No. 18-966

In the Supreme Court of the United States

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 THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The questions presented by the petition are:

1. Whether the district court correctly concluded 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.

2. Whether the district court properly authorized discovery outside of the proffered administrative record.

On March 15, 2019, this Court directed the parties to brief and argue the following additional question:

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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INTERESTS OF AMICUS CURIAE

The Constitution requires an "actual Enumeration" of the population of the United States every decade. Congress has delegated responsibility for that decennial census to the Secretary of Commerce. The results of the census directly affect the apportionment of federal and state representatives, presidential electors, and federal funding. The States rely on federal officials to discharge their duties faithfully and conduct a census that produces accurate results.

In March 2018, Commerce Secretary Wilbur Ross announced a decision to add a citizenship question to the 2020 census questionnaire. Adding that question would substantially depress responses from non-citizens and from citizens with relatives who are non-citizens. That would harm California more than any other State, because California has more non-citizen residents (over 5 million) and more foreign-born residents (over 10 million) than any other State. For example, even accepting the Census Bureau's conservative estimate of a 5.8% decline in the self-response rate for households with at least one non-citizen, California would face a grave risk of losing a congressional seat and would likely lose tens of millions of dollars in federal funding, including for programs supporting its most vulnerable residents. Under more realistic estimates, the harm to California would be even more severe.

California challenged the Secretary's decision on the day it was announced, raising claims under the Administrative Procedure Act and the Enumeration Clause. *California v. Ross*, No. 18-cv-1865 (N.D. Cal.) (petition pending, No. 18-1214). As in the present case arising from New York, the district court in California authorized discovery going beyond the administrative

record, conducted a bench trial, and held that the Secretary's decision must be set aside under the APA. Unlike in the New York case, the California court also heard evidence on the Enumeration Clause claim. It concluded that permanent relief was proper because, under the particular circumstances of the 2020 census, adding a citizenship question would interfere significantly with the enumeration and the government had articulated no reasonable purpose for the question sufficient to justify that effect.

This Court's review of the judgment in the present case will directly affect the outcome of the California litigation. That is especially true in light of the Court's recent order directing the parties in this case to address the legality of the Secretary's decision under the Enumeration Clause. California thus has a direct interest in the proper resolution of this case.

More generally, the Founders designed the Enumeration Clause to ensure equal representation in the national government and to guard against political chicanery. *See, e.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). California, like other States, has a vital interest in ensuring that the courts can and will intervene to review actions by federal officials that would inject distributive inaccuracy into the decennial census, threatening the proper apportionment of congressional representation and presidential electors. California is also a regular plaintiff in cases seeking judicial review of federal administrative actions under the APA, and has a strong interest in protecting and clarifying the legal standards that allow for fair adjudication of those cases. Courts must be able to depend on agency officials to provide truthful explanations for their decisions, and to produce a complete and accurate record of the materials and issues the officials

considered in making the decisions. And where there is good reason to believe that officials have shirked those obligations, district courts must have the authority to enforce them.

ARGUMENT

This case involves the legality of a decision by the Secretary of Commerce to add a citizenship question to the 2020 census. The district court in this case vacated the Secretary's decision under the Administrative Procedure Act. In the similar case in California, the district court came to the same conclusion under the APA but also considered a constitutional claim under the Enumeration Clause and, based on the particular record before it, permanently enjoined use of the citizenship question in 2020. In light of this Court's recent order directing the parties in this case to brief the Enumeration Clause issue, this amicus brief will first address certain legal principles relevant to any consideration of that issue.[1] We then briefly address why both district courts were correct to conclude that the Secretary's decision here was both arbitrary and capricious and contrary to law. Finally, although the Court might not need to reach the issue in this case, we address the principles under which both district courts correctly held that the circumstances here warranted judicial inquiry going beyond the bounds of the "administrative record" initially proffered by petitioners.

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[1] The response of California and other government parties to the pending petition in the California case (No. 18-1214) will address more fully why the constitutional judgment in that case should be affirmed.

I. ADDING A CITIZENSHIP QUESTION TO THE 2020 CENSUS WOULD VIOLATE THE ENUMERATION CLAUSE

1. In the district court, petitioners argued that respondents' Enumeration Clause claim was not justiciable. *See* Pet. App. 391a.[2] The court correctly rejected that argument. *Id.* at 391a-398a.

To allow for proper apportionment of representatives and electors, the Constitution directs Congress to make an "actual Enumeration" of the total population every ten years, "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. The Clause leaves Congress with considerable discretion, much of which it has delegated in turn to the Secretary of Commerce. *See, e.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 15, 19 & n.11 (1996); 13 U.S.C. § 141(a). But the conduct of the census is nonetheless subject to constitutional limits and to judicial review. *See Wisconsin*, 517 U.S. at 19-20. This Court and others have repeatedly "considered constitutional challenges to the conduct of the census," *id.* at 13—and repeatedly rejected arguments that those challenges presented non-justiciable political questions, *see* Pet. App. 392a-393a (collecting cases).

