

RECENT DEVELOPMENTS

ADMINISTRATIVE RECORDS AFTER *DEPARTMENT OF COMMERCE V. NEW YORK*

ARAM A. GAVOOR* AND STEVEN A. PLATT**

The Administrative Procedure Act of 1946 (APA) permits judicial review of agency action upon “the whole record” of the agency. What composes that term is not explicated by the text of the statute. The Supreme Court recently addressed the composition of “the whole record” in APA litigation for the first time in decades in Department of Commerce v. New York. In that case, which considered whether the U.S. Census Bureau lawfully added a question regarding U.S. citizenship to the impending 2020 U.S. Census, the Court held that the challengers had made a “strong showing of bad faith or improper behavior” that merited record supplementation and concluded that although the initial supplementation order was premature, the error was harmless and justified in hindsight.

Building on our 2018 article, Administrative Records and the Courts—cited in Department of Commerce by Justice Thomas—this piece further explicates our criticism of the bad faith exception to APA record review and explains how the Department of Commerce case perpetuated and invigorated this exception, which is inconsistent with the text, purpose, and history of the APA. It closes by hypothesizing the consequences of the Court’s two record rule holdings, primarily the ability of litigants to (improperly) supplement APA records.

I. The Court’s Treatment Of Administrative Records In <i>Department Of Commerce</i>	88
II. The Soundness And Error Of The Opinion	93
III. The Fundamental Flaw Of The <i>Overton Park</i> Bad- Faith Exception To The Record Rule	96
IV. The Future Of Administrative Records	98
Conclusion	100

* Professorial Lecturer of Law, The George Washington University Law School. The authors thank Dick Pierce, Kristin Hickman, Ron Cass, and Chris Walker for their valuable thoughts and comments.

** J.D., University of Minnesota Law School, B.A., The University of Iowa.

I. THE COURT'S TREATMENT OF ADMINISTRATIVE RECORDS
IN *DEPARTMENT OF COMMERCE*

In June 2019, the Supreme Court in *Department of Commerce v. New York*¹ considered the administrative record provision of the Administrative Procedure Act of 1946 (APA).² The APA, which provides for judicial review of “the whole record or those parts of it cited by a party,” led the Court to consider the propriety of completing or supplementing the administrative record in a case challenging the addition of a citizenship question to the decennial census.³

The Court first decided, in Part IV.B of the opinion, that the Department of Commerce’s decision to add a citizenship question was supported by the available evidence.⁴ In Part V, the Court turned to the charge that the Department’s “stated rationale was pretextual.”⁵ Before deciding that issue on the merits, the Court had to decide the proper composition of the administrative record being reviewed. The Court found that the lower court had improperly ordered supplementation of the record, but that such error was harmless because the order was found to be justified upon later completion of the record, which demonstrated that the additional documents had been properly added.⁶ Premised on the provenance of its 1971 holding in *Citizens to Preserve Overton Park, Inc. v. Volpe*⁷—reviewing courts can cross-examine agency decision makers and make use of other extra-record evidence in some circumstances—the Court held that the challengers had made a “strong showing of bad faith or improper behavior,” which justified the addition of new materials to the record.⁸ Proceeding from this resolution of this administrative record dispute, the Court affirmed the district court’s judgment that the Department of Commerce had improperly added a citizenship question to the census on grounds of pretext.⁹

1. 139 S. Ct. 2551 (2019).

2. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012). The research in this essay is current through January 10, 2020.

3. 5 U.S.C. § 706 (2012); see *Dep’t of Commerce*, 139 S. Ct. at 2573–74 (questioning the constitutionality of the citizenship question’s addition to the census and examining the exception that allows for probative inquiry of the administrative record).

4. *Dep’t of Commerce*, 139 S. Ct. at 2569.

5. *Id.*

6. See *id.* at 2573.

7. 401 U.S. 402, 420 (1971).

8. *Dep’t of Commerce*, 139 S. Ct. at 2573–74 (quoting *Overton Park*, 401 U.S. at 420).

9. See *id.* at 2574–76 (finding that the rationale relied upon was “contrived” and failed to “adequately explain” the decision for reinstatement).

