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EXPANDING THE ADMINISTRATIVE RECORD: USING PRETEXT TO SHOW "BAD FAITH OR IMPROPER BEHAVIOR"

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INTRODUCTION

Within the first year of Donald Trump's presidency, his Administration repealed, withdrew, or modified hundreds of regulations and agency decisions.[1] Although these rollbacks encompassed a wide array of administrative actions across a variety of regulatory fields,[2] the most significant and concentrated effort from the Trump Administration focused on destroying Obama-era environmental regulations.[3] President Trump himself promised to get "rid of [the Environmental Protection Agency] in

1. *Interactive Tracking Deregulation in the Trump Era*, BROOKINGS (Aug. 28, 2020), https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ [https://perma.cc/5QZH-ECR5]; *see also* Noam N. Levey & Evan Halper, *Trump Administration's Own Analyses Indicate Many of Its New Regulations Will Hurt Vulnerable Americans*, L.A. TIMES (Nov. 20, 2018, 9:25 AM), https://www.latimes.com/politics/la-na-pol-trump-regulations-impact-20181120-story.html [https://perma.cc/VQZ9-CQLX].

2. *See, e.g.*, Renae Merle & Tracy Jan, *Trump Is Systematically Backing Off Consumer Protections, to the Delight of Corporations*, WASH. POST (Mar. 6, 2018, 8:00 AM), https://www.washingtonpost.com/business/economy/a-year-of-rolling-back-consumer-protections/2018/03/05/e11713ca-0d05-11e8-95a5-c396801049ef_story.html [https://perma.cc/9SDG-229W]; Shannon Von Sant, *Trump Administration Reverses Standards for Energy-Efficient Lightbulbs*, NAT'L PUB. RADIO (Sept. 4, 2019, 4:57 PM), https://www.npr.org/2019/09/04/757623821/trump-administration-reverses-standards-for-energy-efficient-light-bulbs [https://perma.cc/Q4RW-ZAUS]; Adam Minsky, *The Definitive List of Rollbacks to Student Loan Protections*, FORBES (Mar. 26, 2019, 10:35 AM), https://www.forbes.com/sites/adamminsky/2019/03/26/the-definitive-list-of-rollbacks-to-student-loan-protections/#3481930b2818 [https://perma.cc/995S-N6N3]; Levey & Halper, *supra* note 1.

3. *See, e.g.*, Zack Colman, *Trump Releases Plan to Roll Back Obama Administration Climate Rules Aimed at Power Plants*, SCI. MAG. (Aug. 21, 2018, 10:00 AM), https://www.sciencemag.org/news/2018/08/trump-releases-plan-roll-back-obama-administration-climate-rules-aimed-power-plants [https://perma.cc/78BU-9Y7P]; *Trump to Sign New Order Rolling Back Obama Energy Regs*, FOX NEWS (Mar. 28, 2017), https://www.foxnews.com/politics/trump-to-sign-new-order-rolling-back-obama-energy-regs [https://perma.cc/U8FU-PW5S].

every form,"[4] and his Administration attacked climate change policies by eliminating greenhouse gas (GHG) regulations that bound the nation's biggest polluters.[5] Of the hundreds of deregulatory actions, nearly eighty have focused solely on environmental protections.[6]

In addition to posing serious environmental and public health concerns, the Trump Administration's aggressive attack on environmental regulations threatened the rule of law and the democratic process. No other administration sought deregulation so aggressively, and no other president went as far as Trump in influencing agency action and regulations.[7] Indeed, the Trump Administration has repeatedly been described as "amateur hour"[8]—out of the dozens and dozens of lawsuits over

4. Coral Davenport, *E.P.A. Faces Bigger Tasks, Smaller Budgets and Louder Critics*, N.Y. TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/us/politics/epa-faces-bigger-tasks-smaller-budgets-and-louder-critics.html?mtrref=www.nytimes.com [https://perma.cc/SE9G-FWLR] (quoting Donald Trump).

5. *See Regulatory Rollbacks, Environmental Protections of the Chopping Block*, ENV'T INTEGRITY PROJECT, https://www.environmentalintegrity.org/trump-watch-epa/regulatory-rollbacks/ (last visited Aug. 30, 2020) [hereinafter *Regulatory Rollbacks*] [https://perma.cc/B9Y6-Z574]; Colman, *supra* note 3; Nadja Popovich et al., *78 Environmental Rules On the Way Out Under Trump*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html [https://perma.cc/396N-YVVB].

6. Popovich et al., *supra* note 5.

7. The past five administrations, in conjunction with the ever-expanding executive power, have acted quickly to stall, withdraw, or reverse the prior administration's policies. This phenomenon has occurred whether it has been a lame-duck sitting president followed by a different party's administration, after a president who only served for one term, or even during a shift in administrations that shared the same political party. See Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011), for a discussion on how political transitions have affected agency decision-making procedures throughout the past five administrations. Trump, in particular, has micromanaged administrative action. *See, e.g.*, Matthew Dallek, *In the Weeds: Trump Is the Most Aggressive Micromanager in the History of the Oval Office*, WASH. POST., https://www.washingtonpost.com/opinions/2019/09/13/trump-is-most-aggressive-micromanager-history-oval-office/?arc404=true (last visited Aug. 30, 2020) [https://perma.cc/HWK8-NNZN] (explaining how the Trump Administration, compared to prior administrations, is aggressively attacking prior regulations); Peter L. Strauss, *The Trump Administration and the Rule of Law* (Columbia L. Sch. Pub. L. Working Paper, Paper No. 14-650), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3601&context=faculty_scholarship [https://perma.cc/UH73-K6AE]; *see also* Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 812–17 (2019) (describing, generally, Trump's approach to deregulation).

8. Karl Rove, Opinion, *Amateur Hour at the White House*, WALL ST. J. (Feb. 1, 2017, 7:11 PM), https://www.wsj.com/articles/amateur-hour-at-the-white-house-1485994265 [https://perma.cc/NJ8K-2HG5]; Joe Palca, *Former NIH Director Calls Trump Administration's Pandemic Response 'Amateur Hour'*, NAT'L PUB. RADIO

different agency actions, the Trump Administration lost ninety-four suits but won only twelve.[9] This abysmal success rate, coupled with the Administration's aggressive attack on prior regulations, suggests the Administration was lackadaisical in its approach to administrative procedure.

One high-profile loss for the Trump Administration was the *Department of Commerce v. New York* decision. This case centered around highly controversial political concerns, and it was the first time the Supreme Court ever found an agency had violated the Administrative Procedure Act (APA) by providing pretextual justifications for an agency decision. In reviewing the facts of the case, the Court acknowledged that there was a disconnect between the agency's official justifications and the circumstances surrounding the agency's decision. The Court stated that the judiciary is "not required to exhibit a naiveté from which ordinary citizens are free";[10] therefore, if evidence shows there is a "significant mismatch" between the agency's genuine and official justifications, then the agency acted illegally by providing a pretextual justification. In other words, *Department of Commerce* articulated a new way that agencies can violate the APA: by providing on-the-record justifications that significantly differ from their genuine justifications.

Nevertheless, the current framework of judicial review significantly limits the judiciary's ability to review agency action for pretext. In administrative litigation, judicial review of agency actions is limited to the evidence contained in the official administrative record—a record which the agencies mostly create themselves. Accordingly, the agency is incentivized to create a record that supports the agency's official justification but will most likely attempt to exclude any documents that could suggest its official justification is pretextual. Even worse, as searching for an agency's genuine justification for acting often involves examining the "mental processes" of the agency decision-makers, challengers may not even have access to evidence showing the agency's genuine motivations. Decision-makers' mental

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(Jun. 29, 2020, 8:21 AM), https://www.npr.org/sections/health-shots/2020/06/29/884435625/former-nih-director-calls-trump-administrations-pandemic-response-amateur-hour [https://perma.cc/C78V-6LCG].

9. *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup (last updated Aug. 31, 2020) [https://perma.cc/5834-WBQ8].

10. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

processes may not be formalized in written documents, but even if they are, such documents might remain inaccessible through the Freedom of Information Act. Thus, only if challengers ask courts to expand the administrative record to examine the mental processes of agency decision-makers can courts have the information necessary to review for pretext.[11]

Yet challengers face significant hurdles to expanding the administrative record to include evidence regarding the "mental processes" of agency actors,[12] as courts are often reluctant to consider this kind of evidence.[13] Only if challengers provide evidence that demonstrates a "strong showing of bad faith or improper behavior" by an agency actor will a court allow extra-record discovery, such as depositions.[14] As a result, agencies are able to manipulate the decision-making process by providing justifications—crafted to survive legal challenges—as a mere pretext to cover their actual justifications, thereby avoiding meaningful judicial review. Without extra-record discovery to supplement or expand the administrative record, judicial review could become an "empty ritual."[15]

Granted, some scholars disagree as to whether courts should ever examine the mental processes of administrative actors. Some argue that a high standard for showing "bad faith" is necessary to preserve administrative integrity and efficiency.[16] These scholars note that nothing in the APA permits extra-record discovery, and thus argue that any "inquiry into the mental

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11. Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 9, 19 (2018) [hereinafter Gavoor & Platt, *Administrative Records and the Courts*].

12. *See id.* at 63 (discussing why litigants try to expand the record); *see also* James D. Cromley & J. Michael Showalter, *Going Beyond: When Can Courts Look Past the Record in an APA Review?*, GEO. ENV'T 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-an-apa-review/ [https://perma.cc/WT9Y-PSTW] (explaining the correlation between pretext challenges and extra-record discovery).

13. Cromley & Showalter, *supra* note 12 ("[T]he overwhelming majority of courts have declined to use *Overton Park*'s exception to look beyond the administrative record."); Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 44–45.

14. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

15. *See Dep't of Com.*, 139 S. Ct. at 2576.

16. *See* Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 25 n.164 ("There is a strong presumption against discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process.") (quoting Camp v. Pitts, 411 U.S. 138, 141–42 (1973)).

process[es]" is inappropriate.[17] This line of argument suggests that "bad faith or improper behavior" by agency actors is a non-issue as long as the record otherwise supports the agency's decision.[18]

Nonetheless, even if an agency action is "influenced by political considerations or prompted by an Administration's priorities,"[19] the APA requires agencies to provide "reasoned explanations" for their decisions.[20] These decisions might be "informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)."[21] But agencies must offer "genuine justifications" from the administrative record precisely to allow courts to determine if agencies are acting legally.[22] As the *Department of Commerce* Court bluntly stated, "[a]ccepting contrived reasons would defeat the purpose of the enterprise."[23] Because pretextual justifications are the antithesis to "reasoned explanations," courts need to utilize tools—like extra-record discovery—to meaningfully review agency actions and justifications for illegal pretext.[24]

Moreover, unchecked pretextual decision-making poses a real danger of diminishing public trust in judicial review and agency authority. For example, citizens analyzing agency decisions are not limited to the official administrative record and instead can consider the agencies' actions within the broader social and political context. The media can inform this broader perspective by highlighting inconsistencies between an agency's official justification and the underlying political circumstances.[25]

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17. Aram A. Gavoor & Steven A. Platt, *Administrative Records After* Department of Commerce v. New York, 78 ADMIN. L. REV. 87, 98 n.89 (2020) [hereinafter, Gavoor & Platt, *Administrative Records After* Dep't of Com.].

18. *See id.*

19. *Dep't of Com.*, 139 S. Ct. at 2573.

20. *Id.* at 2575–76.

21. *Id.*

22. *Id.*

23. *Id.* at 2576.

24. *See id.*

25. *See* Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html [https://perma.cc/7S9S-E5EP] (explaining that uncovered memos and emails contradicted the Department of Interior's claim that the public-lands decision was not about oil and gas); Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html [https://perma.

