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

RESPONDENTS' JOINT MOTION TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED

John A. Freedman
Counsel of Record for NYIC Plaintiffs-Respondents
David P. Gersch
David J. Weiner
Elisabeth S. Theodore
Samuel F. Callahan
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001-3743
(202) 942-5000
john.freedman@arnoldporter.com

Dale E. Ho
Adriel I. Cepeda Derieux
Cecillia Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Attorneys for the NYIC Plaintiffs

(cont. on next page)

Letitia James
Attorney General State of New York
Barbara D. Underwood*
Solicitor General
Matthew Colangelo
Steven C. Wu
Judith N. Vale
Elena Goldstein
Scott A. Eisman
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
28 Liberty Street
New York, NY 10005
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

Attorneys for the Government Plaintiffs-Respondents

David D. Cole
Sarah Brannon
Davin Rosborough
Ceridwen Cherry
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street, NW
Washington, DC 20005

Christopher Dunn
Perry Grossman
NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004

Attorneys for the NYIC Plaintiffs-Respondents

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Respondents jointly file this Motion to Dismiss the Court's Writ of Certiorari, pursuant to Supreme Court Rule 21.

The question presented in this Petition is whether mandamus is appropriate to reverse the district court's pretrial orders authorizing the deposition of Secretary of Commerce Wilbur Ross and other limited discovery. The orders were entered in this lawsuit challenging the Secretary's decision to modify the Decennial Census to include a question about citizenship status. On January 15, the district court entered final judgment in the case below, enjoining Petitioners' decision to add a citizenship question to the 2020 Census.

The district court's final judgment has fundamentally altered the circumstances that were present when the Court granted certiorari. The question whether the district court was correct to order the Secretary's deposition is now moot, and this Court no longer has jurisdiction to consider it. In its conclusions of law, the district court ruled that it would not reopen the record after final judgment and vacated as moot its order compelling the deposition of Secretary Ross. *New York v. U.S. Dep't of Commerce*, No. 18-cv-02921, slip op. 8 (S.D.N.Y. Jan. 15, 2019). Because Secretary Ross will no longer be "forced to prepare for" or "attend a deposition," Pet. 30; Pet. Br. 44, there is no longer any live controversy over the primary mandamus relief sought by Petitioners—i.e., an order quashing the Secretary's deposition.

Further, there is no need for this Court to consider any remaining questions about other pretrial discovery through mandamus. Petitioners

can obtain adequate review of the district court's decision ordering extra-record evidence on appeal from the final judgment. Indeed, because the district court has issued final judgment, there is now *no form of relief* that Petitioners could obtain via mandamus that would be unavailable on appeal—circumstances that confirm that mandamus is now legally unavailable. And given the entry of final judgment, a piecemeal, interlocutory review of the district court's discovery decisions would delay, rather than expedite, resolution of the merits of this matter in time to "finalize the census questionnaire by mid-2019." Pet. Br. 45. By contrast, a single course of appellate review from the final judgment is likely the most efficient way to ensure full and timely review of the district court's orders before the Census questionnaire must be finalized. Accordingly, the Court should dismiss the Writ of Certiorari as improvidently granted.

BACKGROUND

These consolidated cases involve challenges to Petitioners' decision to add a citizenship question to the 2020 Decennial Census questionnaire. The governmental respondents are 18 U.S. states, the District of Columbia, 10 U.S. cities, five U.S. counties, and the U.S. Conference of Mayors. The organizational respondents are five immigrants' rights groups that together have members in all 50 states. The governmental and organizational respondents (collectively, "Respondents") filed separate suits in the U.S. District Court for the Southern District of New York in April and June 2018. Both suits alleged that the addition of a citizenship question violated the Enumeration

Clause of the Constitution and the Administrative Procedure Act. The organizational respondents further alleged that the addition of a citizenship question violated the Equal Protection Clause of the Fifth Amendment.

On July 3, the district court ordered Petitioners to complete the administrative record and authorized limited additional discovery based on, among other things, the irregularity of the initial administrative record and Plaintiffs' "strong preliminary or prima facie showing" of "bad faith or improper behavior." Pet. App. 100a.

On August 17, the district court authorized the deposition of then-Acting Assistant Attorney General John Gore. Pet. App. 27a. The district court found that AAG Gore possessed highly relevant and important information given his "apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census." Pet. App. 25a. AAG Gore was deposed on October 26.

