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

BRIEF IN RESPONSE FOR 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

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce to add a citizenship question to the 2020 census violated the Administrative Procedure Act or the Enumeration Clause.

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STATEMENT

1. The Constitution requires Congress to conduct an "actual Enumeration" of "the whole number of persons in each State" every ten years. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. The purpose of this requirement is "to determine the apportionment of the Representatives among the States" in a way that advances "the constitutional goal of equal representation." *Wisconsin v. City of New York*, 517 U.S. 1, 19, 20 (1996) (internal quotation marks omitted). The results of the decennial census also affect the allocation of presidential electors, the distribution of federal funds, and intra-state political districting. *Id.* at 5-6. Congress has delegated responsibility for the census to the Secretary of Commerce. *Id.* at 19 (discussing 13 U.S.C. § 141(a)). Although the Secretary has wide discretion in conducting the census, *see id.* at 22-23, that discretion is subject to both constitutional and statutory limits, *see, e.g.*, *id.* at 19-20; 13 U.S.C. §§ 6(c), 141(f).

On March 26, 2018, Commerce Secretary Wilbur Ross announced his decision to add a question about citizenship to the 2020 census questionnaire. Pet. App. 8a. No question about citizenship has been asked on the census form that goes to every household since 1950. *Id.* at 9a. The Secretary asserted that he was acting in response to a December 2017 letter from the U.S. Department of Justice, which had requested the citizenship question in order to assist in enforcement of the Voting Rights Act of 1965. *Id.* at 186a. He declared that, "[f]ollowing receipt" of that letter, he had "initiated a comprehensive review process led by the Census Bureau," *id.*, and he concluded that asking "a citizenship question on the 2020 decennial census

is necessary to provide complete and accurate data in response to the DOJ request," *id.* at 200a.

2. Respondent the State of California filed this complaint on the day that the Secretary announced his decision. *See California v. Ross*, No. 18-cv-1865 (N.D. Cal.).[1] The complaint alleged that the decision was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706, and that it violated the Enumeration Clause, U.S. Const. art. I, § 2, cl. 3. *See* Dkt. 1 at 10-11. Around the same time, other States and private plaintiffs filed separate lawsuits asserting similar claims in the Southern District of New York, which are the subject of *Department of Commerce v. New York*, No. 18-966 (oral arg. scheduled for Apr. 23, 2019).

Shortly after the commencement of this litigation, the Secretary issued a "supplemental memorandum" to "provide further background and context regarding [his] March 26, 2018" decision memorandum. Pet. App. 184a. The supplemental memorandum revealed that he actually began to consider adding a citizenship question "[s]oon after" his appointment; that he and his staff reached out to the Department of Justice to ask whether it "would support, and if so would request, inclusion of a citizenship question as consistent with

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[1] Respondents the County of Los Angeles and the Cities of Los Angeles, Fremont, Long Beach, Oakland, and Stockton were added as plaintiffs on the first amended complaint. *See* Dkt. 12 at 5. (Citations to "Dkt." are to the district court's docket in No. 18-cv-1865.) Respondent the Los Angeles Unified School District later intervened as a plaintiff. *See* Dkt. 47, 75 at 2 n.1. Respondents the City of San Jose and the Black Alliance for Just Immigration filed a separate complaint, which was related to California's suit below. *See City of San Jose v. Ross*, No. 18-cv-2279 (N.D. Cal.).

and useful for enforcement of the Voting Rights Act"; and that all of this took place before he received the December 2017 letter from the Department of Justice that was the original asserted basis for adding the question. Pet. App. 184a.

The district court in this case denied petitioners' motion to dismiss in August 2018. Dkt. 75 at 2. Among other things, the court rejected petitioners' argument that the Enumeration Clause claim presented a non-justiciable political question, noting the substantial body of precedent adjudicating similar claims. *See id.* at 16-20. And it rejected petitioners' argument that the APA claim was "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), because regulations, statutes, and the Constitution provide "manageable standards against which the Secretary's actions can be measured," *e.g.*, Dkt. 75 at 23; *see id.* at 21-25. *See also* Dkt. 114 at 7-16 (denying petitioners' motion for summary judgment as to the constitutional and APA claims).

After denying the motion to dismiss, the district court issued an order authorizing respondents to conduct discovery going beyond the proffered administrative record. Dkt. 76 at 1. It invoked an earlier order entered by the district court in the New York litigation, which authorized extra-record discovery because, among other things, the plaintiffs had made "'a strong showing . . . of bad faith or improper behavior'" by agency officials. 18-966 Pet. App. 526a; *see id.* at 526a-528a. The district court here directed that discovery in the California case would be subject to the limitations imposed in the New York discovery order, and should be taken in coordination with the plaintiffs in the New York case. Dkt. 76 at 1-2.

The district court held a bench trial in January and February 2019 and entered its findings of fact and conclusions of law on March 6. Pet. App. 1a-172a. As to standing, the district court found that the citizenship question would "cause a differential undercount of the State of California's population relative to other states," thus "creating a substantial risk" that California would lose at least one congressional seat and presidential elector. *Id.* at 69a. The citizenship question would also injure respondents by depriving them of federal funding and by causing them to spend money on outreach efforts to help mitigate the degree of the undercount. *Id.* at 67a-68a, 71a-72a.