Justice Thomas authored a partial concurrence and partial dissent with which Justices Gorsuch and Kavanaugh joined.¹⁰ Arguing that the record did not demonstrate bad faith or improper behavior, the Justices cited our scholarship on administrative records.¹¹ They favorably noted our argument that the “bad faith” record supplementation exception to the APA’s record rule in *Overton Park* was unsupported by the APA, unbriefed by the parties, and wholly created by the judiciary—possibly to facilitate its preferences for arbitrary and capricious review.¹² The Justices referred to that question as “an important question that may warrant future consideration.”¹³ Therefore, we write to analyze the scope of the APA’s record rule following *Department of Commerce*,¹⁴ to further explicate our criticism of *Overton Park*, and to hypothesize the consequences of the Court’s two record rule holdings.¹⁵

Our work in *Administrative Records and the Courts*¹⁶ explored the proper domain of the administrative record by comprehensively engaging two important topics that received scant attention from administrative law scholars. First, what should qualify as the record for purposes of judicial review of agency actions under the APA? Second, when, if ever, should a court consider extra-record evidence in the process of reviewing an agency action?¹⁷

Under the text of the APA and the textually-derived principle that a court cannot impose additional requirements on an agency that are not compelled

10. *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).

11. *See id.* at 2579 n.5 (contending that the *Overton Park* exception “has been criticized as having ‘no textual grounding in the APA’”) (quoting Aram A. Gavoort & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 44 (2018)).

12. *Id.*

13. *Id.*

14. We are not exploring whether all parts of *Department of Commerce* were rightly decided, for example, its holdings in Parts IV.B and V regarding whether the addition of the census question was arbitrary or capricious. Certainly, other aspects are already being cited by other courts. *E.g.*, *City of Los Angeles v. Barr*, 929 F.3d 1163, 1180 (9th Cir. 2019). However, we note that the case’s administrative record ruling—which we view as erroneous—was the premise for its merits holding that the census question was added for pretextual reasons and was therefore invalid under the Administrative Procedure Act (APA). Christopher J. Walker, *What the Census Case Means for Administrative Law: Harder Look Review?*, 36 YALE J. ON REG. NOTICE & COMMENT (June 27, 2019), <https://yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review/>.

15. Those holdings are the application of the APA’s “harmless error” clause and the application of *Overton Park*’s “strong showing of bad faith or improper behavior” statement. 5 U.S.C. § 706 (2012); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

16. Gavoort & Platt, *supra* note 11.

17. *See* Gavoort & Platt, *supra* note 11, at 5.

by the APA, generally only record “completion” is lawful.¹⁸ Completion entails ordering the agency to add materials to the record presented to the court if the agency did indeed consider those materials.¹⁹

In contrast, the unfortunately common judicial practice of record “supplementation” is inappropriate.²⁰ Supplementation entails the court, in deciding the lawfulness of the agency action, considering materials that the original decisionmaker never considered, but that the court purportedly should nonetheless consider for various reasons.²¹ One form of “supplementation” is when the challenger makes a “strong showing of bad faith or improper behavior,” an exception that was created in *Overton Park*.²²

Lower courts have countenanced not only completion, but also supplementation that includes the *Overton Park* exception as a mechanism to do so.²³ Courts across the circuits are routinely applying administrative record jurisprudence unfaithful to the APA, in part because the Supreme Court had not meaningfully addressed the issue since *Overton Park* and had not even broached the issue since 1990.²⁴ The negative consequences of misapplying the record rule include the waste of agency and petitioner time and resources, judicial indeterminacy, the weakening of the arbitrary and capricious standard, and separation of powers concerns.²⁵

Our record completion-versus-supplementation argument was premised on the legitimate goal of the *Overton Park* Court to provide judicially manageable standards. In dicta, the Court commented that administrative records can be supplemented upon a “strong showing of bad faith or improper

18. See Gavoor & Platt, *supra* note 11, at 31–35 (presenting the presumption of a complete record and circumstances wherein petitioners should be afforded the ability to “rebut the presumption of agency regularity in the compilation and presentation of the administrative record”).

19. Gavoor & Platt, *supra* note 11, at 33 (proposing that the “whole record” should include only materials directly considered by those involved in the agency decision).

20. Gavoor & Platt, *supra* note 11, at 44 (stating that “record supplementation has no textual grounding in the APA” and has been contrived by courts to permit supplementation of any kind); see also Gavoor & Platt, *supra* note 11, at 42–53 (discussing circumstances where supplementation of the administrative record as improper).

21. Gavoor & Platt, *supra* note 11, at 43.

22. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); see also Gavoor & Platt, *supra* note 11, at 44–47 (discussing how courts have interpreted this exception).

23. See generally Gavoor & Platt, *supra* note 11, at 42–53 (noting variation in the way courts have addressed the presumption of administrative regulatorily thereby allowing or foreclosing supplementation).

