

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

NEW YORK IMMIGRATION COALITION, ET AL.

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

MOTION FOR EXPEDITED CONSIDERATION OF
THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
AND FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT
IN THE EVENT THAT THE COURT GRANTS THE PETITION

The Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the United States Census Bureau, and the Director of the United States Census Bureau, hereby moves, pursuant to Supreme Court Rule 21, for

expedited consideration of the petition for a writ of certiorari before judgment, filed today, to the United States Court of Appeals for the Second Circuit to review the judgment of the United States District Court for the Southern District of New York entered on January 15, 2019 (Pet. App. 1a-353a).

The government respectfully requests that respondents be directed to file responses to the petition on or before February 6, 2019. The government would waive the 14-day waiting period for reply briefs under Rule 15.5, so that the petition could be distributed on February 6, 2019. The Court would then be able to consider the petition at conference on either February 15, 2019 or February 22, 2019.

If the Court grants the government's petition on or before February 22, 2019, the government also hereby requests that petitioners' brief be due on March 15, 2019; that respondents' briefs be due on April 5, 2019; that petitioners' reply brief be due on April 17, 2019; and that oral argument be heard on April 24, 2019. Alternatively, the Court could order that petitioners' brief be due on March 27, 2019; that respondents' briefs be due on April 26, 2019; that petitioners' reply brief be due on May 13, 2019; and that oral argument be heard at a special sitting thereafter in May 2019. Under either proposed schedule, amicus briefs supporting the parties would be due on the dates the parties' briefs are due.

STATEMENT

As explained in the government's petition for a writ of certiorari before judgment, respondents brought this suit under the Administrative Procedure Act, 5 U.S.C. 701 et seq., to challenge the decision by the Secretary of Commerce to reinstate to the 2020 decennial census a question about citizenship. See Pet. 2-5. Although a question asking about citizenship or country of birth (or both) has been asked of at least a portion of the population on every decennial census from 1820 to 2000 (except in 1840), respondents alleged that reinstating the question to the 2020 decennial census will cause some households with links to noncitizens to refuse to respond in whole or in part (despite their legal obligation to do so, see 13 U.S.C. 221), leading to a disproportionate undercounting of certain racial minorities. Respondents further alleged that the Secretary's decision to reinstate the citizenship question was driven by secret motives, including race-based animus against those minority groups.

The district court ordered discovery outside the administrative record to probe the Secretary's mental processes when he made his decision, including by ordering the depositions of several high-ranking Executive Branch officials, and eventually by compelling the deposition of Secretary Ross himself. See Pet. App. 437a-538a. The government applied for a stay and petitioned for a writ of mandamus to halt the extra-record discovery. See

18A375 Appl.; 18-557 Pet. This Court stayed the deposition of Secretary Ross, see 18A375 slip op. (Oct. 22, 2018), and eventually granted the government's petition for a writ of certiorari in No. 18-557 to review the court of appeals' denial of mandamus relief. The Court ordered expedited briefing and scheduled argument on February 19, 2019.

Meanwhile, the district court held a bench trial late last year, and on January 15, 2019, the court issued a final judgment in favor of respondents and enjoined the Secretary from adding the citizenship question to the decennial census. Pet. App. 1a-353a. Respondents moved to dismiss the writ of certiorari in No. 18-557 as improvidently granted, and the Court removed the case from the February argument calendar. The government responded to the motion earlier this week that the Court should defer consideration of the motion while it considers the concurrently filed petition for a writ of certiorari before judgment.

ARGUMENT

1. Expedited consideration of the government's petition for a writ of certiorari before judgment is warranted because, as explained in the petition (at 13-14), the questions presented must be resolved before the end of June 2019, so that the decennial census questionnaires can be printed on time for the 2020 census. This case involves an issue of exceptional national importance -- the decennial census -- and the judgment below, if left to stand,

would likely be the first instance in our Nation's history that the judiciary dictated the "form and content" of the decennial census questionnaire, 13 U.S.C. 141(a). In fact, as described in the petition (at 15-16), the district court resolved several important questions in unprecedented ways.

This case thus easily meets the settled criteria both for certiorari and for certiorari before judgment. Sup. Ct. Rules 10 and 11; see Pet. 13-28. Indeed, the Court already has granted certiorari in No. 18-557 to review the district court's discovery orders, which merged into the final judgment and are therefore reviewable in this case too. And because the census forms must be finalized for printing by the end of June 2019, there is unlikely to be sufficient time to obtain full review of the district court's judgment both in the court of appeals and in this Court by that deadline. Accordingly, certiorari before judgment is, as a practical matter, the only way to protect this Court's plenary review of the district court's rulings.

2. Even then, the ordinary briefing schedules prescribed by Rules 15 and 25 of this Court would not allow the case to be considered and decided this Term -- as it must be to resolve the questions presented before the June 2019 deadline. Accordingly, the government respectfully requests that the Court order expedited briefing. Such expedited briefing would allow an orderly resolution of this important case in this Court and would avoid

review through emergency stays from the court of appeals regardless of how that court rules. The government respectfully proposes the following petition-stage briefing schedule:

February 6, 2019	Respondents' brief in opposition
February 6, 2019	Distribution
February 13, 2019 <u>or</u> February 22, 2019	Consideration at conference

If the Court grants the petition on or before February 22, 2019, the government respectfully proposes the following schedule for briefing and argument:

March 15, 2019	Petitioners' opening brief
April 5, 2019	Respondents' brief
April 17, 2019	Petitioners' reply brief
April 24, 2019	Oral argument

Alternatively, the Court could consider hearing the case at a special sitting in May:

March 27, 2019	Petitioners' opening brief
April 26, 2019	Respondents' brief
May 13, 2019	Petitioners' reply brief
May 20, 2019 or thereafter	Oral argument

Under either proposed schedule, amicus briefs supporting the parties would be due on the dates the parties' briefs are due.

CONCLUSION

For the reasons stated, the government respectfully requests that the Court expedite consideration of the petition for a writ of certiorari before judgment based on the schedule proposed above and, if the Court grants the petition, that the Court expedite briefing and oral argument based on one of the alternative schedules proposed above.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JANUARY 2019