In the district court, petitioners argued principally that respondents could not challenge the "manner" of conducting the census. Pet. App. 395a. They attempted to distinguish this from other cases where

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[2] Petitioners did not renew that argument in their petition or opening brief in this case (or in their petition in the California case). *See* Pet. 13-29; U.S. Br. 54; *see also* Pet. 9-12, *Ross v. California*, No. 18-1214. To the extent the argument is not jurisdictional, *see* Pet. App. 393a n.15, it would appear that petitioners have waived it.

courts have reviewed the constitutionality of "calculation methodologies." *Id.* Each of the three district courts to consider this argument properly rejected it. *Id.* at 393a-396a; *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 563 (D. Md. 2018); *California v. Ross*, ___ F. Supp. 3d ____, 2018 WL 7142099, *9-*10 (N.D. Cal. Aug. 17, 2018). Courts routinely adjudicate challenges to "the manner in which the" census is "conducted." *Carey v. Klutznick*, 637 F.2d 834, 836 (2d Cir. 1980); *see, e.g.*, *Wisconsin*, 517 U.S. at 8-11; *Franklin v. Massachusetts*, 505 U.S. 788, 792-795 (1992). There is no textual or precedential support for treating such challenges as nonjusticiable. *See* Pet. App. 395a-396a ("*every* challenge to the conduct of the census is, in some sense, a challenge to the 'manner' in which the government conducts the 'actual Enumeration'").

2. The district court in this case reasoned that respondents' Enumeration Clause claim with respect to the 2020 census was categorically foreclosed because of historical evidence that questions relating to birthplace or citizenship were asked in the past. Pet. App. 408a-424a; *see, e.g.*, *id.* at 417a (similar questions asked on all but one census between 1820 and 1950). That is incorrect. While history is relevant to any application of the Enumeration Clause, it does not control the analysis in the way suggested by the district court.

a. The "underlying constitutional goal" of the Enumeration Clause is "equal representation" in the federal Congress, subject to certain specified constraints. *Franklin*, 505 U.S. at 806; *see Wisconsin*, 517 U.S. at 17 (noting requirements that there be at least one representative from each State and that district boundaries not cross state lines). The Founders "knew that the calculation of populations could be and often were

skewed for political or financial purposes," and they "consequently focused for the most part on creating a standard that would limit political chicanery." *Utah v. Evans*, 536 U.S. 452, 500 (2002) (Thomas, J., concurring in part and dissenting in part). The text and history of the Enumeration Clause "all suggest a strong constitutional interest in accuracy." *Id.* at 478 (majority opinion).

Of course, no census has been "wholly successful" in obtaining a perfect count of the total population of each State. *Wisconsin*, 517 U.S. at 6; *see also Utah*, 536 U.S. at 504-506 (Thomas, J., concurring in part and dissenting in part). In deciding what degree of error is tolerable, administrators and courts consider both "numerical accuracy" and "distributive accuracy"—in particular, accuracy in determining the relative populations of the respective States. *See Wisconsin*, 517 U.S. at 11 & n.6, 17-18. And "a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, *viz.*, to determine the apportionment of the Representatives among the States." *Id.* at 20.

That need for distributive accuracy sets a "limit[]" on the Secretary's "broad authority over the census." *Wisconsin*, 517 U.S. at 19, 20 (internal quotation marks omitted). If the "Secretary's conduct of the census" is not "'consistent with the . . . constitutional goal of equal representation,'" it may violate the Enumeration Clause. *Id.* at 19-20. In particular, actions that would result in a materially greater undercount in certain places would directly undermine the interest in proper apportionment of representatives and electors. Where there is a reasonable probability of such an

effect, an action relating to the census must be subject to meaningful judicial scrutiny.

That does not mean that any action resulting in a differential undercount will necessarily be invalid. The "wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary," requires considerable "judicial deference." *Wisconsin*, 517 U.S. at 22, 23. Even an action that could affect apportionment may be justified if it serves some legitimate—and sufficiently substantial—countervailing interest. *See* Pet. App. 163a; *cf. Wisconsin*, 517 U.S. at 20. Whether such an interest outweighs a threat to the strong constitutional interest in equal representation will depend on the circumstances of each case. A greater risk that one or more States and their residents will improperly lose representatives will demand a correspondingly greater justification.

b. The district court correctly noted (Pet. App. 411a-412a) that evidence of "historical practice" and "the traditional method of conducting the census" plays an important role in any application of the Enumeration Clause. *Wisconsin*, 517 U.S. at 21, 22; *see Franklin*, 505 U.S. at 803-806. For example, the fact that the census has always been used to collect data beyond the limited information strictly necessary for apportioning representatives supports the general principle that it is "proper to use the census for more than a mere headcount." Pet. App. 413a. And past practice may inform whether an action that results in a differential undercount is nonetheless sufficiently justified by some other government interest. But historical practice alone will rarely, if ever, be dispositive. Even an action that resembles what has been done at some point in the past may violate the Enumeration Clause if, under particular present circumstances, it

would materially undermine the goal of equal representation and the Secretary cannot advance any sufficient countervailing justification.

Here, the evidence of historical practice invoked by the district court does not answer the constitutional question. The court observed that every census but one between 1820 and 1950 "asked a question related to citizenship or birthplace in one form or another." Pet. App. 417a. But much has changed since 1950 (and 1850), particularly with respect to the Nation's immigration laws. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 360-364 (2010). And there is surely no doubt that the 2020 census, in particular, will take place at a moment in the Nation's history when issues surrounding citizenship and immigration are especially fraught with legal, political, and practical sensitivity. The historical evidence thus provides no sound basis for evaluating whether the risk of malapportionment that would arise from adding a citizenship question to *this* census (*see, e.g.*, Pet. App. 201a-203a) is justified by any current and sufficient government interest.

To be clear, California does not contend "that each and every" past census with a citizenship question was "conducted in violation of the Enumeration Clause," Pet. App. 421a, 422a, or that such a question could never properly be added to any census in the future. We argue only that, here as elsewhere, context matters. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (government action that "imposes current burdens . . . must be justified by current needs"). A proposed question that would imperil the constitutional goal of accurate enumeration if asked as part of the current census is not insulated from any judicial review simply because the same or a similar question might have been useful and innocuous in the

past, or might be permissible again in the future. The constitutional question here is the balance between the likely effects of and the asserted justifications for a citizenship question in 2020. And that question is properly subject to judicial review.

