No. 18-1214

In The Supreme Court of the United States

WILBUR L. ROSS, SECRETARY OF COMMERCE, et al.,

Petitioners,

v.

CITY OF SAN JOSE, et al.,

Respondents.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

JOHN F. LIBBY
Counsel of Record
BARRY S. LANDSBERG
RONALD B. TUROVSKY
ANDREW C. CASE
ANA G. GUARDADO
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
JLibby@manatt.com
(310) 312-4000

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
DORIAN L. SPENCE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600

Counsel for Respondents

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

DAVID L. SHAPIRO
Of Counsel to MANATT,
PHELPS & PHILLIPS, LLP
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 491-2758

MARK ROSENBAUM
Public Counsel
610 South Ardmore Ave.
Los Angeles, CA 90005
(213) 385-2977

Counsel for Respondents

CITY OF SAN JOSE
RICHARD DOYLE, City Attorney
NORA FRIMANN,
Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
200 East Santa Clara Street,
16th Floor
San Jose, CA 95113
(408) 535-1900

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the district court correctly concluded, based on the evidence presented at trial, that the Secretary of Commerce's decision to add a citizenship question to the Decennial Census violated the Enumeration Clause of the United States Constitution, U.S. Const. art. I, § 2, cl. 3 as modified by U.S. Const. amend. XIV § 2.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

INTRODUCTION

In a highly unusual and incongruous submission, Petitioners have filed a Petition for a Writ of Certiorari Before Judgment while simultaneously asking this Court to "hold" the case, should the petition be granted. They have done so while acknowledging that, in the alternative, the Respondents to the Petition may have a right to brief and argue their case. And indeed Respondents do.

Respondents here are the City of San Jose ("San Jose") and Black Alliance for Just Immigration ("BAJI," and together with San Jose, the "San Jose Parties" or "Respondents") plaintiffs in *City of San Jose et al. v. Ross et al*., 18-cv-2279 (N.D. Cal.), along with the companion case in which Petitioners have filed their consolidated petition *California et al. v. Ross et al*., 18-cv-1865 (N.D. Cal.) (together, the "California Matters").

The California Matters provide the vehicle best suited for the Court to resolve the Enumeration Clause issue addressed in the Court's March 15 order in *Commerce et al. v. New York, et al*., 18-966 ("the New York Matter"). It is in the California Matters, and not the New York Matter, where the district court actually weighed the evidence relevant to the Enumeration Clause claim. It is in the California Matters, and not the New York Matter, where the district court actually adjudicated the merits of the Enumeration Clause claim. And it is in the California Matters where the district court issued an injunction broader than that issued by the district court in the New York Matter,

because the remedy was based on the finding of liability on the Enumeration Clause claim. Respondents therefore request that the Court adopt the second alternative proposed by Petitioners, set a briefing schedule that would have Petitioners' brief due on April 2, Respondents' on April 12, and Petitioners' Reply on April 18, and permit Respondents to present argument on April 23, 2019, along with the New York Matter.[1]

The Enumeration Clause claim was not tried in the New York Matter, but rather was resolved on a Rule 12 motion to dismiss. As a result, the Enumeration Clause claim was not adjudicated on a full evidentiary record in the New York Matter. By contrast, in the California Matters, the district court denied the government's motion to dismiss the San Jose Parties' Enumeration Clause claim and later denied the government's motion for summary judgment on the same claim. The San Jose Parties (and the State of California) proceeded to trial on this issue and produced substantial evidence, including the testimony of two expert witnesses in support of the Enumeration Clause claim. There is no such trial record in the New York Matter. The California district court specifically weighed that evidence, adjudicated the claim in favor of the San Jose Parties, and issued a lengthy order on this issue based on the evidence presented during trial before the district court. The San Jose Parties therefore respectfully submit that this Court should

[1] Respondents join the Motion to Expedite filed by respondents in *California v. Ross* in full, and could alternatively meet the briefing deadline proposed therein.

review the Enumeration Clause claim on the full trial record of the California Matters and with their participation in briefing and argument of this issue. Petitioners' second alternative will allow for this review. Petitioners' first alternative will not.

Likewise, the San Jose Parties also present different facts and theories of standing than do the respondents in the New York Matter or in the case brought by the State of California. In particular, BAJI presents a theory of associational standing that does not rely on any household failing to respond to the census questionnaire, which is an alleged independent basis for the government's argument that standing is lacking in both the New York and California Matters. Should the Court conclude that respondents in the New York Matter lack standing based on their facts or theories, it would be particularly important for this additional party to be before the Court so that the substantive issue raised in the Court's March 15 order may be addressed on the merits. Holding this petition could require the Court to take emergency action in the final days of the term, with the deadline for printing census forms looming at the same time.

