

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

STATE OF NEW YORK, ET AL.,

Respondents.

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

**MOTION OF UNITED STATES HOUSE OF REPRESENTATIVES TO
PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE*
AND FOR DIVIDED ORAL ARGUMENT**

Pursuant to Rules 21 and 28 of this Court, amicus curiae the United States House of Representatives respectfully moves for leave to participate in oral argument in support of respondents, and for divided argument time. The House of Representatives seeks to present 10 minutes of argument, with 20 minutes allocated to respondents. In the alternative, amicus respectfully requests that the Court extend the total time for oral argument in this important case from 60 to 80 minutes and grant the United States House of

Representatives leave to use 10 minutes of that expanded time to argue as amicus curiae in support of respondents.¹

1. This case plainly presents the “extraordinary circumstances” that warrant allowing the House of Representatives, part of a coordinate branch of government, to participate as amicus curiae in divided argument. Sup. Ct. Rule 28.7. The central issue in this case—the proper conduct of the 2020 Decennial Census—is a matter of immense national importance. The Constitution vests Congress with the duty of conducting an “actual Enumeration” of “the whole number of persons in each State” every ten years. U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. This enumeration sets, for the next decade, the apportionment among the States of representatives in the House of Representatives; the division of the population of each State into legislative districts at the federal and state levels; and the distribution of significant amounts of federal funds.

2. The United States House of Representatives has a paramount institutional interest and perspective in this case that merits granting it divided argument time. The decennial census is a vital cornerstone of our democratic institutions, and none more so than the House of Representatives. The House as a chamber depends upon an accurate census for its institutional integrity, and its membership will be affected by the outcome of this case. In recognition of this interest, members of the House of Representatives have

¹ Amicus alerted respondents to this motion, but respondents have not yet stated a position. Petitioners do not consent to the motion.

participated in this case as amici curiae at every stage: members of the House filed a brief in the district court; the House itself filed a brief in response to the petition for certiorari before judgment in this Court; and the House will file an amicus brief on the merits in support of respondents. The House therefore respectfully requests the opportunity to aid the Court through oral argument and to continue defending its interests.

3. Moreover, the House of Representatives is particularly well positioned to speak to the issues in this case. Through the Census Act, 13 U.S.C. §§ 1 *et seq.*, Congress has delegated to the United States Department of Commerce the responsibility to administer the decennial census. But because of the practical importance of the decennial census—and because of Congress’s continuing constitutionally mandated duty to oversee the decennial census—Congress included within the Census Act procedural and substantive safeguards to help conduct an “actual Enumeration” of the whole population to the greatest extent possible. In this case, the district court found that the Department of Commerce violated these statutory safeguards in adding a citizenship question to the 2020 Decennial Census. *See* Pet. App. 268a, 276a, 284a (finding violations of 13 U.S.C. §§ 6(c) and 141(f)).

4. Oral argument time is warranted in part so that the House of Representatives may address the extent to which the Department of Commerce’s actions are constrained by the statutory limitations Congress put in place in the Census Act. Besides generally supporting the correctness of the

district court's ruling, the House of Representatives would present arguments refuting petitioners' assertion that the Secretary of Commerce's decision concerning what questions to include in the decennial census questionnaire is not subject to judicial review under the Administrative Procedure Act because Congress failed to provide a meaningful standard to cabin the Secretary's discretion. *See* Pet. 19. The House of Representatives would argue, as it did in its amicus curiae brief in response to the petition for certiorari, that the specific requirements of the Census Act meaningfully constrain the Department of Commerce's discretion to add a citizenship question to the decennial census.

5. Moreover, the House would contend that the Census Act's instructions to the Commerce Department are a critical part of Congress's efforts to ensure that it meets *its own* obligation to ensure that the census is conducted in a manner consistent with obtaining an "actual Enumeration." The Congress that enacted these requirements intended these restraints to be effective, and the House of Representatives continues to rely on these mechanisms in its oversight of the census. The House's distinct perspective and insight on these issues "would provide assistance to the Court not otherwise available" and would aid the Court's resolution of this case. Sup. Ct. Rule 28.7.

6. The Court has in several recent cases permitted oral argument by members or chambers of Congress as amici curiae in cases that implicate

significant Congressional interests. *See, e.g., United States v. Texas*, 136 S. Ct. 1539 (2016) (mem.) (granting motion of U.S. House of Representatives); *NLRB v. Noel Canning*, 134 S. Ct. 811 (2013) (mem.) (granting motion of group of 45 Senators); *McCutcheon v. FEC*, 134 S. Ct. 41 (2013) (mem.) (granting motion of Senator McConnell); *Citizens United v. FEC*, 557 U.S. 952 (2009) (mem.) (granting divided argument to Senator McConnell over opposition of appellant and granting divided argument between respondent and Senator McCain, a sponsor of the challenged law); *Office of Sen. Mark Dayton v. Hanson*, 549 U.S. 1335 (2007) (mem.) (granting motion of U.S. Senate).

7. This practice is not new. For many decades, this Court has regularly heard from Congress or its members during oral argument in cases of significance to the legislative branch. *See, e.g., United States v. Lovett*, 328 U.S. 303, 304 (1946) (noting argument by Congress as amicus curiae in a challenge to a statute regarding federal employees); *Journey v. MacCracken*, 294 U.S. 125, 128 (1935) (noting argument by the House of Representatives as amicus curiae in a case concerning Congress’s contempt power); *The Pocket Veto Case*, 279 U.S. 655, 673 (1929) (noting that a member of the Committee on the Judiciary of the House of Representatives was granted oral argument and aided the Court “by a comprehensive and forcible presentation of arguments”).

8. Hearing from the House of Representatives—as part of a co-equal branch of the Federal Government—during oral argument is equally

warranted in this case given the House’s incomparable interest in the conduct of the decennial census.

CONCLUSION

For these reasons, amicus’s motion for leave to participate in oral argument and for divided argument should be granted. In the alternative, amicus respectfully requests that the Court enlarge oral argument time by 20 minutes and grant the United States House of Representatives leave to use 10 minutes of that expanded time to argue as amicus curiae supporting respondents.

Respectfully submitted,

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