3. Applying that constitutional standard to the record before it, the district court in the California case properly held that including the proposed citizenship question in the 2020 census would violate the Enumeration Clause. 18-1214 Pet. App. 161a-169a. It found, after holding a trial on the issue, that the question would cause "a significant differential undercount, particularly impacting noncitizen and Latino communities[.]" *Id.* at 6a. Additional steps intended "to ameliorate these effects . . . would not remediate and could in fact exacerbate the differential undercount of noncitizens and Latino persons." *Id.* The citizenship question, asked in the way it has been proposed and at this particular moment in history, would accordingly create a substantial risk of improperly depriving California and its residents of at least one congressional representative and one presidential elector. *Id.* at 57a-59a, 69a-70a, 166a. And petitioners, although given the opportunity at trial, "fail[ed] to identify any countervailing governmental interest that could justify this harm." *Id.* at 166a.

The record in the present case, although not developed or evaluated below to address this issue, is also sufficient to establish an Enumeration Clause violation. In addressing standing, the district court found that adding a citizenship question to the 2020 census would create "a net differential undercount" that "will cause or is likely to cause several jurisdictions to lose seats in the next congressional apportionment." Pet.

App. 172a-174a. In addressing whether the Secretary's explanation for his decision to add the question was sufficient under the APA, the court explained that the administrative record contained no evidence supporting the assertion that the question would advance any government interest in obtaining more accurate citizenship data, *id.* at 290a-293a, or in enforcing the Voting Rights Act, *see id.* at 124a-126a, 268a-270a, 295a-297a. The record thus shows that adding the proposed citizenship question in 2020 would undermine the constitutional goal of equal representation without serving any countervailing government interest that might justify that harm. If, however, the Court has any doubt concerning the suffiency of the record here on this point, then it should review the Enumeration Clause issue in the context of the California case, where the evidentiary record, the parties' arguments, and the district court's decision were all more specifically directed to this claim. *See* Mot. to Expedite 5-10, *Ross v. California*, No. 18-1214.

II. THE DECISION TO ADD A CITIZENSHIP QUESTION VIOLATED THE APA

Like the district court in the California case, the court below held that Secretary Ross violated the Administrative Procedure Act when he decided to add a citizenship question to the 2020 census for the asserted reason that the question was "necessary to provide complete and accurate data" to the Department of Justice for use in enforcing the Voting Rights Act. Pet. App. 562a; *see id.* at 245a-321a; 18-1214 Pet. App. 77a-161a. It concluded that the Secretary's decision was so inadequately and implausibly explained, given the actual evidence before his agency, as to be arbitrary and capricious; and that, in any event, it was inconsistent with the statutory directions provided by

Congress for the conduct of the census. The court was correct on both counts.

A. The Decision Was Arbitrary and Capricious

First, Secretary Ross's decision to add a citizenship question was arbitrary and capricious. His explanation for the decision "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That includes quantitative and qualitative evidence squarely belying his assertion that "no one provided evidence" that the citizenship question "would materially decrease response rates." Pet. App. 557a; *see id.* at 285a-293a. He also "entirely failed to consider . . . important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. He never addressed, for example, whether the citizenship data he decided to collect would actually be useful for enforcing the Voting Rights Act. *See* Pet. App. 297a-299a.

Moreover, as petitioners conceded below, an agency violates the APA when it invokes a pretextual rationale for its action. Pet. App. 312a; *cf. Woods Petroleum Corp. v. U.S. Dep't of the Interior*, 18 F.3d 854, 859-860 (10th Cir. 1994). It is difficult to imagine a clearer case of an agency head offering a pretextual explanation than the one presented by the record here. Secretary Ross's own public statements establish that he gave a misleading explanation for his decision to add the citizenship question. His initial decision memorandum asserted that he was acting in response to a December 2017 letter from the Department of Justice, which requested the addition of a citizenship question to "permit more effective enforcement of the [Voting Rights] Act." Pet. App. 548a. He said he "set out to take a hard look at the request" and "initiated a

comprehensive review process" by the Census Bureau, "*[f]ollowing* receipt of the DOJ request." *Id.* (emphasis added). He made similar statements in sworn congressional testimony. *See, e.g.*, *id.* at 524a. Shortly after this litigation commenced, however, Secretary Ross acknowledged that he initiated his drive to add a citizenship question long before December 2017—indeed, "[s]oon after" he took office in February 2017. *Id.* at 546a. And he admitted that it was he who asked the Department of Justice to request addition of the question, not the Department that reached out to him. *Id.*

Even standing alone, those shifting explanations and timelines would be sufficient to establish pretext; but the record contains more. It shows, for example, that Secretary Ross decided to add the citizenship question in the spring of 2017. Pet. App. 118a-126a, 313a. By May 2017, his "request that we include the citizenship question" was "months old," and he was hectoring his staff about "why nothing ha[d] been done." *Id.* at 81a. The staff assured him that they would "get [the question] in place," *id.*, described a need "to get [another agency] to request that citizenship be added back as a census question," *id.*, and began to ask other agencies to make such a request, *id.* at 82a. But both the Justice and Homeland Security Departments initially spurned those solicitations. *See id.* at 82a-84a. So Secretary Ross intervened directly with the Attorney General, who was "eager to assist." *Id.* at 90a. Political appointees at the Department of Justice then told the Secretary's staff, in September 2017, that "it sounds like we can do whatever you all need us to do." *Id.*

During all that time, the record reveals no substantive consideration of whether it would actually make

any sense to add a citizenship question for purposes of helping to enforce the Voting Rights Act. *See* Pet. App. 313a. And after eventually requesting addition of the qustion on that asserted basis, the Department of Justice rebuffed every effort by experts in the Census Bureau to inquire into their purported rationale. *See id.* at 95a-97a. As the district court in the California case concluded, this record reflects a determined "effort to concoct a rationale bearing no plausible relation to the real reason, whatever that may be, underlying the decision" to add the citizenship question. 18-1214 Pet. App. 4a. Such a concocted rationale cannot survive scrutiny even under the "deferential standard" (U.S. Br. 29) of the APA.