On September 21, the district court authorized a limited deposition of up to four hours of Secretary Ross. The district court found that exceptional circumstances warranted the deposition in light of the bad faith finding because the Secretary had "unique first-hand knowledge related to the litigated claims" and because that information was not available from another source. Pet. App. 11a (citation omitted). As the district court explained, the Secretary had been very involved in the "unusual process leading to" the addition of a citizenship question, Pet. App. 13a, including having telephone conversations with the Attorney General, among

others. The court further observed that Respondents had been unable to obtain much of the first-hand knowledge possessed by the Secretary because, for example, his subordinates at the Commerce Department claimed that they did not know or recall such information. Pet. App. 17a-18a. The court concluded that the organizational plaintiffs' equal protection claim independently justified the deposition.

Petitioners sought mandamus to quash the depositions of AAG Gore and Secretary Ross, which unanimous panels of the Second Circuit denied. Petitioners then sought stays and mandamus from this Court. On October 22, this Court stayed the district court's order authorizing the deposition of Secretary Ross, pending the filing of a petition for mandamus. The Court declined to stay the district court's orders authorizing the deposition of AAG Gore or other then-remaining discovery.

On October 29, Petitioners filed their Petition for Mandamus in this Court, seeking principally to halt the deposition of Secretary Ross. Petitioners contended that mandamus was necessary because, "[a]bsent review on mandamus, … Secretary Ross will be forced to prepare for and attend a deposition, which cannot be undone." Pet. 30.

On November 2, the Court again declined to stay any proceedings in the trial court except for the already stayed deposition of the Secretary. The district court held a seven-day bench trial from November 5 to November 15. At the end of trial, the district court indicated (without objection) that it would reopen the record for the limited purpose of Secretary Ross's deposition in the event this Court

lifted its stay before final judgment. Order, No. 18-cv-2921 (S.D.N.Y. Nov. 16, 2018), Dkt. No. 538 at 2. On November 16, this Court treated the mandamus petition as a petition for a writ of certiorari before judgment and granted it.

On January 15, 2019, the district court issued a post-trial decision in Respondents' favor, concluding that Petitioners' conduct presented a "smorgasbord of classic, clear-cut APA violations." *New York*, slip op. 8. The court made comprehensive findings of fact and conclusions of law "based exclusively on the materials in the official 'Administrative Record.'" *Id.* All other evidence "merely confirm[ed] the Court's conclusions." *Id.* In a separate holding reached because of the action's "unusual circumstances … and the need to make a comprehensive record for appeal," *id.* at 253, the district court ruled that "Plaintiffs did not carry their burden of proving that Secretary Ross … violated the equal protection component of the Due Process Clause," *id.* at 9. Ultimately, the court reasoned, it was "impossible to know if [Plaintiffs] could have carried th[at] burden … had they been allowed to depose Secretary Ross" and obtain "the best evidence of the question at the heart of the due process inquiry." *Id.* Finally, the district court held that its ruling foreclosed the possibility of reopening the record before final judgment. *Id.* at 277. Accordingly, the court vacated as moot its order compelling Secretary Ross's deposition. *Id.*

Soon after its decision, the district court entered final judgment for Respondents on their APA claims, vacating the Secretary's decision to add a citizenship question, remanding the matter to the government for further consideration, and enjoining Petitioners

from implementing a citizenship question without first curing the APA violations noted in the court's post-trial decision. *See* Final Judgment, Order of Vacatur, and Permanent Injunction, No. 18-cv-2921 (S.D.N.Y. Jan. 15, 2019), Dkt. No. 575.

REASONS FOR DISMISSING THE WRIT OF CERTIORARI

The grant or denial of a writ of certiorari lies squarely in this Court's discretion. *Hammerstein v. Superior Court of Cal.*, 341 U.S. 491, 492 (1951). Thus, when "due regard for the controlling importance of observing the conditions for the proper exercise" of the Court's jurisdiction warrants it, "the writ of certiorari should be dismissed as improvidently granted." *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 285 (1959) (Frankfurter, J., dissenting). For example, this Court has often dismissed a writ when "a shift in the posture of the case" following certiorari "precludes such review" as the Court "anticipated." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001); *see also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 388 (1978) ("Because of the change in the posture of the case between the time of the decision [below] and its presentation to us for decision, we dismiss the writ of certiorari as having been improvidently granted.").

Here, the district court's entry of final judgment shifts the posture of the case and precludes review in the way the Court anticipated. Those changed circumstances not only make the "drastic and extraordinary" remedy of mandamus unsuitable and unnecessary, *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947); they also render the case an "inappropriate vehicle for resolving the question presented," *Tory v.*

Cochran, 544 U.S. 734, 739 (2005) (Thomas, J., dissenting).

First, Petitioners' chief concern—that "Secretary Ross will be forced to prepare for and attend a deposition, which cannot be undone," Pet. Br. 44—has been rendered moot, because the district court vacated the decision that is the subject of the mandamus petition. *New York*, slip op. 277. This Court's interlocutory review of the district court's order authorizing the Secretary's deposition is thus not only unnecessary but also outside the scope of the Court's jurisdiction.

