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 OF RONALD A. CASS AND CHRISTOPHER C. DEMUTH, SR., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE*[1]

Amici are teachers, scholars, and former government officials who each have had extensive engagement with administrative law over a period of more than 40

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

years. *Amici* have served in a variety of positions in the United States government, including positions in the Executive Office of the President, executive departments, independent agencies, and the judicial branch. *Amici* have been responsible for making decisions in official capacities and for reviewing agency decisions. They also have been deeply involved with organizations devoted to administrative law and have taught classes and written numerous articles and books on matters implicated in the questions presented in this case. This brief reflects *amici*'s long-standing interests in the subject of administrative law and particularly in standards for judicial review of administrative action.

SUMMARY OF ARGUMENT

The questions presented in this case address (1) the manner in which courts decide whether an administrative action is "arbitrary" or "capricious" or "an abuse of discretion" and (2) the degree to which courts are permitted to inquire into the particular considerations in the mind of an administrator, seeking to obtain information outside the administrative record to determine an administrator's motivation. Both matters are critical to the dividing line between judicial authority and the authority reposed in other branches of government. These are vital aspects of assuring that distinct governmental powers remain committed to the branches to which they are constitutionally assigned.

The decision below is unusual in the degree to which it substitutes judicial determinations for administrative ones on matters committed to agency discretion, see *New York v. Department of Commerce*, No. 18-CV-2921, at 194–253 (S.D.N.Y., Jan. 15, 2019) (*SDNY Decision*) and for its intrusive inquiry into (and

reliance on) the motives of official decision-makers, see *id*., at 31–102, 245–53.

These aspects of the *SDNY Decision*, however, also are emblematic of broader misunderstandings of the review provisions embodied in the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706. The errors made in the decision below illustrate the need for this Court to clarify both (1) the appropriate standard for review of action that is committed to agency discretion and (2) limitations on judicial inquiry into bases for administrative decisions focused on official motive, especially inquiries that delve into matters outside the administrative record presented in court.

First, there is a stark difference between the appropriate standards for judicial review of questions of statutory *interpretation* and judicial review of administrative *implementation* of statutory provisions. Under the APA, as well as prior law, courts decide matters of legal interpretation. See, e.g., 5 U.S.C. § 706; *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940). Agencies decide matters of implementation subject to review that may be searching on some questions but is deferential on matters within an agency's policy discretion. Compare, e.g., *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 228–32 (1994), with *Heckler v. Chaney*, 470 U.S. 821, 831–35 (1985) (*Chaney*). The distinction between these subjects and review standards has been misunderstood, with courts at times deferring to administrative decisions on core matters of legal interpretation and other times inserting themselves into matters of implementation committed to agency authority. See, e.g., Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron *Step Two*, 2 Admin. L.J. 255, 262–63, 266–67 (1988);

Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 537–39, 542–47 (2018) (Auer *Deference*); Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294, 1311–19 (2015) (*Rethinking*); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 115, 120 (1998); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1087–89 (2008); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 453–56, 472–75 (1989).

Recognition of confusion over the proper standards for review, as well as their importance, has prompted this Court to revisit questions respecting their contours repeatedly. See, e.g., *City of Arlington v. Federal Communications Commission,* 133 S.Ct. 1863 (2013) (*City of Arlington*); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012) (*Christopher*); *Barnhart v. Walton*, 535 U.S. 212 (2002) (*Barnhart*); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (*Mead*). The Court is again addressing limits on deference to agency interpretations of law—specifically, the meaning of an agency regulation—this Term in *Kisor v. Wilkie*, No. 18-15, cert. granted, Dec. 11, 2018 (*Kisor*).