24. Gavoor & Platt, *supra* note 11, at 5.

25. See Gavoor & Platt, *supra* note 11, at 69–75 (examining the negative secondary consequences of misapplying the APA’s records rule in judicial review).

behavior,” a standard not raised in the briefing and not at issue in the case.²⁶ Perhaps Justice Thurgood Marshall, who authored *Overton Park*'s majority opinion, included this dicta as a practical and temporary calibration measure to facilitate APA merits review. Meanwhile, agencies developed and implemented adjudicative procedures that would result in a contemporaneous documentary record that would facilitate Article III review. *Overton Park*'s failure to discuss its new “whole record” exception led lower courts to be inconsistent on what qualifies as “bad faith or improper behavior” such that record supplementation is appropriate.

After a twenty-seven year span,²⁷ the Supreme Court encountered these APA record issues in three Trump Administration cases within a relatively short span.²⁸ In 2017, when plaintiffs, including the University of California Regents, challenged the end of the Deferred Action for Childhood Arrivals (DACA) program, the Court in *In re United States*²⁹ considered the propriety of the district court's order for extra-record review.³⁰ The Court parried the issue and held only that the district court should have considered threshold jurisdictional challenges first.³¹

The Supreme Court also debated this general question in a challenge to President Trump's travel ban executive order in *Trump v. Hawaii*,³² decided in June 2018. The Supreme Court's opinion examined and grappled with allegations of pretext, which also figured into justification arguments for extra-record discovery and extra-Executive Order evidence merits

26. Gavoor & Platt, *supra* note 11, at 22, 44.

27. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–56 (1990).

28. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *In re United States*, 138 S. Ct. 443 (2017).

29. 138 S. Ct. 443 (2017).

30. On remand, the district court issued a decision on the merits without returning to the records dispute, instead assuming that the record should not be supplemented. See *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 493 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (June 28, 2019) (No. 18-857). The Supreme Court has granted a writ of certiorari on the merits of the APA challenge. See *Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (No. 18-857). Thus, it is very unlikely that the Supreme Court will resolve any APA records disputes as part of this case, for which it is hearing oral argument in November 2019. A possible exception may be if the Court rules for the Government and holds that Deferred Action for Childhood Arrivals (DACA) is lawful, but remands to the lower courts to determine if the record should be completed or supplemented and if such additional materials would be a basis to hold DACA unlawful.

31. Our earlier article identified *In re United States* and *Department of Commerce* as possible vehicles for resolving the question of the proper scope of the APA administrative record. See Gavoor & Platt, *supra* note 11, at 24–25, 77.

32. 138 S. Ct. 2392 (2018).

considerations.³³ The opinion was unclear as to whether it was viewing the case as arising under the APA.³⁴

In *Department of Commerce*, the majority ratified some of the circuit courts' most problematic holdings regarding the composition of the administrative record, which we have argued are not grounded in the text, purpose, or history of the APA.³⁵ The challengers alleged that the Secretary of Commerce's decision to add a U.S. citizenship question to the 2020 census was arbitrary or capricious.³⁶

In its opinion authored by Chief Justice Roberts, the Court held in Part IV.B of the opinion that the evidence supported adding a citizenship question.³⁷ But writing for four other Justices, the Chief Justice held in Part V that the administrative record, as completed via stipulation of over 12,000 pages of documents, evinced a "strong showing of bad faith or improper behavior."³⁸ That was the first Supreme Court case to ever conclude that the *Overton Park* standard had been met.³⁹ Proceeding from there, the Court held that the supplementation that occurred in the district court was lawful.⁴⁰ Upon that record, the Court held that the rationale provided for that decision—enforcing the Voting Rights Act—was pretextual, and thus, in those "unusual circumstances," the district court fairly remanded to the agency to provide a valid explanation.⁴¹

33. See *id.* at 2417–20.

34. See generally *id.* (failing to cite the APA or its provisions in title 5 of the U.S. Code). However, the APA was likely the only route for judicial review of whether the executive order violated the entry-suspension clauses under review, 8 U.S.C. §§ 1182(f) and 1185(a), or the First Amendment. *Id.* at 2403, 2407 n.1 (noting the overlap between the two sections the President invoked). The complaint under review lodged separate counts for "violation of 8 U.S.C. §§ 1182(f) and 1185(a)," violation of the First Amendment, and for a "substantive violation of the [APA]." *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1147 n.8 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018). However, neither those provisions in the Immigration and Nationality Act nor the First Amendment itself purport to provide a cause of action. To dodge sovereign immunity, the plaintiffs would have had to invoke the APA, in particular its offer to review agency action that is inconsistent with a statute. See 5 U.S.C. § 706(2)(C) (2012).

