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DIVISION OF APPEALS & OPINIONS

March 13, 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' letter dated March 11, 2019. That letter notes that the district court in *California v. Ross* and *San Jose v. Ross*, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019), recently issued a post-trial ruling holding that the Secretary of Commerce's decision to add a citizenship question to the decennial census was arbitrary and capricious, not in accordance with law, and in violation of the Constitution's Enumeration Clause, and proposes various possible courses of action in relation to that holding.

Respondents take no position at this time on petitioners' anticipated petition for certiorari before judgment in *California v. Ross* and *San Jose v. Ross*—a petition that is yet to be filed, in a case to which respondents are not parties.

As for petitioners' suggestion that the Enumeration Clause be addressed in this case as a possible alternative ground for affirmance, we agree that this Court could affirm the district court's judgment below by sustaining respondents' Enumeration Clause claim. "[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977). Here, although the district court dismissed the Enumeration Clause claim before trial under Federal Rule of Civil Procedure 12(b)(6), the parties briefed the legal standard applicable to the constitutional claim. See Memorandum of Law in Support of Defendants' Motion to Dismiss at 30-35, Dkt. No. 155, No. 18-02921 (S.D.N.Y. May

25, 2018); Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at 32-35, Dkt. No. 182, No. 18-02921 (June 13, 2018). Moreover, there is substantial overlap between respondents’ constitutional claim and their claims under the Administrative Procedure Act (APA): the APA claims are in part predicated on the alleged constitutional violation, *see* Second Amended Complaint ¶ 185, Dkt. No. 214, No. 18-02921 (S.D.N.Y. July 25, 2018); Complaint ¶¶ 202-207, 210, Dkt. No. 18-05025 (S.D.N.Y. June 6, 2018); and, if respondents had been permitted to proceed to trial on their constitutional claim, they would have relied on evidence similar to that supporting their APA claim, including petitioners’ “stark and sudden change in policy, the long-acknowledged deterrent effect on participation rates, the heightened fears of immigrants during this particular cultural moment, [] the total failure of the Census Bureau to follow their own testing protocols for new questions,” and the absence of evidence that the citizenship question was necessary to obtain accurate data for enforcement actions under the Voting Rights Act. Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at 33, Dkt. No. 182, No. 18-02921 (June 13, 2018).¹

As a result, the record is sufficiently developed in this case to allow this Court to address the merits of respondents’ Enumeration Clause claim. And because the district court here both vacated and enjoined the Secretary’s decision, rather than simply remanding to the Secretary, accepting respondents’ constitutional claim as an alternative ground for affirmance would not require this Court to “alter the judgment below.” *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 364 (1994).

We also note that the constitutional issue was not adequately presented by the petition for certiorari and was addressed in the most cursory fashion in petitioners’ opening brief. If the Court wishes to address this issue in this appeal, respondents respectfully request that the Court grant a modest extension of time and space for respondents’ briefs. We would propose extending respondents’ briefing time from April 1 to April 5 and expanding respondents’ briefs by 2,000 words. With that extension, this Court could preserve the April 23 argument.

Petitioners suggest in the alternative that, if this Court were to grant the government’s forthcoming petition in the *California* and *San Jose* cases, it should “consolidate that case with this one for oral argument.” Respondents take no position on this alternative proposal, so long as any consolidation does not subtract from the 40 minutes of argument time requested by respondents in their motion for enlargement of time and divided argument.

¹ The above description is limited to the Enumeration Clause claim that respondents in this proceeding presented below and intend to present to this Court. We take no position on whether the constitutional claim here is similar or not to the Enumeration Clause claim presented in the *California* and *San Jose* cases, or on whether those separate cases involved meaningfully distinct evidence.

Sincerely,

A handwritten signature in blue ink that reads "Barbara D. Underwood". The signature is written in a cursive style with a long horizontal flourish 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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