his decision, irreversibly prejudged the decision, or otherwise acted on a legally forbidden basis. See Mississippi Comm’n on Envtl. Quality v. EPA, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam); Jagers, 758 F.3d at 1185; Air Transp. Ass’n, 663 F.3d at 488.

The district court resisted application of this legal standard by attempting to distinguish this case on its facts. The Secretary’s decision here, the court surmised, was not “supported by ‘objective scientific evidence’” and might have been subject to “improper ‘external political pressures.’” Pet. App. 320a (citation omitted). But deferential APA review is not limited to agency decisions resting on “objective scientific evidence,” and the court cited no contrary authority. Nor is there any evidence here of “improper external political pressures”; at most, the court found that the Secre-
tary communicated with various stakeholders, including a White House official, before making his decision. See *id.* at 77a, 79a. But such communications are perfectly commonplace and, outside certain narrow circumstances not applicable here (such as in on-the-record hearings), are not grounds to set aside agency action under the APA. *Sierra Club v. Costle*, 657 F.2d 298, 408-410 (D.C. Cir. 1981).

In the alternative, the district court found that the Secretary did not in fact believe his stated rationale for reinstating a citizenship question. Pet. App. 320a. Yet the court cited no evidence (much less “solid” evidence, *ibid.*) that the Secretary disbelieved DOJ’s letter and, instead, secretly thought that reinstating the citizenship question to the census would not be useful for VRA enforcement. The court’s finding thus has no basis in the record, let alone the compelling support necessary for a court to overcome the presumption of regularity and level a charge of deceit against a Cabinet Secretary who has taken an oath to obey the law. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

Likewise, the record does not support the district court’s conclusion that the Secretary acted with an “unalterably closed mind.” Pet. App. 318a (citation omitted). The mere fact that the Secretary was inclined towards a certain policy position and reached out to DOJ to ask if it would support that policy does not establish that he was unwilling to rationally consider counterarguments. See *Jagers*, 758 F.3d at 1185 (“subjective hope” that factfinding would support a desired outcome does not “demonstrate improper bias on the part of agency decisionmakers”). “[T]here’s nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support
from other agencies to bolster his views, [and] disagreeing with staff.” *In re Department of Commerce*, 139 S. Ct. 16, 17 (2018) (opinion of Gorsuch, J.).

Nothing in the Secretary’s memoranda (or any other document) suggests that the Secretary would have asserted the VRA-enforcement rationale had DOJ disagreed or, conversely, that DOJ’s request made the Secretary’s decision a *fait accompli*. And the court’s “extraordinary” accusation that a Cabinet Secretary intentionally misled Congress, the judiciary, and the public about his decisionmaking process is unfounded. *Department of Commerce*, 139 S. Ct. at 17 (opinion of Gorsuch, J.). In deeming the Secretary’s explanation of his decisionmaking process “false or misleading,” and in supposedly cataloging “the many ways in which Secretary Ross and his aides sought to conceal aspects of the process,” Pet. App. 314a, the court strained to construe the Secretary’s remarks and actions in the most uncharitable manner possible, in defiance of the presumption of regularity that courts must apply to Executive Branch action. *Armstrong*, 517 U.S. at 464.

For example, as evidence that the Secretary purportedly concealed that he had asked DOJ if it would request that a citizenship question be reinstated, the district court cited the Secretary’s March 20, 2018 statement to Congress that the Commerce Department was “responding ‘solely’ to the Department of Justice’s request.” Pet. App. 128a; see id. at 126a-129a. But that statement was in response to questions asking whether the Commerce Department acted in response to requests from political campaigns or parties. See 2018 WLNR 8815056. Secretary Ross’s disavowal cannot

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reasonably be interpreted as additionally claiming that he had not previously considered the issue or spoken to others within the Administration about it. The court’s other examples are of a piece; viewed in context, none is false or misleading. See 18-557 Gov’t Br. at 25-37 (refuting each example). In concluding otherwise, the court plucked snippets of dialogue out of context, see Pet. App. 124a-129a, and turned the presumption of regularity on its head by viewing each of the Secretary’s statements and acts in the worst possible light, rather than the best. Armstrong, 517 U.S. at 464.

E. The Secretary’s Decision Was In Accordance With Law

The district court erroneously concluded that rein-stating the citizenship question to the decennial census was “not in accordance with law,” 5 U.S.C. 706(2)(A), because the Secretary purportedly violated two provisions of the Census Act: 13 U.S.C. 6(c) and 141(f). Pet. App. 261a-284a.

1. Section 6(c) of the Census Act does not support setting aside the Secretary’s decision

   The district court erroneously concluded (Pet. App. 261a-272a) that the Secretary violated Section 6(c) of the Census Act. That provision states: “To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from [administrative records] instead of conducting direct inquiries.” 13 U.S.C. 6(c).

   At the threshold, Section 6(c) contains no judicially manageable standards to evaluate compliance with its

terms. The district court’s conclusion that administrative records alone were sufficient to satisfy the “kind, timeliness, quality and scope” of citizenship data the Secretary required, 13 U.S.C. 6(c), rests on the premise that the Secretary should have chosen to fill in the undisputed gaps in that data—i.e., the tens of millions of individuals whose citizenship information cannot be linked to administrative records—by imputation and statistical techniques, rather than by reinstating a longstanding citizenship question to the decennial census. See Pet. App. 269a-270a. But Section 6(c) does not supply any standard by which a court could evaluate that policy choice. To be sure, Section 6(c) might require the Secretary to use administrative records when they are readily available and comprehensive. Yet nothing in that provision purports to curtail the Secretary’s discretion to make “direct inquiries” when, as here, the data in those records is concededly incomplete, or to provide any standards by which a court could determine when a dataset is incomplete enough to permit direct inquiries.

It is particularly odd to conclude, as the district court did, that Section 6(c) curtails the Secretary’s discretion to ask a citizenship question. When Section 6(c) was added to the Census Act, see Act of Oct. 17, 1976, Pub. L. No. 94-521, § 5(a), 90 Stat. 2460, a citizenship question had long been included on the decennial census for some or all of the population, even though administrative records were available for the Secretary’s use, see Act of Aug. 28, 1957, Pub. L. No. 85-207, § 3, 71 Stat. 481 (enacting 13 U.S.C. 6(a) and (b)). In enacting Section 6(c), Congress gave no hint that it disapproved of the citizenship (or any other demographic) question or wanted to eliminate it from the census questionnaire in
favor of relying solely on those administrative records, with imputation to fill in the gaps. Yet taken to its logical conclusion, the court’s contrary reasoning likely would mean that every demographic question on the decennial census violates Section 6(c), for the Secretary can always use administrative records to collect data about age, sex, race, or Hispanic origin and then fill in any gaps in that data through modeling or imputation rather than by asking questions on the census. Even the court seemed to recognize that its reasoning in this way proved too much. Pet. App. 271a.

Regardless, the Secretary’s decision fully complied with Section 6(c). Even if acquired and used “[t]o the maximum extent possible,” 13 U.S.C. 6(c), federal administrative records do not contain citizenship data for a large swath of residents—35 million people, according to the Bureau’s estimates. See Pet. App. 55a-56a. Given the “kind, timeliness, quality and scope” of citizenship data the Secretary understood DOJ to be requesting for its VRA enforcement efforts, 13 U.S.C. 6(c), the Secretary reasonably determined that supplementing the data in the administrative records with data from the decennial census would “provide DOJ with the most complete and accurate [citizenship] data in response to its request,” Pet. App. 556a. That is more than sufficient to satisfy Section 6(c).

The district court’s contrary conclusion rested on the mistaken belief that combining citizenship data from administrative records with that from the decennial census “would produce less accurate citizenship data than” using the administrative records alone. Pet. App. 270a. For the reasons already discussed, see pp. 31-35, supra, that belief was erroneous; in fact census citizen-
ship data would improve both completeness and accuracy. The court also was mistaken to suggest that Section 6(c) prohibits asking demographic questions on the census unless the demographic information is “required—as opposed to merely desired.” Pet. App. 267a. Demographic questions of all sorts have been present on every decennial census in the Nation’s history, see id. at 16a-20a, and, as noted, Congress has never suggested that it disapproves.

Finally, the district court observed that the Secretary’s decisional memorandum “nowhere mentions, considers, or analyzes his statutory obligation” under Section 6(c), 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 providing an explanation demonstrating that the provision has been satisfied, 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), or act in contravention of the “plain language of the [relevant] statute,” Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178, 1195 (8th Cir. 2001), cert. denied, 535 U.S. 927 (2002).

2. Section 141(f) of the Census Act does not support setting aside the Secretary’s decision

The district court further erred in concluding (Pet. App. 272a-284a) that the Secretary violated 13 U.S.C. 141(f). That provision establishes a congressional re-
porting scheme for the census questionnaire. Paragraph (1) requires the Secretary to submit a report to Congress containing “the subjects” to be included on the census at least three years before the census date. 13 U.S.C. 141(f)(1). Paragraph (2) requires the Secretary to submit a report to Congress containing the “questions” to be included not less than two years before the census date. 13 U.S.C. 141(f)(2). Paragraph (3) then provides that, “after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate modifying the subjects or questions previously submitted, the Secretary shall submit a report to Congress identifying the modified subjects or questions. 13 U.S.C. 141(f)(3).

It is undisputed that the Secretary timely submitted the required Section 141(f)(1) and (2) reports to Congress in March 2017 and March 2018, respectively. Pet. App. 274a. It also is undisputed that the Secretary informed Congress he intended to include a citizenship question on the census in his (f)(2) report. Ibid. The district court nonetheless concluded that the Secretary violated Section 141(f) because the earlier (f)(1) report did not include citizenship as a “subject.” Id. at 275a-276a. That was erroneous for several reasons.

a. Most important, if the Secretary’s reports were deficient, it is a matter for Congress to address—not the courts. As the D.C. Circuit has explained, the adequacy of “[e]xecutive responses to congressional reporting requirements” generally is 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.” Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 318-319 (1988). Other lower
courts agree. E.g., 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 judicially reviewable); Taylor Bay Protective Ass’n v. Administrator, 884 F.2d 1073, 1080 (8th Cir. 1989) (Army Corps of Engineers flood-control report); United States v. White, 869 F.2d 822, 829 (5th Cir. 1989) (Sentencing Commission report). The district court cited no authority for its contrary approach.

The apparent unanimity is not surprising. Reporting requirements are “by [their] nature *** singularly committed to congressional discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements.” Hodel, 865 F.2d at 318. Thus, “in the absence of a congressional directive for judicial review of claims by non-congressional parties, the issue [is] quintessentially within the province of the political branches to resolve as part of their ongoing relationships.” Id. at 319.

Indeed, judicial review of the Secretary’s compliance with Section 141(f)’s reporting requirements is neither “necessary [n]or advisable.” Taylor Bay, 884 F.2d at 1080. The Secretary informed Congress of his intent to include a citizenship question on the census in March 2018, and Congress has questioned the Secretary about his decision in public hearings on several occasions since. See Pet. App. 71a-73a; 18-557 Gov’t Br. at 25-31 (describing some of the testimony). Congress is thus well aware of the Secretary’s intent to add a citizenship question to the census and could enact legislation if it disapproved.

The district court purported to find “two critical distinctions” that would make the congressional reporting
requirements in Section 141(f) judicially reviewable. Pet. App. 280a. Neither is availing.

First, the court reasoned that the Section 141(f) reports are “conditions precedent to some other agency action subject to judicial review.” Pet. App. 280a. That is incorrect. Neither Section 141(f) nor any other provision of the Census Act conditions the Secretary’s exercise of discretion to ask a particular question on the adequacy or even the submission of the Secretary’s reports to Congress. Congress knows how to condition agency action on the filing of a report, e.g., 10 U.S.C. 2687(b); 25 U.S.C. 1631(b)(1); 50 U.S.C. 1703—yet did not do so in the Census Act. The Section 141(f) informational reports are indistinguishable in that respect from the informational reports in Hodel and other cases. See, e.g., 865 F.2d at 316 n.27.

Second, the district court asserted that even if the contents of the Section 141(f) reports are not judicially reviewable, here the Secretary “failed entirely” to submit an (f)(3) report containing an updated list of the “subjects” to be included on the census. Pet. App. 282a (citation omitted). But that is just another way of subjecting the contents of the informational reports to judicial review; for the only way to conclude that the Secretary was required to (but then did not) file an (f)(3) report is to find that the (f)(1) report did not adequately disclose the subjects to be asked on the census. See Hodel, 865 F.2d at 318; Guerrero, 157 F.3d at 1193. It also is just another way of saying that the reports are preconditions to the Secretary’s exercise of discretion to determine the contents of the census form; otherwise, there would be no warrant to enjoin the asking of the citizenship question as a remedy for failing to file the report.
b. In any event, even if the issue were judicially reviewable, the Secretary complied with Section 141(f). He timely submitted the (f)(1) and (f)(2) reports, and though the (f)(1) report did not identify citizenship as a subject to be asked, the (f)(2) report identified the citizenship question. As a result, that report effectively served as an (f)(3) report modifying the earlier (f)(1) report—for by identifying citizenship as a question, the Secretary necessarily alerted Congress that citizenship also would be a subject. No reasonable reader could conclude otherwise.

The district court rejected that straightforward observation for two reasons, neither of which has merit. First, the court thought that Section 141(f)(3) “conditions the belated addition of a new subject or question on a ‘finding’ by the Secretary that ‘new circumstances exist’” and, in the court’s view, the Secretary did not make such a “finding.” Pet. App. 275a-276a (brackets and citation omitted). That is incorrect. Under the plain text of Section 141(f)(3), the Secretary’s report need not contain his “findings”; it need only contain his “determination of the subjects, types of information, or questions as proposed to be modified.” 13 U.S.C. 141(f)(3). The Secretary’s report here indisputably does that. And even if the Secretary were required to describe his findings of “new circumstances” to Congress, he did so in his decisional memorandum, which explains that DOJ’s formal request arrived in December 2017, many months after the initial (f)(1) report. See Pet. App. 548a.

Second, the district court thought that “if the Section 141(f)(2) report could satisfy Section 141(f)(3) when the Section 141(f)(1) report was to be modified,” it would render “Section 141(f)(3)’s reference to ‘paragraph (1)
... of this subsection’ superfluous.” Pet. App. 276a. That, too, is incorrect. Section 141(f)(3) states that the Secretary may submit his additional report(s) at any time “after submission of a report under paragraph (1) or (2) of this subsection.” 13 U.S.C. 141(f)(3) (emphasis added). The disjunctive reference to “paragraph (1)” is not superfluous; it makes clear that if the Secretary needs to update the “subjects” in an earlier (f)(1) report, he need not wait until after he has submitted his (f)(2) report; he may submit an (f)(3) report any time after submitting the (f)(1) report. And of course nothing in Section 141(f) prevents the Secretary from submitting such an (f)(3) report at the same time as—indeed, in the same document as—his (f)(2) report. That is precisely what the Secretary in effect did here. The court’s determination that doing so was improper not only lacks a basis in the statutory text, but elevates form over substance, enjoining the Secretary from asking the citizenship question simply because he submitted his Section 141(f)(2) and (f)(3) reports, which indisputably provided Congress with all requisite information, in one document instead of two.

F. Respondents’ Constitutional Claims Do Not Provide Alternative Grounds For Affirmance

The district court rejected respondents’ constitutional claims under the Enumeration Clause and the equal-protection component of the Fifth Amendment’s Due Process Clause. See Pet. App. 321a-335a, 408a-424a. Neither provides an alternative basis to affirm the judgment below. Although respondents did not raise either claim as an alternative basis to affirm in their briefs in opposition, other plaintiffs have brought similar claims in federal courts in California and Mary-
land, see p. 5 n.1, supra, and the district courts overseeing that litigation have declined the government’s requests to stay those cases following this Court’s grant of certiorari before judgment here. The government therefore addresses the constitutional claims in the event respondents or other district courts attempt to rely on those claims as a basis for enjoining reinstatement of the citizenship question.

As the district court correctly observed, questions “unrelated to the ‘actual Enumeration’” have a long history on the decennial census, Pet. App. 413a, including “a nearly unbroken practice” over “two centuries” of “including a question concerning citizenship on the census,” id. at 418a; see id. at 417a-419a. In light of that history and the Secretary’s “virtually unlimited discretion” to conduct the census, Wisconsin, 517 U.S. at 19, the court rejected respondents’ contention that “each and every question on the census must bear a ‘reasonable relationship’ to the goal of an actual enumeration.” Pet. App. 420a. If respondents’ position were correct, the court observed, “each and every census—from the Founding through the present—has been conducted in violation of the Enumeration Clause. That would, of course, be absurd.” Id. at 421a-422a.

The district court also correctly rejected respondents’ equal-protection claim because neither the administrative record nor the extensive “extra-record discovery” “reveal[s] discriminatory animus on the part of Secretary Ross.” Pet. App. 332a. Accordingly, respondents “failed to prove * * * that a discriminatory purpose motivated [the] decision to reinstate the citizenship question [to] the 2020 census questionnaire.” Id. at 334a. Indeed, respondents “all but admit[ted]” as much. Id. at 332a.
II. THE DISTRICT COURT ERRED IN AUTHORIZING
DISCOVERY BEYOND THE ADMINISTRATIVE RECORD
TO PROBE THE SECRETARY’S MENTAL PROCESSES

The district court erred in allowing and considering
extra-record discovery. In evaluating a challenge to
agency action under the APA, “the focal point for judi-
cial 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); see Florida Power & Light Co. v.
Lorion, 470 U.S. 729, 744 (1985). A narrow exception to
this rule exists if there is “a strong showing of bad faith
or improper behavior” on the part of the agency deci-
sionmakers, Overton Park, 401 U.S. at 420, but re-
spondents did not make that requisite showing here.

In concluding otherwise, the district court relied on
five alleged circumstances that it thought demonstrated
the Secretary’s bad faith: (1) the Secretary did not re-
veal his true reasons for wanting to reinstate the citi-
zenship question; (2) he made up his mind to add the
question before reaching out to DOJ; (3) he overruled
his subordinates; (4) he deviated from standard operat-
ing procedures; and (5) his reasons were pretextual be-
cause DOJ had never previously suggested that it
needed census citizenship data for VRA enforcement.
Pet. App. 524a-528a; see id. at 443a-444a.

As discussed above, these are the same findings that
the district court used to bolster its conclusions that the
Secretary’s decision was arbitrary and capricious and
pretextual. See pp. 36-45, supra. Accordingly, they are
unavailing for the same reasons. See ibid.; see also
18-557 Gov’t Br. at 18-37. Because the Secretary’s de-
cision was neither pretextual nor arbitrary and capri-
cious, a fortiori it was not made in bad faith.
CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 2019
APPENDIX

1. U.S. Const. Art. I, § 2, Cl. 3 provides in pertinent part:
Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * * . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

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

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

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;

(1a)
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

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

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

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

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

Bureau of the Census

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

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

Functions of Secretary; regulations; delegation

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

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

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

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

6. 13 U.S.C. 6 provides:

**Information from other Federal departments and agencies; acquisition of reports from other governmental and private sources**

(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

(c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to
in subsection (a) or (b) of this section instead of conducting direct inquiries.

7. 13 U.S.C. 141 provides in pertinent part:

**Population and other census information**

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

* * * * *

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—

(1) not later than 3 years before the appropriate census date, a report containing the Secretary’s determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary’s determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new
circumstances exist which necessitate that the subjects; types of information, or questions contained in reports so submitted be modified, a report containing the Secretary’s determination of the subjects, types of information, or questions as proposed to be modified.

* * * * *

8. 13 U.S.C. 221 provides:

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

(a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary, or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100.

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

(c) Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.
No. 18-966

IN THE
Supreme Court of the United States

DEPARTMENT OF COMMERCE, et al.,

Petitioners,

v.

STATE OF NEW YORK, et al.,

Respondents.

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

BRIEF FOR GOVERNMENT RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court correctly concluded, on the basis of well-settled principles of administrative law, that the Secretary of Commerce’s decision to add a citizenship question to the 2020 decennial census questionnaire was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

2. Whether petitioners’ challenges to the district court’s authorization of limited discovery beyond the agency’s proffered administrative record are moot and, in any event, meritless given that extraordinary circumstances raised significant doubts about whether the agency had provided the whole record or an accurate account of its decision-making.

3. Whether the Secretary of Commerce’s decision to add a citizenship question to the 2020 decennial census questionnaire violated the Enumeration Clause of the U.S. Constitution, art. I, § 2, cl. 3.
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INTRODUCTION

The Constitution and the Census Act require the federal government to count every person in this country every ten years. This enumeration has momentous consequences: it determines the allocation of congressional seats, state and local apportionment, and the distribution of billions of dollars in federal funds. And there is just one chance each decade to get the enumeration right.

To ensure that this extraordinarily complex process serves its important purposes, the Department of Commerce and the Census Bureau have developed rigorous, scientifically tested standards to achieve an accurate and complete count. In applying those standards for the last seventy years, Commerce and the Bureau have emphatically declined to ask a citizenship question of every household. As the Bureau has long recognized, a citizenship question would exacerbate the undercount of noncitizen and Hispanic households, rendering the enumeration inaccurate in some States more than others, and undermining its constitutional and statutory purposes.

Secretary of Commerce Wilbur Ross disregarded this longstanding bipartisan and scientific consensus and ordered that a citizenship question be added to the 2020 questionnaire. In doing so, the Secretary rejected uncontroverted evidence showing that the citizenship question would reduce response rates among noncitizen and Hispanic households and thus harm the enumeration’s distributive accuracy. He also sidestepped the Bureau’s well-established procedures for testing changes to the questionnaire to avoid undercounts. And while the Secretary purported to rely on a Department of Justice (DOJ) request for
better citizenship information for Voting Rights Act (VRA) enforcement, he ignored the unanimous evidence before him showing that more accurate citizenship information could be provided at lower cost without asking a citizenship question, and failed to disclose the active role that he and his staff had played in soliciting and then generating DOJ’s supposedly independent request.

The United States District Court for the Southern District of New York (Furman, J.) made detailed factual findings that adding a citizenship question would affirmatively undermine the accuracy of the decennial census (among other harms) for no demonstrable benefit. The court correctly held that the Secretary’s decision violated the Administrative Procedure Act (APA) because it was arbitrary and capricious, it was contrary to two provisions of the Census Act, and the rationale provided by the Secretary was pretextual. For similar reasons, the Secretary’s decision violated the Enumeration Clause.

For each of these reasons, the judgment below should be affirmed.

STATEMENT

A. Modernization of the Decennial Census

1. The Constitution requires an “actual Enumeration” of the population every ten years. Art. I, § 2, cl. 3; amend. XIV, § 2. This enumeration must count all residents, regardless of citizenship. See Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). The enumeration affects the apportionment of representatives to Congress among the States; the
allocation of electors to the Electoral College; the
division of congressional, state, and local legislative
districts within each State; and the distribution of
Congress has delegated the conduct of the decennial
enumeration to the Secretary of Commerce, whose
decisions are constrained by both statutory restric-
tions and the constitutional requirement that the
census bear a “reasonable relationship to the accom-
plishment of an actual enumeration of the population.”
*Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996);
see Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440,
2481 (1997).

2. Before 1960, the decennial census was a
sprawling endeavor with two different and often
conflicting goals: counting the total population, and
collecting other demographic information. The census
questionnaire grew to include hundreds of questions
covering such disparate topics as occupations, literacy,
and health. *See Carroll Wright & William Hunt, The
History and Growth of the United States Census* 166
The complexity of the questionnaire, administered by
in-person enumerators who interviewed respondents
and often misunderstood questions or answers, harmed
the accuracy of both the enumeration and demographic
data. *Margo Anderson & Stephen Fienberg, Who
Counts?* 19-23 (2001); *Margo Anderson, The American
Census* 206-07 (2d ed. 2015).

During this time, the census sometimes, but not
always, requested citizenship information. Before
1960, seven of the fifteen decennial censuses did not seek citizenship status.¹

3. In 1960, the decennial census changed dramatically into its modern form. Growing sophistication of data collection, statistical science, and testing procedures had by then allowed Commerce and the Bureau to understand that the census suffered from serious data-accuracy problems, and to develop ways to address those problems.

Increasingly robust evaluation procedures demonstrated that the census undercounted the population, and that this undercount was not spread evenly across demographic groups or geographic areas. Anderson, supra, at 215-20; Anderson & Fienberg, supra, at 29-30. Evaluations of the 1950 census, for example, demonstrated that the census had undercounted racial minorities at substantially higher rates than others. Anderson & Fienberg, supra, at 30.

Moreover, new data-collection techniques could provide information as accurate as, and sometimes more accurate than, demographic data collected via the decennial census, while lowering costs and lessening the burden on individual responders. Miriam Rosenthal, Striving for Perfection: A Brief History of Advances and Undercounts in the U.S. Census, 17 Gov't Info. Q. 193, 199-200 (2000). Government records containing demographic information (“administrative records”) had grown in number and

¹ No citizenship inquiry appeared in 1790-1810, 1840-1860, and 1880. Although some of these censuses asked about birthplace, that question does not provide citizenship status. Wright & Hunt, supra, at 132, 142-43, 147, 154, 166.
scope with the creation of agencies like the Social Security Administration and the Immigration and Naturalization Service. Anderson, supra, at 186-90. And sampling—a technique that extrapolates information about the entire population from data about a representative subset—proved capable of producing highly accurate demographic data without harming the enumeration. Id. at 206; Plans for Taking the 1960 Census: Hr’g Before the House Subcomm. on Census & Government Statistics (“1960 Plans”) 5-6 (1959).

Given these developments, the 1960 census was dramatically changed to address the differential undercount and to reduce burdens and costs. For the first time, rather than relying on enumerators to visit each household, the Bureau sent the questionnaire by mail. See 1960 Plans, supra, at 6-7. Moreover, the questionnaire sent to most households (the “short form”) was reduced to a few simple, noncontroversial questions, such as the number of individuals in each household and their race, gender, and marital status. All other demographic questions, including those about citizenship, were removed and placed on a “long form” questionnaire, initially sent to one of every four households, and later to one of six households. (Pet. App. 18a; see J.A.1211-1253 (2000 short- and long-form questionnaires).)

The 1950 census was thus the last time the census asked every household about citizenship. (Pet. App. 27a.) Ever since, Commerce and the Bureau have vigorously opposed adding a citizenship question to the questionnaire sent to every household, because doing so will “inevitably jeopardize the overall accuracy of the population count” by depressing responses from certain populations and contributing to a differential undercount. (Pet. App. 28a (quotation marks omitted).)
After the 2000 census, the long-form questionnaire was replaced by the American Community Survey (ACS), a yearly survey conducted separately from the decennial census, and distributed to about one of every thirty-six households. (Pet. App. 18a-19a.)

4. Congress substantially reformed the Census Act in 1976 to further modernize the census. Pub. L. No. 94-521, 90 Stat. 2459 (1976). These reforms permitted Commerce to collect demographic information, but placed important constraints on the use of the decennial census questionnaire for that purpose and prioritized other means of collecting such information.

To collect more up-to-date demographic information than the decennial census provides, Congress authorized the Secretary to conduct a mid-decade census “in such form and content as he may determine, including the use of sampling procedures and special surveys.” § 7, 90 Stat. at 2461 (13 U.S.C. § 141(d)). Congress used the same quoted language in the separate provision authorizing the Secretary to conduct the decennial census. Id. (13 U.S.C. § 141(a)).

This delegation of authority was “essentially the same” as “existing law,” H.R. Rep. 94-1719, at 11 (1976) (Conf.), except that Congress added language to “encourage the use of sampling,” S. Rep. 94-1256, at 4 (1976). The amendments also provided that the Secretary may use the decennial census to collect “other” information besides a “census of population,” but only “as necessary.” § 7, 90 Stat. at 2461 (13 U.S.C. § 141(a)).

Congress also expressly limited the Secretary’s ability to use the decennial census to collect demographic information (aside from total population), and directed him to use more accurate and less costly
statistical techniques instead. First, in 13 U.S.C. § 6(c), Congress required the Secretary to use administrative records instead of census questions to collect demographic data “[t]o the maximum extent possible” given “the kind, timeliness, quality and scope of the statistics required.” § 5, 90 Stat. at 2460. Second, where “feasible,” the Secretary must use sampling instead of census questions to obtain demographic information beyond the enumeration. § 10, 90 Stat. at 2464 (13 U.S.C. § 195). By prioritizing other means of collecting demographic information, Congress intended to minimize the census’s burden on responding individuals and thus maximize census responses. H.R. Rep. 94-1719, at 10; S. Rep. 94-1256, at 1, 5.

5. Since at least 1940, the decennial census has undergone extensive pretesting before census day. Daniel Cork, Census Testing, in Encyclopedia of the U.S. Census 79, 79 (Margo Anderson et al. eds., 2d ed. 2012). Such testing reflects not only the important consequences of the census, but also the fact that the decennial census is conducted only once every ten years, with little room for correction if problems arise. Pretesting is now a multi-year endeavor that subjects nearly every aspect of the census to a battery of evaluations, culminating in a comprehensive “dress rehearsal” to understand how all aspects of the census work together. Id. at 79-81. (J.A.1296.) A critical part of that process is pretesting individual questions to ensure that they yield accurate data without reducing census responses. Pretesting includes administering the questions to a sample of respondents to verify that they “[c]an be understood,” “[a]re not unduly sensitive,” and “do not cause undue burden.” (J.A.627-628.)

Overlapping statutes, guidelines, and agency practices govern testing. For example, the Office of
Management and Budget’s (OMB) data-quality standards direct Commerce to design the census “to achieve the highest practical rates of response,” and thus require pretesting of census questions. (J.A.657.) See 44 U.S.C. §§ 3501(1)-(2), 3506(e). The Bureau’s Statistical Quality Standards likewise require that the census “be pretested with respondents to identify problems” before implementation. (J.A.626.) When an already-pretested survey undergoes “substantive modifications,” including the addition of a new question, “[p]retesting must be performed” again. (J.A.627.)


B. The Decision to Add a Citizenship Question

In a memorandum dated March 26, 2018, the Secretary announced his decision to add a citizenship question to the 2020 census questionnaire sent to every household. (Pet. App. 548a-563a.)
1. The Secretary represented that he began assessing whether to add a citizenship question “[f]ollowing receipt” of a December 2017 letter from DOJ requesting block-level citizenship data to help enforce § 2 of the VRA. (Pet. App. 548a-549a.) But as the Secretary later acknowledged in a June 2018 supplemental decision memorandum, DOJ’s letter had not initiated his decision-making. Rather, the Secretary had begun his “deliberative process” soon after his appointment in February 2017—almost a year before DOJ’s letter. (Pet. App. 546a.) And DOJ had not submitted the December 2017 letter on its own initiative; rather, the Secretary and his staff had approached DOJ to urge them to request a citizenship question. (Pet. App. 82a-84a.)

