

No. 18-1214

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**In the Supreme Court of the United States**

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WILBUR L. ROSS, SECRETARY OF COMMERCE, ET AL.,  
PETITIONERS

*v.*

STATE OF CALIFORNIA, ET AL.

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

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**PETITION FOR A WRIT OF CERTIORARI  
BEFORE JUDGMENT**

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(Additional Caption Listed on Inside Cover)

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WILBUR L. ROSS, SECRETARY OF COMMERCE, ET AL.,  
PETITIONERS

*v.*

CITY OF SAN JOSE, ET AL.

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**QUESTION PRESENTED**

Whether the district court erred in enjoining the Secretary of Commerce from reinstating a citizenship question to the 2020 decennial census.

## **PARTIES TO THE PROCEEDING**

Petitioners (defendants in the district court) are Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce; the United States Department of Commerce; the United States Census Bureau, an agency within the United States Department of Commerce; and Steven Dillingham, in his official capacity as the Director of the United States Census Bureau, substituted for Ron S. Jarmin, former Acting Director of the United States Census Bureau, under Rule 35.3 of the Rules of this Court.

Respondents are the State of California; the County of Los Angeles; the City of Los Angeles; the City of Fremont; the City of Long Beach; the City of Oakland; and the City of Stockton (collectively, plaintiffs in the district court in No. 18-cv-1865). Respondents also include the Los Angeles Unified School District (intervening plaintiff in the district court in No. 18-cv-1865).

Respondents further include the City of San Jose and the Black Alliance for Just Immigration (collectively, plaintiffs in the district court in No. 18-cv-2279).



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The Solicitor General, on behalf of the Secretary of Commerce, the United States Department of Commerce, the United States Census Bureau, and the Director of the United States Census Bureau, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit.

**OPINION BELOW**

The opinion and order of the district court (Pet. App. 1a-172a) is not yet published in the Federal Supplement but is available at 2019 WL 1052434.

### JURISDICTION

The opinion of the district court was entered on March 6, 2019, and its judgment was entered on March 13, 2019 (Pet. App. 173a-175a). The government filed a notice of appeal on March 13, 2019 (Pet. App. 176a-177a). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted at Pet. App. 178a-183a.

### STATEMENT

1. The Constitution requires that an “actual Enumeration” of the population be conducted every ten years to apportion Representatives in Congress among the States, and vests Congress with the authority to conduct that census “in such Manner as they shall by Law direct.” U.S. Const. Art. I, § 2, Cl. 3. The Census Act, 13 U.S.C. 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census “in such form and content as he may determine,” and “authorize[s] [him] to obtain such other census information as necessary.” 13 U.S.C. 141(a).

Exercising that delegated authority, the Secretary of Commerce, Wilbur L. Ross, Jr., determined that the 2020 decennial census questionnaire should include a question requesting citizenship information. Pet. App. 186a-201a. Questions about citizenship or country of birth (or both) have been asked of at least a sample of the population on all but one decennial census from 1820 to 2000, and have been (and continue to be) asked on the annual American Community Survey (ACS)

questionnaire, sent to approximately one in 38 households, since the ACS's inception in 2005. *New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 776-779 (S.D.N.Y. 2018), cert. before judgment granted, No. 18-966 (oral arg. scheduled for Apr. 23, 2019). The decennial census includes many demographic questions, including about sex, Hispanic origin, race, and relationship status. See *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 524 (S.D.N.Y. 2019), cert. before judgment granted, No. 18-966 (oral arg. scheduled for Apr. 23, 2019). Individuals who receive the census questionnaire are required by law to answer fully and truthfully all of the questions. 13 U.S.C. 221.

2. The Secretary explained the reasons for reinstating the citizenship question to the decennial census in a March 26, 2018 memorandum. Pet. App. 186a-201a. The Secretary's decision and memorandum responded to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). *Id.* at 202a-207a. The Gary Letter stated that citizenship data is "critical" to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. V 2017), and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data." Pet. App. 203a; see *id.* at 205a-206a. DOJ thus "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." *Id.* at 207a.

