No. 18-966

# In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,

*Petitioners,*

*v.*

NEW YORK, ET AL.

*Respondents.*

*ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY


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## QUESTION PRESENTED

Whether, in cases in which the plaintiff plausibly alleges that federal agency officials violated the Constitution by acting with discriminatory intent, the Administrative Procedure Act bars the plaintiff from submitting proof of the agency decisionmakers' intent from outside the administrative record.

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## INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. In particular, Becket has frequently represented religious groups harmed by policies that, though allegedly neutral on their face, have ultimately been shown—by evidence developed through discovery and in the courtroom—to be products of unconstitutional religious targeting. See, *e.g.*, *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from denial of certiorari) (representing Christian pharmacy where there was "much evidence that the impetus for the adoption of the [challenged] regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State"); Brief for Appellants at 15, *Fulton* v. *City of Philadelphia*, No. 18-2574 (3d Cir. Aug. 27, 2018) (seeking injunction to protect Catholic adoption agency from forced shutdown where testimony showed that city told the agency that it is "not 100 years ago," "times have changed," and the agency needs to follow the city's

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

view of the Pope's teachings); *Business Leaders in Christ* v. *University of Iowa*, No. 17-80, ___ F. Supp. 3d ____, 2019 WL 460401, at *6, 10 (S.D. Iowa Feb. 6, 2019) (obtaining injunction against university policy forbidding student groups from selecting members based on beliefs where discovery demonstrated that the policy had been applied against a religious group with traditional beliefs about marriage and sexuality but not groups espousing the "ideological inverse").

Here, Becket takes no position on the merits question of whether the Department of Commerce acted legally in reinstating a citizenship question to the census. Instead, Becket is concerned that the Department's theory that the Administrative Procedure Act (APA) bars all extra-record discovery—even for claims, like Respondents' Equal Protection claim, alleging that agency action was motivated by an unconstitutional, discriminatory purpose—would prevent other plaintiffs from proving colorable claims of discrimination against federal agencies under the Free Exercise Clause. If plaintiffs with colorable claims of intentional religious discrimination are barred from pursuing any evidence of an agency's purpose beyond the record the agency has itself compiled to support its decision, then the Free Exercise Clause's protections against religious discrimination—whether facial or subtle, overt or masked—will be severely undermined. Becket therefore files this brief to highlight the potential harm of the "record rule" in this context for future plaintiffs seeking to vindicate their constitutional rights under the Free Exercise Clause.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

For centuries, the emblem of Lady Justice has held a pair of evenly weighted scales. To ensure that the scales of justice aren't tilted at the outset of a dispute, courts evenhandedly apply federal rules governing discovery, evidence, and civil procedure. These rules allow both sides of a dispute to obtain and admit relevant evidence supporting their claims and defenses. Discovery is especially important to smoke out hidden animus in cases in which the plaintiff's claim is based on discriminatory intent. Yet under the "record rule" developed under the APA, plaintiffs seeking to challenge federal agency action must rely on the agency's own internal record, rather than undertaking traditional discovery. Applied to cases in which the plaintiff claims that a facially neutral agency action was in fact motivated by masked, discriminatory intent, the record rule tips the scales in favor of the federal agency—before the case has even begun.

In this case, Becket takes no position on the merits of the ultimate issue—whether the district court was right to enjoin the Secretary of Commerce from reinstating a citizenship question to the 2020 decennial census. Instead, this brief focuses solely on the evidentiary issue encompassed in the second question presented: whether plaintiffs who have plausibly alleged that a federal agency action was motivated by unconstitutional animus should be able to obtain traditional discovery. Here, the district court held that Respondents had a plausible claim of intentional discrimination, denying the Department's motion to dismiss Respondents' Equal Protection argument

that the Department's decision was motivated by animus against racial minorities. Pet. App. 425a-434a. If that decision was right, then the district court was also right to allow discovery, since it would be absurd to ask plaintiffs to prove a claim of masked, invidious discrimination based solely on records generated by the defendant agency itself.