As to the APA claim, the district court held that the Secretary's decision to add a citizenship question was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). The administrative record established that the Secretary's purported reason for the decision—that the Department of Justice needed the information to enforce the Voting Rights Act—was pretextual. Pet. App. 4a; 149a-150a.[2] Moreover, the Secretary's assertion that the citizenship question "would enable the Census Bureau to obtain more 'complete and accurate data'" for that purpose was "directly contradicted by the scientific analysis" conducted by the Census Bureau. *Id.* at 4a, 152a-157a. The Secretary also failed "to consider all relevant factors before making his decision," *id.* at 152a, including "the potential

[2] The district court explained why, under the circumstances of this case, it was appropriate to consider evidence beyond the proffered administrative record in resolving the APA claim. Pet. App. 78a-81a; *see generally* 18-966 California Amicus Br. 14-33. But it held that the Secretary violated the APA even if review were confined to the administrative record produced by petitioners. Pet. App. 3a-5a.

harms the citizenship question could cause to the accuracy of the Census Bureau's final enumeration, and therefore to the allocation of federal funding and apportionment of congressional representation," *id.* at 151a. In addition, the decision was contrary to law, because the Secretary's late action violated federal statutes requiring reports to Congress on the subjects and questions planned for the decennial census (13 U.S.C. § 141(f)) and constraining his discretion to gather information through census surveys when that information is otherwise available through existing records (13 U.S.C. § 6(c)). *See* Pet. App. 143a-148a.

With respect to the Enumeration Clause claim, the district court described the "'strong constitutional interest in accuracy' of the census," Pet. App 162a (quoting *Utah v. Evans*, 536 U.S. 452, 478 (2002)), and noted that the "constitutional purpose" of the Clause "is to determine the apportionment of the Representatives among the States," *id.* at 163a. It reasoned that, "[w]hile each and every question on the census need not be related to the goal of actual enumeration, a decision to alter the census in a way that affirmatively interferes with the actual enumeration, and does not fulfill any other reasonable governmental purpose, is subject to a challenge under the Enumeration Clause." *Id.* Turning to the record before it, the court found that the "citizenship question will significantly impair the distributive accuracy of the census" and "substantially increase[] the risk that California will lose a seat in the House of Representatives." *Id.* at 166a. Petitioners failed to "identify a legitimate governmental purpose" for asking the citizenship question "that is sufficiently weighty to justify this significant harm to the census." *Id.* at 168a. While acknowledging that a citizenship question might be constitutionally permissible at other times or under other circumstances, *see*

id. at 167a-169a, the court held that, based on the record before it, the citizenship question at issue here, asked in the way it has been proposed and at this particular historical moment, would violate the Enumeration Clause, *id.* at 165a, 169a.

The district court entered final judgment on March 13. Pet. App. 173a. It vacated the Secretary's decision and, in light of its holding on the Enumeration Clause claim, also permanently enjoined petitioners from including the citizenship question on the 2020 census. *Id.* at 174a-175a; *see also id.* at 169a-172a.

Petitioners filed a notice of appeal on March 14, *see* Pet. App. 176a-177a, and a petition for certiorari before judgment on March 18. On March 19, California and other respondents filed a motion to expedite consideration of the petition.

ARGUMENT

Under the unusual circumstances of this case, respondents agree that it is appropriate for the Court to grant certiorari before the judgment of the court of appeals. The respondents and amici in *Department of Commerce v. New York*, No. 18-966, have addressed at length why the Secretary's decision to add a citizenship question to the 2020 census violated the Administrative Procedure Act, even if that decision is reviewed based on the proffered administrative record alone. This brief principally focuses on why, in light of the record developed by the parties below and the particular circumstances at this moment in history, the district court correctly held that the proposed citizenship question would also violate the Enumeration Clause of the U.S. Constitution.

I. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT

Although the district court's judgment is correct, respondents agree that it is appropriate for the Court to grant certiorari before judgment under the exceptional circumstances of this case. Certiorari before judgment is available "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. Rule 11. Unlike other recent cases where the federal government has attempted to invoke Rule 11, *see, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 17-1003 (cert. denied Feb. 26, 2018), this case presents a genuine need for the Court to resolve a pressing question of imperative importance. The 2020 census is fast approaching and petitioners have represented that "the census forms must be finalized for printing by the end of June 2019." 18-966 Mot. to Expedite 5.[3] Moreover, the Court has already granted review in *Department of Commerce v. New York*, No. 18-966, on questions that overlap with the issues raised by the pending petition in this case. The Court has previously "reviewed cases before judgment below when a similar or identical question of constitutional or other 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).

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

II. THE SECRETARY'S DECISION TO ADD A CITIZENSHIP QUESTION TO THE 2020 CENSUS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT

Like the district court in the New York litigation, the district court here held that Secretary Ross violated the Administrative Procedure Act when he added a citizenship question to the 2020 census for the asserted reason that the question was "necessary to provide complete and accurate data" to the Department of Justice for Voting Rights Act enforcement. Pet. App. 200a; *see id.* at 77a-161a; 18-966 Pet. App. 259a-321a. Whether the Secretary's decision is reviewed exclusively based on the proffered administrative record or in light of the evidence developed through discovery below, it is arbitrary and capricious because the explanation offered by the Secretary is pretextual, runs counter to the evidence that was before the agency, and fails to consider important aspects of the problem. *See* Pet. App. 149a-157a. The decision also violates two federal statutes governing the Secretary's conduct of the census. *See id.* at 143a-148a (addressing 13 U.S.C. §§ 6(c), 141(f)). These issues are addressed at greater length in briefs filed on April 1 in *Department of Commerce v. New York*, No. 18-966. *See* Br. of New York *et al.* 25-62; Br. of New York Immigration Coalition *et al.* 29-62; California Amicus Br. 10-33.

III. THE SECRETARY'S DECISION VIOLATED THE ENUMERATION CLAUSE

The district court also correctly held that the decision to add a citizenship question, in the manner proposed by the Secretary and at this particular moment in history, violates the Enumeration Clause, U.S. Const. art. I, § 2, cl. 3. *See* Pet. App. 161a-169a.

A. The Enumeration Clause Claim Is Reviewable

Petitioners argued below that respondents' Enumeration Clause claim was a non-justiciable political question. *See* Dkt 37 at 18-22.[4] Each of the three district courts that considered claims challenging the citizenship question under the Enumeration Clause properly rejected that argument. *See* Dkt. 75 at 16-20; 18-966 Pet. App. 391a-398a; *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 561-563 (D. Md. 2018).