Unlike citizens, however, reviewing courts must review only those facts on the record. As a result, if a reviewing judge does not permit extra-record discovery in circumstances where "ordinary citizens are free" from naiveté,[26] then the public may see that judge as a "judicial naif,"[27] weakening society's faith in the judiciary.

In addition to undermining courts' legitimacy, pretextual decision-making raises separation of powers concerns.[28] Agencies are appendages to both the legislative and executive branches; Congress provides agencies with statutory duties and legislative directives, and the executive branch influences agencies' policy directions.[29] The judiciary, in turn, reviews agency action to ensure agencies do not exceed their statutory limits. But if the judiciary lacks sufficient evidence to review pretextual decision-making—because, for example, courts do not readily permit extra-record discovery when warranted—then there is a legitimate danger that agencies will override statutory requirements and begin to wield power with impunity.[30]

This Comment argues that courts should more readily permit extra-record discovery when preliminary signs of pretext strongly suggest "bad faith and improper behavior" by agency decision-makers.[31] Section I.A sets the scene by describing the

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cc/7F5M-NXMQ] (uncovering evidence that the citizenship question was designed to benefit the Republican party); Scott Bronstein et al., *Whistleblower Says He Was Pressured by Trump Administration to Reverse Environmental Decision*, CNN (July 9, 2019), https://www.cnn.com/2019/07/08/politics/interior-department-arizona-development-bernhardt/index.html [https://perma.cc/6PTC-T4KV] (former civil servant brings evidence that politics improperly influenced an environmental decision); Carol Davenport & Lisa Friedman, *Trump, Citing Pandemic, Moves to Weaken Two Key Environmental Protections*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/climate/trump-environment-coronavirus.html [https://perma.cc/7YYL-MML9] (suggesting that the Trump Administration is using the novel coronavirus pandemic as a pretext to weaken environmental protections).

26. *Dep't of Com.*, 139 S. Ct. at 2575 (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

27. David A. Martin, *Executive Discretion and Judicial Deference After the Census Case: The Chief Justice's Tightrope*, LAWFARE (July 23, 2019, 12:06 PM), https://www.lawfareblog.com/executive-discretion-and-judicial-deference-after-census-case-chief-justices-tightrope [https://perma.cc/2SAF-AMLD].

28. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 525–26, 528 (2015).

29. *See id.* at 532–33.

30. See Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515 (2018), for a discussion on the executive's increased involvement in agency rulemakings; *see also* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016).

31. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

basic mechanics of litigation challenging agency decisions. Section I.B shifts focus by examining two recent Supreme Court decisions that illustrate the Court's struggle to review executive action where an agency seems to have offered a pretextual justification. Part II then shows how agencies' reliance on pretextual justifications is becoming a growing and serious problem—especially within the Trump Administration—and describes a 2017 decision by the Fish and Wildlife Service that raised concerns about pretextual decision-making.

Part III first presents a solution: courts should examine whether preliminary signs of pretext strongly suggest "bad faith or improper behavior" by agency officials, allowing challengers to engage in extra-record discovery, including depositions of administrative actors. Part III then proposes and defends five factors that courts should weigh when considering whether the context surrounding an agency's actions sufficiently suggests pretext.[32] These five factors include: (1) the political climate of the agency action; (2) the posture of the agency action, such as whether the agency is rescinding, withdrawing, or promulgating a rule; (3) the extent to which the agency relied on scientific uncertainty; (4) the agency's underlying congressional mandates; and (5) the agency's interaction with interest groups. Considering these factors collectively would help courts evaluate whether extra-record discovery should be permitted, which in turn would enable courts to meaningfully determine if there is a "significant mismatch" between the agency's proffered and "genuine" justification.[33] The Comment ends with a brief discussion of the benefits and drawbacks of such an approach.

I. JUDICIAL REVIEW FOR PRETEXT IN ADMINISTRATIVE RECORDS

In 2019, the Supreme Court made an unprecedented decision to overturn an agency action "solely because [the Court] question[ed] the sincerity of the agency's otherwise adequate rationale."[34] The Court held that because there was a "significant

32. Implicit in the suggestion for courts to consider the five factors is a suggestion that litigators also address these five factors in motions to permit extra-record discovery. However, for ease of reference, this Comment addresses courts' actions, rather than those of litigators.

33. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019).

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

mismatch between the decision . . . and the rationale," the agency's official justification was pretext for its unstated, "genuine" justification.[35] The Court found that the agency's administrative record was "more of a distraction" than the reasoned explanation required by the APA.[36] This holding is novel, in part because the Court was only able to come to this conclusion by examining extra-record evidence, including depositions. Such evidence is typically barred in administrative litigation, but in a rare move, the lower courts had ordered extra-record discovery after challengers made a "strong showing of bad faith or improper behavior."[37]

This type of discovery is rare, in part because of the rules that limit the administrative record in APA litigation. Part A describes the creation of the administrative records, including how the record benefits agencies and how challengers can move courts to complete, supplement, or expand it. Part B then dives into two Supreme Court decisions that reflect the Court's struggle to adjudicate challenges that allege pretextual justifications by administrative agencies.

A. The Administrative Record and Extra-Record Discovery

Disputes over the administrative record in environmental litigation are common and contentious.[38] When a federal agency is sued under the APA, the litigation begins with the administrative agency creating and submitting to the court a record of its decision-making process for judicial review. In general, an agency enjoys a presumption of regularity in creating this record—a presumption that "credits to the executive branch certain facts about what happened and why and, in doing so, narrows judicial scrutiny and widens executive discretion over decision-making processes and outcomes."[39] Challengers seeking to expand the record with evidence that the agency did not include

35. *Id.* at 2575.

36. *Id.* at 2576.

37. *Id.* at 2574 (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

38. *E.g.*, James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301, 1313 (2008) ("The scope of the administrative record is often a highly disputed issue in environmental litigation.").

39. *See, e.g.*, Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2432 (2018) (providing an in-depth analysis of the presumption of regularity).

often move the reviewing court to compel completion or supplementation of the record.[40] Government defendants just as often oppose these motions.[41] On rare occasions, challengers will attempt to overcome the presumption of regularity and seek extra-record discovery—parlance for depositions of administrative actors[42]—however, courts almost always deny such motions.[43]

1. The "Record Rule" and the Presumption of Regularity

The Administrative Procedure Act is aptly named: it requires administrative agencies to follow certain procedures. Courts have interpreted the APA as requiring agencies to provide "reasoned explanations" for their decisions.[44] Citizens challenge those decisions in court, making judicial review a check on the administrative state.[45] But in order for this review to be meaningful, the APA mandates reviewing courts to consider the "whole record or those parts of it cited by a party."[46] In the

40. *See* Saul, *supra* note 38, at 1326; *see also* Peter Constable Alter, Note, *A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U.C. IRVINE L. REV. 1045, 1062 (2020).

41. *See, e.g.*, Alter, *supra* note 40.

42. *See* Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 65. Although extra-record discovery can include different types of discovery, such as requests for internal documents, most agency documents will be included in the administrative record (either initially or through motions to supplement or complete the administrative record) or as part of plaintiffs' FOIA requests.

43. Cromley & Showalter, *supra* note 12.

44. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) (noting "[t]he reasoned explanation requirement of administrative law"); *see also* Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures That Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269, 274 (2017) ("[A]gencies must not act in an arbitrary and capricious manner and as part of that requirement, agencies must provide a 'reasoned explanation' for their decisions.").

45. *E.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1812 ("[Judicial review] may be understood . . . as establishing a system of mutual political checks on agency action."). Presidential elections are also, theoretically, an opportunity to hold agencies accountable; the logic goes that the electorate through presidential elections can indicate its satisfaction with administrative actions and policies. Presidents appoint leaders of the agencies and partially influence agencies' policy directions. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part, dissenting in part) (implying that the electorate keeps agencies accountable by "casting their votes" for a President more in line with their views). *But see* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1481 (2013) ("The degree of democratic accountability that presidentialism offers may be overstated.").

46. 5 U.S.C. § 706.

seminal case, *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court articulated the "record rule."[47] Simply put, this rule requires judicial review "to be based on the full administrative record that was before the [agency] at the time [of its] decision."[48]

Discovery for litigation against administrative agencies is distinct from civil litigation between private parties. In the latter, both parties contribute to the record before the court by, for example, submitting interrogatories or conducting depositions.[49] In contrast, principles of administrative law bar that kind of discovery unless there is a "strong showing of bad faith or improper behavior" on the part of the agency.[50] Additionally, discovery and record creation in administrative litigation disproportionately favors agency defendants because agencies largely create the administrative record.[51] Typically, the record includes the agency's nondeliberative documents that it relied on to make its decision.[52] The record rule, however, does not necessarily require agencies to include deliberative documents—including inter- and intra-agency communication—as the deliberative-process privilege typically shields such materials.[53]

47. Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 21 ("The seminal Supreme Court treatment of the record rule is arguably 1971's *Citizens to Preserve Overton Park v. Volpe*.").

48. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

49. *See* Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 333–34 (1982) (explaining that in administration litigation, "courts generally have responded to the narrow facts of the particular dispute before the court," implying that civil litigation allows for greater fact finding); *see also* Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 25 (explaining APA litigation is different, partially because "a court cannot order traditional civil discovery").

50. *Overton Park*, 401 U.S. at 420.

51. *See* Alter, *supra* note 40, at 1057 ("[T]he agency's preparation and certification of the administrative record is subject to a 'presumption of administrative regularity,' which traditionally makes it difficult for a plaintiff to add materials favorable to its case.").

52. These documents could include public comments on the agency action, policy and guidance directives, and scientific studies or reports because these are usually the documents that agencies consider when making decisions. *See* Cromley & Showalter, *supra* note 12.

53. *See* Alter, *supra* note 40, at 1066 n.154, 1076 (discussing deliberative materials as well as the work product doctrine); *see also* Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 354–58 (2009) (explaining the deliberative process privilege specifically in APA litigation); William R. Sherman, *The Deliberation*

Moreover, courts are split as to whether agencies need to provide information indirectly relied on by the agencies.[54] As a result, agencies have almost unfettered discretion in creating the record, though there are some limitations—for example, the record rule bars agencies and their attorneys from adding post hoc rationalizations explaining their decisions.[55]

As mentioned above, administrative agencies also enjoy a presumption of regularity. This presumption means that courts will assume the administrative record is complete.[56] This makes sense for most actions, as limiting discovery based on an agency's good faith streamlines administrative litigation, alleviates discovery burdens, and protects administrative employees from depositions.[57] But this approach also incentivizes agencies to withhold certain information and can allow them to "masquerade[] behind a façade" of otherwise legitimate justifications.[58]

2. Expanding the Record and *Overton Park*'s "Bad Faith" Exception

Challengers typically file one of two motions (or both) to modify the record: a motion to complete and a motion to supplement.[59] For the former, challengers argue the record is incomplete because the agency has not included documents that it actually relied on.[60] Challengers often use documents obtained via Freedom of Information Act (FOIA) requests to identify gaps in the record.[61] Because FOIA-obtained documents are not automatically part of the administrative record, challengers must file

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Paradox and Administrative Law, 2015 BYU L. REV. 413, 414 (2015) ("Records of deliberations, in short, may be kept secret.").

54. Alter, *supra* note 40, at 1070–72; *see also* Cromley & Showalter, *supra* note 12, at n.13 (providing a list of cases to compare and contrast the different court approaches).

55. *E.g.*, *Overton Park*, 401 U.S. at 419 ("'[P]ost hoc' rationalizations . . . have traditionally been found to be an inadequate basis for review.").

56. *See, e.g.*, *The Presumption of Regularity in Judicial Review of the Executive Branch*, *supra* note 39, at 2432.

57. *See* Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 69–73. Gavoor and Platt describe the harms that could stem from extra-record discovery, so the inverse is presumably true: prohibiting extra-record discovery will bring the opposite. *Id.*

58. Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

59. Alter, *supra* note 40, at 1057–58.

60. *Id.* at 1057.

61. Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 33, 46.

a motion for the court to include them and thereby complete the administrative record.[62] In contrast, challengers move to supplement the record when they believe there is information that the agency perhaps did not directly rely on, but should nonetheless be included to facilitate meaningful review.[63] Supplementing the record typically includes adding documents indirectly relied on by the agencies, explanatory material for "complex subject matters," and other "relevant background information."[64]

In addition to moving to complete or supplement the record, challengers may request extra-record discovery under *Overton Park*'s "bad faith or improper behavior" rule.[65] Extra-record discovery, unlike the other two options, allows challengers to issue interrogatories and depose administrative officials to "inquir[e] into the mental processes of administrative decisionmakers."[66] Such discovery is generally prohibited unless "there is a strong showing of bad faith or improper behavior," as the Supreme Court explained in *Citizens to Preserve Overton Park v. Volpe*.[67]

At the heart of *Overton Park* were concerns over the federal government's treatment of the environment.[68] In the 1950s and 1960s, the city of Memphis, Tennessee, wanted to build a federal highway through Overton Park, one of the only large green spaces in the city at the time.[69] To obtain federal funds for the highway, the city needed approval from the Secretary of Transportation, and the Secretary could approve the project only if there were no other "feasible and prudent" alternatives.[70] The Secretary determined there were no other alternatives and he approved the highway proposal—without providing any justification for his findings.[71] The city planned to move forward with the highway, but a coalition of concerned citizens and national conservation groups challenged this action in court on multiple

62. *See, e.g.*, California v. U.S. Dep't of Homeland Sec., No. 19-cv-04975-PJH, 2020 WL 1557424, at *9–10 (N.D. Cal. Apr. 1, 2020) (describing Ninth Circuit caselaw where plaintiffs used FOIA documents to overcome presumption of regularity).

63. Alter, *supra* note 40, at 1057–58.

64. *See* California v. U.S. Dep't of Homeland Sec., 2020 WL 1557424, at *2, 6.

65. Saul, *supra* note 38, at 1308–09.

66. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

67. *Id.*

68. *See id.* at 405–07 (describing the factual context and importance of the greenspace provided by the Overton Park).

69. *Id.* at 406.

70. *Id.* at 407–08.

71. *Id.* at 408.

grounds; essentially, the arguments focused on the adequacy of the Secretary's justifications.[72] After litigation started, the Secretary provided affidavits explaining his decision, but the Supreme Court found those affidavits were impermissible post hoc rationalizations.[73] As a result, the lower courts did not have the correct administrative record before them—that is, these courts did not have the contemporaneous information that the Secretary relied on when he made his decision.[74] Without that information, the district court could not meaningfully review the agency's decision.[75]

Justice Marshall, writing for the *Overton Park* majority, emphasized the importance of the correct record for review.[76] In addition to articulating the now-common "record rule," Justice Marshall also elucidated the necessity of depositions in limited situations.[77] He explained that when the record is otherwise deficient, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves."[78] Although the Court stated this examination should be limited to situations where there is a "strong showing of bad faith or improper behavior," *Overton Park* shows the importance—and necessity—of "inquir[ing] into the mental processes of administrative decisionmakers."[79] Despite the Supreme Court's approval of such inquiry, however, an "overwhelming majority of courts have declined to use *Overton Park*'s exception to look beyond the administrative record."[80]

B. The Court Is Walking a "Tightrope" to Review Pretextual Justifications

Two high-profile cases have emerged during the Trump Administration, which taken together illustrate the Supreme Court's struggle to review allegations of pretextual decision-

72. *See id.* at 408–09.
73. *Id.* at 419.
74. *Id.*
75. *Id.* at 420.
76. *Id.*
77. *See id.*
78. *Id.*
79. *See id.*
80. See Cromley & Showalter, *supra* note 12, at n.13, for a discussion on courts rejecting the "bad faith" exception.

making and again highlight the importance of *Overton Park*'s "bad faith" exception for extra-record discovery.

1. *Trump v. Hawaii*: The Travel Ban

The Supreme Court first adjudicated a potentially pretextual executive justification when it heard arguments on President Trump's "travel ban."[81] Although the travel ban was not an administrative decision and thus not subject to the same administrative-record rules, the litigation over the ban highlights the Court's struggle to review executive action that is allegedly pretextual.[82] The difference between the majority and dissenting opinions also provides a glimpse into the Court's internal tension over the appropriate scope of evidence for judicial review.

Within days of taking office, President Trump signed the first of three executive orders that placed travel restrictions on arrivals from certain countries—most of which were Muslim-majority.[83] This ban was alarming to some, as Trump had repeatedly employed anti-Muslim rhetoric throughout his campaign.[84] For example, Trump promised "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."[85]

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81. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

82. *See* Cromley & Showalter, *supra* note 12.

83. Exec. Order 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017), https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf [https://perma.cc/9UP2-ZXL9]. The first ban placed a ninety-day moratorium on travel to the United States from predominantly Muslim countries such as Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* This ban was the first of three and was allegedly based on national security concerns over the "visa-issuance process" and intended "to ensure that those approved for admission do not intend to harm Americans and that ['immigrants and nonimmigrants'] have no ties to terrorism." *Id.* at 8977. The order required officials at the Department of Homeland Security—who had no knowledge of or input in the creation of the ban—to enact measures "to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat." *Id.*; *see also* Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 611–12, 615 (2019); Josh Gerstein et al., *These Countries are on Trump's New Travel Ban List*, POLITICO (Sept. 25, 2017, 5:40 PM), https://www.politico.com/interactives/2017/trump-travel-ban-country-list-map/ [https://perma.cc/7MDJ-9QUM].

84. *See, e.g.*, Family, *supra* note 83, at 613–14 (noting that the challenges to the first travel ban were based on constitutional concerns).

85. *All Things Considered*, NAT'L PUB. RADIO (June 26, 2018, 4:23 PM), https://www.npr.org/2018/06/26/623646426/looking-back-at-the-timeline-of-president-tru

Trump consistently expressed anti-Muslim sentiments: "I think Islam hates us"; "They're sick people"; "We're having problems with the Muslims"; "The children of Muslim American parents, they're responsible for a . . . growing number of terrorist attacks."[86]

Although the Administration justified its travel ban by citing national security concerns, challengers suspected these explanations were mere pretext offered to hide the Administration's anti-Muslim motivations.[87] And there was evidence to support that conclusion, including comments from Trump's lawyer.[88] When Trump first signed the travel ban, he referred to it as a "Muslim ban,"[89] and according to Trump's lawyer, Trump told him to: "'Put a commission together. Show me the right way to do it legally.'"[90] The Administration had a difficult time enacting the travel ban legally, as it changed the ban's language three times before the Supreme Court finally upheld it.[91]

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mps-travel-ban [https://perma.cc/Q5VB-Z8F3]; Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, N.Y. TIMES (May 20, 2017, 1:16 PM), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims [https://perma.cc/3RPW-PCHD]. During his campaign, Trump changed his language repeatedly, both promising and "call[ing] for" a Muslim ban, which itself was changed to "extreme vetting." *See, e.g.*, *Trump's Campaign Promises—Has He Delivered on Them?*, BBC NEWS (Aug. 28, 2020), https://www.bbc.com/news/world-us-canada-37982000 [https://perma.cc/EJL9-GS9H].

86. Johnson & Hauslohner, *supra* note 85.

87. *See* Brief for Respondents at 32, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) ("The evidence was overwhelming that EO-2 was promulgated for the unconstitutional purpose of preventing Muslim immigration."); *e.g.*, Brief for the National Asian Pacific American Bar Association and Others as Amici Curiae Supporting Respondents at 23, Trump v. Hawaii, 138 S. Ct. 2392 (No. 17-965) ("The thinly veiled animus behind the Proclamation is even more glaring when set against the long history of such discrimination that Congress has expressly tried to stamp out, and ignoring such evidence would abet pretextual discrimination between people of different religions and nationalities.").

88. *See* Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—And Ordered a Commission to Do It 'Legally'*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally [https://perma.cc/SZP5-K6EQ].

89. *Id.* (quoting Giuliani describing Trump's characterization of the executive order).

90. *Id.*

91. Family, *supra* note 83, at 611 (noting that the travel ban changes stemmed from a desire to scrub the illegal provisions from the different travel bans).

The Supreme Court's split decision shows that the Justices disagreed on which evidence was appropriate for review.[92] The majority upheld the ban by ignoring its conflicted history and taking the Administration's official justification at face value.[93] The Court held that "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, [the Court] must accept that independent justification."[94] In contrast, Justice Breyer, dissenting, suggested the case should be remanded, presumably so the parties could more fully litigate the import of the ban's anti-Muslim history, which was primarily introduced in amicus briefs before the Supreme Court.[95] He recognized that the non-record evidence from amicus briefs, some of which included statements by President Trump, presented a compelling narrative that suggested the travel ban's justification was pretextual.[96] But Justice Breyer ultimately concluded that this evidence was inappropriate for review: "Declarations, anecdotal evidence, facts, and numbers taken from amicus briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide."[97] Thus, even though he would have remanded the case, he at least acknowledged the ban's context—unlike the majority.[98]

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92. *See Trump v. Hawaii*, 138 S. Ct. 2392.

93. *See id.* at 2421. The majority essentially ignored the religious-animus evidence "because there [was] persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility." *See also id.* at 2433 (Sotomayor, J., dissenting) (claiming the majority "ignor[ed] the facts").

94. *Id.* at 2421.

95. *Id.* at 2433 (Breyer, J., dissenting). Justice Breyer would have "sen[t] this case back to the District Court for further proceedings" because "[t]he Government has not had an opportunity to respond, and a court has not had an opportunity to decide" on the significance of the extra-record evidence. *Id.*

96. *Id.* In defending his dissent, Justice Breyer relied on "[d]eclarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs." *Id.* Many of these briefs included statements by President Trump during and after his presidential campaign. *E.g.*, Brief of NAACP Legal Def. & Educ. Fund, Inc. as Amici Curiae Supporting Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1586443, *23–29; Brief of Plaintiffs in Iranian Alls. Across Borders v. Trump as Amici Curiae Supporting Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) 2018 WL 158644.

97. *Trump v. Hawaii*, 138 S. Ct. at 2433.

98. *Id.* ("If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders

In her dissent, Justice Sotomayor went further than Justice Breyer by highlighting the dangers of the majority's limited review. She concluded that the available evidence *was* sufficient to show pretext.[99] Specifically, she cited Trump's campaign promises, excerpts from a campaign interview where he positively compared the travel ban to Japanese internment camps, and his presidential tweets "alluding to a desire to keep Muslims out of the country."[100] In short, Justice Sotomayor believed "the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers."[101] But because the Court minimized and ignored the contextual evidence, "the majority empower[ed] the President to hide behind an administrative review process"[102] and allowed policies to "masquerade[] behind a façade" of otherwise legitimate justifications.[103]

Even though *Trump v. Hawaii* is in many regards a case with remarkable facts, it highlights the judiciary's struggle to review actions that provide facially permissible justifications that nonetheless seem ingenuine when viewed in a wider context.[104]

2. *Department of Commerce v. New York*: The Citizenship Question

A year later, the Supreme Court again reviewed an executive action mired in allegations of pretext in *Department of Commerce v. New York*.[105] This time, however, the Court struck down the action as pretextual and, in doing so, highlighted the dispositive importance of extra-record discovery in APA litigation.[106]

Department of Commerce concerned the Secretary of Commerce's decision to include a citizenship question on the 2020

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preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside.").