35. See Gavoort & Platt, *supra* note 11, at 42–53 (collecting cases).

36. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019).

37. See *id.* at 2569–71. Under the APA, a court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." See 5 U.S.C. § 706(2)(A).

38. *Dep't of Commerce*, 139 S. Ct. at 2574.

39. *Id.* at 2579 (Thomas, J., concurring in part and dissenting in part) ("We have never before found *Overton Park's* exception satisfied . . .").

40. See *id.* at 2574 (majority opinion) (finding that the supplementation was premature but justified).

41. See *id.* at 2573–76 (suggesting the Secretary's theory that the inclusion of a citizenship

I. THE SOUNDNESS AND ERROR OF THE OPINION

On administrative records issues, *Department of Commerce* was rightly decided in some aspects. The Court properly admonished the district court for prematurely ordering extra-record discovery, i.e., record supplementation. The Supreme Court then excused the error as harmless because the materials in the record *completion* revealed a justification (“strong showing of bad faith or improper behavior”) for the record *supplementation*.⁴² The completion was not at issue because the government had stipulated to the inclusion of 12,000 pages of documents.⁴³ The Court did not explain what, precisely, in the completed record met the *Overton Park* standard and thus justified supplementation.⁴⁴

The majority opinion raises more problems than it solves, though in a future case, such stipulations might not occur.⁴⁵ The Court did not reach the issue of the record scope in general and used only the bad faith or improper behavior exception.⁴⁶ The opinion will likely perpetuate the incorrect APA records jurisprudence that many lower courts have developed.⁴⁷ The Court relied on extra-record supplementation, which we have argued is wholly inappropriate. The majority invoked the bad faith or improper behavior exception, the only exception the Court has ever recognized. However, the Court had never determined that standard raised, much less satisfied, until *Department of Commerce*.⁴⁸ The opinion applies the Court’s imprimatur upon

question would help enforce the Voting Rights Act has no merit).

42. *Id.* at 2574 (majority opinion).

43. *Id.* at 2564. The 12,000 pages of additional material consisted of: “emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.” *Id.*

44. *See id.* at 2574 (stating simply that although the order was initially premature it was ultimately justified); *accord id.* at 2580–81 (Thomas, J., concurring in part and dissenting in part).

45. We have previously expressed our non-opposition to stipulations being a method by which the parties may supplement the administrative record. Courts commonly issue orders based on the parties’ stipulations, notwithstanding that the APA does not specifically authorize this procedure. *See Gavoor & Platt, supra* note 11, at 35.

46. *Dep’t of Commerce*, 139 S. Ct. at 2574; *see also* Gavoor & Platt, *supra* note 11, at 77 (speculating that another thirty years may pass before the subject of record scope is addressed).

47. As one former departmental acting general counsel has written, “Roberts expressly finds this threshold met in the census case. But his account of the evidence that led to that conclusion is so Delphic as to afford little future guidance.” David A. Martin, *Executive Discretion and Judicial Deference after the Census Case: The Chief Justice’s Tightrope*, LAWFARE (July 23, 2019), <https://www.lawfareblog.com/executive-discretion-and-judicial-deference-after-census-case-chief-justices-tightrope>.

48. *See* 139 S. Ct. at 2576 (Thomas, J., concurring in part and dissenting in part)

the illogic and vitality of the bad faith or improper behavior exception.⁴⁹ In essence, *Department of Commerce* reinvigorated the *Overton Park* supplementation exception and compounded its error.

To be certain, later decisions of the Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁵⁰ and in *Pension Benefit Guaranty Corp. v. LTV Corp.*,⁵¹ attempted to frame some of the other problematic aspects of *Overton Park*. *Vermont Yankee* held that courts cannot impose additional rulemaking requirements on the agency not found in the statutes.⁵² *Vermont Yankee* was correct that the APA, not common law, is the source of agency obligations.⁵³ *LTV* was correct that the requirement of “the whole record” was indeed from the APA; thus it should be imposed on the agency not just in rulemakings, but also in adjudications.⁵⁴ Despite its attempts to do so, *LTV* did not fully reconcile *Overton Park* with *Vermont Yankee* principles. The Court should have acknowledged a tension between the two opinions and what they represent, rather than inferring what it styled as a *perceived* tension with its description that “one initially might feel that there is some between *Vermont Yankee* and *Overton Park*.”⁵⁵ The *LTV* Court then subtly acknowledged its possible error in *Overton Park* by concluding the aforementioned sentence that “the two cases are not necessarily inconsistent.”⁵⁶