The availability of discovery in intentional-discrimination cases holds particular importance in the religious-liberty context, because Free Exercise claimants often rely on the discovery process to expose key evidence underlying their claims of discrimination, targeting, or hostility by agency officials. At the state and local levels, religious adherents may use the traditional discovery process to prove their claims, but under the Department's view of the record rule, the APA would prevent them from obtaining this critical evidence when seeking judicial review of federal agency actions. Thus, regardless of the Court's decision on the merits, we advocate that when plaintiffs allege a colorable claim of intentional, unconstitutional discrimination, they should have access to traditional discovery so they can prove whether agency officials acted with discriminatory intent, instead of being confined to the agency's own internal record. This approach will not lead to runaway discovery, because plaintiffs must still meet the well-pleaded complaint standard to survive a Rule 12(b)(6) motion to dismiss, as well as the other generally applicable limits on discovery, including the proportionality requirement of Federal Rule of Civil Procedure 26.

## ARGUMENT

### I. Plaintiffs alleging colorable claims of intentional, unconstitutional discrimination are entitled to limited discovery beyond the agency's record.

In their previous briefing on this issue, the parties focused on just one of the district court's rationales for permitting discovery in this case—its conclusion that Respondents have made the threshold showing necessary to satisfy the "bad faith" exception to the "record rule" applicable in APA cases. See Pet'rs' Br. 21-37, No. 18-557; Resp'ts Br. 35-50, No. 18-557. This brief focuses instead on the district court's *other* rationale for declining to apply the record rule: that whether or not Respondents made the showing of bad faith, the record rule does not apply because Respondents plausibly alleged that the Department's action was based on unconstitutional, racial animus. Pet. App. 326a-330a & nn. 80-81. As the district court explained, to apply the record rule to such claims—and thus to deny the plaintiff any discovery into the government's purposes for its actions beyond what can be gleaned from the government's own administrative record—would improperly handicap Equal Protection plaintiffs' ability to prove up their cases, since the government typically does not openly announce on the record that its decisions are based on animus against constitutionally protected groups. That rationale is correct—and it applies with equal force to claims brought by religious plaintiffs under the Equal Protection Clause and under the Free Exercise Clause, which, it is well established, "protects against governmental hostility which is masked, as

well as overt." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993).

1. Section 706 of the APA directs courts, in cases challenging "agency action," to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. While the text does not actually prohibit courts from looking outside the agency record, courts have fashioned a default "record rule" in APA cases that typically displaces the Federal Rules' discovery provisions and confines judicial review of agency decisionmaking to "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

This record rule often serves an important function in APA litigation. For instance, when the plaintiff's APA claim is that the agency's action was "arbitrary [or] capricious" because the agency failed to engage in "reasoned decisionmaking," *Judulang* v. *Holder*, 565 U.S. 42, 52-53 (2011), the record rule rightly focuses judicial review on the materials the agency acknowledges it considered in arriving at its decision and on the agency's official explanation for that decision. After all, in applying arbitrary-or-capricious review, the court's role is not to "substitute its judgment for that of the agency" but rather to assure itself that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962)).

That "examin[ation]" and "explanation," if it occurred, will appear in the administrative record.

Other times, however, there is not an easy fit between application of the record rule and the substance of the plaintiff's claim—and in that situation, courts have carved out multiple exceptions to the record rule. For instance, when the plaintiff's claim is that the agency *failed to consider* some relevant factor it was required to consider, courts have declined to apply the record rule. In that situation, it would be "impossible" for the court to analyze the plaintiff's claims unless it could "look[] outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc.* v. *U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980); see also *Citizens to Pres. Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971) ("since the bare record may not disclose the factors that were considered * * * it may be necessary" to admit extra-record evidence)

This same reasoning applies when the plaintiff's claim is not that the government drew wrongheaded conclusions from the evidence before it or that the government failed to consider relevant data, but rather that the government's decision was based on intentional, unconstitutional animus. Government officials, of course, "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a" constitutionally protected group. *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). If courts are required to apply the record rule to these claims—and thus "take the agency's word that" its official rationale was its real one, *Asarco*, 616 F.2d at 1160—plaintiffs will be unable to obtain the evidence

that the substantive law requires to make out their claims.

