UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1382

LA UNIÓN DEL PUEBLO ENTERO, *et al.*

Plaintiff-Appellees

v.

WILBUR L. ROSS,

sued in his official capacity, as U.S. Secretary of Commerce, *et al.*

Defendant-Appellants.

PLAINTIFF-APPELLEES' RESPONSE TO DEFENDANTS' MOTION TO PLACE THE CONSOLIDATED APPEALS IN ABEYANCE

Plaintiffs oppose Defendants' untimely request to hold the consolidated appeals in abeyance. Defendants' request is a transparent attempt to delay a hearing on Plaintiffs' appeal of the district court's denial of their Fifth Amendment claim, in the hope that despite the merits of the claim, it will simply be too late to provide injunctive relief in time for the 2020 Census. The Supreme Court's pending opinion in *Department of Commerce, et al., v. New York, et al.*

(*New York*), No. 18-966, on whether the addition of the citizenship question to the 2020 decennial census violated the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA") or the Enumeration Clause of the U.S Constitution, art. I, § 2, cl. 3, will not be dispositive of Plaintiffs' Fifth Amendment claim raised by this appeal. While it is possible that the Supreme Court's ruling will contain its views of the factual findings in *New York*, this Court is perfectly suited to take the Supreme Court's views into account if and where they are pertinent to Plaintiffs' Fifth Amendment claim. There is no need to delay briefing on that claim, and moving forward will cause no prejudice to Defendants. However, because of Defendants' intention to print the census forms in time for use in 2020, it *would* be prejudicial to Plaintiffs to delay briefing on their Fifth Amendment claim until after the issuance of the Supreme Court's opinion.

In opposing Plaintiffs' request to expedite briefing, Defendants state that they have no objection to Plaintiffs filing their opening brief solely on their Fifth Amendment claim before the end of June. Response in Opposition to Plaintiffs' Motion to Expedite (and Request to Hold Appeals in Abeyance) ("Defs.' Opp'n") at 9. Keeping Defendants' suggestion in mind, and under the unusual circumstances of this case, Plaintiffs agree that their briefing could commence in June. However, Plaintiffs do not agree that the government's response needs to be delayed until after the Supreme Court's opinion issues. Plaintiffs therefore

respectfully suggest the following schedule for briefing on the Fifth Amendment claim only:

June 5, 2019 – Parties file the joint appendix

June 5, 2019 – Plaintiffs file their opening brief

June 19, 2019 – Defendants file their response

June 26, 2019 – Plaintiffs file their reply, if any

Briefing on Defendants' appeal of the district court's ruling based on the APA and Enumeration Clause should be expedited following the issuance of the Supreme Court's ruling on those two issues in *New York*. Plaintiffs do not object to Defendants filing their opening brief on those claims two weeks after issuance of that opinion, as requested in their Response to Plaintiffs' Amended Motion to Expedite. Defs.' Opp'n at 9.

ARGUMENT

Defendants urge this Court to hold these appeals in abeyance and defer the commencement of all briefing until the issuance of the Supreme Court's ruling in *New York*, which is expected by the end of June. Defs.' Opp'n at 1. At the same time, Defendants acknowledge that the government intends to finalize the 2020 Census questionnaire by the end of June. *Id*. at 3. Defendants make this request for three reasons. First, Defendants believe that the Supreme Court's decision is "virtually certain to resolve the issues presented here[.]" *Id.* at 6. Second,

Defendants question Plaintiffs' timing of their request to expedite. *Id.* at 8. Finally, without any supporting authority, Defendants inject a "likelihood of success" requirement into this Court's consideration of the scheduling of this appeal. *Id.* at 9.

Under review in *New York* before the Supreme Court are the questions of whether the Secretary of Commerce's directive to add a citizenship question to the decennial Census violated the APA or the Enumeration Clause. Plaintiffs do not concede that any opinion that issues from the Supreme Court would necessarily be dispositive, even of those two claims. The record in *New York* does not include the same testimony and other record evidence the Maryland district court considered prior to entering its findings and conclusions. However, assuming for purposes of the instant motion only that the Supreme Court rules that the addition of the citizenship question violated neither the APA nor the Enumeration Clause, and that its holding precludes any other outcome for those claims in this case, such a holding would not automatically dictate the outcome of Plaintiffs' Fifth Amendment claim.

