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June 26, 2019

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

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

Dear Mr. Harris:

This letter responds, on behalf of all respondents in this matter, to petitioners' extraordinary request that this Court decide a legal issue that was neither briefed nor argued in this appeal in order to preempt further proceedings in a case not before this Court. This Court should reject petitioners' request.

Yesterday, petitioners notified this Court of a recent order by the Fourth Circuit in *La Union del Pueblo Entero (LUPE) v. Ross*, No. 19-1382 (4th Cir.), remanding an equal protection claim to the district court for further fact-finding based on newly discovered evidence. Petitioners speculate that, on remand, the district court in *LUPE* may enter a new preliminary injunction on equal-protection grounds, and urge this Court to preemptively quash such an injunction by holding, in this appeal, "that the administrative record, the extra-record evidence, and the Hofeller files do not, individually or together, provide any basis for setting aside the Secretary's decision on the ground that it violates principles of equal protection."

This Court should deny this extraordinary request. In this Court, the parties here did not present briefing or oral argument about the equal-protection claim, aside from a single conclusory paragraph in petitioners' opening brief. See Pet. Br. 54. This Court routinely declines to address questions that the parties "have not briefed or argued" or that are mentioned only in "unelaborated assertion[s]." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 n.4 (2017). It makes even less sense for this Court to reach beyond the parties' arguments here based on petitioners' speculative concerns about

a potentially adverse decision in a separate case not before this Court—particularly when any such decision will issue only after additional proceedings that have not yet taken place.

No support for petitioners' request should be drawn from this Court's decision on March 15, 2019, to direct the parties to address the Enumeration Clause. That decision occurred with enough time for the parties to fully brief and argue the constitutional issue. And, as respondents noted in their letter of March 13, 2019, "there is substantial overlap between respondents' [Enumeration Clause] claim and their claims under the Administrative Procedure Act," both on the law and on the facts. See also Br. for Government Respondents 64-65. By contrast, the equal-protection claim is premised on distinct legal standards and factual issues that were not the basis of respondents' other arguments here.

We would appreciate your circulating this letter to Members of the Court.

Sincerely,

A handwritten signature in black ink that reads "Barbara D. Underwood". The signature is written in a cursive style with a long horizontal line extending to the right.

Barbara D. Underwood
Solicitor General

cc: See attached service list

SERVICE LIST: No. 18-966, *Department of Commerce et al. v. New York et al.*

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