Challenging Agency Action Based on Pretextual Reasons

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Issue Brief

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I. INTRODUCTION

Under the Administrative Procedure Act, an agency may not offer a disingenuous basis for its actions. If an agency justifies action with pretext, it has violated basic principles of administrative law. Litigants might challenge agency action as founded on pretextual bases. This Issue Brief outlines the law governing pretext claims and suggests some strategic considerations litigants might note.

II. PRETEXT CHALLENGES

The Administrative Procedure Act requires agency action to be "reasonable and reasonably explained."[1] A longstanding principle of reasoned decisionmaking is that an agency must "disclose the basis" for its action.[2] When an agency instead offers a pretextual basis for its action — for example, a "contrived" reason that "played an insignificant role in the decisionmaking process" — the agency violates the APA.[3] "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[4] When an agency explains its decision falsely, it frustrates that purpose.

The Supreme Court articulated this rule in *Department of Commerce v. New York*. There, states and other plaintiffs challenged the Department of Commerce's 2018 decision to add a citizenship question to the 2020 Census. The challengers alleged that the agency's stated reason for that decision — the Department of Justice's purported need for citizenship data to aid Voting Rights Act enforcement — was cover for Commerce's true motivation: depressing census response rates among noncitizens, which would have a disproportionate effect on politically "blue" states' share of federal funding and political representation.[5]

The Court agreed that the agency's basis for action was pretextual and affirmed the district court's remand to the agency on that basis. The evidence showed, among other things, that the Secretary of Commerce came into office determined to place a citizenship question on the census, but not for Voting Rights Act enforcement reasons. A subordinate official saw the task as "find[ing] the best rationale" to justify a citizenship question.[6] To that end, the agency set out to convince another agency — "any other willing agency" — to request

[1] *FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021).

[2] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962).

[3] *Department of Commerce v. New York*, 588 U.S. 752, 782, 784 (2019).

[4] *Id.* at 785.

[5] *See generally id.* at 758–66.

[6] *Id.* at 783.

citizenship data.[7] After being rebuffed by two, the Department of Commerce considered whether it could add the question without another agency's request. Some time later, it seized on the Voting Rights Act theory. The Secretary asked the Attorney General to prod the Department of Justice's Civil Rights Division to request citizenship data and assert that rationale. The evidence suggested that the Civil Rights Division did so solely in response to the Department of Commerce's request, not because it actually wanted the data.[8]

The Court concluded that this "evidence tells a story that does not match the explanation the Secretary gave for his decision."[9] Indeed, "the sole stated reason" the agency offered "seems to have been contrived."[10] That, the Court held, violated the APA's requirement of reasoned decisionmaking and warranted remand.[11]

While the pretext principle is straightforward, applying it involves complexities, like distinguishing pretext from ordinary agency decisionmaking, and proving pretext under the rules of APA litigation.

Defining pretext. An agency generally has substantial leeway in meeting its obligation to disclose the basis for an action. For one thing, an agency need not disclose the *entire* basis for its action. The Supreme Court has made clear that an agency may have "unstated reasons" in addition to its "stated reasons."[12] For another, agency decisionmakers may take "political considerations" like "an Administration's priorities" into account.[13] "It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate a legal basis for the preferred policy."[14]

There is some tension between, on the one hand, an agency's prerogative to act based on unstated political considerations and, on the other, the rule against pretextual reasoning. *Department of Commerce* provides some guidance. It was "unlike a typical case in which an agency may have both stated and unstated reasons for a decision."[15] Instead:

- The stated reason "played an insignificant role in the decisionmaking process."[16]

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[7] *Id.* at 784.

[8] *See generally id.* at 783–84.

[9] *Id.* at 784.

[10] *Id.*

[11] *Id.* at 785.

[12] *Id.* at 781.

[13] *Id.*; *see also Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) ("[W]e do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.").

[14] *Dep't of Commerce*, 588 U.S. at 783.

[15] *Id.* at 784.

[16] *Id.* at 782.