Second, the final judgment does not turn on "evidence of the Secretary's mental processes." Pet. Br. 44. Rather, the district court reached its decisions as to the APA "based exclusively on the materials in the official 'Administrative Record,'" *New York*, slip op. 8, concluding that extra-record evidence merely buttressed its extensive findings and conclusions of law, e.g., *id.* at 97, 99, 231 n.68, 241 n.74. Any remaining disputes between the parties over the propriety of discovery outside of the administrative record can and should be addressed through review of the final judgment.

Review of the final judgment will allow appellate courts to consider not only any remaining disputes about extra-record evidence obtained via the strong showing of bad faith, but also any disputes over bases for extra-record discovery that Petitioners have not challenged here. Indeed, a single appeal from the final judgment is the best and most effective vehicle for full and efficient appellate review of this case by the end of June 2019—the deadline for a final decision that Petitioners have set based on their

asserted need to finalize the Census questionnaire by that date. Ultimately, the district court's entry of final judgment confirms that Petitioners will be unable to satisfy the mandamus standard, because they have adequate alternative means to achieve the exact same relief they seek through mandamus. Accordingly, the Writ of Certiorari should be dismissed as improvidently granted.

I. PETITIONERS' REQUEST TO HALT THE DEPOSITION OF SECRETARY ROSS IS MOOT IN LIGHT OF FINAL JUDGMENT.

The Petition principally asks the Court to order the district court to "halt the deposition of Commerce Secretary [Wilbur] Ross." Pet. 14. Petitioners emphasize that request in their Brief, basing their claim that mandamus relief is necessary almost exclusively on the burdens they say they will face if Secretary Ross is deposed. *See* Pet. Br. 44 ("Absent review on mandamus, the district court's order compelling the deposition …. will effectively be unreviewable on appeal from final judgment.").

The district court has issued final judgment and rendered this concern moot. It has "foreclosed" the possibility of reopening the record. *New York*, slip op. 277. Petitioners' requested relief is therefore no longer necessary and does not provide any basis for the extraordinary writ of mandamus.

Indeed, mootness has rendered mandamus to quash the Secretary's deposition beyond the Court's jurisdiction. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). And the federal courts lack jurisdiction to decide a moot

case because their constitutional authority extends only to actual cases or controversies. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam). Because Petitioners' request to halt Secretary Ross's deposition has lost "'its character as a present, live controversy,'" the Court lacks jurisdiction and should dismiss the petition. *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)); *see also Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting) (noting dismissal followed Court's "bec[oming] aware" that it was "possible that the case is moot").

Nor can Petitioners' request fall within the exception to the mootness doctrine for issues that are capable of repetition yet evading review. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). No reason exists "to expect the same parties to generate a similar, future controversy subject to identical time constraints." *Norman v. Reed*, 502 U.S. 279, 288 (1992). More broadly, there is no dispute that a court-ordered deposition of a high-ranking Executive official is exceedingly rare and "justified only in 'extraordinary instances.'" Pet. 25 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)). Whether or not an official's testimony is warranted is thus a highly fact-specific matter that cannot be resolved for future cases by a decision in this case.

Respondents also did not unilaterally render the issue of the Secretary's deposition moot by voluntarily "withdraw[ing] their request to depose Secretary Ross" and "persuad[ing] the trial court to proceed quickly to trial on the basis of the remaining

extra-record evidence they [could] assemble." *In re Dep't of Commerce*, 139 S. Ct. 16, 18 (2018) (Gorsuch, J., concurring in part and dissenting in part). Rather, Respondents maintained that the Secretary's deposition would have provided important information, but proceeded to trial because the Secretary's decision could be set aside based solely on the administrative record, and because waiting might have deprived Respondents of any meaningful relief given Petitioners' claimed need to finalize the Census questionnaire by June.

II. ANY REMAINING DISPUTES PRESENTED BY THIS PETITION CAN AND SHOULD BE ADDRESSED ON REVIEW OF THE FINAL JUDGMENT.

The question presented in the Petition also encompasses the propriety of extra-record discovery, other than the deposition of Secretary Ross, "to probe the mental processes of the agency decisionmaker." Pet. I. Aside from Secretary Ross's deposition, the only other ground on which Petitioners base their request for mandamus relief is that "it remains a near certainty that the district court will rely on evidence of [the] Secretary's mental processes in its analysis." Pet. Br. 44.

That prediction did not materialize. The district court ruled that Petitioners' decision can and should be set aside solely on the basis of the administrative record. The available extra-record evidence—much of which is relevant not to prove "mental processes" but for other reasons—simply confirmed the court's ruling. The propriety of considering evidence beyond the administrative record therefore is not squarely presented by this case, as the judgment rests on that

record alone and can and should be reviewed on that basis.