The instant case focuses attention not on the limits to *deference* but on the limits for judicial *review*, under APA § 706(2)(A), of an exercise *of policy discretion* committed to an agency by law. Many statutes commit some measure of discretion to administrators while setting boundaries around that discretion. The law's directives may tightly constrain the administrative

decision or may give considerable leeway. But the reviewing court's task is to interpret the limits set by law and to review exercises of discretion only for the sorts of unreasonable action that the APA proscribes: action that is arbitrary, capricious, or an abuse of discretion. See APA, 5 U.S.C. § 706(2)(A). This does not include review to determine if an action is less well-reasoned than a judge would like, or weighs evidence and considerations differently than the judge would have, or is associated with political considerations that the judge would not embrace. See, e.g., *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

Although the aspect of a decision that is committed to agency discretion is excepted from review, § 701(a)(2), review of other aspects of the exercise of discretion is generally available to check abuses of discretionary authority. That review should assess whether a decision is so far outside the bounds of reasoned decision-making as to constitute action that is arbitrary (i.e., unreasoned), capricious (based on whim), or abuses discretion (based on reasons that cannot possibly be credited as appropriate grounds for the action being reviewed). *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 511–14 (2009) (*Fox Television Stations*); *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981, 989 (2005) (*Brand X*); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–47 (1996) (*Smiley*).

The *SDNY Decision* evidences a striking disregard for limitations associated with review of matters committed to the discretion of administrative officers. The sort of searching inquiry engaged in below goes beyond careful review to assure that none of the grounds for

overturning discretionary actions applies. It amounts to judicial revision of the task committed to the administrator, substituting judicial for administrative judgment on every significant aspect of the decision. Indeed, the decision below would overstep the bounds of the sort of internal evaluation typically done by executive branch officials reviewing major decisions of other officials—even though executive branch review, which takes place within the same branch authorized to implement the law, is naturally in keeping with a more searching inquiry into the grounds for decision. See, e.g., Christopher DeMuth, *OIRA at Thirty*, 63 Admin. L. Rev. 101, 106 (2011). (One of this brief's *amici* oversaw this process as Administrator of the Office of Information and Regulatory Affairs. See *id*.)

Second, the *SDNY Decision* makes a mistake that is both contrary to law and dangerous in its potential effects on governance by seeking to plumb the *motivation* of administrative decision-makers, rather than evaluating the consistency of their *actions* with legal standards. See *SDNY Decision*, at 31–102, 245–53. This Court has made clear that, in general, for a court reviewing agency action, it is "not the function of the court to probe the mental processes" of the administrator. *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan II*). The Court has warned that delving into the motives and thought processes of a decision-maker in a co-equal branch of government would be "destructive" of the responsibility of administrators and would undermine "the integrity of the administrative process." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan IV*).

Last term, in *Trump v. Hawaii*, No. 17-956 (U.S. Jun. 26, 2018) (*Trump v. Hawaii*), this Court examined another challenge to an administrative action

predicated in part on the assertion that claimed bases for the action were pretextual and that the actual bases were constitutionally proscribed (so that the action assertedly violated plaintiffs' legal rights). The Court stated that there are exceptions to the general rule that courts will not look behind the stated reasons for administrative action, but those exceptions are narrow and reserved for highly unusual circumstances. See *Trump v. Hawaii*, maj. op., slip op. at 32–33. The Court concluded that the exceptions did not apply, see *id.*, maj. op., slip op. at 32–34, and proceeded to review the challenged action to see if it was supported by a merely rational basis, see *id.*, maj. op., slip op. at 33–37.

Amici strongly support the Court's traditional reluctance to examine the motives of administrative decision-makers exercising legally granted authority. Having been government decision-makers as well as academic critics of government decisions, *amici* underscore the threat to constitutionally separated powers if reviewing judges seek to divine the motives of officials in another branch of government, investigating their intentions rather than checking the legality of their decisions.

Amici recognize that answers to the question when courts may undertake an examination of administrative motivation are contested. Compare *id.*, maj. op., slip op. at 32–33, with *id.*, slip op. at 3–8 (Breyer, J., dissenting) (making an "as applied" assessment of the bona fides of the asserted bases for the administrative action); *id.*, slip op. at 1–23 (Sotomayor, J., dissenting) (assessing purpose of administrative action based on extrinsic evidence). In *amici*'s view, however, except in extraordinary circumstances, that inquiry is not appropriate. It is especially inappropriate if it relies on

extrinsic evidence, and most emphatically if it is based on queries to or examination of decision-makers. Such inquiries will chill discussion of potential government actions among a wider circle of officials—even though discussion among a broader set of officials frequently improves decisions. Pursuit of extra-record evidence of official motives in court should not be countenanced for the same reason that calling judges before the dock to answer questions about the motives behind their decisions is not permitted. See, e.g., *Morgan IV*, 313 U.S. at 422.

