

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ELECTRONIC PRIVACY INFORMATION
CENTER,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, et al.,

Defendants-Appellees.

Case No. 19-5031

APPELLANT’S MOTION TO EXPEDITE BRIEFING SCHEDULE

Pursuant to 28 U.S.C. § 1657(a) and D.C. Cir. Rule 47.2(a), Appellant Electronic Privacy Information Center (“EPIC”) respectfully moves the Court to adopt an expedited schedule for briefing and argument in this matter. In support, EPIC states as follows:

1. This appeal arises from EPIC’s action under the Administrative Procedure Act (“APA”) and the E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note) against the Defendants United States Department of Commerce and Bureau of the Census. EPIC challenges (1) the Government’s unlawful addition of a question regarding citizenship status to the 2020 Census prior to the

completion and publication of privacy impact assessments required by section 208 of the E-Government Act; and (2) the Government's unlawful failure to complete and publish the privacy impact assessments required by section 208.

2. On January 18, 2019, EPIC moved for a preliminary injunction to prevent the Government from initiating the collection of personal data about citizenship status pending final resolution of EPIC's claims. On February 8, 2019, the U.S. District Court for District of Columbia (Hon. Dabney L. Friedrich) denied EPIC's motion for preliminary relief. *See* Order, Ex. A; Mem Op., Ex. B. EPIC filed a notice of appeal from the district court's order on February 12, 2019.

3. Under 28 U.S.C. § 1657(a), this Court "shall expedite the consideration of . . . any action for temporary or preliminary injunctive relief[.]" *See also* D.C. Cir. Rule 47.2(a). Because this appeal arises from EPIC's motion for a preliminary injunction, EPIC is entitled to expedited consideration. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 n.8 (D.C. Cir. 2001) ("[U]nder 28 U.S.C. § 1657(a), the granting or denying of a preliminary injunction is the basis for an expedited appeal[.]").

4. Moreover, good cause exists for the Court to adopt an expedited briefing schedule. Time is of the essence in this case. The "printing, addressing, and mailing of Internet invitations, reminder cards or letters, and

paper questionnaire packages” for the 2020 Census will begin approximately four months from now in June 2019. U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century* at 97 (Dec. 2018).¹ Once this process begins, it will be impossible—absent extraordinary “disruption and expense”—to correct the Government’s unlawful decision to include a citizenship question without first completing the required privacy impact assessments. *New York v. U.S. Dep’t of Commerce*, No. 18-2921, 2019 WL 190285, at *121 (S.D.N.Y. Jan. 15, 2019). It is therefore essential that the Court adopt a briefing schedule which will allow for a ruling on EPIC’s appeal, and the final adjudication of EPIC’s claims, before the Government begins to print census forms in June.

5. EPIC’s arguments for expedition are precisely the grounds relied on by the Department of Commerce and the Census Bureau to obtain expedited consideration of the Government’s appeals in *New York v. U.S. Department of Commerce*, a separate case concerning the citizenship question. As the Government told the Supreme Court last month in a motion for expedited review: “[T]he questions presented [in *New York*] must be resolved before the end of June 2019, so that the decennial census questionnaires can be printed on time for the 2020 census.” Motion for Expedited Consideration of

¹ <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf>.

the Petition for a Writ of Certiorari Before Judgment and for Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition at 2, *Dep't of Commerce v. New York*, No. 18-966, 2019 WL 331100 (U.S. Feb. 15, 2019).

6. The Supreme Court granted the Government's petition for certiorari before judgment and scheduled oral argument for "the second week of the April argument session." *New York*, No. 18-966, 2019 WL 331100, at *1.

7. Prior to the Supreme Court's grant of certiorari, the Government also obtained expedited consideration of its Second Circuit appeal concerning the citizenship question. There, the Government argued:

Due to the production demands associated with printing and distributing tens of millions of census questionnaires by April 1, 2020, *see* 13 U.S.C. § 141(a), the Secretary [of Commerce] must finalize the census questionnaire by the end of June 2019. If this Court does not reach a decision by that time, this case will become moot as a practical matter, and the Secretary will be prevented from implementing his decision to reinstate a citizenship question. . . . An expedited appeal is thus appropriate to ensure that this Court and, if necessary, the Supreme Court have sufficient time to decide this appeal before the June 2019 deadline.

Unopposed Motion to Expedite Briefing Schedule ¶ 2, *New York v. U.S. Dep't Commerce*, No. 19-212 (2d Cir. filed Jan 25, 2019).

8. Accordingly, subject to the Court's availability to hold oral argument, EPIC respectfully moves the Court to adopt the following schedule in this case:

Appellant’s opening brief:	March 1, 2019
Joint appendix:	March 1, 2019
Appellees’ brief:	March 15, 2019
Appellant’s reply brief:	March 22, 2019
Oral argument:	April 8, 2019

9. EPIC conferred with opposing counsel, who stated that the Government takes no position on EPIC’s motion if the Government is given at least 30 days in which to compose its brief. But allowing 30 days for a principal brief would leave the Court exceptionally little time in which to decide this appeal.

10. In *New York v. U.S. Department of Commerce*, the Government requested just 21 days for each party to file principal briefs before the Second Circuit and Supreme Court. Unopposed Motion to Expedite Briefing Schedule ¶ 3, *New York*, No. 19-212; Motion for Expedited Consideration at 2, *New York*, No. 18-966, 2019 WL 331100.

11. The Second Circuit adopted the Government’s proposed briefing schedule, Motion Order, *New York*, No. 19-212 (2d Cir. Feb. 1, 2019), and the Supreme Court provided less than two months for briefing and argument. *New York*, No. 18-966, 2019 WL 331100, at *1.

12. *New York v. U.S. Department of Commerce* involves numerous plaintiffs, distinct claims, and disputed questions of fact. In contrast, the issues before the Court in this appeal are narrow. Given these facts, two weeks for the Government’s principal brief would be appropriate here.

Respectfully Submitted,

Dated: February 21, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The motion is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 27(d)(2)(A) and D.C. Circuit Rule 27(a)(2), because it contains 1,033 words.

/s/ John L. Davisson
JOHN L. DAVISSON

CERTIFICATE OF SERVICE

I, John Davisson, hereby certify that on February 21, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case will be served by email and the CM/ECF system:

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