- The decisionmaker "had made up his mind" "well before" the accrual of the stated basis.[17]
- The decision was taken "for reasons unknown but unrelated to" the stated reason.[18]
- "[T]he evidence tells a story that does not match the explanation the [agency] gave for its decision."[19]
- "[T]he sole stated reason" "seems to have been contrived."[20]

So, while it might be acceptable for an agency to have political motivations and unstated reasons, its stated basis for acting must be "genuine," not "contrived" or an "insignificant" factor in the decision.

Courts have applied this principle in subsequent challenges to agency action. For instance, in *Sweet v. DeVos*, a class of plaintiffs initially challenged the Department of Education's failure to decide applications for student loan relief under the agency's borrower defense policies and then objected to the Department's subsequent flood of unreasoned denials of those applications.[21] The court observed that "[a]fter justifying eighteen months of delay largely on the backbreaking effort required to review individual applications, distill common evidence, and 'reach considered results,' the Secretary has charged out of the gate, issuing perfunctory denial notices utterly devoid of meaningful explanation at a blistering pace."[22] The court, applying *Department of Commerce*, found that "the evidence tells a story that does not match the explanation the Secretary gave for her decision," amounting to "a strong showing of agency pretext."[23]

Similarly, in *New York v. Wolf*, New York and a class of its residents challenged the Department of Homeland Security's decision to categorically exclude New York residents from eligibility for Customs and Border Protection's Trusted Traveler Programs.[24] The agency justified its decision on the ground that New York's so-called green light law—which authorized the state Department of Motor Vehicles to issue drivers licenses without regard to citizenship and immigration status—ostensibly "compromised CBP's ability to confirm whether an individual applying for TTP membership meets program eligibility requirements" by denying DHS access to certain DMV records.[25] The agency itself ultimately conceded,

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[17] *Id.* at 783 (internal quotation marks omitted).

[18] *Id.*

[19] *Id.* at 784.

[20] *Id.*

[21] 495 F. Supp. 3d 835, 838–39 (N.D. Cal. 2020).

[22] *Id*. at 846.

[23] *Id.* (internal quotation marks and alterations omitted).

[24] 2020 WL 6047817, at *1 (S.D.N.Y. Oct. 13, 2020).

[25] *Id.* at 6.

however, that residents of other jurisdictions that did not furnish that sort of information remained eligible for TTP.[26] The court concluded that the agency's action "was certainly arbitrary and capricious" and "may well have been pretextual."[27]

Proving pretext. Litigants might face challenges in uncovering evidence of pretext and bringing it before a court. Generally, a court may only evaluate an agency's decision in light of the administrative record,[28] the set of materials that was "before the agency at the time the decision was made,"[29] and the rationale the agency gave when it acted.[30] That reflects a "presumption of regularity" — a view that, all else equal, courts trust that agencies have followed proper procedures and acted for their stated reasons.[31]

In some cases, the administrative record itself will be enough to prove the agency's stated reason did not capture its basis for acting. For instance, in a pre-*Department of Commerce* challenge to the Fish and Wildlife Service's denial of a petition to classify the bald eagle population of the Sonoran Desert as a distinct population segment under the Endangered Species Act, agency staff said, in communications included in the administrative record, that senior agency officials "have reached [a] policy call & we need to support [it]" by "find[ing] an analysis that works" and "fit[ting] argument in as defensible a fashion as we can."[32] That prompted the court to reject the agency's stated reason for the denial — that the petition "did not present substantial scientific or commercial information indicating that the petitioned action may be warranted."[33] And in recent litigation over the Biden Administration's requirement that employees of federal contractors and subcontractors be vaccinated against COVID-19, the Sixth Circuit concluded, based on the government's "own documents," that the government's stated interest in ensuring the economy and efficiency of its contractors was "a naked pretext to invade traditional state prerogatives" over vaccination.[34]

[26] *Id.*

[27] *Id.*

[28] *Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978).

[29] *Env. Def. Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981).

[30] *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943).

[31] *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)

[32] *Center for Biological Diversity v. Kempthorne*, 2008 WL 659822, at *11 (D. Ariz. Mar. 6, 2008).

[33] *Id.* at *2.