Finally, changing the traditional, APA-based standard of review to accommodate inquiries into official motives encourages use of judicial review not strictly as a means for keeping official actions within *legal* bounds but as extensions of *political* disputes into the judicial domain. This undermines the perceived legitimacy of the courts and intrudes on decisions committed to other branches. Those concerns have been voiced in connection with discussion of the scope of judicial remedies and their implications for forum-shopping. See, e.g., *Trump v. Hawaii*, slip op. at 5–10 (Thomas, J., dissenting). The use of judicial challenges as political weapons has been observed by others, including politically-selected officials who have participated in them. See, e.g., Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. Rich. L. Rev. 633 (2018) (describing coordination among politically-allied state attorneys general and other groups in legal challenges). Changing the rules of judicial review to accommodate concerns about motives exacerbates problems associated with the political use of judicial fora.

ARGUMENT

I. Judicial Review Should Not Intrude on Discretion Granted to Administrators by Law.

A. Judicial Review of Actions Based on Policy Considerations Implementing Statutory Directives Should Be Distinguished from Statutory Interpretation.

The appropriate standards for judicial review of administrative actions have been the most discussed questions in administrative law—and among the most discussed questions in all of American law—for the past 35 years. See, e.g., Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 782 (2010); Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1, 2 (2013); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. U. L. Rev. 551, 552–53 (2012). This reflects both the standards' importance and the lack of clarity respecting them. Standards of review are critical to the dividing line between judicial authority and the authority reposed in other branches of government. They are central to assuring that distinct governmental powers given to different branches of government remain committed to the branches to which they are constitutionally assigned. To that end, this Court has repeatedly endeavored to clarify the contours of the standards for judicial review of administrative action. See, e.g., *City of Arlington*, *supra*, 133 S.Ct. at 1868–73; *Christopher*, *supra*, 132 S.Ct. at 2165–69; *Fox Television Stations*, *supra*, 556 U.S. at 511–14; *Brand X*, 545 U.S. at 981–989; *Barnhart*, *supra*, 532 U.S. at 518–22; *Mead*, *supra*, 533 U.S. at

530–34; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Smiley*, *supra*, 517 U.S. at 740–47.

Much academic commentary has focused on the distinction between standards for review of statutory interpretation by administrators and review of policy decisions that often are framed in the same terms as statutory grants of administrative authority. See, e.g., Beermann, *supra* at 788–91, 797–99, 805–07; Byse, *supra* at 261–67; Cass, *Rethinking*, *supra* at 1311–15; Eskridge & Baer, *supra* at 1123–35; Farina, *supra* at 466–67, 476–79, 499–502; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 Admin. L.J. Am. U. 187, 198–200 (1992); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 863–64, 870–72 (2001); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143, 1145–50 (2012). Statutory interpretation is the province of the courts; but decisions necessary to implement the laws commonly rest with administrative officials, who frequently invoke statutory terminology to explain their policy choices. So long as the delegation of discretion is consistent with the Constitution's commitment of the law-making power to Congress,[2] and the action of

[2] The evidence of legislative commitment of discretion does not, of course, resolve the question whether the degree and nature of the discretion accorded violate strictures on delegation of legislative power. See, e.g., *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1042–43 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 151–61, 177 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335–53 (2002); Neomi Rao, *Administrative*

the administrators does not exceed the scope of statutorily-granted discretion, the choice of discretionary actions is decidedly the province of other branches, not the courts.

Although this distinction between interpretation and implementation has been a source of confusion, the standards applicable to the two distinct sorts of decision are spelled out in the APA. The APA directs reviewing courts to "decide all relevant questions of law [and] interpret constitutional and statutory provisions . . ." 5 U.S.C. § 706. It excepts agency action from review "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). It also directs that courts are to "hold unlawful and set aside agency actions . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Decisions on questions of law, such as the meaning of a statutory provision, plainly are committed to the courts. Reviewing judges are instructed to *decide* legal questions and to *interpret* legal provisions. Courts' authority over legal questions includes interpretation of the scope of discretion granted by law. See, e.g., *Michigan v. Environmental Protection Agency*, 135 S.Ct. 2699, 2706–07 (2015); *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S.Ct. 2427, 2439–49 (2014). Policy authority is exercised in the space permitted for discretionary decisions within the bounds of law. Unlike review of questions of law, once the scope of policy authority is defined, review of its exercise focuses on *finding* whether actions are arbitrary, capricious, or an abuse of discretion. These