The *LTV* Court should have squarely indicated that it was not wholesale endorsing *Overton Park*, but rather only its narrow holding that an administrative record was required for judicial review. *LTV* should have emphasized that other parts of *Overton Park*, including its record supplementation dicta, were still subject to the *Vermont Yankee* rule despite not being explicitly

(addressing the novelty of the Court’s decision). “And the Court does not claim that the evidence in the administrative record alone would prove that the March 2018 memorandum was a pretext.” *Id.* at 2581.

49. Gavor & Platt, *supra* note 11, at 46–47.

50. 435 U.S. 519 (1978).

51. 496 U.S. 633 (1990).

52. 435 U.S. at 547–48.

53. *LTV*, 496 U.S. at 654 (“*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.”).

54. *Id.* at 654–55 (“At most, *Overton Park* suggests that § 706(2)(A), which directs a court to ensure that an agency action is not arbitrary and capricious or otherwise contrary to law, imposes a general ‘procedural’ requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of decision.”).

55. *Id.* at 654.

56. *Id.* (emphasis added).

addressed by *LTV*. *Department of Commerce* might have followed this path as well save for the fact that this issue was not squarely put before the Court.⁵⁷

Another significant aspect of *Department of Commerce* is that its majority opinion does not explicate what exactly made the erroneous record supplementation harmless.⁵⁸ While the APA excuses harmless error, it arguably only does so for the government in regards to its challenged action because the statute thrice speaks in terms of reviewing “agency action.”⁵⁹ However, the statute does simply say that the court shall take due account “of the rule of prejudicial error” without describing *whose* error, although to read that language to encompass record compilation error ignores that section’s context.⁶⁰ The Court’s permissive attitude toward this strain of the-ends-justify-the-means supplementation may encourage lower courts to imagine there is no harm to the government if the challenger is permitted to engage in discovery.⁶¹

Department of Commerce went further in its approach than the Court did in *Trump v. Hawaii*.⁶² Although *Hawaii* was not framed as an APA case, the Court’s treatment of pretextual evidence in that case contrasts with its treatment of apparently pretextual evidence in *Department of Commerce*.⁶³ Chief Justice Roberts, the author of both majority opinions, did not differentiate why the Court could look at this evidence in the census case, but not with regard to the travel ban. Peculiarities of constitutional immigration case law may have informed the difference.⁶⁴ Each case’s treatment might have been outcome-determinative.

57. See Petition for Writ of Certiorari before Judgment at *I, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019), No. 18-966, 2019 WL 338906 (Questions Presented).

58. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (“The District Court invoked that exception in ordering extra-record discovery here. Although that order was premature, we think it was ultimately justified in light of the expanded administrative record.”).

59. See 5 U.S.C. § 706 (2012) (articulating the scope of a court’s review).

60. *Id.*

61. *Gavoor & Platt*, *supra* note 11, at 3–4 (citing *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1377–78 (Fed. Cir. 2009), as an example of an APA discovery fishing expedition that was reversed on appeal).

62. 138 S. Ct. 2392 (2018).

63. See James D. Cromley et al., *Going Beyond: When Can Courts Look Past the Record in an APA Review?*, GEO. ENVTL. L. REV. ONLINE (Aug. 15, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/going-beyond-when-can-courts-look-past-the-record-in-a-n-apa-review/> (comparing the court’s acceptance of extra-record material in *Department of Commerce* to combat “contrived” reasoning with its rejection in *Trump v. Hawaii*). Compare *Trump v. Hawaii*, 138 S. Ct. at 2421–23 (articulating the relevance of evidentiary materials but upholding the action on the basis of national security), with *Dep’t of Commerce*, 139 S. Ct. at 2573–74 (conducting the review in light of all extra-record discovery).