[34] *Kentucky v. Biden*, 23 F.4th 585, 609 & n.15 (6th Cir. 2022). For more examples of successful pretext claims founded on the record itself, see, *e.g.*, *Saget v. Trump*, 375 F. Supp. 3d 280, 344–45, 360–62 (E.D.N.Y. 2019) (holding, in a challenge to Department of Homeland Security's termination of Haiti's Temporary Protected Status designation, that plaintiffs had shown sufficient evidence of agency bad faith to be entitled to extra-record discovery, but that just the "evidence contained within the administrative record" was sufficient to prove that the agency's action was "reverse-engineered" and "founded on a pretextual or sham justification"), and *Cowpasture River Preservation Ass'n v. Forest Serv.*, 911 F.3d 150, 179 (4th Cir. 2018) (concluding "that the Forest Service's approval of [a] project was a preordained decision and the Forest Service reverse engineered [its rationale] to justify this outcome." (internal quotation marks omitted)), *rev'd on other grounds*, *Forest Serv. v. Cowpasture River Preservation Ass'n*, 590 U.S. 604 (2020).

In many cases, though, hidden reasons will not appear in the administrative record. In those cases, challengers will need to bring in more evidence to demonstrate that the agency's justifications are pretextual. They can do so in two ways.

First, they can move to complete the record — a demand for the agency to produce other materials it relied on that were initially omitted.[35] Such motions are based on the APA's rule that judicial review take place on "the whole record."[36] Courts presume that the record is complete,[37] but a plaintiff may make "a prima facie showing that the agency excluded from the record evidence adverse to its position"[38] or that any "materials exist that were actually considered by the agency decision-makers but are not in the record as filed."[39]

Second, challengers can ask courts to supplement the record with "extra-record evidence going to the reasons for the agency's action."[40] Courts, though, are generally reluctant to do so. The Supreme Court has said that to introduce extra-record evidence, "there must be a strong showing of bad faith or improper behavior."[41] The courts of appeals have outlined other circumstances in which evidence outside of the record may be brought in. According to the D.C. Circuit, courts "may consult extra-record evidence when the procedural validity of the agency's action remains in serious question," "such as where the administrative record itself is so deficient as to preclude effective review."[42] Likewise, the Ninth Circuit holds that "a reviewing court may consider extra-record evidence" where the evidence "is necessary to

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[35] *See, e.g.*, *Department of Commerce.*, 588 U.S. at 765.

[36] 5 U.S.C. § 706; *see U.S. Lines, Inc. v. Fed. Maritime Comm'n*, 584 F.2d 519, 534 n.43 (D.C. Cir. 1978).

[37] *See, e.g., Sweet v. DeVos*, 495 F. Supp. 3d 835, 844 (N.D. Cal. 2020) ("Absent a showing otherwise, an agency's certified record, in support of either action or inaction, enjoys a presumption of completeness and regularity.").

[38] *Kent Cnty. v. EPA*, 963 F.2d 391, 395–96 (D.C. Cir. 1992).

[39] *Comprehensive Community Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 308–09 (S.D.N.Y. 2012).

[40] *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 634 (S.D.N.Y. 2019), *aff'd in part*, *rev'd in part*, *Dep't of Commerce*, 588 U.S. at 785. Some courts do not distinguish between these two forms of adding to the record — completing and supplementing. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014). But they are different. *New York*, 351 F. Supp. 3d at 633 n.55. Completing the record ensures compliance with the APA's mandate that judicial review be on "the whole record." 5 U.S.C. § 706; *Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 23 (D.D.C. 2016). Consequently, the only obstacle to completing the record is the presumption that the agency has already furnished a complete record. *Sweet*, 495 F. Supp. 3d at 844. By contrast, supplementing the record generally means adding "information on the merits that was *never* presented to the agency." *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). It is thus an *exception* to the APA's whole-record rule. *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018). Because supplementation generally implicates an "inquiry into executive motivation," it "should normally be avoided" and is available only "[o]n a strong showing of bad faith or improper behavior." *Department of Commerce*, 588 U.S. at 781 (internal quotation marks omitted). To that end, the Supreme Court has suggested that it may be appropriate "to complete the administrative record" even when "extra-record discovery" is not warranted. *Id.* at 781–82. For a helpful treatment of the differences between completing and supplementing the record, see Br. of Amicus Curiae Nat'l Res. Def. Council in Support of Resps., *Dep't of Commerce v. New York*, No. 18-966 (U.S. Apr. 1, 2019).