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Collusion: How Delegation Diminishes the Collective Congress, 90 N.Y.U. L. Rev. 1463 (2015).

are narrowly tailored standards prohibiting actions that are without reason (arbitrary), that respond to considerations that are inexplicable, transient, and unrelated to the merits of the matter (capricious), or that turn on considerations that cannot be credited as appropriate bases for decision (abuse of discretion, such as, for example, if the Federal Communications Commission decided to grant broadcast licenses only to Commissioners' relatives). See, e.g., Cass, Auer *Deference*, *supra* at 539. The concluding phrase of § 706(2)(A), telling courts to set aside decisions "otherwise not in accordance with law" cannot be read as authorizing significant further review without violating basic rules of statutory construction and making the rest of the section redundant.

The standards set forth in § 706(2)(A) do not contemplate reconsideration of the merits of policy choices, only their fit with basic criteria for reasoned decision. See, e.g., U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (*Attorney General's Manual*) (explaining APA's consistency with prior law; APA provision for judicial review "does not empower a court to substitute its discretion for that of an administrative agency"). Commentary on behalf of the Attorney General at the time of APA's enactment emphasized that substituting judicial for administrative discretion would depart from prior law, result in the courts exercising executive authority, and violate the constitutional allocation of powers. See *id*., at 105–08. Even writings expressing skepticism of the *Attorney General's Manual* as a neutral presentation of the law, see, e.g., George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1682–83 (1996), do not provide reason to believe

that the APA approved substitution of judicial for administrative discretion on policy matters.

Thus, under the APA (and similar statutes), judicial review of policy decisions should not be subject either to the *de novo* review appropriate for issues of law that are in the courts' domain or to review that is so intensive that it effectively becomes *de novo* review. See, e.g., Cass, *Rethinking*, *supra* at 1314–15; Merrill & Hickman, *supra* at 836; Strauss, *supra* at 1145–50. Indeed, past decisions suggest a line of demarcation for judicial review far short of that result. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Brand X*, 545 U.S. at 981, 989; *Smiley*, 517 U.S. at 740–47; *Webster v. Doe*, 486 U.S. 592, 600–01 (1988) (*Webster*); *Chaney*, 470 U.S. at 831–35.

B. Courts' Role in Reviewing Discretionary Agency Action under the APA Is Strictly Limited.

The decision below purports to apply the review provisions embodied in the APA, 5 U.S.C. §§ 701–706. See *SDNY Decision*, at 194–253. The *SDNY Decision* describes the course of events that led to the challenged administrative action in great detail. It recites extensively the various considerations advanced by interested parties and by public officials. Yet the tenor of the court's recitation of these considerations, and its subsequent disposition of parties' claims, indicates that the court substituted judicial judgment for administrative judgment.

The question presented here, however, is whether § 706(2)(A) can be read to provide for the sort of searching review evident in the *SDNY Decision*, and, if so, whether that can co-exist with accepted legal and constitutional standards. In the view of *amici*, the

lower court's decision seriously misapplies § 706(2)(A) of the APA, contravening limitations on judicial review contained in the APA and long recognized by this Court. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Smiley*, 517 U.S. at 740–47 (1996); *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 831–35; *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813–14 (1978) (*Citizens Committee*); *American Trucking Associations v. United States*, 344 U.S. 298, 314–15 (1953) (*Trucking Associations*).

There is no question that the action challenged in this litigation is properly subject to review under APA § 706(2)(A), as it is action for which the Secretary of Commerce exercises discretionary authority under statutory instructions. Responsibility for the decennial census is constitutionally assigned to Congress, see U.S. Const., art. I, sec. 2, cl. 3, and responsibility for conducting the census is delegated to administrators by law. Congress first assigned that function to marshals. See Census Act of 1790, 1 Stat. 101. Currently, the responsibility for conducting the census and making decisions in support of that task resides with the Department of Commerce. See Census Act of 1954, 68 Stat. 1012, 13 U.S.C. §§ 1 et seq. The law provides broad discretion to the Secretary of Commerce. See, e.g., *id*. at §§ 4, 141. That discretion undoubtedly includes authority to select the questions asked in the decennial census. The Secretary's discretion is not so broad as to bar any review under the APA's declaration that its review provisions do not apply "to the extent that" matters are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). But the discretion granted to the Secretary of Commerce plainly is broad enough that his action is appropriately reviewed under APA § 706(2)(A).