B. The Decision Was Contrary to Law

The district court also correctly held that the Secretary's decision to add a citizenship question was "not in accordance with law." 5 U.S.C. § 706(2)(A). As the court explained, the Secretary's late action violated 13 U.S.C. § 141(f), a provision of the 1976 Census Act requiring timely reports to Congress on the subjects and questions planned for the decennial census. Pet. App. 272a-284a. In addition, the decision contravened 13 U.S.C. § 6(c), a provision "that Congress enacted seemingly . . . for the very circumstances presented here." Pet. App. 262a; *see id.* at 262a-272a.

Section 6(c) requires that, in conducting the census, "[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" government and private entities "instead of conducting direct inquiries." 13 U.S.C. § 6(c). Congress adopted this provision to advance "the dual interests of economizing and reducing respondent burden." H.R. Rep. No. 94-1719, at 10

(1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 5476, 5478. It serves as a substantive constraint on the Secretary's delegated discretion to gather information through census surveys when that information is otherwise available through existing records (such as records from the Social Security Administration, sometimes referred to in this context as "administrative records").[3]

Secretary Ross decided to obtain citizenship data by both adding a citizenship question to the census *and* using existing records, instead of the alternative of using existing records alone. *See* Pet. App. 554a-556a. As the district court found, however, the evidence shows that using existing records *without* adding a question to the census would actually yield better, more accurate data. *See id.* at 268a-270a. Under these circumstances, Section 6(c) by its terms required Secretary Ross to use existing records "instead of conducting direct inquiries." 13 U.S.C. § 6(c). The Secretary's contrary decision would create precisely the kind of "respondent burden" that Congress directed him to avoid. H.R. Rep. No. 94-1719, at 10.

III. THE DISTRICT COURT PROPERLY ALLOWED EXTRA-RECORD DISCOVERY

The second question presented by petitioners addresses whether the district court properly authorized discovery outside of the administrative record. Based on the circumstances before it after petitioners initially proffered an administrative record, the district court ordered petitioners to produce a complete record—which led to a nearly ten-fold increase in the

[3] This is one of many reasons why the Secretary's decision is not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see also* Pet. App. 398a-408a.

size of the now-accepted record—and authorized respondents to take limited discovery going beyond the administrative record. Pet. App. 523a-528a; *see infra* n.6. Petioners appear to have abandoned any challenge to the district court's order requiring them to complete the administrative record. And, in holding that Secretary Ross's decision to add a citizenship question violated the APA, the district court ultimately relied "exclusively" on the materials in that completed record. Pet. App. 10a. In light of petitioners' apparent concession and the district court's decision, there might be no need for this Court to address the availability of extra-record discovery. To the extent the Court does reach that question, however, this case would provide an opportunity to clarify a subject that engenders considerable confusion. Under the circumstances of this case, the district court acted entirely within its discretion in authorizing limited extra-record discovery. And the information obtained through that discovery further supports the judgment below.

A. In Appropriate Circumstances, District Courts May Consider Information Beyond the Proffered Administrative Record

1. APA review is normally, but not always, limited to the administrative record and the agency's stated explanation

In a typical case under the Administrative Procedure Act, the "task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985) (internal citation omitted); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per

curiam). That inquiry generally focuses on the "contemporaneous explanation" offered by the agency. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); *see Camp*, 411 U.S. at 143.

This typical approach follows from the presumption of regularity. In the normal course, "[w]ith regard to the conduct of a public office," courts presume "that everything is done properly, and according to the ordinary course of business." *Schell v. Fauché*, 138 U.S. 562, 565 (1891). Although the presumption of regularity has its roots in evidentiary doctrine, it has evolved into more of "a general working principle," *Nat'l Archives & Record Admin. v. Favish*, 541 U.S. 157, 174 (2004), allowing "courts to presume that what appears regular is regular" when the government acts, *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

In the present context, an agency's "designation of the Administrative Record . . . is entitled to a presumption of administrative regularity," meaning that the court "assumes the agency properly designated the Administrative Record" unless the circumstances demonstrate otherwise. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). For similar reasons, courts generally presume that an agency has engaged in a reasoned decisionmaking process and offered a genuine explanation for its action, rather than concealing the true reason it acted. Accordingly, judicial review of the legality of agency actions is normally based on the agency's publicly stated grounds. *Cf. Vermont Yankee*, 435 U.S. at 549; *Camp*, 411 U.S. at 143.

But the presumption of regularity is not irrebuttable. Where the circumstances establish a likelihood that government officials have acted in an *ir*regular way, courts need not continue to presume that those

officials followed the regular order. *See, e.g., Favish*, 541 U.S. at 174; *Butler*, 244 F.3d at 1340. That is just as true in the APA context as elsewhere. *See, e.g.*, *Bar MK Ranches*, 994 F.2d at 740. In appropriate circumstances, district courts have the authority to seek and consider information going beyond the proffered administrative record—particularly where agency officials appear to have obscured the true basis for the agency's decision or concealed some of the information they considered in making the decision. And that authority is a critical part of our system of judicial review of agency action. It acts as a check against conduct that might otherwise "frustrate effective judicial review." *Camp*, 411 U.S. at 142-143; *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (the "presumption of regularity . . . is not to shield [the Secretary's] action from a thorough, probing, in-depth review").