The supplemental memorandum also failed to fully disclose the Secretary’s engagement with the issue before December 2017. (Pet. App. 74a-99a, 118a-129a.) The Secretary actually “made the decision months before DOJ sent its letter.” (Pet. App. 118a.) The Secretary and his staff then “actively lobbied other agencies” to request a citizenship question, including both DOJ and the Department of Homeland Security (DHS). (Pet. App. 121a.) After both agencies declined (Pet App. 82a-84a), the Secretary reached out to then–Attorney General Sessions, who discussed the issue with John Gore, then the Acting Assistant Attorney General for Civil Rights. (Pet. App. 89a-90a.) The Attorney General’s senior counselor reassured the Secretary’s Chief of Staff that DOJ would “do whatever you all need us to do.” (J.A.254.) Gore then wrote DOJ’s December 2017 letter, signed by another DOJ official, requesting the addition of a citizenship question to the decennial questionnaire to provide DOJ
with block-level citizenship data for VRA enforcement. (Pet. App. 91a-95a, 564a-569a.)

2. In December 2017 and January 2018, in response to DOJ’s letter, Dr. John Abowd—the Bureau’s Chief Scientist—and his team of experts analyzed the effects of adding a citizenship question to the decennial questionnaire in a series of memoranda. (J.A.104-122, 290-295, 301-318.) The Bureau conducted this analysis without any awareness of the Secretary’s involvement in generating DOJ’s letter (Pet. App. 116a-117a).

The memoranda warned the Secretary that adding the question would not only depress the initial response rate for all households, but would also depress the response rate of households with a noncitizen by at least 5.1 percentage points more than for citizen households—approximately 1.6 million more people not responding. (J.A.114-115 (630,000 households); J.A.1008 n.58 (2.54 persons per household).) The memoranda explained that because this estimate was “cautious,” the actual differential reduction in self-response rates would likely be much greater. (J.A.114-116.) (The Bureau later updated its analysis to warn that the differential decline in response rates would be at least 5.8 percentage points—approximately 6.5 million people (J.A. 1008).2) While the Bureau attempts to address initial nonresponses through Nonresponse Followup (NRFU)

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2 This updated conclusion reflected both the increase from 5.1% to 5.8% and updated figures on the number of noncitizen households and the average number of people per household. (J.A.1008 & n.58.)
procedures, the memoranda warned that NRFU would be “very costly” (J.A.105, 115) and would not resolve the problems introduced by the lower response rate (J.A.113-116).

By contrast, the Bureau explained that it could use existing administrative records to produce block-level citizenship data as accurate as the block-level race, age, and ethnicity data DOJ already uses for VRA purposes. (J.A.105-107, 290-292, 317-318.) The Bureau would use the “Numident,” a database containing “information on every person” with a Social Security or Individual Taxpayer Identification Number. (J.A.117.) This database contains highly reliable citizenship information because individuals must provide proof of citizenship or immigration status to obtain these numbers. (J.A.117.) The Bureau would then “link” individual census responses to these database records by matching personal identifying information. (J.A.156, 158, 954.) The Bureau could already link roughly 90% of census respondents to Numident records, and planned to obtain additional records from other agencies to increase the number of successful linkages. (J.A.120-121, 133-135, 154-155.) The Bureau could then integrate this citizenship data with the other block-level census data (known as “PL94-171 data”) that the Secretary produces and makes publicly available after every decennial census for redistricting and that DOJ already uses for VRA enforcement. (J.A.105-107, 290-292, 317-318, 860,

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3 NRFU includes visits by enumerators; “use of administrative records; collection of information from ‘proxies,’ such as neighbors or landlords; and ‘imputation,’ a process through which the Census Bureau extrapolates data about households” from comparable household data. (Pet. App. 151a.)

Because a citizenship question would generate “substantially less accurate” citizenship data than administrative records and would also impair the enumeration, the Bureau recommended using administrative records to provide block-level citizenship data to DOJ. (J.A.105.) The Bureau’s Acting Director informed DOJ that this approach would provide “higher quality [citizenship] data produced at lower cost” than adding a citizenship question. (J.A.265.) Although the Bureau sought to meet with DOJ to discuss this recommendation, the Attorney General directed DOJ to decline such a meeting. (Pet. App. 95a-97a; J.A.266.)

Meanwhile, the Secretary directed the Bureau to analyze the effects of using both a citizenship question and administrative records to generate citizenship data. (Pet. App. 51a-58a.) In a memorandum dated March 1, 2018, Dr. Abowd and his team provided the Secretary with an analysis concluding that this hybrid approach would “have all the negative cost and quality implications” of adding the citizenship question—including a decrease in self-response rates—while “result[ing] in poorer quality citizenship data than” using administrative records alone. (J.A.158-159.)
3. The Secretary then issued his March 26, 2018, decision memorandum announcing that he would both add a citizenship question to the decennial questionnaire and use administrative records. (Pet. App. 548a-563a.) The memorandum asserted that “limited empirical evidence exists about whether adding a citizenship question would decrease response rates” (Pet. App. 557a), disregarding the multiple empirical analyses demonstrating that adding the question would disproportionately decrease response rates and harm the enumeration’s accuracy. The memorandum also stated that the advantage of the Secretary’s approach was that it would provide DOJ the “most complete and accurate” citizenship data (Pet. App. 556a), contrary to evidence that this approach would provide less complete and less accurate citizenship data than using administrative records alone. The Secretary further claimed that the citizenship question was sufficiently “well tested” (Pet. App. 550a), even though the question had not undergone any of the testing that governs the census questionnaire.

C. Procedural History

1. New York, seventeen other States, sixteen local governments, and the U.S. Conference of Mayors (“government respondents”) filed a complaint alleging that the Secretary’s decision to add a citizenship question violated the APA and the Enumeration Clause.
2. Petitioners’ initial Administrative Record contained scarcely any documents preceding DOJ’s December 2017 letter, despite the Secretary’s acknowledgment in his supplemental decision memorandum that he had been deliberating the citizenship question during that time. (Pet. App. 546a.) On July 3, 2018, the district court ordered petitioners to complete the Administrative Record, authorized limited expert discovery, and authorized additional discovery based on the irregularity of petitioners’ initial record and on a strong showing of petitioners’ bad faith and improper behavior. (Pet. App. 523a-531a.) On August 17, the district court authorized a deposition of Gore (Pet. App. 452a-455a), and on September 21 authorized a deposition of the Secretary (Pet. App. 437a-439a).

This Court stayed the Secretary’s deposition but declined to stay Gore’s deposition or other discovery. 139 S. Ct. 16 (2018). The Court then granted certiorari to review the pretrial discovery orders, 139 S. Ct. 566 (2018) (No. 18-557), but declined to stay the trial, 139 S. Ct. 452 (2018).

3. Meanwhile, the district court denied petitioners’ motion to dismiss the APA claims, concluding that the Secretary’s decision to add a citizenship question to the decennial census was reviewable. (Pet. App. 21a-25a, 402a-408.)

The court did, however, dismiss respondents’ Enumeration Clause claim for failure to state a claim. (Pet. App. 408a-424a.) While the court recognized that the Enumeration Clause reflects “a strong constitutional interest in accuracy” (Pet. App. 423a (quoting Utah v. Evans, 536 U.S. 452, 478 (2002))), it held that the existence of a citizenship inquiry before 1960 precluded the argument that such a question was
altogether forbidden by the Constitution (Pet. App. 412a).

4. After an eight-day trial, the district court issued an opinion containing detailed findings of fact and conclusions of law. (Pet. App. 1a-353a.) The court entered final judgment vacating the Secretary’s decision, enjoining the addition of a citizenship question to the 2020 census unless the legal defects identified by the court were cured, and remanding to Commerce. (Pet. App. 352a.)

First, the court evaluated what evidence it could properly consider. As the parties had agreed, the court considered the Administrative Record for any purpose (Pet. App. 250a) and extra-record evidence to determine respondents’ standing (Pet. App. 129a-130a). The court did not consider extra-record evidence to resolve whether petitioners had violated the APA, except where such material illuminated technical matters or showed a failure to consider important factors. (Pet. App. 260a-261a.) The court further determined that, while it could permissibly consider extra-record material to decide whether the Secretary’s decision was pretextual, it did not need to do so because it “would reach the same conclusions” based solely on the Administrative Record. (Pet. App. 261a.)

Second, the court determined that respondents had standing. (Pet. App. 130a-239a.)

Third, the court ruled that the Secretary’s decision violated the APA in multiple independent ways. The decision was arbitrary and capricious, and based on a pretextual rationale. The decision was also contrary to law because it violated two statutes: one requiring the Secretary, “[t]o the maximum extent possible,” to
acquire demographic information using administrative records rather than direct inquiries, 13 U.S.C. § 6(c); and another precluding the Secretary from altering previously reported census topics without making certain findings and filing a new report with Congress, id. § 141(f). (Pet. App. 261a-321a.) The court noted that extra-record evidence confirmed, but was not essential to, its conclusions on the APA claims. (Pet. App. 313a-315a, 320a-321a.)

Fourth, the court rejected the Fifth Amendment equal protection claim brought by private respondents in a consolidated case. (Pet. App. 322a.)

Finally, the court vacated as moot its order authorizing the Secretary’s deposition. (Pet. App. 352a-353a.)

5. In No. 18-557, the parties submitted opening briefs in this Court addressing the pretrial discovery issues. After the district court entered final judgment, respondents moved to dismiss the writ as improvidently granted. The Court removed No. 18-557 from its argument calendar and suspended further briefing. The Court then granted certiorari before judgment in this case.

6. In a separate proceeding brought by different plaintiffs to challenge the addition of a citizenship question, the United States District Court for the Northern District of California (Seeborg, J.), on March 6, 2019, issued a post-trial decision holding that the Secretary’s decision violated both the APA and the Enumeration Clause. California v. Ross, No. 18-cv-1865, 2019 WL 1052434 (N.D. Cal. 2019). This Court directed the parties here to brief and argue, as an alternative ground for affirmance, whether the Secretary’s decision violated the Enumeration Clause.
SUMMARY OF ARGUMENT

I. Government respondents have standing. Petitioners’ opening brief does not dispute the district court’s extensive findings about injury and redressability. Instead, petitioners argue only that respondents’ injuries are not traceable to the Secretary’s decision to add a citizenship question because they are more proximately caused by the unlawful and irrational failure of third parties to respond to the census questionnaire. But this Court has long held that the intervening acts of third parties do not break the causal chain if those acts predictably result from challenged conduct. Here, the district court made factual findings—uncontested by petitioners—that the citizenship question will cause differential nonresponse rates for noncitizens and Hispanics, leading to a differential undercount and a decrease in data quality that will concretely injure respondents. Given this proof that third parties will react in ways that harm government respondents, it is immaterial whether their reactions are unlawful or irrational.

II. The Secretary’s decision to add a citizenship question violates the APA.

A. The Secretary’s decision is reviewable. Petitioners misread § 141(a) of the Census Act, 13 U.S.C. § 141(a), as conferring unreviewable discretion on the Secretary to place whatever questions he wants on the decennial questionnaire. This Court has repeatedly reviewed the Secretary’s actions under this provision. And petitioners’ argument is inconsistent with the 1976 Census Act, which is the source of the language that petitioners rely on here. That enactment included multiple provisions that constrained the Secretary’s conduct of the census and provide judicially
manageable standards here, including the requirement that the Secretary rely, to the "maximum extent possible," on administrative records rather than census questions to collect demographic information, 13 U.S.C. § 6(c).

B. The Secretary’s decision was arbitrary and capricious.

First, the Secretary unreasonably ignored the uncontroverted empirical evidence that the citizenship question would make the enumeration less accurate. All the evidence in the Administrative Record demonstrates that a citizenship question would cause millions of noncitizens and Hispanics to not respond to the census, undermining the accuracy of the constitutionally required headcount.

The Secretary was not entitled to dismiss this evidence as "inconclusive." That label is contradicted by the firm conclusions of the analyses themselves. More fundamentally, even if the evidence of an undercount were inconclusive, the Secretary’s actions would still be unreasonable because he abandoned the well-established process for testing proposed changes to the questionnaire. The testing process ensures that no change is made to the census without understanding its effects. Under this longstanding conservative approach, inconclusive evidence of harm does not permit altering the questionnaire without further testing.

Second, the Secretary acted contrary to the evidence by concluding that a citizenship question was necessary to provide DOJ with information for VRA enforcement. The Bureau informed the Secretary that it could obtain data sufficient to address DOJ’s purported needs, without adding a citizenship question,
by linking highly reliable administrative records containing citizenship status to individual census responses. The Secretary rejected that proposal in favor of a solution that purportedly would provide even more accurate citizenship information. But the Secretary never explained how using his preferred approach rather than the administrative-records approach would result in any improvement to VRA enforcement.

In any event, all the evidence in the Administrative Record demonstrates that the Secretary’s solution—using administrative records and adding a citizenship question—would provide less accurate citizenship data, at greater cost, than relying on administrative records alone. The Secretary disregarded the fact that the citizenship question will introduce significant errors not present under the administrative-records approach: at least 9.5 million wrong responses on citizenship status; the loss of information about additional millions of noncitizens and Hispanics due to the undercount; and an inability to link an additional one million individuals to administrative records. These harms are not offset by an increase in the number of census responses on citizenship status, as petitioners claim: the Administrative Record shows that a citizenship question will often trigger inaccurate responses, and the Bureau expressly concluded that sophisticated modeling based on available administrative records would produce comparatively more accurate citizenship information.

Third, the Secretary failed to justify his conclusion that the purported benefit of providing DOJ more citizenship data “outweighs” any harm to the accuracy of the enumeration. The Constitution and the Census Act require the Secretary to prioritize an accurate
enumeration due to the momentous consequences of the headcount, including its effect on the allocation of House seats and billions of dollars in federal funds. The Secretary provided no explanation for his judgment to subordinate that priority in favor of generating what he asserts (counter to the evidence) would be incrementally more accurate citizenship data.

Fourth, the Secretary’s stated rationale was pretextual. While he claimed to be relying on DOJ’s independent judgment about the need for a citizenship question, the district court found that it was in fact the Secretary and his staff who engineered DOJ’s request from the outset. The Secretary’s supposed reliance on DOJ’s expertise thus could not provide the necessary rationale for his decision.

C. The Secretary’s decision was also contrary to law. First, given the evidence that administrative records alone would satisfy DOJ’s VRA-enforcement needs, the Secretary’s decision to add a citizenship question violated 13 U.S.C. § 6(c), which requires the Secretary to collect demographic information using administrative records to the maximum extent possible instead of by posing direct inquiries through the decennial census. Second, the Secretary violated 13 U.S.C. § 141(f) by adding the citizenship question without submitting the mandated report to Congress or making the required findings that new circumstances necessitated a change.

III. The Secretary’s decision violated the Enumeration Clause. That provision requires the Secretary’s decisions about the census to be reasonably related to the pursuit of an accurate enumeration of the total population. The Secretary flouted this
constitutional obligation by adding a citizenship question that would affirmatively undermine the accuracy of the headcount. And the Secretary’s justification that the question would provide valuable information to DOJ is contradicted by the Administrative Record and the evidence produced at trial.

IV. Insofar as petitioners’ challenge to extrarecord discovery is not moot, this Court should reject it. The district court properly authorized discovery beyond the Administrative Record because petitioners had conceded that failed to disclose the full basis for the Secretary’s decision and had in fact obfuscated the Secretary’s decision-making process. Discovery was therefore essential to provide the “whole record” that the APA requires.

ARGUMENT

I. GOVERNMENT RESPONDENTS HAVE STANDING.

To have standing, “a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” *Davis v. FEC*, 554 U.S. 724, 733 (2008). The district court correctly held that government respondents have standing here.

A. Petitioners do not challenge injury or redressability in their opening brief. The district court made extensive factual findings demonstrating that the addition of a citizenship question to the 2020 census will both cause a net differential undercount of noncitizen and Hispanic households and—separate from the undercount—will irreparably harm the accuracy of census data used by government respondents
for essential governmental functions. (Pet. App. 141a-147a, 150a-168a, 184a-187a, 233a-236a). Specifically, the district court found that adding a citizenship question will reduce noncitizen self-responses by “at least 5.8%”—or roughly 6.5 million people—and also significantly reduce self-responses from Hispanic households (Pet. App. 150a, 169a; J.A.1008). Because NRFU would not cure these differential declines, these reductions would result in a net incremental undercount of noncitizens and Hispanics. (Pet. App. 169a.)

That differential undercount and other harms to data accuracy will injure government respondents in at least four ways: (a) loss of seats in Congress and in state and local legislatures; (b) loss of federal funding; (c) harm to accurate population data used to distribute government services; and (d) forced diversion of resources. (Pet. App. 173a-194a.) Petitioners contest neither these factual findings nor the district court’s legal conclusion (Pet. App. 194a-239a) that these injuries satisfy Article III.

B. Instead, petitioners argue (Br. 17-21) that government respondents’ injuries would not be fairly traceable to the Secretary’s decision because they are more proximately caused by individuals’ unlawful and irrational reactions to the addition of a citizenship question.

This argument misconceives the requirements for traceability. When a third party’s actions are part of

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4 These findings rebut petitioners’ assertion (Br. 19-20) that recognizing standing here would permit challenges to “any demographic question on the decennial census.” Under the district court’s reasoning, plaintiffs would have standing to challenge only census questions proved to cause such harms, not any question to which some people refuse to respond.
the causal chain, all that is required is a showing that the challenged conduct had a “determinative...effect” on that third party. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Because “[p]roximate causation is not a requirement” for standing, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014), challenged conduct need not be the only step—or even “the very last step”—in the causal chain, *Bennett*, 520 U.S. at 169. Here, the district court found, and petitioners do not challenge, that the citizenship question will affect the census responses of noncitizens and Hispanics, leading directly to government respondents’ injuries.

Petitioners are thus wrong to characterize the district court’s reasoning as relying on “speculation about the decisions of independent actors.” Br. 18 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013)). When a plaintiff has no direct evidence about how a third party will react to challenged conduct, it may be speculative to assume that the third party will react in an irrational or illegal way. But here, because respondents proved how noncitizens and Hispanics would react to the citizenship question (Pet. App. 228a), there is no need for judicial “guesswork as to how independent decisionmakers will exercise their judgment,” *Clapper*, 568 U.S. at 413.

C. Petitioners’ arguments (Br. 17-21) about the rationality or lawfulness of individuals’ responses to the citizenship question are thus beside the point. The rationality or lawfulness of a third party’s reaction to challenged conduct has never been a barrier to standing so long as a plaintiff can show that the third party will react “in such manner as to produce causation.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).
This Court and others have consistently recognized standing based on third parties’ irrational or illegal responses to challenged governmental action. In *NAACP v. Alabama ex rel. Patterson*, for example, this Court found standing to challenge a law compelling disclosure of the NAACP’s membership based on proof that past disclosures had caused third parties to respond irrationally—and often illegally—through “economic reprisal, [termination] of employment,” and threats of physical injury. 357 U.S. 449, 462 (1958). And in *Block v. Meese*, the D.C. Circuit held that a distributor could challenge the government’s classification of a film as “political propaganda” based on the anticipated, albeit irrational, public reaction to that classification. 793 F.2d 1303, 1307-09 (D.C. Cir. 1986) (Scalia, J.).

Similarly, plaintiffs have standing to challenge a defendant’s failure to safeguard private information even when a data thief was “the most immediate cause of plaintiffs’ injuries.” *Attias v. CareFirst Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 981 (2018); *Lambert v. Hartman*, 517 F.3d 433, 437-38 (6th Cir. 2008). And plaintiffs have standing to challenge a federal agency’s reduction of a financial penalty when the reduction will predictably increase the likelihood that regulated entities will fail to comply with the law. *NRDC v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018). Contrary to petitioners’ attempted distinction (Br. 20), these rulings did not turn on any finding that the defendant breached a legal duty to protect the plaintiffs, but instead recognized that the third parties’ irrational or illegal action was simply one step in the causal chain connecting plaintiffs’ harm to defendants’ conduct, see *Bennett*, 520 U.S. at 169.
D. As petitioners acknowledged below (Pet. App. 480a-481a), their position would effectively preclude anyone from having standing to challenge census decisions that reduce participation, even decisions made with the intent and predictable effect of doing so. But this Court’s precedents do not support petitioners’ claim that nonresponses are legally irrelevant to standing. The Court has repeatedly heard census-related cases in which the asserted harm to the plaintiff resulted from third parties’ failure to respond to the census. See Evans, 536 U.S. at 457-58 (imputing data for people who failed to respond); Department of Commerce v. United States House of Representatives, 525 U.S. 316, 324 (1999) (sampling as part of NRFU). Petitioners have a constitutional and statutory duty to address such nonresponses, not to ignore them.

II. THE SECRETARY’S DECISION VIOLATED THE APA.

A. The Secretary’s Decision Is Reviewable.

The district court properly rejected petitioners’ argument that Congress vested the Secretary with unreviewable discretion over the decennial census questionnaire. (Pet. App. 398a-408a.) Agency action is subject to a “strong presumption” of judicial review. Weyerhaeuser Co. v. United States Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018). The APA’s narrow exception to this presumption for decisions “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), applies only in “rare instances” where Congress has provided “clear and convincing evidence” that it vested an agency with unfettered discretion, Citizens to Pres.

1. Petitioners rely (Br. 21-22) on language in 13 U.S.C. § 141(a) mandating that the Secretary “shall... take a decennial census of population...in such form and content as he may determine.” But that language merely requires the Secretary to conduct a decennial census and was not “intended to effect a new, unreviewable commitment to agency discretion.” Franklin v. Massachusetts, 505 U.S. 788, 816 n.16 (1992) (Stevens, J., concurring in part & in judgment). Requiring an agency to exercise some discretion does not confer unfettered discretion. See Weyerhaeuser, 139 S. Ct. at 370.

Indeed, this Court and others have repeatedly considered challenges involving the Secretary’s authority under § 141(a) to conduct the decennial census—the same authority he invokes here—and squarely rejected the argument that there are no manageable standards to apply.6 Petitioners attempt to distinguish these cases by asserting (Br. 25) that none of them involved the census questionnaire, but that distinction finds no support in the statute. The “form and content” that § 141(a) requires the Secretary to “determine” is not the content of the questionnaire specifically, but rather the conduct of the decennial

5 The APA’s exception to reviewability does not apply to respondents’ Enumeration Clause claim. See Franklin v. Massachusetts, 505 U.S. 788, 801 (1992); Webster v. Doe, 486 U.S. 592, 601-02 (1988).

census generally—as confirmed by § 141(a)’s inclusion of “sampling” and “special surveys” within “form and content.” Just as other aspects of the Secretary’s conduct of the census under § 141(a) are reviewable, so too are his decisions regarding the questionnaire.

That conclusion is consistent with other statutory language and the broader context of the 1976 Census Act, which added the quoted language to § 141(a). The 1976 Act not only continued to require the Secretary to conduct the decennial census, but more specifically confirmed his duty to pursue an accurate enumeration and expressly constrained his authority to use the census to gather demographic information other than the enumeration. In particular, Congress directed the Secretary to use other techniques besides the census to collect demographic information such as citizenship status. These “narrower and more specific” statutory provisions inform the Secretary’s authority under § 141(a), *House of Representatives*, 525 U.S. at 338, and provide ample “law to apply,” *Overton Park*, 401 U.S. at 410 (quotation marks omitted).

First, the 1976 Act, consistent with the Constitution, imposed a duty to pursue an accurate enumeration. The “strong constitutional interest in accuracy,” *Evans*, 536 U.S. at 478, requires that Congress’s census-related decisions bear a “reasonable relationship to the accomplishment of an actual enumeration of the population,” *Wisconsin*, 517 U.S. at 20. Congress, in turn, built the pursuit of an accurate enumeration into the language and structure of the Census Act by requiring the Secretary to produce a “tabulation of total population” in each State “as required for the apportionment of Representatives in Congress,” § 141(b). *See 2 U.S.C. § 2a(a).* “This statutory command…embodies a duty to conduct a census
that is accurate....” *Franklin*, 505 U.S. at 819-20 (Stevens, J.).

Second, the 1976 Act required the Secretary to rely on administrative records to obtain demographic data, “instead of conducting direct inquiries” on the decennial census, “[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required.” 13 U.S.C. § 6(c). Petitioners’ contention that § 6(c) provides no judicially manageable standards (Br. 45-46) ignores the “maximum extent possible” requirement—directive language of the type that courts “routinely assess,” *Weyerhaeuser*, 139 S. Ct. at 371. See *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004) (“best available control technology”); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) (“maximum extent practicable”). And the Secretary’s reliance on effective VRA enforcement as the rationale for adding a citizenship question provides judicially manageable standards to evaluate whether the question is needed for that purpose and whether administrative records would produce “the kind, timeliness, quality and scope of the statistics required” for that purpose. (As explained infra at 43, 59-61, the Secretary’s reasoning failed to satisfy those standards.)

Third, the Act provides that the Secretary may use the decennial questionnaire to collect “other” information besides a “census of population,” but only “as necessary.” § 141(a). Courts routinely interpret similar language as imposing judicially enforceable constraints. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“appropriate and necessary”); *National Treasury Emps. Union v. Horner*, 854 F.2d 490, 495 (D.C. Cir. 1988) (“necessary”).
Congress imposed these limitations on the use of the census questionnaire based on the growing understanding that administrative records and sampling could enable the Secretary to obtain sufficiently accurate demographic data without undermining the accuracy of the enumeration. See H.R. Rep. 94-1719, at 10. This history demonstrates that, by adding the language of § 141(a) in the 1976 Act, Congress did not intend to grant the Secretary unreviewable discretion to collect demographic information from the decennial census without regard to whether that information is obtainable through other means.

2. The established testing procedures that have long governed the decennial census provide further standards by which to evaluate whether the Secretary’s decision was arbitrary and capricious. Under applicable statutes, guidelines, and practices, pretesting is required even for minor changes to the census questionnaire to preserve the accuracy of the enumeration and other census data. See supra at 7-8. Petitioners miss the mark in asserting (Br. 39-40) that these requirements are not legally binding on the Secretary. Petitioners conceded below that OMB’s directives, which require pretesting, do legally bind the Secretary. (Pet. App. 308a-309a.) In any event, courts do not look only to legally binding obligations to evaluate APA claims; to the contrary, this Court has routinely relied on an agency’s “past practice,” National Cable & Telecommns. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005), or “serious reliance interests” by regulated entities, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). OMB’s directives and the Bureau’s Statistical Quality Standards likewise provide a basis by which to evaluate the reasonableness of the Secretary’s
decision to add a citizenship question without adequate testing.

3. These statutory restrictions and established standards together create a regime far different from the one in *Webster v. Doe*, a case that arose in the distinct context of national security and that involved a single provision authorizing the CIA director to terminate an employee whenever he “shall deem such termination necessary or advisable in the interests of the United States.” 486 U.S. 592, 594 (1988) (quotation marks omitted). The Census Act contains “[n]o language equivalent to ‘deem…advisable,’” *Franklin*, 505 U.S. at 817 (Stevens, J.), and instead contains specific provisions constraining the Secretary’s collection of demographic information.

Petitioners also misplace reliance on *Heckler v. Chaney*, arguing that the Secretary’s decision involves a “complicated balancing of a number of factors” immune from judicial review. Br. 24 (quoting 470 U.S. 821, 831 (1985)). *Heckler* referred only to the “complicated balancing” of factors inherent in an agency’s refusal to exercise enforcement power—authority that, unlike the conduct of the census, is traditionally reserved to the unreviewable discretion of the executive branch. 470 U.S. at 831-32. By contrast, judicial review of census-related decisions has long helped to ensure “public confidence in the integrity” of the census and to “strengthen this mainstay of our democracy.” *Franklin*, 505 U.S. at 817 (Stevens, J.).
B. The Secretary’s Decision Was Arbitrary and Capricious.

In deciding to add a citizenship question to the 2020 census questionnaire, the Secretary disregarded uncontroverted evidence about the question’s impact on response rates, unreasonably concluded that the question was necessary to provide DOJ block-level citizenship information for VRA enforcement, and made an unexplained policy judgment that any purported benefits to DOJ were “of greater importance” than any harm to the enumeration. (Pet. App. 562a.) Each step of this process was a “classic, clear-cut APA violation[].” (Pet. App. 10a.)

1. The Secretary Disregarded Harms to the Enumeration.

   a. Undisputed evidence demonstrated that a citizenship question would depress response rates.

   As the Secretary recognized, it was “incumbent” upon him “to make every effort to provide a complete and accurate decennial census” given the constitutional and practical importance of an accurate enumeration. (Pet. App. 549a.) The Secretary further recognized that “[a] significantly lower response rate by non-citizens” or Hispanics “could reduce the accuracy of the decennial census.” (Pet. App. 552a.) But the Secretary then acted arbitrarily and capriciously in finding that he lacked empirical evidence that adding a citizenship question will disproportionately depress response rates of noncitizen and Hispanic households. (Pet. App. 552a-557a, 560a-561a.) That conclusion was contrary to the Administrative Record, which contains uncontroverted
empirical evidence that the question will disproportionately depress response rates and thus will “harm[] the quality of the census count” (J.A.105; see Pet. App. 42a-50a, 141a-144a, 285a-286a). See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Because “the only evidence in the record available...actually supports the opposite conclusion[],” the Secretary’s decision fails to “satisfy the APA’s reasoned decisionmaking requirement.” Clark County v. FAA, 522 F.3d 437, 442 (D.C. Cir. 2008) (Kavanaugh, J.).

i. In multiple empirical analyses, the Bureau’s Chief Scientist and his technical staff informed the Secretary that adding the citizenship question would depress the response rate of noncitizen households by at least 5.1 percentage points more than it would depress the response rate of citizen households. (J.A.114; see J.A.104-159, 292, 310.) The analyses warned that this “cautious estimate” likely did not reflect the full extent of the actual disproportionate reduction in response rates caused by a citizenship question.7 (J.A.114-116.)

The Bureau reached this conclusion by comparing the response rates of citizens and noncitizens to the 2010 census, which did not contain a citizenship question, and the 2010 ACS, which did contain such a question. The data showed that among citizens, the drop in response rate from census to ACS was 13.8 percentage points (79.9% to 66.1%), whereas for noncitizens the drop was 18.9 points (71.5% to 52.6%)

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7 The district court found that this differential decline was large enough to affect, among other things, legislative apportionment and federal funding. See supra at 21-22.
—a differential decrease of 5.1 points for noncitizens (18.9% minus 13.8%). (J.A.310.)

The Bureau attributed this disproportionate decline specifically to the citizenship question. That conclusion was confirmed by empirical analyses demonstrating that Hispanic households—which contain a higher proportion of noncitizens—were twice as likely as non-Hispanic white households to refuse to answer the citizenship question on the mail-in ACS, and nine times as likely as non-Hispanic white households to stop responding to the internet version of the ACS once they reached the citizenship question. Because these analyses demonstrated that the citizenship question specifically had a strong deterrent effect on Hispanic and noncitizen respondents, the Bureau concluded that the question rather than other factors (such as general distrust of government or the ACS’s length) was driving down response rates for those populations. (J.A.109-112.)