Section 706(2)(A) was designed as a check on misuse of administrative discretion, see, e.g., Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, *Administrative Law: Cases and Materials* 126–27 (7th ed. 2016); *Trucking Associations*, 344 U.S. at 314–15. The limited nature of such review was clearly understood in cases that preceded the APA and many decided following the APA's enactment. See, e.g., *Citizens Committee*, 436 U.S. at 813–14; *Trucking Associations*, 344 U.S. at 314–15; *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185–86 (1935); *Attorney General's Manual*, *supra* at 105–08. That understanding has been reaffirmed more recently as well. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14.

However, the court below conducted the judicial review function in a manner more akin to *de novo* review than to the review provided for under that APA section. The district court effectively compares the administrator's judgments leading to and supporting the action taken to the court's *own* view of *better* judgments, ones more sensitive to concerns that resonate with the district judge and that balance costs and benefits in a manner more congenial to the judge. See *SDNY Decision*, at 225–45.

Despite the care taken in delineating reasons for preferring a different set of evaluations to those made by the Secretary of Commerce, the district court's approach seriously misunderstands the standard for review in APA § 706(2)(A). See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Smiley*, 517 U.S. at 740–47 (1996). The skepticism of the court below respecting all aspects of the administrative decision permeates the court's discussion, including discussion of the administrative action's consistency with APA § 706(2)(A), underscoring the intrusive nature of the court's review.

Perhaps, the court below was misled by statements in decisions such as *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (*Overton Park*), respecting the need for an inquiry that is "searching and careful," to support review that goes well beyond assuring that exercises of discretionary authority are not arbitrary or capricious or an abuse of discretion. See, e.g., *SDNY Decision*, at 197. The decision below seems to give weight to that statement, even though *Overton Park* also cautioned that the "standard of review is a narrow one." *Overton Park*, 401 U.S. at 416. Even if the decision below is not entirely guided by this Court's decision in *Overton Park*, the special circumstances in that case merit emphasis along with instruction that the appropriate standard of review for arbitrariness, capriciousness, or abuse of discretion insists on congruence with standards of reason that are within the bounds of statutory command, not on consistency with reviewers' preferences.

The lower court's misunderstanding presents a special difficulty when applied to a matter of great public import; even more relevant to the interests of *amici*, it threatens to undermine the division between courts' role and the role constitutionally assigned to the political branches. Cf. *Trump v. Hawaii*, slip op. at 5–10 (Thomas, J., concurring) (discussing threat to constitutional structure from judicial remedies that unduly intrude into decisions committed to political branches). Sensitivity to the importance of this dividing line—to the separation of powers that is central to constitutional structures—is visible in numerous cautions from this Court respecting the limits of judicial review. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 30–32; *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 830–35; *Fiallo v. Bell*, 430 U.S. 787, 792, 799 (1977); *Morgan IV*, 313 U.S. at 422. The same can be said of

standards, such as those in 5 U.S.C. §§ 706(2)(B)–(D), (F), which are less deferential but address matters within the core competence (and legal assignment) of the judiciary. See, e.g., Cass, *Rethinking*, *supra* at 1313–14. See also Beermann, *supra* at 788; Farina, *supra* at 472–75; Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377, 1377–78 (1997).

The APA standards of review encompassed in 5 U.S.C. § 706(2)(A)—review to identify "arbitrary" or "capricious" actions or actions that constitute an "abuse of discretion"—are narrow, focused, and specific. In contrast to review for administrative decisions that contravene constitutional or statutory commands, 5 U.S.C. §§ 706(2)(B), 706(2)(C), the specific instructions in § 706(2)(A) identify actions that violate basic requirements of reasoned decision-making. That standard is plainly consistent with the assignment of discretion to administrators and with the division of responsibilities among the branches. See, e.g., Cass, Auer *Deference*, *supra* at 538–39. The decision of the court below exceeds the scope authorized by APA § 706(2)(A).