Lower courts have repeatedly recognized this principle. Justice Kennedy's widely cited opinion as a circuit judge in *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982), for example, acknowledged "that even when judicial review is confined to the record of the agency, as in reviewing informal agency actions, there may be circumstances to justify expanding the record or permitting discovery." But the precise contours of those circumstances remains uncertain. *Public Power Council* identified four circumstances in which courts might go beyond an agency's proffered record. *See id.* at 793-794. Other circuits have articulated somewhat different approaches.[4] This has led to understandable "confusion

[4] *See, e.g.*, *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (listing three circumstances); *Axiom Res. Mgmt., Inc.*

on the part of litigants and the district judges who are often uncertain how many exceptions exist and what exactly the exceptions are." *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1279 (D. Colo. 2010). This case may present the Court with an opportunity to allay that confusion.

2. Extra-record discovery is not limited to cases involving bad faith or improper behavior

Petitioners have repeatedly suggested that extra-record discovery is *only* available in APA cases upon a showing of "bad faith or improper behavior" under this Court's decision in *Overton Park*. *E.g.*, U.S. Br. 16, 55; 18-557 U.S. Br. 15, 22.[5] That is not correct. As lower courts have long recognized, extra-record discovery is appropriate in a number of other circumstances as well—most of which are implicated by this case.

First, circumstances may require discovery regarding the proper contents of the administrative record. The complete administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers," including "evidence contrary to" the decision ultimately made by the agency. *Thompson v. U.S. Dep't of Labor*, 885 F.2d

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v. United States, 564 F.3d 1374, 1380-1381 (Fed. Cir. 2009) (adopting a single overarching standard); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (listing five circumstances); *Esch v. Yeutter*, 876 F.2d 976, 991-992 (D.C. Cir. 1989) (listing eight circumstances); *see generally* Hickman & Pierce, *Administrative Law Treatise* § 10.5 (6th ed. 2019) (collecting cases); Pet. App. 253a-259a.

[5] The briefs in *In re United States Department of Commerce*, No. 18-557, in which this Court suspended briefing on January 18, address issues relating to the district court's orders authorizing limited discovery.

551, 555 (9th Cir. 1989); *see* 18-557 Pet. 17 (adopting *Thompson* standard). It is essential for district courts to have the complete administrative record before them when they resolve an APA claim. *See* 5 U.S.C. § 706; *Pub. Power Council*, 674 F.2d at 794. If "it appears the agency has relied on documents or materials not included in the" record that it initially proffered to the reviewing court—as in this case—the court may require production of the complete record. *Pub. Power Council*, 674 F.2d at 794; *see, e.g.*, *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 79-81, 86 (D.D.C. 2018).[6]

To ensure the production of the complete record, it is occasionally necessary for district courts to authorize focused discovery into whether the proffered record is complete and, if not, what materials are missing. *See, e.g.*, *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *NRDC v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975). In rare circumstances, courts may also authorize discovery to re-create materials that should be in the record but were destroyed by the agency. *See, e.g.*, *Arkla Exploration Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 352, 357 (8th Cir. 1984); *Pitney Bowes Gov. Solutions, Inc. v. United States*, 93 Fed. Cl. 327, 334-

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[6] The present case illustrates the importance of such orders. Petitioners initially produced an administrative record that was facially incomplete. Pet. App. 525a-526a. After the district court ordered them to complete it, they eventually produced a new record with "over 12,000 pages of documents" (18-557 U.S. Br. 9-10)—nearly ten times the size of their initial submission (*see* D.Ct. Dkt. 173). If the district court had accepted petitioners' representations that the initial proffered record included "all of the non-privileged documents that were directly or indirectly considered by the Secretary" (D.Ct. Dkt. 194 at 2), it never would have seen a substantial majority of the documents that comprise the now-accepted record.

336 (2010). This type of record-focused discovery involves an application of the presumption of regularity. Courts begin by presuming that the agency has satisfied its obligation to produce the whole record. *See, e.g.*, *Bar MK Ranches*, 994 F.2d at 740. But that presumption is rebutted, at least to the point of allowing some further inquiry, if there are reasonable, non-speculative grounds for suspecting that the proffered record is incomplete.

Second, there are "cases in which supplementation of the record through discovery is necessary to permit explanation or clarification of technical terms or subject matter involved in the agency action under review." *Pub. Power Council*, 674 F.2d at 794; *see* Pet. App. 255a-256a. This can be particularly important in cases involving complex scientific or technical subjects, in which effective review depends on a judge's ability to "go outside the administrative record to consider evidence for background information." *Pub. Power Council*, 674 F.2d at 794; *see, e.g.*, *Arkla Exploration*, 734 F.2d at 352-353, 357; *Border Power Plant Working Grp. v. Dep't of Energy*, 467 F. Supp. 2d 1040, 1050-1051 (S.D. Cal. 2006). Even federal agency defendants at times ask courts to consider extra-record materials "allowing an explanation of agency process and technical material[s]." *E.g.*, *NRDC v. Evans*, 2003 WL 22025005, at *3 (N.D. Cal. Aug. 26, 2003).

Third, courts sometimes look to extra-record information to help them apply the APA's requirement that the agency must make a rational decision "based on consideration of the relevant factors." *State Farm*, 463 U.S. at 42, 43; Pet. App. 256a-257a. Particularly "when highly technical matters are involved" it can be "impossible" for a court "to determine whether the agency took into consideration all relevant factors

unless it looks outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *see, e.g.*, *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997).