The government's primary position that this case may be held and disposed of summarily after the Court issues a decision in the New York Matter is starkly inconsistent with its position that swift resolution is a matter of national urgency and that emergency action should be avoided. A petition for certiorari before judgment may be granted "only upon a showing that the case is of such imperative public importance as to

justify deviation from normal appellate practice and to require ***immediate determination*** in this Court." Rules of the Supreme Court of the United States, Rule 11 (emphasis added). A case cannot both be so important that it must be immediately resolved and so inconsequential that it may be held for months pending the determination of another case on a meaningfully different record.

What does make sense is for this Court to grant the Petition, and consolidate the California Matters with the New York Matter for argument on April 23. Given the importance of the Enumeration Clause issue, this Court and the public deserve that it be decided on the full record—indeed the only record—specifically speaking to the claim.

ARGUMENT

A. Procedural History

In April 2018, the San Jose Parties filed their complaint, alleging that the Secretary's decision to add a citizenship question to the 2020 Census was arbitrary and capricious and otherwise not in accordance with the law, in violation of the Administrative Procedure Act ("APA"), and unconstitutional under the Enumeration Clause and the Apportionment Clause. The case was transferred to the court hearing *California v. Ross* and the cases were considered and tried together, but not consolidated.

In August 2018, the district court denied the government's motion to dismiss. In doing so, the district court rejected the government's argument that the Secretary's decision to include a citizenship question was consistent with longstanding historical census practice. This same argument had been accepted by the district court in the New York Matter. *See State of New York v. United States Department of Commerce*, 315 F. Supp. 3d 766, 803 (S.D.N.Y. 2018) (finding "a nearly unbroken practice" over "two centuries" of "including a question concerning citizenship on the census").

In November 2018, the government moved for summary judgment on all claims and the San Jose Parties moved for partial summary judgment on the APA claim, relying solely on the administrative record. In December 2018, the court denied both motions.

The district court conducted a six-day bench trial in January 2019 and held nearly a full day of closing argument on February 15, 2019. On March 6, 2019, the district court issued a 126-page ruling on its findings of fact and conclusions of law. (Pet. App. 1a). The district court dismissed the San Jose Parties' Apportionment Clause claim on standing grounds but ruled in their favor on the APA claim and the Enumeration Clause claim.

The district court found that San Jose and BAJI each established standing. Both were injured, it held, because both were now spending money to mitigate the harm that will be a direct result of the addition of the

citizenship question to the 2020 Decennial Census. (Pet. App. 72a-74a). For San Jose, the court further ruled that adding the question will harm it because it will lead to a differential undercount that will in turn lead to the loss of federal funding. (Pet. App. 72a-73a). The district court also noted that BAJI had set forth facts in support of associational standing. (Pet. App. 74a n.14). The district court concluded that there were injuries fairly traceable to the Secretary's decision to include the citizenship question in the 2020 Census and that a favorable decision vacating or enjoining the Secretary's decision would redress those injuries. (Pet. App. 74a-77a).

The court then ruled that the Secretary's decision to include the citizenship question in the 2020 Census violated the APA because it was arbitrary and capricious, represented an abuse of discretion, and was otherwise not in accordance with the law. The court found that a violation of the APA flowed from the administrative record alone. (Pet. App. 149a-157a). No extra-record evidence was presented in the San Jose case in support of the APA claim.

The court also ruled that the Secretary's decision to add a citizenship question to the 2020 Census "violate[d] the Enumeration Clause of the Constitution because its inclusion will materially harm the accuracy of the census without advancing any legitimate governmental interest." (Pet. App. 165a). The court determined that the inclusion of the citizenship question undermined the strong constitutional interest in the accuracy of the census because it would uniquely and

substantially impact specific demographic groups. The court also found that the government failed to identify any countervailing governmental interest that could justify this harm to the census. (Pet. App. 166a-167a).

On March 13, the district court entered its final judgment, order of vacatur, and permanent injunction. (Pet. App. 173a). In that judgment, the district court permanently enjoined Secretary Ross "from including the citizenship question on the 2020 Census, regardless of any technical compliance with the Administrative Procedure Act." (Pet. App. 175a).

On March 14, the government filed a Notice of Appeal in the Ninth Circuit. (Pet. App. 175a). It petitioned the Court for certiorari before judgment on March 18, 2019.

