No. 18-557

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED

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The Court should defer consideration of respondents' motion (Mot.) to dismiss the writ of certiorari as improvidently granted. The government intends to file forthwith a petition for a writ of certiorari before judgment, with a proposal for expedited briefing to allow for oral argument and decision this Term. The Court should therefore defer ruling on respondents' motion until it rules on the forthcoming petition. If the petition is granted, respondents' motion should be denied and the cases should be consolidated for argument.

STATEMENT

1. The Constitution requires that an "actual Enumeration" of the population be conducted every ten years to apportion Representatives in Congress among

the States, and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. The Census Act, 13 U.S.C. 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," and "authorize[s] [him] to obtain such other census information as necessary." 13 U.S.C. 141(a).

Exercising that delegated authority, the Secretary of Commerce, Wilbur L. Ross, Jr., determined that the 2020 decennial census questionnaire should include a question requesting citizenship information. Pet. App. 136a-151a. Questions about citizenship or country of birth (or both) have been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and have been (and continue to be) asked on the annual American Community Survey (ACS) questionnaire, sent to approximately one in 38 households, since the ACS's inception in 2005. 315 F. Supp. 3d 766, 776-779. The decennial census includes many demographic questions, including about sex, Hispanic origin, race, and relationship status. See 18-cv-2921 D. Ct. Doc. 574, at 21, 22 (Jan. 15, 2019). Individuals who receive the census questionnaire are required by law to answer fully and truthfully all of the questions. 13 U.S.C. 221.

2. The Secretary explained the reasons for reinstating the citizenship question to the decennial census in a March 26, 2018 memorandum. Pet. App. 136a-151a. The Secretary issued the memorandum in response to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). *Id.* at 152a-157a. The Gary Letter stated that citizenship data is "critical" to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. 10301 (Supp. V 2017), and that "the decennial

census questionnaire is the most appropriate vehicle for collecting that data." Pet. App. 152a-153a; see *id.* at 155a-156a. DOJ thus "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." *Id.* at 157a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau," Pet. App. 136a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau initially presented three alternatives: do nothing; reinstate the citizenship question to the decennial census; or rely on federal administrative records to estimate citizenship data in lieu of reinstating the citizenship question. *Id.* at 139a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider, and he ultimately adopted, a fourth option: reinstating a citizenship question to the decennial census while *also* using federal and state administrative records (*i.e.*, a combination of the second and third options). *Id.* at 143a. The Secretary concluded that this option "will provide DOJ with the most complete and accurate CVAP data in response to its request." *Id.* at 144a.

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for non-citizens. Pet. App. 140a-142a, 144a-147a. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up * * * operations," *id.* at 140a, he concluded from his discussions with Department of Commerce personnel, Census Bureau leadership, and outside parties that, to the best of everyone's know-

ledge, there was an insufficient empirical basis to conclude that reinstating a citizenship question would, in fact, materially affect response rates. *Id.* at 140a-142a (reviewing the available data); *id.* at 145a. The Secretary further concluded that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns." *Id.* at 150a.

3. a. Respondents (plaintiffs below) are governmental entities (including States, cities, and counties) and non-profit organizations. The operative complaints allege that the Secretary's action violates the Enumeration Clause; is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; and denies equal protection by discriminating against racial minorities. See 18-cv-5025 Compl. ¶¶ 193-212; 18-cv-2921 Second Am. Compl. ¶¶ 178-197.[1] All of the claims rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, some households containing at least one noncitizen may be deterred from doing so (and those households will disproportionately contain racial minorities). Respondents maintain that Secretary Ross's stated reasons in his memorandum are pretextual, and that his decision was driven by secret reasons, including animus

[1] Challenges to the Secretary's decision also have been brought in district courts in California and Maryland. See *California* v. *Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); *Kravitz* v. *United States Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *City of San Jose* v. *Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *La Union Del Pueblo Entero* v. *Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018). Bench trials are ongoing in all four cases.