64. *Trump v. Hawaii*, 138 S. Ct. at 2420 (“A conventional application of [*Kleindienst v. Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end

II. THE FUNDAMENTAL FLAW OF THE *OVERTON PARK* BAD-FAITH EXCEPTION TO THE RECORD RULE

The *Overton Park* record rule error exists in the context of the early 1970s Court and its attempts to form judicially manageable standards in response to novel problems in administrative law. Like *Overton Park* (1971), the Court's due process opinions in *Goldberg v. Kelly* (1970)⁶⁵ and *Wisconsin v. Constantineau* (1971)⁶⁶ suffer from the same lack of textual grounding. In *Goldberg* and *Constantineau*, the Court approached due process from a subjective standpoint with a "grievous loss" test that lacks any semblance of the contemporary textual interest-based analysis that the Court soon thereafter began to use.⁶⁷ Moreover, the remedy in *Goldberg* was maximalist in its application. No majority consideration was given to the opinion's replicability in nonwelfare contexts and its unintended adverse consequences—harming the public fisc and reducing the efficacy of welfare programs—were due to the increase in administrative costs required by the due process strictures of revoking benefits.⁶⁸ The Supreme Court quickly and substantially abrogated the due process methodological framework in those cases in a pair of 1972 opinions.⁶⁹

In 1993, the Court issued its landmark administrative exhaustion opinion in *Darby v. Cisneros*,⁷⁰ which conditioned the domain of its *McGee v. United States* (1971)⁷¹ and *McKart v. United States* (1969)⁷² administrative exhaustion standard to only those claims for which the APA in 5 U.S.C. § 704 does not apply.⁷³ Because the Supreme Court is accustomed to abrogating

to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order.”).

65. 397 U.S. 254 (1970).

66. 400 U.S. 433 (1971).

67. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 919–22 (2000).

68. Justice Black's dissent, in particular, focused primarily on the welfare implications of the majority's opinion. *Goldberg v. Kelly*, 397 U.S. 254, 279 (1970) (Black, J., dissenting) (“While this Court will perhaps have insured that no needy person will be taken off the [welfare] rolls a full ‘due process’ proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.”).

69. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572, 576–77 (1972) (requiring a showing of deprivation of liberty or property interest); *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) (noting the requirements in *Roth*).

70. 509 U.S. 137 (1993).

71. 402 U.S. 479 (1971).

72. 395 U.S. 185 (1969).

73. *Darby*, 509 U.S. at 138.

problematic administrative law cases from this era, even if it takes decades to do so, it would have precedent in correcting its error in *Overton Park* now. Moreover, the Court's preference to avoid reversal would not be offended in taking this abrogating course of action as it was in *Kisor v. Wilkie*.⁷⁴ There, in the name of stare decisis, the Court exercised great care to avoid reversing two of its previous administrative deference cases⁷⁵ and destabilizing this area of law.⁷⁶

Justice Thomas's partial concurrence pushes back against these errors in reasoning.⁷⁷ That opinion understood that *Overton Park* may have wrongly created the "bad faith or improper behavior" standard.⁷⁸ Justice Thomas, Justice Gorsuch, and Justice Kavanaugh noted that it was unclearly applied and likely misapplied in *Department of Commerce*.⁷⁹ The partial concurrence further articulated that "bad faith or improper behavior" was not shown on the expanded record and noted the potential for future litigation mischief.⁸⁰ This opinion signaled that these three Justices may consider further action in this space when the right case presents. Justices Thomas and Gorsuch had earlier written in the case—when the Court stayed, pending a grant of certiorari, the Secretary's deposition but not all extra-record discovery—that the supplementation exception actually "requires an extraordinary justification," as it is leveled "against a coordinate branch of government."⁸¹ This would be an even higher standard than what *Overton Park* set.⁸² Because Justice Thomas thought the standard was misapplied, he did not *need* to address whether the standard properly exists in the first place, as we suggested.⁸³

74. 139 S. Ct. 2400, 2403 (2019).

75. *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

76. *Kisor*, 139 S. Ct. at 2423–24.

77. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2579 n.5 (2019) (Thomas, J., concurring in part and dissenting in part).

78. *Id.*

79. *See id.* at 2580–81 (proffering that "at most . . . the Secretary was predisposed to add a citizenship question" and that the evidence within the record falls short of establishing bad faith and pretext alike).

80. *See id.* at 2583–84 (indicating newfound potential for partisan harassment of agency officials).

81. *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (Gorsuch, J., concurring in part and dissenting in part).

82. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (requiring a "strong showing of bad faith or improper behavior").

83. *Dep't of Commerce*, 139 S. Ct. at 2579 n.5 (Thomas, J., concurring in part and dissenting in part).