Thus, in *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court already contemplated that claims of unconstitutional animus may be entitled to ordinary discovery, even in APA cases. In *Webster*, the plaintiff alleged, among other things, that his firing by the CIA was arbitrary and capricious and was motivated by unconstitutional discrimination on the basis of sexual orientation. *Id.* at 595-96. This Court dismissed the arbitrary-and-capricious claim, holding that the text of the statute enabling the CIA's Director to make termination decisions supplied no "meaningful judicial standard of review." *Id.* at 600. But the Court agreed with the court of appeals that the plaintiff's constitutional claims should proceed—and that the case should be "remanded * * * for a determination of the reason for the Director's termination of" the plaintiff for purposes of those claims. *Id.* at 598, 601-05. Rejecting the government's argument that "inquiry and discovery" on this point would entail impermissible "'rummaging around' in the Agency's affairs," the Court explained that "the District Court has the latitude to control any discovery process * * * so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its * * * mission." *Id.* at 604.

*Webster*'s recognition that Equal Protection claims of intentional discrimination may sometimes entail discovery, even in APA cases, makes good sense. As the district court explained below, this Court's Equal Protection jurisprudence requires

plaintiffs to prove that the government acted with a "discriminatory intent or purpose." *New York* v. *U.S. Dep't of Commerce*, 345 F. Supp. 3d 444, 451-52 (S.D.N.Y. 2018) (quoting *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). "That same precedent *mandates* 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,' and *explicitly calls for* consideration of 'evidence' such as the 'historical background of the decision,' the 'specific sequence of events leading up [to] the challenged decision,' procedural and substantive 'departures' from the norm, and, in 'some extraordinary instances,' the testimony of decisionmakers." *Id.* at 452 (quoting *Arlington Heights*, 429 U.S. at 266-68) (emphasis in original). It would therefore "be perverse" to apply the default record rule to such claims; that would "suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'" *Ibid.*

Importantly, the same point applies to claims of intentional discrimination under the Free Exercise Clause. Government action violates the Free Exercise Clause if it is not "neutral" toward religion. *Lukumi*, 508 U.S. at 531-32. And a law is not neutral toward religion if, among other things, its "object * * * is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. This inquiry is not limited to the law's "facial neutrality"; "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. Yet application of the record rule to plausible claims

of religious animus would curtail the Free Exercise Clause's protections against "covert suppression of" religion, *ibid*, limiting the plaintiff's evidence of discrimination to a universe of material prepared for public scrutiny by the government itself.

Because application of the record rule would undermine plaintiffs' ability to prove Free Exercise and Equal Protection claims of intentional discrimination by federal agencies, an intentional-discrimination exception should permit limited discovery in these cases. When plaintiffs allege a plausible claim of intentional discrimination that is unconstitutional under substantive law, they should be entitled to discovery, even if the case is a challenge to agency action governed by the APA. This rule would not only harmonize the scope of admissible evidence with the requirements of the plaintiff's claim, but also would accord with the heightened protection this Court has afforded to "the precious liberties established and ordained by the Constitution" in other contexts. See *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984). Just as constitutional claims invoke heightened factual review by the courts, *ibid.*, so do they warrant protections to ensure that the relevant facts are available for consideration in the first place.

2. The district court's concern that applying the record rule to claims of intentional discrimination would "risk undermining decades of * * * jurisprudence" (*New York*, 345 F. Supp. 3d at 452) is far from speculative. To the contrary, Equal Protection and Free Exercise decisions from this Court and others have frequently turned on direct and circumstantial evidence of the decisionmaker's purpose—the kind of evidence that typically will be unavailable if a re-

viewing court is forbidden from looking outside the administrative record.

In *Hunter* v. *Underwood*, for instance, this Court held unconstitutional under the Equal Protection Clause a state constitutional provision disenfranchising persons convicted of crimes involving "moral turpitude." 471 U.S. 222, 223 (1985). The provision was "on its face [] racially neutral." *Id.* at 227. But, relying on "testimony and opinions of historians" about the state decisionmakers' intent—and suggesting that it would have considered testimony from "eyewitnesses" to the proceedings had they been available—this Court held that the provision was unconstitutional because it had been "enacted out of racial animus." *Id.* at 228-233. Make *Hunter* a case about federal agency action, rather than a state constitutional provision, and the evidence relied on by the *Hunter* Court would be prohibited by the Department's view of the record rule.