B. Respondents Presented Evidence At Trial In Support Of Their Enumeration Clause Claim—A Claim That Was Dismissed Prior To Trial In The New York Matter

In contrast to the New York Matter, at trial of the California Matters, Respondents introduced substantial evidence to prove the Enumeration Clause violation. That evidence included proof that there has not been "a nearly unbroken practice" of "including a question concerning citizenship on the census." *State of New York*, 315 F. Supp. 3d at 803. Questions involving citizenship status have, in fact, been off the census more often than they have been on it, and even those questions that have been included in the past differ in

material ways, including how many people were asked, how the question was formed, and what instrument included the question. Margo Anderson, the foremost historian of the census, submitted an affidavit in the California Matters, in which she testified that the question proposed by Secretary Ross had never been posed on a census in the manner he proposed, and that adding Secretary Ross's question would break from historical census practice.

In addition, Respondents presented an expert, Dr. Colm O'Muircheartaigh, professor in the Harris School of Public Policy and senior fellow at the National Opinion Research Center ("NORC") at the University of Chicago. Dr. O'Muircheartaigh testified for a full day of trial, on subjects as varied as the impact of the proposed question on the United States Census Bureau's ("Bureau") Nonresponse Follow Up ("NRFU") operations, the impact of sensitive questions on survey accuracy (both generally and specific to the census), and the interplay between the current macro-environment and the proposed question on the ultimate accuracy of the census. The district court relied substantially on Dr. O'Muircheartaigh's testimony in its ruling on the Enumeration Clause. (Pet. App. 21a-43a). Dr. O'Muircheartaigh did not testify in the New York Matter.

After a six-day trial, extensive post-trial briefing, and nearly a full day of closing argument, the California court ruled that "[t]he Secretary's decision to add a citizenship question to the 2020 Census violates the Enumeration Clause of the Constitution because its inclusion will materially harm the accuracy of the census

without advancing any legitimate governmental interest." (Pet. App. 165a).

The district court in the California Matters made this ruling after considering the evidence presented to support the claim that Secretary Ross violated the Enumeration Clause claim, while the court in the New York Matter had no such opportunity, having dismissed the case at the pleadings stage. In addition, and in contrast to the New York Matter, the court in the California Matters considered the macro-environment, *i.e.*, the social and political climate in which a citizenship question may be asked, and the resulting level of trust the respondents to the question have, in assessing its constitutionality. This issue is important, as this Court has in recent years adjudicated that the constitutionality of government action may depend on this macro-environment.

For example, the Court found that the formula determining coverage under Section 5 of the Voting Rights Act was constitutional when it was passed in 1965, and subsequently in 1973, 1980, and 1999, but not in 2013, in part because the constitutional analysis depends upon "current conditions." *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013). And in *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003), the Court held that consideration of race in college admissions were constitutionally acceptable in 2003 because it was necessary to achieve student body diversity under the societal conditions at the time negatively affecting minority applicants, but suggested that such policies might no longer be constitutional in 2028 based on the

presumption these conditions would no longer be present. *Id.*

Because the district court in the California Matters considered all of these factual issues in its adjudication of the Enumeration Clause claim, but the district court in the New York Matter did not, full resolution of that claim is appropriate only on the basis of the record in the California Matters.

C. Respondents Have Unique Standing Claims

In order to encourage census participation, Respondents are each currently spending money specifically aimed at those who may not participate because of the addition of the citizenship question. The district court found that in light of "the substantial risk posed by the addition of the citizenship question, it is reasonable for San Jose to spend additional time and money on the outreach to address concerns about the addition of the citizenship question." (Pet. App. 64a). *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). The harms identified by the district court included the loss of federal funds, but the City of San Jose also presented evidence that it would be harmed because, as the Bureau acknowledges, adding the citizenship question will cause a decline in the quality of the data the Bureau reports. The district court found that these harms were traceable to Secretary Ross's decision and would be redressed by a favorable outcome. (Pet. App. 74a-77a). The San Jose Parties' theories of standing

are supported by facts set forth only in the California Matters.

In addition, BAJI presented evidence that its members were harmed, and that it had associational standing based on the harm to those members. *See Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977) (setting forth the standards for associational standing). This theory was not presented in the New York Matter and does not depend upon any household failing to return a census questionnaire. This theory could provide an independent basis for BAJI's standing here should the Court agree with the government in the New York Matter that injury based on failing to respond to the questionnaire is not fairly traceable to the addition of the citizenship question. *See* Brief for Petitioners, *Commerce et al. v. New York et al.*, 18-966, at 20.

BAJI contends that the plain fact that its members are compelled by the government to fill out a form or otherwise be subject to a fine constitutes injury-in-fact sufficient to challenge the constitutionality of that compelled government action. Completing and returning the citizenship question is likely to take as long as receiving two text messages, which has been found to be a sufficient imposition on a plaintiff's time to establish injury-in-fact. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (receipt of two unwanted text messages qualifies as an injury-in-fact).

