UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-2856 Caption [use short title]

Motion for: Stay of District Court Proceedings In Light Of The Supreme Court's Order Granting A Petition For Writ of Certiorari And A Request for An Immediate Administrative Stay.

In re Department of Commerce

Set forth below precise, complete statement of relief sought:

The government respectfully requests that this Court stay further proceedings in the district court pending the Supreme Court's decision in In re Department of Commerce, No. 18-315, in which certiorari was just granted. The government also request an an immediate administrative stay.

MOVING PARTY: Department of Commerce, et al. (petitioners) **OPPOSING PARTY:** State of New York, et al.

☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Gerard Sinzdak **OPPOSING ATTORNEY:** Judith N. Vale

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: S.D.N.Y. Honorable Jesse M. Furman, No. 18-cv-2921 (JMF)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this Court? ☑ Yes ☐ No
Requested return date and explanation of emergency: Monday, Nov. 19, 2018. District court proceedings are ongoing, with important deadlines on Nov. 21 and Nov. 27. An immediate administrative stay is therefore requested.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: /s/Gerard Sinzdak **Date:** Nov. 19, 2018 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 18-2856

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau, Petitioners.

MOTION TO STAY DISTRICT COURT PROCEEDINGS IN LIGHT OF THE SUPREME COURT'S ORDER GRANTING A PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Supreme Court Rule 23.3, the federal government respectfully asks this Court, in these cases challenging the decision of Secretary of Commerce Ross to reinstate a citizenship question on the decennial census, to issue a stay of further district court proceedings pending the Supreme Court's resolution of *In re Department of Commerce*, No. 18-557 (U.S.)—in which the Court on November 16, 2018, granted certiorari and scheduled oral argument on February 19, 2019, to resolve the question whether the district court erred in ordering extra-record discovery in these cases. The Supreme Court's resolution of that question will thus establish the proper scope of judicial review of the Secretary's decision. A stay of further district court proceedings is warranted to allow the Supreme Court to decide the question in an orderly fashion, to avoid the unnecessary expenditure of resources by the parties and the courts, and to mitigate the possibility that the district court's consideration of extra-record evidence will improperly influence its decision on the merits. The federal government also requests that this Court issue an immediate administrative stay while it considers this stay motion.[1]

[1] On November 18, 2018, the federal government sought a stay of further proceedings and an immediate administrative stay from the district court. On November 19, 2018, the district court ordered plaintiffs to respond to the government's request by 4pm on Tuesday, November 20, 2018, thus implicitly denying the government's request for an immediate stay. Due to the exigencies of time, and the interests of both the parties and the courts, the government moves this Court for relief.

1. On September 25, 2018 and October 9, 2018, this Court denied the federal government's petitions for writ of mandamus, which challenged, as relevant here, the district court's decision to permit extra-record discovery in these cases and its order compelling Secretary Ross to appear for a deposition. *See* Order, *In re Department of Commerce*, Nos. 18-2856 & 18-2857 (2d Cir. Oct. 9, 2018); Order, *In re Department of Commerce*, Nos. 18-2652 & 18-2659 (2d Cir. Sept. 25, 2018). The government sought review of this Court's orders denying mandamus relief in the Supreme Court. On November 16, 2018, the Supreme Court granted the federal government's petition for a writ of certiorari, issued an expedited briefing schedule, and set the case for oral argument on February 19, 2019. *See* Att. 1. Although this Court and the Supreme Court previously denied the government's request to stay district court proceedings pending the Supreme Court's resolution of the government's then-pending petition for writ of certiorari, *see* Att. 2; Att. 3, the Supreme Court's decision to grant the petition is a significant change in circumstances that merits revisiting the question whether a stay is justified. As Justice Gorsuch stated in a prior order in these cases, "when [the Supreme Court] grant[s] certiorari," lower courts should "normally" stay proceedings and "await further guidance." *In re Dep't of Commerce*, No. 18A375, 2018 WL 5259090, at *2 (U.S. Oct. 22, 2018) (opinion concurring in part and dissenting in part); *see also Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (instructing the district court to stay the proceedings pending a Supreme Court decision in a closely related case which was likely to determine the question of liability).

2. A stay of further district court proceedings, including entry of final judgment, is warranted here. Entry of final judgment by the district court could give rise to a claim that the Supreme Court's resolution of the question whether the district court's review should be limited to the administrative record had become moot. Although such a claim would be without merit because the Supreme Court will be able to order effective relief notwithstanding the district court's entry of final judgment, a stay would avoid the prospect of unnecessary litigation over that issue in the Supreme Court and would eliminate any possibility of interference with the Supreme Court's ongoing review. *See In re Dep't of Commerce*, 2018 WL 5259090, at *2 (opinion of Gorsuch, J.) (noting that a "complete stay" of district court proceedings was warranted "to protect the very review [the Court] invite[d]" and now has granted).