If these issues are ever squarely presented in a certiorari petition, these three Justices may also win Justice Alito's or another justice's vote, thus securing the four votes needed to grant certiorari.⁸⁴ Although Justice Alito did not join Justice Thomas's opinion, he dissented from the record-review portion of the majority opinion.⁸⁵ Justice Alito wrote separately to address other aspects of the majority opinion with which he disagreed, but he did not suggest that he agreed with any of the reasoning in the record-review portion.⁸⁶

III. THE FUTURE OF ADMINISTRATIVE RECORDS

We predict that unless the Court signals the *Department of Commerce* opinion as a one-off case,⁸⁷ APA record supplementation by traditional discovery tools and otherwise will proliferate in the lower courts. Extra-record issues will adversely affect the government's ability to defend itself in APA litigation, divert resources from agencies' core missions, compulsorily draw the attention of officers of the United States who should otherwise be engaging in the executive function of running the government, and cause long delays with more bet-the-agency litigation that will render impossible the government's ability to fix its rulemaking and adjudicative errors within a single presidential term.⁸⁸ Bad faith and pretext, after all, apply to principally subjective mental processes that can be on occasion evidenced by documents.⁸⁹ Those types of findings are best revealed by depositions, direct examination, and cross-examination, which are evidentiary characteristics that are outside the bounds of APA review.⁹⁰ Unless abated by the Court, these disruptive

84. The "rule of four" is the Supreme Court's practice of granting a writ of certiorari upon the votes of four Justices. See *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 527 (1957) (Frankfurter, J., dissenting) (taking issue with the merit-based decisionmaking required by the rule). See generally Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–73 (1988) (discussing the "nonmajority nature" and genesis of the rule).

85. *Dep't of Commerce*, 139 S. Ct. at 2606 (Alito, J., concurring in part and dissenting in part).

86. *Id.* at 2596–606.

87. See *id.* at 2584 (Thomas, J., concurring in part and dissenting in part) ("In short, today's decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only.").

88. See Gavor & Platt, *supra* note 11, at 69–74 (listing the myriad of consequences to follow from extra-record issues).

89. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (holding that "inquiry into the mental process of administrative decisionmakers is usually to be avoided," but may be had upon a "strong showing of bad faith or improper behavior").

90. See Gavor & Platt, *supra* note 11, at 11–14 (explaining the proper contents of the administrative record, based on the APA principle that review proceeds upon "the whole

phenomena will transcend the current Administration into future administrations as sophisticated and sovereign litigants avail themselves to any tool that is available to thwart the political objectives of the Executive. Justice Thomas's opinion suggested that other agency action from previous administrations could be subject to challenge, for example, the 2015 "Open Internet Order," possibly under this misapplication of the "bad faith or improper behavior" standard.⁹¹

These consequences might arise more frequently because *Department of Commerce* does not make clear the chronological relationship between "bad faith" and "pretext." Records obtained as part of a "bad faith" supplementation were the basis for the Court's finding that the Secretary of Commerce's decision was pretextual.⁹² By not clearly distinguishing its records holding and its pretext-based merits holding, the majority opinion leaves open the possibility that a challenger could use these standards in reverse order—that is, to leverage an allegation or threadbare showing of pretext to demonstrate a "strong showing of bad faith or improper behavior," which in turn proves the pretext. The opinion's nontreatment of the relationship between the standards opens the possibility that lower courts will apply these concepts cyclically. And any time a court allows an allegation of pretext to permit record supplementation—the reverse order from what we believe is permissible for record completion, only—there will be undue, increased time and monetary resource expenses.

Unfortunately, these errors in interpreting the administrative record are frequently shrouded from appellate review and correction.⁹³ The government might concede records issues or negotiate the record's contents with the challenger, as happened in *Department of Commerce*.⁹⁴ If the government elects to contest records decisions by the district court, the government faces a sizeable hurdle to having those decisions reversed. If the government seeks to immediately stave off compliance with an interlocutory records decision, it must take the extraordinary step of petitioning for a writ of mandamus.⁹⁵

record" generated during the decisionmaking process).

91. *Dep't of Commerce*, 139 S. Ct. at 2579 (Thomas, J., concurring in part and dissenting in part).

92. *Dep't of Commerce*, 139 S. Ct. at 2574–76 (majority opinion).

93. See *In re United States*, 138 S. Ct. 371, 375 (2017) (Breyer, J., dissenting from grant of stay) ("[The Court is] 'poorly positioned to second-guess district courts' determinations in this area."); see also Gavoov & Platt, *supra* note 11, at 72–73 ("[Records holdings by district courts] can be difficult to correct, as courts of appeals typically review district courts' determinations of whether to allow in extra-record evidence for abuse of discretion.").