Should the BAJI member choose *not* to complete the form, he or she would be subject to a fine. And numerous cases have found that an individual has standing to challenge government action that requires that individual to take action or be subject to a fine. *Thomas More Law Center v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011) (individual subject to Affordable Care Act's mandate to purchase health insurance has standing to challenge the law because either purchasing insurance or being subject to a fine for not purchasing insurance constitutes injury-in-fact), *abrogated on the merits without reversal on standing grounds by National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 612 (2012). *See also Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611, 626 (W.D. Va. 2010) (same), *Goudy-Bachman v. U.S. Dept. of Health and Human Services*, 811 F. Supp. 2d 1086, 1091 (M.D. Pa. 2011) (same).

When, as here, a party challenges government action as unconstitutional, he or she need not wait until he or she is punished for failing to comply with the law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). The BAJI members allege that they are being compelled to provide their immigration status, in violation of the Constitution, and under penalty of a criminal fine. BAJI thus presents an alternative standing theory not asserted in the New York Matter.

D. Respondents Should Be Permitted To Brief And Argue Their Enumeration Clause Claim

Though, as the Petitioner states, the Court may very well "address the enumeration claim in No. 18-966," (Pet. at 10), it cannot address in that case the evidence, findings, and remedy *upon which a judgment on that claim was entered in the California Matters*. (Pet. at 10).[2] Indeed, absent the district court's decision in this case, there is no indication that any party in the New York Matter would have requested that the Court address the Enumeration Clause. Only after the district court issued its findings of fact and conclusions of law did the government file its letter in the New York Matter requesting that the Court adjudicate the Enumeration Clause issue. Because Respondents are not a party to the New York Matter, and no petition had been filed in this case, Respondents had no opportunity to address the Court on the different facts and theories in this case before it issued its March 15 order. The respondents in the New York Matter took no position as

---

[2] The San Jose Parties agree that the decision of the district court "covers largely the same ground" as the district court decision in the New York Matter regarding the Administrative Procedure Act. (Pet. at 10). Although there is at least one substantial difference in the APA claims—notably, that the San Jose Parties did not enter any extra-record evidence at trial and based their APA claim solely on the administrative record—this difference may not merit independent briefing and argument because the district court in the New York Matter held that its decision "is supported by evidence in the Administrative Record alone." *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 567 (S.D.N.Y. 2019). It is therefore not necessary for the Court separately to address the APA claims in this case.

to whether the California Matters "involved meaningfully distinct evidence." New York Respondents' Letter to the Court, March 13, 2019, *Commerce et al. v. New York et al.*, 18-966 at 2 n.1.

Respondents contend, for the reasons set forth above, that the evidence in this matter is meaningfully distinct, and that the Court should hear the Enumeration Clause claim based on the record upon which judgment for Respondents was entered. Moreover, the district court here issued an injunction barring the government from adding a citizenship question whether or not the requirements of the APA have been met. That relief—substantially broader than the relief issued in the New York Matter—should not be vacated without review of the case in which it was issued.

Respondents therefore respectfully request that the Court consolidate the California Matters with the New York Matter, and permit an expedited briefing schedule—limited to the issues of standing and the Enumeration Clause in the California Matters—as follows:

Opening Brief: **April 2, 2019**

Opposition Brief: **April 12, 2019**

Reply Brief: **April 18, 2019**

Respondents ask that the case be scheduled for argument on April 23, immediately after argument in *Commerce et al. v. New York et al.*, 18-966.

CONCLUSION

The petition for a writ of certiorari should be granted, this case should be consolidated with *Commerce et al. v. New York et al.*, 18-966, and Respondents should be granted the opportunity to brief and argue their claim consistent with Petitioners' second proposed alternative.

Respectfully submitted,

JOHN F. LIBBY
Counsel of Record
BARRY S. LANDSBERG
RONALD B. TUROVSKY
ANDREW C. CASE
ANA G. GUARDADO
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
JLibby@manatt.com
(310) 312-4000

DAVID L. SHAPIRO
Of Counsel to MANATT, PHELPS & PHILLIPS, LLP
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 491-2758

MARK ROSENBAUM
Public Counsel
610 South Ardmore Ave.
Los Angeles, CA 90005
(213) 385-2977

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
DORIAN L. SPENCE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600

CITY OF SAN JOSE
RICHARD DOYLE, City Attorney
NORA FRIMANN, Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
200 East Santa Clara Street, 16th Floor
San Jose, CA 95113
(408) 535-1900

Counsel for Respondents

March 20, 2019