After receiving DOJ's formal request, the Secretary "initiated a comprehensive review process led by the Census Bureau" that included "legal, program, and policy considerations," Pet. App. 186a-187a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau in-

initially presented three alternatives: do nothing; reinstate the citizenship question to the decennial census; or rely solely on federal administrative records to estimate citizenship data in lieu of reinstating the citizenship question. *Id.* at 189a. After reviewing those alternatives, the Secretary asked the Census Bureau to consider, and he ultimately adopted, a fourth option: reinstating a citizenship question to the decennial census while also using federal and state administrative records (*i.e.*, a combination of the second and third options). *Id.* at 193a. The Secretary concluded that this option “will provide DOJ with the most complete and accurate CVAP data in response to its request.” *Id.* at 194a.

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for noncitizens. Pet. App. 190a-192a, 194a-197a. While the Secretary agreed that a “significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up \* \* \* operations,” *id.* at 190a, he concluded from his discussions with Department of Commerce personnel, Census Bureau leadership, and outside parties that, to the best of everyone’s knowledge, there was an insufficient empirical basis to conclude that reinstating a citizenship question would, in fact, materially affect response rates. *Id.* at 190a-192a (reviewing the available data); *id.* at 195a. The Secretary further concluded that “even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns.” *Id.* at 200a.

3. a. Respondents (plaintiffs below) are governmental entities and a non-profit organization. The operative

complaints allege that the Secretary's action is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; violates the Enumeration and Apportionment Clauses, U.S. Const. Art. I, § 2, Cl. 3 and Amend. XIV, § 2; and violates Sections 6(c) and 141(f) of the Census Act, 13 U.S.C. 6(c) and 141(f). See 18-cv-1865 Am. Compl. ¶¶ 47-59; 18-cv-1865 Compl. in Intervention ¶¶ 37-49; 18-cv-2279 Compl. ¶¶ 90-117. (Unlike plaintiffs in the *New York* cases, see 351 F. Supp. 3d at 664-671, respondents did not bring an equal-protection claim.) All of respondents' claims rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, some households associated with noncitizens may be deterred from doing so (and those households will disproportionately contain racial minorities).

b. After denying the government's motions to dismiss the complaints, see 18-cv-1865 D. Ct. Doc. 75 (Aug. 17, 2018), and its motions for summary judgment, see 18-cv-1865 D. Ct. Doc. 114 (Dec. 14, 2018), the district court held a bench trial in January and February 2019.

On February 15, 2019 (during closing arguments here), this Court granted the government's petition for a writ of certiorari before judgment in *Department of Commerce v. New York*, No. 18-966, to review materially identical claims challenging the Secretary's decision to reinstate the citizenship question to the 2020 decennial census. Oral argument in No. 18-966 is scheduled for April 23, 2019. The district court declined to stay this case pending this Court's resolution of the *New York* case. See 18-cv-1865 D. Ct. Doc. 203 (Feb. 22, 2019).

4. On March 6, 2019, the district court entered an opinion memorializing its findings of fact and conclusions of law. Pet. App. 1a-172a.

a. The district court first determined (Pet. App. 66a-77a) that respondents had Article III standing based on three potential injuries: loss of federal funding, loss of political representation, and diversion of resources. The court reasoned that these injuries would be fairly traceable to the government’s inclusion of the citizenship question, notwithstanding their dependence on unlawful third-party action, because a decline in self-response rates is “predictable” and “cannot be exclusively attributed” to other factors. *Id.* at 75a-76a. The court further determined, however, that respondents did not have standing to pursue claims under the Apportionment Clause, U.S. Const. Amend. XIV, § 2. Pet. App. 66a n.13.

b. The district court next held (Pet. App. 143a-148a) that the Secretary’s decision was “not in accordance with law,” 5 U.S.C. 706(2)(A), because it violated Sections 6(c) and 141(f) of the Census Act, see 13 U.S.C. 6(c) and 141(f).