against minorities. To prove their claims, respondents announced their intention to seek extra-record discovery before the administrative record had been filed. At a May 9, 2018 hearing, respondents asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery, was thus justified, "prefatory to" the government's production of the administrative record. 18-cv-2921 D. Ct. Doc. 150, at 9 (May 18, 2018).

b. At a July 3, 2018 hearing, the district court granted respondents' request for extra-record discovery over the government's objections. Pet. App. 93a-100a. The court concluded that respondents had made a sufficiently "strong showing of bad faith," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), to warrant extra-record discovery. See Pet. App. 98a. Following that order, the government supplemented the administrative record with thousands of pages of documents, including materials reviewed and created by direct advisors to the Secretary, and even including materials created by indirect advisors that were shared with the direct advisors.

c. On July 26, 2018, the district court dismissed respondents' Enumeration Clause claims because the "nearly unbroken practice" of Congress's including or authorizing questions about citizenship, along with the "longstanding historical practice of asking demographic questions generally," meant that asking about citizenship "is not an impermissible exercise of the power granted by the Enumeration Clause to Congress." 315 F. Supp. 3d at 803-804; see *id.* at 799-806. The court did not dismiss respondents' APA and equal protection claims, concluding that respondents had alleged sufficient facts to demonstrate standing at the motion-to-

dismiss stage, *id.* at 781-790; that respondents' claims were not barred by the political question doctrine, *id.* at 790-793; that the content of the census questionnaire was not committed to the Secretary's discretion by law, *id.* at 793-799; and that respondents' allegations, accepted as true, stated a plausible claim of intentional discrimination, *id.* at 806-811.

d. On August 17, 2018, the district court entered an order compelling the deposition testimony of then-Acting Assistant Attorney General (AAG) for DOJ's Civil Rights Division, John M. Gore.[2] Pet. App. 24a-27a. The court concluded that Acting AAG Gore's testimony was "plainly 'relevant'" to respondents' case in light of his "apparent role" in drafting the Gary Letter, and concluded that he "possesses relevant information that cannot be obtained from another source." *Id.* at 25a.

e. On September 21, 2018, the district court entered an order compelling the deposition of Secretary Ross himself. Pet. App. 9a-23a. The court recognized that court-ordered depositions of high-ranking governmental officials are highly disfavored, but nonetheless concluded that "'exceptional circumstances'" existed that "compel[led] the conclusion that a deposition of Secretary Ross is appropriate." *Id.* at 10a-11a (citations omitted). The court reasoned that exceptional circumstances were present because, in the court's view, "the intent and credibility of Secretary Ross" were "central" to respondents' claims, and Secretary Ross has "'unique first-hand knowledge'" about his reasons for reinstating a citizenship question that cannot "'be obtained through

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[2] On October 11, 2018, the Senate confirmed Eric S. Dreiband as Assistant Attorney General for the Civil Rights Division. Mr. Gore was, however, the Acting AAG at all times relevant to this dispute.

other, less burdensome or intrusive means.'" *Id.* at 16a, 18a (citation omitted).

4. On October 22, 2018, this Court granted a stay as to the September 21 order compelling Secretary Ross's deposition, to "remain in effect until disposition of" a "petition for a writ of certiorari or a petition for a writ of mandamus," as long as it was filed "by or before October 29, 2018 at 4 p.m." 18A375 slip op. 1. The Court denied a stay as to Acting AAG Gore's deposition and further extra-record discovery into Secretary Ross's mental processes, but did "not preclude the [government] from making arguments with respect to those orders." *Ibid.*

The government filed a petition for a writ of mandamus or, in the alternative, for a writ of certiorari in advance of the Court's deadline. On November 16, the Court treated the petition as a petition for a writ of certiorari and granted it. The government moved the district court and the court of appeals to stay further trial proceedings in light of this Court's grant of the government's petition. Both courts declined to stay further trial proceedings. 18-cv-2921 D. Ct. Doc. 544 (Nov. 20, 2018); 18-2856 C.A. Doc. 93 (Nov. 21, 2018). On November 26, 2018, the government lodged a letter with this Court suggesting that it might wish to reconsider staying trial proceedings. Meanwhile, Acting AAG Gore was deposed on October 26, trial commenced on November 5, and closing arguments were delivered on November 27.