II. Courts Should Not Seek Extrinsic Evidence of Administrators' Motives for Actions Challenged under the APA.

A. Review of Agency Actions under the APA Focuses on Lawfulness, Including Basis in Administrative Record, Not on Motives.

The second question presented—whether the court below improperly sought and based its decision on extrinsic information respecting (or from which the court inferred) the motivations behind the action by

the Secretary of Commerce—also presents a matter of both considerable and increasing importance. The answer to this question, however, should be entirely clear: courts should not inquire into official motives, only into the consistency of official decisions with legal requirements.

The starting point for evaluation of the issue, as this Court has stated repeatedly over the past three-quarters of a century, is the longstanding rule that, in general, when reviewing agency action, it is "not the function of the court to probe the mental processes" of the administrator. *Morgan II*, 304 U.S. at 18. Three years after this Court's decision in *Morgan II*, in a continuation of the litigation that first elicited Chief Justice Hughes' memorable phrase, this Court repeated that remonstrance. Justice Frankfurter, writing for the Court in *Morgan IV*, observed that seeking to examine the motivations of an administrator—like seeking to examine the motivations of a judge—would be "destructive" of the "responsibility" of the official whose motivations are the subject of inquiry and would undermine "the integrity of the administrative process." *Morgan IV*, 313 U.S. at 422.

In particular, this Court has made plain that use of judicial processes such as hearings and depositions to inquire directly into the thinking of administrative decision-makers is inappropriate. That was the focus of the second of the four *Morgan* cases decided by this Court. See *Morgan II*, 304 U.S. at 18. That is also an error made by the court below in the instant case. Yet, this case also presents an opportunity to identify broader limits on judicial inquiries into official motives.

Justice Frankfurter's analogy to probing the actual motivation behind a judicial decision is apt. See *Morgan IV*, 313 U.S. at 422. Disappointed litigants

and other critics of judicial decisions may be so certain of the correctness of their position that they greet any contrary decision with suspicion. Every judge is familiar with speculation that something in the judge's background, personal life, religion, or past political associations explains the *real* basis for a decision. Yet appellate courts routinely review lower court decisions for consistency with the law and do not permit counsel directly to question a judge about his or her thought processes leading to a decision or to subpoena law clerks for similar inquiries.

This Court has stated that the role of a court reviewing administrative actions is comparably circumscribed. Courts properly look at the administrative record and base a judgment on that; they do not hold hearings on the decision-maker's thinking about the action taken or try to deduce that from other extrinsic evidence. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 32–33; *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973); *Morgan IV*, 313 U.S. at 422; *Morgan II*, 304 U.S. at 18.

In general, the appropriate judicial inquiry asks whether the official who has taken the challenged administrative action can offer an explanation stating considerations that either plausibly or rationally support the action taken. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 32–34. As a rule, a contention that an official has offered reasons in support of an action as mere pretexts to obscure an inappropriate basis for action, such as bias in favor of one party or against another party, will not be entertained. That is true both in the context of APA challenges to decisions that are largely within the deciding official's discretion and in the context of challenges under other auspices, such as claims predicated on constitutional violations for which plaintiffs assert a cause of action implied in the

constitutional right. See, e.g., *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017).

This Court has recognized exceptional cases in which claims have been accepted that "it is impossible to 'discern a relationship to legitimate state interests,' or that the policy is inexplicable by anything but animus.'" *Trump v. Hawaii*, maj. op., slip op. at 33 (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996) (*Romer*)). Those are cases involving actions that this Court said "lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'" *Trump v. Hawaii*, maj. op., slip op. at 33 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (*Moreno*)).

This is an extremely narrow category of cases and an exception not applicable here. Yet, even in these cases, the sort of inquiries conducted by the court below—seeking evidence that the explanations given were in fact pretextual—would be unacceptable. Expanding this narrow category of cases such as *Romer* and *Moreno* to cases such as the instant case would threaten to convert routine disputes over government policy into debates over the *bona fides* of the decision-makers.