The analyses also established that these disproportionate reductions in response rates are significant and will thus “harm the quality of the census count” (J.A.105)—i.e., reduce its accuracy (J.A.113). The analyses explained that decreasing response rates would cause more noncitizen and Hispanic households who would otherwise self-respond to enter NRFU instead. (J.A.113-114.) And because the data on these households produced by NRFU would be less accurate than these households’ self-responses—in part because NRFU responses may come from a proxy, such as a landlord, rather than directly from a household member—increased NRFU at the expense of self-responses would “reduce the quality of the resulting data.” (J.A.113-114; see Pet. App. 153a, 158a-166a.)
Finally, the Bureau emphasized that its analyses of the harms to census accuracy also applied to the Secretary’s proposal to both add a citizenship question and use administrative records to generate block-level citizenship data. (J.A.159.) By contrast, using only administrative records to generate block-level citizenship data would not harm the enumeration’s accuracy. (J.A.159.) The Secretary’s assertion that he lacked empirical evidence about the citizenship question’s effect on response rates thus runs “counter to the evidence before” him, *State Farm*, 463 U.S. at 43.

ii. The Secretary’s attempts to disregard this evidence (Br. 30-31) cannot withstand scrutiny. He claimed that the analyses of the relative decline in response rates for noncitizens compared to citizens were “inconclusive” (Br. 30; see Pet. App. 55a), but that characterization cannot be squared with the plain language of every memorandum prepared by the Bureau during this time, all of which conclude—unequivocally—that the citizenship question would cause a measurable and disproportionate decline in noncitizen response rates.8 And extensive trial evidence confirms this point: Dr. Abowd testified that the Bureau’s subsequent research showed that the disproportionate decline in response rates would be worse than initially projected (J.A.854), and several other experts likewise testified that the citizenship question will disproportionately depress noncitizen and Hispanic response rates (Pet. App. 146a-148a).

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8 Indeed, the evidence showed that the differential decline is getting worse: the disproportionate decline in noncitizen response rates in 2000 was only 3.3 percentage points, but rose to 5.1 percentage points in 2010. (J.A.110-111.)
There is no reasoned basis for the Secretary’s contention (Pet. App. 553a) that comparisons of the short-form census questionnaire to the ACS or to the long-form questionnaire were too “challenging” given general differences between these instruments. The Bureau specifically controlled for such differences to produce strong empirical evidence that it was the citizenship question, rather than other aspects of the ACS or long-form questionnaire, that produced disproportionate declines in noncitizen and Hispanic response rates. (J.A.111.) The Secretary likewise misplaced reliance on the assertion that other ACS questions have overall nonresponse rates purportedly “comparable” to the citizenship question’s overall nonresponse rate. See Br. 30. The analyses do not rest on the overall nonresponse rate to the ACS citizenship question but rather the difference in nonresponse rates between noncitizens/Hispanics and citizens/non-Hispanic whites—a difference that demonstrates that the citizenship question is causing the disproportionate depression in response rates.9 (J.A.109-110.) The district court thus properly declined to defer to the Secretary’s “conclusory and unsupported” dismissal, McDonnell Douglas Corp. v. United States Dep’t of Air Force, 375 F.3d 1182, 1187 (D.C. Cir. 2004), of the very empirical evidence that he said would present a serious concern about the citizenship question's

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9 Indeed, petitioners acknowledged that the Secretary lacked evidence that the difference in nonresponse rates for the ACS citizenship question was comparable to the difference in nonresponse rates for other questions. (PX-297, at 28-29.)
“reduc[ing] the accuracy of the decennial census” (Pet. App. 552a). 10

Disregarding the strong evidence of the citizenship question’s negative effects on census accuracy was particularly arbitrary because there is no evidence in the Administrative Record at all “supporting a conclusion that addition of the citizenship question will not harm the response rate.” (Pet. App. 286a.) The Secretary purported to base his conclusion on a conversation with the Senior Vice President of data science from the Nielsen Company, who told him that the response rate to a privately operated survey had not declined when Nielsen “added questions on place of birth” and arrival in the United States. (Pet. App. 559a.) But the Administrative Record shows that Nielsen’s survey was not remotely comparable to the decennial census because Nielsen, unlike the Bureau, (a) paid survey participants, and (b) had no obligation to count total population in any event. (J.A.238-240.) See National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 842 (D.C. Cir. 2006) (Kavanaugh, J.) (rejecting agency reliance on examples that had “no bearing” on relevant issue). Moreover, despite the Secretary’s assertion that “empirical evidence” from Nielsen supported his decision (Pet. App. 559a), no such evidence exists in the Administrative Record (Pet. App. 109a-112a). The Secretary also purported to rely (Pet. App. 559a) on an example shared by a former Bureau official about a

10 The Secretary’s criticism of the Bureau’s comparative analyses was also unreasonable because it was his eleventh-hour request to evaluate a citizenship question—and his failure to engage the Bureau for nearly a year beforehand—that forced the Bureau to rely on such analyses rather directly testing the question’s impact on responses. See infra at 37-42.
prior controversial Bureau decision to share data with another agency, but that example did not involve an alteration to the decennial census (J.A.236)—and the same official informed the Secretary that “asking a citizenship question on the Decennial Census would diminish response rates and degrade the quality of responses” (J.A.235). The Secretary’s conclusion is thus arbitrary because he “provided absolutely no evidence to back it up.” Safe Extensions, Inc. v. FAA, 509 F.3d 593, 605 (D.C. Cir. 2007).

b. The Secretary’s reliance on a purported lack of information was unreasoned when he abandoned testing procedures.

Even if the Secretary could reasonably conclude that he lacked conclusive empirical evidence about the citizenship question’s effect on response rates (Pet. App. 554a), he still acted arbitrarily and capriciously in adding the question without conducting any of the established testing procedures that are designed to provide him with precisely such empirical evidence. See State Farm, 463 U.S. at 52 (requiring reasoned explanation for changing course without “engaging in a search for further evidence”). The policy underlying these rigorous testing procedures is a conservative one: that a survey as large, complex, and important as the decennial census should not be altered without a firm understanding of the effects of any such change. Thus, uncertainty about the effects of changing the questionnaire is itself a compelling reason not to make the change. But without even a “minimal level of analysis,” Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016), the Secretary repudiated nearly sixty years of bipartisan and scientific consensus
about the way to evaluate and achieve an accurate decennial census.

i. As the Administrative Record makes clear, and trial evidence confirms, the Secretary failed to follow the “well-proven multi-year” testing process that traditionally governs the decennial census questionnaire.11 (J.A.204; see J.A.278-280, 597-600, 887-892.) These procedures are not mere technicalities. They ensure that the enumeration and other census data are as accurate as possible by evaluating whether any proposed change to the census questionnaire, however minor, would drive down response rates. (J.A.204-205, 626-628.) And the Bureau has consistently declined to make changes—including to the questionnaire—when testing has demonstrated reductions in response rates even less severe than the Bureau found here. See supra at 8 (3.4% reduction).

The Secretary ignored these procedures here, adding the citizenship question without subjecting it to any testing. (Pet. App. 100a-101a; J.A.204-205.) Moreover, the Secretary had ample opportunity to conduct at least some testing (Pet. App. 546a), and indeed was presented with the Bureau’s proposal to conduct a test that would have further “isolate[d]” the effects of the citizenship question on response rates—but declined to do so (Pet. App. 554a; Trial Tr. 1001-1004). The Secretary’s stark departure “from decades-

11 The Bureau’s empirical analyses, while persuasive evidence of the likely effect of the question, were no substitute for this testing process. The analyses were done on the basis of existing data about past responses to the decennial census and other surveys. By contrast, testing involves generating new data, such as by randomized controlled trials or field testing of a specific question. 1980 Census, supra, at 2-19–2-20.
long past practices and official policies” of testing without any reasoned explanation or even acknowledgment of the change was arbitrary and capricious. American Wild Horse Pres. Campaign v. Perdue, 873 F.3d 914, 923 (D.C. Cir. 2017); see Encino, 136 S. Ct. at 2125-26.

Even worse, the Secretary invoked, as part of his reason for adding the citizenship question, the purported absence of the very empirical evidence that the testing process would have produced. Courts would not defer to the Secretary of Health and Human Services if he abandoned the Food and Drug Administration’s rigorous testing procedures and then approved a new drug based on a purported lack of evidence. Cf. Troy Corp. v. Browner, 120 F.3d 277, 293 (D.C. Cir. 1997) (arbitrary and capricious to list chemical as toxic without following testing guidelines). The district court properly declined to defer to similarly unreasoned decision-making here.

ii. Petitioners’ efforts to excuse the Secretary’s disregard for established testing procedures are unavailing.

First, petitioners cannot rely on an asserted “tradition” of a citizenship question (Br. 39) because there is no tradition comparable to what the Secretary seeks to do here. No questionnaire mailed to every household has ever included a citizenship question. Before 1960, enumerators surveyed households in person, interviewing individual respondents; and from 1960 onwards, a citizenship question appeared only on the long-form questionnaire or the ACS sent to a fraction of the population. The Secretary’s addition of a citizenship question on the short-form questionnaire mailed to every household is thus unprecedented.
More fundamentally, the era when a citizenship question was sometimes asked (in person) of every resident was a time before testing procedures existed, before sampling and administrative records were shown to provide useful demographic data without harming the enumeration’s accuracy, and before it was understood that questions about sensitive topics could reduce the accuracy of the enumeration. Indeed, prior censuses asked many questions that today would be rejected as likely to deter certain people from participating, including questions about slaves, Wright & Hunt, supra, at 154; “grown daughters who assist in the household duties,” id. at 190; and “[i]diots,” including their head size, id. at 200. But shortly after improved statistical methodologies became widely accepted, the Census Bureau removed citizenship (and many other topics) from the questions asked of every resident. And since the application of better statistical science and more robust testing procedures, Commerce and the Bureau have strongly opposed adding a citizenship question to the short-form questionnaire because it will harm the enumeration’s accuracy, and because citizenship data is available from other sources. Simply stating that a citizenship question (like many others) was asked before 1960 under dramatically different circumstances thus does not come close to satisfying the Secretary’s obligation to provide a reasoned explanation for reversing decades of considered agency judgment. See Encino, 136 S. Ct. at 2125-26; Judulang v. Holder, 565 U.S. 42, 61 (2011).

Second, petitioners are mistaken in asserting (Br. 39-40) that the Secretary did follow testing procedures. Notwithstanding the Secretary’s assertion (Pet. App. 550a), testing a question for use on the ACS and
long-form questionnaire does not qualify it for use on the decennial census. (Pet. App. 305a-308a.) The Administrative Record—including a letter from a bipartisan group of former Bureau Directors—demonstrates that these other instruments differ in scope and kind from the short-form questionnaire mailed to every household, and that the testing done for those instruments is no substitute for the proven, multi-year testing process applicable to the decennial census questionnaire specifically. (J.A.194-196, 204-205.) Indeed, the Bureau’s own Statistical Quality Standards anticipate that questions will be tested in the context of the specific survey on which they appear. (J.A.626-631.)

Moreover, even if testing for these other surveys were relevant, petitioners incorrectly assert (Br. 40) that the citizenship question “performed adequately” on those surveys (J.A.627). To the contrary, the Administrative Record demonstrates that the citizenship question has not performed adequately on the ACS (or the long-form questionnaire) because noncitizens “inaccurately mark ‘citizen’ about 30 percent of the time.” (Pet. App. 555a; see J.A.147.) Petitioners miss the mark in relying on Dr. Abowd’s statement that the Bureau “would accept” the testing performed on the ACS citizenship question. (J.A.108.) Dr. Abowd made clear that the citizenship question has not performed adequately on the ACS (J.A.117, 930-932), but explained that he had no better option but to rely on ACS testing, given “the quality, cost, [and] risk constraints that [the Bureau was] facing to make this decision” (Trial Tr. 1108; see Trial Tr. 1290-1291).

Third, the Secretary’s assertion that placing “the citizenship question last on the decennial census form” would “minimize” any decrease in response rates (Pet.
App. 562a) is pure speculation, given that no evidence supports it and no testing was done to produce such evidence. (Pet. App. 288a.) The Secretary’s reliance on unfounded speculation in place of evidence was thus arbitrary and capricious. See National Lifeline Ass’n v. FCC, 915 F.3d 19, 32 (D.C. Cir. 2019).

2. The Secretary’s Reliance on DOJ’s Purported Need for More Accurate Citizenship Data Was Arbitrary and Capricious.

The Secretary’s sole justification for undermining the accuracy of the 2020 enumeration was that adding a citizenship question was necessary to provide DOJ the data it claimed to need for VRA enforcement. (Pet. App. 562a.) As the district court correctly concluded, this rationale was both unreasoned and contrary to the evidence.

a. The Secretary failed to explain why a citizenship question was necessary when administrative records would satisfy DOJ’s request.

DOJ’s December 2017 letter asked the Secretary to add a citizenship question to resolve specific concerns with existing ACS data on citizenship. In response, the Bureau informed both DOJ and the Secretary that all of these concerns would be addressed, without adding a citizenship question, by linking highly reliable administrative records containing citizenship information to individual census responses. The Secretary rejected this administrative-records approach (Pet. App. 554a-555a), but he failed to explain why this approach did not fully resolve DOJ’s purported problems and thus provide adequate citizenship
information for VRA enforcement. That complete lack of reasoned decision-making violated both the APA and the Secretary’s statutory obligation to rely on administrative records “[t]o the maximum extent possible.” 13 U.S.C. § 6(c); see State Farm, 463 U.S. at 48 (“agency must cogently explain” decision).

In its letter, DOJ raised specific objections about the citizenship data then available. DOJ claimed that the adoption of the ACS in 2010 had deprived DOJ of the citizenship data it previously received from the long-form questionnaire “sent to approximately one in every six households.” (Pet. App. 566a.) DOJ complained that, unlike citizenship data from the long-form questionnaire, ACS citizenship data was not part of the same database as other decennial-census data, was not reported at the census-block level, and did not cover the same timeframe. (Pet. App. 566a-568a).

The Bureau informed both DOJ and the Secretary that there was an available solution to all of these concerns that would not require the addition of a citizenship question. As explained supra at 11-12, the Bureau proposed linking individual citizenship information from the Numident database (and other administrative records) to the PL94-171 data that DOJ uses for VRA purposes and that States and their subdivisions use for redistricting. That approach would resolve all of DOJ’s purported concerns with ACS citizenship data by producing “block-level tables of citizen voting age population [CVAP] by race and ethnicity” in the same database (J.A.291), at the same time, and with “essentially the same accuracy” as the decennial-census data DOJ and jurisdictions conducting redistricting already use (J.A.317; see J.A.107).
The Secretary never explained why a citizenship question would still be necessary given that administrative records alone would resolve DOJ’s concerns. As petitioners do not dispute, the administrative-records approach will provide direct evidence of citizenship status for about 90% of the population—295 million people—with sophisticated modeling inferring citizenship for the remaining 10%. (J.A.146.) Petitioners now argue (Br. 33) that asking a citizenship question will somewhat improve the accuracy of the information for the 10% who cannot be linked to administrative records. But even if that were true—and it is not (see infra at 45-51)—neither petitioners’ brief nor the Secretary’s decision memorandum provides any explanation why such an incremental change would make any meaningful difference for VRA enforcement. In other words, despite having “staked [his] rationale” on DOJ’s purported concerns with citizenship data, the Secretary provided no reasoned explanation or evidence that DOJ would still have any such concerns under the administrative-records approach. See National Fuel, 468 F.3d at 843.

DOJ certainly provided no such explanation or evidence. To the contrary, its letter suggests that DOJ would have been satisfied with the administrative-records approach because that approach would produce data far more accurate than the long-form questionnaire (sent to only one of six households) that the letter favorably mentions (Pet. App. 566a). And when the Bureau sought to discuss the administrative-records approach with DOJ, the Attorney General forbade any meeting. (J.A.266.) DOJ thus never made any request for data better than that supplied by the Bureau’s administrative-records approach; it asked
only for data better than that supplied by the ACS, a request that the Bureau’s approach fully satisfied.

Moreover, the Administrative Record demonstrates, and trial evidence confirms, that any incremental increase in citizenship-data accuracy for just 10% of the population would not make any meaningful difference given that ACS-derived citizenship data is already sufficient for VRA enforcement (Pet. App. 295a-297a; see infra at 52-53) and that the administrative-records approach would significantly improve that accuracy in any event. Neither the Secretary nor DOJ nor petitioners have identified a single VRA case that DOJ failed to bring or lost because of the absence of whatever supposed marginal improvement a citizenship question might contribute. The Secretary’s decision to add a citizenship question nonetheless, for reasons divorced from any concrete connection to DOJ’s stated interests, was arbitrary and capricious. Cf. National Fuel, 468 F.3d at 843 (“Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking.”)

b. The Secretary irrationally chose an approach that would produce less accurate citizenship information than using administrative records alone.

In any event, the Secretary’s conclusion that a citizenship question would produce more accurate information than the administrative-records approach (Pet. App. 556a) was directly contrary to the evidence before him. As the district court found, “all of the relevant evidence before Secretary Ross—all of it—
demonstrated that using administrative records” alone will “actually produce more accurate block-level CVAP data than” using both a citizenship question and administrative records. (Pet. App. 290a.)

Under the administrative-records approach, the Bureau would link 295 million census respondents (out of 330 million total) to administrative records containing citizenship information, and use sophisticated modeling to determine the citizenship of the remaining 35 million census respondents for whom administrative records cannot be linked (“unlinked respondents”). (Pet. App. 54a-55a; J.A.146.) The Bureau explained that this modeling would be very accurate. (J.A.106, 135-136, 146.)

The Secretary did not contest that, where administrative records exist, they provide extremely reliable evidence of citizenship status. (Pet. App. 554a-555a.) But he reasoned that adding a citizenship question would produce additional information about citizenship among the 35 million unlinked respondents, in the form of 22.2 million direct responses to the question from that group. (Pet. App. 56a, 555a-556a.) Petitioners now argue that “logic” (Br. 32) compels the conclusion that more data from census responses about this group’s citizenship status is better than less. But that argument is directly contradicted by the Administrative Record, which shows that adding a citizenship question will in fact impair the Bureau’s use of administrative records without contributing any meaningful additional information about citizenship status—thus making the net effect of using both methods less accurate than using administrative records alone. (Pet. App. 57a.)
i. This impairment derives from several factors. First, the Administrative Record makes clear that asking the citizenship question will result in inaccurate responses that the Bureau must accept. Survey responses to the citizenship question are “highly suspect.” (Pet. App. 291a.) As the Secretary acknowledged based on responses to the ACS citizenship question (Pet. App. 560a), noncitizens inaccurately respond as citizens “at a very high rate” (J.A.120)—“often more than 30%” (J.A.117). The Bureau thus found here that a citizenship question would generate 9.5 million responses that conflict with those respondents’ citizenship data in administrative records, and are likely incorrect given the high accuracy of such records. (J.A.148, 294.) And the question would generate another 500,000 responses that cannot be matched to administrative records but are also likely inaccurate given the general unreliability of survey responses on citizenship. (J.A.148, 150, 157.) Adding a citizenship question would thus “create a problem that would not exist” under the administrative-records approach. (Pet. App. 57a; see J.A.157.)

Petitioners attempt to minimize the significance of this error by asserting, for the first time on appeal, that “nothing prevents” the Secretary from discarding the 9.5 million citizenship-question responses that conflict with administrative records and using the records’ citizenship information instead. Br. 34. But petitioners are mistaken. This newly described option was not part of the Secretary’s analysis, and was not even presented to the district court, so it cannot be invoked as a post hoc rationale. See SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943). Moreover, this modification of long-settled procedures has not itself been fully analyzed or tested. The Administrative
Record shows that the “long established” practice of the Bureau is to accept all responses given to the decennial census questionnaire, and to resort to administrative records only when no response is provided. (J.A.130.) See Evans, 536 U.S. at 466-67. Only this established approach has undergone testing, whereas the Bureau has not even begun “explor[ing] the possibility of checking or changing” responses to a census question (J.A.131)—a technique that might open the door to further errors or political manipulation. The accuracy of the census is too important to be governed by last-minute adjustments by appellate counsel.

Second, in addition to leading to millions of inaccurate responses, adding a citizenship question will also reduce the number of responses by causing a net undercount of noncitizen and Hispanic households, which the Bureau estimated at 6.5 million people. (Pet. App. 152a, 169a-171a.) See supra at 21-22. Because the enumeration will miss these people entirely, the Bureau will have no information about them. This undercount will thus lead not only to the loss of citizenship information for these individuals, but also to the loss of the remaining data necessary for VRA enforcement.

Third, the citizenship question will also increase by one million the total number of individuals who cannot be linked to administrative records (J.A.149-150) because the question would degrade the accuracy of personal identifying information obtained from the census, making it harder to match such information to individuals’ administrative records (J.A.146-147, 158).

The Secretary’s decision memorandum entirely fails to mention these “important aspect[s] of the
problem,” *State Farm*, 463 U.S. at 43. Given “the lack of any coherent explanation” to address these major errors introduced by adding a citizenship question, the Secretary’s determination does “not satisfy the reasoned decisionmaking requirement,” *Clark County*, 522 F.3d at 443.

ii. Petitioners instead rely exclusively on the purported benefit of obtaining 22.2 million census responses on citizenship from individuals whose citizenship is not otherwise established by administrative records. Whereas reliance on administrative records alone would require modeling to determine the citizenship status of 35 million individuals for whom administrative records cannot be linked, petitioners assert (Br. 33) that it is “an obvious improvement” to obtain responses for 22.2 million of those individuals and therefore model for only 13.8 million of them. But there are several fundamental flaws in petitioners’ claim.

First, the Administrative Record demonstrates that the 22.2 million responses to the citizenship question will be less accurate than the information produced by modeling. (J.A.146-148.) These responses will include both self-responses to the citizenship question, and responses derived from in-person visits and proxies. But as explained *supra* at 47, noncitizens often self-respond to a citizenship question by inaccurately claiming to be citizens—a problem that will introduce *at least* 500,000 inaccurate responses into the 22.2 million unlinked responses. (J.A.148.) And in-person visits and proxy responses will introduce additional errors beyond these incorrect self-responses, such as when proxies inaccurately describe the number or citizenship status of household members. (J.A.157-158.) By contrast, data from administrative records does not contain such errors and thus allows
highly accurate modeling for individuals whose citizenship status is not reflected in such records. (J.A.135-136, 146.)

Second, even setting aside the peculiar sensitivities of the citizenship question, petitioners are wrong to assume (Br. 33) that survey responses are “obvious[ly]” more reliable than other statistical methods. This Court has recognized that statistical estimates may produce results at least as accurate as direct survey questions. See Evans, 536 U.S. at 472; cf. House of Representatives, 525 U.S. at 348 (Scalia J., concurring in part) (Framers “must have...known that various methods of estimating unreachable people would be more accurate than assuming that all unreachable people did not exist”). Congress reached a similar judgment when, in the 1976 Act, it directed the Secretary to use sampling, rather than census questions, whenever feasible to collect data other than the enumeration. See 13 U.S.C. §§ 141(a), (d), 195. The traditional use of the decennial census questionnaire rather than other techniques, such as sampling and modeling, thus derives not from any inherently superior accuracy of questionnaire responses but rather from the unique requirements applicable to the actual enumeration. See House of Representatives, 525 U.S. at 343.

Third, the addition of a citizenship question will substantially diminish the accuracy of any modeling. As petitioners concede (Br. 34), modeling for the 13.8 million (with a citizenship question) will be worse than modeling of the 35 million (without the citizenship question) because the underlying data on which the model is based will be inherently less accurate. (J.A.148, 150; Pet. App. 291a.)
Because the “record evidence actually undermines” the Secretary’s statement that more accurate citizenship data would be produced from using both a citizenship question and administrative records, the Secretary’s decision to ask the question nonetheless was arbitrary and capricious. See Clark County, 522 F.3d at 443 n.2; New England Coal. on Nuclear Pollution v. Nuclear Regulatory Comm’n, 727 F.2d 1127, 1130-31 (D.C. Cir. 1984) (Scalia, J).

3. The Secretary Failed to Explain Why He Was Prioritizing Citizenship Data over the Enumeration.

In addition to irrationally assessing the harm to the enumeration and the benefits to citizenship data attributable to a citizenship question, the Secretary also arbitrarily concluded that providing DOJ with allegedly “more accurate” citizenship data “outweighs” and “is of greater importance than any adverse effect that may result” from the citizenship question (Pet. App. 562a (emphasis added)). Assuming the Secretary can choose to sacrifice the accuracy of the decennial census for some other nonconstitutional objective, he must still provide a reasoned explanation for why the benefits gained are worth the harms incurred given the constitutional, statutory, and practical importance of pursuing an accurate enumeration. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). The Secretary failed to do so here.

Discretion to balance harms and benefits is not unfettered. Rather, an agency must rationally account for the relative importance that the Constitution or Congress has assigned to certain factors. Moreover, when, as here, the agency purports to act in service of some real-world benefit (improved VRA enforcement)
and is faced with credible claims of real-world harm (inaccurate enumeration), it must reasonably assess the practical effects of the balance it strikes. See State Farm, 463 U.S. at 55 (agency must “bear in mind that Congress intended safety to be the preeminent factor”); Center for Biological Diversity v. EPA, 722 F.3d 401, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (agency “not permitted to substitute its view of the costs and benefits of regulation for Congress’s view”). Merely identifying each side of the balance does not provide a reasoned explanation for choosing one over the other. Cf. Michigan, 135 S. Ct. at 2707 (“One would not say that it is even rational...to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”). The Secretary thus “need[ed] to explain” why a theoretical improvement to citizenship-data accuracy “justifies” concrete harms to the enumeration. National Fuel, 468 F.3d at 844.

The Secretary provided no such explanation. He made no findings whatsoever about the “broader, real-world impact” of either side of his purported balancing. See American Wild Horse, 873 F.3d at 931. (Pet. App. 294a-297a.) As to harm to the enumeration, the Secretary focused only on potential impacts on response rates (Pet. App. 556a) but nowhere considered the severe and irreparable consequences of even a small decrease to the distributional accuracy of the enumeration, including the loss of congressional seats and federal funding. See supra at 21-22.

The Secretary also made no findings about the concrete benefits of improving the accuracy of citizenship data for VRA purposes. Contrary to petitioners’ assertion (Br. 30), it is not self-evident that incrementally more complete and accurate
citizenship data would have any measurable effect on DOJ’s ability to enforce the VRA. See supra at 42-45. To the contrary, the Administrative Record shows that the absence of a citizenship question since the VRA’s enactment in 1965 has not hampered DOJ’s or private advocates’ efforts to enforce the VRA given the availability of ACS-derived citizenship data.12 (Pet. App. 295a-296a n.71; J.A.193-196, 397-400, 269-272; see also Dep. of Pamela Karlan 49-53, 66, California, No. 18-cv-1865, N.D. Cal. ECF:145; id. at 59 (no cases that plaintiffs “could bring and win if they had” citizenship data from the census “that they can’t bring and win now”).) Even if ACS data were not sufficient, the Secretary never explained why the improvements of the Bureau’s recommended administrative-records approach would not suffice. And the Secretary also failed to address the practical impact of the Bureau’s disclosure-avoidance protocols, which introduce margins of error into data shared with other agencies to protect census respondents’ privacy. (Pet. App. 297a-299a.)

The Secretary thus failed to provide any explanation for why a theoretical improvement to the

12 The trial evidence confirms that DOJ does not need more accurate citizenship data than the ACS provides—let alone more accurate data than administrative records would provide. Dr. Lisa Handley testified that her work on VRA matters has never been impeded by using ACS-derived citizenship data, and that she is unaware of any VRA claim rejected based on shortcomings with the ACS. (J.A.797-802.) And Gore admitted that he did not know of any case questioning the adequacy of ACS citizenship data, or any changes in the law or statistical science supporting his request for a citizenship question. (J.A.1024-1025, 1079-1086, 1105-1109.)
accuracy of citizenship data “outweighs” or is “of greater importance than” the enormous practical consequences of harming the accuracy of the enumeration (Pet. App. 562a). His conclusory balancing of the harms and benefits of a citizenship question does not constitute reasoned decision-making.13

4. The Secretary’s Rationale Was Pretextual.

a. The district court also properly found the Secretary’s decision to be arbitrary and capricious because it relied on a pretextual rationale. The Secretary purported to defer to a genuine, independent request by DOJ for additional citizenship data to improve VRA enforcement. But in fact, the Secretary had already decided to add a citizenship question before receiving DOJ’s request. And petitioners never disclosed—until this litigation—that it was the Secretary and his staff who provided the VRA-enforcement rationale to DOJ and then worked closely with DOJ to draft the December 2017 letter articulating that rationale. The Secretary’s rationale for adding a citizenship question thus misrepresented that he was deferring to DOJ’s expert judgment, when in fact the decision was driven by the Secretary and his staff.

Settled principles of administrative law foreclose any deference when a decision-maker falsely claims to rely on the expertise of another agency to defend its

13 DOJ’s December 2017 letter is no substitute for such reasoning. DOJ did not conduct the balancing that the Secretary purported to do here, and in any event the Secretary cannot blindly defer to another agency’s request to add a question to the decennial census. See Delaware Dep’t of Nat. Res. & Envtl. Control v. EPA, 785 F.3d 1, 16 (D.C. Cir. 2015).
determination. First, the APA requires an agency to disclose the actual rationale for its action so that the reviewing court may understand “the basis on which the [agency] exercised its expert discretion.” *Burlington*, 371 U.S. at 167; *see* S. Rep. 79-752, at 15 (1945) (agency must “explain the actual basis” of its rules). As petitioners conceded below, presenting a false rationale for a decision would violate the APA. (Pet. App. 312a-313a.)

Second, a decision-maker acts arbitrarily by purporting to rely on another agency’s expertise when, in fact, the decision-maker instructed that agency rather than the other way around. Such illusory reliance undercuts the foundational premise for judicial deference to administrative action: that the decision resulted from an exercise of specialized expertise that courts lack. *See State Farm*, 463 U.S. at 54. When a decision-maker purports to rely on an exercise of expert judgment that never happened, there is nothing to which the courts can defer.

The Secretary’s decision to add a citizenship question transgressed both these principles. While the Secretary represented that he was responding to DOJ’s December 2017 request, the Administrative Record demonstrates that the Secretary decided to add a citizenship question months before that request, as the district court explained in detail. (Pet. App. 118a-129a.) The Secretary and his staff then engaged in extensive discussions—both internally and with outside parties—that presumed the decision to add a citizenship question had already been made, and turned to how best to “execut[e]” that decision. (J.A.402.) Absent from these discussions was “any mention, at all, of VRA enforcement.” (Pet. App. 313a.)
The Administrative Record demonstrates that the Secretary and his staff also went to “extraordinary lengths” (Pet. App. 318a) to find any other agency to request the citizenship question and thus provide “cover for a decision” that had already been made (Pet. App. 124a). In particular, after both DOJ and DHS initially refused to request a citizenship question (J.A.414), the Secretary personally called the Attorney General (J.A.252-253, 281-282), leading the Attorney General’s Chief of Staff to assure Commerce that DOJ would “do whatever you all need us to do” (J.A.254). And after the Secretary’s staff provided “DOJ with the [VRA] rationale” (Pet. App. 121a), Gore drafted DOJ’s letter.