The "crucial, likely dispositive guidance" anticipated by Defendants, Defs.' Opp'n at 7, under those circumstances is highly unlikely to materialize, given what is required to prove the APA and Enumeration Clause claims, and how distinct the legal standards are from those controlling claims under the Fifth Amendment. For

example, the Supreme Court could adopt Defendants' argument that the content of the census questionnaire is committed to agency discretion by law and is therefore not subject to judicial review under the APA. *See* Br. for Pet'r, *Dep't of Commerce v. New York*, No. 18-966 (U.S. Feb. 21, 2019), at 21-28. Under those circumstances, this Court could nonetheless review a claim that the Defendants have violated constitutional restrictions. *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981). For example, this Court could find that the addition of the question rested on "[political] considerations that Congress could not have intended to make relevant[.]" *Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985) (citations and quotation marks omitted); *see also Kravitz v. Dep't of Commerce*, 336 F. Supp. 3d 545, 569 (D. Md. 2018) ("[T]hat is exactly what Plaintiffs allege herein—that the Secretary's action was not based upon a desire to obtain either an accurate census headcount or citizenship data necessary to better enforce the [Voting Rights Act] but rather 'a partisan act aimed at advancing the Trump Administration's anti-immigration political agenda.'") (citations omitted). Similarly, this Court could find that despite a Supreme Court ruling that the case is unreviewable under the APA, it is nonetheless obliged to review Plaintiffs' constitutional Fifth Amendment claim.

The Supreme Court could also base a ruling for Defendants on the "deferential" and "narrow" standard of review under the APA. *National Ass'n of*

Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Under this narrow and deferential standard, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action." *FCC*, 556 U.S. at 513. In contrast, because "racial discrimination is not just another competing consideration," a court must do much more than review the proffered rationale for "arbitrariness or irrationality." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Judicial deference of the kind accorded to governmental decision-making under the APA is not warranted when this Court reviews whether the record supports a conclusion that Defendants engaged in intentional discrimination. *Id*. Even if this Court reviews the district court's denial of Plaintiffs' Fifth Amendment claim under a clearly erroneous standard, deference of the kind afforded under the APA is unwarranted because a finding that Defendants' justifications are rational "is a far cry from a finding that a particular law would have been enacted without considerations of race." *North Carolina State Conference of NAACP v. McCrory (NAACP)*, 831 F.3d 204, 234 (4th Cir. 2016) (citing *Arlington Heights*, 429 U.S. at 265-66, (explaining that a court reviewing an intentional discrimination claim must do much more than review for "arbitrariness or irrationality")).

For the same reasons, a finding that there was no violation of the Enumeration Clause will not preclude review of Plaintiffs' Fifth Amendment claim. Compliance with the Enumeration Clause requires that the Secretary's conduct of the 2020 decennial Census "need bear only a reasonable relationship to the accomplishment of an actual enumeration[.]" *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). Such a finding would not preclude a conclusion that after an examination of the *Arlington Heights* factors, most of which are not relevant to an Enumeration Clause inquiry, the decision to include a citizenship question on the decennial Census was born out of improper discriminatory motives. Indeed, discrimination need not be the sole nor even the primary motive for the addition of the question in order to find for Plaintiffs. *NAACP*, 831 F.3d at 220 (citing *Arlington Heights*, 429 U.S. at 265-66).

Finally, Defendants' suggestion that the Supreme Court may expressly resolve the Fifth Amendment claim is far-fetched at best. A one-paragraph reference to intentional discrimination in Defendants' Supreme Court briefing in *New York*, *see* Br. for Pet'r, *Dep't of Commerce v. New York*, No. 18-966 (U.S. Mar. 6, 2019) at 54, is not likely to cause the Supreme Court to consider the issue, particularly given the heightened scrutiny and absence of deference inherent in such an inquiry. Had the Supreme Court wished to resolve this issue, it would have specified additional questions to be briefed and argued, as it did when it

requested briefing of the Enumeration Clause claim. Docket Order, *Dep't of Commerce v. New York*, No. 18-966 (U.S. Mar. 15, 2019) (order directing parties to brief Enumeration Clause issue); *see also Arizonans for Official English v. Arizona*, 517 U.S. 1102 (1996) (order directing parties to brief additional questions on standing); *Vermont Agency of Natural Res. v. United States*, 528 U.S. 1015 (1999) (order issued ten days before oral argument directing parties to file supplemental briefs addressing standing question).[1]

Defendants' second reason for urging denial of Plaintiffs' Motion to Expedite and for holding the appeals in abeyance is that Plaintiffs did not immediately file their Motion to Expedite briefing, and did not attempt to bypass this Court to "ask the Supreme Court to consider the issue." Defs.' Opp'n at 8. Defendants insist that the Census Bureau must send the final questionnaire to the printer by the end of June, and thus Plaintiffs have ensured that "briefing in this Court would not be completed before the deadline." *Id.* at 9.