As Justice Frankfurter's analogy to judicial decisions illustrates, the distinction between reviewing a decision and seeking to divine the motivation of the decision-maker is essential to maintaining proper respect for government. *Amici*, as former government officials who have been privy to administrative decision-making in many different contexts, underscore the destructive nature of inquiries into official motives. Such inquiries would discourage discussion of potential actions among broader groups of officials. Among other experiences, we have seen first-hand the effects

of rules that reduce the privacy of official communications among principal officers in multi-member agencies: these rules deter collegial discourse on the most important agency decisions. Chilling honest dialogue on important issues among decision-makers impairs the quality of official decisions and increases the frictions in and costs of agency operation.

Similar concerns informed the judgment of the United States Court of Appeals for the Second Circuit, announced by Chief Judge Learned Hand some 70 years ago, in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (*Gregoire*). Gregoire sued five federal officials, including two Attorneys General of the United States, asserting that his arrest and incarceration were based on pretext and were in fact motivated by malice. The circuit decision upheld the suit's dismissal. Judge Hand's opinion sympathized with concerns that officials not act willfully and maliciously to violate the law and harm individuals, but explained that those concerns did not justify burdening the far broader class of officials who might be called on to justify their motives in court. See *Gregoire*, 177 F.2d at 580–81. After reviewing the precedents, Hand concluded that "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who do their duty to the constant dread of retaliation." *Id*., at 581.

This case does not involve an assertion of individual harm of the sort addressed in *Gregoire* or of personal malice, nor do plaintiffs seek monetary damages, but Judge Hand's concern that subjecting officers to probing and potentially invasive judicial process would undermine official functions applies equally in this case. Based on our decades of experience in government, studying government, and teaching and writing

about government, *amici* firmly believe that permitting intrusive judicial inquiries into matters of official motive would be far more likely to damage effective government than to promote it.

B. Concerns about Administrative Bias and Prejudgment Apply in Other Contexts and Are Best Addressed through Other Means.

To be sure, there are legitimate concerns over prevention of biased or prejudiced decision-making, which can deprive litigants of rights under the Due Process clauses of the Fifth and Fourteenth Amendments, as this Court has held in various contexts. See, e.g., *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). These cases, however, differ from the present case in several critical respects.

First, the cases in which due process guarantees were found to be infringed concern individual determinations with direct, immediate impact on the party advancing the due process objection.[3] Second, the contexts in which this Court has accepted such claims almost invariably involve bias from personal financial gain for the decision-maker. Third, the decisions at issue are individuated adjudications or licensing decisions that effectively constitute such adjudications.

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[3] *Gibson v. Berryhill*, 411 U.S. 564 (1973), arguably differs in being a rule-based determination on licensing. However, the peculiar context of the rule being reviewed, its focus on excluding practitioners in a single business entity, and its effect on excluding from the continued practice of optometry the individuals who brought the challenge makes that case tantamount to the sort of individual determination at issue in other cases.

Where the decisions challenged have been more in the nature of broader policy determinations, this Court has rejected due process claims based on a decision-maker's policy inclinations, announcements, and connections. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975). Similarly, this Court has rejected challenges based on bias and self-interest where the financial gain at issue was institutional rather than personal and a direct personal gain was not shown. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). To the same effect, lower courts typically have rejected such challenges to administrative proceedings where the proceeding is not in the nature of an adjudication or where the asserted ground of bias or prejudgment comes from extra-record statements and more tenuous connections. See, e.g., *Association of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980) (prejudgment claim in rulemaking rejected); *Action for Children's Television v. Federal Communications Commission*, 564 F.2d 458 (D.C. Cir. 1977) (claim of improper *ex parte* contacts in rulemaking rejected).

Most important, courts in these cases did not engage in direct inquiries into the mental state or motivations of decision-makers. Concerns over the propriety of officials' participation in policy decisions have been resolved by reference to publicly available information. See, e.g., *Air Transport Association of America, Inc. v. National Mediation Board*, 663 F.3d 476, 488 (D.C. Cir. 2011) (denying discovery request).

