No. 18-1214

IN THE
Supreme Court of the United States

WILBUR ROSS, ET AL., PETITIONERS,

V.

STATE OF CALIFORNIA, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO EXPEDITE

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Respondents the State of California, the County of Los Angeles, the Cities of Los Angeles, Fremont, Long Beach, Oakland, and Stockton, and the Los Angeles Unified School District hereby move, pursuant to Supreme Court Rule 21, for expedited consideration of this motion and of the petition for a writ of certiorari before judgment filed by the United States in this case. Under the unusual circumstances of this case, respondents respectfully suggest that the Court should consider this motion at its March 22 Conference. Respondents do not agree with petitioners that the Court should hold this petition pending its disposition of *Department of Commerce v. New York*, No. 18-966, in which the Court recently ordered the parties to address whether the addition of a citizenship question to the 2020 census would violate the Enumeration Clause. Because of differences in the records and the procedural histories of this case and *New York*, and the exigencies associated with both cases, respondents suggest that the Court construe this motion as a response to the petition in this case, consider and grant the petition at the March 22 or March 29 Conference, direct expedited briefing focused on the Enumeration Clause issue, and set this case for argument in conjunction with *New York* on April 23. Alternatively, in light of petitioners' request for the Court to hold this case pending its consideration of the *New York* case, absent further direction respondents will file a response to the petition by April 5.

1. The Constitution requires an "actual Enumeration" of the population of the United States every decade, U.S. Const. art. I, § 2, cl. 3, and Congress has delegated responsibility for that decennial census to the Secretary of the Department of

Commerce, 13 U.S.C. § 141(a). The results of the decennial census directly affect the apportionment of federal and state representatives, presidential electors, and federal funding. *See Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996). This case arises out of the same agency action as the *New York* case: the decision by the Secretary of Commerce to add a citizenship question to the 2020 Census for the asserted reason that it is "necessary to provide complete and accurate data in response to [a] DOJ request." Pet. App. 200a. The record establishes that this was a wholly pretextual explanation for the decision. *See, e.g.*, *id.* at 4a, 149a-150a. And empirical evidence—including studies by the Census Bureau—indicates that the presence of this question would be not only unjustified but also affirmatively harmful, substantially depressing responses from non-citizens and from citizens with relatives who are non-citizens. *See id.* at 3a-4a, 12a-20a. That differential undercount would harm California more than any other State, because California has more non-citizen residents (over 5 million) and more foreign-born residents (over 10 million) than any other State. Dkt. 1 at 3.[1] It would imperil tens of millions of dollars of federal funding and create a grave risk that California would improperly lose a congressional seat (and thus a presidential elector as well). *See* Pet. App. 47a-59a.

Respondents filed this suit on March 26, 2018, the same day that the Secretary announced his decision. Dkt. 1. The complaint alleged that, under the particular

[1] Citations to "Dkt." are to the electronic docket in *California v. Ross*, No. 18-cv-1865 (N.D. Cal.)

circumstances of the case, the decision violated the Enumeration Clause and the Administrative Procedure Act. As in the *New York* litigation, the district court authorized discovery going beyond the administrative record. Dkt. 76. Unlike in the *New York* litigation, however, the district court in the California case denied petitioners' motion to dismiss with respect to the Enumeration Clause claim. Dkt. 75 at 16-20, 25-29. The parties thus developed a record specific to that claim, and the district court considered evidence and argument regarding that claim at a bench trial in January and February 2019.

The district court issued its findings of fact and conclusions of law on March 6. Pet. App. 1a. Like the *New York* district court, it held that, on the record before the court, the Secretary's decision to add a citizenship question to the 2020 census was arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act. *See id.* at 2a-5a, 143a-161a. Unlike the *New York* district court, the court in this case also conducted a fact-intensive analysis of the Enumeration Clause claim. *See id.* at 165a-169a. The court concluded that it was unconstitutional for the Secretary to add a citizenship question to this specific census, because under the particular circumstances shown by the record before the court the "question affirmatively interferes with the actual enumeration and fulfills no reasonable government purpose." *Id.* at 5a; *see id.* at 165a-169a.

On March 11, petitioners submitted a letter to this Court in the *New York* proceeding announcing their intent to file a petition for certiorari before judgment in this case. They asked the Court either "to hold the forthcoming California

petition" pending its disposition of *New York* or to "grant the government's petition in the California case and consolidate that case with [*New York*] for oral argument." 18-966 U.S. Letter (Mar. 11, 2019).

The district court entered its final judgment on March 13. Pet. App. 173a. The judgment vacates the Secretary's decision and, in accordance with the court's ruling in favor of respondents on the Enumeration Clause claim, permanently enjoins petitioners "from including the citizenship question on the 2020 Census, regardless of any technical compliance with the Administrative Procedure Act." *Id.* at 175a. Petitioners filed a notice of appeal the same day. *Id.* at 176a. They filed their petition for certiorari before judgment on March 18.