1. To allow for proper apportionment of representatives and electors, the Constitution directs Congress to make an "actual Enumeration" of the total population every ten years, "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. The Clause leaves Congress with considerable discretion, much of which it has delegated in turn to the Secretary of Commerce. *See, e.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 15, 19 & n.11 (1996); 13 U.S.C. § 141(a); *supra* 1. But the conduct of the census is nonetheless subject to constitutional limits and to judicial review. *See Wisconsin*, 517 U.S. at 19-20.

Indeed, this Court and others have repeatedly "considered constitutional challenges to the conduct of the census." *Wisconsin*, 517 U.S. at 13; *see id.* at 13-24; *Utah v. Evans*, 536 U.S. 452, 473-479 (2002); *Franklin v. Massachusetts*, 505 U.S. 788, 801-806

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[4] Petitioners did not renew this argument in their petition in this case (*see* Pet. 9-12), or in their petition or opening brief in the New York case (*see* 18-966 Pet. 13-29; 18-966 U.S. Br. 53-54), in which they have urged the Court to "definitively resolve" the legality of the Secretary's decision under the Enumeration Clause (18-966 U.S. Letter (Mar. 11, 2019)). To the extent the argument is not jurisdictional (*see* 18-966 Pet. App. 393a n.15), it would appear that petitioners have waived it.

(1992); 18-966 Pet. App. 392a-393a (collecting lower court cases). And the courts have repeatedly rejected arguments that such challenges presented non-justiciable political questions. In *Franklin*, which involved how to count overseas military personnel, the Court reviewed an Enumeration Clause claim notwithstanding the appellants' argument "below that the courts have no subject-matter jurisdiction over this case because it involves a 'political question.'" 505 U.S. at 801 n.2.[5] Lower courts, too, "have consistently rejected application of the political question doctrine in" cases challenging "the conduct of the census." 18-966 Pet. App. 392a.

In *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), for example, the Second Circuit considered a claim that the 1980 census "was conducted in a manner that will inevitably result in an undercount," causing a loss of representation, dilution of votes, and decreased federal funds. *Id.* at 836. It rejected the Secretary of Commerce's argument that the claim involved a political question. *Id.* at 838. And district courts across the Nation have held that similar claims were justiciable after applying the factors from *Baker v. Carr*, 369 U.S. 186 (1962). *See, e.g.*, *District of Columbia v. Dep't of Commerce*, 789 F. Supp. 1179, 1181-1185 (D.D.C. 1992); *Texas v. Mosbacher*, 783 F. Supp. 308, 310-312 (S.D. Tex. 1992); *City of Phila. v. Klutznick*, 503 F. Supp. 663, 674 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1325-1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981).

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[5] The Court noted that it had "recently rejected a similar argument" in the context of a claim under the Apportionment Clause. *Franklin*, 505 U.S. at 801 n.2 (citing *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 456-459 (1992)).

2. In the district court, petitioners attempted to distinguish this case from others where courts have reviewed Enumeration Clause claims, arguing that those cases addressed "judicially cognizable" challenges regarding whether particular "calculation methodologies" satisfied the requirement for an "actual Enumeration," whereas this one presents a nonjusticiable challenge to "the '[m]anner' of conducting the census." Dkt. 37 at 18, 21. But courts have routinely adjudicated challenges to "the manner in which the" census is "conducted," *Carey*, 637 F.2d at 836, including challenges to the content of the census questionnaire itself, *see Morales v. Daley*, 116 F. Supp. 2d 801, 803-810 (S.D. Tex. 2000); *cf. Prieto v. Stans*, 321 F. Supp. 420, 421-423 (N.D. Cal. 1970).

There is no textual or precedential support for the distinction petitioners have attempted to draw. As the district courts here and in New York noted, "*every* challenge to the conduct of the census is, in some sense, a challenge to the 'manner' in which the government conducts the 'actual Enumeration.'" 18-966 Pet. App. 395a-396a; *see* Dkt. 75 at 18. The manner of conducting the census includes, for example, decisions about how to assign particular counted individuals, *e.g.*, *Franklin*, 505 U.S. at 792-795, the use of post-count surveys, *e.g.*, *Wisconsin*, 517 U.S. at 8-11, and other calculation methodologies, *e.g.*, *Utah*, 536 U.S. at 457-458. And courts properly treat all challenges to the manner of conducting the census as justiciable. *See* 18-966 Pet. App. 395a; *Kravitz*, 336 F. Supp. 3d at 563 ("nothing in the Supreme Court's holdings suggests that courts can review the sufficiency of the 'actual Enumeration' but not the 'Manner' in which the count is conducted").

Petitioners also argued below that courts should not adjudicate this type of challenge because federal law "requires the Secretary to report census questions to Congress two years prior to the Census," which "allow[s] the Legislative Branch adequate time to consider the propriety of these questions." Dkt. 37 at 20 (citing 13 U.S.C. § 141(f)(2)). That argument ignores the fact that here the Secretary violated that very reporting requirement, as two district courts have now confirmed. *See* Pet. App. 145a-148a; 18-966 Pet. App. 272a-284a.[6] And while the Secretary has previously argued that it is beyond the power of the courts to review his decision under any of these constitutional and statutory provisions because the decision is "subject to oversight only by Congress," *e.g.*, Dkt. 37 at 25, he cannot credibly maintain that argument at the same time that he is refusing to provide Congress with information and documents about the decision on the ground that the "issue [is] in litigation before the Supreme Court and before other courts," *Hearing on Commerce Dep't Oversight and Census Issues: Hearing Before the H. Oversight & Reform Comm.*, 116th Cong. (Mar. 14, 2019); *see id.* ("to the degree that this is involved in pending litigation, there may be problems" with providing documents to the Committee).[7]

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[6] Moreover, Congress has already addressed the propriety of this type of question to a certain extent, when it directed the Secretary to acquire information from administrative records to "the maximum extent possible . . . instead of conducting direct inquiries." 13 U.S.C. § 6(c). Secretary Ross violated that requirement as well. *See* Pet. App. 143a-145a; 18-966 Pet. App. 262a-272a.

