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

PETITIONERS' OPPOSITION TO
NYIC RESPONDENTS' MOTION FOR LIMITED REMAND

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Trial is long since over; briefing in this Court has concluded; oral argument has been heard; and the Court is poised to issue its decision soon. Yet now at the eleventh hour, private respondents—but not New York or the other governmental respondents—seek to reopen discovery on the basis of "[n]ew evidence, discovered after oral argument." Mot. 1. The Court should deny that request.

According to private respondents, a years-old document allegedly discovered among the personal effects of a deceased private citizen, Dr. Thomas Hofeller, somehow proves that *he* was the true mastermind behind the Secretary of Commerce's decision to reinstate a citizenship question to the 2020 decennial census—and all because Hofeller allegedly wrote an unrelated and cryptic paragraph in a separate letter that someone else gave to the Department of Justice (DOJ) official who later

drafted the formal request to the Census Bureau requesting a citizenship question.

Private respondents' conspiracy theory is implausible on its face. Moreover, the allegedly "new evidence" is not even new; respondents either already knew or, with minimal diligence, easily could have discovered its substance months ago. And in any event it is irrelevant to respondents' claims here. If anything, private respondents' motion only underscores the district court's fundamental error in allowing respondents to stray beyond the administrative record in the first place. The motion should be denied.

STATEMENT

1. a. Exercising the authority delegated to him by the Census Act to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a), the Secretary of Commerce, Wilbur L. Ross, Jr., determined in a March 26, 2018 memorandum that the 2020 decennial census questionnaire should include a question requesting citizenship information. Pet. App. 548a-563a. The Secretary's memorandum responded to a December 12, 2017 letter (Gary Letter) from DOJ, which was drafted by then-Acting Assistant Attorney General John M. Gore. *Id.* at 564a-569a.

The Gary Letter stated that citizenship data is "critical" to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. V 2017), and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data." Pet. App. 565a; see *id.* at 567a-568a. It further explained how citizenship data from the American Community Survey (ACS) suffered from at least four flaws that census citizenship data would avoid. 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.

b. Respondents successfully sought extra-record discovery, including to compel Gore's deposition. Pet. App. 452-455a. In his October 26, 2018 deposition, Gore was asked whether, when he was drafting the Gary Letter, he had had "any communication with anybody who was not a federal employee at the time about having a citizenship question on the census." D. Ct. Doc. 601-7, at 37-38.[1] Gore answered that he had "had a conversation with a gentleman named Mark Neuman," who Gore understood had been "advising the Department of Commerce and the Census Bureau with respect to this issue." *Id.* at 38. When asked for "the substance of [his] conversation with Mr. Neuman," Gore declined to answer on the basis of deliberative-process privilege. *Ibid.* Respondents did not challenge the privilege assertion, either then or later in the district court. Nor was Gore asked any follow-up questions about his meeting with Neuman.

Neuman was deposed two days later. See D. Ct. Doc. 601-8. He, too, identified Gore as someone "with whom [he had] communicated about the possible addition of a citizenship or immigration question to the 2020 census." *Id.* at 33. When asked whether he had "provided some information to Mr. Gore for purposes of the letter that DOJ subsequently drafted regarding the citizenship question," Neuman answered: "Mainly the—mainly a copy of the—of the letter from the Obama Administration, Justice Department, to the Census Bureau on the

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[1] Unless otherwise specified, all references are to the docket in No. 18-cv-2921 (S.D.N.Y.). The government sent a copy of D. Ct. Docs. 601 and 601-1 through 601-12 to this Court on June 3, 2019.

issue of adding a question on the ACS." *Id.* at 39-40. Neuman was not asked whether he provided anything else to Gore during their meeting.