[41] *Citizens to Preserve Overton Park*, 401 U.S. at 420.

[42] *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (internal quotation marks and alterations omitted).

determine whether the agency has considered all relevant factors and explained its decision."[43]

Often, plaintiffs will need to produce the very evidence they want added to the record and convince the court that it satisfies the criteria for supplementation.[44] That means adducing documentary evidence suggesting, for instance, that the agency possessed motivations other than those identified in its rulemaking, suffered from undue political pressure, departed from ordinary procedures, or that settled on a particular decision irrespective of the evidence.[45] (Notably, though, some judges — including one Supreme Court justice — have been willing to consider public statements of government officials as evidence that the stated justifications for administrative action are suspect without a formal motion to supplement the record.[46])

Other times, plaintiffs will need to convince a court — either by pointing to such extrinsic evidence or holes in the record — that the agency's decision cannot adequately be explained without discovery. As noted, courts often caution that extra-record discovery is disfavored, but litigants might still be able to obtain it. For example, the *Department of Commerce* plaintiffs persuaded the district court to permit extra-record discovery, including, eventually, depositions, by pointing to public statements by President Trump's campaign and advisors indicating that the agency's motive was political, the agency's "shifting chronology" of events, and its "extremely unusual decisionmaking process" — as well as by arguing that the agency's stated rationale simply did not hold up.[47]

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[43] *San Luis & Delta-Mendota Water Auth.* 776 F.3d at 992 (internal quotation marks omitted). *San Luis & Delta-Mendota Water Authority* also explained that plaintiffs may complete the record, supplement the record with material necessary to help the court understand technical or complex cases, and, in line with *Overton Park*, make a "showing of agency bad faith" to justify extra-record discovery." *Id.*

[44] A "court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). That rule allows courts to "take judicial notice of matters of public record." *Philips v. Pitt. Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

[45] *See, e.g.*, *Tummino v. Torti*, 603 F. Supp. 2d 519, 544–49 (E.D.N.Y. 2009); *Saget v. Trump*, 375 F. Supp. 3d 280, 343–44 (E.D.N.Y. 2019).

[46] *See Nat'l Fed. of Indep. Bus. v. OSHA*, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring) (quoting the public statements of former White House Chief of Staff Ron Klain in opining "that the agency pursued its regulatory initiative" — an emergency temporary standard mandating that certain employers require their employees to be vaccinated against or regularly test for COVID-19 — "only as a legislative 'work around.'"); *West Virginia v. EPA*, 597 U.S. 697, 745 (2022) (Gorsuch, J., concurring) (noting President Obama's statement that "if Congress won't act soon . . . I will" as evidence that the EPA's Clean Power Plan violated the major questions doctrine).

[47] *State of New York v. Dep't of Commerce*, S.D.N.Y. No. 1:18-cv-2921, ECF No. 193 (June 26, 2018). To be sure, the Supreme Court later held that the district court decision to order extra-record discovery was "premature" but "ultimately justified in light of the expanded administrative record." *Department of Commerce*, 588 U.S. at 781–82. That conclusion highlights that the evidence sought through extra-record discovery is often also the evidence needed to obtain it.

One court allowed extra-record discovery in support of plaintiffs' constitutional claim that the Department of Homeland Security's 2019 Public Charge Rule, which rendered inadmissible certain immigrants "who receive[] one or more designated public benefits for more than 12 months in the aggregate within any 36-month period," was motivated by covert racial animus.[48] Plaintiffs made "a strong showing that DHS's stated reason for promulgating the Final Rule — protecting the fisc — obscures . . . the real reason — disproportionately suppressing nonwhite immigration" based on, among other things, "emails" from a White House official "commending white nationalist content," presidential statements "reflect[ing] . . . animus," and a DHS official's view that Emma Lazarus's poem, *The New Colossus*, inscribed on the Statute of Liberty, "was referring back to people coming from Europe."[49]

