No. 18-557

In the Supreme Court of the United States

IN RE UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF RESPONDENTS' JOINT MOTION TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED

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INTRODUCTION

Petitioners' response to the motion to dismiss the Court's writ confirms the motion's principal point: that given the entry of final judgment, mandamus is neither necessary nor appropriate. Petitioners do not assert that mandamus to halt Secretary Ross's deposition is necessary now that the district court has vacated its order compelling the Secretary's testimony in light of final judgment. And any concerns that Respondents might at some future point seek to depose Secretary Ross notwithstanding this vacatur (*see* Resp. 15 n.3) have been allayed by Respondents' formal withdrawal of their notice of the Secretary's deposition. *See New York v. U.S. Dep't of Commerce*, No. 18-cv-02921 (S.D.N.Y. Jan. 24, 2019), ECF No. 577. Nor do Petitioners dispute that all other questions concerning pretrial discovery were overtaken by the final judgment; in fact, they acknowledge that their appeal now "encompass[es] the underlying question presented in this case," Resp. 14, thus obviating any need to keep this interlocutory request for mandamus on the Court's docket. This Court should accordingly dismiss the writ of certiorari as improvidently granted.

ARGUMENT

1. Petitioners invite the Court to defer acting on Respondents' motion until it considers Petitioners' recently filed petition for certiorari before judgment. The Court should not do so. Petitioners acknowledge that their petition subsumes the questions this Court initially agreed to consider via mandamus, which have now "merge[d] into the court's final judgment." Resp. 14. Indeed, the petition expressly asks the Court to review the precise pretrial discovery question that the current certiorari grant covers. *See* Pet. i, 26-28. Thus, any disagreements with the various discovery rulings that the final judgment incorporates, including the threshold issue of mootness, can be considered together with that judgment—whether on direct review in the Second Circuit or on certiorari in this Court. Petitioners effectively concede as much, acknowledging that this Court should "grant respondents' motion and dismiss this case" if it denies their petition for certiorari. Resp. 12. Given that Petitioners can now obtain post-judgment review of the district court's authorization of extra-record discovery, this Court need not consider whether that authorization meets the criteria for mandamus relief—a remedy that is "'drastic and extraordinary,' 'reserved for really extraordinary causes,' and one of 'the most potent weapons in the judicial arsenal.'" *Dolan v. United States*, 560 U.S. 605, 628 (2010) (Roberts, C.J., dissenting) (quoting

Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004)).

2. Petitioners ask the Court to "simply hold" the case in the Court's docket, *see* Resp. 14, until the Court "considers the government's … petition," *id.* But Petitioners do not so much as attempt to illustrate what purpose this "placeholder" serves. Whatever the merits of the petition for certiorari before judgment, there is no basis for the Court to preserve *this* appeal, which concerns issues that are now unquestionably inappropriate for mandamus. Indeed, Petitioners do not dispute that they will now be unable to satisfy the requirements for obtaining mandamus. This Court's practice has been clear that "the importance of an issue should not distort the principles that control the exercise of [the Court's] jurisdiction." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (dismissing writ of certiorari as improvidently granted). Rather, "by adhering scrupulously to the customary limitations on [the Court's] discretion regardless of the significance of the underlying issue, [the Court] promotes respect for [its] adjudicatory process." *Adams v. Robertson*, 520 U.S. 83, 92 (1997) (internal quotations and alterations omitted); *see also Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ).[1]

[1] Respondents have never argued that the issue of the propriety of extra-record discovery, generally, is "moot." *Cf.* Resp. 15 n.3.

3. Finally, the cases Petitioners cite to support their invitation to "hold" the case and consolidate it "[i]n the event the petition is granted," Resp. 14, are inapposite. Neither *United States v. Booker*, 543 U.S. 220 (2005), nor *Gratz v. Bollinger*, 539 U.S. 244 (2003), presented circumstances where the initially sought relief became unsuitable but the Court preserved an initial petition pending review of a subsequent petition asking for *separate* review following a fundamental change in the case's posture. At best, *Booker* and *Gratz* show that this Court, on infrequent occasion, will consider a case in the absence of review from the Courts of Appeals where the "importance of the questions presented" makes it prudent to do so. *Booker*, 543 U.S. at 229.

Whether this Court grants or denies the newly filed petition for certiorari before judgment, the issues presented in this mandamus petition need no longer be decided via mandamus. Petitioners are not entitled to a placeholder on the Court's docket while the Court considers their new petition.

It is not, and may indeed present an alternative ground for affirmance on the merits. But (1) mandamus is now inappropriate; and (2) the Court may never need to address the issue of extra-record discovery because it can affirm the final judgment solely on the basis of the administrative record. Both points support dismissal. As for the dispute over Secretary Ross's deposition, that is plainly moot; the very order of which Petitioners seek review has been vacated. (Petitioners do not argue that the "capable-of-repetition-yet-evading-review" exception is satisfied.)

CONCLUSION

The Court should dismiss the writ of certiorari as improvidently granted.

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