During his deposition, Neuman was presented with a draft letter that he had produced in discovery (Neuman Letter), which purported to be a letter from DOJ to the Census Bureau requesting reinstatement of a citizenship question. D. Ct. Doc. 601-8, at 58-60; see D. Ct. Doc. 601-5, at 5-6 (copy of Neuman Letter). Neuman observed that the Neuman Letter "is very different than the letter that ultimately went from DOJ," D. Ct. Doc. 601-8, at 60, and he denied having been any "part of the drafting process of the letter" that was "sent by [DOJ] to the Commerce Department in December 2017," *id.* at 38. Neuman was not asked whether he shared the Neuman Letter with anyone. But the government also had produced a copy of the Neuman Letter to respondents in discovery before Gore's deposition, noting that it had been "collected from John Gore" "in hard copy." D. Ct. Doc. 601-5, at 4. Respondents did not ask Gore any questions about the Neuman Letter.

c. Following a bench trial, the district court entered judgment for respondents on their statutory claims, but ruled against them on their equal-protection claim. Pet. App. 1a-353a. This Court granted the government's petition for a writ of certiorari before judgment on February 15, 2019. Following expedited briefing, oral argument was heard on April 23.

2. a. On May 30, 2019, the private respondents—the New York Immigration Coalition (NYIC), CASA de Maryland, Inc., the American Arab Anti-Discrimination Committee, ADC Research Institute, and Make the Road New York (collectively, NYIC)—moved the dis-

trict court for an order to show cause why the government should not be sanctioned. D. Ct. Doc. 595. The State of New York and the other governmental respondents did not join the motion. NYIC claimed to have discovered "new evidence that contradicts sworn testimony of Secretary Ross's expert advisor A. Mark Neuman and senior DOJ official John Gore." *Id.* at 1. According to NYIC, that new evidence comprises (a) Gore's statement to staffers of a congressional subcommittee that Neuman gave him a copy of the Neuman Letter and (b) two files found in the personal effects of Dr. Thomas Hofeller, a private citizen and Republican redistricting expert who passed away last year. *Ibid.*

One of those files is an unpublished 2015 study discussing "the practicality of the use of citizen voting age population (CVAP) as a basis for achieving population equality for legislative redistricting." D. Ct. Doc. 595-1, at 55. The other, created two years later in August 2017, comprises a single paragraph discussing two cases about the VRA from 2006 and 2009. See *id.* at 123. That paragraph appears verbatim in the Neuman Letter—but not the Gary Letter. Compare *ibid.* with *id.* at 120.

According to NYIC, the "new evidence reveals that" Hofeller "played a significant role in orchestrating the addition of a citizenship question to the 2020 Decennial Census." D. Ct. Doc. 595, at 1. NYIC complained that "[b]oth Neuman and Gore concealed Dr. Hofeller's role in crafting the October 2017 draft letter [*i.e.*, the Neuman Letter] and the VRA enforcement rationale it advanced." *Ibid.* NYIC also alleged that "neither Neuman nor Gore disclosed that Neuman gave [the Neuman Letter] to Gore," and that "Gore's testimony that he initially drafted the DOJ letter to Commerce requesting the citizenship question was materially misleading

given that the December 2017 DOJ letter was adapted from the Neuman DOJ Letter, including, in particular, Dr. Hofeller's VRA rationale." *Id.* at 3.

b. During his deposition, Neuman discussed Hofeller at length. Neuman said "Tom Hoffler" was someone he spoke to "about a potential citizenship or immigration question on the 2020 census." D. Ct. Doc. 601-8, at 3. Neuman explained that Hofeller (whose name is misspelled in the deposition transcript) "was known in the redistricting community" and was "a point person for redistricting" in Republican circles. *Id.* at 6, 16. According to Neuman, Hofeller was "pretty important, because in the past Tom Hof[el]ler was able to get members of Congress to support funding for the [Census] Bureau." *Id.* at 10.

Neuman said that he probably spoke to Hofeller about a census citizenship question around five times during the presidential transition and up to a dozen times afterward. D. Ct. Doc. 601-8, at 7, 44. Neuman explained that those conversations primarily concerned block-level data, which Hofeller was "obsess[ed]" with "because block level data means that you can draw the most accurate districts." *Id.* at 45. Hofeller told Neuman that a census citizenship question would generate "block level citizen voting age population data," which would be useful "to ensure one person, one vote." *Id.* at 19-20. Neuman denied, however, discussing with Hofeller the use of census citizenship data "for reapportionment purposes," including "whether undocumented immigrants or non-citizens should be included in the state population counts for reapportionment purposes." *Id.* at 23. All told, Neuman's discussion of his conversations with Hofeller occupy more than 30 transcript pages. See *id.* at 3, 6-28, 30-32, 43-46, 49-51.

c. The district court declined to grant NYIC's request for an order to show cause, and instead advised the private respondents that if they wished to move for sanctions, they should file a motion and supporting brief no later than July 12, 2019. D. Ct. Doc. 605, at 1.