This use of extra-record information does not undermine the principle that judicial review should focus on "the validity of the grounds upon which the [agency] itself based its action." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Courts may not use the information to second-guess "the correctness or wisdom of the agency's decision," *Asarco*, 616 F.2d at 1160, or as a source of "a new rationalization either for sustaining or attacking the [a]gency's decision," *Ass'n of Pacific Fisheries v. EPA*, 615 F.2d 794, 811-812 (9th Cir. 1980) (Kennedy, J.); *see Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981). They use it, instead, to develop the background and technical knowledge necessary to understand and review the rationale offered by the agency. Reference to extra-record information of this sort may be particularly important where an agency has made an informal decision without following notice-and-comment procedures, because even the complete administrative record may not contain the type of technical information normally found in comments from outside experts.

Finally, extra-record discovery may be necessary for purposes unrelated to the court's review of the merits of an APA claim. As petitioners conceded below, a district court may consider extra-record evidence in deciding whether APA plaintiffs have standing. Pet. App. 129a & n.30. And discovery may also be appropriate with respect to merits claims that are independent of the APA claim. Effective judicial review of a claim under the Enumeration Clause, for example,

requires consideration of evidence regarding the effect of the challenged action on distributive accuracy and congressional apportionment, which may not be found in the administrative record. *See supra* 5-10; 18-1214 Pet. App. 163a-165a.

3. *Overton Park* allows discovery when plaintiffs rebut the presumption that the agency's explanation is genuine

Petitioners' arguments about extra-record discovery in this case principally involve the district court's application of *Overton Park*, which recognizes the availability of discovery into an agency's decisionmaking process in cases involving "a strong showing of bad faith or improper behavior." 401 U.S. at 420. This Court has never elaborated on what constitutes "bad faith or improper behavior." And most lower-court decisions on the subject simply recite that language without explaining it. *See, e.g.*, *Murphy v. Comm'r of Internal Revenue*, 469 F.3d 27, 31 (1st Cir. 2006); *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). To the extent the Court finds it appropriate to address the subject in this case, lower courts and litigants would benefit from further guidance concerning the *Overton Park* standard.

1. *Overton Park* is best understood in light of the presumption of regularity. *See* 401 U.S. at 415. When an agency's decision is accompanied by a contemporaneous explanation, courts should begin their review by presuming that the stated explanation is a genuine one that resulted from a bona fide decisionmaking process. If nothing calls that presumption into question, then the "validity of the" decision should "stand or fall on the propriety of" the stated explanation. *Camp*, 411 U.S. at 143. But if known circumstances or available evidence provide a substantial basis for inferring that

agency officials may have departed from the regular order—that the decisionmaking process may have been infected by improper conduct, or that the public explanation they have provided may not reflect the actual basis for their action—then a reviewing court should not blindly accept the proffered explanation. *See Overton Park*, 401 U.S. at 420. Under such circumstances, focused discovery allows the court to inquire into the decisionmaking process for the purpose of determining whether or not it can appropriately review the decision based on the stated explanation and the proffered administrative record alone.

Sometimes, after reviewing the results of extra-record discovery, a court will not find a sufficient basis for concluding that the process involved bad faith or improper conduct. In those cases, the court should complete its review based exclusively on the originally stated explanation and the proffered administrative record, without regard to the information obtained in extra-record discovery. But where discovery confirms a suggestion of bad faith or improper conduct, the extra evidence developed through that further inquiry is properly considered in resolving whether the decision is valid under the APA. If the court vacates an agency decision based on such evidence, it would generally remand to the agency for a new decision process (along with, in appropriate cases, an order directing the recusal of officials who engaged in improper conduct). *Cf. Camp*, 411 U.S. at 143.

2. Whether a sufficiently "strong showing," *Overton Park*, 401 U.S. at 420, has been made to call the presumption of regularity into question will turn on the circumstances of each case. Courts have, for ex-

ample, allowed extra-record discovery based on circumstances indicating that agency decisionmakers had undisclosed conflicts of interest, were subject to improper political influence, or were otherwise biased against affected parties. *See, e.g.*, *Latecoere Int'l, Inc. v. Dep't of Navy*, 19 F.3d 1342, 1357, 1364-1365 (11th Cir. 1994); *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1281-1284 (W.D. Wis. 1997); *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45, 47, 49-52 (2011).[7]

Evidence of such improper conduct by agency officials creates a strong possibility that the agency's decisionmaking process was not a fair or publicly accountable one. It also creates a likelihood that some undisclosed factor other than the stated explanation was the actual basis for the decision (*e.g.*, a bribe, a desire to profit on an investment, an improper political directive, or some improper personal bias). In such circumstances, limiting judicial review to the stated explanation and the proffered administrative record would prevent courts from carrying out their obligation to review the agency's decision in light of the grounds on which the agency decisionmakers actually acted. *See generally Chenery*, 318 U.S. at 94; 5 U.S.C. § 706.

But *Overton Park* does not require evidence suggesting something as blatant as a bribe for courts to

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[7] When agency officials act with an improper motive, even the complete administrative record is unlikely to contain evidence of the misconduct. For example, agency officials are "not likely to keep a written record of improper political contacts," *Sokaogon Chippewa Cmty.*, 961 F. Supp. at 1281, or to document accepted bribes or personal biases. And some misconduct may itself aim to prevent the creation of record evidence. *See* Rohlf, *Avoiding the 'Bare Record'*, 35 Ohio N.U. L. Rev. 575, 607 (2009).

authorize focused discovery into an agency's decisionmaking process. Extra-record discovery is also warranted where other circumstances sufficiently indicate that the decisionmaking process may have been subverted or that the stated explanation for the decision is not genuine. That includes situations in which there is some substantial reason to believe that an agency has manufactured an explanation for the purpose of justifying a decision that was already made for other, undisclosed reasons. Whether or not the undisclosed reasons are "legally forbidden" (18-557 U.S. Br. 23), such a showing establishes a sufficient likelihood that the stated explanation is pretextual—thus rebutting, at least to the extent of allowing further inquiry, the presumption that the agency has provided the courts and the public with a genuine explanation for its action.