The trial evidence reinforces the district court’s findings from the Administrative Record. For instance, a key member of the Secretary’s staff “all but admit[ted] that Secretary Ross had made up his mind to add the citizenship question in the spring of 2017,” and that his task in soliciting support from other agencies was to “find the best rationale’ to support” that predetermined result. (Pet. App. 314a.) Gore admitted that he drafted DOJ’s letter solely in response to the Secretary’s request and principally based on Commerce’s written work product and advice, rather than any expertise of DOJ staff. (J.A.1077-1078, 1114-1115; Pet. App. 125a.) And Gore admitted not knowing whether a citizenship question would result in citizenship data more accurate than the data DOJ already uses. (J.A.1100-1103.)

The district court thus properly found that DOJ’s letter reflected the Secretary’s assertions about the VRA rationale rather than any independent judgment by DOJ. But courts should not defer to the Secretary of Commerce’s judgment about VRA enforcement. Cf.
National Fuel, 468 F.3d at 843 (no deference to Federal Trade Commission’s report that “relied largely on [Federal Energy Regulatory Commission’s] assertions, not the FTC’s independent examination”).

b. Petitioners offer no persuasive answer to the district court’s factual findings or legal reasoning. Instead, they repeatedly mischaracterize the nature of the Secretary’s decision, as the district court found.

For example, petitioners argue (Br. 41-42) that the district court faulted the Secretary merely for having “additional” reasons beyond the purportedly “rational and supported” reason he gave. But the district court did no such thing; it found that the sole reason the Secretary provided—deference to DOJ’s independent judgment about its VRA-enforcement needs—was neither rational nor supported because DOJ did not exercise independent judgment, and the VRA rationale was inadequate. Petitioners similarly argue (Br. 43) that the Secretary merely had an “inclin[ation] towards a certain policy position” when he “reached out to DOJ to ask if it would support that policy.” But the court found that the Secretary had already decided to add the citizenship question, manufactured the VRA-enforcement rationale, provided it to DOJ to present as its own, and then made it appear as if DOJ had independently exercised judgment to request citizenship data. (Pet. App. 120a-121a.) These circumstances, along with other evidence, supported the district court’s finding that the rationale given by the Secretary was pretextual.

c. There is no basis for petitioners’ contention (Br. 42) that a finding of pretext requires evidence that the Secretary subjectively disbelieved the stated grounds for the decision, irreversibly prejudged the decision, or
was otherwise driven by some legally forbidden motive. Such evidence could support a finding of bad faith that renders an agency decision arbitrary and capricious. See Woods Petroleum Corp. v. United States Dep’t of Interior, 18 F.3d 854, 859-60 (1994), adhered to on reh’g en banc, 47 F.3d 1032 (10th Cir. 1995). But an agency’s decision is also arbitrary when it recites a false rationale, or purports to rely on a nonexistent exercise of expert judgment—for instance, if an agency were to claim that its decision was based on studies that had never been conducted.

In any event, the district court’s pretext finding would be supported even if such a finding required proof that the Secretary had an unalterably closed mind or subjectively disbelieved the VRA-enforcement rationale. Ample evidence demonstrated that the Secretary had “decided to add the question for reasons entirely unrelated to VRA enforcement well before he persuaded DOJ” to send its letter. (Pet. App. 318a.) And evidence likewise demonstrated that the Secretary did not believe the VRA-enforcement rationale, such as evidence that the Secretary urged officials who lacked VRA-enforcement responsibilities to request the citizenship question. (Pet. App. 120a-121a.) The district court thus properly found that any presumption of regularity was rebutted under the exceptional facts presented here. See United States v. Armstrong, 517 U.S. 456, 470 (1996).
C. The Secretary’s Decision Was Contrary to Law.

The district court correctly concluded that the Secretary’s decision violated two statutes.

1. The Secretary violated 13 U.S.C. § 6(c) by adding a citizenship question to the decennial census even though administrative records would provide block-level citizenship data sufficient to satisfy DOJ’s purported VRA-enforcement needs. Section 6(c) requires that “[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of statistics required,” the Secretary must “acquire and use information available” from administrative records “instead of conducting direct inquiries.” The Secretary violated this statutory mandate here because, as explained supra at 43-45, administrative records will provide DOJ with block-level citizenship data of the “kind, timeliness, quality and scope” that it purported to need.14

Petitioners’ contrary arguments are unavailing. First, petitioners claim (Br. 45-46) that § 6(c) leaves to the Secretary the “policy choice” to use census questions whenever he deems administrative records to be “incomplete.” But that argument cannot be squared with the statute’s mandatory language, which directs that the Secretary “shall” use administrative records, shall do so “instead of conducting direct inquiries,” and shall do so “[t]o the maximum extent possible.”

14 Section 6(c) thus provides a standard for reviewing the Secretary’s decision (see supra at 28); a basis to find the decision arbitrary and capricious (see supra at 43-45); and a ground to find an independent statutory violation.
Congress thus left “the Secretary no room to choose.” (Pet. App. 266a.)

Moreover, mere “gaps in [the] data” about citizenship from administrative records (Br. 46) cannot justify the Secretary’s choice to burden the entire population with a citizenship question when administrative records will produce direct citizenship data for 295 million people and will produce highly reliable citizenship data for the remaining 35 million through modeling. (J.A.149.) Petitioners’ contrary argument mistakenly presumes that § 6(c) has no application if administrative records do not on their face contain information. That interpretation makes little sense given the context and purpose of the 1976 amendments to the Census Act, which expressly prioritized the use of sampling and other statistical techniques to extrapolate information for the entire population based on information about a subset of the population. See supra at 6-7. Congress’s command that the Secretary use administrative records “[t]o the maximum extent possible” “instead of conducting direct inquiries” thus cannot reasonably be read to excuse the Secretary from using statistical methods based on such records in place of the decennial census to derive information about the whole population.

Second, contrary to petitioners’ assertion (Br. 46-47), the presence of a citizenship question on the long-form questionnaire before 1976 does not remotely suggest that Congress intended to exempt a citizenship question from § 6(c). In 1976, the use of administrative records, sampling, and modeling was relatively new. Congress fully expected that these methods could displace the then-current uses of the decennial census questionnaire to obtain demographic data. See H.R. Rep. 92-1288, at 15-16 (1972); Mid-Decade Census,
Indeed, by 1976, the citizenship question had already been removed from the short-form questionnaire distributed to all households and placed on the long-form questionnaire—a sample survey that used modeling to generate citizenship data for the vast majority of residents. Section 6(c) merely continued a development that had already begun.

Third, there is no merit to petitioners’ assertion (Br. 47) that finding a § 6(c) violation here will invalidate “every demographic question” on the decennial census. Whether administrative records will suffice in a given case is a fact-specific inquiry that depends on the reliability and availability of administrative records for the particular type of information required, and the ease of linking those records to census responses. Here, the district court’s finding of a § 6(c) violation properly rested on the substantial and uncontroverted evidence that administrative records alone would provide highly reliable information about citizenship status specifically.

2. The district court also correctly set aside the Secretary’s decision as contrary to 13 U.S.C. § 141(f). That provision precludes the Secretary from altering the census subjects that he previously reported to Congress unless he “finds new circumstances exist which necessitate” such a change and submits a new report. 13 U.S.C. § 141(f)(1), (3). The Secretary violated this provision because he failed to include citizenship as a census subject in his initial report under § 141(f)(1), and then failed to issue a new report or issue any findings that “new circumstances” warranted adding citizenship as a subject, as required by § 141(f)(3). (Pet. App. 274a.) The Secretary’s inclusion of a citizenship question in his separate report of such
questions under § 141(f)(2) (Br. 52-53) did not satisfy the statute’s distinct requirements to separately report census *subjects* under § 141(f)(1) and to report specific findings justifying any change in such subjects under § 141(f)(3). (Pet. App. 275a-276a.)

Petitioners are incorrect in arguing (Br. 49-51) that only Congress may enforce § 141(f). As the district court explained (Pet. App. 276a-284a), § 141(f) is unlike the purely informational reporting requirements in the cases on which petitioners rely because the provision here imposes a substantive constraint on the Secretary’s ability to surprise Congress or the public by altering the subjects of the decennial census belatedly, and without making findings to justify the change.

**III. THE SECRETARY’S DECISION VIOLATED THE ENUMERATION CLAUSE.**

The Secretary’s decision also violated the Enumeration Clause. This Court need not address this constitutional claim if it holds that the Secretary’s action violates the APA. *See Califano v. Yamasaki*, 442 U.S. 682, 692 (1979). But if the Court reaches the constitutional claim, it should affirm the judgment below on this alternative ground. *See United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

A. The Enumeration Clause requires an “actual Enumeration” of the population every ten years that must be conducted by “counting the whole number of persons in each State.” U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. While this provision leaves substantial discretion to Congress (or its delegate, the Secretary) to determine the “methodological details” of conducting the required headcount, that discretion is
constrained by the “strong constitutional interest in accuracy,” *Evans*, 536 U.S. at 474, 478, with a “preference for distributive accuracy,” *Wisconsin*, 517 U.S. at 20. Thus, decisions by Congress or the Secretary about the conduct of the decennial enumeration must bear “a reasonable relationship to the accomplishment of an actual enumeration of the population.” *Id.*

The history and purpose of the Enumeration Clause confirm the central importance of accuracy as a limiting constitutional principle. The Framers deliberately chose the objective measure of total population as the relevant constitutional metric to avoid the use of the census for political manipulation. *Evans*, 536 U.S. at 478; *see id.* at 503 (Thomas, J., concurring & dissenting in part) (Framers’ “principal concern was that the Constitution establish a standard resistant to manipulation”); cf. *Evenwel*, 136 S. Ct. at 1142 (tally of “total population” is “more reliable and less subject to manipulation and dispute than statistics concerning eligible voters”). This anti-manipulation purpose would be severely undermined if, as petitioners argued below, the Enumeration Clause would be satisfied by any “person-by-person headcount,” however poorly planned or implemented. (S.D.N.Y. ECF:155 at 30.) Under that extreme interpretation, petitioners could conduct a census that dramatically and foreseeably undermines the enumeration’s accuracy because of “bias, manipulation, fraud or similarly grave abuse,” *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 675 (E.D. Pa. 1980), without transgressing any constitutional line. But such a deviation from the objective goal of an accurate headcount was “exactly the type of conduct and temptation the Framers wished to avoid.” *Id.*
B. Here, the Secretary’s decision to add a citizenship question to the 2020 census violated the Enumeration Clause because it would affirmatively undermine the accuracy of the enumeration. See also California, 2019 WL 1052434, at *2, *67-69 (finding violation of Enumeration Clause because inclusion of a citizenship question “affirmatively interferes with the actual enumeration and fulfills no reasonable government purpose”). As explained supra at 21-22, the evidence here demonstrates that the addition of a citizenship question would lead to a differential undercount severe enough to cause several States to lose congressional seats, among other injuries. Such loss of representation is precisely the type of injury that the Enumeration Clause was designed to prevent. See, e.g., Franklin, 505 U.S. at 790; Department of Commerce v. Montana, 503 U.S. 442, 445 (1992).

The Secretary cannot defeat the constitutional claim by asserting that adding a citizenship question would provide useful data for DOJ’s enforcement of the VRA. While this Court has deferred to the Secretary’s judgment about how best to achieve an accurate enumeration, see Evans, 536 U.S. at 478, his decision here was not made to improve the accuracy of the enumeration. Instead, he decided that collecting data for VRA enforcement “is of greater importance than any adverse effect [on the enumeration] that may result” from the citizenship question.15 (Pet. App. 562a.)

15 Wisconsin’s reference to the Secretary’s “virtually unlimited discretion,” 517 U.S. at 19, does not hold, as petitioners suggest (Br. 21), that any census-related decision is unreviewable under the Constitution. In Wisconsin, the Court deferred to the
Even if it were permissible for the Secretary to trade the enumeration’s accuracy for some other policy objective, the evidence here demonstrates that adding a citizenship question would not enhance VRA enforcement. As explained supra at 43-45, the district court found that the Bureau could provide DOJ the block-level citizenship data that it claimed to need for VRA enforcement, without adding a citizenship question, by linking highly reliable administrative records containing citizenship information to census responses. Nothing in the Administrative Record suggests that the data collected by a citizenship question would enable more effective VRA enforcement than the data collected from administrative records. Indeed, there is not even evidence that a citizenship question would be an improvement over the citizenship data currently collected by the ACS (and earlier by the long-form questionnaire). See supra at 52-53 & n.12. Because there is no evidence that a citizenship question would provide any meaningful improvement, the Clause bars the Secretary from relying on that justification to sacrifice the accuracy of the enumeration.

C. The district court misconstrued respondents’ constitutional claim as a challenge to any decennial-census question “unrelated” to the Enumeration Clause’s goal of conducting a headcount of all residents—including any demographic question. (Pet. App. 418a.) But the defect at issue here is not that the citizenship question is merely “unrelated” to the Secretary’s judgment about which treatment of census data would be most accurate for apportionment. 517 U.S. at 20-24. It did not defer to a decision about whether to pursue accuracy at all—let alone to undermine accuracy in pursuit of some other objective.
headcount of total population, but rather that adding this question to the 2020 census would affirmatively undermine the accuracy of the headcount. And the proof of this harm derives from the particular circumstances of this case, not from some broad-based challenge to any demographic question. See supra at 21-22. See also California v. Ross, No. 18-cv-1865, 2018 WL 7142099, at *15 (N.D. Cal. Aug. 17, 2018) (constitutional claim arises from “the effect of asking a question about citizenship in the context of this decennial census taking”).

For similar reasons, the district court misplaced reliance on the fact that the decennial census form has in the past included demographic questions, including questions related to citizenship. (Pet. App. 412a-419a.) The early use of demographic questions on the census, including questions about citizenship, occurred before the modernization of the census process provided a clear scientific understanding of the potential harms to the enumeration of asking particular questions. See supra at 3-4. Accordingly, for those prior forms, there is no indication that the Secretary had before him concrete and unrebutted evidence that the inclusion of a particular demographic question would lead to a materially less accurate headcount, as is the case here.

D. Petitioners asserted below that respondents’ Enumeration Clause claim was a nonjusticiable political question. The district court correctly rejected that argument. (Pet. App. 391a-398a.)

Under the political question doctrine, courts may not adjudicate a constitutional dispute where there is “a lack of judicially discoverable and manageable standards for resolving it,” or where there is “a textually demonstrable constitutional commitment of the
issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). Here, the constitutional interest in accuracy provides a judicially manageable standard to evaluate the Secretary’s decision to add a citizenship question. See *supra* at 62-63. And contrary to petitioners’ arguments below, the Constitution does not commit the conduct of the census entirely to the unreviewable discretion of either Congress or the Secretary.

The Enumeration Clause provides that the decennial census shall be conducted “in such Manner as [Congress] shall by Law direct.” Art. I, § 2, cl. 3. The district court correctly observed that this Court and others have never found this language to completely insulate the Secretary’s conduct of the census from judicial review. (Pet. App. 392a-393a.) Indeed, petitioners concede (Br. 27) that the Secretary’s decisions concerning the census are not entirely unreviewable. In particular, petitioners acknowledged below that courts may review whether the Secretary is in fact conducting a “person-by-person headcount of the population” but contended that courts are powerless to evaluate “the manner” by which the Secretary conducts such a headcount. (S.D.N.Y. ECF:155 at 21.)

Petitioners’ dichotomy is “a false one.” (Pet. App. 395a.) The core error in petitioners’ argument below is that the “manner” of conducting the decennial census can and does have consequences for whether the Secretary is in fact conducting a “person-by-person headcount of the population.” That connection lies at the heart of both respondents’ Enumeration Clause and APA claims: respondents alleged, and proved at trial, that a citizenship inquiry would make the person-by-person enumeration *less* accurate.
Petitioners’ attempt to label respondents’ constitutional claim as a challenge to the “manner” of conducting the decennial census thus does not distinguish this case from the challenges that are indisputably justiciable under the Enumeration Clause.

IV. THE DISTRICT COURT PROPERLY AUTHORIZED DISCOVERY.

The entry of final judgment has largely mooted the parties’ discovery dispute. See No. 18-557 Gov’t Resp. Br. 26-28. The district court vacated its order authorizing the Secretary’s deposition (Pet. App. 352a-353a), and respondents withdrew that deposition request (S.D.N.Y. ECF:577). And because the Administrative Record alone supports the district court’s judgment (Pet. App. 260a-261a), this Court may affirm without resolving whether extra-record discovery was warranted.

If the Court reaches the question, it should affirm the district court’s discovery orders. Petitioners misconstrue (Br. 55) the basis for discovery as an attempt to “probe the Secretary’s mental processes.” But discovery was justified to uncover objective facts about the decision-making process that should have been disclosed as part of the “whole record” that the APA requires. 5 U.S.C. § 706; see 18-557 Gov’t Resp. Br. 30-39. As the district court explained (Pet. App. 126a-129a), petitioners obscured their decision-making, depriving respondents—and the courts—of the information that the Secretary “directly or indirectly” considered. Thompson v. United States Dep’t of Labor, 885 F.2d 551, 555 (9th Cir. 1989). On July 3, when the first discovery order was entered, petitioners had concededly failed to disclose the Secretary’s deliberations before December 2017; the
Secretary had provided contradictory accounts of those deliberations; and there was evidence that the Secretary had prejudged the decision to add a citizenship question and used the VRA-enforcement rationale as a pretext. See supra at 55-56; 18-557 Gov’t Resp. Br. 40-48. Given this “strong showing of bad faith or improper behavior,” Overton Park, 401 U.S. at 420, extra-record discovery was warranted to understand “the basis on which the” Secretary reached his decision. Burlington, 371 U.S. at 167.

CONCLUSION

For each of these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

—v.—

STATE OF NEW YORK, ET AL.,

Petitioners,

Respondents.

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

BRIEF FOR RESPONDENTS
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QUESTIONS PRESENTED

1. Whether the district court correctly found that the Secretary of Commerce’s decision to add a citizenship question to the Decennial Census was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act and the Census Act.

2. Whether extra-record discovery to probe the mental processes of the decisionmaker—including the deposition of the Secretary—was proper in light of plaintiffs’ equal protection claim and evidence of pretext and bad faith, and in any event need not be decided given the district court’s merits decision “based exclusively on … the Administrative Record,” and vacatur of its order compelling the Secretary’s testimony.

3. Whether the Secretary of Commerce’s decision to add a citizenship question to the Decennial Census violated the Enumeration Clause of the U.S. Constitution, art. I, § 2, cl. 3.
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INTRODUCTION

In ordering the addition of a citizenship question to the census questionnaire, Commerce Secretary Wilbur Ross overruled the unanimous objection of the Census Bureau, which warned that it would have “an adverse impact ... on the accuracy and quality of the 2020 Census.” J.A.109. He also ignored the Bureau’s conclusion that adding the question would disserve the Secretary’s ostensible purpose, by generating less accurate information about citizenship than would be available without it. J.A.105, 159. “Based exclusively on the materials in the official ‘Administrative Record,’” the district court found multiple “classic, clear-cut” Administrative Procedure Act (APA) violations, each of which independently justified setting aside the Secretary’s decision. Pet. App. 10a.

Most importantly, the district court found that the Secretary’s decision rested on two factual predicates, both directly contradicted by the Administrative Record. The Secretary reasoned (1) that the Census Bureau could not determine whether asking a citizenship question would affect census response rates, and (2) that asking the question would result in “more complete and accurate” citizenship information for the Department of Justice (DOJ). Pet. App. 555a, 557a. But the Administrative Record established that asking the question: (1) would “harm[] the quality of the census count,” J.A.105, because it would cause a “decline in overall self-response” to the 2020 Census, especially among noncitizens; and (2) would produce “substantially less accurate citizenship status data than are available from administrative sources,” J.A.105.
For much the same reason, the district court also found that the Secretary’s decision violated the Census Act’s obligation “to acquire and use” administrative records for data collection, instead of “direct inquiries,” to “the maximum extent possible.” Pet. App. 263a (quoting 13 U.S.C. § 6(c)). Because the Administrative Record established that the Secretary could actually get better citizenship information from government records alone, Section 6(c) precluded him from using a “direct inquiry” on the census to do so.

The court found further that the Secretary violated the APA by failing to consider a substantial legal obstacle to sharing with DOJ the very “full count” block-level citizenship information the Secretary sought to obtain: the Bureau’s statutorily mandated confidentiality protocols. Pet. App. 297a-300a.

“Perhaps most egregiously,” the Secretary’s rationale was pretextual. Pet. App. 331a. He decided to add the question “well before” he even considered his stated rationale: DOJ’s request for better data to enforce the Voting Rights Act (VRA). He sought to conceal that fact in his memorandum announcing the decision, and in testimony to Congress. Commerce, not DOJ, came up with the VRA enforcement rationale, and DOJ now concedes that it does not need a citizenship question to enforce the VRA. Pet. App. 94a, 313a. APA review requires agencies to set forth their actual reasons for acting; the Secretary instead did all he could to obscure them.

The stakes could not be higher. The Census Bureau’s “best analysis” is that the question would reduce 2020 Census responses by 6.5 million people.

“All of the relevant evidence before Secretary Ross—all of it—demonstrated that using administrative records [alone] would actually produce more accurate block-level [citizenship] data than adding a citizenship question.” Pet. App. 290a. Because the Secretary’s decision rests on the opposite conclusion absent support in the Administrative Record, it is arbitrary and capricious and contrary to law. The APA requires reasoned decisionmaking by administrative agencies; this decision flunks that test.

STATEMENT OF THE CASE

A. The Decennial Census and the Citizenship Question

“The Constitution confers upon Congress the responsibility to conduct an ‘actual Enumeration’ of the American public every 10 years, with the primary purpose of providing a basis for apportioning political representation among the States.” Wisconsin v. City of New York, 517 U.S. 1, 24 (1996). The census must include all “persons” regardless of citizenship status, U.S. Const. art. I, § 2, cl.3, and is the “linchpin of the federal statistical system,” Department of Commerce

Many households do not respond to the census; consequently, “[s]ome segments of the population are ‘undercounted’ to a greater degree than are others, resulting in a phenomenon termed the ‘differential undercount.’” Id. at 7. “Since at least 1940, the Census Bureau has thought” that it undercounts “some racial and ethnic minority groups ... to a greater extent than it does whites.” Id. Recognizing this as a “significant problem,” it has “devoted substantial effort toward achieving [its] reduction.” Id.

That effort has included the Commerce Department’s consistent opposition to including a citizenship question on the Decennial Census questionnaire. Before the 1980 Census, it argued that “[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate,” and therefore, “any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count.” Fed’n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 568 (D.D.C. 1980) (“FAIR”). Before the 1990 Census, the Bureau opposed legislation to “add[] a citizenship question” because it would make “[t]he census ... less accurate.” Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm.
on Post Office & Civ. Serv., 101st Cong. 44 (1989). And Census Directors appointed by presidents from both parties recently warned this Court that a citizenship question would “frustrate the Census Bureau’s ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats.” Br. of Former Directors of the U.S. Census Bureau as Amici Curiae *25, Evenwel v. Abbott, No. 14-940, 2015 WL 5675832.

For decades, the government has therefore collected citizenship data from only a “sample of the population.” Pet. 3. It did so previously through the “long form,” a decennial sample survey that asked “a small subset of the population subsidiary census questions.” Utah v. Evans, 536 U.S. 452, 468 (2002). Congress now requires the Bureau to collect citizenship data through the American Community Survey (ACS), which samples approximately two percent of households annually. 52 U.S.C. § 10503(b)(2)(A). While the “actual Enumeration” for apportionment cannot be corrected using statistical sampling, see House of Representatives, 525 U.S. at 343, sample surveys like the ACS can be statistically “adjust[ed] … for survey nonresponse,” J.A.120-21.

B. The Statutory and Administrative Framework Governing the Census

Congress directs the Commerce Secretary to “take a decennial census of population,” and authorized the Secretary to collect “other ... information as necessary,” 13 U.S.C. § 141(a), limiting that discretion in several specific ways. In particular, the 1976 Census Act “constrain[ed] the Secretary’s authority” in order to “address[] concerns that the Bureau was
requiring the citizenry to answer too many questions in the decennial census,” which can harm response rates. Br. for Respondents 37 n.50, 40, House of Representatives, No. 98-404, 1998 WL 767637 (citation omitted).

The 1976 Act required the Secretary to use alternative data sources instead of adding questions to the Decennial Census whenever possible. First, it transformed Section 195 of the Census Act from “a provision that permitted the use of sampling for purposes other than apportionment into one that required that sampling be used for such purposes if ‘feasible.’” House of Representatives, 525 U.S. at 341. Similarly, Section 6(c) now directs that “the Secretary shall acquire and use” records from other governmental entities “instead of conducting direct inquiries” of the population, “[t]o the maximum extent possible.” 13 U.S.C. § 6(c). The 1976 Act “emphasize[d] the Congress’ desire that such authority be used whenever possible in the dual interests of economizing and reducing respondent burden.” H.R. Conf. Rep. 94-1719, 94th Cong., 2nd Sess., 1976 WL 14025 (1976), at *10.

The 1976 amendments also require advance notice before the Secretary may add questions to the census. Section 141(f) requires the Secretary to submit two reports to Congress—one “not later than 3 years before the appropriate census date,” identifying “subjects proposed to be included,” and another “not later than 2 years before the appropriate census date,” identifying “questions proposed,” 13 U.S.C. § 141(f)(1)-(2). The Secretary may amend either report only if “new circumstances exist which
necessitate that the subjects … or questions … be modified.” 13 U.S.C. § 141(f)(3) (emphasis added).

The Secretary’s authority over the census is further constrained by various standards. The Office of Management and Budget (OMB) Statistical Policy Directives, adopted in 2006, require data-collection design that “achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost.” J.A.654, 658. And the Census Bureau Statistical Quality Standards, adopted in 2010 as directed by OMB, 67 Fed. Reg. 38467 (June 4, 2002), require pretesting of new census questions, subject to narrow exceptions not applicable here. J.A.626-630.

C. The Secretary’s Decision to Add a Citizenship Question

In March 2017, the Secretary submitted a report to Congress pursuant to 13 U.S.C. § 141(f)(1), titled “Subjects Planned for the 2020 Census and American Community Survey.” J.A.160. “The list of subjects did not include citizenship status.” Pet. App. 33a. One year later, on March 26, 2018, the Secretary reversed course and issued a memorandum directing the addition of a citizenship question to the 2020 census.

The Secretary’s memorandum purported to respond to a December 12, 2017 DOJ letter, requesting the inclusion of a citizenship question. DOJ's letter asserted that the question would produce a “full count” of citizenship data at the census block level—purportedly “critical to the Department’s enforcement of Section 2 of the Voting Rights Act”—rather than “estimates” with a margin of error. Pet. App.
The Secretary’s decisional memorandum stated: “[F]ollowing receipt of the DOJ request, I set out to take a hard look at the request ... so that I could make an informed decision on how to respond ... [and] immediately initiated a comprehensive review process.” Pet. App. 548a. The Secretary contemporaneously testified to Congress that DOJ “initiated the request,” that his decision “respond[ed] solely” to DOJ, and that he was “not aware” of any discussions concerning the question between Commerce and the White House. Pet. App. 72a (emphasis added).

But the Secretary’s timeline misrepresented the decisionmaking process. In truth, the Secretary set out to add a citizenship question to the census long before the DOJ request; lobbied DHS and DOJ to ask for the question; and concocted the VRA rationale as the purported basis for DOJ’s request.

On June 21, 2018, after this lawsuit was filed, the Secretary issued a “supplemental memorandum” revealing that he first considered adding a citizenship question not in response to the DOJ request, but “soon after” his appointment in February 2017, for reasons he did not specify. Pet. App. 546a-547a. The Administrative Record revealed that—contrary to his statements to Congress—the Secretary discussed adding a citizenship question in April 20171 with then-White House advisor Steve Bannon, and, at Bannon’s direction, with then-Kansas Secretary of State Kris Kobach, who advised that the question’s absence on the census “leads to the problem that

1 See Dist. Ct. Doc. 379-1, at 3.
aliens ... are still counted for congressional apportionment purposes.” J.A.186.

The supplemented Administrative Record also revealed that on May 2, 2017—seven months before the DOJ letter—the Secretary wrote his aides that he was “mystified why nothing ha[d] been done in response to [his] months old request that we include the citizenship question.” J.A.276. In response, Commerce Policy Director Earl Comstock promised that “[o]n the citizenship question we will get that in place,” and that he would “work with Justice to get them to request” it. J.A.276. After months of unsuccessful lobbying of both first DOJ and then DHS to request the question, the Secretary personally intervened with the Attorney General, Pet. App. 82a-91a, and “inquired whether [DOJ] would support ... a citizenship question” based on “the Voting Rights Act” as a rationale, Pet. App. 546a. DOJ’s December 12 letter followed. Pet. App. 564a-569a.

None of this was mentioned in the Secretary’s congressional testimony or decisional memorandum. The full picture came to light only after the agency supplemented the Administrative Record with more than 11,000 pages it had initially withheld. The district court concluded that the Secretary’s “first version of events, set forth in the initial Administrative Record, the Ross Memo, and his congressional testimony, was materially inaccurate.” Pet. App. 74a.
The Secretary’s Disregard of the Administrative Record

The Secretary made his decision in the face of unequivocal evidence in the Administrative Record that adding a citizenship question “harms the quality of the census count, and would [provide DOJ with] substantially less accurate citizenship status data than are available from administrative sources,” such as the Social Security Administration. J.A.105.

In his decisional memorandum, the Secretary asserted that “no one provided evidence that” a citizenship question “would materially decrease response rates.” Pet. App. 557a. That “[w]as simply untrue.” Pet. App. 285a-286a. Based on multiple empirical analyses, the Census Bureau had unambiguously advised that the question would have “an adverse impact on self-response” and “on the accuracy and quality of the 2020 Census.” J.A.109.

The Secretary also stated in his decisional memorandum that a citizenship question is “necessary to provide complete and accurate data in response to the DOJ request.” Pet. App. 562a. But that was untrue as well. The Bureau had offered the Secretary three “alternatives” for producing block-level citizenship data: (A) deploying “Census Bureau statistical experts” to perform “sophisticated modeling” with existing ACS data, J.A.107-108; (B) “adding a citizenship question to the 2020 census,” J.A.105; or (C) “link[ing]” census respondents to existing governmental “administrative records,” J.A.116.

The Census Bureau’s memoranda explained that citizenship data gathered through a census
question would be “of suspect quality,” J.A.158, because noncitizens “inaccurately mark ‘citizen’ about 30 percent of the time” on Census Bureau sample surveys, Pet. App. 555a. The Bureau concluded that, in contrast, using “reliable federal administrative records”—which are “verified” based on legal documents concerning citizenship status—“better meets DOJ’s stated uses, is comparatively far less costly than [adding a citizenship question], and does not harm the quality of the census count.” J.A.105.

The Census Bureau delivered its analyses to the Secretary in December 2017 and January 2018. Pet. App. 42a. The Secretary’s senior aides then posed a series of follow-up questions for the Bureau to answer for the Secretary. Question 31 asked: “What was the process that was used in the past to get questions added to the decennial Census or do we have … a precedent … established?” Pet. App. 107a. The Bureau responded:

The Census Bureau follows a well-established process when adding or changing content on the census or ACS to ensure the data fulfill legal and regulatory requirements established by Congress. Adding a question or making a change to the Decennial Census or the ACS involves extensive testing, review, and evaluation. This process ensures the change is necessary and will produce quality, useful information for the nation.