94. *Dep't of Commerce*, 139 S. Ct. at 2564.

95. See FED. R. APP. 21 (listing the requirements, process, and courts' options with a writ of mandamus); 28 U.S.C. § 1292 (2012) (noting that an immediate appeal must be made within

If the government complies with the decision, the district court's decision will still be reviewed only for abuse of discretion.⁹⁶ Rarely will an appeal present otherwise if the government is adversely affected by records issues, and rarely will the plaintiff be in a posture to seriously challenge a record determination from a federal district judge.

We note also that of the minimal case law that has developed in the relatively short span since *Department of Commerce*, at least one court has sidestepped the Supreme Court's pretext analysis by noting that *Department of Commerce* concerned the APA.⁹⁷ That court, considering a *constitutional* challenge, concluded that "equal protection principles, not the APA, supply the governing legal framework for assessing whether plaintiff is entitled to discovery at this time" for litigation that would otherwise present under the APA.⁹⁸

CONCLUSION

We conclude that the Court may find itself presented with another APA record-oriented case and consider significantly cabining the precedential effect of *Department of Commerce*'s unwarranted administrative record holdings. Alternatively, the Court might simply ignore the records aspect of the case in future litigation.⁹⁹ Some commenters observe that *Department of Commerce* will

ten days after the order is made); *see, e.g.*, *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 185 (3d Cir. 2006) (holding that a private action challenging rulemaking under the APA is limited to the administrative record).

96. *See, e.g.*, *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (stating that the court would only review the disputed ruling for abuse of discretion, as supplied by the APA, because there is no private right of action allowing for review under an alternative review); *Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 856 (7th Cir. 2009) (holding that the general rule of reviewing an agency's decision is limited to abuse of discretion).

97. *Mayor & City Council of Baltimore v. Trump*, No. CV ELH-18-3636, 2019 WL 6970631, at *7-8 (D. Md. Dec. 19, 2019).

98. *Id.* at *9.

99. One case in which this issue may arise, but is not likely to, is the DACA case the Court will hear in November 2019. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (June 28, 2019) (No. 18-857) (U.S. oral argument scheduled for Nov. 12, 2019). *Compare In re United States*, 138 S. Ct. 443, 443 (2017) (in an earlier stage of the case, confronting administrative records issues), *with Br. for Pet'rs, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 2019 WL 3942900 (Aug. 19, 2019) (briefing before the Supreme Court, failing to raise as an issue the composition of the administrative record). Again, we emphasize that this Essay takes issue with only a limited subset of the issues that *Department of Commerce* confronted.

be a so-called “one-off” case,¹⁰⁰ perhaps in the mold of *King v. Burwell*¹⁰¹ or *Bush v. Gore*.¹⁰² There is merit to that thinking; Part V of the majority opinion seems to strive to limit its “hard look” review to the unusual facts of the case, including the point that the government consented to discovery.¹⁰³ Part IV.B exists to emphasize that the agency action undertaken was, in theory, permissible. However, the opinion does not preclude lower courts and challengers from brushing aside this implied limit and deeming agency justification as pretext in a variety of regulatory contexts.

Though that may be possible in regards to the Court’s APA “pretext” and “contrived” holding, the administrative records holdings of *Department of Commerce*—record supplementation and harmless error—frequently arise before the merits stage of APA litigation.¹⁰⁴ Because administrative records issues largely arise at the sub-merits stage, and some in the bench and bar may begin to view APA evidence to be more in alignment with traditional discovery, we agree with the concurring Justices that this problem will grow. That growth, in both the administrative records and merits holdings contexts, can lead to the Court soon having a vehicle to explicitly moor its administrative records jurisprudence to the APA or to otherwise ignore the problematic aspects of the *Department of Commerce* opinion.

100. See also Marcia Coyle, *Two SCOTUS Vets Denounce Roberts's Census Ruling as 'One-Off' and 'Bizarre'*, LAW.COM (July 16, 2019), <https://www.law.com/nationallawjournal/2019/07/16/two-scotus-vets-denounce-robertss-census-ruling-as-one-off-and-bizarre/?slreturn=20190628152213> (articulating that the Court’s decision could revolutionize litigation of the APA).

101. 135 S. Ct. 2480 (2015).

102. 531 U.S. 98 (2000).

103. See Dep’t of Commerce, 139 S. Ct. at 2569 (narrowing the Court’s scope of review to focus on the Secretary’s decision in relation to the specific facts found).

104. This was precisely the posture of *In re United States*, 138 S. Ct. at 444–45.