ARGUMENT

Private respondents—but not New York or the other governmental respondents—contend (Mot. 1) that Hofeller "concocted" the VRA rationale in the Gary Letter and "wrote a portion of an early Justice Department draft letter articulating the VRA rationale for adding the [citizenship] question." On that basis, they seek (Mot. 7) a "limited time-bound remand to the district court to engage in expedited factfinding." Private respondents' contention is meritless, and their request for a remand should be denied.

1. a. NYIC's conspiracy theory is implausible on its face. Although its theory has shifted somewhat since the filing in the district court—it no longer claims that the Gary Letter "bears striking similarities to Dr. Hofeller's 2015 study," D. Ct. Doc. 595, at 3; cf. D. Ct. Doc. 601, at 1-2—NYIC identifies the following chain supposedly linking Hofeller to Secretary Ross's decision:

1. Hofeller authored a 2015 study, never published, in which he observed that "[a] switch to the use of citizen voting age population as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites," D. Ct. Doc. 595-1, at 63, and that "[u]se of CVAP would clearly be a disadvantage for the Democrats," *id.* at 61.

2. Two years later, Hofeller created a file on his hard drive comprising a single paragraph:

> We note that in these two cases, one in 2006 and one in 2009, courts reviewing compliance with requirements of the Voting Rights Act and its application in legislative redistricting, have required Latino voting districts to contain 50% +1 of "Citizen Voting Age Population (or CVAP). It is clear that full compliance with these Federal Court decisions will require block level data that can only be secured by a mandatory question in the 2020 enumeration. Our understanding is that data on citizenship is specifically required to ensure that the Latino community achieves full representation in redistricting.

D. Ct. Doc. 595-1, at 123.

3. The Neuman Letter, which Neuman gave to Gore, contains that same paragraph. See D. Ct. Doc. 595-1, at 120; D. Ct. Doc. 601-5, at 5-6.
4. Gore later drafted the Gary Letter, which formally requested reinstatement of a citizenship question because census citizenship data would be useful for VRA enforcement in light of ACS citizenship data's well-known flaws. Pet. App. 567a-568a. The Gary Letter includes neither the paragraph in the Hofeller file nor any other text from the Neuman Letter.
5. The Secretary issued his March 2018 decisional memorandum, relying in part on the Gary Letter's description of the problems with ACS citizenship data for VRA enforcement.

From those alleged facts, NYIC asserts that Secretary Ross must have added the citizenship question *not* (as he said) because the resulting data would be responsive

to DOJ's formal request, but because he secretly was doing Hofeller's bidding to help "Republicans and Non-Hispanic Whites" and harm "Democrats" by enabling States to redistrict based on CVAP instead of total population. D. Ct. Doc. 595-1, at 61, 63. Even assuming the Hofeller files are admissible, but see Fed. R. Evid. 802, 901(a), NYIC's chain of logic fails at every step.

First, NYIC errs in attributing a discriminatory motive to Hofeller's 2015 study. Nowhere in that study did Hofeller suggest that he intended to harm any racial minority. Instead, the study was his attempt to predict, as an objective matter, the consequences of a potential ruling in favor of the appellants in *Evenwel* v. *Abbott*, 136 S. Ct. 1120 (2016), which this Court had not yet decided. Such a ruling would have required Texas to draw districts based on CVAP instead of total population. See *id.* at 1123. After exhaustively analyzing the demographic makeup of the existing districts and counties in Texas, the 2015 study observed:

> The 97 GOP districts have sufficient CVAP populations to actually form 103.2 districts, while the 53 Democrat districts only have sufficient CVAP population to comprise 46.8 districts. Use of CVAP would clearly be a disadvantage for the Democrats.