[7] These statements are at 46:22-46:31 and 1:07:35-1:07:46 of the video available at https://www.c-span.org/video/?457414-1/commerce-secretary-ross-2020-census&start=4032 (last visited Apr. 4, 2019).

B. Judicial Review of Claims Under the Enumeration Clause Requires a Context- and Record-Specific Inquiry

The district court here applied an appropriate legal standard in assessing whether, based on the record before it, the Secretary's decision to add the citizenship question violated the Enumeration Clause. It first assessed whether that decision would result in a differential undercount that would threaten the constitutional interest in fair apportionment, and then considered whether the Secretary had advanced any countervailing government interest in asking the citizenship question sufficient to justify that threat. *See* Pet. App. 163a.

1. The "underlying constitutional goal" of the Enumeration Clause is "equal representation" in the federal Congress, subject to certain specified constraints. *Franklin*, 505 U.S. at 806; *see Wisconsin*, 517 U.S. at 17 (noting requirements that there be at least one representative from each State and that district boundaries not cross state lines). The Founders "knew that the calculation of populations could be and often were skewed for political or financial purposes," and they "consequently focused for the most part on creating a standard that would limit political chicanery." *Utah*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part). They adopted an "actual Enumeration" as a method of fairly "apportion[ing]" congressional representatives and presidential electors "among the several States." U.S. Const. art. I, § 2, cl. 3; art. II, § 1, cl. 2; amend. XIV, § 2; *see generally Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016) (Fourteenth Amendment "retained total population as the congressional apportionment base").

The text and history of the Enumeration Clause thus "suggest a strong constitutional interest in accuracy," *Utah*, 536 U.S. at 478, coupled with a strong interest in avoiding partisan trickery, *see, e.g.*, *id.* at 500 (Thomas, J., concurring in part and dissenting in part). The choices the Founders made in drafting the Clause—including using population rather than wealth as the basis for apportionment, having the federal government conduct the census instead of the States, and requiring Congress to undertake the census and re-apportion representation at fixed intervals—minimized the incentives and opportunities for political manipulation. *See, e.g.*, 1 Records of the Federal Convention 561, 578-583, 586, 592, 594 (M. Farrand ed., rev. ed. 1966). Those choices reflect a recognition that an actual headcount, conducted on a regular basis by the federal government, would be the "most accurate way of determining population with minimal possibility of partisan manipulation." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348-349 (1999) (Scalia, J., concurring in part); *cf.* The Federalist No. 36, at 226 (Hamilton) (Cooke ed., 1961) (in context of discussing direct taxation, observing that "[a]n actual census or enumeration of the people" of each State would "effectually shut[] the door to partiality or oppression").

Of course, no census has been "wholly successful" in obtaining a perfect count of the total population of each State. *Wisconsin*, 517 U.S. at 6; *see also Utah*, 536 U.S. at 504-506 (Thomas, J., concurring in part and dissenting in part). In deciding what degree of error is tolerable, administrators and courts consider both "numerical accuracy" and "distributive accuracy"—in particular, accuracy in determining the relative populations of the respective States. *Wisconsin*,

517 U.S. at 11 & n.6, 17-18. And "a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, *viz.*, to determine the apportionment of the Representatives among the States." *Id.* at 20.

That need for distributive accuracy sets a "limit[]" on the Secretary's "broad authority over the census." *Wisconsin*, 517 U.S. at 19, 20 (internal quotation marks omitted). If the "Secretary's conduct of the census" is not "'consistent with the . . . constitutional goal of equal representation,'" it may violate the Enumeration Clause. *Id.* at 19-20. In particular, actions that would result in a materially greater undercount in some places than in others would directly undermine the interest in proper apportionment of representatives and electors. Where there is a reasonable probability of such an effect, an action relating to the census must be subject to meaningful judicial scrutiny.

That does not mean that every action resulting in a differential undercount will necessarily be invalid. The "wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary," requires considerable "judicial deference." *Wisconsin*, 517 U.S. at 22, 23. The Secretary is generally entitled to make choices that are reasonably related to the purpose underlying the Enumeration Clause. *Cf. id.* at 20. And even an action that could affect apportionment may be justified if it serves some legitimate—and sufficiently substantial—countervailing interest. *See* Pet. App. 163a, 167a-168a. Whether such an interest outweighs a threat to the strong constitutional interest in equal representation will, of course, depend on the circumstances of each case. A greater risk that one or more States and their residents will improperly lose

representatives will demand a correspondingly greater justification.

2. In reviewing any claim under the Enumeration Clause, evidence of "historical practice" and "the traditional method of conducting the census" plays an important role. *Wisconsin*, 517 U.S. at 21, 22; *see Franklin*, 505 U.S. at 803-806. For example, the fact that the census has always been used to collect data beyond the limited information strictly necessary for apportioning representatives supports the general principle that it is "proper to use the census for more than a mere headcount." 18-966 Pet. App. 413a. And past practice may inform whether an action that results in a differential undercount is nonetheless sufficiently justified by some other government interest. But historical practice alone will rarely, if ever, be dispositive. Even an action that resembles what has been done at some point in the past may violate the Enumeration Clause if, under particular present circumstances, it would materially undermine the goal of equal representation and the Secretary cannot advance any sufficient countervailing justification.