Pet. App. 107a-108a. Later, in curating the Administrative Record, Commerce officials outside the
Census Bureau, without the Bureau’s knowledge, rewrote the Bureau’s answer. They deleted the Bureau’s description of the “well-established process” involving “extensive testing” for adding a census question, and substituted a statement that the “Bureau did not fee[ld] bound by past precedent.” Pet. App. 108a-09a; J.A.142. The Bureau was never consulted or informed about the misrepresentation. Pet. App. 109a.

Around the same time that the Census Bureau communicated its recommendation to the Secretary, the Acting Census Director contacted DOJ and shared its assessment that “the best way” to provide citizenship data would be through administrative records, and “suggest[ed] a meeting of Census and DOJ technical experts to discuss the details.” J.A.264-265. But the Attorney General personally vetoed the meeting. J.A.1110-1111; Pet. App. 96a-99a.

Ultimately, the Secretary directed the Census Bureau to adopt a fourth alternative: compiling citizenship data from a combination of administrative records and responses to a citizenship question (“Alternative D”). He speculated that doing so “may eliminate the need” to impute citizenship for people lacking records, and that “citizenship data provided to DOJ will be more accurate with the question than without it.” Pet. App. 556a, 562a.

But in a March 1, 2018 memorandum, J.A.151-159, the Bureau had told him precisely the opposite, that Alternative D:

- “would not 'help fill the ... gaps’” in available records, because millions of respondents would not answer the question, and many
others would answer incorrectly, J.A.157-158; and

- would result in “poorer quality citizenship data” than using administrative records alone, J.A.159.

There was no evidence in the Administrative Record to the contrary. Pet. App. 290a.

The Secretary nonetheless adopted Alternative D. In doing so, he also ignored evidence before him that the Census Bureau cannot fulfill DOJ’s request for “full count” citizenship data at the level of individual census blocks, instead of the “estimates” with a “margin of error” that DOJ had always used previously. Pet. App. 568a. That is because the Bureau applies “disclosure avoidance” protocols to ensure the confidentiality of census responses pursuant to 13 U.S.C. § 9(a)(2), and therefore can provide DOJ only with estimates of citizenship at the block level—even if a citizenship question is added to the census. Pet. App. 297a-299a.

E. Proceedings Below

Plaintiffs are five organizations suing on behalf of themselves and their thousands of members who would be affected by the undercount that adding a citizenship question to the census would cause.

Following a bench trial, the district court held that the decision to add a citizenship question to the 2020 census presented “a veritable smorgasbord of classic, clear-cut APA violations.” Pet. App. 9a-10a. The court first held that plaintiff organizations had associational standing, because plaintiffs’ members would be harmed by the undercount caused by the question, Pet. App. 196a-200a; and also standing “to
pursue ... claims in their own right,” Pet. App. 219a-225a, because they had been forced “to divert organizational resources away from their core missions and towards combating the negative effects of the citizenship question,” Pet. App. 221a (applying Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)).

On the merits, the court found that the Secretary’s decision was “not in accordance with law,” 5 U.S.C. § 706(2)(A), because it violated Sections 6(c) and 141(f) of the Census Act. Pet. App. 261a-262a. The court found that the Secretary’s decision ran “counter to ... the evidence before the agency” in “a startling number of ways,” Pet. App. 285a, and “failed to consider’ several ‘important aspect[s] of the problem,’” Pet. App. 294a (quoting Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Further, the court found that the Secretary failed to justify “dramatic departure[s]” from standards “that have long governed administration of the census,” Pet. App. 300a, and that the rationale the agency offered for its decision was “clear[ly]” pretextual, Pet. App. 311a. Finally, the district court concluded that plaintiffs did not prove their Fifth Amendment claim. Pet. App. 334a-335a.²

² The court previously dismissed plaintiffs’ Enumeration Clause claim. The organizational plaintiffs agree that the Enumeration Clause constitutes an alternative basis for affirmance and adopt the arguments of the government plaintiffs.
SUMMARY OF ARGUMENT

The district found multiple, independent, “clear-cut APA violations,” “[b]ased exclusively on the materials in the official ‘Administrative Record,’” Pet. App. 10a, and set aside the Secretary’s decision. Defendants offer no compelling reason to disturb that judgment.

I. No “speculation” is required to find that Plaintiffs have standing. Br. 18. The Secretary’s decision will—according to defendants’ own analysis—cause approximately 6.5 million people not to respond to the census. J.A.1008. The resulting undercount would indisputably harm plaintiffs: states in which plaintiffs’ members reside risk losing House seats and substantial federal funding for programs on which plaintiffs’ members rely. Under House of Representatives, 525 U.S. 316, it does not matter that these injuries will occur only because people refrain from answering the census. All that matters is that the Secretary’s decision will in fact result in injury. There is no dispute that it will.

II. This Court applies a “strong presumption that Congress intends judicial review of agency discretion,” Bowen v. American Hospital Ass’n, 476 U.S. 610, 670 (1986), and there is no indication that Congress sought to exempt census questions from ordinary APA review. Nothing in the Census Act or APA forecloses review of the Secretary’s decisions. And this Court already held that the same language in the Census Act does not commit the actions of an agency head to his absolute discretion. Bell v. New Jersey, 461 U.S. 773, 791-92 (1983).
III. The district court correctly found multiple APA violations. Pet. App. 10a. Affirmance is required if the record supports any one of them.

A. The Secretary’s decision is directly contradicted by the Administrative Record. His decision expressly depended on two propositions: that a citizenship question would not “decrease [census] response rates”; and that combining responses to a citizenship question with administrative records on citizenship would yield “more accurate” data. Pet. App. 557a, 562a. Both were flatly contradicted by the Census Bureau’s analyses in the Administrative Record, which unequivocally demonstrated: (1) that adding a citizenship question “harms the quality of the census count,” J.A.105; and (2) that the Secretary’s proposal to use both administrative data and a citizenship question would contaminate “reliable federal administrative records” with “suspect quality” responses to a citizenship question, “result[ing] in poorer quality” citizenship information than relying on administrative records alone. J.A.117, 158-159. While the Secretary may disagree with the conclusions of his technical experts, he cannot do so absent any evidence contradicting these findings.

B. For similar reasons, the decision also violates the Census Act, which requires the use of administrative records instead of “direct inquiries,” to “the maximum extent possible.” 13 U.S.C. § 6(c). The Administrative Record is clear: citizenship data gathered through administrative records alone would be more accurate than the Secretary’s proposal, and therefore “best meets DoJ’s stated uses.” J.A.105. Choosing a “direct inquiry” over those records when
the records would yield better data was contrary to law. And by failing to propose citizenship to Congress as a subject “3 years before the ... census,” the Secretary's decision separately violated Section 141(f) of the Census Act.

C. The Secretary also failed to consider that the Census Bureau’s disclosure avoidance protocols—adopted pursuant to its statutory obligation to preserve the confidentiality of census responses—prohibit it from fulfilling the Secretary’s ostensible purpose: to provide the DOJ with “full count” citizenship data at the level of individual census blocks. Pet. App. 297a-300a, 568a. Nor did he meaningfully consider whether “better” citizenship data is actually “necessary” to enforce the VRA, where the Administrative Record and 54 years of successful VRA enforcement without a citizenship question, disprove that notion.

D. The Secretary’s decision also “dramatically departed from the standards and practices ... governing administration of the census,” which required pretesting of new questions. Pet. App. 300a-303a. The citizenship question is not exempt from pretesting by virtue of its inclusion on the ACS, because, with 30 percent of noncitizens wrongly marking “citizen,” it had not “performed adequately” there. Pet. App. 555a, J.A.627.

E. Perhaps “most egregiously,” Pet. App. 311a, the Secretary’s decision was pretextual. In his decisional memorandum and congressional testimony, the Secretary portrayed his
decisionmaking process as “initiated” by DOJ and “responding solely to [DOJ’s] request”; and that he was “not aware” of any discussions about this issue with the White House. Pet. App. 72a. These statements were false. The Administrative Record revealed that the Secretary’s decision was made “well before” he even considered the issue of VRA enforcement, Pet. App. 313a, for reasons that he has never publicly specified. And the Secretary went to extraordinary lengths to conceal and misrepresent his reasons for acting. Defendants’ response—that agencies can make decisions for reasons that are completely different from those they publicly disclose, Br. 41-42—violates the transparency in decisionmaking that is a hallmark purpose of the APA, and would prevent meaningful judicial review.

F. Finally, defendants argue that, notwithstanding all of the above APA violations, because the census has asked about citizenship in the past, “it simply cannot be arbitrary” to do so now. Br. 28. But there is no entrenchment exception to APA review. And if there were, it would compel affirmance. For decades, Commerce has recognized that a “differential undercount” of racial and ethnic minorities threatens census accuracy, and has thus

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5 Id.
firmly opposed a census citizenship question. The Census Bureau deems its “best” estimate—that the question will deter 6.5 million people from responding—“conservative,” given the current immigration enforcement environment. J.A.761-762, 821, 1005, 1008. And the presence of the question in 1950 is irrelevant on its face to the question whether the Secretary’s VRA rationale was arbitrary and capricious; the VRA was enacted in 1965. Likewise, the Census Act provision requiring the use of administrative data in lieu of census questions whenever possible was enacted in 1976. And the Census Bureau’s pretesting requirement was adopted in 2010. J.A.618. The Secretary cannot “rely simply on the [distant] past.” Shelby Cty. v. Holder, 570 U.S. 529, 553 (2013). Rather, he must offer “a reasoned explanation ... for disregarding facts and circumstances that underlay” the Census Bureau’s consistent practice over the last 70 years. Encino Motorcars v. Navarro, 136 S. Ct. 2117, 2126 (2016). He has not.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

The district court correctly held that plaintiff organizations have standing based on injuries—both to their members and themselves—caused by the addition of a citizenship question to the census. Pet. App. 194a-239a. Defendants do not dispute that these injuries will occur. But they contend that because the injuries involve “unlawful third-party action,” Br. 18—the millions of people deterred by a citizenship question from responding to the census—standing is absent. That argument has no basis in
precedent or logic. The actions of intervening third parties sometimes cut against standing where they make an injury or its remedy speculative. But there is no speculation necessary here: defendants do not dispute that adding the question will exacerbate the undercount.

Defendants’ own “best” “conservative estimate” is that adding a citizenship question will reduce census responses by at least 5.8% among non-citizen households, approximately 6.5 million people. J.A.761-762, 821, 826-827, 1005, 1008. The district court made factual findings—unchallenged by defendants—that “[t]he Census Bureau’s [nonresponse follow-up] operations will not remedy th[at] decline[,]” which will thus “translate into an incremental net differential undercount of people who live in [noncitizen] households in the 2020 census.” Pet. App. 169a.

Defendants also do not contest the district court’s findings that the question will cause a “certainly impending” or “substantial risk” that: several states in which plaintiffs’ members live (Arizona, California, Illinois, New York, and Texas) will lose a House seat, Pet. App. 175a; and those states and others will lose funds for federal programs, upon which specific plaintiffs’ members rely, Pet. App. 180a-184a. Nor do defendants contest that the Secretary’s action has already injured plaintiffs, by forcing them to divert hundreds of thousands of dollars “to address the effects of a citizenship question” on census participation. Pet. App. 187a.

Accordingly, no “speculation” is needed to conclude that plaintiffs have been and will be further
injured by the Secretary’s decision, or that the district court’s injunction will remedy that harm. Where, as here, government action influences third party conduct “in such a manner as to produce causation and permit redressability,” a plaintiff has standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Indeed, this Court has already found standing based on predicted injuries arising from individuals’ refusal to comply with the legal obligation to respond to the census. In *House of Representatives*—unmentioned by defendants in their discussion of standing—this Court held that an Indiana resident had standing to challenge the Census Bureau’s use of sampling, which would change the projected “net undercount rate,” and thereby cause Indiana to lose a House seat. 525 U.S. at 330. The sampling, and therefore plaintiffs’ injury, would occur only if some people “unlawfully refuse to … return the census form.” Br. 17. Yet this Court found standing to sue.

Citing *Bennett v. Spear*, 520 U.S. 154 (1997), defendants argue that a citizenship question will not “coerce anyone” into failing to respond to the census. Br. 18. But *Bennett* held that “injury produced by determinative or coercive effect” on a third party suffices for standing. Id. at 169 (emphasis added). Here, defendants do not dispute that adding a citizenship question will have a “determinative” effect on millions who will not respond, thus causing harm to plaintiffs. Pet. App. 139a-173a. Where third-party conduct is involved in the chain of causation resulting in injury, traceability requires only that a “defendant’s actions constrained or influenced” such conduct. *Carver v. City of New York*, 621 F.3d 221,

Defendants object that plaintiffs’ injuries result from “unlawful” action, because the law requires everyone to respond to the census. Br. 18. That argument is foreclosed by House of Representatives. And while the fact that a course of conduct is unlawful may sometimes make it speculative that parties will engage in it, that is not so here. Defendants routinely spend millions of dollars to address the public’s failure to respond to the census, and they themselves predict that millions more people will be induced by the citizenship question not to respond. In these circumstances, the fact that the triggered conduct is unlawful does nothing to dispel the certainty that it will occur. Cf. Attias v. Carefirst, Inc., 865 F.3d 620, 627-30 (D.C. Cir. 2017) (standing where company’s negligence permitted unlawful hacking); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 21 (D.D.C. 2010) (standing where bank permitted terrorist organizations to use its funds). 6

6 Nor does it matter that some deterred from responding may fear illegal acts by the government. Br. 18. Even if “the public reaction which underlies all the alleged harm ... is an irrational one,” that is “irrelevant” for Article III causation purposes. Block v. Meese, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). All that matters is that the challenged action will in fact cause the relevant change in third-party behavior, resulting in injury to plaintiffs. Id. And, separate from fears of government malfeasance, defendants’ decision to add a citizenship question
Finally, defendants claim that finding standing here would permit anyone philosophically opposed to a census question to “manufacture” injuries by boycotting the census. Br. 19-20. Plaintiffs’ standing, however, arises not from self-inflicted injuries, but from the “determinative effect” of the Secretary’s actions on more than 6 million people who will not respond if a citizenship question is asked. And plaintiffs’ diversion of resources is not a manufactured injury; the Bureau acknowledged that it relies heavily on outreach by “trusted partners” including plaintiffs, whose work has been made “more difficult” by the citizenship question. Pet. App. 187a-193a, 221a-222a; J.A.933-934.

In sum, the defendants concede that the challenged action will cause millions not to respond, and that this will redound to plaintiffs’ detriment. Nothing more is required for standing.

II. THE DECISION TO ADD A QUESTION TO THE CENSUS IS NOT COMMITTED TO AGENCY DISCRETION.

The Secretary’s decision to add a citizenship question to the census is reviewable agency action. This Court applies a “strong presumption that Congress intends judicial review of administrative action.” Bowen, 476 U.S. at 670. Exceptions are “rare” and reserved for actions “traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation or a decision not to reconsider a final action,” Weyerhaeuser Co. v.
Defendants have not rebutted the strong presumption of APA reviewability here. Under the Census Act, Congress directed the Secretary to administer the census subject to its constitutional duty to ensure an actual enumeration, and pursuant to specific statutory mandates. Congress gave no indication that it intended to abrogate the ordinary constraints imposed by the APA, and imposed additional specific limitations on the Secretary's discretion.

Accordingly, this Court has entertained several challenges to the Commerce Secretary's census decisions. See, e.g., Utah, 536 U.S. at 452; House of Representatives, 525 U.S. at 316; Wisconsin, 517 U.S. at 1. As this Court has held, at minimum, the Secretary must act in a manner bearing “a reasonable relationship to the accomplishment of an actual enumeration of the population.” Wisconsin, 517 U.S. at 20. “The census is intended to serve the constitutional goal of equal representation,” which “is best served by the use of a Manner that is most likely to be complete and accurate.” House of Representatives, 525 U.S. at 348 (Scalia, J., concurring in part). Defendants offer no reason why a reviewing court cannot evaluate whether decisions about the questions on the census are “arbitrary, capricious, an abuse of discretion” or “not in accordance with law.” 5 U.S.C. § 706(2)(A).
Defendants point to a single phrase to support their contention that the Secretary has unfettered discretion to draft the census in whatever way he chooses, even arbitrarily and capriciously. Section 141(a), they note, directs the Secretary to “take a decennial census of population ... in such form and content as he may determine.” But that language does not stand alone, and must be read in conjunction with other statutory constraints in Sections 6(c), 141(a), 141(f), and 195, discussed infra. Moreover, this Court has already held that the phrase “may determine” does not signal Congress’s intent to confer unreviewable authority on an agency head. See Bell, 461 U.S. at 791-92 (decisions under statute permitting adjustments for overpayments “as the Secretary may determine” are “subject to judicial review,” including under 5 U.S.C. § 706); Chappell v. Wallace, 462 U.S. 296, 303 (1983) (decisions under statute providing that agency “may correct any military record” when it “considers it necessary” “are subject to judicial review”).

The two cases on which defendants rely are so plainly distinguishable that they only underscore that defendants have not overcome the strong presumption of reviewability. Webster v. Doe involved the CIA Director’s personnel decision, under a statute that provided that the Director “may, in his discretion” terminate employees “whenever he shall deem such termination necessary or advisable.” 486 U.S. 592, 594 (1988) (emphasis added). “No language equivalent to ‘deem ... advisable’ exists in the census statute.” Franklin v. Massachusetts, 505 U.S. 788, 817 (1992) (Stevens, J., concurring). Congress understandably did not want courts reviewing the nation’s spymaster’s hiring decisions,
said so. *Webster*, 486 U.S. at 600 (statute “exudes ... deference” to the CIA). While the CIA’s work carries imperatives of secrecy and national security, the census does not. To the contrary, “[t]he open nature of the census enterprise and [] public dissemination of the information collected are closely connected with our commitment to a democratic form of government.” *Franklin*, 505 U.S. at 818 (Stevens, J., concurring).

*Heckler v. Chaney*, 470 U.S. 821 (1985), held that “an agency’s refusal to take requested enforcement action” is presumptively unreviewable, largely because reviewing inaction would require judging whether the agency had wisely chosen to conserve its resources against a potentially infinite array of opportunity costs. *Id.* at 831. By contrast, the Court explained, an agency’s affirmative act “provides a focus for judicial review,” and “at least can be reviewed to determine whether the agency exceeded its statutory powers.” *Id.* at 832. The Secretary’s “affirmative act” to put a citizenship question on the census is not “peculiarly within [his] expertise,” and can be measured against the standards set by Congress under the APA and Census Act. *Id.* at 831.\(^7\)

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\(^7\) The same distinction explains *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir. 1992). See Br. 23-24, 27. *Tucker* distinguished the Census Bureau’s decision not to make a statistical adjustment to census results, which the Seventh Circuit held nonreviewable, from the “judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense,” which would present “a different case.” 958 F.2d at 1418.
This is not one of the “rare circumstances” where relevant statutes afford “no meaningful standard against which to judge the agency’s exercise of discretion.” Weyerhaeuser, 139 S. Ct. at 370. As this Court has held, the Secretary’s “broad” grant of authority under Section 141(a) “is informed … by the narrower and more specific” provisions of the Act, which constrain the Secretary’s authority, such as Section 195, which “requires the Secretary to use statistical sampling in assembling the myriad demographic data that are collected in connection with the decennial census.” House of Representatives, 525 U.S. at 339.

Similarly, Section 6(c) directs that “the Secretary shall acquire and use” administrative records from other governmental entities, “instead of conducting direct inquiries” of the population, “[t]o the maximum extent possible.” 13 U.S.C. § 6(c). This directive is anything but discretionary: it “command[s] that the Secretary not add additional questions to the census … where administrative records would suffice.” Pet. App. 265a. Cf. Flint Ridge Dev. Co. v. Scenic Rivers Ass’n, 426 U.S. 776, 787-88, (1976) (interpreting NEPA mandate that agencies comply with Act “to the fullest extent possible” as “neither accidental nor hyperbolic,” but “a deliberate command” that agencies comply unless there is “a clear and unavoidable conflict in statutory authority”).

8 Section 141(f) further constrains the Secretary’s authority to obtain “other census information.” It requires the Secretary to report to Congress “not later than 3 years before the appropriate census date” identifying “subjects proposed to be included … in such a census.” 13 U.S.C. § 141(f)(1).
Section 6(c)’s command to use administrative records whenever possible comports with Section 141(a), which authorizes the Secretary to obtain “other” information aside from the enumeration, but only “as necessary.” Reading Sections 6(c) and 141(a) together, the Census Act authorizes the collection of information through census inquiries only where “necessary,” and where it is not possible to gather such information from the government’s administrative records.\(^9\)

Defendants’ reliance on a 1973 House Report—for a bill that did not even advance out of committee—is unavailing. The quoted language is inconsistent with the final 1976 report, which made clear Congress’ intent to limit the Secretary’s discretion to add questions to the census, by

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Secretary may amend that report only where “new circumstances … necessitate that the subjects, types of information, or questions contained in reports so submitted be modified.” *Id.* § 141(f)(3) (emphasis added). The provision sets a judicially enforceable point at which, absent changed circumstances, the Secretary cannot alter questionnaire subjects.

“direct[ing] the Secretary of Commerce to acquire and use to the greatest extent possible statistical data available from other sources in lieu of making direct inquiries,” to “reduc[e] respondent burden,” H.R. Conf. Rep. 94-1719, 94th Cong., 2nd Sess. 1976, 1976 WL 14025, at *10. As Congress subsequently explained, its goal was to “constrain[] the Secretary’s authority,” in order to “address[] concerns” that there were “too many questions in the decennial census.” Br. for Respondents 37 n.50, 40, *House of Representatives*, 525 U.S. 316 (citing H.R. Rep. No. 94-944, at 5 (1976)).

Defendants conceded that under their reading of the Census Act, a Secretary’s decision to add questions into, e.g., “whether and how many guns people owned,” or “who [they] voted for” would be unreviewable, regardless of their effect on response rates. Pet. App. 480a, 497a. Indeed, even a “question that is intended to and will have the predictable effect of depressing the count” of voters associated with only one political party could not be reviewed. Pet. App. 480a-481a. That reading gives the Secretary complete, unreviewable license to subordinate the constitutional duty of an actual enumeration to the collection of any “other” information he thinks “convenient.” Br. 22. Nothing in the Census Act provides “clear” congressional intent to compel such a result. *See Webster*, 486 U.S. at 603.

III. THE SECRETARY’S DECISION WAS ARBITRARY AND CAPRICIOUS.

In adding a citizenship question to the census, the Secretary violated the APA in multiple ways. The two principal predicates underlying his decision
were contradicted by, and had no support in, the Administrative Record beyond his own assertions. He violated statutory dictates that required him to gather information through government records—and not census questions—“to the maximum extent possible,” and to provide Congress advance notice of census topics. 13 U.S.C. §§ 6(c), 141(f). He failed to consider another statutory constraint that would preclude him from achieving his professed goal. He departed from established standards without adequate explanation. And the only rationale he advanced for his decision was pretextual. Any one of these shortcomings is sufficient to invalidate his action. Defendants can prevail only if they can show the district court erred in each of these findings.

A. The Decision Was Contrary to the Evidence in the Administrative Record.

Agency action that rests on explanations “run[ning] counter to the evidence” is arbitrary and capricious. State Farm, 463 U.S. at 43. The district court properly found that the Secretary’s decision contradicted the Administrative Record in “a startling number of ways.” Pet. App. 285a. The Secretary’s decision to combine responses to a citizenship question with data from administrative records (“Alternative D”) rested on two key assertions: that “no one provided evidence” that “a citizenship question ... would materially decrease response rates”; and that mixing responses to a citizenship question with administrative records would produce “more accurate” citizenship data. Pet. App. 557a, 562a.
Both predicates for the Secretary’s decision were refuted by the unequivocal evidence in the Administrative Record, showing that adding a citizenship question “harms the quality of the census count,” J.A.105; and that “Alternative D would result in poorer quality citizenship data” than relying exclusively on administrative records, J.A.159. No evidence in the Administrative Record was to the contrary. The district court did not “second guess” anyone, but merely followed settled law to hold that because the predicates for the Secretary’s decision were contradicted and unsupported by the Administrative Record, the decision is arbitrary and capricious.

1. The decision was contrary to unequivocal evidence in the Administrative Record that a citizenship question would damage the accuracy of the census.

In his decisional memorandum, the Secretary asserted “no one provided evidence” that “a citizenship question ... would materially decrease response rates.” Pet. App. 557a. As the district court found, that “[w]as simply untrue.” Pet. App. 285a-286a. The Administrative Record is “rife with both quantitative and qualitative evidence ... demonstrating that” the question would “materially reduce response rates among immigrant and Hispanic households.” Pet. App. 286a (citing J.A.105-06, 301-02, 308-11, 365-66). The Secretary could only conclude otherwise by misstating the evidence in the Administrative Record at every turn.

The Record contained several empirical analyses by the Census Bureau, including a
comparison of response rates for the census (which does not include a citizenship question) and for the “long form” and ACS (which did). That evidence established that all households “have lower self-response rates” on surveys featuring a citizenship question, but “the decline in self-response for noncitizen households was ... greater than the decline for citizen households.” J.A.110. Thus adding the question would have “an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census.” J.A.109.

The Secretary discounted this comparative analysis, claiming that “the [Census] Bureau attributed th[e] difference to the greater outreach and follow-up associated with” the Decennial Census, Pet. App. 553a, and the ACS being “much longer than the census questionnaire,” Br. 30. These assertions were untrue: the Census Bureau did not attribute the difference to either of these factors, but rather explained that its analysis controlled for differences between the census and the ACS, and that “the only difference ... in [its] studies was the presence of at least one noncitizen in noncitizen households.” J.A.111 (emphasis added).

The Secretary also asserted that “differential nonresponse rates to the citizenship question are ‘comparable to nonresponse rates for other questions.”’ Br. 30 (quoting Pet. App. 553a). But here, too, the Administrative Record showed otherwise. The Census Bureau found that “nonresponse rates for the citizenship question are much greater than ... comparable rates for other demographic variables like sex, birthdate/age, and race/ethnicity.” J.A.110 (emphasis added). The
Bureau also warned the Secretary that Hispanics were nine times more likely than whites to stop answering the ACS altogether once they came across the citizenship question, J.A.112—a fact that he simply ignored.

 Defendants argue that the Secretary could disregard that evidence because it was not “definitive.” Br. 30. But the Census Bureau’s technical experts are scientists, not psychics. Their memoranda reflected their best scientific judgment, and contained “the only quantitative evidence in the Administrative Record on the effect of the citizenship question on response rates.” Pet. App. 286a. Defendants’ lone trial witness, Census Chief Scientist Dr. John Abowd, confirmed that the Bureau’s memoranda reflected “the best analysis” “[w]ith available data” of the effect of a citizenship question, J.A.823, and that “the Census Bureau agrees” “that the balance of evidence available suggests that adding a citizenship question to the 2020 census would lead to a lower self-response rate” among noncitizens, J.A.808.10 And “there [was] no

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10 Defendants did not appeal the district court’s consideration of their own expert’s testimony for the purpose of explaining technical information in the Administrative Record; they challenge only the court’s consideration of extra-record discovery concerning the Secretary’s “mental processes.” Pet. i. Extra-record expert evidence is both proper and routinely considered where “necessary to explain technical terms or complex subject matter involved” in the agency decision at issue. Animal Def. Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988). Explanatory testimony is therefore commonplace in census-related litigation. See, e.g., Utah, 536 U.S. at 466-68 (describing expert testimony on whether the Bureau’s practice of “imputation” constitutes “sampling”); Massachusetts v. Mosbacher, 785 F. Supp. 230, 245 n.13, 254-55 (D. Mass. 1992)
evidence in the Administrative Record supporting a conclusion that addition of the citizenship question will not harm the response rate.” Pet. App. 286a.

The Secretary’s memorandum misrepresented the evidence in other ways. It stated that Christine Pierce, Senior Vice President for the survey firm Nielsen, told him it “had added questions” to surveys “on sensitive topics such as … immigration status … without any appreciable decrease in response rates,” and that “no empirical data existed on the impact of a citizenship question.” Pet. App. 552a. But these were all “material[] mischarateriz[ations].” Pet. App. 109a. Dr. Pierce testified that she never “state[d] that Nielsen had added ‘questions concerning immigration status … without any appreciable decrease in response rates’”; “did not say … no empirical data existed on the impact of a citizenship question”; and instead “told Secretary Ross unequivocally that [she] was concerned that a citizenship question would negatively impact self-response rates.” J.A.530-531; see also Pet. App. 109a-112a. And the district court identified other material mischaracterizations of the Administrative Record by the Secretary regarding the burden imposed by the question on all respondents, the effect of its placement on the census questionnaire, and the cost of its implementation. See Pet. App. 286a-289a.

Finally, defendants assert that the Secretary “acknowledged the risk” that a citizenship question “would depress response rates,” Br. 30, but ultimately made a “policy-laden balancing” decision,

Br. 31, to prioritize “complete and accurate” citizenship data over the risk of “some impact on [census] responses,” Pet. App. 562a. But the Secretary expressly rested his decision on a conclusion, contrary to the Administrative Record, that the Census Bureau could not determine whether the question would reduce census responses. A single throwaway “even if” sentence, without more, “d[oes] not come close to satisfying the agency’s duty under the Administrative Procedure Act” to actually assess burdens and benefits. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730-32 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). Even assuming that the Secretary’s “policy decision” were permissible, it cannot rest on factual predicates unequivocally contradicted by his own experts’ findings throughout the Administrative Record.

2. **The decision was contrary to unequivocal evidence in the Administrative Record that a citizenship question would not produce more complete and accurate citizenship data.**

The second key assertion underlying the Secretary’s decision was his “judgment’ that [using administrative records and] adding the question to the census ‘will provide DOJ with the most complete and accurate [citizenship] data in response to its request.’” Pet. App. 289a-290a. This, too, was directly contrary to the findings of Census Bureau scientists—who unlike the Secretary, are experts in statistics—that Alternative D “would result in poorer quality citizenship data than [relying exclusively on administrative records],” J.A.159, while using
The Bureau’s analysis in the Administrative Record indicated that adding a citizenship question provides no marginal benefit, and actually damages citizenship data quality, for two main reasons. It reduces census response rates, impairing the Bureau’s ability to use administrative records—the highest quality citizenship information available. And because it is highly inaccurate for people who lack citizenship records, it produces unreliable data for those who answer the question, while corrupting the Bureau’s imputation model for those who do not.

The Secretary’s contention that Alternative D would provide “more complete and accurate” citizenship data, Pet. App. 556a—the ostensible justification for asking the question—was directly contrary to the Administrative Record, in four respects.