D. Ct. Doc. 595-1, at 61. That is an empirical observation about the impact of switching from total-population to CVAP-based districts, not an expression of intent to harm Democrats, much less Hispanics. Similarly, the study observed:

> There are presently 35 districts with [Hispanic CVAP] percentages over 40. As a whole, those 35 districts only contain sufficient [Hispanic CVAP] populations to comprise 30.1 districts.

D. Ct. Doc. 595-1, at 60-61. That, too, is an empirical observation, not an expression of intent to harm Hispanics. NYIC's claims (Mot. 2) of "an unconstitutional, racially discriminatory motive" in the 2015 study are thus baseless.

Second, the 2017 paragraph that appears in the Neuman Letter, which not even NYIC claims expresses a discriminatory motive, has no relation to the 2015 study (other than their alleged author). They were written years apart and deal with different issues: one is about the population base for redistricting, the other is about block-level data for VRA compliance. The two documents are thus unrelated in time and scope, and no reasonable reader could conclude that the latter was written in stealth service of the former. That breaks the chain between any purported improper motive expressed in the 2015 study and the paragraph that appears in the Neuman Letter.

Third, there is no connection between the Neuman Letter and the Gary Letter drafted by Gore. Even a cursory comparison reveals that the Gary Letter bears no resemblance to any part of the Neuman Letter, including the paragraph found in the Hofeller files. Compare Pet. App. 564a-569a with D. Ct. Doc. 601-5, at 5-6. Nor could any reasonable reader conclude that the Hofeller paragraph "sets forth the Government's publicly-stated VRA enforcement rationale." Mot. 5. The government's VRA rationale in the Gary Letter centers on four flaws in ACS citizenship data that would be cured by census citizenship data. Pet. App. 567a-568a. The paragraph in the Neuman Letter says nothing of the sort. The only thing the two documents have in common is that both purport to be letters addressed from DOJ to the Census Bureau—and even on that triviality, the

Neuman Letter is addressed to a different person and contains no signature. Tellingly, despite having had the Neuman Letter for months—and quizzing Neuman about it in his deposition, see D. Ct. Doc. 601-8, at 58-64 —NYIC has until now never suggested that it bore any resemblance to the Gary Letter.

Fourth, there is no basis to conclude that anything Hofeller wrote influenced Secretary Ross's decisional memorandum. The most NYIC can muster is that the Secretary "was aware" that Neuman met with Gore. Mot. 5, 9. But that fact was hardly a secret; Gore and Neuman freely testified that they had met. D. Ct. Doc. 601-7, at 38-39; D. Ct. Doc. 601-8, at 33-41, 53, 56. The Secretary's awareness of a meeting between Neuman and Gore does not even arguably show that he was stealthily acting to further the secret goals of Hofeller, a private citizen.

Moreover, had the Secretary wanted to reinstate a citizenship question to the 2020 decennial census for the sole purpose of enabling districts to be drawn on the basis of CVAP rather than total population, he did not need to rely on a secret unpublished study from Hofeller. The *administrative record itself* contains a request to add the question in part for that purpose. The Attorney General of Louisiana requested reinstatement of a citizenship question because, in his view, drawing districts without considering CVAP "dilutes the votes of all legally-eligible voters by improperly counting those ineligible to vote when determining the population for representative districts." Administrative Record 1079. When the Secretary and his staff later met with him in March 2018, "AG Landry noted that states have a lot of flexibility when it comes to redistricting, and having accurate data about citizen voting age population would

better inform the state legislatures charged with carrying out the task of redistricting." Administrative Record 1203. The State of Texas advanced a similar argument before this Court in *Evenwel*. See 136 S. Ct. at 1126 (noting "Texas'[s] separate assertion that the Constitution allows States to use alternative population baselines, including voter-eligible population").

Yet the Secretary did *not* rely on that rationale in his decisional memorandum. Instead, he relied on DOJ's explanation—which respondents, despite hundreds of pages of briefing, have never challenged—that citizenship data from the ACS has substantial limitations. It is implausible that the Secretary would affirmatively choose not to adopt the reasons provided by the Attorney General of Louisiana in a public letter and discussions memorialized in the administrative record, or the reasons urged by the State of Texas in a publicly filed brief in this Court—yet secretly adopt essentially the same reasons expressed in a years-old unpublished document found among the personal effects of a deceased private citizen. NYIC's conspiracy theory is thus nonsensical even on its own terms.

b. Remand also is improper because NYIC's request comes too late. NYIC had every opportunity to learn all of the information it now claims is "new," yet failed to do so. It is not entitled to a do-over.