Here, the evidence of historical practice invoked by petitioners (and by the district court in the New York litigation) does not answer the constitutional question. They note that decennial censuses contained questions related to birthplace or citizenship through much of the nineteenth and early-twentieth century. *See* 18-966 U.S. Br. 54; 18-966 Pet. App. 417a (with one exception, every decennial census between 1820 and 1950 "asked a question related to citizenship or birthplace in one form or another"). [8] But much has

[8] The history of prior census questions related to citizenship is

changed since 1950 (and 1850), particularly with respect to the Nation's immigration laws. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 360-364 (2010). And the 2020 census, in particular, will take place at a moment in the Nation's history when issues surrounding citizenship and immigration are especially fraught with legal, political, and practical sensitivity. The historical evidence thus provides no sound basis for evaluating whether the risk of malapportionment that would arise from adding a citizenship question to *this* census (*see, e.g.*, Pet. App. 57a-59a) is justified by any current and sufficient government interest.

To be clear, respondents do not contend "that each and every" past census with a citizenship question was "conducted in violation of the Enumeration Clause," 18-966 Pet. App. 421a, 422a, or that such a question could never properly be added to any census in the future. We argue only that, here as elsewhere, context matters. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (government action that "imposes current burdens . . . must be justified by current needs"). A proposed question that would imperil the constitutional goal of accurate enumeration if asked as part of the current census is not insulated from any judicial review simply because the

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not quite as consistent as petitioners claim. For example, questions specific to citizenship status were asked of all households on less than half of prior censuses: the 1820 and 1830 censuses, which asked each household for the number (but not the names) of foreigners not naturalized; the 1870 census, which asked all males over 21 years if they were citizens; the 1890 to 1930 censuses, which asked only foreign-born males over 21 years if they had been naturalized; and the 1940 and 1950 censuses, which asked all foreign-born individuals if they had been naturalized. *See* Dkt. 144 at 37; 18-966 Br. of Historians & Social Scientists 21-24.

same or a similar question might have been useful and innocuous in the past, or might be permissible again in the future. The constitutional question here is the balance between the likely effects of and the asserted justifications for a citizenship question in 2020.

C. On the Record Developed Below, the Secretary's Decision Violated the Enumeration Clause

Reviewing the Secretary's decision to add a citizenship question to the 2020 census under the proper legal standard, and in light of the record developed by the parties below, the district court correctly held that the Secretary violated the Enumeration Clause. *See* Pet. App. 161a-169a.

1. The proposed citizenship question would cause a differential undercount and imperil equal representation

Based on the evidence presented at trial in this case, the district court correctly found that the citizenship question Secretary Ross decided to add to the 2020 census would materially decrease the response rate in households containing non-citizens and Hispanics, in a manner that the Census Bureau's follow-up procedures would be ill equipped to remedy. That type of differential undercount—which would create a grave risk of California improperly losing one or more representatives and electors—is antithetical to "the constitutional goal of equal representation." *Wisconsin*, 517 U.S. at 20 (internal quotation marks omitted).

1. There does not appear to be any dispute between the parties as to the district court's finding that the citizenship question would lead to a differential undercount in the first instance. Pet. App. 11a. To the

extent there is any disagreement, it pertains to the degree of the distributive inaccuracy that the Secretary's question would inevitably inject into the initial count.

The United States Census Bureau, a petitioner in this case, has closely examined the effects that a citizenship question would have on responses to the 2020 census. *See* Pet. App. 11a-20a. Its own estimate, based on its analysis of prior annual surveys that ask similar questions of millions of households, is that the "differential decline in the self-response rate of noncitizen households" would be "5.8 percent." *Id.* at 14a; *see id.* at 12a-13a, 15a. The Bureau acknowledges that this estimate is "conservative," *id.* at 15a, because, among other things, the citizenship question would be more prominent on the 2020 census questionnaire than it was on the prior annual surveys. *See id.* at 15a-16a. In addition, although the Bureau has found that "Hispanic households are disproportionately less likely to respond to a survey with a citizenship question" than other households, *id.* at 12a; *see id.* at 12a-14a, 16a-17a, the Bureau's estimate does not account for that lower response rate in households of Hispanic citizens, *see id.* at 14a-16a. Nor does it account for changes in the national political and cultural climate over the last several years. *See id.* at 15a-16a. For example, the Bureau's Center for Survey Measurement recently found a "largely unprecedented" level of "concerns regarding negative attitudes toward immigrants," and noted that fears among immigrants and Spanish-speaking individuals associated with providing information to the Bureau have "markedly" increased, *id.* at 18a; *see id.* at 19a-20a (Bureau finding that citizenship question would be a "determining factor" in discouraging certain populations from participating in 2020 census).

Evidence presented by respondents below corroborates the Census Bureau's conclusion "that Latinos and immigrants hold considerable fears about participating in the 2020 Census," and that "the citizenship question will depress self-response rates, particularly for Latinos and households with noncitizens." Pet. App. 22a; *see id.* at 23a-28a. After conducting a nationwide survey with a random sample of more than six thousand people, respondents' expert concluded that self-response rates across all households would likely decline between 6.3 and 8.0 percent nationally because of the citizenship question. *Id.* at 25a-26a. And because Hispanic households tend to be larger than other households, the citizenship question would disproportionately affect Hispanics—and thus would disproportionately affect California, which has the largest percentage of Hispanics in the nation. *Id.* at 26a-27a. In particular, respondents' expert projected that the decline in self-response rates in California would be between 10.5 and 14.1 percent. *Id.* at 26a; *see* Dkt. 91-12 (expert's full report).[9]

2. The initial differential undercount that the citizenship question would create would not be remedied by the Census Bureau's follow-up procedures. Indeed, the very presence of that question would make those procedures less effective than they normally are. The

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[9] The district court accorded less weight to the expert's survey than to the Census Bureau's estimates because the survey question regarding whether a citizenship question would affect participation in the 2020 census referred to the "federal government" instead of the "Census Bureau." Pet. App. 27a-28a & n.8. But the court nonetheless found that the "survey provides credible evidence that the addition of the citizenship question is likely to result in a significant decline in self-response rates in California and within the Latino population relative to the public at large." *Id.* at 28a.