99. *See id.* (Sotomayor, J., dissenting).
100. *Id.* at 2435–37.
101. *Id.* at 2440.
102. *Id.* at 2443.
103. *Id.* at 2433.
104. *See* Cromley & Showalter, *supra* note 12.
105. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).
106. *Id.* at 2576.

decennial census.[107] Although the census had contained some type of citizenship question in previous decades, it was usually never asked of the entire population.[108] Again in light of rhetoric emanating from the Trump Administration—this time directed against immigrants—the Administration's decision to add a citizenship question to allegedly aid enforcement of the Voting Rights Act (VRA) raised concerns about pretext.[109] Democrats were especially concerned that adding a citizenship question would "discourage noncitizens from responding, skewing the population counts used to draw Congressional districts and eventually giving Republicans a bigger electoral advantage."[110] The Census Bureau[111] denied these allegations and claimed the Department of Justice (DOJ) had requested that the Bureau add the question to help the DOJ enforce VRA violations.[112] Immediately, states and non-profit groups challenged the citizenship-question decision in court,[113] alleging the Secretary had acted arbitrarily and capriciously by providing this pretextual justification to mask his actual reasoning.[114]

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107. *Id.* at 2562.

108. *Id.* at 2561–62; *see also* Michael Wines & Emily Baumgaertner, *At Least Twelve States to Sue Trump Administration Over Census Citizenship Question*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/us/census-citizenship-question.html [https://perma.cc/MY5T-4M8Z] (providing a brief history of censuses asking a citizenship question and noting that a census had not asked the whole population this question since 1960).

109. Engy Abdelkader, *Immigration in the Era of Trump: Jarring Social, Political, and Legal Realities*, 44 HARBINGER 76, 77–78 (2020), https://socialchangenyu.com/wp-content/uploads/2020/04/Engy-Abdelkader_RLSC-Harbinger_44.pdf [https://perma.cc/73XX-9CGZ] ("Trump described Mexican immigrants as 'rapists' bringing drugs and crime into the U.S. He claimed, 'The U.S. has become a dumping ground for everyone else's problems . . . When Mexico sends its people, they're not sending their best. They're sending us not the right people.'"). See *id.* for a thorough discussion on anti-immigration rhetoric in the Trump Administration.

110. Dara Lind & Abby Nelson, *The Fight Over the 2020 Census Citizenship Question, Explained*, VOX (June 12, 2019, 5:20 PM), https://www.vox.com/policy-and-politics/2019/6/12/18663009/census-citizenship-question-congress [https://perma.cc/M2EK-TB76].

111. The Census Bureau is housed inside the Department of Commerce and all citizenship questions have to run through the Secretary of Commerce. *Dep't of Com.*, 139 S. Ct. at 2561.

112. *Id.* at 2562–64.

113. *Id.* at 2561.

114. *See id.*; *see also* Second Amended Complaint for Declaratory and Injunctive Relief paras. 103, 195, New York v. Dep't of Com., 333 F. Supp. 3d 282 (S.D.N.Y. July 25, 2018), ECF No. 214, 2018 WL 6927660, at *103, *195. (plaintiffs also brought constitutional and other statutory claims).

The agency initially provided only a few documents as part of the administrative record.[115] Of significant import was a memo from Secretary of Commerce Wilbur Ross which explained the citizenship question was added solely because of the DOJ's request.[116] This memo, along with some internal emails and other communications, constituted the entire administrative record submitted to the court at the beginning of the litigation.[117] A few months later, though, the Bureau added additional materials to voluntarily supplement the original record—a move encouraged by the DOJ.[118] These materials included another memo explaining that Secretary Ross had considered adding the citizenship question a few months into his tenure and "had asked whether DOJ would formally request its inclusion."[119]

Claiming that the new information added by the Bureau implicitly indicated the record was incomplete, challengers moved the district court to compel completion of the record and permit extra-record discovery under the *Overton Park* "bad faith or improper behavior" exception.[120] In a rare move, the district court found the *Overton Park* exception was satisfied and granted the motions.[121] Challengers deposed key administrative officials, though they were ultimately barred from deposing Secretary Ross.[122] Through these depositions, the challengers discovered that Secretary Ross had brought the topic up within one week of appointment, contradicting the timeline provided by the Bureau in the record.[123] Moreover, the depositions showed that Ross had shopped around to find the best legal justification for adding the citizenship question.[124] The Bureau determined that a VRA-enforcement concern, if requested by the DOJ, would be the most

115. Index of Administrative Record, New York v. Dep't of Com., 333 F. Supp. 3d 282 (S.D.N.Y. June 8, 2018), ECF No. 173.

116. *Dep't of Com.*, 139 S. Ct. at 2562–64.

117. Index of Administrative Record, *supra* note 115.

118. *Dep't of Com.*, 139 S. Ct. at 2574.

119. *Id.*

120. *Id.* at 2573–74.

121. New York v. Dep't of Com., 333 F. Supp. 3d 282, 285–86 (S.D.N.Y. 2018).

122. *Dep't of Com.*, 139 S. Ct. at 2575. The district court initially found that "Secretary Ross must sit for a deposition because, among other things, his intent and credibility are directly at issue in these cases." New York v. Dep't of Com., 333 F. Supp. 3d at 285. On emergency appeal, the Supreme Court barred deposition of Secretary Ross. *See Dep't of Com.*, 139 S. Ct. at 2564.

123. *Dep't of Com.*, 139 S. Ct. at 2574–75.

124. *Id.*

legally defensible. Accordingly, the Bureau ghost-wrote the request letter for the DOJ to formally return to the Bureau.[125]

Based on this extra-record evidence, the district court found that Secretary Ross's decision was arbitrary and capricious, as well as pretextual.[126] That is, the court found that "the rationale he provided for his decision was not his real rationale."[127] On appeal, the Supreme Court disagreed with the district court that the agency's decision to add a citizenship question was arbitrary and capricious.[128] Rather, the Court determined "the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'"[129]

The Court agreed, however, that the Secretary's decision was pretextual.[130] The Court stated the judiciary is "not required to exhibit a naiveté from which ordinary citizens are free."[131] Relying on the extra-record discovery and considering the Secretary's citizenship-question decision in context, the Court found that "the evidence [told] a story that does not match the explanation the Secretary gave."[132] Because the Court could not have reached this conclusion without depositions permitted by the district court, the extra-record discovery was dispositive for the Court's holding.

Even so, the Court criticized the district court's discovery order.[133] Citing *Overton Park*, the Court claimed the order allowing extra-record discovery was "premature"[134] yet still found that the extra-record discovery was "ultimately justified in light of the expanded administrative record."[135] The extra-record evidence enabled the Court to "view[] the evidence as a whole" and identify the impermissible "significant mismatch" between

125. *Id.* at 2575. It was also later uncovered that a G.O.P. strategist had encouraged Ross to add the citizenship question because it could support a gerrymandering effort that would favor Republicans. Wines, *supra* note 25.

126. New York v. Dep't of Com., 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019).

127. *Id.* at 635.

128. *Dep't of Com.*, 139 S. Ct. at 2571.

129. *Id.* at 2569.

130. *See id.* at 2575–76 ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.").

131. *Id.* at 2575 (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

132. *Id.*

133. *Id.*

134. *Id.* at 2574 (stating that, at the time, "the most that was warranted was the order to complete the administrative record").

135. *Id.*

official and "genuine" justifications.[136] As a result, the Court acknowledged the importance of extra-record discovery but did not elaborate on when such discovery is warranted.[137]

Because of this oversight, in tandem with the historical non-use of the *Overton Park* exception, some commentators believe *Department of Commerce* is the product of unique circumstances.[138] The decision to add a citizenship question to the census was highly politicized, garnered national attention, and carried underlying tones of racial animus toward immigrants that would have implicated Due Process and Equal Protection concerns.[139] To these commentators, the political context explains the Court's decision and strips it of precedential value.[140] Other scholars disagree, arguing that the decision represents a foundational step toward increased transparency and accountability in administrative action.[141]

Regardless, the holding in *Department of Commerce* is clear: a "significant mismatch" between the agency's on-the-record and off-the-record justifications is grounds for reversal.[142] And, by extension, extra-record discovery is almost certainly necessary for that review.[143] As such, challengers need tools to expand the administrative record to inquire into the "mental processes of administrative decisionmakers."[144]

Taken together, *Trump v. Hawaii* and *Department of Commerce* stand for the proposition that litigants can challenge

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136. *Id.* at 2575.

137. *See id.*; *see also* Cromley & Showalter, *supra* note 12.

138. *See Census Act—Review of Administrative Action—Judicial Review of Pretext*—Department of Commerce v. New York, 133 HARV. L. REV. 372, 381 (2019) [hereinafter *Census Act*] ("[T]here is no reason to think *Department of Commerce* will be a basis to subject other administrative decisions to similarly searching review.").

139. *E.g.*, Michael Vines, *2020 Census Won't Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/HE2E-JAWM] (describing the controversy surrounding the citizenship question); *see Census Act*, *supra* note 138, at 380–81; *see also* Lind & Nelson, *supra* note 110.

140. *Census Act*, *supra* note 138.

141. Martin, *supra* note 27; *see also* Gavoor & Platt, *Administrative Records After* Dep't of Com., *supra* note 17, at 98 ("We predict that unless the court signals the *Department of Commerce* opinion as a one-off case, APA record supplementation by traditional discovery tools and otherwise will proliferate in the lower courts.").

142. *Dep't of Com.*, 139 S. Ct. at 2575.

143. *See id.*

144. *See id.* at 2573–75 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

agency action as pretextual. Courts, however, must first grapple with the *Overton Park* standard for allowing extra-record discovery in administrative litigation.

II. PRETEXTUAL DECISION-MAKING: CAUSES AND CASE STUDY

Agencies undoubtedly have wide discretion in policy choices, and they are not required to state every reason or motivation for their decisions.[145] Having a "significant mismatch" between their actual and provided justifications, however, is inappropriate and dangerous. Section A explains two phenomena that contribute to the increased use of pretextual decision-making. Section B then presents a case study of a 2017 Fish and Wildlife Service decision that raises concerns of pretextual decision-making.

A. Growing Evidence that Agencies Are Providing Pretextual Justifications

Two modern developments have created an environment that both inhibits and enables agencies to "hide behind [the] administrative review process."[146] First, the advent of social media has put government actors in the limelight, creating a lasting digital record of government action.[147] Second, agencies' increased reliance on scientific expertise has made it difficult to separate legitimate scientific findings from pretextual ones.[148]

1. Convergence of Politics and Social Media

Over the past decade, government actors have become more involved with digital media, often tweeting, posting, or

145. *See* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1488–89 (1983).

146. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2443 (2018) (Sotomayor, J., dissenting).

147. *See generally* Gabriel M. A. Elorreaga, Comment, *Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media*, 50 ST. MARY'S L.J. 483 (2019) (describing the increased use of social media by presidential administrations and campaigns).

148. *See, e.g.*, Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 751–53 (2011) ("The 'science charade' posits that agencies cloak policy decisions in a shroud of science, exaggerating the role of science to the detriment of administrative-law values, statutory goals, and science itself.").

otherwise sharing information online. By using social media, government officials not only provide insight into their motivations and thought processes but also create vast amounts of long-lasting data as evidence of their intentions.[149] This development has been largely positive: people are more engaged in political discussions, and representatives are more connected to constituents.[150] Government officials can now instantly offer wide-reaching comments in response to local, national, and global events, and the internet allows their statements, photos, and videos to exist in perpetuity.[151] But as the public becomes increasingly aware of officials' statements surrounding agency action, it might also simultaneously experience a growing feeling of distrust toward those agencies when their on-the-record, formal justifications for their actions do not match the informal, broadcasted statements of their officials.[152]

2. Reliance on Scientific Expertise

While social media illuminates evidence of pretext, agencies can rely on their presumed scientific expertise to mask that evidence. For example, agencies like the Environmental Protection Agency (EPA) and Fish and Wildlife Service (FWS) implement statutes that require scientific analysis to a varying degree.[153] And all agencies—environmentally focused or not—must adhere to statutes like the National Environmental Policy Act (NEPA)

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149. Vann R. Newkirk II, *The American Idea in 140 Characters*, ATLANTIC (Mar. 24, 2016), https://www.theatlantic.com/politics/archive/2016/03/twitter-politics-last-decade/475131/ [https://perma.cc/Q5FJ-G2KK].