NYIC either knew or easily could have learned that Neuman gave Gore a copy of the Neuman Letter. The government produced a copy of that letter in discovery before both Gore and Neuman's depositions, and expressly told respondents that it had been "collected from John Gore" "in hard copy." D. Ct. Doc. 601-5, at 4. So NYIC knew (1) Neuman had the letter; (2) Neuman met Gore and gave him documents; and (3) Gore

had the letter. If NYIC had not already deduced that Neuman gave the letter to Gore, it easily could have learned that fact with simple, obvious questions. To Gore: "Who gave you this letter?" To Neuman: "Did you give this letter to anyone?" NYIC asked neither. Neuman *was* asked what he gave to Gore, and he replied that he "mainly" provided an Obama-era DOJ document. D. Ct. Doc. 601-8, at 39-40. Unasked was the obvious follow-up: "*What else* did you give to Gore?" A party's incomplete deposition questioning provides no basis to reopen fact development long after trial is complete.

NYIC incorrectly insists (Mot. 9-10) that there remain a series of "outstanding questions" that must be resolved, including: "Who at Commerce knew that the VRA rationale came from Dr. Hofeller? Who at Commerce asked Dr. Hofeller to spell out that rationale in a draft DOJ letter? Who at Commerce knew about Dr. Hofeller's conclusion that the citizenship question would enable redistricting that is 'advantageous to Republicans and Non-Hispanic Whites'?" As an initial matter, those questions are irrelevant because they contain built-in assumptions that are false—"the VRA rationale" in the Gary Letter and the Secretary's decisional memorandum did *not* "c[o]me from Dr. Hofeller"; and neither Hofeller nor Neuman "spell[ed] out" anything "in a draft DOJ letter" because nothing they created or provided served as a draft of the Gary Letter.

More important, NYIC could have discovered the answers to every single one of those questions about Hofeller's (peripheral) role had it exercised some diligence. Neuman testified at length about Hofeller and their discussions about the citizenship question, CVAP, and block-level data. If NYIC had questions on those topics, it should have asked them. It did not. Indeed,

respondents (correctly) found Neuman's role so tangential that they did not designate or seek to admit into evidence even a single line of his deposition transcript. And it was respondents who insisted on proceeding to trial immediately after Neuman's deposition. Having deliberately made that strategic litigation choice, NYIC should not be heard to complain now.

Moreover, it appears that the law firm representing NYIC has had the Hofeller files since February or March, if not earlier. See Doc. 167-1, at 2, *Kravitz* v. *United States Dep't of Commerce*, No. 18-cv-1041 (D. Md. June 14, 2019) (law firm received physical drives on March 13, 2019); D. Ct. Doc. 601-12, at 4 (files were subpoenaed in February after Hofeller's estranged daughter alerted an advocacy group to the files "[l]ate last year"). If those files were as important as NYIC's lawyers now claim they are, counsel should have alerted the government and this Court to them months ago—and not mere days before a final decision in this case.

c. Remand is inappropriate for the further reason that none of the supposedly new "evidence" is relevant to this case. NYIC contends (Mot. 8) that the new evidence "indicates that Commerce understood that adding a citizenship question would enable redistricting methods harmful to voters of color." But that is a completely different injury and theory of liability from what respondents have maintained throughout this litigation. Until NYIC's recent eleventh-hour filings, respondents had maintained that their injuries arose from the mere presence of the citizenship question on the ground that it would result in an undercount of certain noncitizen populations. Not once did they assert that they would be injured because the citizenship question might ena-

ble States to use "redistricting methods harmful to voters of color." *Ibid.* A remand to develop facts to support a theory of injury that respondents did not raise is unwarranted.