Turning to Free Exercise, in *Lukumi*, the Court held unconstitutional a series of city ordinances banning animal sacrifice. The Court granted that the ordinances may not have "discriminate[d]" against religion "on [their] face." *Lukumi*, 508 U.S. at 533. But emphasizing that that the Free Exercise Clause forbids not just facial discrimination but also "covert," "masked," or "subtle departures from neutrality," the Court concluded that the ordinances' true "object or purpose [was] the suppression of religion." *Id.* at 533-34 (internal quotation marks omitted). Further, Justice Kennedy reached that conclusion based not just on the ordinances' text and operation, but also on the "events preceding their enactment" and contemporaneous statements of city residents and officials. *Id.* at

540-42 (opinion of Kennedy, J.). Justice Kennedy explained that because "neutrality" under the Free Exercise Clause requires "an equal protection mode of analysis," "[r]elevant evidence includes * * * the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540 (citing *Arlington Heights*, 529 U.S. at 266).

To be sure, the portion of Justice Kennedy's *Lukumi* opinion relying on historical evidence and lawmakers' statements commanded only two Justices. See *Stormans*, 136 S. Ct. at 2437 n.3 (Alito, J., dissenting from denial of certiorari) (noting "[i]t is an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers' personal intentions, as is done in the equal protection context," but explaining how such evidence indicated lack of neutrality there). In *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), however, a majority relied on similar evidence to find government action non-neutral. There, the Court looked to state civil rights commissioners' comments at public meetings to find that the commission's decision to reject a religious baker's claim that he could not be required to create cakes for same-sex weddings was motivated by "a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729-1730.

Consistent with *Lukumi* and *Masterpiece*, lower courts have consistently looked to historical-

background evidence to determine whether a law was motivated by an impermissible purpose under the Free Exercise Clause. Moreover, this type of evidence has frequently played a key, and sometimes dispositive, role, in the lower courts' Free Exercise cases.

For example, historical evidence of religious animus was critical to a recent decision by the New Mexico Supreme Court limiting the scope of New Mexico's Blaine Amendment. *See Moses* v. *Ruszkowski*, No. S-1-SC-34974, ___ P.3d ____, 2018 WL 6566646 (N.M. Dec. 13, 2018) (*Moses II*). *Moses* involved a textbook lending program making textbooks available to all students, whether in public or private schools. The program was challenged under New Mexico's Blaine Amendment, which had been imposed on the state by the U.S. Senate as a condition of statehood. The Senate's proposed version prohibited aid to "sectarian or denominational school[s]," *id.* at *4, a known reference to Catholic institutions. See *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality). But the adopted version prohibits aid to both "sectarian" and "private" schools—an apparent compromise to satisfy both the U.S. Senate and the New Mexico constitutional convention's Catholic delegates. Applying the provision's plain text, the New Mexico Supreme Court initially ruled 5–0 that the textbook lending program violated the Blaine Amendment. *Moses* v. *Skandera*, 367 P.3d 838 (N.M. 2015). After Becket sought review, highlighting the anti-Catholic animus underlying Blaine Amendments generally, this Court granted certiorari, vacated, and remanded the case in light of *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017). See *New Mexico Ass'n of Non-Public Schs.* v. *Moses*, 137 S. Ct. 2325 (2017).

On remand, the New Mexico Supreme Court reached the opposite conclusion by looking "through a different lens, one that focuses on discriminatory intent." *Moses II*, 2018 WL 6566646, at *12. In so doing, the *Moses II* court relied heavily on historical and social evidence—evidence that would not have been admissible under the default record rule in an APA case. Citing *Masterpiece* and *Lukumi*, the court examined the historical and social context of Blaine Amendments, finding that the rationale for these provisions was deeply anti-Catholic. *Id.* at *9. The court also found that "New Mexico was caught up in the nationwide movement to eliminate Catholic influence from the school system," because the Catholic schools that many Spanish speakers attended were being blamed for the state's subpar educational outcomes. *Id.* at *12. Based on this evidence, the court reversed its earlier ruling and held that textbook loans to private schools did not violate the New Mexico Constitution. As in *Hunter*, the animus underlying New Mexico's Blaine Amendment would have gone undetected had the record rule prohibited the court from looking to evidence of intent other than the government's own records.

The New Mexico Supreme Court's about-face based on historical evidence of religious animus makes *Moses II* a particularly dramatic example of how overextension of the record rule would cripple Free Exercise claims. But numerous other cases are to similar effect.