Section 6(c) requires the Secretary to “acquire and use information available from” federal and state administrative records “[t]o the maximum extent possible” “instead of conducting direct inquiries” on the census form, but only if doing so is “consistent with the kind, timeliness, quality and scope of the statistics required.” 13 U.S.C. 6(c). The district court thought it “possible” to obtain “the same” citizenship data from administrative records—namely, “block-level data on citizens versus noncitizens”—and thus “using administrative records alone was superior to adding a citizenship question.” Pet. App. 144a-145a (citation omitted).

Section 141(f) requires the Secretary to submit periodic reports to Congress about the census. Paragraph (1) requires a report containing “the subjects proposed to be included” in the census at least three years before the census date, paragraph (2) a report containing “the questions proposed to be included” at least two years before the census date, and paragraph (3) an updated report with any “modified” subjects or questions “if the Secretary finds new circumstances exist which necessitate” the modifications. 13 U.S.C. 141(f)(1), (2), and (3). The Secretary’s (f)(1) report, submitted in March 2017, did not include citizenship as a *subject* area; but his (f)(2) report, submitted in March 2018, did include the proposed citizenship *question*. Pet. App. 146a. Nevertheless, the court concluded that the Secretary violated Section 141(f) because, in the court’s view, that provision imposes a “substantive restriction[] on the Secretary’s authority to make last minute changes to the census without good cause.” *Id.* at 147a. DOJ’s December 2017 letter, the court concluded, was “nothing more than a pretext” and thus did not constitute sufficiently good cause. *Id.* at 148a.

c. The district court further found (Pet. App. 148a-161a) that the Secretary’s decision to reinstate a citizenship question to the decennial census was arbitrary and capricious, see 5 U.S.C. 706(2)(A), because the Secretary’s reasons were pretextual, he did not consider all relevant factors, and his decision ran counter to the evidence. The court relied on evidence outside the administrative record to bolster its conclusions. Pet. App. 157a-161a.

The district court first concluded that the Secretary “decided to add the citizenship question well before

DOJ made the request” for reasons other than VRA enforcement, and he therefore “fail[ed] to disclose the basis for his decision” notwithstanding his March 2018 decisional memorandum. Pet. App. 149a-150a.

The district court also concluded that the Secretary “failed to consider the potential harms the citizenship question could cause to the accuracy of the Census Bureau’s final enumeration,” Pet. App. 151a, notwithstanding the Secretary’s express acknowledgment of the concern that adding a citizenship question “would negatively impact the response rate for noncitizens,” *id.* at 190a, and his lengthy discussion of that concern, *id.* at 190a-192a, 194a-197a. In the court’s view, the Secretary’s “failure to investigate and consider the likely effects of the citizenship question on the accuracy of the Census Bureau’s enumeration \* \* \* was an abdication of his duty.” *Id.* at 152a.

Finally, the district court concluded that the Secretary’s decision ran counter to the evidence because it was a “‘plainly inferior’ course of action.” Pet. App. 152a (citation omitted). In the court’s view, “adding a citizenship question will result in citizenship data less accurate and no more complete than citizenship data gathered through administrative records alone.” *Id.* at 153a. The court determined that “there is no evidence in the Administrative Record supporting Secretary Ross’s assertion that self-reported citizenship data is more accurate than citizenship data from administrative records.” *Id.* at 154a.

d. The district court also held (Pet. App. 162a-169a) that the Secretary’s decision violated the Enumeration Clause, U.S. Const. Art. I, § 2, Cl. 3. Relying on evidence outside the administrative record, the court determined that reinstating a citizenship question to the

decennial census “will materially harm the accuracy of the census without advancing any legitimate governmental interest.” Pet. App. 165a. Focusing on “distributive accuracy,” the court found that California could lose up to three congressional seats as a result of the citizenship question’s presence and the government “fail[ed] to identify any countervailing governmental interest that could justify this harm.” *Id.* at 166a. The court concluded that although the citizenship question “may have been perfectly harmless in 1950” and the Secretary could “ask about citizenship on future census questionnaires,” he could not reinstate a citizenship question to the decennial census in 2020. *Id.* at 167a, 169a.

e. The district court vacated the Secretary’s decision and remanded to the agency. Pet. App. 169a. The court enjoined the Secretary from reinstating a citizenship question to the 2020 decennial census without first “curing the problems identified in this Opinion” under the APA. *Id.* at 171a (citation omitted). But the court then also enjoined the Secretary from asking the citizenship question “regardless of any technical compliance with the APA.” *Id.* at 172a.