150. *See* MONICA ANDERSON ET AL., PEW RESEARCH CTR., ACTIVISM IN THE SOCIAL MEDIA AGE 5 (2018), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/07/PI_2018.07.11_social-activism_FINAL.pdf [https://perma.cc/YS55-DPJD] ("Americans use a range of social media sites and are increasingly turning to these platforms to get news and information. Social networking sites have also emerged as a key venue for political debate and discussion and at times a place to engage in civic-related activities.").

151. Kaveh Waddell, *Your Data Is Forever*, ATLANTIC (June 2, 2016), https://www.theatlantic.com/technology/archive/2016/06/your-data-is-forever/485219/ [https://perma.cc/VT9Y-QAAM]; see POLITICIANS ON SOCIAL MEDIA (Pete Schauer ed., 2019), for a collection of essays analyzing politicians' use of social media and how it impacts politics and political engagement.

152. *See* German Lopez, *Trump Could Damage Public Trust in Government for Generations*, VOX (May 16, 2017, 3:40 PM), https://www.vox.com/policy-and-politics/2017/5/16/15642378/trump-scandals-trust-government [https://perma.cc/VD4W-8BC2].

153. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671(q) (2018); Clean Water Act, 33 U.S.C. §§ 1251–1388 (2018).

and Endangered Species Act (ESA), which both typically require scientific evaluation of federal action.[154] Consequently, all federal agencies have the opportunity to "manipulate science in ends-oriented ways" to mask genuine justifications.[155]

Some scholars disagree on the extent to which the policy objectives of agencies ought to influence their use of science. Some claim agency rules must be based strictly on objective scientific data; to do otherwise would be arbitrary and capricious.[156] Others criticize the increased reliance on purely science-based regulations.[157] These critics believe agencies, as part of the executive branch, should rely on policy priorities to make scientific decisions that are inherently political.[158] As a middle ground, some scholars take a realist approach to agency science. These scholars believe that agency-funded science is inherently different from nongovernmental science precisely because agencies must make policy choices that inadvertently impact—and sometimes even drive—their scientific findings.[159] They argue that although nongovernmental science also has some institutional-policy bias, those biases might more readily discernible than government-sponsored science.[160]

Regardless, in theory agencies are designed to provide expertise for complex regulatory matters and are presumed to be

154. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370(m) (2018); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2018).

155. Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719, 1719 (2019); *see also* Meazell, *supra* note 148, at 743–48.

156. *E.g.*, McGarity & Wagner, *supra* note 155 ("Political appointees have employed dozens of strategies over the years, in both Democratic and Republican administrations, to manipulate science in ends-oriented ways that advance the goal of deregulation."); Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 491 (analyzing "the potential effects of each model on agencies' evaluation of scientific knowledge and judicial review of agency reasoning regarding science"); Alexander W. Resar, *The Parameters of Administrative Reason Giving*, 67 U. KAN. L. REV. 575, 576 (2019) ("[T]he question of permissible considerations has been, if at times implicit, central to the contestation between technocracy and political accountability that has occupied most recent attempts to legitimate judicial review of the administrative state.").

157. See Watts, *supra* note 30, for a discussion on the potentially positive impacts of executive action on agency decision making.

158. *See id.*

159. Meazell, *supra* note 148, at 744 ("Legal institutions and the citizenry at large suffer from a science obsession, assuming that if only we had answers from science, we would know what regulatory decisions are 'correct.' Certainly, our institutions ought to do their best to incorporate good science into decision making, but the ultimate decisions that must be made are policy choices.").

160. *Id.*

neutral, acting for the public good.[161] But because each administration has different policy objectives, all agency decisions are naturally infused with non-neutral politics.[162] As a result, it is naïve to expect apolitical decision-making from agencies, and the public should accept the fact that agency science is politicized to some extent.[163] That being said, agencies should not work in an ends-oriented way merely to construct a pretext for ulterior justifications.

Nevertheless, the judiciary is usually ill-equipped to review an agency's scientific methods or substance. Instead, reviewing courts require only that agencies provide a reasoned explanation for those decisions. As a result, agencies enjoy a great deal of deference for their science-based choices,[164] thus creating ample opportunities to abuse discretion and manipulate science to provide a pretextual justification. Without extra-record discovery, there may be no opportunity for meaningful review of those actions.

B. A Case Study of Pretextual "Shenanigans":[165] The Vigneto Development

A proposed 12,000-acre private development in arid southeastern Arizona is a contemporary example of potentially pretextual agency decision-making that requires extra-record discovery for meaningful judicial review.[166] The San Pedro River, one of the only undammed rivers in the Southwest, meanders through the area after it crosses the Mexico-U.S. border.[167] This part of the desert is a haven for migratory birds and various endangered and threatened species.[168] It is a place of immense

161. *See id.* at 744–48.
162. *See id.*
163. *E.g.*, *id.*
164. *Id.* at 739–42.
165. Tony Davis, *The 'Shenanigans' Behind a Federal Employee's Decision to Blow the Whistle*, HIGH COUNTRY NEWS (May 30, 2019), https://www.hcn.org/issues/51.11/u-s-fish-and-wildlife-the-shenanigans-behind-a-federal-employees-decision-to-blow-the-whistle [hereinafter Davis, *The 'Shenanigans'*] [https://perma.cc/4YHG-X962].
166. *See id.*
167. Motion to Complete or Supplement Administrative Record and for Extra-Record Discovery at 1, Lower San Pedro Watershed Alliance v. Barta, No. 4:19-cv-00048-RCC (D. Ariz. Dec. 23, 2019), ECF No. 38 [hereinafter Vigneto Challenger's Motion to Compel].
168. *Id.*

ecological beauty and importance, and is one of the only significant areas for migratory bird habitat between the Colorado and Rio Grande Rivers.[169]

Although the area is ecologically important, there has been a decades-long attempt to develop housing communities on private property in the area.[170] Despite the lands' private ownership, there is federal oversight because the nearby San Pedro River and connected waterways trigger federal jurisdiction under the Clean Water Act.[171] As such, before filling some of the land, developers needed to obtain a federal permit from the Army Corps of Engineers (Corps), which the agency provided to developers in 2006.[172]

The Great Recession of 2008, however, caused the original landowners to sell, thus delaying any development. That was the case until 2015, when a new landowner, Mike Ingram,[173] revitalized the project and initiated a plan to create a 28,000-home community on a 12,000-acre patch in the Arizona desert.[174] This community, inspired by Italian Villas, would be marketed as the "Villages at Vigneto" and would rely on groundwater to support the community.[175] The development's opponents claim this groundwater use would significantly deplete the area's water resources, thereby negatively impacting local threatened and endangered species that rely on that water.[176] Although Ingram's project differed from the 2006 proposal, he intended to use the 2006 Corps permit for his development.[177]

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169. Davis, *The 'Shenanigans'*, *supra* note 165.

170. Bronstein et al., *supra* note 25.

171. Vigneto Challenger's Motion to Compel, *supra* note 167.

172. Bronstein et al., *supra* note 25.

173. *Id.* ("Ingram is a wealthy and powerful figure in Arizona. El Dorado Holdings is one of the largest private landholders in the southwestern US, with assets exceeding $1 billion. Ingram is also one of the owners of the Arizona Diamondbacks, the state's Major League Baseball team.").

174. Tony Davis, *Ex-Federal Official: 'I Got Rolled' by Trump Administration to Ease Way for Vigneto Housing Development*, TUSCON.COM (Apr. 29, 2019), https://tucson.com/news/local/ex-federal-official-i-got-rolled-by-trump-administration-to-ease-way-for-vigneto-housing/article_e6d7a688-0a63-5f88-b993-24384d87a4bd.html/ [https://perma.cc/232J-G543].

175. See *The Villages at Vigneto*, VIGNETO ARIZ., https://vignetoaz.com/ (last visited Sept. 6, 2020) [https://perma.cc/Y3K9-8VGB], for a description and sketch-renderings for the development.

176. *See* Vigneto Challenger's Motion to Compel, *supra* note 167.

177. Bronstein et al., *supra* note 25.

Despite Ingram's efforts, local and national opposition stalled development.[178] The EPA had been consistently opposed to the development since 2005.[179] And in 2016, environmental groups sued the Corps, alleging the agency had failed to adequately consider the project's impact on endangered species.[180] Generally, the groups claimed the ESA required the Corps to formally consult with the FWS about the ecological impacts.[181] This formal consultation would require the Corps to conduct a biological assessment—a sometimes arduous and expensive process that can take years to finish.[182]

In October 2016, the FWS became involved again.[183] In reviewing the Corps' decision, the FWS field supervisor, Steve Spangle, determined the Corps had erred in granting the 2006 permit and would need to first complete a biological assessment.[184] But after President Trump took office in 2017, Spangle suddenly reversed his position.[185] Spangle contradicted his prior findings in a letter of concurrence which agreed with the Corps' determinations and stated that the Corps had been correct—there was no need to conduct a biological assessment.[186] This about-face allowed the Corps to reinstate the permit, which subsequently sanctioned Ingram to move forward with the Villages at Vigneto development.[187]

Four months after issuing the letter of concurrence, Spangle retired.[188] Two years later, Spangle approached the media as a whistleblower, alleging that high-ranking political appointees in the Department of Interior (Interior) had improperly interfered by exerting political influence over Spangle's Vigneto decisions.[189] Spangle disclosed that a few months into Trump's

178. *Id.*

179. *Id.* ("The Environmental Protection Agency has long been opposed to building on the site, writing in 2005 that it 'represented a substantial and unacceptable impact on aquatic resources of national importance,' and the EPA stance has not changed since.").

180. *Id.*

181. *See* Vigneto Challenger's Motion to Compel, *supra* note 167, at 2.

182. Bronstein et al., *supra* note 25.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.*

188. *Id.*

189. Ian James, *High-Level Trump Appointee Sought Reversal on Arizona Development Near San Pedro River, Ex-Official Says*, AZCENTRAL (May 3, 2019),

Administration, an attorney from Interior had called him about his Vigneto decision.[190] The attorney, Pam Romanik, told Spangle that a high-ranking political appointee disagreed with Spangle's 2016 position on the development,[191] and that, if he "knew what was good politically" for him, he would reverse course.[192] A few weeks later, Spangle issued the backtracking letter of concurrence.[193] After Spangle came forward, litigators requested documents under FOIA that could shed light on the political interference, and journalists dug in.[194]

Collectively, their evidence tells a story of improper influence that led to Spangle's allegedly pretextual letter allowing the Vigneto development to move forward. These investigations uncovered that Ingram, the man behind the Vigneto development, had an extensive history with the Republican Party and David Bernhardt, then-Deputy Secretary of Interior.[195] Long before Trump appointed Bernhardt to Interior in April 2017, Bernhardt represented Ingram's big-game hunting organization, the Safari Club International Foundation.[196] After Trump's inauguration and Bernhardt's appointment, Ingram maintained a relationship with Bernhardt and other high-ranking Interior appointees.[197] Between April and August 2017, Ingram had eleven meetings with these appointees, one of which was, importantly, a secret breakfast meeting with Bernhardt at a hunting lodge in Montana in August 2017.[198] A few weeks after this meeting, Bernhardt scheduled a call with Romanik to discuss "the Corps

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https://www.azcentral.com/story/news/local/arizona-environment/2019/05/03/ex-official-trump-reverse-decision-vigneto-political-san-pedro-river/3616674002/ [https://perma.cc/X7E3-W7HJ].