Moreover, respondents could not have asserted that theory of injury anyway. For one thing, they would not have had standing, for the injury is entirely speculative: it will not materialize unless sovereign States independently choose in the future to redistrict based on CVAP rather than total population. That also would make any injury not fairly traceable to the federal government. Even setting aside those flaws, such a theory would fail on the merits, too. This Court has found that redistricting based on citizen voting-age population is constitutionally permissible under some circumstances. See *Burns* v. *Richardson*, 384 U.S. 73, 93-94 (1966). Indeed, "[t]he Constitutions of Maine and Nebraska authorize the exclusion of noncitizen immigrants" from their apportionment base (though it appears that neither State does so). *Evenwel*, 136 S. Ct. at 1125 n.3. And when recently asked to hold that redistricting based on CVAP is impermissible, this Court pointedly declined to do so. *Id.* at 1133; see *id.* at 1143-1144 (Alito, J., concurring in the judgment); cf. *id.* at 1133 (Thomas, J., concurring in the judgment) ("The Constitution * * * leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government."). Respondents could not claim to be injured by the citizenship question merely because it might someday enable States to choose a redistricting method that, under *Evenwel* and *Burns*, remains constitutional.

In passing, NYIC asserts (Mot. 2) that the Hofeller connection "suggests an unconstitutional, racially discriminatory motive," presumably a reference to NYIC's failed equal-protection claim. See Pet. App. 331a-334a. But NYIC has not even arguably shown any racially discriminatory motive on the part of Secretary Ross. During the decisionmaking process, the Secretary communicated with dozens of stakeholders, ranging from staunch supporters of the citizenship question to those who vehemently opposed it. *Id.* at 549a. It would be absurd to attribute all of their private motives to the Secretary. As the district court correctly observed, "point[ing] primarily to the motivations of 'those who influenced' Secretary Ross in the decisionmaking process"—such as Kris Kobach, Steve Bannon, and then-Attorney General Sessions—is insufficient "to impute their discriminatory purpose to" the Secretary. *Id.* at 333a (citation omitted); see *id.* at 333a-334a. It follows *a fortiori* that the allegedly discriminatory motives of Hofeller—whom the Secretary is not alleged to have contacted during his decisionmaking process—cannot be attributed to the Secretary either.

That said, NYIC's motion suggests that it might belatedly attempt to revive the equal-protection claim in the lower courts on the basis of the Hofeller files. In fact plaintiffs in *Kravitz*, *supra*, have done just that, and the district court in Maryland recently granted their motion for an indicative ruling under Federal Rule of Civil Procedure 62.1(a), stating that the Hofeller files raise "a substantial issue" potentially warranting relief on the equal-protection claim under Rule 60(b)(2). Doc. 174, at 1, *Kravitz*, *supra*, No. 18-cv-1041 (June 19, 2019). The court did not rule "that it would grant the [Rule 60(b)(2)] motion," Fed. R. Civ. P. 62.1(a)(3), indicating

that it anticipates yet more litigation on the equal-protection issue. Doc. 174, at 1, *Kravitz*, *supra*. The government addressed the equal-protection claim in its brief here "in the event respondents or other district courts attempt to rely on those claims." Gov't Br. 54.

Accordingly—and to avoid addressing the issue in an emergency posture—the Court may wish to address the equal-protection claim in its opinion to make clear that neither respondents' original evidence nor the Hofeller files demonstrate any racial animus on the part of Secretary Ross. Indeed, a finding that the Secretary's decision cannot be set aside as pretextual, see *id.* at 40-45, necessarily forecloses a claim that it may be set aside as pretextual for a discriminatory reason.

2. NYIC also tries to bolster its conspiracy theory with allegations of "false or misleading testimony or representations" on the part of Gore and Neuman. Mot. 5, 10. Those allegations are baseless.

NYIC's only allegation against Gore (Mot. 5-6) is that Neuman's having given Gore a copy of the Neuman Letter supposedly "contradicts Gore's deposition testimony in this case that he was the one who wrote the initial draft of the DOJ letter." Mot. 6. NYIC presumably refers to the following exchange:

> Q. Is it fair to say that you wrote the first draft of the letter from the Department of Justice to the Census Bureau requesting a citizenship question on the 2020 census questionnaire?
>
> A. Yes.