Defendants' argument is a red herring that simply underscores the prejudice to Plaintiffs and the lack of prejudice to Defendants, who concede that they will need just two weeks following the Supreme Court's decision to respond to Plaintiffs' brief. The tactical advantage Defendants seek to gain by delay has no

[1] Supreme Court Rule 14(1)(a), governing the content of a Petition for Writ of Certiorari, counsels that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."

relevance to the merits of this claim. Moreover, the June 2019 deadline for printing of the Census forms may not be set in stone. Although the government represents in their briefing that the end of June is the absolute deadline for a decision, there was evidence produced in discovery suggesting that with additional resources the Census Bureau could accommodate a later decision. Included in Plaintiffs' deposition designations entered at trial is the deposition testimony of Dr. John Abowd, Chief Scientist and Associate Director of Research and Methodology at the U.S. Census Bureau, and Defendants' witness under Fed. R. Civ. P. 30(b)(6). Decl. of Denise Hulett in Support of Plaintiff-Appellees' Response to Defendants' Motion to Place the Consolidated Appeals in Abeyance ("Hulett Decl."), Ex. 1 (ECF No. 103-9, *Kravitz v. Dep't of Commerce*, No. 18-2041 (D. Md.)). In response to a question regarding when the Census Bureau would need to finalize the census forms in order to guarantee implementation of the 2020 Census without a citizenship question, Dr. Abowd testified as follows:

> So I did check. I actually asked the acting director to give me an answer that is the agency's answer. With existing resources, June 30 of 2019 is the content lock-down date. With exceptional effort and additional resources, October 31st, 2019 is the final date. Any date after that would require major redesigns in the 2020 Census, and some might require congressional authorization to change the census date.

Hulett Decl., Ex. 1 at 436:13-437:8.

Therefore, if this Court entered an order enjoining the addition of the citizenship question as late as October of 2019, the Census Bureau would be able to follow that instruction, provided that the resources were allocated to do so. In any case, given the government's intent to send the Census forms to the printer at the end of June, further delay is unwarranted, could cause irreparable harm to Plaintiffs, and could be costly to the government.

Finally, Defendants argue without citation that the Motion to Expedite should be denied because the district court denied Plaintiffs' Fifth Amendment claim, and that denial will be reviewed for clear error. In making their third point, Defendants have accomplished little more than to describe their view of the procedural stance of this case. However, in doing so, Defendants concede that a Supreme Court ruling in favor of the government will nonetheless necessitate a ruling from this Court on Plaintiffs' Fifth Amendment claim. Defs.' Opp'n at 9.

Defendants subsequently suggest an alternative to their preferred outcome (holding both appeals in abeyance), stating that the "government also does not object to Plaintiffs' filing an opening brief on their cross appeal before the end of June, as long as the government's response brief is not due until at least two weeks after the Supreme Court's decision." *Id.* Plaintiffs respectfully disagree with the condition imposed by Defendants, as again, it gives the government unfair advantage and unnecessarily delays this Court's consideration of Plaintiffs' Fifth

Amendment claim. For reasons set forth above and in Plaintiffs' Motion to Expedite, this Court can fully consider Plaintiffs' Fifth Amendment claim without awaiting the results of the Supreme Court's review, which although it will involve some of the same facts, will be based on different legal claims requiring a far narrower level of scrutiny than the Fifth Amendment claim presented by Plaintiffs' cross-appeal.

CONCLUSION

There is no need to adopt a scheduling approach that would preclude meaningful review of Plaintiffs' Equal Protection claim, especially when the Court is addressing a matter of great national importance. The U.S. Census is taken only once every ten years, and profoundly affects political representation and the distribution of federal funding for a decade. Whether or not the government engaged in intentional discrimination in the conduct of the Census is a question that should be resolved prior to the launch of the 2020 Census. In response to Defendants' alternative suggestion, Plaintiffs therefore respectfully request the briefing schedule set forth in the introductory section of this response.

Dated: May 22, 2019

By /s/ Denise Hulett

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**Admitted to the Fourth Circuit Court of Appeals*
*** Admission application to the Fourth Circuit Court of Appeals forthcoming*