In *Congregation Rabbinical College of Tartikov, Inc.* v. *Village of Pomona*, 280 F. Supp. 3d 426 (S.D.N.Y. 2017), for instance, the court found that village zoning and environmental ordinances had been

passed for the discriminatory purpose of preventing an Orthodox Jewish community from building a rabbinical college, and thus violated the Equal Protection and Free Exercise Clauses. *Id.* at 448-68, 482-85. The court reached this conclusion based not just on the ordinances' text and government records but on "evidence and testimony presented during" a 10-day "trial," including trial testimony by village officials. *Id.* at 435, 449; see also *id.* at 452 (listing statements made by officials outside of official proceedings that were "indicative of Defendants' prejudice against Tartikov and Orthodox/Hasidic Jews").

Likewise, in *Rader* v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996), the court held that university officials violated the Free Exercise Clause when they refused to allow a student to live in off-campus housing maintained by a Christian group. The defendants argued that the refusal was based on a religion-neutral requirement that freshmen live on-campus. *Id.* at 1552-53. But the court disagreed, relying on trial testimony from the university decisionmakers, which "manifested a degree of antipathy toward" members of the Christian group and demonstrated that some of the decisionmakers had refused the exemption "base[d] * * * upon their own religious experiences and their own perceptions" of the student's religious beliefs. *Id.* at 1553-55; see also *id.* at 1554 & n.26 (decisionmakers testified at trial that student's views were "simply not true" and insinuated that the Christian group opposed "[d]iversity of thought").

These cases demonstrate that application of the record rule is inconsistent with "substantive law" that—like the Equal Protection and Free Exercise Clauses—"provides that [the government deci-

sionmaker's] motive or purpose are relevant." Pet. App. 328a & n.80. The reviewing court needs the ability to look beyond the record that decisionmakers "may have carefully curated to exclude evidence of their true 'intent' and 'purpose,'" *ibid.* (citation omitted)—and look to things like historical evidence (*Hunter*; *Moses II*) and direct testimony from decisionmakers (*Congregation Rabbinical College*; *Rader*). Otherwise, in challenges to federal agency action, the discriminatory animus that the Equal Protection and Free Exercise doctrines are designed to "smoke out" will all too often go undetected. Pet. App. 327a.

3. The availability of discovery for intentional-discrimination claims against federal agencies is especially critical under the Free Exercise Clause, since the administrative state's insulation from democracy heightens the risk of discrimination against religious Americans.

While Americans can actively participate in the political process by electing legislators, lobbying, and donating to campaigns, "most Americans have no hope of even identifying most administrative lawmakers, let alone meeting or speaking with them." Phillip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1939 (2015). And while administrative agencies are thus less democratically accountable to Americans in general, they operate with a "distinctively hard edge" for religious Americans, because administrative lawmaking is designed to be "scientific" and "rational" rather than responsive to constituents' needs. *Id.* at 1921. This emphasis often leads administrators to be "relatively indifferent, if not unsympathetic to religious

concerns"—a tendency that is especially harmful if Free Exercise plaintiffs must rely solely on the agency's record in court. *Ibid.*

Because "congressional lawmaking is open to the concerns of religious Americans in ways that administrative rulemaking is not," the scope of judicial review should be, if anything, broader in the administrative context—not severely limited. Hamburger at 1940. Yet application of the APA record rule to religious-discrimination claims would have just the opposite effect on religious plaintiffs. If a *state* law restricts a religious adherent's free exercise, he can sue under the state constitution or religious freedom statute, contact his state legislators, vote them out of office, or lobby for an exemption. He can take all these steps and more if a federal *statute* impinges his free exercise, including suing under the federal Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act. But if a federal *agency*, whether through a rulemaking or an official's action, is the alleged discriminator, the religious adherent may be forced to stay home rather than vindicate his rights, since he will be restricted by the record rule from admitting the ordinary kinds of evidence that would reveal the discrimination he experienced. And while the notice-and-comment period before promulgation of an agency rule does permit citizens to write to administrative officials, this often "functions as charade" when compared to the meaningful influence citizens can have in the legislative process through elections, campaigns, and lobbying. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 231.

Thus, the administrative lawmaking process remains largely a "closed world"—resulting in "severe and constitutionally significant consequences for religious Americans." Hamburger at 1942. The issue here of a closed agency record gains importance in light of Americans' lack of access to administrative lawmakers. Because of this limitation, courts should "more directly and systematically recognize how, on account of the exclusion [from political participation], even apparently equal administrative law is apt to be unequal." *Id.* at 1978. An intentional-discrimination exception to the record rule would help ensure administrative accountability through balanced and thorough judicial review.