First, although the Secretary asserted that Alternative D “would maximize the Census Bureau’s ability to match the decennial census responses with administrative records,” Pet. App. 555a-556a, the Census Bureau told him this was not true. Indeed, defendants have conceded that under Alternative D, “the number of people whose citizenship information cannot be ‘linked’ to federal administrative records would increase” by approximately one million. Br. 32. Because adding a citizenship question would reduce census self-responses, Alternative D would force the Bureau to count more people through less accurate methods, including “proxy” responses from neighbors and landlords, and people so enumerated are harder to link to administrative records.
Thus, the record established that Alternative D would *impede* the Census Bureau’s ability to use administrative records on citizenship—the most accurate citizenship data available. Pet. App. 56a (citing J.A.150).

Second, although the Secretary asserted that Alternative D would help fill the “gaps” in citizenship administrative records, Br. 46, the Administrative Record showed that this was wrong: Alternative D would generate *less accurate* data, thereby directly undermining its ostensible purpose. There are an estimated 22 million people for whom administrative citizenship data is unavailable, but who are expected to respond to the citizenship question. Br. 33. The Census Bureau, however, warned that these responses would often be inaccurate, J.A.117-120, as noncitizens who answer citizenship questions on Census Bureau sample surveys “inaccurately mark ‘citizen’ about 30 percent of the time,” Pet. App. 555a. The Bureau explained that many noncitizens “have a strong incentive to provide an incorrect answer,” meaning “survey-collected citizenship data may not be reliable for many of the people falling in the gaps in administrative data.” J.A.157. By contrast, the Bureau recommended that, without a citizenship question, it can use a more accurate process of “imputation”—“inferring” characteristics based on “a nearby sample,” *Utah*, 536 U.S. at 458. The Bureau’s analysis in the Administrative Record stated that “an accurate model can be developed and deployed for this purpose,” based on “high-quality administrative data.” J.A.146, 157.

Defendants argue that, “of the 22 million additional responses, just under 500,000 ... will be
inaccurate.” Br. 33. But as Dr. Abowd explained, this would still be “less accurate than ... modeling ... citizenship status.” J.A.882, see also J.A.873. And the fact that “most” people answer a citizenship question correctly is unremarkable: most census respondents are citizens, and “the vast majority of citizens ... correctly report their status when asked a survey question.” J.A.117. But the stated aim of the citizenship question is not to get correct answers “most” of the time—it is to accurately distinguish noncitizens among the majority-citizen population and locate them in individual census blocks, which requires high accuracy rates for each respondent category.

To illustrate: assume that 90 out of 100 students did their homework and 10 did not; but when asked, 99 say they did (all 90 who actually did their homework, and 9 of the 10 who didn’t). The question would have an impressive sounding overall accuracy rate of 91%. But it is wrong as to 90% of negligent students and useless for identifying them, much less which classroom they are in. The task here similarly requires a high rate of accuracy for each respondent group, and the Census Bureau concluded that imputation would do better than a citizenship question, because “citizenship status responses are systematically biased for a subset of noncitizens.” J.A.148.

Third, the Secretary asserted that Alternative D “may eliminate the need for the Census Bureau to have to impute an answer for millions of people.” Pet. App. 556a. But once again, the Administrative Record directly contradicted this assertion. The Bureau stated that Alternative D “does not solve the
[imputation] problem.” J.A.159. Indeed, defendants concede that the Bureau would still have to impute citizenship for at least 13.8 million people. Br. 33; see also J.A.147. The Secretary asserted that Alternative D will “improve the quality of imputation,” Br. 33, but that assertion had no basis in the Administrative Record. Defendants admit that the Census Bureau concluded that “using administrative records alone would be preferable because the modeling or imputation process ... will in the aggregate be less accurate if the citizenship question is asked.” Br. 34 (emphasis added). Without a citizenship question, the Administrative Record established, “missing citizenship data would be imputed from a more accurate source,” Pet. App. 291a—“high-quality administrative data,” J.A.157—rather than from an amalgamation of administrative and survey data contaminated by “suspect quality” responses to a citizenship question, J.A.158.

Fourth, the Census Bureau informed the Secretary that Alternative D would result in 9.5 million people whose census responses would conflict with administrative records—that is, people who say that they are a citizen but whose social security records say otherwise. Pet. App. 56a (citing J.A.150). While defendants now assert that “nothing prevents the Census Bureau, in the event of such conflicts,” from using administrative record data “instead of the self-response data,” Br. 34, the Administrative Record established the contrary, namely that “Census Bureau practice is to use self-reported data,” J.A.147. In any event, the Secretary never addressed this issue, much less endorsed the argument belatedly advanced by counsel. “[A] court may uphold agency action only on the grounds that the agency

Against all this, defendants hypothesize a new principle of data science: two sources of data are always better than one. Br. 32. But it is common sense that causing an undercount of millions of noncitizens will not make the Bureau’s citizenship data “more accurate and complete.” *Id.* And it does not “def[y] logic,” *id.*, to rely on a single accurate source of data, rather than to contaminate it with biased information from another source. Defendants’ own witness confirmed the Administrative Record evidence that:

- “using administrative records and not including a citizenship question on the census would best meet DOJ’s stated uses,” J.A.862; and

- “the Census Bureau did not recommend alternative D,” because it “would result in poorer quality citizenship data” than relying exclusively on administrative records, J.A.865.

Dr. Abowd also confirmed that these conclusions were communicated to the Secretary at a pre-decisional meeting in February 2018. J.A.862. He further emphasized that the Census Bureau’s conclusion remains that Alternative D is “worse for the Census Bureau’s goal of conducting an accurate 2020 census,” and “worse for the Department of Justice’s goal of having accurate block-level [citizenship] data.” J.A.941; *see also* J.A.865-866. No contrary view was expressed in the Administrative Record or at trial.
In short, the district court correctly concluded that the linchpin of the Secretary’s decision was directly contradicted by all the evidence in the Administrative Record. “Agency action based on a factual premise that is flatly contradicted by the agency’s own record ... cannot survive review under the arbitrary and capricious standard.” City of Kansas City v. Dep’t. of Hous. & Urban Dev., 923 F.2d 188, 194 (D.C. Cir. 1991). At a minimum, the Secretary failed to explain why he reached a conclusion where “the only evidence in the record available ... actually supports the opposite conclusion[],” Clark County v. FAA, 522 F.3d 437, 441-42 (D.C. Cir. 2008) (Kavanaugh, J.), much less why he reversed almost 70 years of Census Bureau policy of not including the question based on two demonstrably false premises. “[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009).

The district court’s conclusion that the Secretary’s decision was contrary to the Administrative Record in these fundamental respects is not a disagreement with the Secretary’s policy judgment, Br. 31, but a conclusion that his reasoning was founded on demonstrably false premises. That conclusion alone is sufficient to affirm. But as the district court found, the Secretary’s decision violated the APA in multiple other ways.

B. The Decision Was Contrary to Law.

The district court also correctly found that the Secretary’s decision was contrary to Sections 6(c) and
141(f) of the Census Act, and was thus contrary to law.

1. The district court concluded that the Secretary’s decision violated Section 6(c)’s directive to “acquire and use” administrative records “[to the maximum extent possible” “instead of conducting direct inquiries.” 13 U.S.C. § 6(c). He “add[ed] a ‘direct inquiry’ to the census questionnaire when the data gained from available administrative records would have been adequate—indeed, better” than trying to mix that data with responses to a census question. Pet. App. 268a. The court’s decision was not based on the Secretary’s “mere failure to cite” Section 6(c) in his decisional memorandum. Br. 48. Rather, as detailed supra, “every relevant piece of evidence ... support[ed] the conclusion that Alternative D would produce less accurate citizenship data than [using administrative records alone].” Pet. App. 270a. “[N]one [suggested] that Alternative D would yield more accurate citizenship data.” Pet. App. 270a.

Defendants contend that the Section 6(c) does not apply because federal administrative records do not contain citizenship data for everyone. Br. 47. But citizenship information may be imputed from administrative records, and that imputation is more accurate than census responses. See supra. The Secretary did not “use” administrative records to the “maximum extent” possible when he substituted an inaccurate direct inquiry for accurate imputation.

It does not follow, as defendants suggest, that if Section 6(c) precludes a citizenship question, it would also preclude questions “about age, sex, race, or Hispanic origin.” Br. 47. There is no evidence that
such information can be obtained through administrative records as accurately as it can be gathered through the census, let alone that such questions reduce census responses, produce inaccurate responses, or otherwise degrade the quality of census data. Citizenship survey questions are uniquely problematic, which is why every piece of evidence before the Secretary supported using administrative records alone. Indeed, while the Bureau usually prefers self-reported data from surveys, Dr. Abowd explained that, “citizenship status is one characteristic where ... administrative records tend to be more accurate than survey responses.” J.A.859.

The fact that, in passing the 1976 Census Act, “Congress gave no hint that it disapproved of [a] citizenship ... question,” Br. 46, is irrelevant. By 1976, a citizenship inquiry had not been posed to the whole population for more than 25 years. And Congress need not specifically list or exhaust every scenario where its prohibition could apply. Broad statutory language “does not demonstrate ambiguity. It demonstrates breadth.” Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (internal quotation marks and citation omitted).

2. The district court also correctly concluded that the Secretary’s decision violated 13 U.S.C. § 141(f). Pet. App. 272a-284a. The Secretary failed to disclose citizenship as a subject to be included on the 2020 census form when he submitted his (f)(1) report in March 2017. See Pet. App. 275a, J.A.160-184. And “there is no evidence ... that Secretary Ross ever made ... a finding” of “new circumstances which
necessitate” a modification,” as required under 13

This violation does not concern the “adequacy”
of the Secretary’s report, Br. 49, but rather the
Secretary’s complete failure even to attempt to
discharge his obligation under Section 141(f)(3) to
identify “new circumstances” that would
“necessitate” a citizenship question.

Defendants describe the December 2017 DOJ
request letter—which the Secretary himself
initiated—as the “new circumstance” Section 141(f)
calls for. Br. 52. But that asks this Court to find that
the Secretary discharged his statutory obligation by
creating a “new circumstance” himself. That would
render Section 141(f) null. “[A]dvance consideration
of the questions” is meant not only for Congress, but
to ensure that the public “will not be unfairly subject
to questions invading their privacy.” H.R. Rep. No.
94-944, at 5 (1976); cf. Armstrong v. Bush, 924 F.2d
282, 291-92 (D.C. Cir. 1991) (rejecting argument that
congressional oversight indicative of intent to
preclude review, which “would create an enormous
exception” to reviewability).

C. The Secretary Ignored Important
Aspects of the Problem in Violation
of the APA.

The APA instructs courts to set aside agency
action when the decisionmaker “failed to consider an
important aspect of the problem.” State Farm, 463
U.S. at 43. The district court correctly found that the
Secretary failed to meaningfully consider whether a
citizenship question would assist DOJ’s enforcement
efforts, because (1) even if a citizenship question is
added, the Bureau’s statutory disclosure avoidance protocols preclude it from fulfilling DOJ’s request for block-level “full count” citizenship data; and (2) even if the Bureau could provide DOJ with its requested data, the Administrative Record did not establish that such data would help DOJ enforce the VRA.

1. The Secretary failed to consider that the Census Bureau cannot fulfill DOJ’s request for “full count” block-level citizenship data.

DOJ requested a census question to gather “full count” citizenship information—as opposed to “estimates” with a “margin of error”—for each “census block,” Pet. App. 568a, “the smallest level at which demographic and socioeconomic data [is] available,” Bush v. Vera, 517 U.S. 952, 1017 (1996). But the Census Bureau cannot satisfy DOJ’s request, because regardless of whether there is a citizenship question on the census, the Bureau may share only citizenship estimates at the block level. Those are materially indistinguishable from the estimates of citizenship DOJ currently uses. The Secretary failed even to consider this obstacle to his asserted goal.

Federal law forbids the Bureau from releasing information “whereby the data furnished by any particular [respondent] ... can be identified.” 13 U.S.C. § 9(a)(2). Because census blocks can be very small—for example, nearly 22% of New York’s census blocks contain fewer than ten persons, J.A.585, and many contain only a single individual, J.A.833, 913—the Bureau does not share block-level demographic data that reflect actual responses to the census. To satisfy its statutory confidentiality obligations, the Census Bureau applies “disclosure avoidance”
protocols that do not merely “anonymize the data,” Br. 37, but alter demographic totals for every individual census block, Pet. App. 298a. The result is that, while demographic data for larger geographic areas remain accurate, data for each individual census block are transformed into estimates “with associated margins of error, rather than a true or precise ‘hard count.’” Pet. App. 298a (citing J.A.920-922); see also J.A.912-925.

Consequently, “even with a citizenship question on the census, there would not be a single census block ... where citizenship data would actually reflect the responses of the block’s inhabitants to the census questionnaire.” Pet. App. 298a. Such “block-level [citizenship] data would not be a “hard count,” as the DOJ requested, but would continue to “be estimates, with associated margins of error”—just like the citizenship estimates derived from sample surveys that DOJ currently employs to enforce the VRA. Pet. App. 298a. Critically, neither DOJ nor the Bureau know whether block-level estimates of citizenship based on census responses will be more or less precise than the citizenship estimates that DOJ currently uses. Pet. App. 95a, 299a; J.A.922-923, 1100, 1102-1103.

The Secretary did not even address this obstacle, even though it eviscerates his sole rationale—that adding the question would provide DOJ with “full count” block-level citizenship information to better enforce the VRA. Defendants’ counsel argue for the first time in their opening brief that disclosure avoidance measures would not “prevent” the data from being “usable,” or impair the data’s accuracy, and that any contrary suggestion is
“speculative.” Br. 37-38. But it is the Secretary who must consider the issue, not his counsel after the fact. This argument was not raised below or in the petition, and is forfeited. *See United States v. Jones*, 565 U.S. 400, 413 (2012).

Counsel’s belated argument also misses the point. The issue is not whether DOJ can “use” the data or whether it is “accurate”—after all, DOJ can use existing ACS citizenship data, which no one claims are inaccurate—but whether the citizenship question would enable the Bureau to satisfy DOJ’s request for “full count” citizenship data at the block level. Pet. App. 568a. It would not. Tellingly, Defendants do not advise this Court that the Census Bureau can, in fact, lawfully produce “full count,” block-level citizenship data to DOJ, as opposed to mere “estimates,” based on responses to a citizenship question.

While defendants complain that the district court “relied on extra-record evidence,” Br. 38, this obstacle arises from federal law, and an “agency cannot simply ‘close its eyes’ to the existence of [a] statute.” *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 516 (1983). In any event, the disclosure avoidance protocols were detailed at length in the Administrative Record. Pet. App. 297a-298a n.72; J.A.257-263, 319-321, 324-343, 345-346, 348-364, 379-380, 387. Defendants acknowledge that “the Secretary was plainly aware of them,” Br. 38, and claimed that he “constructively considered” their effect, J.A.960-961. And Dr. Abowd, testified that he “discussed [disclosure avoidance] with the [S]ecretary,” at a pre-decisional February 2018 meeting, and “remind[ed him] that we would be
using disclosure-avoidance procedures at the block level.” J.A.925.

2. The Secretary failed to consider whether “better” citizenship data would facilitate VRA enforcement.

The Secretary also failed to meaningfully consider (or even address) whether a citizenship question would advance the single goal he gave for his decision: facilitating VRA enforcement. Pet. App. 295a. While the Secretary described the citizenship question as “necessary” to “respon[d] to the DOJ request,” Pet. App. 562a, he never addressed whether the information sought was in fact necessary for DOJ’s stated purpose. Overwhelming record evidence showed that it was not.

DOJ has enforced the VRA without a citizenship question directed to all households for the “entire fifty-four-year existence of the VRA.” Pet. App. 297a. That alone lodges a “presumption ... that ... policies will be carried out best” if the settled policy persists. State Farm, 463 U.S. at 41-42. Nothing in the Administrative Record rebuts this presumption. Defendants simply assert that DOJ’s past practice cannot “ossify the census.” Br. 37. But DOJ’s decades-old “settled course of behavior” on the VRA “embodies the agency’s informed judgment that” it will most properly “carry out the policies committed to it by Congress” by “pursuing that course.” State Farm, 463 U.S. at 41-42 (quotations omitted). Longstanding practice cannot be ignored in the absence of a compelling explanation that is missing here. See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542 (1978) (quotations omitted).
Tellingly, DOJ’s letter did not say that asking the question or obtaining block level data was necessary. Pet. App. 295a-296a. And DOJ has now expressly disclaimed that the question is in fact “necessary” for VRA enforcement. Pet. App. 94a-95a (citing J.A.1113). That concession accords with the Administrative Record, which is replete with evidence submitted by former DOJ personnel, organizations experienced in VRA enforcement, and 18 state attorneys general, all stressing that a citizenship question is unnecessary to administer the statute. See, e.g., J.A.188-202, 211-234, 269-272. The Secretary might have a reason for disagreeing with all of these sources—but at a minimum the APA requires that he explain himself. Vt. Yankee, 435 U.S. at 542.

Defendants argue that the Secretary can “rely on DOJ’s analysis,” Br. 36, but Commerce supplied the VRA rationale to DOJ and prevailed upon it to make the request, Pet. App. 546a. The APA “does not permit” an agency to “dodge” its obligations “by passing the entire issue off onto a different agency.” Del. Dep’t of Nat. Res. & Envtl. Control v. EPA, 785 F.3d 1, 16 (D.C. Cir. 2015). Courts cannot determine whether agency action is supported by the record if an agency can simply get another agency to assert that some fact is true, and rely on that assertion despite the lack of evidence. Nor would the record rule, confining a court’s review in most cases to the evidence before the deciding agency, make any sense if a deciding agency could blindly adopt the conclusions of another agency.

The Administrative Record contains no evidence to support the reasons that DOJ offered in
its “request” letter as to why the sample-based citizenship data it has used for decades are not “ideal” for VRA enforcement. Pet. App. 564a.\textsuperscript{11} DOJ stated that it currently must “rely[] on two different data sets”—census data for total population, and ACS for citizenship—that supposedly “do not align in time” with each other. Pet. App. 567a-568a. But defendants admitted that they do not know whether a citizenship question would avoid the problem by producing a single data set including both population and citizenship. See J.A.912, 964. And unrefuted testimony indicated that combining census and ACS data takes “[a] few minutes,” costs much less than adding a citizenship question, and that the data sets do align in time. J.A.798-800.

DOJ also noted that ACS estimates are not currently reported at the granularity of individual “census block[s],” and have a “margin of error.” Pet. App. 568a. But the Census Bureau advised that it can generate block-level citizenship data without a citizenship question, with “sophisticated modeling” in conjunction with existing ACS data,\textsuperscript{12} or with

\textsuperscript{11} The cases cited in the DOJ letter did not even support its request. See, e.g., Negron v. City of Miami Beach, 113 F.3d 1563, 1569-70 (11th Cir. 1997) (rejecting argument that “citizenship information ... based upon a sample” could not be combined with “census data ... based upon the entire population.”); Barnett v. City of Chicago, 141 F.3d 699, 702-04 (7th Cir. 1998) (“[V]erify[ing] ... citizenship ... would enormously complicate the decennial census and open the census-takers to charges of manipulation.”); see also Pet. App. 296a n.71.

\textsuperscript{12} The Census Bureau deems ACS estimates aggregated over a “five-year” period reliable for “all areas” regardless of population size, see J.A.797, 911, 1197-1199.
administrative records, J.A.107-109, which the Bureau advised would be “the best way to provide PL94 block-level data with citizen voting population by race and ethnicity,” J.A.264-265 (emphasis added). And, as explained supra, regardless of how citizenship data is collected—through sampling, a census question, or administrative records—any block-level data shared by the Bureau must continue to be estimates with margins of error, not a “full count.” Pet. App. 298a.

Defendants identify only one other piece of evidence in the Administrative Record purportedly supporting the need for a citizenship question: a handful of conclusory letters from States asserting “that citizenship data from the census would be useful for their own VRA and redistricting efforts.” Br. 36-37. But the Secretary did not say he relied on state “redistricting efforts.” And if he did rely on these letters, they only support a finding of pretext: 13 state attorneys general described a citizenship question as the “solution” to the alleged problem that “legally eligible voters … have their voices diluted or distorted” by “[n]on-citizens.” Dist. Ct. Doc. 173,13 at 1210.

D. The Secretary Violated Standard Census Bureau Practice.

The district court also correctly held that the Secretary’s decision was arbitrary and capricious because “it represented a dramatic departure from

the standards and practices that have long governed administration of the census”—namely, the Census Bureau’s Statistical Quality Standards (SQSs) and OMB’s Statistical Policy Directives (SPDs)—and the Secretary “failed to justify those departures.” Pet. App. 300a. Indeed, Commerce not only failed to explain the departure, but actually rewrote a Census Bureau response to scrub from the Administrative Record the Bureau’s description of its “well-established process” for adding questions to the Census. Pet. App. 106a-109a; see also Statement, supra at 11.

Defendants do not dispute that the Census Bureau’s procedures—adopted in 2010 following OMB’s directive to preserve the “objectivity, utility, and integrity” of data, J.A.605—mandate pretesting and refinement before “new questions [are] added” to the census, J.A.627. Pretesting is a critical safeguard to measure the likely effect of a proposed question and prevent exacerbation of the undercount: for example, after pretesting revealed that asking for a social security number would significantly reduce census responses, the Bureau decided not to add such a question. Pet. App. 30a.

Defendants offer four arguments to justify the failure to conduct pretesting. None are persuasive.

1. Defendants argue that because a question about citizenship or country of birth was on most “decennial census[es] from 1820 to 1950,” the Secretary’s decision does not depart from standard practices. Br. 2, 38-39. But the OMB and Census Bureau standards at issue were not in existence until 2006 and 2010, respectively. J.A.608, 618; Pet. App. 31a-32a. And including a citizenship question on the
“long form” and ACS sample surveys is materially different from placing one on the Decennial Census, because sample surveys can be statistically “adjust[ed] … for survey nonresponse.” J.A.984.

2. Defendants argue the Secretary properly relied on the “questionnaire testing” performed when the citizenship question was added to the ACS in 2006. Br. 40. But Census SQS Sub-Requirement A2-3.3 exempts questions from pretesting only if they have “performed adequately in another survey.” J.A.627. The Administrative Record demonstrated that the ACS citizenship question had not performed adequately, because noncitizens answer it incorrectly so frequently. Pet. App. 305a-306a, 555a. Dr. Abowd confirmed that, in his expert opinion, “I don’t think the question performs adequately” on the ACS. J.A.931. The court also credited testimony from “dozens of experts in relevant fields” with the same view. Pet. App. 306a n.74. The question is therefore not exempt from the Bureau’s pretesting requirement.

3. Defendants argue that the Bureau’s Standards should not bind the Secretary. This argument was never raised below and is waived. Pet. App. 308a; OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 397 (2015). Moreover, the Census SQSs were adopted in response to government-wide OMB guidelines, and have been endorsed and adhered to by the Commerce Department since their adoption. See Pet. App. 309a; 67 Fed. Reg. 38467 (June 4, 2002). They bind the Department.

4. Defendants argue that the OMB SPDs—which mandate that an agency achieve “the best balance between maximizing data quality and
controlling measurement error while minimizing respondent burden and cost,” J.A.658—provide no judicily manageable standard. They waived this argument by not raising it below as well. And “judicial review still exists to require the agency to follow procedural or substantive standards contained in its own regulations.” Ctr. for Auto Safety v. Dole, 828 F.2d 799, 805 (D.C. Cir. 1987), on reh’g, 846 F.2d 1532 (D.C. Cir. 1988). Here, the district court properly found that the Secretary ignored these standards altogether by failing to address unequivocal Administrative Record evidence that the option he selected undermined data quality while increasing respondent burden and cost. Pet. App. 304a.

E. The Secretary’s Rationale Was Pretextual.

The district court properly found that the Secretary’s VRA enforcement rationale was pretextual. Pet. App. 311a-321a. Defendants respond that the Court should review only the Secretary’s stated rationale, without acknowledging that it was a sham. Br. 41-42. Their position is untenable. Permitting dishonesty about the factors relied on by an agency would make it impossible for courts to review agency action under the APA. “Judicial review … will [] function accurately and efficaciously only if the [agency] indicates fully and carefully the methods by which … it has chosen to act.” In re Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

Where pretext is established, agency action must be set aside, because the agency has not disclosed “the methods by which … it has chosen to
act,” id., a point defendants conceded below. See Pet. App. 259a (defense counsel: “[if] the state[d] reason were not the real reason … the decision would not be rational for the stated reason”); accord Woods Petroleum Corp. v. U.S. Dep’t of Interior, 18 F.3d 854, 859 (10th Cir. 1994) (decision arbitrary and capricious where pretext for ulterior motive); Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977) (“fictional account of the actual decisionmaking process” is “perforce … arbitrary”). This Court has never held that APA review is restricted to a pretextual rationale created to mask the agency’s actual reasons for decision.

In his decisional memorandum, the Secretary wrote that he “set out to take a hard look” at adding a citizenship question in December 2017, “[f]ollowing receipt of the DOJ request,” Pet. App. 548a, for “improved … data to enforce the VRA,” Pet. App. 550a. This tracked the Secretary’s testimony to Congress, where he declared that the decision “respond[ed] solely to [DOJ’s] request”;14 affirmed that DOJ “initiated the request” for the citizenship question, Pet. App. 72a; and stated that he was “not aware” of any discussions between the agency and the White House.15

All of this was untrue. The Administrative Record demonstrates, and the district court found, that it was Commerce, not DOJ, which first thought of asking a citizenship question, and then lobbied DOJ to make the request. The Administrative Record laid bare the following timeline:

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14 2018 WLNR 8815056.
15 Id.
• in March 2017, an aide emailed the Secretary in response to “Your Question on the Census,” informing him that “neither the 2000 nor the 2010 Census asked about citizenship,” advising that noncitizens must by law be included in the census, and enclosing an article about “the pitfalls of counting illegal immigrants,” J.A.245-246;

• in April, White House chief strategist Steve Bannon “direct[ed]” the Secretary to speak with then-Kansas Secretary of State Kris Kobach about a citizenship question, J.A.186, who subsequently told the Secretary that the lack of a citizenship question on the census “leads to the problem that aliens ... are still counted for congressional apportionment purposes,” J.A.186 (when that is in fact not a “problem,” but a constitutional mandate);

• in May, the Secretary admonished his staff that he was “mystified why nothing ha[d] been done in response to [his] months old request” to add a citizenship question to the census, and in response, an aide promised to “get that in place” by “get[ting] Justice to request” it, J.A.276, 652;

• Commerce approached a DOJ official in charge of immigration enforcement to ask if DOJ would request a citizenship question, but DOJ declined, J.A.413-414;

• Commerce then approached a DHS official to ask if DHS would request a citizenship question, but DHS declined, J.A.413-414;
• After the Secretary had two further calls with Kobach in July, J.A.185-186, he pressed his staff for the balance of the summer to approach DOJ again, and stated if a conclusion was not soon reached “I will call the AG,” J.A.281-282;

• the Secretary then personally contacted the Attorney General to secure DOJ’s request, J.A.1066-1067; Pet. App. 89a-90a; and

• in November, the Secretary admonished his staff that they were “out of time,” and asked to call “whoever is the responsible person at Justice,” Pet. App. 93a.

The DOJ letter—which the Secretary’s decisional memorandum described as beginning his decisionmaking process—came only after both DHS and DOJ turned Commerce down, and the Secretary directly intervened with the Attorney General himself. He then wrote a decisional memorandum and testified to Congress in a way that surgically omitted all of the above, and flatly denied his contact with the White House. Placing the Secretary’s comments “in context,” Br. 45, does not rehabilitate them, see 18-557 NYIC Respondents’ Br. 34-37 (discussing each statement).

Extra-record discovery confirmed that the VRA rationale was retrofitted as a post hoc justification for the Secretary’s precommitment.16

16 Discovery into the Secretary’s intent was proper. Defendants do not challenge that plaintiffs plausibly alleged a claim of intentional discrimination in violation of the Fifth Amendment, see 18-557, NYIC Respondents’ Br. 53-57, and were separately entitled to discovery as to intent on that basis, see Webster, 486
The Secretary’s chief policy aide testified that he never asked and never learned the real reason why the Secretary wanted to add the citizenship question, J.A.1280-81; that the Secretary’s actual “rationale ... may or may not be ... legally valid,” J.A.1294; but that it was his job to find a “legal rationale” for the decision,” J.A.1293. Acting Assistant Attorney General Gore, who authored DOJ’s request letter, admitted that a citizenship question “is not necessary for DOJ’s VRA enforcement efforts,” J.A.1113, and that he does not know whether the question will produce “more precise” data than what DOJ already has, J.A.1102. And when the Census Bureau offered to discuss a better means of producing block-level citizenship data that would avoid adding a citizenship question, the Attorney General personally vetoed the meeting. J.A.1110-1111.

Defendants argue that it does not matter if the Secretary “had unstated reasons for supporting a policy decision in addition to a stated reason” in the record, as long as he “actually believed” the stated rationale. Br. 11, 42. That is wrong. An agency’s “responsibility [is] to explain the rationale and factual basis” for its decision. Bowen, 476 U.S. at 627; see also Judulang v. Holder, 565 U.S. 42, 53 (2011) (Court’s review “involves examining the

U.S. at 604. Courts may also authorize discovery “into the mental processes of administrative decisionmakers” upon a “strong showing of bad faith or improper behavior.” Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). The district court did not abuse its discretion or otherwise err when it applied this standard. The Secretary’s representations and the agency’s actions supported a finding of bad faith. 18-557, NYIC Respondents’ Br. 28-52.
reasons for agency decisions—or ... the absence of such reasons”). Neither this Court’s cases—nor those of lower courts that defendants cite, Br. 42—hold that the APA allows agency action to stand on pretense.

Defendants invoke the “presumption of regularity that attaches to Executive Branch action.” Br. 15. But “[u]nder the [APA],” the “presumption of regularity [is] rebutted by record evidence suggesting that the decision is arbitrary and capricious.” Palantir USG, Inc. v. United States, 904 F.3d 980, 995 (Fed. Cir. 2018) (internal quotations omitted); see also R.H. Stearns Co. of Bos. v. United States, 291 U.S. 54, 63 (1934). Nor does that presumption permit an agency to conceal the actual reasons for its actions. See Fox Television Stations, 556 U.S. at 515 (agency must “provide reasoned explanation for its action”).

Defendants argue that agency action may be set aside as pretextual only if the decisionmaker acted with an “unalterably closed mind.” Br. 43. That standard, however, applies not to pretext inquiries, but to whether a decisionmaker should be disqualified from rulemaking on due process grounds. See Miss. Comm’n on Envtl. Quality v. EPA, 790 F.3d 138, 183 (D.C. Cir. 2015); see also FTC v. Cement Inst., 333 U.S. 683, 701 (1948). Defendants cite no case employing the “unalterably closed mind” rule to address whether a decisionmaker can act for reasons others than those he disclosed.

In sum, the Administrative Record confirms that the VRA was “not the true reason for the [relevant] decision.” Tex. Dept of Cmty. Affairs v.
Burdine, 450 U.S. 248, 256 (1981). Rather, the Secretary set out to add a citizenship question to the census and invoked the VRA as a post hoc rationale. Perhaps the most important provisions in the APA are the sections providing for judicial review. Such review is not possible without an agency providing its rationale and explaining its reasoning. Key to this review is that the agency provide its actual reason, not a sham.