C. Intrusive Inquiries into Official Motives Impair Perceived Legitimacy of Judicial Processes and Separation of Powers.

Finally, special caution is required before inquiring into officials' motives, as that inquiry invites greater

intrusion of political considerations into litigation respecting government actions. In recent years, litigation has been used as an extension of political conflicts, with litigants who are politically-selected among the parties seeking judicial review of administrative actions presenting legal questions closely related to or identical to politically-contested issues. This development, and problems associated with it, have been noted by judges, scholars, public officials, and news media. See, e.g., *Trump v. Hawaii*, slip op. at 5–10 (Thomas, J., dissenting); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 457—61 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, Geo. Mason Legal Stud. Research Paper No. LS 18-22, Nov. 7, 2018, at 20–32, available at https://www.usgovernmentspending.com/recent_spending (*Nationwide Injunctions*); Lin, *supra*, at 634–46; Sarah N. Lynch, "Attorney General Vows to Fight Nationwide Injunctions," Reuters, Sep. 13, 2018, available at https://www.reuters.com/article/us-usa-justice-courts/attorney-general-vows-to-fight-nationwide-court-injunctions-idUSKCN1LT34A; Alan Neuhaus, "State Attorney Generals Lead the Charge Against President Donald Trump," U.S. News & World Rep., Oct. 27, 2017, available at https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump; Paul Nolette, "State Attorneys General Have Taken Off as a Partisan Force in National Politics," Wash. Post, Oct. 23, 2017, available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics/?utm_term=.e5530ca3ba5b.

Lower court inquiries into matters such as officials' motives for the actions being reviewed exacerbate problems associated with complaints about politicization of judicial process. Questions respecting unstated motives for official action necessarily require far more subjective inquiries than does asking whether there is evidence of arbitrariness or capriciousness or other grounds specified in the APA. Legal tests that turn on more subjective judgments at times are appropriate, but in general such tests reduce the clarity of decisions and provide increased scope for considerations apart from those readily identified with the merits of the legal dispute. Similar observations underlie calls for narrower, more certain legal tests and more narrowly confined sources of decision; these have come from scholars and jurists of widely divergent views in an array of disparate contexts. See, e.g., Ronald A. Cass, *The Rule of Law in America* 4–20, 28–29 (2001); Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* 110 (1915 ed.) (1885); Lon L. Fuller, *The Morality of Law* 46–94, 209–13 (rev. ed. 1969); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651, 689–90 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176, 1178–83 (1989).

Less clarity in the tests applied and a wider set of materials relevant to decision increases the dispersion of potential outcomes across decision-makers, reducing reliability and increasing incentives to seek out decision-makers who are predicted to be more inclined toward specific (favored) outcomes. See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 14–41 (Amy Guttman ed., 1997); Cass, *Nationwide Injunctions*, *supra* at 20–27. When the issues presented for decision or the settings in which they are presented overlap with political disputes, the

incentives for forum-shopping can have especially pernicious effects. These include changes in the perceived legitimacy of judicial decisions and their potential intrusion into responsibilities committed to other branches of government.

The overlap between concerns about political characterization of decisions and the use of legal tests that permit inquiry into decision-makers' motivations is starkly illustrated by the decision below. The district court went through the administrative record and extrinsic evidence adduced in lower court proceedings to discern whether political considerations played a part in the Secretary of Commerce's decision to add a question to the 2020 decennial census. See *SDNY Decision*, at 26–102, 204–07. The decision suggests that they did, finding that the real reasons for the Secretary's action were hidden from the court, were unrelated to his stated rationale, and produced a bias so strong that he could not rationally consider the effects of his decision. *Id*. at 245–53. Yet, even a sincere effort to deduce the motivations of a decision-maker is an exercise in guesswork. Different reviewers of the same record easily can reach different conclusions.

Uneven application of less-constraining legal tests, the potential for application of such tests to vary across courts, and the potential for politically-connected litigants to seek out specific courts to decide legal questions that have political significance, together threaten to undermine confidence in our courts. See, e.g., Bray, *supra* at 457–61; Cass, *Nationwide Injunctions*, *supra* at 20–32; Lin, *supra* at 634–46; Nolette, *supra*. Those concerns provide an additional reason to restate the understanding that inquiries into decision-makers' motives are strongly disfavored, especially if

accomplished through trial proceedings designed to adduce information not in the written record. Inquiry into motives leads to unnecessary friction with other branches of government and to questions about the role of the courts. Those inquiries are not only contrary to law but at odds with fundamental precepts of constitutional structure as well.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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