## II. An intentional-discrimination exception to the default record rule will not lead to runaway discovery.

Given the political stakes of this case, and Respondents' unusual request to depose the head of the Department of Commerce, legitimate concerns arise that an intentional-discrimination exception to the record rule would open the floodgates to routine depositions of high-ranking executive officials. But as this Court recognized in *Webster*, key limiting principles ensure that the availability of discovery in cases involving claims of discriminatory animus will not lead to excessive "rummaging around" in the government's affairs. *Webster*, 486 U.S. at 604.

1. First, as a natural limit on any exception to the record rule, plaintiffs must provide a well-pleaded complaint in order to survive a Rule 12(b)(6) motion to dismiss, and thus to be entitled to any discovery at all. In *Bell Atlantic Corporation* v. *Twombly*, this

Court made clear that a plaintiff's obligation "requires more than labels and conclusions," and that "[f]actual allegations must be enough to raise a right to relief above the speculative level * * * on the assumption that all of the complaint's allegations are true." 550 U.S. 544, 555 (2007). The plaintiff's claim must be plausible on its face, which it is only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

This means that under the intentional-discrimination exception to the default record rule, a Free Exercise or Equal Protection plaintiff could not get around the record rule by a rote recitation that the government's action was motivated by religious animus. Instead, the plaintiff would have to plausibly plead, based on "sufficient factual matter," that the defendant agency acted "not for a neutral * * * reason but for the purpose of discriminating on" an unconstitutional basis. *Iqbal*, 556 U.S. at 676-77. Lower-court caselaw shows that this standard has real teeth in Free Exercise cases. *E.g.*, *Carr* v. *Zwally*, No. 18-1197, ___ F. App'x ____, 2019 WL 136978, at *2-3 (10th Cir. Jan. 8, 2019) (affirming grant of motion to dismiss against Free Exercise plaintiff because he "fail[ed] to plausibly allege that [the defendant] acted with" a religiously-discriminatory purpose, rather than just "out of a personal animus"). And indeed, in this case, the district court dismissed one of Respondents' constitutional claims under Rule 12(b)(6),

while denying the Department's motion to dismiss on, *inter alia*, Respondents' Equal Protection claim—thus limiting the scope of discovery to only those claims that met the *Twombly* standard of plausibility. Pet. App. 423a-424a.

2. Likewise, beyond the gatekeeping function of Rule 12(b)(6), the discovery rules themselves already contain mechanisms designed to prevent excessively burdensome discovery. Any discovery must of course satisfy Rule 26, which requires that the discovery both be relevant and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). But more importantly, in cases in which discovery is sought against government officials, this Court has emphasized that district courts have "the latitude to control any discovery process so as to balance [the plaintiff's] need for access to proof which would support a colorable constitutional claim against" the need to avoid undue intrusion on the government's decisionmaking process. *Webster*, 486 U.S. at 604.

Given this balancing already required by the discovery rules, the Department appropriately insists that depositions of "high-ranking government officials" should occur "only in 'extraordinary instances.'" Pet'rs' Br. 38, No. 18-557 (quoting *Arlington Heights*, 429 U.S. at 268). But where the plaintiff has alleged a plausible claim of intentional, unconstitutional discrimination, the rarity of this practice should be a function of the discovery rules—not, as the Department urges, the record rule. After all, the record rule prohibits not just depositions of high-ranking officials but *all* discovery beyond the administrative record—interrogatories, requests for admission, and document requests alike. There is no justification for pro-

hibiting Free Exercise and Equal Protection plaintiffs with plausible animus claims from engaging in *any* discovery just to stop them from engaging in one particularly burdensome kind.

* * *

The Free Exercise Clause protects against "mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi*, 508 U.S. at 547. Yet under the Department's view of the record rule, plaintiffs alleging religious-discrimination claims against federal agencies will be able to prove up their case only if the agency's discriminatory purpose is "overt" enough to appear on the face of the very record the agency has prepared for public view. The Court should reject that position and hold that plaintiffs alleging plausible claims against federal agencies of intentional, unconstitutional discrimination are ordinarily entitled to discovery, subject to the limitations inherent in the discovery rules.

## CONCLUSION

In answering the second question presented, the Court should hold that when a plaintiff plausibly alleges that agency action was motivated by intentional, unconstitutional discrimination, the APA does not bar extra-record discovery.

Respectfully submitted.

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