Bureau acknowledges that people who "refus[e] to self-respond due to the citizenship question are particularly likely to refuse to respond" to in-person follow-up enumeration. Pet. App. 34a. That stands to reason: A resident who is too scared to return the census form will be even less likely to respond when an agent of the federal government arrives at her house to collect the same information. *See id.* at 35a; c*f. id.* at 35a-36a ("in-person follow-up enumeration has been differentially less effective in census tracts with a higher proportion of households containing a noncitizen"). And public outreach campaigns designed to encourage participation in hard-to-count immigrant communities are unlikely to succeed if the Bureau is unable to provide its typical assurances that it is not collecting information related to immigration status. *See id.* at 30a-33a; *see also id.* at 31a (Bureau's chief scientist acknowledges it is "'highly unlikely' that the integrated partnership and communications campaign can eliminate the negative effects of" a citizenship question).

Other follow-up techniques are similarly unlikely to yield an accurate count in immigrant and Hispanic communities. The Census Bureau admits that it is more difficult to find a "proxy respondent" (such as a neighbor or landlord with knowledge about an uncounted household) in a neighborhood with a high concentration of non-citizens. Pet. App. 37a. Even when proxies can be found, they "generally provide lower quality enumeration data than self-responses"—and that is particularly true in neighborhoods with high concentrations of immigrants, *id.* at 38a, and when the proxies are asked to report on citizenship status, *id.* at 97a. The Bureau also acknowledges that it is more difficult to enumerate non-citizens and Hispanics using "administrative records" (such as records from

the Social Security Administration and the Internal Revenue Service). *Id.* at 39a. And the imputation model that the Census Bureau uses as a last-ditch effort to account for uncounted households under-represents certain populations—including non-citizens and Hispanics who do not respond to the citizenship question. *Id.* at 41a. It also fails to account for the fact that Hispanic households are larger, on average, than other households. *Id.*[10]

In short, the Census Bureau's follow-up procedures would not effectively make up for the undercount that the citizenship question would cause among non-citizen and Hispanic populations. Pet. App. 43a. Indeed, the "persons most likely not to self-respond to the citizenship question are also some of the most unlikely to be counted at every . . . stage" of the follow-up procedures. *Id.* at 44a. These shortcomings would only be compounded by the fact that "[n]one of the testing that has been used to plan [follow-up] staffing levels, the number of field offices, enumerator training, [follow-up] protocols, or census questionnaire assistance has accounted for a citizenship question on the 2020 Census," *id.* at 36a—notwithstanding the dramatic increase in follow-up workload that would certainly result from adding the citizenship question, *see id.* at 33a; Plaintiffs' Trial Exhibit 160 at 42-43. Nor has the Census Bureau significantly increased spending on outreach since the

[10] In addition, the Census Bureau's follow-up procedures are not designed to locate persons who are left off the self-response forms or whose addresses are concealed from the Census Bureau's Master Address File. Pet. App. 21a-22a. The latter problem particularly affects certain immigrants, who are more likely to live at such hard-to-locate addresses. *Id.* at 21a, 44a. "If such persons do not self-respond to the 2020 Census because of the citizenship question, they will not be counted." *Id.* at 44a.

Secretary's decision to add a citizenship question. Pet. App. 32a-33a; Plaintiffs' Trial Exhibit 272 at 18.

3. The "substantial net differential undercount of noncitizens and Latinos" that would result from asking the citizenship question, Pet. App. 44a, creates a grave threat of improperly depriving California of at least one representative and presidential elector, *see id.* at 57a-59a.

Without the citizenship question, California is expected to maintain its current level of congressional representation following the 2020 census. Pet. App. 57a. Under the most optimistic scenario projected by respondents' population expert—which accepts the Census Bureau's conservative estimate that a citizenship question would result in a 5.8 percent non-response rate in non-citizen households, and assumes an 86.6 percent success rate in follow-up procedures—adding the question would make California 15 percent more likely to lose a congressional seat. *See id.* at 59a, 69a. If follow-up procedures were not successful, and even assuming the same conservative non-response rate, California would have a nearly 50-50 chance of losing a congressional seat. *See id.* at 58a-59a; *see also id.* at 70a (concluding that this scenario is "most probative"). And when the higher non-response estimates developed by respondents' expert are used, California faces a risk of "los[ing] up to three congressional seats due to the citizenship question." *Id.* at 166a (finding "credible evidence" for this projection); *see also* Dkt. 91-8 (full declaration of respondents' expert); 18-966 Pet. App. 201a ("California's prospective loss of a seat in the House of Representatives is 'certainly impending.'").

These increased risks run contrary to the constitutional goal of obtaining an accurate count that

properly apportions representatives among the States. *See Utah*, 536 U.S. at 478; *Wisconsin*, 517 U.S. at 20. And, as discussed below, petitioners have altogether failed to identify any countervailing government interest sufficient to justify them.

2. The question would not advance any legitimate government interest

The Secretary's asserted reason for adding a citizenship question to the 2020 census was "to provide census block level citizenship voting age population . . . data that are not currently available" for the purpose of "determining violations of Section 2 of the Voting Rights Act." Pet. App. 186a. In litigation, petitioners have advanced a somewhat broader interest in obtaining "more accurate and complete citizenship data for the United States population," including for millions "of people whose citizenship information cannot [currently] be 'linked' to federal administrative records." 18-966 U.S. Br. 32. But the record in this case demonstrates that including the question on the 2020 census would only diminish the accuracy and completeness of the citizenship data already gathered by the Census Bureau, and that any data collected as a result of the question would not advance enforcement of the Voting Rights Act.