2. Although the district court's judgment is correct, under the exceptional circumstances of this case, respondents agree that it is appropriate for the Court to grant certiorari before judgment. The 2020 decennial census is fast approaching, and the United States has represented that "the census forms must be finalized for printing by the end of June 2019." 18-966 Mot. to Expedite 5.[2] Moreover, the Court has already granted review in *New York* on questions that overlap with the issues raised by the pending petition. The Court has previously "reviewed cases before judgment below when a similar or identical question of constitutional or other

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[2] More precisely, the Chief Scientist and Associate Director for Research and Methodology at the Census Bureau testified in this case that "[w]ith existing resources, June 30th of 2019 is the content lock-down date. With exceptional effort and additional resources, October 31st, 2019 is the final date." Dkt. 175-2 at 88.

importance was before the Court in another case." Shapiro et al., *Supreme Court Practice*, § 4.20 (10th ed. 2013); *see, e.g.*, *United States v. Booker*, 543 U.S. 220, 229 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 259-260 (2003).

3. On March 15, this Court directed the parties to the *New York* case to brief and argue the Enumeration Clause issue. Petitioners contend that the Court should hold the petition they have filed in this case, resolve in the *New York* matter whether the Secretary violated the Enumeration Clause or the Administrative Procedure Act, and then dispose of this case based on the decision in *New York*. The Court may of course consider the Enumeration Clause claim presented by the plaintiffs in *New York* based on the record developed in that case. *See* 18-966 Resp. Letter (Mar. 13, 2019). But under the circumstances here, it would be both irregular and unwise to defer consideration of the present case on the premise that the Court will be able to "definitively resolv[e]" (18-966 U.S. Letter (Mar. 11, 2019)) the constitutionality of the Secretary's decision in *New York*.

The district court in *New York* dismissed the Enumeration Clause claim in that case at the pleading stage, based on a categorical conclusion that historical practice forecloses any such challenge to a citizenship question on any census. 18-966 Pet. App. 408a-424a. As a result, the parties did not conduct discovery specific to the Enumeration Clause issue, the district court did not consider evidence or argument specific to that issue at its bench trial, and the district court's January 2019 findings of fact and conclusions of law did not specifically address the issue. Although none of the parties in *New York* raised any question regarding the

Enumeration Clause at the petition stage, petitioners asked this Court to address that issue in their brief on the merits (18-966 U.S. Br. 53-54) and their March 11 letter. This Court ordinarily "disapprove[s] the practice of smuggling additional questions into a case after we grant certiorari," *Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion of Jackson, J.), both as a matter of fairness and "to maintain the integrity of the process of certiorari," *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 159 (1999) (Stevens, J., concurring in part and dissenting in part). In the unusual circumstances here, however, the Court understandably deviated from normal procedures to the extent of allowing the parties in *New York* to brief and argue whether that constitutional claim might provide an alternative ground for affirming the *New York* judgment. *Cf. Taylor*, 504 U.S. at 646 ("'unusual circumstances'" might warrant consideration of questions not presented in the petition).

While the Court may appropriately consider the arguments of the New York parties about whether the record in that case supports affirmance on an alternative Enumeration Clause ground, treating that case as the exclusive vehicle for resolving the constitutionality of the Secretary's decision would interfere with the Court's ability to effectively and finally resolve questions of great national importance in the short time allowed by the need to permit orderly conduct of the impending census. This Court generally prefers not to decide issues that were never addressed or resolved by the courts below. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is 'a court of final review and not first view.'"). Although the

New York district court did address the Enumeration Clause issue at the pleading stage, *see* 18-966 Pet. App. 408a-424a, it ruled that the claim was categorically unavailable as a matter of law. The premise of petitioners' argument that this Court should reach the Enumeration Clause issue in *New York*, however, is that it might present an "alternative ground[] for affirmance." 18-966 U.S. Br. 53; *see* 18-966 U.S. Letter (Mar. 11, 2019). To affirm on that alternative ground, this Court would have to disagree with the legal ruling of the *New York* district court, determine what legal standard applies to the Enumeration Clause claim, and then apply that standard to a record that was developed after the district court erroneously dismissed that claim as a matter of law. That would put the Court in the undesirable position of conducting a fact-intensive analysis in the first instance, without "the benefit of the lower court's refinement and resolution of [the] issues." Shapiro et al., *Supreme Court Practice*, § 6.26(a).