190. Davis, *The 'Shenanigans'*, *supra* note 165.

191. *Id.*

192. *Id.*

193. *Id.*

194. *See* Vigneto Challenger's Motion to Compel, *supra* note 167, at 11 (citing to FOIA documents they had petitioned for after Spangle came forward); *see also* Bronstein et al., *supra* note 25 (explaining that CNN dug in deeper to Spangle's allegations).

195. James, *supra* note 189.

196. Bronstein et al., *supra* note 25.

197. *See* Tony Davis, *Interior Official Met 'Secretly' With Developer on Benson Project During Permitting Process*, TUSCON.COM (July 9, 2019), https://tucson.com/news/local/interior-official-met-secretly-with-developer-on-benson-project-during-permitting-process/article_ce0dfa75-11b5-5188-bc1b-d21b80004891.html [https://perma.cc/TF3G-5LCC].

198. *E.g.*, Bronstein et al., *supra* note 25; Vigneto Challenger's Motion to Compel, *supra* note 167, at 7; Davis, *supra* note 197.

matter."[199] A few hours after that call, Romanik contacted Spangle, telling him a high-ranking political appointee disagreed with the FWS decision to require a biological assessment for the project.[200] This timeline strongly suggests that Ingram's secret meeting with Bernhardt resulted in Bernhardt pressuring the FWS to reverse course on the Vigneto development project.

Ingram was also personally connected with the Trump family.[201] After Trump was elected, Ingram planned a "Camouflage & Cufflinks" post-inaugural fundraiser.[202] Ingram specifically invited two of Trump's sons, Donald Jr. and Eric, to attend and promised at least a $500,000 donation to Trump-supporting organizations.[203] The fundraiser was eventually cancelled due to allegations that Ingram was trying to buy political influence with the Trump family.[204] But Ingram had and continued to donate to Trump-supporting PACs, totaling over $50,000.[205] Notably, a few weeks after Spangle reversed position, Ingram made a $10,000 donation to the Trump Victory Fund.[206] These interactions suggest that the Interior's interference in the Vigneto decision was politically based and calculated to benefit Ingram's personal business.

These political actions seem especially egregious in light of statutory mandates the FWS must follow and the agency's historical opposition to the Vigneto development. The FWS is charged with implementing the ESA, one of the nation's most aggressive environmental laws.[207] Moreover, suddenly finding that there was no need for a biological assessment where one had previously been required—though nothing in the project proposal changed—seems disingenuous at best. If the FWS were to leave out any mention of these political contacts in an administrative record for judicial review, then under the analysis laid

199. *See* Vigneto Challenger's Motion to Compel, *supra* note 167, at Exhibit 4 (Bernhardt's calendar had an 8:30 morning call scheduled with Romanik the day she called Spangle); *see also id.* at Exhibit 5 (email from Romanik to another attorney saying "the 8:30 with David was on the Corps matter").

200. *See* Bronstein et al., *supra* note 25.

201. *See* James, *supra* note 189.

202. *Id.*

203. *See id.*

204. *See id.*; Bronstein et al., *supra* note 25 ("The event was canceled after ethical questions surfaced over buying access to the President and his sons.").

205. Bronstein et al., *supra* note 25 (Ingram donated over $50,000 to Trump-supporting organizations between 2015 and 2019).

206. *Id.*

207. *See* Vigneto Challenger's Motion to Compel, *supra* note 167, at 2.

out in Part III below, this evidence would seemingly constitute a "preliminary showing of pretext" sufficient to warrant extra-record discovery under *Overton Park*.

Concerned by this new information, environmental groups that were already litigating the 2017 decision immediately filed motions to grant extra-record discovery to further investigate Spangle's allegations of improper political influence.[208] The challengers argued that, at the very least, the agency must provide its deliberative materials for the 2017 decision, but (as of this Comment's writing) the court has not yet issued any orders mandating the agency do so. Although the FWS has included in the record the news articles discussing Spangle's accusation of political interference, the agency denies the allegations and argues its decision was based on "the best available science as required by the Endangered Species Act."[209]

Additionally, the FWS maintains that this kind of political behavior was not untoward, claiming that political influence is expected and tolerated in administrative agencies.[210] In other words, the FWS maintains there is insufficient evidence to demonstrate a "strong showing of bad faith or improper behavior."[211] Despite the availability of evidence of this improper behavior, the challengers cannot depose Spangle, Bernhard, Ingram, Romanik, or any other person unless the court grants extra-record discovery. Although challengers have petitioned the court to permit extra-record discovery, the government strongly opposes such discovery, and the court has yet to grant or deny the motion.

The reasoning behind Interior's reversal is a perfect example of an administrative action that strongly appears to be pretextual, but one that will likely go undisturbed without extra-record discovery. Only with extra-record discovery can a reviewing court engage in meaningful judicial review and determine if

208. The challengers also requested the agency include news articles about Spangle's decision and certain FOIA documents to the record. The agency complied and those documents are now part of the administrative record, subject to judicial review. However, without depositions, it will be difficult for the challengers to show that the Spangle decision was an illegal pretext because there is other evidence to support the agency's official justifications.

209. Bronstein et al., *supra* note 25.

210. *See* Defendants' Opposition to Plaintiffs' Motion to Complete or Supplement the U.S. Fish & Wildlife Service's Administrative Record and for Extra-Record Discovery, Lower San Pedro Alliance v. Barton, No. 4:19-cv-00048-RCC (D. Ariz. Jan. 17, 2010), ECF No. 45.

211. *See id.*

there is an impermissible mismatch between the agency's proffered and genuine justifications.

III. PRELIMINARY SHOWING OF PRETEXT AND THE BENEFITS OF EXTRA-RECORD DISCOVERY

As the preceding Sections described, administrative agencies enjoy a great deal of discretion creating the administrative record—discretion which could allow agencies' to "masquerade[] behind a façade" of otherwise legitimate justifications.[212] Without adequate judicial review, pretextual decision-making poses dangers to the integrity of judicial review and the separation of powers. Furthermore, the increased use of social media in tandem with agencies' ability to manipulate science suggests that courts should be more wary of, and have the necessary tools to evaluate, pretextual decision-making.

The solution is simple: courts should more readily grant extra-record discovery when preliminary signs of pretext strongly suggest "bad faith or improper behavior." Although extra-record discovery is inappropriate for some administrative challenges, other limited situations necessitate extra-record discovery.[213] Section A provides five factors courts should balance to determine if there is a preliminary showing of pretext. Section B then argues that the benefits of this approach outweigh the concerns about extra-record discovery in administrative challenges.

A. *Preliminary Showing of Pretext to Satisfy the* Overton Park *Exception*

Challenging actions as pretextual is a new tool in the "judicial toolbox for dealing with a wayward executive branch."[214] But courts cannot meaningfully review agency decision-making for pretext unless they permit challengers to pursue extra-record discovery, and courts cannot permit extra-record discovery unless challengers make a "strong showing" that agency officials

212. Trump v. Hawaii, 138 S. Ct. 2392, 2432 (2018) (Sotomayor, J., dissenting).

213. *See* Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, at 69–75 (analyzing the harms of expansive record and implicitly suggesting that most situations would be better without expansive discovery).

214. Martin, *supra* note 27.

exhibited "bad faith or improper behavior" in their decision-making.[215]

Admittedly, there seems to be a disconnect between the phrases "preliminary showing" and "strong showing." But that disconnect is a matter of semantics. A court "cannot require . . . conclusive evidence [of bad faith] . . . at a point when [challengers] are seeking to discover the extent" of pretextual decision-making.[216] Rather than requiring indisputable proof, courts should thus interpret the evidence as being more likely than not to prove pretext. This approach is similar to other preliminary findings in the law, such as reviewing evidence for preliminary injunctions.[217] In those situations, the moving party must show they would be more likely than not to win on its merits.[218]

This Comment proposes the same should be true for preliminary showings of pretext. In other words, a preliminary showing is not antithetical to a strong showing; to constitute a preliminary showing of pretext, the evidence must demonstrate only that the agency action is more likely than not to be pretextual. Moreover, a preliminary showing does not undermine the strong-showing requirement because of the dangers that agencies pose by offering pretextual justifications. Finally, it is important to note that a preliminary showing of pretext does not fundamentally alter or expand the narrow *Overton Park* exception. The Supreme Court recently reaffirmed just how narrow this exception is;[219] nonetheless, courts should be cognizant of plaintiffs' limited means to meet the *Overton Park* exception when the agency almost unilaterally dictates what will and will not be included in the record for review.[220] Then, once extra-record discovery occurs, courts can view the "evidence as a whole" to determine if it "tells a story" congruent with the agency's official justifications or whether the official justification was "more of a distraction."[221]

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215. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

216. Sokaogon Chippewa Cmty. v. Babbitt, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997).

217. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits.").

218. *Id.*

219. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019).

220. *Sokaogon Chippewa Cmty.*, 961 F. Supp., at 1280.

221. *Dep't of Com.*, 139 S. Ct. at 2575–76.

With this in mind, there are at least five factors courts should consider when deciding whether there is a preliminary showing of pretext.[222] First, courts should consider the political context of the agency action, including a given administration's rhetoric and overall trend of administrative action, and the timing of the action in relation to political events, like elections. Second, courts should consider whether the agency action is a reversal, rescission, delay, or new promulgation, as such distinctions can provide a clearer picture of the agency's motivations. Third, courts should analyze the extent to which an agency relies on "scientific uncertainty" to justify its action. Fourth, courts should consider whether the agency action furthers the purposes of the statutes authorizing the agency action. Finally, courts should examine administrative officials' connections with interest groups in relation to the agency's decision. While none of these factors alone is likely sufficient to constitute a preliminary showing of pretext, taken together they potentially "tell[] a story"[223] that the agency's real reason for acting is different than the one the agency puts on the record.

1. Political Climate

Courts should first consider the political climate surrounding agency actions. Agencies do not promulgate decisions in a vacuum, and judicial review should not "exhibit a naiveté"[224] about the political context of agency decision-making. This is not to say political motivations for administrative actions should be condemned or disallowed[225]—it is expected that politics will influence agency actions, and agencies may even have unstated

222. Note, when plaintiffs petition the court to permit extra-record discovery, they must show that the record is inadequate. In some cases, this may mean contrasting extra-record evidence with the administrative record. *See, e.g.*, California v. U.S. Dep't of Homeland Sec., No. 19-cv-04975, 2020 WL 1557424, at *9–10 (N.D. Cal. Apr. 1, 2020). In other situations, the parties will work together to permit documents (like FOIA documents or news articles) into the record. In the litigation over the Vigneto development, for example, the plaintiffs filed a motion for extra-record discovery (relying on news articles about Spangle) while simultaneously petitioning the Service to add those news articles to the record (which they did). Vigneto Challenger's Motion to Compel, *supra* note 167, at Exhibits 2, 6.

223. *Dep't of Com.*, 139 S. Ct. at 2575.

224. *Id.* (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2nd Cir. 1977)).

225. *See id.* at 2573 ("[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations.").

motivations for their decisions.[226] Instead, the political climate only contextualizes the agency's decision, which may indicate whether the agency's genuine justification contradicts the official one. For ease of analysis, this Comment divides evidence of political climate into three categories.

First, rhetoric and public statements issued from executive branch officials, especially from political appointees, can provide insight into the political agendas of agency decision-makers, which the record may not reflect. For example, in *Hawaii* and *Department of Commerce*, challengers cited Trump's anti-Muslim rhetoric and racist remarks.[227] As Justice Sotomayor noted, those comments were not made in a vacuum but were in fact directly connected to the executive actions. Similar rhetoric is present surrounding Trump's environmental rollbacks.[228] As discussed in Section III.B.3 below, the Trump Administration has been vocal in its antagonism to climate change and environmental regulations.