1. The Chief Scientist at the Census Bureau concluded that adding the citizenship question "would lower census data quality"—including the quality of data regarding citizenship status. Pet. App. 99a. Existing citizenship data obtained using "administrative records" are "'very accurate,'" because they reflect proof of citizenship status. *Id.* at 97a. In contrast, self-reported information on citizenship status is inaccurate because non-citizens frequently "misreport

themselves as citizens." *Id.* at 99a. In the annual surveys of millions of households conducted in 2010 and 2016, for example, "individuals for whom the administrative data indicate noncitizen respond[ed] citizen in 32.7% and 34.7% of the" questionnaires. *Id.* at 100a. Further inaccuracies would result from the fact that "lowered self-response rates due to the citizenship question would decrease the number of people who can be linked to" their (more accurate) administrative records, because the personal identifying information collected when the Bureau resorts to follow-up procedures "is of lower quality." *Id.* at 102a. Similarly, the Bureau's attempts to impute citizenship status for people in non-responsive households will be less accurate because the imputation model will rely on the less accurate self-response data. *See id.* at 106a.

After reviewing these and other factors, the district court correctly concluded that "all of the evidence in the Administrative Record shows that adding a citizenship question to the 2020 Census would yield citizenship data that is less accurate and no more complete than gathering that data using administrative records alone." Pet. App. 155a. And when the Bureau's Chief Scientist was questioned on this issue, he stood by his prior conclusion that the Secretary's decision would decrease the overall quality of citizenship data obtained by the Bureau. *See* Dkt. 172-1 at 81-87, 94-97, 101-106.

Petitioners disagree, arguing that the Chief Scientist's memoranda actually "make clear that adding the citizenship question would, as the Secretary concluded, yield more accurate and complete citizenship data for the United States population." 18-966 U.S.

Br. 32. That argument is based on the fact that including the question on the 2020 census form would reduce "the number of people for whom the Bureau would need to 'model' [*i.e.*, impute] citizenship information . . . from 35 million to 13.8 million." *Id.* at 33. But that would hardly be an "obvious improvement in data completeness and quality," *id.*, when much of that reduction would result from self-reported citizenship information that the Census Bureau *knows* would be inaccurate, *see* Pet. App. 99a-100a, in lieu of imputed information that it views as "more accurate," *id.* at 132a; *see* Dkt. 172-1 at 102-103. At bottom, petitioners' argument—and the Secretary's explanation for his decision—are premised on an irrational preference for inaccurate self-reported data over more accurate data that are already in government records and that the Census Bureau has relied on for decades.[11]

Petitioners also assert that responses to the citizenship question would provide "valuable 'compar[ison]' data that the Bureau can use to improve the quality of imputation 'for that small percentage of cases where [imputation] is necessary.'" 18-966 U.S. Br. 33 (alterations in original); *see* Pet. App. 194a. But petitioners identify no evidence—in the proffered administrative record or elsewhere—supporting that assertion. Although Secretary Ross raised this purported benefit in his original decision memorandum, the Census Bureau's Chief Scientist testified that he was not consulted on the issue prior to the issuance of

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[11] That preference is not only irrational, it is in conflict with the statute directing the Secretary not to "conduct[] direct inquiries" to obtain information that he can readily acquire from "other units of government" or other sources. 13 U.S.C. § 6(b), (c); *see* Pet. App. 143a-145a; 18-966 Pet. App. 262a-272a; *see also* 18-966 California Amicus Br. 13-14.

that memorandum; that the Bureau does not agree with the assertion; and that the citizenship question would actually "make it more difficult for the Census Bureau to establish the accurate ratio of citizen to noncitizen responses to impute." Pet. App. 134a; *see* Dkt. 172-1 at 104-106.

2. Nor does the record establish that the citizenship question would advance the principal interest invoked by the Secretary in his decision memorandum: enforcing Section 2 of the Voting Rights Act. Pet. App. 186a. Congress enacted the Voting Rights Act in 1965. *Id.* at 109a. Section 2 of the Act, as amended in 1982, prohibits minority voter dilution through multimember districts or the splitting of a geographically compact minority group between two or more single-member districts. *See Bartlett v. Strickland*, 556 U.S. 1, 10-11 (2009). The last time the decennial census asked all households a question related to citizenship was 1950. Pet. App. 9a. Thus, for more than half a century, across presidential administrations of both parties, the Department of Justice has enforced Section 2 without using data obtained from a citizenship question on the standard decennial census form.

Instead, the Department has used citizenship information obtained from the "long form" census questionnaire (which was, for example, sent to one in every six households in 2000) and from a survey of millons of American households that the Census Bureau conducts annually. See Dkt. 144 at 38. The Bureau has always reported this information at the "block group" level of geography. *See id.*; Dkt. 146-2 at 49 (Request for Admission No. 156); Plaintiffs' Trial Exhibit 819 at 31.

The December 2017 letter that the Department of Justice sent to the Census Bureau purported to request a citizenship question on the 2020 census on the ground that the resulting data "would be more appropriate for use in redistricting and in Section 2 litigation than [annual survey] citizenship estimates," including because they would provide information at the "block" level. Pet. App. 206a.[12] Other than that letter, however, the proffered administrative record contains no information supporting these assertions. That is not surprising, given that the Attorney General forbade Department of Justice personnel from meeting with the Census Bureau to discuss the request. Pet. App. 125a.

The district court credited the expert testimony of respondents' two experts on the Voting Rights Act, both of whom have worked on Section 2 enforcement actions brought by the Department of Justice. *See* Pet. App. 139a-142a. They testified that "'currently available census data has proven perfectly sufficient to ascertain whether an electoral system or redistricting plan dilutes minority votes.'" *Id.* at 140a; *see id.* at 142a (describing second expert's testimony that existing data from the Bureau's annual survey "are sufficient for plaintiffs to bring and prevail in cases brought under Section 2 of the VRA"). In particular, data at the "block group" level are sufficient to litigate Section 2 cases, *id.* at 140a, and "no reported Section 2 case has ever failed" because of any purported inadequacy associated with existing citizenship data, *id.* at 142a.