D. Ct. Doc. 595-1, at 106. Gore's answer was true: he did in fact write the first draft of *the Gary Letter*. NYIC has adduced no evidence to the contrary. NYIC's claim

that Gore lied conflates the Gary Letter with the Neuman Letter, an entirely different document.

NYIC fares no better with its allegations against Neuman, who is not a governmental employee and was represented by private counsel throughout this litigation. NYIC asserts that Neuman told three falsehoods: (1) he said "he was not 'part of the drafting process of the DOJ letter' requesting the addition of a citizenship question"; (2) he "denied that an October 2017 meeting between him and Gore was about a 'letter from DOJ regarding the citizenship question' "; and (3) he "testified that Dr. Hofeller advised him that adding the question would 'maximize' representation for the 'Latino community.' " Mot. 5-6 (brackets and citations omitted).

The first statement is unequivocally true: Neuman did not play a role in drafting *the Gary Letter*. As explained above, NYIC's contrary assertion rests on a willful conflation of the Neuman Letter with the Gary Letter. As for the second statement, NYIC has mischaracterized Neuman's testimony. Neuman left no doubt that his meeting with Gore was "about the possible addition of a citizenship or immigration question to the 2020 census." D. Ct. Doc. 601-8, at 33. He further clarified that the meeting was not specifically about a "letter from DOJ," but more generally about "how Census interacts with the Justice Department," and he agreed that "the timing" of his meeting with Gore "dovetails with what you and I were discussing earlier" about "a meeting * * * *about a letter from DOJ*." *Id.* at 53 (emphasis added). NYIC could not possibly have been misled about the nature of the meeting between Gore and Neuman. And NYIC has not explained what is supposedly false about the third statement; it is perfectly consistent for Hofeller to have told Neuman one thing while having

written something else in his unpublished 2015 study. Moreover, NYIC again has misrepresented Neuman's testimony; he *denied* that the statement "was something that [Hofeller] suggested" and instead made clear that the "point about maximization is *my* word. I want Latino representation to be maximized." *Id.* at 49 (emphasis added).

3. a. A remand for factfinding at this late hour also would prejudice the government. NYIC's contention (Mot. 7) that "2020 Census forms can be finalized without additional congressional appropriations as late as October 31" is unsupported by the record. The witness upon whose testimony NYIC relies made clear that "[u]nder the current budget, * * * changes to the paper questionnaire after June of 2019 * * * would impair the Census Bureau's ability to timely administer the 2020 census," and that a delay until October would be feasible only with "exceptional resources." J.A. 905-906. And the same witness previously testified that "changes to the paper questionnaire after June of 2019" would be infeasible "[w]ithout appropriate funding adjustments," D. Ct. Doc. 502-2, at 214, and that October was a viable possibility only "[w]ith exceptional effort and additional resources," D. Ct. Doc. 502-4, at 98. The district court thus correctly found that for all practical purposes, "the Census Bureau needs to finalize the 2020 questionnaire by June of this year." Pet. App. 12a.

b. The Court also should reject NYIC's alternative request (Mot. 11 n.3) to delay decision "pending the district court's resolution of [NYIC's] sanctions motion." NYIC has not filed a sanctions motion; the district court did not grant its previous request, see D. Ct. Doc. 605, at 1, and NYIC has until July 12 to decide whether to file a new motion, *ibid.* This Court should not hold its

decision for a possible sanctions motion in the district court that has not yet been filed and that NYIC is under no obligation to file. Moreover, any motion for sanctions based on alleged discovery misconduct not only would be meritless, see pp. 17-19, *supra*, but also would be a collateral issue that has no bearing on the disposition of this case on the merits.

Nor should the Court grant NYIC's alternative request (Mot. 11 n.3) to dismiss the writ as improvidently granted. As the petition for a writ of certiorari before judgment observed (at 16), "to the government's knowledge, this is the first time the judiciary has ever dictated the contents of the decennial census questionnaire," and "[i]n light of the immense nationwide importance of the decennial census, if the district court's ruling is to stand, it should be this Court that reviews it." Those observations remain true regardless of NYIC's farfetched conspiracy theory; indeed, indulging its belated request to dismiss this case would effectively allow the district court's judgment to stand with no appellate review at all.

CONCLUSION

Respondents' motion should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JUNE 2019