F. That The Census Long Ago Included a Different Citizenship Question Does Not Render the Secretary’s Decision Lawful.

Any one of the multiple APA violations described above is sufficient to affirm the district court. Defendants nonetheless argue that adding a citizenship question to the census is rational ipso facto—regardless of its effect, how or why it was added, or whether it will actually fulfill its stated purpose—because similar questions appeared on some decennial questionnaires between 1820 and 1950. See, e.g., Br. 28-29. That proposition has no basis in fact or law.

As an initial matter, the Secretary did not justify his decision based on the need to restore some decades-old status quo ante. And even if he had, “[70]-year old facts hav[e] no logical relation to the present day.” Shelby Cty., 570 U.S. at 554. The differential undercount that the Census Bureau now “recognize[s] ... as [a] significant problem” was not understood until the mid-twentieth century. Wisconsin, 517 U.S. at 7. It has subsequently informed the Bureau’s longstanding opposition to a citizenship question on the census. FAIR, 486 F.
Moreover, *nothing* in the Administrative Record speaks to the effect on census accuracy, if any, of the 1950 citizenship question—which, unlike the proposed 2020 question, was asked by an in-person enumerator only as a follow-up for people born abroad.\(^\text{17}\) Uncontested evidence in the Administrative Record indicates that, since at least 2000, the particular question proposed for the 2020 census has depressed responses to Census Bureau sample surveys. J.A.110-111. The Bureau now estimates “conservative[ly]” that this question would cut census responses by “6.5 million additional people,” Pet. App. 145a, 152a, and warns that its actual effect “could be much greater,” J.A.115-16, given research showing “a higher level of concern” about immigration enforcement, Pet. App. 143a (internal quotations omitted).

The statutory and regulatory framework governing the census has also materially changed. Whatever the purpose of the citizenship question was in 1950, it could not have been enforcement of the VRA, which was not enacted until 1965. Further, Congress amended the Census Act in 1976—more than a quarter century after the census last asked about citizenship—to require the Secretary to use sampling and administrative data over direct questions whenever possible. 13 U.S.C. §§ 6, 195. And in 2010, the Census Bureau adopted procedures requiring pretesting to ensure that new questions do

not harm the count’s “integrity.” J.A.605, 616-618, 624-632.

Nor does the fact that the government has more recently asked about citizenship through sample surveys legitimize the Secretary’s decision. Sampling is very different: while non-responses to the census can damage the accuracy of the enumeration and thus, apportionment, sample surveys like the ACS can be statistically “adjust[ed] … for survey nonresponse,” J.A.120-21, and do not carry the same stakes. The Bureau has express statutory authorization to use sampling to obtain data separate from the enumeration, 13 U.S.C. § 195, and is specifically obligated to collect citizenship data through the ACS, 52 U.S.C. § 10503(b)(2)(A).

In short, “things have changed dramatically” since 1950. Shelby Cty., 570 U.S. at 547. Defendants cannot “rely simply on the past.” Id. at 553. They must instead offer “a reasoned explanation … for disregarding facts and circumstances that underlay” 70 years of “prior policy,” Encino Motorcars, 136 S. Ct. at 2126 (internal quotations omitted), governing the census—“an important method of maintaining democracy” at the heart of “our constitutional structure,” Utah, 536 U.S. at 510 (Thomas, J., concurring in part and dissenting in part). They have not.
CONCLUSION

For the reasons set forth above, and the Enumeration Clause grounds addressed by the New York plaintiffs, the judgment below should be affirmed.

Respectfully submitted,

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Date: April 1, 2019
No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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A. Respondents Lack Article III Standing

The government has explained (Gov’t Br. 17-21) that respondents’ alleged injuries are not fairly traceable to the citizenship question because they depend on unlawful third-party action that is itself driven by speculative fears that the government will act unlawfully in the future (by misusing census responses). Such speculative fears, which would not give the third parties themselves standing, cannot be bootstrapped through an unlawful refusal to answer the citizenship question to confer standing on respondents. See id. at 19-20. Tellingly, respondents have no answer to this simple point.

Instead, respondents cite several cases that purportedly found standing “based on third parties’ irrational or illegal responses to challenged governmental action.” NY Br. 24; see ACLU Br. 21-22. But none of those cases
involved unlawful third-party action driven by speculative fears of future unlawful governmental action. This Court has never endorsed such a capacious theory of standing. To the contrary, it has consistently refused to find standing when the asserted injuries—even if they actually occur—are based on speculation of future unlawful action. See Clapper v. Amnesty Int’l USA, 568 U.S. 398, 414 (2013); McConnell v. FEC, 540 U.S. 93, 228 (2003); Spencer v. Kemna, 523 U.S. 1, 15 (1998); City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983); O’Shea v. Littleton, 414 U.S. 488, 497 (1974); see also United States v. Armstrong, 517 U.S. 456, 464 (1996) (presumption of regularity).

Amnesty International is instructive. The plaintiffs there argued they had standing to challenge the constitutionality of a statute authorizing certain foreign surveillance in part because “the risk of surveillance under [the statute] is so substantial that they have been forced to take costly and burdensome measures” in response. 568 U.S. at 407. Acknowledging that the plaintiffs had, in fact, undertaken the costly measures, this Court nevertheless found those injuries not fairly traceable to the government because they were the result of plaintiffs’ own independent decisions based on a “highly speculative” fear of future governmental action. Id. at 410; see id. at 415-416. Respondents’ bid for standing here suffers from the same flaw: their injuries would be the result of third parties’ independent decisions to illegally refuse to answer the census based on a highly speculative fear that the government also will break the law in the future. Indeed, the Amnesty International plaintiffs’ own such fears were insufficient to support stand-
ing; it follows a fortiori that someone else’s unreasonable fears are insufficient to support respondents’ standing.

Respondents’ cases do not suggest otherwise. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the NAACP’s injury was the disclosure of its private membership information by direct governmental compulsion. *Id.* at 453-454. There is no such direct injury here. And any injuries inflicted on NAACP members by third parties (whether lawfully or unlawfully) would have been directly facilitated by the governmentally compelled disclosure. See *id.* at 462. Here, by contrast, the government does not facilitate—to the contrary, it makes unlawful—any refusal to answer the census. At all events, the challenged governmental action in *NAACP* chilled the right of free association, see *id.* at 460-463, and this Court has recognized that standing requirements are somewhat relaxed in that context, see *Meese v. Keene*, 481 U.S. 465, 473 (1987); cf. *Amnesty Int’l*, 568 U.S. at 420. Similarly, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.) (Scalia, J.), cert. denied, 478 U.S. 1021 (1986)—another First Amendment case—involves direct governmental regulation of the plaintiff film distributor and no allegation at all of unlawful third-party action, much less unlawful third-party action caused by speculative fears of future unlawful governmental action. *Id.* at 1307-1309.

Respondents’ reliance (NY Br. 25; ACLU Br. 21) on *Utah v. Evans*, 536 U.S. 452 (2002), and *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), also is misplaced. The governmental actions at issue in those cases—hot-deck imputation in *Evans*, certain statistical sampling methods in *House
of Representatives—directly modified the census enumeration tallies and thus directly caused the plaintiffs’ alleged injuries. See Evans, 536 U.S. at 457-458; House of Representatives, 525 U.S. at 324-326. Here, by contrast, the link between the challenged governmental action (asking the citizenship question) and respondents’ alleged injuries not only is indirect but requires third parties to unlawfully refuse to return the census form, and to do so out of speculative fear that the government will act unlawfully in the future by disclosing their answers. That speculation-fueled intervening step is not “fairly” attributable or traceable to the Secretary of Commerce’s decision to ask the question. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 44 (1976).

Respondents are incorrect to suggest (NY Br. 25) that the government’s position “would effectively preclude anyone from having standing to challenge census decisions that reduce participation.” Only theories of injury predicated on unlawful third-party action driven by speculative fears of future unlawful governmental action would be precluded. A plaintiff still would have standing to challenge governmental decisions that “determinative[ly] or coercive[ly]” reduce participation in the census by their own operation, Bennett v. Spear, 520 U.S. 154, 169 (1997), such as refusing to distribute the questionnaire to certain areas or populations. Cf. House of Representatives, 525 U.S. at 324-325. And a plaintiff could challenge governmental decisions that directly modify the enumeration tally and resulting apportionment, as in Evans, House of Representatives, or Franklin v. Massachusetts, 505 U.S. 788 (1992) (whether and how to allocate overseas federal employees to States). This case does not involve such circumstances.
Conversely, respondents have no meaningful answer to the government’s observation (Gov’t Br. 20) that their theory of standing would permit any demographic question on the census to be challenged so long as a group of individuals disproportionately residing in certain States announced their intent to illegally boycott that question. This Court should not permit a heckler’s veto to manufacture an Article III controversy in that manner. Cf. McConnell, 540 U.S. at 228.

B. Respondents’ Arbitrary-And-Capricious Claims Are Not Reviewable Under the APA

The government has explained (Gov’t Br. 21-28) that Section 141(a) of the Census Act, 13 U.S.C. 1 et seq., grants the Secretary “virtually unlimited discretion” over the form and conduct of the census, Wisconsin v. City of New York, 517 U.S. 1, 19 (1996), and that because no judicially manageable standard exists in either the Constitution or the Census Act to evaluate the propriety of demographic questions on the decennial census, the Secretary’s decision to include a question about citizenship is “committed to agency discretion by law,” 5 U.S.C. 701(a)(2).

In their 132 pages of combined briefing, respondents do not articulate a judicially manageable standard they think should apply to the Secretary’s exercise of that discretion. Instead, they simply identify (NY Br. 28; ACLU Br. 25, 27-28) other statutory provisions that purportedly constrain the Secretary’s discretion to conduct the census. Whether or not compliance with those provisions is judicially reviewable under the “not in accordance with law” provision of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), none of them supplies a judicially manageable standard to evaluate whether the Secretary’s exercise of his discretion to ask
a demographic question on the decennial census is arbitrary and capricious under the APA. Indeed, the statutory provisions most directly applicable to the content of the census questionnaire pointedly contain no standards at all. See 13 U.S.C. 5 (“The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.”); 13 U.S.C. 141(a) (“The Secretary shall *** take a decennial census *** in such form and content as he may determine.”).

Rather than identify a standard, respondents simply repeat the refrain that the Secretary must “pursue an accurate enumeration.” NY Br. 27; see ACLU Br. 29. That is no standard at all, for a court has no way to determine how accurate is accurate enough. Even the district court recognized that “including any additional questions on the census—particularly questions on sensitive topics such as race, sex, employment, or health—can serve only to reduce response rates.” Pet. App. 421a. Yet there is a venerable tradition of including such demographic questions—including about citizenship—on the decennial census. Indeed, each long form contained dozens of demographic questions—such as (in 2000) how the respondent commutes to work, whether she has telephone service, and what type of heating fuel she uses, J.A. 1216, 1219 (2000 long form); or (in 1960) whether the respondent owns a washer and dryer, whether his freezer is detached from the refrigerator, and how many televisions, radios, and air conditioners he owns, Bureau of the Census, U.S. Dep’t of Commerce, Notice of Required Information for the 1960 Census of Population and Housing 2; see also NY Br.
40 (listing other unusual questions). Neither the Constitution nor the Census Act provides a standard by which a court can judge the propriety of such questions based on their impact on response rates or the accuracy of enumeration. Indeed, “you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.” *Tucker v. United States Dep’t of Commerce*, 958 F.2d 1411, 1417-1418 (7th Cir. 1992).

To be sure, *Wisconsin* stated that certain decisions about the census must bear “a reasonable relationship to the accomplishment of an actual enumeration.” 517 U.S. at 20. But the Court applied that standard in the context of a constitutional challenge to a governmental decision—refusing to apply a statistical adjustment to the census tallies—that would directly modify the enumeration. *Ibid.* That constitutional standard has no applicability to arbitrary-and-capricious review-ability of demographic questions. *Every* demographic question comes at the expense of enumeration; such questions have been included on the decennial census not because they bear a “reasonable relationship” to enumeration, but because they further an entirely different governmental purpose (obtaining valuable information about the populace) notwithstanding their potential impact on enumeration. Invalidating a demographic question about citizenship under the “reasonable relationship” standard logically would require invalidating the demographics questions about sex, age, race, and Hispanic origin too; there is no judicially manageable standard in the Census Act that is capable of distinguishing demographic questions that satisfy the “reasonable relationship” standard from those that do
not. Accordingly, that standard has no bearing on the issue presented here.

Respondents fall back (NY Br. 29; ACLU Br. 28-29) on the legislative history of the 1976 Census Act to claim that it was intended to constrain the Secretary’s authority to ask demographic questions. But the language they cite from committee reports (see NY Br. 29; ACLU Br. 29) is about the use of administrative records and sampling under Sections 6(c) and 195, respectively—not about the Secretary’s discretion to ask demographic questions on the decennial census questionnaire under Sections 5 and 141(a). Those provisions were enacted, as confirmed by their legislative history (relating to a bill containing exactly the same language as was eventually enacted), to provide the Secretary “greater discretion” to ask questions on “subjects of current national concerns.” H.R. Rep. No. 246, 93d Cong., 1st Sess. 14 (1973).

The discretion afforded to the Secretary to “determine” the “form and content” of the census, 13 U.S.C. 141(a), and more specifically to “determine the inquiries, and the number, form, and subdivisions thereof,” 13 U.S.C. 5, is thus at least as broad as that granted to the Director in *Webster v. Doe*, 486 U.S. 592 (1988), to “terminate the employment” of an agency employee “whenever he shall deem such termination necessary or advisable in the interests of the United States,” *id.* at 615-616 (citation and emphasis omitted). And as in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Secretary’s determination of what demographic information to collect on the census questionnaire requires a “complicated balancing of a number of factors,” underscoring its “general unsuitability for judicial review.” *Id.* at 831.

Respondents’ attempts (NY Br. 30; ACLU Br. 25-26) to
distinguish Webster and Chaney are unavailing. Their near-exclusive reliance on Justice Stevens’s concurring opinion in Franklin is misplaced not only because a majority of the Court pointedly refused to endorse that concurrence, 505 U.S. at 796-801, but because Wisconsin later effectively rejected it altogether in finding that the Constitution and Section 141(a) of the Census Act bestow “virtually unlimited discretion” on the Secretary to conduct the census, 517 U.S. at 19.

Similarly unavailing is respondents’ reliance (ACLU Br. 25) on Bell v. New Jersey, 461 U.S. 773 (1983), and Chappell v. Wallace, 462 U.S. 296 (1983), for the proposition that the statutory phrase “may determine” is judicially reviewable. Not only do Bell and Chappell predate this Court’s decisions in Webster and Chaney, but neither case held that there is a freestanding right of judicial review for issues that an agency decisionmaker “may determine.” Instead, both of them simply recognized the availability of judicial review on issues for which the governing statute and regulations expressly provided a standard: in Bell, whether States misspent federal educational funds on something other than programs “designed to meet the special educational needs of educationally deprived children” in qualifying low-income areas, Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, sec. 205(a)(1), 79 Stat. 30, see Bell, 461 U.S. at 791-792; and in Chappell, whether it was “necessary to correct an error or remove an injustice” in plaintiffs’ military records, 10 U.S.C. 1552(a) (1982), see Chappell, 462 U.S. at 303.
C. The Secretary’s Decision Was Not Arbitrary And Capricious

Even if there were a judicially manageable standard to determine when a demographic question has rendered the census unacceptably inaccurate, respondents have not shown that the Secretary’s decision to reinstate a citizenship question to the decennial census was so irrational as to be arbitrary and capricious. As the government has explained (Gov’t Br. 28-40), the Secretary expressly acknowledged the possibility of an undercount, yet determined that because it would be the result of unlawful action, it was outweighed by the benefits of providing the Department of Justice (DOJ) more complete and accurate census citizenship data to aid enforcement of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 et seq. (Supp. V 2017). Under the narrow and deferential standard of review applicable under the APA in general and to the conduct of the census in particular, the Secretary’s reasoning is more than adequate. See Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

1. Like the district court, respondents insist (NY Br. 31-37, 45-51; ACLU Br. 30-41) that using administrative records alone would yield more complete and accurate citizenship information than combining the data from those records with census citizenship data, as the Secretary chose to do. The government has explained (Gov’t Br. 31-35) why that is factually incorrect. In documenting the costs of adding the citizenship question, the district court (and now respondents) overlooked a key benefit: obtaining responses from some 22 million people whose citizenship information is not in administrative records, thereby reducing the number of people...
for whom citizenship data must be imputed from 35 million to 13.8 million.

Respondents assert (NY Br. 49-51; ACLU Br. 37-38) that it would be more accurate to model or impute citizenship information for those 22 million individuals than to use their self-responses, even though the Census Bureau expects 98% of those self-responses to be accurate, see Gov’t Br. 33. Respondents do not actually claim that imputation will surpass 98% accuracy; instead, they assert (ACLU Br. 38) that the 98% accuracy rate is irrelevant because, in their view, “the stated aim of the citizenship question *** is to accurately distinguish noncitizens among the majority-citizen population and locate them.” That is incorrect. Neither DOJ nor the Secretary “stated” an aim to “locate” noncitizens. To the contrary, VRA enforcement and redistricting efforts require data on only the total number of citizens (or, to be more precise, the total number of citizens of voting age, sorted by race), with no need to identify who is a citizen and who is not. See Thornburg v. Gingles, 478 U.S. 30, 42-51 (1982) (describing the principles of VRA § 2).

In any event, respondents cite (ACLU Br. 38) only a small snippet of extra-record testimony to support their assertion that imputation will be more accurate than the self-responses for those 22 million people; they cite no empirical data whatsoever. That is unsurprising, for no such data exists. The Bureau told the Secretary that even though it had “high confidence that an accurate model can be developed and deployed for” imputing citizenship information in the future, it had not yet developed or tested such a model, and that even if it were to develop the model it would “never possess a fully adequate truth deck to benchmark” the model’s accuracy.
J.A. 146. For that reason, the Bureau concluded that it “cannot quantify the relative magnitude of the errors across the alternatives at this time.” J.A. 148.

In the face of that uncertainty, it was reasonable for the Secretary to choose to rely on self-responses that will be 98% accurate over imputations of unknown accuracy based on models that do not yet exist. That is especially so because those additional 22 million responses —along with the rest of the roughly 294 million self-responses, Pet. App. 56a—could themselves be used to calibrate a “truth deck” to fine-tune the models. See id. at 556a. Respondents’ assertion that imputing citizenship information for those 22 million people would nevertheless be preferable to soliciting self-responses thus amounts to nothing more than an improper attempt to “substitute [their] judgment for that of the agency.” State Farm, 463 U.S. at 43.

2. Respondents’ remaining quibbles about the completeness and accuracy of census citizenship data are unavailing. For example, citing the estimated 9.5 million self-responses that will contradict citizenship data in administrative records (NY Br. 45-51; ACLU Br. 35-41), respondents reject the obvious solution (Gov’t Br. 34) of simply using the latter in the event of a conflict, asserting that this “option was not part of the Secretary’s analysis.” NY Br. 47; see ACLU Br. 39. Respondents are mistaken. The Bureau made clear to the Secretary before he made his decision that it would “revisit[]” its practice of relying on self-responses over contradictory administrative-record data “in the case of measuring citizenship.” J.A. 147. The Secretary was thus fully aware that the Bureau did not view the 9.5 million conflicting responses as a significant problem. Nothing in the APA or this Court’s precedents requires
an agency decisionmaker to slay every strawman in explaining a decision. Cf. *State Farm*, 463 U.S. at 43 (courts must uphold agency decision, even if “of less than ideal clarity,” as long as “the agency’s path may reasonably be discerned”) (citation omitted).

Respondents also are mistaken to suggest (NY Br. 32-35; ACLU Br. 31-34) that the Secretary overlooked comparison studies concluding that adding a citizenship question to the 2020 census will disproportionately depress response rates among certain demographic groups. In fact, the Secretary expressly acknowledged and discussed those studies, which largely were based on the American Community Survey (ACS). Pet. App. 552a-554a. He simply observed that the limited data available made it impossible to quantify the magnitude of the differential drop in self-response rates that was directly traceable to the citizenship question in particular, especially after correcting for people who already are predisposed to mistrust governmental data collection efforts. *Id.* at 557a-558a. Moreover, as the Secretary observed, there could be many reasons for the differential drop in response rates to the ACS besides just the citizenship question. *Ibid.*; see Oklahoma et al. Amicus Br. 30-33 (describing some possibilities).

Also, an increase in differential nonresponse rates does not necessarily translate into a net differential undercount. Respondents repeatedly cite (NY Br. 10, 22, 48; ACLU Br. 2, 15, 19, 20, 61) an estimate that households containing up to 6.5 million people would not self-respond to the census. That estimate postdated the Secretary’s decision and is not in the administrative record; analysis in the administrative record estimated that 630,000 households (containing roughly 1.6 million
people) would not self-respond. Pet. App. 561a. Regardless, the Bureau made clear that nonresponse follow-up (NRFU) operations would substantially, even if not completely, mitigate any potential undercount as a result of those nonresponses. See J.A. 114-115. And the Secretary observed that the anticipated increase in the cost of NRFU operations was “well within the margin of error” that already had been budgeted. Pet. App. 561a. At trial, the Bureau’s chief scientist confirmed that there was no evidence of an undercount:

I do not believe that I have produced or the Census Bureau’s produced or any external expert has produced credible evidence, credible quantitative evidence that the addition of a citizenship question to the 2020 census will increase the net undercount or increase the differential net undercounts for identifiable subpopulations. There’s no credible quantitative evidence that the addition of a citizenship question will affect the accuracy of the count.

11/14/2018 Tr. 1114 (emphasis added). The Secretary thus reasonably concluded that the benefits of obtaining census citizenship data outweighed the potential costs. Pet. App. 562a.

3. Respondents assert (NY Br. 52) that even if the Secretary correctly “identif[ied] each side of the balance,” he “did not provide a reasoned explanation for choosing one over the other.” That too is incorrect. He understood that citizenship data in administrative records was incomplete, in a different dataset from, and misaligned in time with the other data DOJ used for VRA enforcement (voting-age population and race); that a citizenship question would address those problems; and that any resulting increase in nonresponse rates would be mitigated in part by NRFU operations.
and other statistical tools at the Bureau’s disposal—and in any event would be the product of an unlawful refusal to fill out the census. See Pet. App. 556a-562a. Weighing these incommensurable factors requires a fundamentally normative policy judgment, and the Secretary explained that he gave greater weight to the benefits, in part because the costs were the result of unlawful conduct. Id. at 562a. Respondents might disagree with that judgment, but it was not “so implausible that it could not be ascribed to a difference in view.” State Farm, 463 U.S. at 43.

Indeed, the Secretary expressly explained that “even if there is some impact on responses” from including the citizenship question, “[t]he citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.” Pet. App. 562a. Particularly given his “virtually unlimited discretion” over the census, Wisconsin, 517 U.S. at 19, the Secretary acted rationally and justifiably in concluding that he was not required to capitulate to the equivalent of a heckler’s veto when making policy choices about which demographic questions to ask. Setting aside issues of standing, it is inconceivable that an organized bloc could somehow render the inclusion of questions about race or sex arbitrary and capricious merely by credibly threatening a sufficiently large illegal boycott of the census in States that were inclined to bring suit. Respondents’ arbitrary-and-capricious challenge to the citizenship question fails for the same reason.

4. Respondents next assert (NY Br. 37-42; ACLU Br. 51-54) that the Secretary’s decision was arbitrary
and capricious because he did not follow internal Bureau procedures for pretesting new questions before including them on the decennial census. But this is not a new question. It has been asked, in one form or another, of at least a substantial portion of the population on every decennial census (save one) from 1820 to 2000, and has been asked of some 41 million households on the ACS since its inception in 2005. See Pet. App. 26a-27a. Respondents’ assertion (NY Br. 40-41; ACLU Br. 53) that pretesting for the ACS is insufficient pretesting for the decennial census misses the point: the citizenship question was not just pretested for inclusion on the ACS, but was actually included on the ACS for 15 years—and is materially identical to the question that appeared on (and was tested for) the long form in 2000. Compare Pet. App. 34a (proposed citizenship question) with J.A. 1273 (ACS) and J.A. 1214 (2000 long form). For that reason, the Bureau told the Secretary that no further testing was necessary because it would “accept the cognitive research and questionnaire testing from the ACS.” J.A. 108.

Respondents’ suggestion (NY Br. 41; ACLU Br. 53) that the question nevertheless had to be retested because it had not performed well on the ACS is meritless. As just mentioned, the Bureau made clear that no further testing was necessary. J.A. 108. Although respondents cite (NY Br. 41; ACLU Br. 53) extra-record trial testimony supposedly to the contrary, in fact that same witness agreed that “the citizenship question performed adequately on the ACS” for purposes of pretesting because “41 million households have already been asked that question.” 11/14/2018 Tr. 1108. Respondents’ second-guessing that conclusion cannot make it
arbitrary and capricious for the Secretary to have accepted the Bureau’s assurances that no further testing was necessary.

5. Finally, respondents assert (ACLU Br. 45-51) that the Secretary failed to consider that federal privacy laws permit the Bureau to provide “only citizenship estimates at the block level,” not “full count citizenship information,” id. at 45 (emphasis omitted), and that in any event citizenship data is not “in fact necessary” for “facilitating VRA enforcement,” id. at 48. Those are strawmen.

First, DOJ did not request “full count” block-level citizenship data in violation of federal privacy laws; that is purely respondents’ invention. DOJ requested citizenship data to match the timeframe, scope, and accuracy of the census population data it currently receives from the Bureau. Pet. App. 567a-568a. That population data—which includes age and race information, necessary for VRA enforcement—also is subject to the same privacy laws, and has long been provided as block-level estimates. See J.A. 907, 910. There was no reason for the Secretary to think that DOJ contemplated a departure from this settled practice for citizenship data. Indeed, the Bureau had no trouble recognizing DOJ’s request as one for “block-level citizen voting-age population estimates.” J.A. 105 (emphasis added); see J.A. 290 (“The Department of Justice has requested census block-level citizen voting-age population estimates.”).

Nor would those estimates be “materially indistinguishable from the” ACS estimates that “DOJ currently uses” for citizenship data. ACLU Br. 45. To the contrary, unlike ACS data, census-generated block-level estimates of citizenship data would be from the same dataset as, and aligned in time with, the population, age,
and race data currently used for VRA enforcement and redistricting. See Pet. App. 567a-568a. Moreover, the margins of error associated with census and ACS data are fundamentally different: ACS estimates contain “[s]ampling” errors, whereas census estimates contain “nonsampling” errors. J.A. 909. ACS sampling errors are endemic to “statistical estimate[s] based on a statistical sample,” ibid., whereas the nonsampling errors in census data include statistical “noise” deliberately “infused” into the data to protect privacy, which (unlike sampling errors) the Bureau is “able to control,” J.A. 921-922; see J.A. 915; 11/13/2018 Tr. 1038-1043. Accordingly, the Bureau was confident that it could produce data “fit for use by the Department of Justice” while complying with all privacy requirements. J.A. 922.

Second, DOJ never said that census citizenship data was strictly “necessary” for VRA enforcement; rather, DOJ said it “would be more appropriate” than ACS data, which “does not yield the ideal data” for the four reasons set forth in its formal request. Pet. App. 567a-568a. The government is not prohibited from trying to improve the quality of data used in VRA enforcement and redistricting efforts, and the Secretary was entitled to make the policy judgment that satisfying DOJ’s formal request for census citizenship data was a worthy goal. Respondents’ intimation (ACLU Br. 49) that the VRA rationale should be discounted simply because the Department of Commerce suggested it to DOJ seems to be premised on the notion—as misguided in the law as it is in life—that a person is incapable of honestly analyzing an issue simply because another person suggested it first.

Relatedly, respondents claim that “‘sophisticated modeling’ in conjunction with existing [five-year] ACS
data, or with administrative records,” would satisfy DOJ’s requirements, ACLU Br. 50-51 (citation and footnote omitted), and that using “administrative records alone would resolve DOJ’s concerns,” NY Br. 44; see id. at 42-45. That ignores DOJ’s request for citizenship data that aligns in time with, and is from the same database as, census population, race, and age data. See Pet. App. 567a-568a. DOJ expressly identified the rolling ACS estimates as a potential source of error, id. at 568a, and the Bureau itself noted that citizenship data in administrative records is incomplete and sometimes outdated. J.A. 117, 120-121; see Project on Fair Representation Amicus Br. 8-11. Respondents’ insistence that ACS or administrative records data “is already sufficient for VRA enforcement,” NY Br. 45, is nothing more than another attempt to “substitute [their] judgment for that of the agency,” State Farm, 463 U.S. at 43—in this case, the judgment of both DOJ and the Department of Commerce.

D. The Secretary’s Stated Rationale Cannot Be Dismissed As Pretextual

The government has explained (Gov’t Br. 40-45) that the district court’s finding of what it called “pretext” defies the presumption of regularity and the deferential review mandated by the APA. Specifically, respondents did not show that the Secretary disbelieved his stated reasons, had an unalterably closed mind, or otherwise acted on a legally forbidden basis. Indeed, respondents have not identified any evidence suggesting that the Secretary thought DOJ’s analysis in its formal request for citizenship data was anything but genuine.

Instead, citing boilerplate that an agency must “explain the rationale and factual basis” for its decisions,
respondents continue to insist that the Secretary’s decision must be set aside merely because he allegedly had additional undisclosed motives for his decision. ACLU Br. 58 (citation omitted); see NY Br. 55. But respondents’ cases say only that an agency must identify some legitimate and rational basis for its decision—not that it also must reveal every additional motive in the mind of the decisionmaker. See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (agency must “‘disclose the basis of its order’” and “make findings that support its decision”) (citation omitted); see also Judulang v. Holder, 565 U.S. 42, 53 (2011) (similar); Bowen v. American Hosp. Ass’n, 476 U.S. 610, 627 (1986) (similar).

Indeed, a requirement that decisionmakers act free from any additional unstated motives would subject virtually all agency actions to challenge. See Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (courts must not turn agency decisionmaking into a “rarified technocratic process, unaffected by political considerations”); cf. 18A375 slip op. 2 (Oct. 22, 2018) (opinion of Gorsuch, J.) (observing that “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”). Respondents remain unable to cite any authority for setting aside agency action based on a facially legitimate and rational reason simply because the decisionmaker might have harbored additional unstated non-invidious reasons for pursuing the decision.

Respondents also assert (NY Br. 57) that the Secretary’s decision was pretextual because “DOJ did not exercise independent judgment” in stating its VRA rationale. There is no basis for that assertion. Nothing in
the administrative record—or for that matter in the extra-record evidence—supports the contention that DOJ did not independently analyze the issue and independently conclude that census citizenship data would improve VRA enforcement for the four reasons identified in its letter. See Pet. App. 567a-568a.