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[12] A census "block" is a smaller geographic unit than a "block group." A "block group" is a cluster of "blocks" and contains between 600 and 3,000 people. *See* Block Groups for the 2020 Census, 83 Fed. Reg. 6937, 6940 (Feb. 15, 2018).

3. It is conceivable that the federal government could identify an interest that would actually be served by adding a citizenship question to the decennial census, perhaps even one sufficient to justify the harm that the question would inflict, under the current circumstances, on the constitutional goal of equal representation. But none of the arguments asserted by petitioners in this litigation—and nothing in the proffered administrative record or the record the parties developed in the court below—establishes such an interest. To the contrary, the record establishes that adding a citizenship question to the 2020 census would undermine the government's interest in accurate citizenship data and would be of no practical utility in enforcing the Voting Rights Act.

3. Proper analysis of the Enumeration Clause claim considers evidence outside of the administrative record

Petitioners argued below "that the Enumeration Clause claims must be decided on the basis of the Administrative Record alone." Pet. App. 163a. Even if petitioners were correct that the APA's requirements regarding consideration of evidence beyond the proffered administrative record extended to the separate constitutional claim, those requirements would allow the consultation of extra-record evidence under the circumstances of this case. *See* 18-966 California Amicus Br. 14-33; *cf.* Pet. App. 165a. But petitioners are not correct: judicial review of an independent constitutional claim is not necessarily restricted to the administrative record that an agency defendant produces in response to a separate APA claim. *Cf. Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding APA challenge to agency action unreviewable, but allowing

"further proceedings" on constitutional claims, including "any discovery process which may be instituted").

Discovery is typically available in civil suits alleging colorable constitutional claims, *see* Fed. R. Civ. P. 26(b)(1), and parties may ordinarily use the evidence from discovery to prove their case, *see* Fed. R. Civ. P. 56(c); Fed. R. Evid. 402. The fact that a complaint asserts a colorable constitutional claim along with a colorable APA claim should not change that. Of course, district courts retain "broad authority . . . to distinguish reasonable and productive uses of the discovery procedures from abusive invocations of those procedures and to design protective orders to curtail the latter." *Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1963). And a court may reasonably restrict or prohibit discovery on a constitutional claim that is functionally equivalent to a parallel APA claim. *See, e.g.*, *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43-44 (D.D.C. 2018); *Chiayu Chang v. USCIS*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017) (collecting cases). Here, however, the APA and Enumeration Clause claims are separate causes of action governed by distinct legal standards. *Compare* 5 U.S.C. § 706, *with supra* 13-18.[13]

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[13] Petitioners have also argued that judicial review of the Enumeration Clause claim is limited to the administrative record "because the APA provides the waiver of sovereign immunity for this claim." Dkt. 195 at 60. But that waiver provision, 5 U.S.C. § 702, applies to "*all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity, . . . whether under the APA or not," *Puerto Rico v. United States*, 490 F.3d 50, 57-58 (1st Cir. 2007) (internal quotation marks omitted). Nothing in that provision suggests that the record requirements for APA claims would apply to non-APA claims. In any event, re-

As discussed above, proper judicial review of a claim under the Enumeration Clause will require courts to consider, among other things, the likely effect of the challenged conduct on "distributive accuracy" and congressional apportionment. *See Wisconsin*, 517 U.S. at 18-19, 20. But a proffered administrative record might not contain the information necessary for courts to complete that review. Indeed, if those issues were not considered by the agency decisionmakers, it might not contain *any* information on the subject. *See, e.g.*, *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (administrative record includes "documents and materials directly or indirectly considered by agency decision-makers") (emphasis omitted).

In this case, it was necessary for the respondents to retain experts to analyze the effects of the citizenship question, and the district court relied on the opinions of those experts in adjudicating the Enumeration Clause claim. *See* Pet. App. 57a-59a, 166a. Those issues are not adequately developed in the administrative record. It would be passing strange to prohibit courts from considering the factors that this Court has identified as central to the Enumeration Clause analysis just because the agency decisionmakers who took

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spondents sought (and obtained) injunctive relief on their Enumeration Clause claim, and claims seeking to enjoin unconstitutional conduct by federal officials are not barred by sovereign immunity. *See, e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949); *Ex parte Young*, 209 U.S. 123 (1908).

an action of dubious legality neglected to consider them. *Cf.* Pet. App. 165a.[14]

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In adopting the requirement for an "actual Enumeration," the Founders spoke with a clear voice. They wanted to "shut[] the door to partiality," The Federalist No. 36, at 226 (Hamilton) (Cooke ed., 1961), by adopting "the most accurate way of determining population with minimal possibility of partisan manipulation," *Dep't of Commerce*, 525 U.S. at 348-349 (Scalia, J., concurring in part). Here, after disregarding the evidence and overruling technical and scientific advisers, the Secretary of Commerce decided to add to the decennial census a question that advances no current government interest and would improperly deprive some States, including California, of federal funding and very possibly of proper representation in the national government. The Enumeration Clause prohibits that result.

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[14] Petitioners' rule would also appear to prohibit courts from considering historical evidence if, as here, such evidence is not in the proffered administrative record. That would also be a strange result, given that historical evidence is surely relevant to the analysis of an Enumeration Clause claim. *See Wisconsin*, 517 U.S. at 21-22. Indeed, petitioners' arguments about the Enumeration Clause focus exclusively on extra-record historical evidence. *See* 18-966 U.S. Br. 54.

CONCLUSION

The judgment of the district court should be affirmed.

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