A stay of proceedings is also merited to avoid the unnecessary expenditure of the parties' and the district court's resources. The parties' post-trial briefs are currently due in the district court on November 21, and the court has scheduled closing arguments for November 27. Those briefs and arguments must account for the significant extra-record evidence that the district court permitted plaintiffs to enter at trial. Any subsequent final decision on the merits from the district court could also incorporate such evidence. If the Supreme Court were to conclude that judicial review of the Secretary's decision to add a citizenship question should have been limited to the administrative record, the resources expended in addressing the improperly admitted evidence would go to waste. At a minimum, it would be far

more efficient to await a ruling from the Supreme Court regarding the proper scope of review before any further judicial proceedings are conducted.

Moreover, a stay would reduce any risk that the district court's consideration of extra-record evidence would influence its analysis of the record materials. The federal government recognizes that the district court has already been exposed to the extra-record evidence during trial, that it intends to differentiate findings of law and fact that are based solely on the administrative record and those that are based on extra-record evidence, Dkt No. 485 at 3, and that district courts routinely must disregard improper evidence that has been put before them. Nevertheless, the complex task of disregarding all the extra-record evidence when making findings based solely on the administrative record will be made much more difficult if the post-trial process involves the district court in making alternative findings based specifically on the extra-record evidence that will require the court to focus directly on that evidence. A stay thus would mitigate the risk that the district court's review will be influenced by inadmissible evidence by ensuring that at least the critical post-trial process will be limited to the record that the Supreme Court holds is proper. It will also conserve judicial resources, because the district court can avoid the need to issue alternative findings or modify its ruling based on the Supreme Court's direction regarding the permissible scope of review.

By contrast, a stay is unlikely to prejudice plaintiffs. The Census Bureau does not need to begin printing the 2020 census questionnaire until June 2019. Because the

Supreme Court expedited its review by scheduling oral argument in this case on February 19, 2019, the district court will be in a position to enter final judgment before the Census Bureau needs to print the questionnaire. And conversely, it is extremely unlikely that full merits briefing and argument in this Court, let alone the Supreme Court, would be possible before June 2019 even if the district court declined to stay proceedings. A stay, however, would ensure that the final judgment in the district court is, indeed, final and not subject to a remand by this Court when the Supreme Court issues its ruling, thereby facilitating more-expeditious appellate proceedings. Accordingly, staying proceedings and awaiting Supreme Court guidance best serves judicial economy, the parties' interests, and the public interest.

CONCLUSION

For the foregoing reasons, this Court should stay further proceedings in the district court pending the Supreme Court's decision in *In re Department of Commerce*, No. 18-557 (U.S.) and issue an immediate administrative stay while it considers this motion.

Respectfully submitted,

JOSEPH H. HUNT
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NOVEMBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the word limit of Federal Rule of Appellate Procedure 27 because it contains 1,261 words. I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Gerard Sinzdak
GERARD SINZDAK

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished automatically by the appellate CM/ECF system on all other counsel.

s/ Gerard Sinzdak
GERARD SINZDAK

ATTACHMENT 1

(ORDER LIST: 586 U.S.)

FRIDAY, NOVEMBER 16, 2018

CERTIORARI GRANTED

18-315 COCHISE CONSULTANCY, ET AL. V. UNITED STATES, EX REL. HUNT

The petition for a writ of certiorari is granted.

18-557 IN RE DEPARTMENT OF COMMERCE, ET AL.

The petition for a writ of mandamus is treated as a petition for a writ of certiorari. The petition for certiorari is granted. Petitioners' brief on the merits is to be filed on or before Monday, December 17, 2018. Respondents' brief on the merits is to be filed on or before Thursday, January 17, 2019. The reply brief is to be filed on or before Monday, February 4, 2019. The case is set for oral argument on Tuesday, February 19, 2019.

ATTACHMENT 2

S.D.N.Y.-N.Y.C.
18-cv-2921
18-cv-5025
Furman, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of October, two thousand eighteen.

Present:

John M. Walker, Jr.,
Raymond J. Lohier, Jr.,
Circuit Judges,
William H. Pauley III,*
District Judge.

In Re: United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

18-2856
18-2857

Petitioners.

Petitioners have filed a motion for a stay of pretrial and trial proceedings in two consolidated district court cases pending resolution of their forthcoming petition for a writ of mandamus or certiorari in the Supreme Court. Upon due consideration, it is hereby ORDERED that the motions for a stay are DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

* Judge William H. Pauley III, of the United States District Court for the Southern District of New York, sitting by designation.

ATTACHMENT 3

Search documents in this case: Search

No. 18A455

Title:	**In Re Department of Commerce, et al., Applicants**
Docketed:	October 29, 2018
Linked with 18-557	
Lower Ct:	

DATE	PROCEEDINGS AND ORDERS
Oct 29 2018	Application (18A455) for a stay, submitted to Justice Ginsburg. **Main Document** **Proof of Service**
Nov 02 2018	Application (18A455) referred to the Court.
Nov 02 2018	Application (18A455) denied by the Court. Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: Department of Commerce, et al.		