Second, the general trend of a given agency's administrative actions—such as increased agency action in a particular regulatory field—can suggest the agency is acting with an ends-oriented agenda that is not reflected in the administrative record. In *Hawaii* and *Department of Commerce*, the executive actions at issue occurred shortly after one another, indicating a concentrated attack on immigration policies.[229] The Administration's approach to environmental regulations indicates a similar trend.[230] Of the hundred-some actions that either rescinded previous rules or promulgated new, contradictory rules, nearly eighty have focused solely on reversals of environmental

226. *Id.*

227. *See id.*

228. *Regulatory Rollbacks*, *supra* note 5; Colman, *supra* note 3; Popovich et al., *supra* note 5; Justin Worland, *Donald Trump Called Climate Change a Hoax. Now He's Awkwardly Boasting About Fighting It*, TIME (July 8, 2019), https://time.com/5622374/donald-trump-climate-change-hoax-event/ [https://perma.cc/8435-U9DK]; Alan Feuer, *Citing Trump's 'Racial Slurs,' Judge Says Suit to Preserve DACA Can Continue*, N.Y. TIMES (Mar. 29, 2018), https://www.nytimes.com/2018/03/29/nyregion/daca-lawsuit-trump-brooklyn.html [https://perma.cc/88NQ-76CS].

229. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (agency action occurred throughout 2017); Dep't of Com., 139 S. Ct. 2551 (same); Regents v. U.S. Dep't of Homeland Sec., 140 S. Ct. 1891 (2020) (same).

230. *See Regulatory Rollback Tracker*, ENV'T. & ENERGY LAW PROGRAM, https://eelp.law.harvard.edu/regulatory-rollback-tracker/ (last visited Sept. 10, 2020) [https://perma.cc/5UAT-B8BS]. This tracker has all of Trump's environmental reversals. Collectively, they indicate a concentrated affront on environmental regulations. *Id.*

protections.[231] These actions range from eliminating regulations on GHG emissions[232] to repealing the Clean Power Plan.[233] While one rule promulgation or reversal would raise no suspicions on its own, dozens of separate actions together should lead courts to at least question whether agencies have different motives than their administrative records indicate.

Third, the timing of an agency action in relation to political events and past agency decisions can be a sign of pretextual decision-making. For example, if an agency spends years developing a rule, and then three months into a new presidency completely reverses its position without acknowledging on the record the new administration's political influence, it might be evidence of a "significant mismatch" between the agency's true and provided rationales.[234] The Vigneto development described in Part II.B is a prime example—seven months after a new president was inaugurated, the administrative agency completely reversed course. Each of these components of political climate, taken separately or together, may indicate some level of pretextual decision-making.

2. Withdrawals, Reversals, or Delays of Administrative Rules

The second factor for preliminary showings of pretext examines whether the challenged agency action is a reversal, withdrawal, or delay of a previous policy. As administrations change, an agency will naturally shift its policy and promulgate rules that differ from prior ones.[235] While regulatory updates,

231. *E.g.*, Popovich et al., *supra* note 5 (detailing air pollution from GHG emissions' threat to public health).

232. *See Regulatory Rollbacks*, *supra* note 5; Colman, *supra* note 3; Popovich et al., *supra* note 5.

233. EPA, Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

234. See, for example, the EPA's sudden shift in the rule changing (again) the definition of "waters of the United States." Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May Not Be Enough*, 64 ST. LOUIS U. L.J. 373 (2020) (providing a thorough history of the rule change).

235. The past five administrations, in conjunction with the ever-expanding executive power, have acted quickly to stall, withdraw, or reverse the prior administration's policies. This phenomenon has occurred when it has been a lame-duck sitting president followed by a different party's administration, after a president who only served for one term, and even during a shift in administrations that shared the same political party. But none have been as aggressive as the Trump

modifications, and rollbacks are to be expected to a certain degree, it is not unprecedented for courts to view a policy reversal or shift with heightened skepticism.[236] For example, in *F.C.C. v. Fox Television*, the Supreme Court held that an agency may need to provide a "more detailed justification" when a "prior policy has engendered serious reliance interests"[237] or "the new regulation relies 'upon factual findings that contradict those which underlay its prior policy.'"[238] As Justice Kennedy opined, "an agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."[239] When changing positions, the agency must acknowledge the factual record of prior regulation and reconcile that record with its new rule.[240]

Although the underlying *Fox Television* standard may not apply to claims alleging pretextual decision-making, *Fox Television* shows the Supreme Court has been previously skeptical where agencies make wholesale changes in their policies or regulations.[241] Similarly, it is justifiable for a court to view an agency's reversal, withdrawal, or delay of a rule as indicative of pretextual decision-making, especially when considered alongside the other four factors.

Furthermore, the degree of change between the prior policy and the new agency action might indicate pretext. Agencies work incrementally towards achieving their mandated goals, and any major retreat from this progress may signal that it is solely politics driving the decision. As the Supreme Court stated in *Massachusetts v. EPA*, "[a]gencies . . . do not generally resolve massive problems in one fell regulatory swoop," but rather they "whittle away at them over time, refining their preferred approach as circumstances change."[242] This incremental-step approach necessarily implies that agencies should be working

Administration. See O'Connell, *supra* note 7, for a discussion on how political transitions have affected agency decision-making procedures throughout the past five administrations.

236. *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).
237. *Id.*
238. *Id.*
239. *Id.* at 537 (Kennedy, J., concurring).
240. *Id.*
241. *See id.*
242. Massachusetts v. EPA, 549 U.S. 497, 524 (2007).

toward something, and dramatic shifts in policy could be a pretext for other justifications.

3. Justifying a Change Using Scientific Uncertainty

The third factor a reviewing court should consider is the extent to which an agency relied on "scientific uncertainty" to justify its actions. As discussed in Part II, agencies have a great deal of discretion in deciding how and when to use science to justify their positions, and in some scenarios, an agency might rely on science's inherent uncertainty to justify a certain agency action.

One example is the ongoing regulatory saga concerning the Yellowstone grizzly bear, which began in 1975 when the FWS listed grizzly bears as threatened under the ESA. In 2007, the FWS delisted the Yellowstone grizzly and repeatedly referenced scientific uncertainty as a justification for its decision.[243] Specifically, the FWS argued that because the science was uncertain, the agency had to make a policy choice, and because courts "do not purport to resolve scientific uncertainties or ascertain policy preferences," reviewing courts should uphold the delisting decision.[244] The agency claimed it followed the ESA by using the "best scientific and commercial data available" to make its delisting decision.[245] However, the decision was contingent on the best available science showing that the grizzly bears' food sources—specifically whitepine bark—would be sufficient to

243. The FWS found that: (1) whitepine bark is a necessary food source, but repeatedly claimed that the "compound uncertainties associated with projections of possible future habitat changes, and the grizzly bear's corresponding responses to those changes"; (2) the "uncertainties as to the eventual land uses of surrounding areas"; (3) the "multiple uncertainties regarding assumptions about human behavior and how humans will react to grizzly bears"; and (4) the "uncertainty of predicting the impacts of . . . pine beetle infestations" justified the delisting of the Yellowstone grizzly bear. Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment and Removing the Yellowstone Distinct Population Segment of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14,866, 14,880, 14,888, 14,929 (Mar. 29. 2007) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Grizzly Bear Listing].

244. Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1019 (9th Cir. 2011).

245. Final Grizzly Bear Listing, *supra* note 243. In this rulemaking, the FWS identified the Yellowstone grizzly bear as a "distinct population segment" before promptly delisting that segment. *Id.* Doing so allowed the FWS to remove protections for the grizzly bears in the Yellowstone region while maintaining protections for the rest of the grizzly bears. *Id.*

sustain grizzly bear populations.[246] Challengers to the rule claimed the FWS failed to consider climate change impacts on the long-term viability of whitepine bark and, consequently, the long-term viability of Yellowstone grizzly bears.[247]

The Ninth Circuit agreed with the challengers and rejected the agency's justification.[248] The court explained that "scientific uncertainty generally calls for deference to agency expertise."[249] But "it is not enough simply to invoke 'scientific uncertainty' to justify an agency action,"[250] nor is it sufficient "to merely recite the terms 'substantial uncertainty' as a justification for its action."[251] The court held that relying on scientific uncertainty did not rationally support the FWS's decision, and the court vacated the rule.[252]

In addition to being arbitrary and capricious, agencies' reliance on scientific uncertainty could be a pretext for their true justifications. Indeed, even though the court invalidated the 2007 grizzly-delisting decision based on the arbitrary and capricious standard, the political climate during this time and the FWS's history of Yellowstone grizzlies decisions suggests that FWS's scientific-uncertainty justification was likely pretext for other motivations.[253] Courts should consider an agency's reliance on scientific uncertainty as one factor that might indicate pretext, even if in some scenarios scientific uncertainty is a legitimate justification for agency action.

Courts should be particularly suspicious of agencies relying on scientific uncertainty to justify Trump Administration changes to environmental regulations, given the Trump Administration's persistent attack on science and climate change. During his campaign, Trump expressly said he planned "to get rid of

246. Complaint for Declaratory and Injunctive Relief, Greater Yellowstone Coal., Inc. v. Servheen, No. CV-07-134-M-DWM (D. Mont. Nov. 13, 2007), ECF No. 1, 2007 WL 4910038. Note, in 2020 an appellate court ruled that the bear should remain on the endangered and threatened species list. Marie Fazio, *Grizzly Bears Around Yellowstone Can Stay on Endangered Species List, Court Rules*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/grizzly-bears-yellowstone.html [https://perma.cc/83S6-5KNS].

247. *Greater Yellowstone Coal.*, 665 F.3d 1015.

248. *Id.* at 1020.

249. *Id.* at 1028.

250. *Id.* at 1029.

251. *Id.* (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 52 (1983)).

252. *Id.* at 1030.

253. *See id.* at 1028–30.

[the EPA] in . . . every form"[254] and repeatedly downplayed the dangers of climate change by claiming it is a "Chinese hoax."[255] Immediately upon entering office, the Administration deleted references to climate change on the White House website,[256] issued a gag order on scientists within the government,[257] and dissolved an expert committee within the EPA.[258] Thus, when an agency in the Trump Administration shifts course and retreats on climate change policies, citing concerns over scientific uncertainty, it seems more likely than not that "the evidence tells a story that does not match the [official explanations]."[259]

4. Statutory Requirements

Fourth, courts should not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[260] Although courts defer to agencies in order to show respect for "agency expertise and political accountability,"[261] if an agency seems to be acting on something other than expertise or is perhaps not following the purposes of the statutes it is legally required to implement, then that might be a sign that the agency is proffering pretextual justifications.

All agencies must adhere to legal requirements in the statutes they implement, and agency action should further the purposes of those statutes. For example, the FWS is legally required

254. Davenport, *supra* note 4.

255. Worland, *supra* note 228.

256. Chris Baynes, *Trump Administration Removes Quarter of All Climate Change References From Government Websites*, INDEP. (Aug. 17, 2019, 9:12 AM), https://www.independent.co.uk/news/world/americas/us-politics/trump-climate-change-government-websites-global-warming-a9020461.html [https://perma.cc/5NVF-AZDY].

257. Angela Chen, *Trump Silences Government Scientists with Gag Orders*, VERGE (Jan. 24, 2017, 3:58 PM), https://www.theverge.com/2017/1/24/14372940/trump-gag-order-epa-environmental-protection-agency-health-agriculture [https://perma.cc/8PL2-NW38].

258. Lisa Friedman, *E.P.A. to Disband a Key Scientific Review Panel on Air Pollution*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/climate/epa-disbands-pollution-science-panel.html [https://perma.cc/B35L-KN7C].

259. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019).

260. Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rel. Auth., 464 U.S. 89, 97 (1983) (quoting NLRB v. Brown, 380 U.S. 278, 291–92 (1965)).

261. Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENV'T. L. REV. 247, 273 (2019) (quoting Louis J. Virelli, III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 762–64 (2014)) (stating that Trump is not so much attacking science as he is attacking regulatory science).

to consider the "best scientific and commercial data available" in making its decisions to list endangered and threatened species and when designating their critical habitat.[262] The EPA is tasked with implementing and enforcing various environmental statutes, all having different purposes and requiring varying levels of science-based decisions.[263] The Clean Air Act, one of the main statutes that the EPA implements, is meant "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare,"[264] and for certain Clean Air Act programs, the EPA must use the "best available control technology."[265]

At the early stage in litigation when courts entertain motions for extra-record discovery, they need not conclusively find that the agency has violated legal requirements to determine that the agency action exhibits signs of pretextual reasoning. Instead, courts should preliminarily assess both (1) the strength of challengers' other, non-pretext legal claims and (2) whether the agency action works contrary to the broad purposes of the statutes they implement, to determine whether the agency appears to be acting contrary to statutory requirements.

5. Interest-Group Connections

Finally, courts should consider an agency's contacts with outside interest groups in relation to an agency decision. Standing alone, agency relationships with industry groups are not necessarily improper;[266] indeed, the APA already has built-in rules curtailing certain types of ex parte contacts.[267] Yet interest-group connections can indicate pretextual decision-making in certain circumstances.[268] Environmental regulations are an area of administrative law especially prone to interest-group involvement—including pressures from the executive branch, congressional members, environmental groups, and private

262. 16 U.S.C. §§ 1531, 1533(b) (2018).

263. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671(q) (2018); Clean Water Act, 33 U.S.C. §§1251–1388 (2018); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

264. 42 U.S.C. § 7401.

265. 42 U.S.C. § 7475(8); *see id.* § 7475(a)(3).

266. Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 ENV'T L. 957, 996–1000 (2015) (providing a discussion on ex parte communications in administrative proceedings).

267. *Id.* at 997–98.

268. *See id.*

industry interests. And if those interests trump the agencies' scientific determinations, these politics-driven regulations can have long-lasting impacts on the environment.[269]

The 2002 "fish kill" incident on the Klamath River is an excellent but sobering example of interest-group pressure improperly influencing an agency's decision,[270] leading to a disastrous result. Between 2001 and 2002, federal agencies in charge of allocating water among users in the Klamath Basin initially determined the Klamath River had insufficient water to both satisfy all water claims and protect endangered salmon downstream.[271] Based on their scientific findings (required by the ESA), the FWS and the National Marine Fisheries Service concluded water must be withheld from farmers in the Klamath Basin.[272] These agencies gave their recommendations to the Interior in the newly-elected Bush Administration and withheld water in the summer of 2001.[273] Farmers protested immediately, and in early 2002 the Bush Administration conveniently "found there was not enough scientific evidence to support" the agencies' findings.[274] "As a result, the Bush Administration sidestepped the ESA" in order to divert water to the farmers that year.[275] But the diversion made water levels extremely low, resulting in an outbreak of gill rot disease that killed at least 33,000 salmon that summer.[276]

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269. *See id.* at 1011–15. Kuehn conducted an empirical review of all cases reported on Westlaw that concern environmental law and allege bias. *Id.* He found that "the extensive jurisprudence arising from environmental bias disputes and the continuing stories in the press about alleged environmental bias reinforce the perceived saliency of the problem and the potential benefits of greater government attention to the issue." *Id.* at 1016–17.

270. *E.g.*, Matthew G. McHenry, *The Worst of Times: A Tale of Two Fishes in the Klamath Basin*, 33 ENV'T L. 1019, 1027–31 (2003) (giving a contemporaneous explanation for the 2001–02 fish kill on the Klamath Basin).

271. Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST (June 27, 2007), http://voices.washingtonpost.com/cheney/chapters/leaving_no_tracks/ [https://perma.cc/AVL9-Q5YM]. As an interesting note, Becker and Gellman won a Pulitzer Prize "[f]or their lucid exploration of Vice President Dick Cheney and his powerful yet sometimes disguised influence on national policy," which included this story. *The 2008 Pulitzer Prize Winner in National Reporting, Jo Becker and Barton Gellman of* The Washington Post, PULITZER PRIZES, https://www.pulitzer.org/winners/jo-becker-and-barton-gellman (last visited Sept. 13, 2020) [https://perma.cc/P57Y-K5GX].

272. McHenry, *supra* note 270, at 1027.

273. *Id.*

274. *Id.* at 1027–28.

275. *Id.* at 1028.

276. Jeff Barnard, *Klamath River Fish Kill Estimates Rise to 33,000*, SEATTLE PI (Oct. 25, 2002), http://www.seattlepi.com/local/93015_salmon26.shtml [https://

Five years later, the *Washington Post* published an exposé on Vice President Dick Cheney's involvement, which showed the decision to divert water to farmers was based on electoral politics and directly contradicted the best available science.[277] Cheney "set in motion a process to challenge the science protecting the fish" to appease a former colleague, Robert F. Smith, a Republican Congressmen who represented the Oregon farmers' district.[278] Cheney also had personal political motivations, as George W. Bush had lost Oregon by close margins in the presidential election months prior.[279] Given his personal relationships with various Interior officials and his inherent power as vice president, Cheney was able to influence the Department's science-based decisions to reach political ends.[280]

This information clearly indicates that the 2002 decision to divert water directly stemmed from improper interest-group contacts. Given agency deference and limitations on extra-record discovery, however, it would have been immensely difficult to prove those contacts sullied the agency's procedure or contradicted official justifications. Moreover, evidence of Vice President Cheney's involvement came from investigative journalism, not depositions during judicial review of administrative action. Consequently, even if the interviews with these government officials had been publicly available at the time, that type of evidence would most likely have been barred in typical administrative litigation. While political contacts with agency decisionmakers are not inherently illegal, courts need to view these interactions in tandem with the other four factors. Doing so can indicate a preliminary showing of pretext sufficient to satisfy the *Overton Park* "bad faith or improper behavior" exception.

* * *

Courts should review these five factors to determine if there was a preliminary showing of pretext sufficient to permit extra-record discovery under *Overton Park*. Courts should consider the political context, the posture of agency action, the agency's

perma.cc/KMM8-PTP4]. At least one source estimates the fish-kill had much more severe impacts, potentially killing up to 77,000 salmon. *See* Becker & Gellman, *supra* note 271.

277. Becker & Gellman, *supra* note 271.

278. *Id.*

279. *Id.*

280. *See id.*

dependence on scientific uncertainty, the relevant congressional mandates, and any interest-group contacts the agency may have had leading up to its decision. Collectively, these factors may "tell[] a story" of what actually motivated the agency's decision-making to determine if that story is different than the agency's on-the-record justification.[281] A preliminary showing of pretext would be sufficient to be a "strong showing of bad faith or improper behavior," which allows the court to permit extra-record discovery.[282] Using that discovery order, challengers can then gather more evidence—including depositions—to prove whether there was an illegal "significant mismatch" between the agency's official and "genuine" justifications.[283]

B. Benefits of Extra-Record Discovery in Limited Contexts

Admittedly, there are persuasive policy reasons for courts' hesitancy to allow extra-record discovery.[284] Agencies have an immense burden to promulgate regulations, and subjecting agencies to depositions and document review can be burdensome.[285] Extra-record discovery slows down the administrative process and creates a fear of litigation, which can have a "chilling effect" on the work of civil servants.[286] Moreover, administrative actors might expect a level of immunity to protect the agency from frivolous claims and to encourage candid decision-making processes within the agency.[287]

Nevertheless, failing to invoke the *Overton Park* standard based on preliminary showings of pretext would most likely create "a cement wall, impervious even to legitimate claims of improper influence."[288] Such a "cement wall" may endanger the integrity of judicial review and threaten the separation of powers. Granting extra-record discovery in limited situations mitigates those harms and provides three distinct benefits.

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281. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019).
282. *See* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971).
283. *Dep't of Com.*, 139 S. Ct. at 2575.
284. See Gavoor & Platt, *Administrative Records and the Courts*, *supra* note 11, for a thorough discussion on the drawbacks of extra-record discovery.
285. *Id.*
286. *Id.*
287. *Id.*
288. Sokaogon Chippewa Cmty. v. Babbitt, 961 F. Supp. 1276, 1280 (W.D. Wis. 1997).

First, a preliminary-showing-of-pretext standard gives clarity to courts struggling to define *Overton Park*'s scope. Since the 1971 decision, lower courts have failed to articulate a manageable standard, in part because there was little clarity on what a "strong showing of bad faith or improper behavior" entailed.[289] Most cases discussing *Overton Park* do so merely to say the standard is high without specifically delineating the threshold.[290] This five-factor analysis for a preliminary showing of pretext provides a clear framework for lower courts to use moving forward.

Second, this clear preliminary-pretext standard protects the integrity of courts by allowing courts to avoid the naiveté of ignoring important context, which could make judicial review "an empty ritual."[291] By granting extra-record review, courts create an opportunity to examine agency action for pretext. This in turn shows the court is meaningfully grappling with questions of pretext and considering an agency action in the appropriate contexts.

Finally, courts will hold agencies more accountable by granting extra-record discovery more often.[292] If agencies know there is a chance of extra-record discovery, agencies would likely be more careful moving forward, specifically taking effort to avoid even the appearance of pretext. This accountability will hopefully result in regulations based on "genuine justifications" rather than "contrived reasons [that] would defeat the purpose of the [agency rulemaking]."[293] In sum, these benefits, stemming from *Overton Park* exceptions to allow extra-record discovery, enable the judiciary to make "judicial review . . . more than an empty ritual" and increase accountability in agency actions.[294]

CONCLUSION

The Supreme Court has provided an initial framework to combat pretextual justifications, first in *Overton Park* and later in *Department of Commerce*. The latter holds that a significant mismatch between an agency's on-the-record and off-the-record

289. Cromley & Showalter, *supra* note 12 (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 402 (1971)).
290. *See id.* at n.13.
291. Dep't of Com. v. New York, 139 S. Ct 2551, 2576 (2019).
292. *See id.*
293. *Id.* at 2575–76.
294. *Id.* at 2576.

justification is grounds for reversal; the former provides an avenue for challengers to uncover agencies' off-the-record justifications. In determining whether to grant a motion to supplement the record through full discovery, specifically depositions, courts should see if there is a preliminary showing of pretext by using five factors: (1) political context, (2) posture of administrative action, (3) reliance on scientific uncertainty, (4) underlying congressional mandates, and (5) history of and present connection with interest groups. Adopting this approach will enhance judicial review, increase agency accountability, and mitigate the dangers inherent in pretextual decision-making.

Pretextual justifications can threaten the legitimacy of any area of agency regulation, including education benefits, financial controls, immigration policies, or environmental protections. The longer-lasting the impacts and the higher the stakes, the more important it becomes to ensure that agencies are accountable and provide authentic reasons for their actions, rather than using administrative process as a "distraction" for true motivations.

For environmental regulations specifically, abuse of agency discretion through pretextual decision-making can have long-lasting, negative impacts on natural resources and the environment. The United States has the opportunity to use its power, authority, and government to proactively fight climate change, protect endangered and threatened species, and preserve open spaces. But if environmental and natural resource agencies are permitted to create new regulations relying on pretextual justifications to hide their true justifications, the United States will lose that important opportunity. What's more, until courts are better able to consider evidence of pretext, the integrity of judicial review will be weakened, the separation of powers will be threatened, and public trust in governmental institutions will be diminished. Increased allowance of extra-record discovery is essential to avoid these serious problems and hold agencies accountable through meaningful judicial review.

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