Courts have also permitted extra-record discovery when it is necessary to determine whether agency decisionmakers relied on particular materials in acting,[50] and even *after* a finding of pretext, when "a pressing deadline" warrants information on an agency's reasoning quickly, rather than after a potentially lengthy remand.[51] The Federal Rules of Civil Procedure and related doctrines will, of course, govern what discovery is available.[52]

There is substantial overlap between the question whether to supplement the record and the ultimate merits question of whether the agency offered a false basis for its action. The burden to supplement is essentially "a prima facie showing" of pretext.[53] Consequently, if challengers feel that supplementing the record is necessary to prove pretext, litigation on that issue will be closely bound up with the merits.[54]

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[48] *Cook Cnty. v. Wolf*, 461 F. Supp. 3d 779, 783 (E.D. Ill. 2020).

[49] *Id.* at 785, 796. As noted, this discussion arose in the context of a constitutional claim, not an APA claim. The court discussed at length whether the rule that extra-record discovery is available only on a "strong showing of bad faith or improper behavior" applies in the constitutional context. *Id.* at 792 (quoting *Dep't of Commerce*, 588 U.S. at 781). And while it ultimately concluded that the plaintiff "is entitled to discovery on [its equal protection] claim regardless of whether it can satisfy the 'strong showing' standard applicable to APA claims," it also held that the plaintiff "satisfies the 'strong showing' standard in any event." *Id.* at 795. In general, the constitutional question whether a facially neutral policy was motivated by improper animus may be determined by a pretext analysis. *See generally Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

[50] *Club v. Angelle*, 2021 WL 9526861, at *4 (E.D. La. Mar. 4, 2021).

[51] *Sweet v. DeVos*, 495 F. Supp. 3d 835, 846–47 (N.D. Cal. 2020).

[52] As just one example, "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition — for example, that the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013); *accord In re U.S. Dep't of Education*, 25 F.4th 692, 700 (9th Cir. 2022). More generally, "[t]hat the Court allows some discovery . . . does not imply endless discovery." *Cherokee Nation v. Dep't of Interior*, 2021 WL 3931870, at *3 (D.D.C. Sept. 2, 2021).

[53] *See Dep't of Commerce*, 588 U.S. at 782.

[54] A good example is *Sweet v. DeVos*, where the court justified extra-record discovery based on a finding of pretext. 495 F. Supp. 3d at 846–47.

III. STRATEGIC CONSIDERATIONS

As prospective litigants consider challenging agencies' rationales as pretextual, a few points might be kept in mind:

Pretext claims might be litigated differently from other APA claims. As explained, APA cases are generally summary proceedings adjudicated on the administrative record and the parties' briefs.[55] That might hold true for the subset of pretext cases where an agency's true reasoning is apparent from the record itself. But to the extent that proving pretext requires going beyond the administrative record, the litigation might look different. Litigants might prepare detailed complaints compiling evidence of pretext as comprehensively as possible. That thoroughness could serve the dual purposes of strengthening the plausibility of a pretext claim against a motion to dismiss[56] and increasing the likelihood that a court might credit pretext allegations in adjudicating claims for interim relief like a temporary restraining order or a preliminary injunction.[57] Next might come motions practice over whether supplementation is appropriate, which, as explained above, frequently requires plaintiffs to satisfy a substantial burden. If they do so, discovery itself might follow. Finally, to adjudicate the factual question whether an agency's reasoning was pretextual, an evidentiary hearing or even a trial might be required.[58]

Challengers might focus on supplementing the record without discovery. Supplementing the record and winning a pretext claim are, as discussed, similar. So successfully supplementing the record can be an end in itself.

As explained above, litigants can seek to supplement the record by taking discovery. But that can be challenging, and so as a first step, litigants might focus on developing a

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[55] *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review [under the APA] should be the administrative record already in existence, not some new record made initially in the reviewing court.") *North Carolina Fisheries Ass'n, Inc. v. Guttierez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007) ("Summary judgment . . . serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review."); *Lodge Tower Condo. Ass'n v. Lodge Props., Inc.*, 880 F. Supp. 1370, 1374 (D. Colo. 1995) ("Agency action . . . is reviewed, not tried.").

[56] *Cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (to state a conspiracy claim under Section 1 of the Sherman Act, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"; instead, "allegations plausibly suggesting (not merely consistent with) agreement" are required).