5. On January 15, 2019, the district court entered an opinion and order memorializing its findings of fact and conclusions of law. 18-cv-2921 D. Ct. Doc. 574 (Op.). Determining that the Secretary's decision violated the APA, the court vacated the Secretary's decision to reinstate the citizenship question to the 2020 decennial census

and enjoined the Secretary from reinstating the question "based on [his] March 26, 2018 memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum." Op. 272.

a. The district court first held that most respondents had Article III standing. Op. 155-189. The court concluded that some private respondents had associational standing because some of their members "receive funds from federal programs that distribute those funds on the basis of census data." Op. 158. The court reasoned that if census data were inaccurate as a result of adding the citizenship question, those members could potentially suffer monetary injury. The court also concluded that the alleged "degradation in data quality" could injure all respondents. Op. 165-173. The court further determined that respondents New York and Illinois each alleged an impending injury-in-fact because each faced a "substantial risk" of losing at least one congressional seat in the 2020 decennial census. Op. 160-161. The court rejected the government's argument that these and other purported injuries would not be fairly traceable to the inclusion of a citizenship question on the decennial census form because each would materialize, if at all, only because of the independent and unlawful actions of third parties. Op. 178-189.

b. The district court then held that the Secretary's decision was "not in accordance with law," 5 U.S.C. 706(2)(A), because it violates 13 U.S.C. 6(c) and 141(f)(1).

Section 6(c) of the Census Act requires the Secretary to "acquire and use information available from" federal and state administrative records "[t]o the maximum extent possible" "instead of conducting direct inquiries" on the census form, but only if doing so is "consistent

with the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. 6(c). The district court found that the Secretary violated subsection (c) because his March 26, 2018 decisional memorandum did not cite the provision. Op. 210-211. The court rejected the government's argument that the Secretary in fact considered all of the factors listed in subsection (c) in his memorandum, even though he did not cite the provision. Op. 211-214. Instead, the court deemed the Secretary to have "misunderstood his own options" because, in the court's view, reinstating the citizenship question and using federal and state administrative records "would produce *less accurate citizenship data*" than relying only on the administrative records. Op. 213-214.

Section 141(f)(1) of the Census Act requires the Secretary to submit a report to Congress containing "the subjects proposed to be included" and "the types of information to be compiled" in the census to the appropriate congressional committees at least three years before the census date. 13 U.S.C. 141(f)(1). Section 141(f)(2) requires a similar report containing "the questions proposed to be included" in the census at least two years before the census date. 13 U.S.C. 141(f)(2). Secretary Ross timely submitted both reports; although the first report did not include citizenship as a "subject" area, the second report did include the proposed citizenship question. See Op. 216-217. The district court nevertheless concluded that Secretary Ross violated subsection (f)(1) by not including citizenship as a "subject" in a report to Congress. The court rejected the government's argument that the contents of the Secretary's reports to Congress under Section 141(f) are not judicially reviewable. See Op. 218-224.

c. The district court further held that the Secretary's decision was arbitrary and capricious because his decisional memorandum included what the court viewed as inaccuracies, and because the Secretary failed to consider "important aspect[s] of the problem," Op. 231 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (brackets in original). An example of the inaccuracies was the Secretary's statement that adding the question is "no additional imposition" for millions of households containing citizens or lawful immigrants; in the court's view, "common sense" dictates that adding the question would impose "an additional burden—one question's worth, per person, per household—on every respondent." Op. 226. An example of an "important aspect" the court thought that the Secretary failed to consider was "whether it was necessary to respond to DOJ's request at all." Op. 231-232.

