

**In The  
Supreme Court of the United States**

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DEPARTMENT OF COMMERCE, et al.,

*Petitioners,*

v.

NEW YORK, et al.,

*Respondents.*

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RESPONSE TO PETITIONERS' MOTION TO EXPEDITE

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## INTRODUCTION

In this case challenging the Secretary of Commerce's decision to add a citizenship question to the decennial census, the Department of Commerce, the Secretary, the Bureau of the Census, and the Bureau Director have petitioned for certiorari before judgment. Petitioners have also moved to expedite this Court's consideration of their petition for certiorari before judgment and, if that petition is granted, to expedite this Court's merits review.

Respondents agree that this Court should expedite its consideration of the petition for certiorari before judgment. However, respondents respectfully request that their responsive briefs be due by February 11, 2019, rather than by petitioners' proposed deadline of February 6, 2019. Given the length of the district court's decision and the number of issues raised in the petition, a February 11 deadline will provide respondents with sufficient time to consider petitioners' arguments and draft their responsive briefs. A February 11 deadline will still enable this Court to consider the petition at its February 15 conference.

Respondents intend to address petitioners' proposed schedule for expedited merits briefing in their briefs responding to the petition for certiorari before judgment. Respondents therefore respectfully request that the Court defer consideration of petitioners' request to expedite merits briefing until certiorari-stage briefing is completed.

## STATEMENT

1. Respondents—a group of States and other governmental entities and a group of immigrants’-rights organizations—brought lawsuits under the Administrative Procedure Act (APA) challenging the decision by Secretary of Commerce Wilbur Ross to alter the decennial census questionnaire by adding a question about citizenship status.

In January 2019, after consolidating the cases for an eight-day trial, the United States District Court for the Southern District of New York (Furman, J.) entered judgment vacating the Secretary’s decision to add a citizenship question to the 2020 decennial census, enjoining petitioners from adding a citizenship question to the 2020 census unless they cure the legal defects identified in the court’s opinion, and remanding the matter to the Secretary for further proceedings. (Pet. App. 352a.) The court issued extensive findings of fact and conclusions of law:

*First*, based on its review of the trial evidence and detailed factual findings, the district court determined that respondents had standing to bring their claims. (Pet. App. 137a-245a.)

*Second*, based solely on the administrative record, the district court ruled that the Secretary’s decision “violated the APA in multiple independent ways.” (Pet. App. 9a-10a; *see* Pet. App. 250a, 260a-261a.) Specifically, the court determined that the decision was contrary to law because it violated two statutes: one requiring the Secretary to acquire citizenship data using administrative records under the circumstances presented here, 13 U.S.C. § 6; and another requiring the Secretary to

make and report certain findings before altering the topics on the census questionnaire, 13 U.S.C. § 141(f). (Pet. App. 261a-284a.) The court also found the decision arbitrary and capricious because the Secretary had provided explanations that ran counter to the evidence before him, failed to consider important aspects of the problem, and failed to justify extensive departures from required standards and procedures. (Pet. App. 284a-311a.) The court further concluded that the Secretary's decision violated the APA because it was pretextual—i.e., based on factors other than the rationale he had given. (Pet. App. 311a-321a.)

*Third*, the court concluded that the private plaintiffs had not proved their Fifth Amendment equal protection claim. (Pet. App. 321a-335a.)

*Finally*, given issuance of the final judgment, the court vacated as moot its prior September 21 order authorizing a deposition of the Secretary. (Pet. App. 352a.)

2. Petitioners have filed a notice of appeal from the district court's final judgment in the Second Circuit. Petitioners have also filed an unopposed motion to expedite the Second Circuit appeal. Petitioners' proposed schedule asks the Second Circuit to decide their appeal by May 2019. *See* Unopposed Mot. to Expedite Briefing Schedule, *New York v. Department of Commerce*, No. 19-212 (2d Cir. Jan. 25, 2019), ECF No. 24. That motion is currently pending.

3. Petitioners subsequently petitioned this Court for certiorari before judgment. The petition argues that certiorari before judgment is appropriate "because the government must finalize the decennial census questionnaire for printing by the end of June 2019." Pet. 13-16.

The petition identifies two questions for this Court’s review. Pet. I. The first question is whether the district court erred in enjoining the Secretary from adding a citizenship question to the 2020 decennial census. *Id.* The body of the petition makes clear that this question is intended to subsume at least seven distinct legal issues— “[a]ny one of” which, petitioners contend, “likely would merit this Court’s review.” Pet. 15-16; *see also id.* 19-20 (identifying a separate issue).

The second question identified in the petition is whether the district court improperly authorized limited pretrial discovery beyond the administrative record purportedly “to probe the mental processes of the agency decisionmaker,” including by issuing the now-vacated order authorizing the Secretary’s deposition. Pet. I, 26-27. This Court previously granted certiorari to decide whether the Second Circuit erred in declining to issue mandamus relief to overturn those pretrial discovery orders, but subsequently removed the case from the argument calendar and suspended the briefing schedule after the district court entered final judgment and respondents moved to dismiss the writ of certiorari as improvidently granted.

4. Together with their petition for certiorari before judgment, petitioners also filed a motion to expedite this Court’s consideration of the petition and, if the Court grants the petition, to expedite the Court’s merits review. The motion argues (at 4) that the questions presented in the petition “must be resolved before the end of June 2019, so that the decennial census questionnaires can be printed in time for the 2020 census.” Based on the purported June 2019 printing deadline, the motion proposes that respondents’ briefs in opposition to the petition for certiorari before judgment be

due by February 6, 2019, for distribution at the Court's February 15 or February 22 conferences.

Separately, the motion argues that, if the Court were to grant certiorari before judgment, the Court should expedite the merits briefing schedule to enable oral argument to be held on April 24, 2019. Mot. 6. Alternatively, the motion proposes a more extended briefing schedule under which this Court would hear oral argument at a special sitting in May. *Id.*

### **ARGUMENT**

1. Although petitioners assert that June 2019 is the deadline by which the Census Bureau must finalize the content of the census questionnaire (Pet. 14), the trial testimony demonstrates that the Bureau can extend that deadline to October 31, 2019, if the Bureau receives additional resources. (Tr. at 1023.) Nonetheless, respondents do not object to expedited briefing on the question of whether the Court will grant the petition for certiorari before judgment.

However, respondents respectfully request that their briefs in response to the petition be due by February 11, 2019, one week beyond the deadline that petitioners have proposed. A February 11 deadline will provide respondents with sufficient time to evaluate and respond to petitioners' argument that this Court should grant review on at least seven different legal issues. Moreover, this deadline will still provide the Court with time to review the petition and briefs in opposition before its February 15 conference. Petitioners have consented to this proposed schedule, so long as

respondents email them with electronic copies of their briefs in response by 10 a.m. on February 11.

2. Respondents are evaluating petitioners' proposal for expedited merits briefing in the event that this Court were to grant certiorari before judgment. Respondents intend to address petitioners' proposed schedule in their briefs in response to the petition, and will propose any alternative schedule in those briefs. Respondents respectfully request that the Court defer consideration of the schedule for any merits briefing until after certiorari-stage briefing is completed.

## CONCLUSION

For these reasons, the Court should order that respondents' briefs in response to the petition for certiorari before judgment be due by February 11, 2019, and should defer consideration of petitioners' proposed schedule for merits briefing until after respondents file their responsive briefs.

Respectfully submitted,

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