[57] *Cf. Nat'l Council of Nonprofits v. OMB*, 2025 WL 368852, at *2 (D.D.C. Feb. 3, 2025) (granting a temporary restraining order against the Trump administration's across-the-board "federal funding freeze" in part based on a public statement of the White House Press Secretary stating that the freeze remained in effect notwithstanding a contrary directive of the Office of Management and Budget).

[58] *See, e.g., New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019) ("[T]his Court held — and completed — an eight-day bench trial to resolve Plaintiffs' claims, taking direct testimony by affidavit from many witnesses and orally from others.").

supplemental record composed of evidence available without discovery like public statements of agency decisionmakers. There are several good reasons for that approach. First, obviously, public evidence can be gathered without costly and time-consuming discovery practice. And, if it is sufficient to prove pretext, its use avoids the need to litigate thorny discovery matters in addition to litigating supplementation itself and the merits. Second, public evidence can be used to prove entitlement to additional discovery if necessary. Third, while of course public evidence can be used on a motion to supplement the record, some judges, as discussed, have been willing to consider it without a formal motion.[59]

One avenue for obtaining evidence without discovery, though perhaps not without litigation, is through the Freedom of Information Act. In particular, where relevant, litigants might seek communications between the agency and outside individuals and organizations. Communications that originated or were sent outside the agency are far less likely to fall within a FOIA exception. For instance, the so-called "deliberative process privilege," which shields materials that are "both predecisional and deliberative," generally does not apply to external communications.[60]

Final agency action is the best target for pretext claims. Pretext claims arise under the APA,[61] which may only be used to challenge final agency action,[62] and "the President is not an 'agency.'"[63]

That said, litigants might explore challenges to presidential action on pretext grounds. In 2018's *Trump v. Hawaii*, the Supreme Court considered a claim that the true motivation behind President Trump's proclamation banning travel and immigration from several Muslim-majority countries was Islamophobia rather than security concerns.[64] To be sure, in light of the President's broad authority over immigration and national security — and with the APA's reasoned decisionmaking rules out of play — the Court took pains to defer to President Trump's asserted rationale, despite seemingly overwhelming evidence that it did not reflect his actual motivation.[65] One district court has decided that *Department of Commerce*'s pretext rule does not "extend[] beyond the APA context to . . . allow [courts] to second-guess the

[59] *See supra* n.46.

[60] *American Oversight v. HHS*, 101 F.4th 909, 916–17 (D.C. Cir. 2024).

[61] The APA does not expressly bar pretextual agency reasoning. But, as *Department of Commerce* explains, pretext claims arise from administrative law's reasoned decisionmaking rule, 588 U.S. at 780–81, which is generally understood to be part of the APA's prohibition on "arbitrary" and "capricious" agency action, 5 U.S.C. § 706(2)(A); *see FCC v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021).

[62] 5 U.S.C. § 704.

[63] *Dalton v. Specter*, 511 U.S. 462, 470 (1994) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

[64] 585 U.S. 667, 697–711 (2018).

[65] *Id.* at 705–06.

motives behind" presidential declarations.[66] But given the lack of developed case law on the issue, litigants might explore pretext claims against presidential action.

Litigants might bring similar claims when an agency decisionmaker's mind is "unalterably closed." One way of describing the pretext claim in *Department of Commerce* was that the Secretary of Commerce had made up his mind to add a citizenship question to the Census and charged his staff to gin up a rationale. A claim along these lines could also lie under the Constitution. The Due Process Clause requires that "[a]n individual should be disqualified from rulemaking" "when they act with an unalterably closed mind and are unwilling or unable to rationally consider arguments."[67] Similarly, agency adjudicators may not "adjudge[] the facts as well as the law of a particular case in advance of hearing it."[68] In many cases, though, challengers might stick with APA pretext claims. Such claims likely apply in more circumstances than "unalterably closed mind" claims. As in *Department of Commerce*, plaintiffs can use a pretext claim to challenge bias and prejudgment, but such a claim might also be brought in any other case where an agency's stated basis for acting appears to have "played an insignificant role in the decisionmaking process."[69] Additionally, it may well be easier to demonstrate that an agency's reasoning is contrived than to show that an individual decisionmaker labored under the sort of profound bias the Due Process Clause prohibits.[70]

