

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

DEPARTMENT OF COMMERCE, et al.,

Petitioners,

v.

NEW YORK, et al.,

Respondents.

RESPONDENTS' MOTION TO DIVIDE AND ENLARGE ORAL ARGUMENT TIME, AND
RESPONSE TO THE UNITED STATES HOUSE OF REPRESENTATIVES' MOTION
TO PARTICIPATE IN ORAL ARGUMENT

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INTRODUCTION

In accordance with Supreme Court Rules 21, 28.3, and 28.4, respondents jointly move to enlarge the total time for oral argument, and to divide oral argument time between the two respondent groups. Respondents ask the Court to extend the total time for oral argument to eighty minutes, and to divide the forty minutes for respondents evenly between the government respondents and the private respondents. This enlargement of time is necessary in order to provide respondents adequate time to address the numerous issues presented in this appeal, which involves a nearly three-hundred-page decision issued after an eight-day trial, in addition to several pretrial decisions. The division of argument time will ensure that each group of respondents—a collection of States and other governmental entities on the one hand and a collection of private advocacy organizations on the other—can adequately present its own distinct perspective and represent its own interest. Petitioners take no position on respondents’ motion.

The United States House of Representatives has moved to participate in oral argument as *amicus curiae* supporting respondents. If the total argument time is further enlarged—beyond the eighty minutes that respondents have requested—to account for the time requested by the House, respondents do not oppose so much of the motion as requests permission for the House to present argument. Given the many issues raised by the questions presented in this case and the need to ensure that the parties have adequate time to present their arguments, respondents

respectfully request that any argument time granted to the House not be allotted from the forty minutes sought by respondents in this motion.

STATEMENT

1. Respondents brought two separate 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.

In February 2019, this Court granted certiorari before judgment to answer two questions: whether the district court correctly concluded that the Secretary's decision violated the APA, and whether the district court properly allowed certain pretrial discovery beyond the administrative record.

2. On March 4, 2019, the United States House of Representatives, as *amicus curiae* supporting respondents, moved for divided argument and for leave to participate in oral argument. The House's motion seeks ten minutes of argument time, to be taken from the time allotted to respondents.

ARGUMENT

1. Regardless of whether the Court grants the House of Representatives' motion for divided argument, it should grant respondents' motion to enlarge the time for argument and to divide argument evenly between the government respondents and the private respondents.

Respondents have distinct interests that warrant divided argument. States and their political subdivisions, as sovereign or quasi-sovereign entities, have unique interests that private parties do not adequately represent. This Court has thus routinely divided argument when, as here, both a government entity and a private party were on the same side. *See, e.g., American Legion v. American Humanist Ass'n*, No. 17-1717, 2019 WL 271957 (U.S. Jan. 22, 2019) (mem.) (Maryland-National Capital Park and Planning Commission and private petitioners); *Tennessee Wine & Spirits Ass'n v. Blair*, No. 18-96, 2019 WL 98538 (U.S. Jan. 4, 2019) (mem.) (State of Illinois and private petitioner); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 466 (2017) (mem.) (State of Colorado and private respondents).

Respondents also have distinct perspectives and arguments on the questions presented. For instance, the government respondents and private respondents identified overlapping but different injuries to support their standing: the government respondents proved at trial that adding the citizenship question will cause them the unique harm of losing seats in the U.S. House of Representatives or in state legislatures, and further deprive them of federal funding to which they would otherwise be entitled (Pet. App. 178a-182a); while the private respondents proved

that the citizenship question would force them to divert resources needed to run their organizations, and also proved that they could assert associational standing on behalf of their members (Pet. App. 187a-194a, 196a-200a). Moreover, on the second question presented—whether the district court properly authorized pretrial discovery beyond the administrative record—the private respondents have a unique argument that their equal protection claim (which the government respondents did not assert) provided an independent basis for discovery. *See, e.g., League of United Latin American Citizens (LULAC) v. Perry*, 546 U.S. 1149 (2006) (mem.) (dividing argument between appellants); *see also LULAC v. Perry*, 548 U.S. 399, 409 (2006) (op. of Kennedy, J.) (appellants did “not join each other as to all claims”).