5. The district court entered its judgment on March 13, 2019, and the government filed a notice of appeal (Pet. App. 176a-177a) later that day.

#### REASONS FOR GRANTING THE PETITION

This case raises substantially similar issues as *Department of Commerce v. New York*, No. 18-966, which is scheduled for oral argument on April 23, 2019. Accordingly, the Court should hold this petition pending resolution of that case and dispose of it as appropriate thereafter. Alternatively, the Court should grant this petition and consolidate it for argument with No. 18-966.

**A. The Court Should Hold The Petition For No. 18-966**

The district court's decision covers largely the same ground as the decisions in *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), cert. before judgment granted, No. 18-966 (oral arg. scheduled for Apr. 23, 2019), and *New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018), cert. before judgment granted, No. 18-966 (oral arg. scheduled for Apr. 23, 2019). The *New York* court also enjoined the Secretary's decision as violating Sections 6(c) and 141(f) of the Census Act, as being arbitrary and capricious under the APA, and as being pretextual. 351 F. Supp. 3d at 635-664. This Court's resolution of those claims in No. 18-966 will be dispositive of the same issues in this case. Accordingly, the Court should defer consideration of this petition pending its resolution of No. 18-966, and then dispose of it as appropriate thereafter. See Stephen M. Shapiro et al., *Supreme Court Practice* § 5.9, at 340 (10th ed. 2013).

To be sure, the district court here, unlike in *New York*, held that the Secretary's decision violated the Enumeration Clause. Compare Pet. App. 165a-169a (finding an enumeration violation), with 315 F. Supp. 3d at 799-806 (finding no such violation). As a result of that holding, only if this Court addresses the Enumeration Clause can its decision definitively resolve whether the Secretary may reinstate a question about citizenship to the 2020 decennial census.

Nevertheless, holding this petition still is appropriate because the Court can address the enumeration claim in No. 18-966. Respondents in that case raised an enumeration claim, and it was litigated and decided in the district court. *New York*, 315 F. Supp. 3d at 799-806. The claim also is fairly encompassed in the first

question presented in that case because the APA governs all claims against agencies alleging that their actions are “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. 706(2)(B); see 18-966 Pet. at I. Respondents in No. 18-966 agree that “the record is sufficiently developed in th[at] case to allow this Court to address the merits of respondents’ Enumeration Clause claim.” Letter from Barbara D. Underwood, Solicitor Gen., State of New York, to Scott S. Harris, Clerk of Court, at 2 (March 13, 2019). And the Court recently directed the parties to address that claim in their respective briefs, see 18-966 Order (March 15, 2019), thereby ensuring an adversarial presentation of the issues.

Accordingly, holding this petition pending resolution of No. 18-966 and disposing of it as appropriate thereafter would be the most efficient way to definitively resolve the important issues in this case by the June 2019 deadline for finalizing the 2020 decennial census questionnaires.

**B. Alternatively, The Court Should Grant The Petition**

As just discussed, it is unnecessary to do anything more than hold this petition for *New York*. But if the Court thinks otherwise or has any concerns about reaching the Enumeration Clause or any other relevant issue in the *New York* case, it 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. It is imperative that this Court resolve the Enumeration Clause issue before June 2019, lest the district court’s decision below be the final word on the matter. As the government observed in its petition for a writ of certiorari before judgment in *New York*, “[i]n light of the immense nationwide importance

of the decennial census, if the district court's ruling is to stand, it should be this Court that reviews it." 18-966 Pet. at 16. That observation applies with even greater force here, given that the district court enjoined the Secretary from exercising his discretion to dictate the form and content of the census questionnaire on a ground that even the *New York* court recognized lacked merit.

#### CONCLUSION

The petition for a writ of certiorari before judgment should be held pending resolution of No. 18-966, and then disposed of as appropriate. Alternatively, the petition should be granted.

Respectfully submitted.

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