In the district court's view, the Secretary also had failed to comply with various statistical quality standards, including OMB Statistical Policy Directive Number 2, which requires the Census Bureau to "'design and administer' the census 'in a manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost.'" Op. 239 (citation omitted). According to the court, the Secretary's decision to use *both* administrative records *and* a decennial census question to gather citizenship data, instead of administrative records alone, was not the "best" balance of benefits and costs. Op. 238-240 (citation omitted).

d. The district court also concluded that the Secretary violated the tenet of administrative law that "the grounds upon which the . . . agency acted be clearly

disclosed." Op. 245 (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943)). In the court's view, it was "clear that Secretary Ross's rationale was pretextual" and thus not the "real reason for his decision," *ibid.*, because the Secretary had "made the decision [to add the citizenship question] months before DOJ sent its letter," Op. 94 (¶ 167) (emphasis omitted). The court so found based on language in a few internal emails. For example, Secretary Ross sent a May 2017 email (Pet. App. 158a) asking about his "months old request that we include the citizenship question"; but because the Secretary did not ask about his "'months old' request to *analyze* inclusion of the question," the email showed prejudgment. Op. 94-95 (¶ 168).

e. The district court rejected respondents' equal-protection claim, finding no evidence of any discriminatory animus on the Secretary's part. Op. 261-262. Although the court stated that respondents might have found such evidence if they had been able to obtain "sworn testimony from Secretary Ross himself," it held they had in effect waived their right to that testimony by "decid[ing] to press ahead to trial rather than waiting to see if the Supreme Court eventually lifts the stay" of Secretary Ross's deposition. Op. 263.

f. As a remedy, the district court vacated the Secretary's decision to reinstate the citizenship question to the 2020 decennial census and remanded to the agency. The court also enjoined the Secretary "from adding a citizenship question to the 2020 census questionnaire based on Secretary Ross's March 26, 2018 memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum." Op. 272. The injunction operates nationwide. Op. 273-275. Finally, the court vacated its September 21, 2018

order compelling the deposition of Secretary Ross as moot. Op. 277.

6. On January 17, 2019, respondents moved to dismiss the writ of certiorari as improvidently granted. On January 18, the Court removed the case from the February argument calendar and suspended the briefing schedule pending further order of the Court.

ARGUMENT

The Court should defer consideration of respondents' motion to dismiss the writ of certiorari as improvidently granted while it considers the government's forthcoming petition for a writ of certiorari before judgment. If the Court grants the government's petition, it should deny respondents' motion and consolidate the cases for argument and decision this Term. If the Court denies the government's petition, it should grant respondents' motion and dismiss this case.

1. The government intends to file forthwith a petition for a writ of certiorari before judgment to the Second Circuit to review the district court's January 15, 2019 opinion and order vacating and enjoining the reinstatement of the citizenship question to the 2020 decennial census. See Sup. Ct. R. 11. The government already has filed a notice of appeal to the Second Circuit from the district court's order. See 18-cv-2921 D. Ct. Doc. 576 (Jan. 17, 2019); 18-cv-5025 D. Ct. Doc. 168 (Jan. 17, 2019). As respondents recognize (Mot. 7-8, 10), the government must finalize the census questionnaire by the end of June 2019 to enable it to be printed on time. It is exceedingly unlikely that there is sufficient time for review in both the court of appeals and in this Court by that deadline. Even assuming highly expedited briefing and decision in the court of appeals, the case would not reach this Court until the spring at the earliest, leaving

insufficient time for briefing, argument, and decision absent extraordinary expedition. Accordingly, as a practical matter, granting the government's petition for a writ of certiorari before judgment is likely the only way to protect this Court's opportunity for review.