Given the distinct interests of the two respondent groups, the sheer number of issues raised in the petition for certiorari before judgment and petitioners’ opening brief, and the national importance of the decennial census enumeration, this Court should also enlarge the parties’ argument time. Petitioners have advanced at least four distinct arguments in support of the first question presented: (1) respondents lack standing; (2) the decision to add the citizenship question is not reviewable under the APA; (3) the decision to add the citizenship question was not arbitrary and capricious; and (4) the decision to add the citizenship question was not contrary to law. *See* Pet. 17-26; Br. for Petitioners 17-53. As to (3) in particular, the district court identified multiple independent APA violations falling into multiple separate categories—each of which is separately challenged on this appeal. Petitioners also argue that the district court improperly authorized discovery beyond the

administrative record (Pet. 26-28; Br. for Petitioners 55)—a question to which the parties have already devoted full merits briefs in a separate related case (18-557) that was previously scheduled for argument and then removed from the argument calendar. And in their opening brief (at 53-54), petitioners also address the equal protection and Enumeration Clause claims raised by respondents and rejected by the district court, arguing that these claims do not provide alternative grounds for affirmance.

In addition, all parties agree that the issue underlying the legal dispute—the propriety of adding a citizenship question to the census—is one of national importance. *See* Pet. 13; Government Resps.’ Br. in Response 33; Private Resps.’ Br. in Response 2. This Court has previously enlarged argument time in cases addressing matters of extraordinary public importance. *See, e.g., United States v. Texas*, 136 S. Ct. 1539 (2016) (mem.); *Michigan v. EPA*, 135 S. Ct. 1541 (2015); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (mem.); *National Fed’n of Indep. Bus. v. Sebelius*, 565 U.S. 1193 (2012) (mem.); *LULAC*, 546 U.S. 1149; *McConnell v. Federal Election Comm’n*, 539 U.S. 911 (2003) (mem.).

Respondents therefore request that the Court enlarge the time for argument to allow petitioners and respondents forty minutes each, with respondents’ time to be evenly divided and with counsel for the government respondents to present first.

If the Court enlarges argument time but grants fewer than forty minutes to each side, or if it declines to enlarge argument time, respondents request that they be given an opportunity to consult each other and inform the Clerk’s Office of their

joint proposal for dividing time. See Stephen M. Shapiro et al., *Supreme Court Practice*, § 14.6, at 781 (10th ed. 2013).

2. Respondents do not oppose so much of the House of Representatives' motion as requests permission to participate in oral argument as amicus curiae supporting respondents, so long as the total argument time is further enlarged to provide argument time for the House beyond the forty minutes requested for respondents in this motion. This Court has previously enlarged the time for argument when granting an amicus curiae leave to participate. See, e.g., *Gamble v. United States*, 139 S. Ct. 582 (2018) (mem.); *Wittman v. Personhuballah*, 136 S. Ct. 1241 (2016) (mem.); *National Fed'n of Independent Bus.*, 565 U.S. 1193; *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 566 (2015) (mem.); *Bush v. Vera*, 516 U.S. 911 (1995) (mem.); *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972) (mem.). Thus, if the Court grants the House's motion, respondents request that the Court further enlarge the total argument time—beyond eighty minutes—to account for the time to be allotted to the House for argument, rather than subtract any time from the forty minutes requested by respondents.

CONCLUSION

For these reasons, respondents jointly request that the Court enlarge the total argument time to eighty minutes, with the forty minutes for respondents to be divided equally between the government respondents and the private respondents, with counsel for the government respondents presenting first. Respondents do not oppose so much of the United States House of Representatives' motion as requests leave to

argue as amicus curiae, so long as the Court further enlarges the total argument time to account for the time to be allotted to the House, rather than subtract any argument time from the forty minutes requested by respondents.

Respectfully submitted,

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