Good cases for a pretext claim are likely good cases for broader reasoned decisionmaking claims. Pretext claims, as an outgrowth of the APA's reasoned decisionmaking requirement, are just one type of arbitrary and capricious claim. Contrived reasoning may suffer from other flaws as well. If a particular result was predetermined or the rationale for it pretextual, it may be that the agency failed to deal sufficiently with meritorious objections to its action. (To be sure, this was not the case in *Department of Commerce*. There, the Court held that the agency had not acted arbitrarily and capriciously in adding a citizenship question to the Census, apart from its pretextual reasoning.[71])

Those who suspect an agency has not been forthcoming regarding its reasons for a proposed action might consider submitting adverse comments. That could prove an effective strategy to expose flaws in agency reasoning that could be the basis for eventual APA

[66] *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 33–34 (D.D.C. 2020).

[67] *Mississippi Comm'n on Env. Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015).

[68] *Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007); *see also Meta Platforms, Inc. v. FTC*, 2024 WL 1549732, at *1 (D.C. Cir. Mar. 29, 2024). These cases indicate that the "unalterably closed mind" standard follows from the Constitution's guarantee of due process. *See also Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) ("Decisionmakers violate the Due Process Clause when they act with an 'unalterably closed mind.'"). But some courts have described it, alternatively or in addition, as an APA rule. *See Sherley v. Sebelius*, 776 F. Supp. 2d 1, 21 (D.D.C. 2011).

[69] *Dep't of Commerce*, 588 U.S. at 782.

[70] *See C&W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1564–65 (D.C. Cir. 1991) (requiring that a decisionmaker's bias and prejudgment be proved with a "clear and convincing showing").

[71] *Dep't of Commerce*, 588 U.S. at 773–77.

claims. It might also be important to preserve claims for litigation. For instance, courts will generally decline to entertain objections to a notice-and-comment rule that were not first presented to the agency in the comment record.[72]

Seeking vacatur. For an APA violation, the "default remedy" is vacatur.[73] But courts sometimes remand matters to the agency for further consideration without vacating the deficient action.[74] Whether vacatur or simple remand is the default in pretext cases is unclear. One district court, relying on *Department of Commerce*, took the position that "[i]n an ordinary case, pretext leads to remand so the agency may explain itself."[75] To that end, *Department of Commerce* said that "the District Court was warranted in remanding to the agency, and we affirm that disposition."[76] But the district court "disposition" affirmed by the Supreme Court was, in fact, "*vacatur* and remand."[77]

In any event, litigants might argue that vacatur is generally appropriate in pretext cases. For other APA violations, including reasoned decisionmaking errors, it is the norm.[78] Moreover, the availability of remand without vacatur "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[79] It may not be possible to speculate as to the disruption vacatur of pretextual agency action would cause in a particular case. But litigants might argue that pretextual agency reasoning is, categorically, a sufficiently "serious" form of error to preclude a departure from the ordinary practice of vacatur. After all, perhaps the most basic requirement of administrative law is that an agency "disclose the basis" of its action.[80] And the Supreme Court has explained that when an agency offers a pretext, it violates that rule. "Accepting contrived reasons would

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[72] *See, e.g., Advocates for Highway & Auto Safety v. Federal Motor Carrier Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005) ("[A] party will normally forfeit an opportunity to challenge an agency rulemaking on a ground that was not first presented to the agency for its initial consideration."); *Natural Res. Def. Council v. EPA*, 824 F.2d 1146, 1150–51 (D.C. Cir. 1987) (en banc) (courts will consider arguments "if the agency has had an opportunity to consider the identical issues presented to the court but which were raised by other parties" (internal quotation marks and alterations omitted)).

[73] *Montana Wildlife Fed'n v. Haaland*, 127 F.4th 1, 50 (9th Cir. 2025).

[74] *E.g., Cigar Ass'n of Am. v. FDA*, 126 F.4th 699, 705–06 (D.C. Cir. 2025); *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

[75] *Sweet v. DeVos*, 495 F. Supp. 3d 835, 846 (N.D. Cal. 2020).