E. Section 6(c) Of The Census Act Does Not Provide A Basis To Set Aside The Secretary’s Decision

As the government has explained (Gov’t Br. 45-48), (1) the Secretary’s determination of the “kind, timeliness, quality and scope” of the citizenship data he required is not judicially reviewable, and (2) he opted to use the citizenship data in administrative records to “the maximum extent possible” because he intends to combine it with census citizenship data to fill in the gaps. 13 U.S.C. 6(c).

Respondents do not challenge the first point. See NY Br. 59-61; ACLU Br. 42-43. As to the second, they suggest (NY Br. 60; ACLU Br. 42) that even though citizenship data for 35 million individuals is missing from the administrative records, Section 6(c) requires the Secretary to impute their citizenship rather than ask about it on the census. That is incorrect. Nothing in the text of Section 6(c) suggests that it constrains the Secretary’s discretion in that manner. Respondents’ theory would mean the Secretary’s decision to ask the sex and age questions on the census likewise violate Section 6(c), as administrative records have highly accurate and complete information about sex and age—and it is certainly possible to impute missing data on those characteristics.

Indeed, because Section 6(c) applies to all census inquiries, respondents’ theory would make the citizenship question unlawful on the ACS too—an absurd result
that would cripple VRA enforcement and redistricting efforts. And respondents’ theory would mean the long form violated Section 6(c) too, for administrative records no doubt contained at least partial data about many of the pieces of demographic information requested on that form, too. Congress has given no indication it intended any of those absurd results, either when it enacted Section 6(c) or in the years since.

In any event, the Secretary exercised his discretion to determine that the “kind, timeliness, quality and scope” of data required to satisfy DOJ’s request meant providing citizenship data from the same dataset as, and aligned in time with, the census population and race data. See Pet. App. 567a-568a. That constraint cannot be satisfied by citizenship data in administrative records, let alone by imputations from that data for the 35 million people missing from those records.

F. Section 141(f) Of The Census Act Does Not Provide A Basis To Set Aside The Secretary’s Decision

For the reasons stated by the government (Gov’t Br. 48-53), respondents’ claim under Section 141(f) is not judicially reviewable and the Secretary did not violate that provision in any event. Respondents provide no reason to conclude otherwise, as they simply echo the district court’s conclusions in a few short paragraphs (NY Br. 61-62; ACLU Br. 43-44) and barely attempt to respond to the government’s arguments. And contrary to the United States House of Representatives’ assertion at page 14 of its merits-stage amicus brief, Section 141(f) does not “restrict[] the topics and questions on the decennial census to those the Secretary announces to Congress at the prescribed times”; amicus identifies no text in the statute imposing such a restriction, and in
any event the Secretary did alert Congress at the prescribed time that citizenship was both a topic and a question when he submitted his March 2018 report, see Gov’t Br. 49, 52-53.

G. The District Court Erred In Authorizing Discovery Outside The Administrative Record

Respondents argue (NY Br. 68) that the “entry of final judgment has largely mooted the parties’ discovery dispute,” as has their withdrawal of the request to depose the Secretary. If that is true, it would compel a vacatur of the district court’s orders under United States v. Munsingwear, Inc., 340 U.S. 36 (1950), because the government would “have been prevented from obtaining *** review” by circumstances outside of its control, Camreta v. Greene, 563 U.S. 692, 712 (2011) (citation omitted), on an issue that independently warranted this Court’s review.

In any event, respondents’ assertion (NY Br. 68) that extra-record discovery “was justified to uncover objective facts about the decision-making process” confuses the district court’s order (Pet. App. 525a-526a) expanding the administrative record, which the government does not challenge here, with its orders (id. at 437a-451a, 452a-455a, 530a-531a) authorizing discovery outside the administrative record to probe the Secretary’s mental processes, which requires “a strong showing of bad faith or improper behavior,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). Respondents have not made that showing. See Gov’t Br. 55; 18-557 Gov’t Br. 21-44.
H. The Secretary’s Decision Did Not Violate The Enumeration Clause

The district court correctly dismissed (Pet. App. 408a-424a) respondents’ Enumeration Clause claims. Under the Constitution, the Secretary’s conduct of the 2020 decennial census “need bear only a reasonable relationship to the accomplishment of an actual enumeration.” Wisconsin, 517 U.S. at 20. Even if that standard could meaningfully be applied the Secretary’s exercise of discretion to ask demographic questions, but see p. 7, supra, it is easily met here. Every decennial census—including the very first, which sought “a just and perfect enumeration,” Act of Mar. 1, 1790, ch. II, § 1, 1 Stat. 101—has included demographic questions, and most of them have included questions about citizenship or place of birth (or both). See Pet. App. 26a-27a, 418a. It would therefore be “absurd,” as the district court observed, to find that a demographic question about citizenship violates the Enumeration Clause. Id. at 422a. Indeed, given the constitutional nature of the claim, respondents’ position would mean that even Congress could not act by statute to reinstate a citizenship question to the decennial census. That, too, would be absurd.

Respondents nevertheless assert that reinstating the citizenship question violates the Enumeration Clause because “it would affirmatively undermine the accuracy of the enumeration.” NY Br. 64; see id. at 66. As with their arguments on arbitrary-and-capricious reviewability, see pp. 5-9, supra, respondents offer no judicially manageable standard to determine precisely how much undermining is required to trigger a violation of the Clause. If this Court finds that the Secretary’s decision to reinstate a citizenship question was not arbitrary and capricious, a fortiori that decision cannot
have violated the Enumeration Clause. As the district court recognized, every demographic question potentially undermines the accuracy of the enumeration for the entirely separate governmental goal of obtaining useful information about the populace. See Pet. App. 418a-422a. Respondents’ theory would therefore render every demographic question unconstitutional.

Remarkably, respondents appear to embrace that conclusion, suggesting (NY Br. 66) that even a longstanding demographic question might become unconstitutional because “the modernization of the census process [has] provided a clear scientific understanding of the potential harms to the enumeration of asking particular questions.” Yet however much our modern scientific understanding might have progressed, it cannot possibly alter the meaning of the Constitution or constric the “virtually unlimited discretion” the Secretary has to conduct the decennial census—including by asking demographic questions. Wisconsin, 517 U.S. at 19.

Echoing the district court in California v. Ross, 358 F. Supp. 3d 965 (N.D. Cal. 2019), petition for cert. before judgment pending, No. 18-1214 (Mar. 18, 2019), amicus California argues that “much has changed since 1950 *** with respect to the Nation’s immigration laws,” thereby making the citizenship question unconstitutional today. California Amicus Br. 8; see California, 358 F. Supp. 3d at 1049 (musing that “the citizenship question may have been perfectly harmless in 1950” and “may be harmless again in the year 2050”). California presumably picked 1950 since that was the last time the citizenship question was asked of every household; but it was on every long form between 1960 and 2000 (including after the last major overhaul of the
Nation’s immigration laws, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546)—and the long form also was used for enumerating at least one of every six households. California’s theory would make those censuses unconstitutional too. See Pet. App. 421a-423a.

In any event, California’s argument appears to be that the constitutionality of a demographic question depends on how other laws, such as the immigration laws, happen to influence the response rate to that question in light of the general political climate at the time. See California Amicus Br. 7-9. This Court should reject that argument. Whatever the correlative relationship between the response rate on a particular census question and other laws, it is far more relevant that the Census Act encourages people (through coercive penalties and assurances of confidentiality) to respond to all of the questions. See 13 U.S.C. 9(a), 221. Besides, if California is correct that other laws and the general political climate induce fluctuations in the response rates to a given question, then any harm resulting from an undercount would be fairly traceable to those other laws and the political climate—not to the asking of the question. Cf. Amnesty Int’l, 568 U.S. at 414-418.

Finally, respondents assert that reinstating the citizenship question violates the Enumeration Clause because it “fulfills no reasonable government purpose.” NY Br. 64 (citation omitted). That is incorrect. Even if that standard applies, VRA enforcement and redistricting plainly are reasonable governmental purposes, and the Secretary was entitled to credit DOJ’s request for more complete and accurate citizenship data in furtherance of those purposes. Moreover, on this constitutional
question, the Secretary need only provide a rational basis for his decision, cf. *State Farm*, 463 U.S. at 43 n.9—and it cannot have been irrational (and thus unconstitutional) for the Secretary to reinstate a question that the United Nations recommends asking on a census, that most major Western democracies ask on their censuses, and that the United States itself asked on most censuses for 200 years. See Pet. App. 567a. And that is to say nothing of the myriad other demographic questions that always have been included on the census. Taken to its logical conclusion, respondents’ theory would mean that every decennial census in our Nation’s history, from the first to the last, has been unconstitutional. That cannot be right.

Respectfully submitted.

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APRIL 2019
No. 18-966

In The

Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

STATE OF NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment to the
United States Court of Appeals for the Second Circuit

BRIEF OF NORMAN Y. MINETA,
THE SAKAMOTO SISTERS, THE COUNCIL ON
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AND NEW YORK, INC.), AND THE FRED T.
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INTERESTS OF AMICI CURIAE

Norman Y. Mineta, Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker come forward as amici curiae because they know first-hand about the dangers—particularly for immigrant and minority communities—from government exploitation of census data. The government weaponized confidential census data during World War II to facilitate the mass removal and incarceration of their families and communities. The unlawful and pretextual manner in which the federal government has endeavored to add a citizenship question to the 2020 decennial census compels amici to offer that profoundly troubling historical context to inform the Court’s consideration of the questions presented.

Norman Y. Mineta served as Secretary of Transportation under President George W. Bush, as Secretary of Commerce under President Clinton, as a member of the U.S. House of Representatives from 1975 to 1995, and as mayor of San Jose, California, from 1971 to 1975. Norm’s parents had to respond as non-citizens to the 1920, 1930, and 1940 decennial censuses because this Court made clear in Ozawa v. United States, 260 U.S. 178 (1922), that his parents—who emigrated from Japan—were not eligible for naturalized citizenship due to their Japanese

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1 This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae made a monetary contribution intended to fund the brief’s preparation or submission.
ethnicity. In 1942, when Norm was 10 years old, the federal government removed him and his family from their home, and incarcerated them with thousands of other Japanese Americans—first at the Santa Anita racetrack in southern California and then at the Heart Mountain camp in Wyoming. Even though he was a young boy at the time, Norm clearly recalls being surprised that the federal government was able to so quickly round up many Japanese Americans from his community on the day of the Pearl Harbor bombing and in the months that followed. Years later, he learned that the U.S. Census Bureau had provided critical information that facilitated the surveillance of Japanese American communities, as well as their eventual exclusion and incarceration.

Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker are three sisters who spent World War II incarcerated at the Minidoka concentration camp in Idaho. Their parents were American citizens born and raised in Washington State. Eileen was five years old and Joy was six months old when the federal government removed them, their parents, and two brothers from their Seattle home and sent them all to live in a converted horse stall at the Puyallup Fairgrounds south of Seattle. The federal government then moved them to Minidoka, where Sharon was born. Like Norm and his family, the Sakamoto family was unaware that the Census Bureau cooperated with military authorities by identifying where Japanese Americans lived. Sharon, Eileen, and Joy join as amici because they are deeply concerned that the proposed citizenship question on the 2020 decennial census will cause immigrants and other persons of color to avoid
responding for fear that the information will be used to harm them, just as the federal government harmed Japanese Americans during World War II.

The Council on American-Islamic Relations (CAIR) is the Nation’s largest Muslim American civil rights and advocacy organization, and the Council on American-Islamic Relations, New York, Inc. (CAIR-NY) is an independent New York affiliate. Following the tragic attacks of 9/11, CAIR and CAIR-NY aided Muslim New Yorkers impacted by the perceived misuse of census data. Shortly after 9/11, at the request of what is now U.S. Customs and Border Protection, the Census Bureau provided a list of U.S. cities that had more than 1,000 Arab American residents. Over a year later, it provided a zip-code-level breakdown of Arab American populations by country of origin. Government officials subsequently insisted that the Bureau disclosed this data to help notify travelers about currency reporting requirements and to improve airport signage. Muslim Americans, however, viewed these post-9/11 disclosures as pretextual and infected with animus, thereby reducing their trust and participation in the 2010 decennial census. CAIR and CAIR-NY join as amici out of concern that the inclusion of a citizenship question in the 2020 decennial census will further erode Muslim Americans’ trust and participation.

The Fred T. Korematsu Center for Law and Equality is a non-profit organization based at the Seattle University School of Law. It works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu—who defied military orders during World War II that resulted in
the unlawful incarceration of 120,000 Japanese Americans—the Korematsu Center works to advance social justice for all. It has a special interest in addressing government action that harms classes of persons based on race or nationality.²

INTRODUCTION AND SUMMARY OF ARGUMENT

The decennial census depends on self-reporting and can achieve its mandate under the Enumeration Clause only when the public trusts that the federal government will not misuse collected information. In recognition of that fact, every U.S. President since 1910 has issued a proclamation reassuring individuals and their communities that no harm could result from participating in the decennial census. Toward that end, the modern Census Act requires the Secretary of Commerce to treat census data as confidential.

Despite those assurances, the government has breached the public’s trust on several occasions throughout the Nation’s history—particularly during World Wars I and II. The most notable breach is the Census Bureau’s 1942 disclosure of data on the whereabouts of Japanese Americans. The evidence is clear—and, indeed, the Bureau now admits—that it provided the data that powered the machinery of mass removal and incarceration of Japanese Americans during World War II.

The Census Bureau disclosed confidential data to wartime authorities out of supposed “military urgency,” but the coram nobis cases 40 years later

² The Korematsu Center does not represent the official views of Seattle University.
demonstrated any such urgency was a lie. The real reason for the government’s deplorable treatment of Japanese Americans was a baseless perception of disloyalty grounded in racial stereotypes.

As that history demonstrates, the fear that census data could be used to harm individuals and communities is anything but abstract. Immigrant communities and other communities of color, in particular, thus have good reason to be suspicious of the government’s decision to include a citizenship question on the 2020 decennial census. The district court’s exhaustive post-trial findings confirm that suspicion here: the citizenship question was added through a process that the court found to be arbitrary, and it was based on a justification that the court found to be pretextual.

The federal judiciary plays a vital role in ensuring that improper motives do not infect government decisionmaking. Heeding the lessons of the government’s historical exploitation of census data, including its misuse of such data to facilitate the mass incarceration of Japanese Americans on the pretext of national security, this Court should firmly reject the government’s attempt once again to escape meaningful judicial scrutiny.

ARGUMENT

I. PUBLIC TRUST IN THE CENSUS DERIVES FROM THE FEDERAL GOVERNMENT’S ASSURANCE THAT IT WILL NOT MISUSE DATA.

The promise of data confidentiality is integral to the modern Census Bureau’s ability to achieve the
“actual Enumeration” required by the U.S. Constitution. U.S. CONST. art. I, § 2, cl. 3; see, e.g., Vincent P. Barabba & D.L. Kaplan, U.S. Census Bureau Statistical Techniques To Prevent Disclosure—The Right of Privacy vs. the Need To Know (1975) (“Should the public’s confidence in the Bureau’s pledge of confidentiality for their census returns erode, goodwill and cooperation will erode.”), quoted in U.S. DEP’T OF COMMERCE, REPORT ON STATISTICAL DISCLOSURE AND DISCLOSURE-AVOIDANCE TECHNIQUES 32 (1978). In recognition of the need for public trust, the modern Census Act restricts the Secretary’s ability to (i) “use the information furnished” by census respondents “for any purpose other than the statistical purposes for which it is supplied”; (ii) “make any publication whereby the data furnished by any particular establishment or individual *** can be identified”; or (iii) “permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.” 13 U.S.C. § 9(a)(1)-(3).

The federal government, however, did not always seek to protect census data. For example, to facilitate an accurate enumeration in the 1790 decennial census, the government posted draft census data in public places to shame noncompliant persons and levy community pressure on them. See JASON G. GAUTHIER, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 129 (2002).

It was not until the early twentieth century that the Census Bureau (created in 1902) adopted a more sensible approach of incentivizing participation in the decennial census through “guarantees *** designed to

President William Howard Taft sought to remove politics from the census process by ordering the Secretary of Commerce and Labor to promulgate regulations to ensure that “the census shall not be made to serve the political purposes of any one.” The Census and Politics, N.Y. TIMES, at 8 (Aug. 18, 1909) (quoting President Taft’s letter).

In a similar vein, President Taft issued a proclamation in 1910 to assure the public that participation in the census would not lead to harm:

The sole purpose of the census is to secure general statistical information *** , and replies are required from individuals only in order to permit the compilation of such general statistics. The census has nothing to do with *** army *** service *** , with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance, nor can any person be harmed in any way by furnishing the information required. There need be no fear that any disclosure will be made regarding any individual person or his affairs.

1910 Census Proclamation, U.S. Census Bureau. The sitting U.S. President has delivered a virtually identical proclamation for every decennial census since then. Challenges, supra, at 5.
Yet the Census Bureau almost immediately failed to live up to its promise of confidentiality. In 1917, the Bureau disclosed “to courts, draft boards, and the Justice Department” the names of thousands of draft-age men who failed to register for the Selective Service during World War I. Challenges, supra, at 7. In doing so, the Bureau’s Director concluded that “statistical confidentiality should be conditioned and compromised by more apparently pressing government needs.” Id.

Unsurprisingly, the floodgates opened: “[O]nce census officials supported the initial release of information to draft boards in 1917, officials in other agencies, for example in the Justice Department, asked for further releases.” Challenges, supra, at 10. “[I]n early 1920, while the enumerators were in the field, the Justice Department, on behalf of the Department of Labor, asked if the local enumerators in Toledo, Ohio, could provide information about individuals’ citizenship from the 1920 Census of Population *** for use in deportation cases.” Id. at 8 (ellipsis in original) (citation and internal quotation marks omitted).

After World War I, Census Bureau Directors William Mott Steuart (1921-1933) and William Lane Austin (1933-1941) viewed regaining public trust through data confidentiality as paramount. See Challenges, supra, at 9-10, 16. But by 1941, as the United States faced the prospect of World War II, President Franklin Roosevelt “sought a mechanism to permit the administrative and intelligence agencies access to individual level information collected by the U.S. Census Bureau.” Id. at 16. President Roosevelt
“involuntarily retired” Director Austin and nominated a more compliant director, who immediately “authorized the Commerce Secretary to provide officials in other government agencies access to confidential census data for the ‘national defense program.’” Id. at 17. Within a year, Congress passed the Second War Powers Act of 1942, which stated “[t]hat notwithstanding any other provision of law, *** data *** in the possession of the Department of Commerce or any bureau or division thereof, may be made available *** to any branch or agency of the Government *** for use in connection with the conduct of the war.” Pub. L. No. 77-507, § 1402, 56 Stat. 176, 186-187. That Act temporarily suspended the existing statutory confidentiality protection for census data. 13 U.S.C. §§ 8-9 (1940).

Requests for the Census Bureau to share census data continued during the postwar period. For instance, a few years after the end of World War II, “the Attorney General’s Office sought information from census records about certain individuals for use by the FBI in the context of rising concern about possible Communist infiltration and sabotage.” Challenges, supra, at 25 (citation and internal quotation marks omitted). To be sure, for a period beginning in 1962, the “Bureau effectively resisted any federal agency requests for access to individual reports for the purpose of taxation, investigation or regulation.” Id. at 28. But in 2001, the Bureau facilitated the U.S. Department of Homeland Security’s post-9/11 access to data from the 2000 decennial census concerning the 5-digit postal codes of Arab Americans. Id. And “[a]s during the world wars, there is much discussion today in the United States
about coordination of government information and efficiency.” *Id.* at 30.

The upshot of these examples is that many Americans—particularly those from immigrant and minority communities—have reason to distrust how the government might use responses to a citizenship question, which could suppress response rates and degrade the quality of the data gathered. Past experience has also eroded confidence in the effectiveness of “ethical safeguards *** to deter the most likely and persistent ‘intruders,’ that is, other agencies of government with investigative, intelligence, or prosecutorial agendas.” *Challenges, supra,* at 29. In today’s age, where national security and other exigencies have brought the issue of census data confidentiality back to the fore, it is imperative that the decennial census be administered in a manner that eliminates any concern that data will be wielded against those who provide responses.

II. THE MASS INCARCERATION OF JAPANESE AMERICANS, FACILITATED BY CENSUS DATA AND PRETEXT, SERVES AS A CAUTIONARY TALE.

A. The Government Used Census Data To Incarcerate Japanese Americans During World War II.

One of the most glaring and heinous examples of the Census Bureau's violation of the public trust occurred during World War II: the Bureau played a central role in the mass removal and incarceration of over 120,000 Japanese Americans during the spring of 1942. “The historical record is clear that senior
Census Bureau staff proactively cooperated with the internment, and that census tabulations were directly implicated[].” U.S. CENSUS BUREAU POLICY OFFICE, A MONOGRAPH OF CONFIDENTIALITY AND PRIVACY IN THE U.S. CENSUS 16 (July 2001) (hereinafter “CENSUS BUREAU MONOGRAPH”).

Most directly, the Census Bureau now admits to “providing 1940 census data on Japanese Americans” to the War Department, specifically the Western Defense Command, “for small geographic areas down to the census tract and block levels.” CENSUS BUREAU MONOGRAPH, supra, at 15. In February 1942, the Bureau deployed the head of its statistical research division, Calvert Dedrick, “to the Western Defense Command to assist in the implementation of the evacuations.” Margo Anderson, Public Management of Big Data: Historical Lessons from the 1940s, FED. HIST. 17, 22 (2015) (hereinafter “Public Management”). Dedrick later testified that the Western Defense Command asked him for “a detailed cross-tabulation for even the most minute areas,” such as “cities by blocks.” William Seltzer & Margo Anderson, After Pearl Harbor: The Proper Role of Population Data Systems in Time of War 7 (Mar. 28, 2000) (unpublished draft). Dedrick agreed and provided unpublished data that allowed the Western Defense Command “to find where the citizens of Japanese descent lived” and to identify “exactly the city blocks where the people of Japanese descent lived.” Public Management, supra, at 29-30 (citation and quotation marks omitted).

Contemporaneous evidence confirms the Census Bureau’s admission. In 1943, U.S. General John L.
DeWitt, Commander of the Western Defense, authored what the government offered as the military’s official account of the wartime removal and incarceration. J.L. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942 (June 5, 1943) (hereinafter “Final Report”). General DeWitt detailed how the Bureau performed a “special tabulation” of 1940 decennial census data for the Western Defense Command, which “plotted on maps” the “total number of Japanese individuals and families *** for each census tract.” Id. at 86. Specifically, the Bureau provided “tables” showing “various city blocks where the Japanese lived and *** how many were living in each block.” REPORT OF THE CWRIC, PERSONAL JUSTICE DENIED 105 n.* (The Civil Liberties Public Education Fund & University of Washington Press, 1997).

That information allowed the Western Defense Command to round up Japanese Americans—what General DeWitt referred to as the “logistics of evacuation”—with swift and surgical precision. Final Report, supra, at 356. Indeed, General DeWitt concluded that “[t]he most important single source of information prior to the evacuation was the 1940 Census of Population,” which “became the basis for the general evacuation and relocation plan.” Id. at 352; see also id. at 79 (census data was “[o]f prime importance in shaping the evacuation procedure”).

Beyond sharing data with the Western Defense Command, the Census Bureau disclosed information about individual Japanese Americans to federal agencies. William Seltzer & Margo Anderson, Census Confidentiality Under the Second War Powers Act


(1942-1947), at 5 (Mar. 12, 2007) (unpublished draft). In 1943, pursuant to the Second War Powers Act, the U.S. Treasury Department requested from the Commerce Department “a list of the Japanese residing in the Metropolitan Area of Washington, D.C., as reported in the 1940 Census, including information as to addresses.” Id. at 16 & fig. 1. The Commerce Department complied within seven days, creating a spreadsheet that listed the “name, address, sex, age, marital status, citizenship status, status in employment, and occupation and industry” of 79 Japanese Americans. Id. at 21-22 & figs. 5a-b. The rapidity of the disclosure demonstrates that “the Bureau not only provided identifiable micro-data on Japanese Americans to other federal agencies but also had well-developed procedures to do so expeditiously.” Id. at 24. Thus, at the very least, the 1943 Washington, D.C. disclosure is strong evidence that “lists of Japanese Americans from the 1940 Census were provided to assist in the mopping up stages of the round-up of Japanese Americans on the West Coast.” Id. at 40.

The foregoing lays bare how the federal government used the 1940 decennial census for the purpose of finding and incarcerating Japanese Americans, despite President Roosevelt’s 1940 proclamation that “[t]here need be no fear that any disclosure will be made regarding any individual person or his affairs” and that “[n]o person can be harmed in any way by furnishing the information required.” Proclamation 2385: Sixteenth Decennial Census (Feb. 9, 1940), in 1940 SUPPLEMENT TO THE CODE OF FEDERAL REGULATIONS 26-27 (1941). This shameful episode from our Nation’s history provides
real-world context for Respondents’ concern that the Census Bureau will use citizenship data for improper purposes or in ways that will harm them or their communities.

B. The Japanese American Incarceration Cases Are Powerful Reminders That This Court Must Be Vigilant In Policing Pretext.

In addition to asking the Court to remember the use of census data during World War II, amici ask the Court to uphold the district court’s searching inquiry into the government’s stated reason for adding the citizenship question to the 2020 decennial census and to ensure that the reason is not pretextual. In the Japanese American incarceration cases, the Court failed to scrutinize the government’s claim that its actions were necessary, and 40 years later, it was discovered that the government’s reasons were a pretext for discrimination. The Court should remember the lesson of those cases. It should scrutinize the government’s proffered justification here (including by subjecting decisionmakers to discovery), and it should affirm the district court’s conclusion—based on scores of post-trial factual findings—that the Secretary of Commerce concealed his true motivation for adding the citizenship question.

The district court held that “the sole rationale” the government “articulated for [its] decision—that a citizenship question is needed to enhance [the Department of Justice’s (DOJ) Voting Rights Act (VRA)] enforcement efforts—was pretextual.” Pet.
App. 320a. In particular, the district court found several facts demonstrating that the government made its decision “well before” the DOJ’s request for a citizenship question “and for reasons unrelated to the VRA.” *Id.* at 313a. Worse still, “the record also includes evidence of the many ways in which Secretary Ross and his aides sought to conceal” the decision to add the citizenship question. *Id.* at 314a.

The Administrative Procedure Act (APA) exists precisely so that Article III courts can ferret out and invalidate such agency action. It confers upon courts the essential responsibility to “set aside agency action” that is “not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(A), (C). And it is a core tenet of APA review that an agency decisionmaker must “disclose the basis of” decision. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); see also *Securities & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[T]he process of review requires that the grounds upon which the administrative agency acted be clearly disclosed[.]”). Pretextual decisionmaking is anathema to those principles.

The Solicitor General nonetheless invites this Court to insulate the Secretary’s action from APA review altogether. Gov’t Br. 21-28. As a fallback, the

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3 Significantly, the only other court to consider this question also found that the Secretary’s rationale was pretextual. *See State v. Ross*, No. 18-CV-01865-RS, 2019 WL 1052434, at *48 (N.D. Cal. Mar. 6, 2019) (“Together, this evidence establishes that Defendants intended to use the VRA enforcement as a pretext for adding the citizenship question when VRA enforcement was not, in fact, their true purpose.”).
Solicitor General argues that the district court’s pretext finding “defies fundamental principles governing APA review of agency action” because it puts the focus on an unstated justification not in the administrative record. *Id.* at 40-45. Relatedly, the Solicitor General seeks to shield decisionmakers from having to reveal their true intentions in discovery. *Id.* at 55.

As the Japanese American incarceration cases poignantly demonstrate, the costs of allowing the actual justifications for government action to go undetected—or even unchecked—are unmeasurably high. There, the government argued that the wartime orders resulting in the incarceration of 120,000 persons of Japanese ancestry—two-thirds of whom were American citizens—were justified by military necessity because those persons posed a threat of espionage and sabotage. *See Hirabayashi v. United States*, 320 U.S. 81 (1943), conviction vacated 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 320 U.S. 115 (1943), conviction vacated 772 F.2d 1496, 1498 (9th Cir. 1985); *Korematsu v. United States*, 323 U.S. 214 (1944), conviction vacated 584 F. Supp. 1406, 1413 (N.D. Cal. 1984). This Court infamously deferred, reasoning that “it is not for any court to sit in review of the wisdom of the[] action or [to] substitute its judgment for [the decisionmakers].” *Hirabayashi*, 320 U.S. at 93; *see also Korematsu*, 323 U.S. at 218 (same).

Forty years later, *coram nobis* petitions revealed that the government had engaged in “the suppression of evidence which established *** the real reason for the exclusion order,” and instead had provided this Court a false and pretextual record to support the
mass exclusion of Japanese Americans. *Hirabayashi*, 828 F.2d at 604. Although the government had represented that the immediate round-up of Japanese Americans was necessary because there was insufficient time to separate the loyal from the disloyal, General DeWitt’s Final Report originally said no such thing. *Id.* at 596, 598. Instead, it took the racist and revealing position that one could never separate the “sheep from the goats” because Japanese Americans were inherently disloyal on account of their “ties of race, intense feeling of filial piety and *** strong bonds of common tradition, culture and customs.” *Hirabayashi v. United States*, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986). When it was discovered that the Report contradicted the government’s argument, the government ordered the Report revised and destroyed the original versions. *Hirabayashi*, 828 F.2d at 598-599.

The government also failed to apprise this Court of intelligence reports from the Federal Bureau of Investigation (FBI), the Federal Communications Commission (FCC), and the Office of Naval Intelligence (ONI) that refuted the government’s claim of military necessity. Justice Department attorney John L. Burling attempted to insert a footnote into the government’s brief in *Korematsu*, stating that General DeWitt’s “recital” with respect to “the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry” were “in conflict with information in the possession of the Department of Justice.” *Korematsu*, 584 F. Supp. at 1417 (emphasis and internal citation omitted). His memorandum to Assistant Attorney General Herbert Wechsler stated: “General DeWitt’s report makes flat statements
concerning radio transmitters and ship-to-shore signaling which are categorically denied by the FBI and by the [FCC]. There is no doubt that these statements were intentional falsehoods.” *Id.* at 1424. The footnote as filed, however, did the opposite of what Burling recommended in “ask[ing] the Court to take judicial notice” of “the justification for the evacuation.” Br. of U.S. 11 n.2, *Korematsu v. United States*, No. 22 (U.S. Oct. 5, 1944).


These well-chronicled events make all-too-concrete the concern that the government’s stated rationale for pursuing a particular end may be cut from whole cloth. The APA empowers courts to evaluate the government’s justification in real time, rather than discover 40 years later that it was pretextual.

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Korematsu, Hirabayashi, and Yasui are painful yet powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of Article III courts as guardians against pretextual government action. Rather than repeat the failures of the past, this Court should repudiate them and affirm the greater legacy of those cases: Blind deference to the Executive Branch’s stated rationale is incompatible with the protection of fundamental freedoms. Accordingly, this Court should reject the government’s invitation to abdicate its critical role to root out pretext under the APA; subject the government’s reason for adding a citizenship question to the 2020 decennial census to searching judicial scrutiny; and stand as a bulwark against government action that threatens immigrant and other communities of color.
CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted.

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