The government's forthcoming petition will satisfy both the traditional criteria for certiorari and the criteria for certiorari before judgment. It will present the question whether the district court erred in holding that the Secretary's decision to reinstate the citizenship question to the decennial census violated the APA and in enjoining the Secretary of Commerce, "to whom Congress has delegated its constitutional authority over the census," *Wisconsin* v. *City of New York*, 517 U.S. 1, 23 (1996), from exercising his delegated authority. That is both an "important question of federal law that has not been, but should be, settled by this Court" and "an important federal question" that the district court decided "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Moreover, this Court already granted certiorari to consider whether the district court erred in permitting discovery beyond the administrative record, including depositions of high-ranking officials. The case is no less deserving of review now that it includes the ultimate merits question of whether the Secretary's decision to reinstate the citizenship question to the decennial census was lawful.

Indeed, this "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. As the district court recognized, the decennial census "is a matter of national importance" with "massive and lasting consequences," in part because it "occurs only once a decade, with no possibility

of a do-over." Op. 9. In light of the impending deadline for finalizing the census questionnaire, it is "imperative" for the government (and respondents as well) to obtain a final resolution of the important issues presented by this case. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (reviewing certain executive actions before judgment because they were "of great significance and demand[ed] prompt resolution"); *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942) ("public importance" of issues presented counseled a decision from the Court without "any avoidable delay").

2. The forthcoming petition also will fairly encompass the underlying question presented in this case, on which the Court already has granted certiorari. As respondents recognize (Mot. 11-12), the district court's interlocutory orders compelling discovery outside the administrative record to probe Secretary Ross's mental processes, including the orders compelling the depositions of Acting AAG Gore and Secretary Ross, merge into the court's final judgment issued on January 15, 2019. Therefore, rather than dismiss the writ of certiorari as improvidently granted, the Court should simply hold this case while it considers the government's forthcoming petition. In the event the petition is granted, this case could be consolidated with that one, see, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 229 (2005); *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2003), or it could be held and disposed of as appropriate in light of the Court's resolution of that other case. Together with its petition for a writ of certiorari before judgment, the government will propose expedited petition-stage and merits-stage briefing schedules that would enable the cases to be heard this Term during the Court's April sitting or, alternatively, at a special sitting in May.

3. Because the propriety of the district court's orders remains at stake between the parties (in both this case and the pending appeal of the district court's final judgment), this case is not "moot," as respondents claim; rather, as they all but concede (Mot. 11-12), the underlying orders themselves remain perfectly reviewable.[3] The government agrees, however, that in light of the district court's entry of final judgment and the need to resolve the form of the census questionnaire by the end of June 2019, it no longer makes sense to have parallel proceedings in this Court and the lower courts. For the reasons given above, this Court therefore should grant the government's forthcoming petition for a writ of certiorari before judgment and consolidate the cases for decision this Term. If the Court denies that petition, however, it should grant respondents' motion and dismiss this case.

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[3] Even now, respondents carefully avoid disclaiming their intention to depose Secretary Ross in the future, if they can. See Mot. 5. That alone keeps the issue alive. And it remains possible that respondents will attempt to rely on the district court's extensive findings and conclusions based on the other extra-record evidence as alternative grounds for affirmance. To the extent respondents are willing to affirmatively waive their bid to depose the Secretary or rely on those alternative grounds, or to the extent the Court views the issues as truly moot, rather than dismiss the petition altogether, the Court should vacate the lower courts' orders compelling the extra-record discovery (including the Secretary's deposition) under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

CONCLUSION

The Court should defer consideration of respondents' motion to dismiss the writ of certiorari as improvidently granted while it considers the government's forthcoming petition for a writ of certiorari before judgment. If that petition is granted, the Court should deny the motion and consolidate the cases, with a view to consideration and decision this Term. If that petition is denied, however, the Court should grant the motion and dismiss this case.

Respectfully submitted.

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Solicitor General

JANUARY 2019