[76] *Dep't of Commerce*, 588 U.S. at 785.

[77] *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 673 (S.D.N.Y. 2019) (emphasis added).

[78] *E.g., Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1196 (D.C. Cir. 2023) (vacating in light of "significant" "deficiencies" in agency's analysis); *Cboe Futures Exchange, LLC v. SEC*, 77 F.4th 971, 982 (D.C. Cir. 2023); *see generally* Stephanie J. Tatham, Admin. Conf. of the United States, The Unusual Remedy of Remand Without Vacatur 1 (Jan. 3, 2014) ("Ordinarily, when a court finds that an agency action was arbitrary and capricious, unlawful, or unsupported by substantial evidence, the action is vacated and the agency must try again.").

[79] *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

[80] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–69 (1962).

defeat the purpose of the enterprise" of APA review.[81] Pretextual reasoning is, in other words, a fundamental APA violation.[82]

Litigants should be mindful of other legal contexts in which pretext might be relevant. This Issue Brief has focused on challenges to pretextual agency action under the APA's reasoned decisionmaking requirement. Litigants might consider other ways to challenge executive action resting on hidden or false reasons or considerations. For instance, the APA's notice and comment requirement has been understood to require agencies to furnish the evidentiary basis for their proposed actions so as to enable informed commenting.[83] More broadly, the President's constitutional duty to "take Care that the Laws be faithfully executed" arguably prohibits him from acting with an ulterior motive to undermine the law.[84] Other claims can probe whether a facially neutral official act was motivated by racial animus,[85] or whether an employer's asserted nondiscriminatory basis for an employment action was genuine.[86]

IV. CONCLUSION

The Supreme Court has acknowledged that, notwithstanding the APA's requirement that agencies disclose the basis for their actions, agencies may act on unstated reasons. Nevertheless, litigants might bring pretext claims regularly during the second Trump administration. Pretext litigation succeeded during the first Trump administration, including because the administration's actual motivations were apparent or revealed by public reporting. During this second Trump administration, already rife with reporting of attempts

[81] *Dep't of Commerce*, 588 U.S. at 785.

[82] Vacatur is also appropriate when an agency fails to follow the APA's notice and comment requirements. *See, e.g.*, *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015). Litigants might argue that an agency's failure to give an honest account of its reasoning is a similar form of error warranting the same default remedy. After all, in both cases, the agency falls short of a required procedural step in its decisionamking — either taking public comments or disclosing the basis of its action.

[83] *See Window Covering Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1283 (D.C. Cir. 2023).

[84] U.S. const. art. II § 3; *cf. Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 613 (1838) (the Take Care Clause prohibits the President from "dispensing" with Congress's laws by "forbid[ding] their execution").

[85] *See, e.g.*, *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–68 (1977); *see also Cook Cnty. v. Wolf*, 461 F. Supp. 3d 779, 795–96 (E.D. Ill. 2020).

[86] *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

to sabotage critical agency programs (and even agencies themselves),[87] retaliate against opponents,[88] and favor friends,[89] APA litigators might have many options.

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[87] Stacey Cowley et al., *With Attacks on Consumer Bureau, Musk Removes Obstacle to His 'X Money' Vision*, N.Y. Times (Feb. 13, 2025).

[88] *See, e.g.*, Benjamin Mullin & David McCabe, *F.C.C. Chair Orders Investigation Into NPR and PBS Sponsorships*, N.Y. Times (Jan. 30, 2025); Brian Stelter, *The FCC's Battle with CBS Over Its Harris Interview is Raising Red Flags*, CNN (Feb. 3, 2025).

[89] *See, e.g.*, Rachel Franzin & Taylor Giorno, *Oil Bigwigs Open Wallets for Trump After Billion-Dollar Request*, The Hill (Oct. 31, 2024); Unleashing American Energy, Exec. Order 14,154, § 7, 90 Fed. Reg. 8353, 8357 (Jan. 20, 2025); *see also* Jael Holzman, *Trump Has Paralyzed Renewables Permitting, Leaked Memo Reveals*, Heatmap (Feb. 4, 2025).