



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

March 11, 2019

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Department of Commerce, et. al. v. New York, et al., No. 18-966

Dear Mr. Harris:

The petition for a writ of certiorari before judgment in the above-captioned case was granted on February 15, 2019, and oral argument is scheduled for April 23, 2019. After the Court granted the petition, the government requested stays in pending cases presenting the same issues. On February 22, however, a California district court declined to stay the litigation; and on March 6, following a bench trial, the court determined that the Secretary violated the APA in reinstating the citizenship question to the 2020 decennial census. *California v. Ross*, 2019 WL 1052434 (N.D. Cal.). Like the New York district court in the above-captioned case, the California district court found the Secretary's decision "arbitrary" and "capricious" and "not in accordance with law," 5 U.S.C. 706(2)(A). Unlike the New York court, however, the California court further found the Secretary's decision to have violated the Enumeration Clause, U.S. Const. Art. I, § 2, Cl. 3.

In light of that finding, only if the Court addresses respondents' Enumeration Clause claim can its decision definitively resolve whether the Secretary may reinstate a question about citizenship to the 2020 decennial census. In the government's view, that does not require any further action from the Court at this time. Respondents raised an Enumeration Clause claim, and it was litigated and decided below. It is fairly encompassed within the first question presented because all of respondents' challenges to agency action arise under the APA. See 5 U.S.C. 706(2)(B) (authorizing courts to set aside agency action that is "contrary to constitutional right, power, privilege, or immunity"). There is no jurisdictional bar to this Court's consideration of the issue. And although the Court ordinarily does not address alternative grounds for affirmance unless raised by respondents, it would be prudent to do so here in light of the California court's ruling. Indeed, the government addressed the Enumeration Clause claim in its opening brief (at pp. 53-54) in part precisely because of the possibility that "other district courts [could] attempt to rely on th[at] claim[] as a basis for enjoining reinstatement of the citizenship question." That possibility has now materialized.

As soon as the California district court enters its judgment, the government intends to file a notice of appeal, followed by a petition for a writ of certiorari before judgment. In light of the June 2019 deadline to finalize the decennial census questionnaire, we respectfully suggest that the most orderly path forward would be for this Court to hold the forthcoming California petition and address the Enumeration Clause claim in its disposition of this case. That would

avoid the prospect of having to address the Enumeration Clause claim in the California case in a highly expedited or emergency posture. In the alternative, if the Court has any concerns about addressing respondents' Enumeration Clause claim in this case, it should grant the government's petition in the California case and consolidate that case with this one for oral argument. Finally, although the Court need not take any action at this time, it may wish to direct respondents to address the Enumeration Clause claim in their briefs, due on April 1, 2019, to ensure an adversarial presentation of the issues beyond that already contained in the district-court briefing and in amicus briefs in this Court.*

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

* The same situation might arise with respect to an equal-protection claim; a district court in Maryland recently denied the government's stay request and concluded a bench trial to review a challenge to the Secretary's decision that included such a claim, and that court is likely to issue a ruling shortly. See *Kravitz v. Department of Commerce*, No. 18-cv-1041 (D. Md.); *La Union Del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md.). As with the Enumeration Clause claim, respondents here unsuccessfully raised an equal-protection claim, and the government addressed the claim in its opening brief. See U.S. Br. 53-54.

18-0966
UNITED STATES DEPARTMENT OF COMMERCE,
ET AL.
STATE OF NEW YORK, ET AL.

ERIC S. BAXTER
THE BECKET FUND FOR RELIGIOUS FUND
1200 NEW HAMPSHIRE AVE. NW,
STE. 700
WASHINGTON, DC 20036
202-349-7221
EBAXTER@BECKETLAW.ORG

RONALD A. CASS
CASS & ASSOCIATES, PC
10560 FOX FOREST DRIVE
GREAT FALLS, VA 22066-1743
703-438-7590
RONCASS@CASSASSOCIATES.NET

WILLIAM S. CONSOVOY
CONSOVOY MCCARTHY PARK PLLC
3033 WILSON BLVD.
SUITE 700
ARLINGTON, VA 22201
703-243-9423
WILL@CONSOVOYMCCARTHY.COM

IAN FEIN
NRDC
111 SUTTER STREET
21ST FLOOR
SAN FRANCISCO , CA 94104
415-875-6147
IFEIN@NRDC.ORG

JOHN A. FREEDMAN
ARNOLD & PORTER, LLP
555 TWELFTH STREET, N.W.
WASHINGTON, DC 20004
202-342-500
JOHN_FREEDMAN@APORTER.COM

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM LAW INSTITUTE
25 MASSACHUSETTS AVENUE, NW
SUITE 335
WASHINGTON, DC 20001
202-232-5590
CHAJEC@IRLI.ORG

DALE E. HO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 BROAD STREET
NEW YORK, NY 10004
212-549-2693
DALE.HO@ACLU.ORG

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVENUE, NW
SUITE 700-1A
WASHINGTON, DC 20036
202-355-9452
LJ@LARRYJOSEPH.COM

DOUGLAS N. LETTER
U.S. HOUSE OF REPRESENTATIVES
219 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6532
202-225-9700
DOUGLAS.LETTER@MAIL.HOUSE.GOV

MITHUN MANSINGHANI
SOLICITOR GENERAL OF OKLAHOMA
313 N.E. 21ST STREET
OKLAHOMA CITY , OK 73105
405-521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

WILLIAM J. OLSON
WILLIAM J. OLSON, P.C.
370 MAPLE AVENUE WEST
SUITE 4
VIENNA, VA 22180-5615
703-356-5070
WJO@MINDSPRING.COM

KAYLAN L. PHILLIPS
PUBLIC INTEREST LEGAL FOUNDATION
32 E. WASHINGTON STREET
SUITE 1675
INDIANAPOLIS, IN 46204
KPHILLIPS@PUBLICINTERESTLEGAL.ORG

ROBERT D. POPPER
JUDICIAL WATCH, INC.
425 THIRD STREET SW
WASHINGTON , DC 20024
202-646-5172
RPOPPER@JUDICIALWATCH.ORG

KAYLA TONEY
WINSTON & STRAWN LLP
1700 K STREET, NW
WASHINGTON, DC 20006
202-282-5226
KTONEY@WINSTON.COM

JASON B. TORCHINSKY
HOLTZMAN VOGEL JOSEFIK TORCHINSKY
PLLC
45 NORTH HILL DRIVE
SUITE 100
WARRENTON, VA 20186
540-341-8808
JTORCHINSKY@HVJT.LAW

BARBARA UNDERWOOD
NY STATE OFFICE OF THE ATTORNEY
GENERAL
28 LIBERTY STREET
23RD FLOOR
NEW YORK, NY 10005
BARBARA.UNDERWOOD@AG.NY.GOV