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### **Citizenship Question Litigation Update Making NC Count, 2020 Census Convening**

- Earlier this month on January 15<sup>th</sup>, 2019, the District Court for the Southern District of New York, struck down the citizenship question from the 2020 Census. In the court's robust and fact bound decision, Judge Furman found that Secretary Ross violated the public trust and that he misled the public with a quote "sham justification" for why the citizenship question should be added to the census.
  - o In vacating the citizenship question, Judge Furman described the Secretary's decision as unlawful and contrary to law.
- This case was brought by sixteen states, including North Carolina, seven cities, and the U.S. Conference of Mayors.
  - o New York, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.
  - o Cities of Chicago, New York, Philadelphia, Providence, Seattle, and the County of San Francisco.
  - o Combined case with the New York Immigration Coalition, Casa de Maryland, American-Arab Anti-Discrimination Committee, ADC Research Institute, and Make the Road New York.
- The 277 page opinion leads with an extremely careful and thoughtful discussion of standing (a federal court's power to hear a case: injury, causation, and redressability), particularly in the description of the harm to states and municipalities.
  - o Discussed the deterrent effect the question would and has had
  - o Went on to describe the extremely significant harm that would flow from a low response rate due to the question, namely to political representation and federal funding.

- Court opinion goes on to document a smorgasbord of clear cut, classic violations of administrative law. Public officials are given a lot of discretion in making decisions, including the Secretary of Commerce who oversees the Census Bureau and has a lot of power over the Census survey itself. But, those powers are not limitless. Administrative law helps hold public officials accountable and serves as a check on those powers of discretion.
  - o The APA provisions establish a scheme of “reasoned decision-making”. Not only must an agency decree operate within the scope of authority assigned by congress, but the process by which it reaches those results must be logical and rational.
  - o “arbitrary and capricious” → means that the agency failed to consider an important aspect of a problem, offered an explanation for its decisions that run counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different in view of the product of agency expertise.
- One of the violations in the APA regards the Census Act. The Census Act itself gives a lot of discretion to the Secretary of Commerce, but Congress can and has placed limits on that discretion. Congress directs that the Census Bureau, to the greatest extent possible, rely on administrative records before conducting direct questions to the public.
  - o Relying on expert testimony and reports directly from the Census Bureau, the court found that the Bureau can gather more accurate information about a resident’s citizenship status from administrative records than it can from asking the question directly.
- Court found four independent reasons to set aside the citizenship question:
  - o Court concluded Sec Ross ignored and violated clear statutory duty to rely on administrative records (rather than direct inquiries) to the “maximum extent possible”
  - o Even if Census Act statute did not exist, Ross decision to add a citizenship question rather than collect citizenship data through more effective and less costly means was not supported, making it arbitrary and capricious
    - Census Bureau calculated in Jan 2018 that adding a citizenship question to the 2020 census was likely to lead to a 5.1% differential decrease in self-response rate among noncitizen households.
  - o Failed to satisfy the statutory requirement that he report any plan to address the subject of citizenship to congress at least three years before the decennial census as required by Title 13 (section 141(f)(1)).
  - o Court concluded that Ross’s decision was pre-textual – that his purported rationale was not his real one. Violates provision in the APA which require he disclose the basis for his decision.



- Importantly, the court noted that the problem with Sec Ross's decision was not that it was inadequately explained, but rather it was substantively arbitrary and capricious with statutes that constrain his discretion.
- Given the timeline needed to be met before the June of 2019 deadline to print materials, those guidelines will be very tough to adhere to. Now, this does not prohibit the Census Bureau from conducting research about the citizenship question.
  - Acquire adequate information consistent with the kind, timeliness, and quality and scope of statistics required, submits report to the relevant congressional committees, consider all relevant evidence and aspects of the problem, and provides, in support of his decision, his real rationale.
- The administration has appealed the decision S.D.N.Y. decision.
  - Late Jan 2019, the defendants asked the Supreme Court to bypass the second circuit and to take its appeal directly to the Supreme Court. The administration has sought this sort of leap frog approach in other cases. The Supreme Court has been reluctant to accept these sort of appeals, but it seems plausible that it will do so in this case.
  - One of the major sticking points in the NY case before it reached trial was on an issue of discovery. 1) Could the court order discovery of materials outside the administrative record as presented by the defendants and; 2) could it compel a deposition of Sec Ross. Those issues were already sitting in front of the Supreme Court when the case went to trial. But Judge Furman proceeded to rule solely on the administrative record before him in support of the APA claim. The Court removed the date for oral argument on that issue from its calendar.
  - Given these factors, including the need for expeditious resolution, it seems likely that the Court will grant the administration's request here.
- NY case is one of seven lawsuits challenging the citizenship question. 2 in the SDNY, 2 in Cali, 2 in Maryland, and 1 in DC.
  - A conjoined trial for a set of cases in California wrapped up earlier this month and are scheduled to hold closing arguments on Feb 15<sup>th</sup>. This case differs from the NY cases in that the court kept alive the questions about a violation of the Enumeration and Apportionment Clauses. Also, the defendants did not brief the Census Act claim in the NY case, but I think we can expect them to address that issue more fully in the California case.
  - Another case is taking place in Baltimore, Maryland. Trial began on Jan 22<sup>nd</sup> and plaintiffs presented evidence that the government engaged in a conspiracy to add the citizenship question and there are intentional discrimination claims.

- In that case, MALDEF (Mexican American Legal Defense and Educational Fund), El Pueblo, Asian Americans Advancing Justice, and a host of other Latin American and Asian American caucuses.
    - Case joined with one brought by Maryland and Arizona
  - The D.C. case is a little different. Brought by the Electronic Privacy Information Center and focuses on how the government will handle citizenship data if it is gathered in the 2020 census. Plaintiffs in that case want the court to compel, under the auspices of the APA, the Census Bureau to conduct and publicly release a Privacy Impact Assessment for the collection, processing, and storage of personally identifiable citizenship data on the 2020 census. Case was filed in late November 2018, so it is still in its very early stages and will hopefully be declared moot at some point in the near future.
- The Maryland District Court ruled this a week that a case brought by the NAACP challenging the government's inadequate preparations for the 2020 census may move forward.
  - Their claims focus on how, unless the census bureau significantly improves its 2020 planning in terms of staffing, testing, and funding, the upcoming census will drastically undercount African Americans and other communities of color. This undercount will contribute to unequal political representation and reduced federal funding for communities of color.
  - In his opinion allowing discovery in the case to move forward, Judge Grimm emphasized the importance of ensuring adequate funding for census operations, especially given the recent 35-day government shutdown and that this ongoing state of uncertainty makes it more likely that the census bureau will be unprepared for the 2020 census.
- What congress can do:
  1. Remove the question from the census
  2. Mandate that the census bureau not include citizenship data in the redistricting file it sends to states.