Treating a strong showing of pretext as a sufficient basis for extra-record discovery is consistent with *Overton Park*, which directed that "bad faith"—separate and apart from "improper behavior"—could be a basis for extra-record discovery. 401 U.S. at 420. Courts have recognized multiple forms of bad faith, including "[s]ubterfuges and evasions" and "evasion of the spirit of the bargain." Restatement (Second) of Contracts § 205 cmt. d (1979) ("A complete catalogue of types of bad faith is impossible . . . ."). And as petitioners acknowledge (18-557 U.S. Br. 23), the common meaning of "bad faith" encompasses any type of "[d]ishonesty" regarding "belief, purpose, or motive." *Black's Law Dictionary* 166 (10th ed. 2014). When an official first decides to take an action, then concocts a rationale to justify that action, and finally discloses the newly invented rationale but not the reasons that actually motivated the decision, he or she is acting with dishonesty of purpose and motive.

To be sure, the fact that a decisionmaker may have had "additional reasons for the decision beyond the ones expressly relied upon" (18-557 U.S. Br. 23) might not, by itself, establish bad faith. But where the evidence indicates that an official created and then invoked a new explanation for the purpose of justifying a decision that he was already inclined to make for other reasons, that is sufficient to satisfy the *Overton Park* standard. *See* Heinzerling, *The FDA's Plan B Fiasco*, 120 Geo. L.J. 927, 984 (2014) ("The point here is not that an agency has one and only one reason for any given decision, but that the reason or reasons it gives to the public for its decision should be genuine ones and not ones made up in order to survive judicial review.").

3. This understanding of *Overton Park* is consistent with *Chenery*. The critical insight of *Chenery* is that courts should review agency decisions based on "the grounds upon which the agency acted in exercising its powers," 318 U.S. at 95, and may not affirm them "based on another ground" that is "within the power of the . . . court to formulate" but not one upon which the agency's "action was based," *id.* at 88, 92. When an agency discloses the actual grounds on which it has based a decision, courts must review the decision on the basis of that explanation. *Id.* at 87. But *Chenery* does not allow an agency to offer the public a pretextual basis for an action while concealing the actual reason. To the contrary, *Chenery* rests on the principle that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Id.* ("The courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.").

Thus, requiring agencies to disclose the grounds that actually motivate their actions is essential to the principles of transparency and accountability that *Chenery* and the APA were intended to protect. *See, e.g.*, *Franklin*, 505 U.S. at 796; Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 996 (2007); *cf. Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 498-499 (9th Cir. 2018) ("[P]ublic accountability for agency action can only be achieved if the electorate knows how to apportion the praise for good measures and the blame for bad ones."). Those principles would be undermined by a rule barring any judicial inquiry into substantial allegations that agency officials have provided a pretextual justification for a decision.

4. Allowing extra-record discovery based on a sufficient showing of likely pretext is also consistent with precedent restricting courts' ability to "probe the subjective mental processes of the agency decisionmaker." *E.g.*, 18-557 U.S. Br. 19. In *Overton Park* itself, this Court recognized that while "inquiry into the mental processes of administrative decisionmakers is *usually* to be avoided," such an "inquiry *may* be made" if there is "a strong showing of bad faith or improper behavior." 401 U.S. at 420 (emphasis added).

Moreover, it is simply inaccurate to suggest that all extra-record discovery probes the decisionmaker's "mental processes." *E.g.*, U.S. Br. I, 55; 18-557 U.S. Br. 18, 25. When discovery is directed at officials other than the ultimate decisionmaker—as most of the discovery at issue here was—there is little danger that it will reveal the decisionmaker's inner thoughts or feelings. Even in the rare instance of a decisionmaker personally responding to written discovery or sitting for a deposition, many questions will not probe "mental processes." Questions about whether the

decisonmaker held a particular investment or communicated with a particular person, for example, do not necessarily require any response describing internal thoughts or mental impressions.

Nor does the *Morgan* line of cases forbid this type of discovery, as petitioners have suggested. *E.g.*, 18-557 U.S. Br. 17, 19, 38-39. Those cases involved an agency adjudication over stockyard rates. In the context of that proceeding—which "ha[d] a quality resembling that of a judicial proceeding"—this Court observed that it was "'not the function of the court to probe the mental processes of the Secretary,'" such as by allowing questioning on "the manner and extent of his study of the record" or about whether he considered or disregarded particular materials. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*); *see Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan I*). But the *Morgan* cases do not hold—or even suggest—that *any* discovery beyond the administrative record, with respect to *any* type of agency decision, necessarily constitutes improper "discovery into the Secretary's mental processes." 18-557 U.S. Br. 18.

5. Petitioners advance a much narrower understanding of *Overton Park*, contending that extra-record discovery is available only upon "a strong showing that the decisionmaker did not actually believe the stated grounds on which he ultimately based his decision, irreversibly prejudged the decision, or otherwise acted on a legally forbidden basis." 18-557 U.S. Br. 23; *cf.* U.S. Br. 42. That is not the standard articulated in *Overton Park*—or in any decision of this Court. And neither the purposes of the *Overton Park* standard nor

the dictionary definitions of "bad faith" and "improper conduct" demand such a cramped reading.[8]

Indeed, petitioners' narrow standard does not even find support in the circuit decisions petitioners cite. *See* 18-557 U.S. Br. 23, 33. The most recent, *Mississippi Commission on Environmental Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam), addressed whether, based on facts already known to the parties, an EPA regional administrator's participation in a proceeding violated the Due Process Clause; it did not consider whether to authorize extra-record discovery under *Overton Park*. The next, *Jagers v. Federal Crop Insurance Corp.*, 758 F.3d 1179, 1184-1185 (10th Cir. 2014), also did not involve any request for extra-record discovery; the cited passage explained why the agency's decision was not arbitrary and capricious based on a review of the administrative record. The final case, *Air Transportation Association of America, Inc. v. National Mediation Board*, 663 F.3d 476, 488 (D.C. Cir. 2011), merely recited the "bad faith or improper behavior" standard from *Overton Park* and applied it, without elaboration, to the facts before the court.