Moreover, holding the petition in this case would create an unnecessary risk of disorder and confusion in the final days of the Term. There are differences in the records and factual findings in the two cases. For example, the respective plaintiffs relied on different experts to estimate the effect of a citizenship question on each State's counted population in 2020 and the resulting effect on congressional apportionment—critical questions for purposes of the Enumeration Clause analysis—and those experts used different undercount "scenarios" to describe the range of possible outcomes. *Compare* Pet. App. 57a-59a, 69a-70a (California court's findings based on Dr. Fraga's analysis), *with* 18-966 Pet. App. 173a-178a (*New York*

court's findings based Dr. Warshaw's analysis). If this Court considers the Enumeration Clause claim in *New York* and resolves it on a basis that involves consideration of the record and expert testimony in that case, its decision might—but would not necessarily—control the resolution of the separate Enumeration Clause claim in this case. Before the Court could summarily reverse or affirm the judgment in this case, it would need to apply its *New York* decision to the different record and factual findings developed below. And because there would not be time in this case to allow a lower court to undertake that analysis in the first instance, deferring consideration of this petition could require the Court to conduct the analysis for itself in a hurried fashion at the very end of the Term, likely without any time for supplemental briefing. Similarly, if the Court ultimately decides not to address the Enumeration Clause issue in its *New York* decision, it would have scarcely any time to consider the issue anew in this case before the deadline petitioners have set for the printing of the census forms.[3]

Petitioners have in effect suggested that the Court use the *New York* proceedings to review the district court's judgment in this case. *See* 18-966 U.S. Br. 54 ("The government therefore addresses the constitutional claims in the event

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[3] Similar problems could arise with respect to the Court's analysis of its jurisdiction under Article III. The standing arguments that petitioners have raised in their opening brief in the *New York* case are legal in nature and would apparently apply equally to both cases. *See* 18-966 U.S. Br. 17-21. But if this Court's independent analysis of jurisdiction were to turn on specific evidence of injury, the record in the present case is different and in some respects more substantial. *Cf.* 18-966 Pet. App. 201a-203a (recognizing that California is more likely to lose a congressional seat than any other State).

. . . other district courts attempt to rely on those claims as a basis for enjoining reinstatement of the citizenship question"). But the record in the *New York* case does not include the testimony and other record evidence that the California district court considered before arriving at that judgment; or the factual findings that court made based on that record; or the arguments of the plaintiffs who successfully litigated the claim through trial and to final judgment. There is no need to adopt any such anomalous and unsatisfactory approach, especially when the Court is addressing a matter of great national importance. The present case is now in the court of appeals, petitioners have already filed their petition for certiorari before judgment, and all parties are willing to brief and argue the case on the necessary expedited basis. *See* Pet. 11 (alternative argument that the Court "should grant this petition and order expedited briefing so that this case can be argued either in tandem with No. 18-966 or during a special sitting in May 2019").

For these reasons, respondents request that the Court expedite consideration of the petition in this case, construe this motion as a response to the petition under Rules 12.6 and 15.3, grant the petition at the March 22 or March 29 Conference, and set the case for argument in conjunction with the *New York* case on April 23. Respondents are prepared to file a brief on the merits by any deadline set by the Court, and respectfully propose that the parties could file simultaneous briefs on Friday, April 12. Respondents expect that the briefing would focus on the Enumeration Clause issue and any other legal or factual issues distinct to the California case. But however the Court might direct the parties to handle briefing

and argument, the better course would be not to hold this case but to grant plenary review. Doing so would preserve the opportunity for the Court to consider and rule on the Enumeration Clause question in the context of a proceeding where that question was adequately litigated and decided below, based on an appropriately developed record.

4. If the Court instead accepts petitioners' proposal to hold this case pending its disposition of the *New York* case, then the response to the petition will presumably be respondents' only opportunity to argue directly before this Court why the judgment below should be affirmed.[4] In light of that possibility, if the Court has not acted on this motion or the petition by April 5, respondents intend to file a response to the petition addressing why the decision below is correct on the merits, particularly with respect to the Enumeration Clause claim.[5] Of course, respondents will file that brief at an earlier date if instructed to do so by the Court.

5. Respondents also request expedited consideration of this motion. Because of the unusual circumstances of this case, respondents respectfully suggest that the Court should consider this motion at the March 22 Conference.

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[4] The State of California also intends to file a separate brief as *amicus curiae* in support of the respondents in *New York* by April 1.

[5] Should the Court grant the petition after April 5, it could treat that response to the petition as respondents' brief on the merits, and allow petitioners to address the arguments raised in that brief in a short supplemental brief or in their reply brief in the *New York* case.

6. Petitioners have authorized us to include the following statement of their position: "The government does not believe expedition is necessary now that the Court has added the enumeration question in the *New York* case, but the government has no objection to expedited consideration of the petition if the Court wishes." We are also authorized to inform the Court that respondents the City of San Jose and the Black Alliance for Just Immigration do not object to this motion.

CONCLUSION

Respondents respectfully request that the Court expedite consideration of this motion, consider the petition for a writ of certiorari before judgment at either the March 22 or March 29 Conference, construe this motion as a response to that petition, grant the petition, and set this case for argument in conjunction with the *New York* case on April 23.

Respectfully submitted,

March 19, 2019

/s/ Michael J. Mongan

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