Moreover, if any controversies remain about the propriety of the district court's reference to non-administrative-record evidence adduced through discovery, the Court should still dismiss the writ because those issues are best resolved on appeal from final judgment. In light of the final judgment, mandamus relief is simply unnecessary and inappropriate with respect to extra-record discovery.

The "general rule [is] that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). Unsurprisingly, the Court has declined to exercise its discretionary jurisdiction when doing so would be inconsistent with its "healthy respect for the virtues of the final-judgment rule." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); *see Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (underscoring Court "generally await[s] final judgment in the lower courts before exercising [its] jurisdiction"); *see also* 22 James W. Moore et al., *Moore's Federal Practice* § 405.03[2][a][ii][A] (3d ed. 1997) ("The Court does not ordinarily grant certiorari … especially if further proceedings might affect the issue on to which certiorari is sought.").

Now that the district court has rendered final judgment, Petitioners may obtain appellate review of any remaining disputes about extra-record discovery or evidence by appealing from the final judgment.

That review may encompass not only any remaining disputes about the preliminary finding of bad faith that Petitioners now challenge on an interlocutory basis, but also any disputes about the district court's consideration of extra-record materials for reasons unrelated to bad faith, such as to provide background information or to understand important factors not considered by the Secretary. The availability of such comprehensive appellate review means that mandamus is not "appropriate under the circumstances" presented here, *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004), because Petitioners have "other adequate means to attain" the relief they seek, *id.* at 380 (citation omitted).

Petitioners' Brief implicitly acknowledges that mandamus would no longer be necessary or appropriate once the district court ruled. Specifically, Petitioners argued that they lacked other adequate means to attain relief from the district court's pretrial discovery order because, "*until* the district court enters a judgment and that judgment becomes final … it remains a near certainty that the district court will rely on evidence of Secretary [Ross's] mental processes." Pet. Br. 44 (emphasis added). In other words, Petitioners claimed irreparable harm is the *possibility* of the district court's *reliance* on purportedly improper materials. Even assuming such reliance ever could have been the sort of harm that might justify mandamus relief, now that the district court has rendered its decision, mandamus relief will be only retrospective. In other words, mandamus relief could only duplicate relief available on appeal.

Mandamus is likewise now unnecessary to "avoid the district court's having to make two parallel sets

of rulings," Pet. Br. 46, one of which relies solely on the administrative record and one of which further relies on extra-record evidence. The district court has made its ruling. Ultimately, any relief that Petitioners could obtain from mandamus—an order that the district court should not have authorized any extra-record discovery or considered any evidence obtained through discovery—can be obtained from an appeal from the final judgment. Given the availability of other means to obtain relief, mandamus is inappropriate. *Cheney*, 542 U.S. at 380.

Interlocutory review of the district court's decisions here will only delay, not expedite, resolution of the merits of this matter in time to "finalize the census questionnaire by mid-2019." Pet. Br. 45. If Petitioners believe that appellate review of the merits is appropriate before finalizing the content of the Census questionnaire on that timeline, Pet. Br. 44, they may seek expedited review of the final judgment.

CONCLUSION

The district court has issued final judgment. Mandamus cannot provide the Petitioners with any relief other than the relief available on a direct appeal from that judgment. Petitioners are—as they have acknowledged—free to "raise … arguments asserted in th[e] petition" on appeal "following … judgment in favor of respondents." Pet. 31. The Court should dismiss the writ of certiorari as improvidently granted because changed circumstances in this case mean the Court lacks jurisdiction to consider the order authorizing the

deposition of Secretary Ross, and render mandamus neither necessary nor appropriate relief.

Respectfully submitted,

DALE E. HO
ADRIEL I. CEPEDA DERIEUX
CECILLIA WANG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2693

DAVID D. COLE
SARAH BRANNON
DAVIN ROSBOROUGH
CERIDWEN CHERRY
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2337

JOHN A. FREEDMAN
Counsel of Record
DAVID P. GERSCH
DAVID J. WEINER
ELISABETH S. THEODORE
SAMUEL F. CALLAHAN*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
John.Freedman@arnoldporter.com

CHRISTOPHER DUNN
PERRY GROSSMAN
NEW YORK CIVIL LIBERTIES FOUNDATION
125 Broad St.
New York, NY 1004
(212) 607-3300

**Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

Counsel for Respondents New York Immigration Coalition et al.

MATTHEW COLANGELO
Executive Deputy Attorney General
ELENA GOLDSTEIN
Senior Trial Counsel
Division of Social Justice

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
SCOTT A. EISMAN
Assistant Solicitor General
28 Liberty Street New York, NY 10005-1400
(212) 416-8020
Barbara.Underwood@ag.ny.gov

**Counsel of Record*

Counsel for the Government Plaintiffs-Respondents

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