Moreover, the practical effect of petitioners' standard would be to create a nearly irrebuttable presumption of regularity with respect to the explanations that agencies proffer for their decisions. Under petitioners' standard, even a strong showing that the decisionmaker was "inclined to follow a certain path" from the beginning "or harbored additional motivations for his action" would be an "insufficient" basis for extra-

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[8] *See, e.g.*, *Black's Law Dictionary* 166 (10th ed. 2014) ("bad faith *n.* (17c) 1. Dishonesty of belief, purpose, or motive[.]"); *id.* at 875 ("improper *adj.* (15c) 1. Incorrect; unsuitable or irregular. 2. Fraudulent or otherwise wrongful.").

record discovery. 18-557 U.S. Br. 24. Instead, APA plaintiffs would apparently be required to make a threshold showing of "strong evidence" that the decisionmaker in fact "did *not* sincerely believe the basis for his decision, or that he *had* irreversibly prejudged the issue." *Id.* at 20 (emphasis in original). To make a showing that a person did not "sincerely believe[]" something, *id.*, however, it is generally necessary to provide evidence that the person lacked a subjective belief in it. And petitioners would take any inquiry into a decisionmakers' subjective mental beliefs off the table. *See, e.g.*, *id.* at 18, 19, 39.

Even if one could envision circumstances in which petitioners' evidentiary standard could be satisfied—perhaps a cabinet secretary misdirects to plaintiffs' counsel an email in which he confesses that a stated ground is pretextual—the standard does not make sense as a pre-condition to extra-record discovery. If an APA plaintiff could produce at the threshold direct evidence that the decisionmaker personally believed that he had irreversibly prejudged a decision, or believed that the stated basis was pretextual, or believed that his actual reason was an illegal one, what need would there be for additional discovery? That direct evidence, by itself, would be a sufficient basis for vacating the decision. Nothing in *Overton Park* suggests that the threshold showing necessary to obtain extra-record discovery should be equivalent to a showing sufficient to prevail on the merits, as petitioners now seem to contend. *Compare* 18-557 U.S. Br. 23, *with* U.S. Br. 42.

B. Extra-Record Discovery Was Appropriate Here, and Confirms That the Secretary's Decision Violated the APA

1. The district court did not abuse its discretion by authorizing extra-record discovery here. As explained above, the Secretary's demonstrably pretextual explanation for adding the citizenship question is sufficient to support a final judgment that the decision was arbitrary and capricious. *See also* Pet. App. 311a-321a. At a minimum, the abundant evidence of pretext surrounding his shifting timelines and explanations was surely enough to make out the threshold showing of bad faith required for extra-record discovery.

Petitioners' principal response to the powerful evidence of pretext in this case is repeated invocation of the presumption of regularity. U.S. Br. 15, 43, 44, 45; *see also* 18-557 U.S. Br. 22, 25, 31, 32, 43. But that presumption only allows "courts to presume that what appears regular is regular." *Butler*, 244 F.3d at 1340. It does not require them to ignore clear indications that agency officials have abandoned the regular order by concocting a rationale as the public justification for a decision that was actually made for undisclosed reasons.

Extra-record discovery was appropriate in this case for other reasons as well. Petitioners have conceded that it was necessary for the district court to consider extra-record evidence in deciding whether respondents have Article III standing. Pet. App. 129a n.30. In light of the complexity of this case, it was also appropriate for the district court to consider extra-record evidence to clarify technical matters and to ascertain the relevant factors that the Secretary should have

considered in making his decision. *See Pub. Power Council*, 674 F.2d at 794.

2. While the Court need not look beyond the (complete) administrative record to affirm the judgment below (*see, e.g.*, Pet. App. 10a), the information developed through discovery confirms that the Secretary's decision could not be sustained under the APA. For instance, depositions revealed that none of Secretary Ross's senior aides knew why he directed them to add the citizenship question. Pet. App. at 82a, 122a-123a, 314a. And after meeting with Secretary Ross, Attorney General Sessions actually forbade Justice Department personnel from meeting with Census Bureau personnel to discuss what information would supposedly be most helpful for enforcing the Voting Rights Act. *Id.* at 311a. This and similar extra-record information only reinforces the conclusion that the Voting Rights Act rationale eventually offered by the Secretary was a pretext designed to justify a decision he had already made on other grounds.

Other extra-record evidence provided important technical background to the district court or highlighted factors that the agency should have—but did not—take into account. For example, extra-record materials provided background on the Census Bureau's standards and practices for testing questions for inclusion on the census, and helped the district court understand how the Secretary deviated from those procedures. Pet. App. 306a n.74. Similarly, deposition testimony explaining the Census Bureau's confidentiality obligations and disclosure-avoidance practices helped identify an important aspect of the problem that the Secretary failed to consider. *Id.* at 297a-298a & n.72. While there is no need to consider

those or other extra-record materials to affirm the district court's judgment, the district court acted well within its discretion in authorizing the discovery that produced them, and it would be entirely appropriate for this Court to take them into account.

CONCLUSION

The judgment of the district court should be affirmed.

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