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Supreme Court Report

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This *Report* summarizes cases granted review on October 16 and 19, 2020 (Part I).

I. Cases Granted Review

● *Trump v. New York*, 20-366. The President issued a memorandum directing the categorical exclusion of all undocumented immigrants from the congressional apportionment base tabulated following the 2020 census. At issue is whether that directive violates the Census Act, the Fourteenth Amendment, or Article I of the Constitution. The Court will also address the President's contention that the relief the three-judge district court entered—enjoining the Secretary of Commerce from including the information necessary to implement that policy in his report to the President of the results of the Census—does not satisfy the requirements of Article III of the Constitution.

The Census Act requires the Secretary of Commerce to report to the President, by December 31, 2020, "[t]he tabulation of total population by States" to be used "for the apportionment of Representatives." 13 U.S.C. §141(b). Between January 3 and January 10, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State" is entitled under the method of equal proportions. 2 U.S.C. § 2a(a). On July 21, 2020, partway through the census field operations, President Trump issued the Memorandum at issue here. The Memorandum declares that "[f]or the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude" undocumented immigrants from the congressional apportionment base "to the maximum extent feasible[.]" The Memorandum directs the Secretary of Commerce to send two different sets of numbers to the President in the Section 141(b) report. First, the Memorandum requires the Secretary to send the tabulation of total population in each state determined by the decennial census; that count will include all undocumented immigrants whom the Census Bureau determines are usual residents of a state. Second, the Memorandum directs the Secretary to include in the Section 141(b) report "information permitting the President," "following the census," to exclude undocumented immigrants from the apportionment figures that the President transmits to Congress under 2 U.S.C. §2a(a), which provides the basis for apportioning congressional seats.

On July 24, 2020, appellees—a group of states and localities and a separate group of nonprofit organizations—filed complaints challenging the Memorandum on various constitutional and statutory bases. The cases were consolidated and a three-judge district court was convened to hear them. The district court granted partial summary judgment to appellees, held that the Memorandum violates federal law, and entered declaratory and injunctive relief. The court determined that the government appellees have standing because the Memorandum is interfering with the ongoing census count by deterring immigrant households—regardless of their legal status—from responding to the census. On the merits, the court held that the Memorandum violates the Census Act in "two independent ways." First, the court concluded that the Memorandum's categorical exclusion of millions of undocumented immigrants who indisputably reside here violates Congress's command to include in the apportionment base all "persons" who live "in each State," regardless of immigration status. Second, the court concluded that the Memorandum contravenes the Act's mandate "to use the results of the census—and only the results of the census—in connection with the apportionment

process." The court reasoned that the Memorandum unlawfully directs the Secretary to send two sets of numbers in the Section 141(b) report: (i) the decennial census's total-population counts and (ii) separate figures that will allow the President to subtract undocumented immigrants from the apportionment base following the census. [Note: Some of the language in this paragraph and the prior one was borrowed from the parties' cert-stage briefs.]

Appellants (President Trump and other federal officials) argue that "[t]he district court erred at the outset in holding that the relief awarded will likely redress a cognizable Article III injury to appellees that is fairly traceable to the Memorandum. There is a fundamental mismatch between the court's award of relief in the future (prohibiting the Secretary from including information in his report to the President) and a speculative present injury (the Memorandum's alleged "chilling effect" on participation in the census). Most important, and as the court appeared to recognize, even assuming that the Memorandum is chilling participation in the census, that alleged injury will no longer exist once field data collection ends (currently scheduled for September 30); the judgment thus will be moot before it ever actually takes effect to constrain the Secretary's December 31 report. That alone is sufficient basis to vacate the judgment, at least once field data collection ends." Appellants add that, in their view, "the Memorandum's alleged 'chilling effect' on census participation is too speculative to constitute cognizable Article III injury in the first place." On the merits, appellants argue that "Congress has vested discretion in the Secretary to determine, subject to the President's supervision and direction, how to conduct the decennial census—and the Executive Branch has long exercised that discretion by considering administrative records and data in addition to that obtained by the census questionnaire. See *Franklin v. Massachusetts*, 505 U.S. 778, 794-795, 797-799 (1992). That is what the Memorandum instructs the Secretary to do here. In holding that this use of administrative records would somehow cause the apportionment no longer to be 'based on the results of the census alone,' the district court fundamentally misunderstood the statutory framework governing the decennial census, subjected the government to an unworkable and illogical standard that has never before been imposed in the history of the census, and contravened this Court's precedent. Indeed, the district court acknowledged that, in *Franklin*, 'overseas personnel . . . were counted using administrative records rather than a questionnaire,' yet provided no coherent explanation as to why the use of administrative records here is nevertheless impermissible." (Citations omitted.)

On the Article III issue, the government appellees respond (in part) that not only was the Memorandum causing ongoing harm during the census count, its "directive to exclude undocumented immigrants from the apportionment base threatens injury to several Government Appellees by placing them at substantial risk of losing a House seat and an elector in the Electoral College." In the government appellees' view, "A future injury provides standing and is ripe for review when it is 'certainly impending, or [when] there is a substantial risk that the harm will occur.'" On the merits, the government appellees maintain that "[w]hen Congress first enacted §2a(a)'s precursor in 1929, the terms "in each State" and "decennial census of the population" had well-established meanings. . . . [E]very branch of government had interpreted Article I's mandate to apportion based on the 'respective Numbers' of persons enumerated in each State, U.S. Const. art. I, §2, cl. 3, and the Fourteenth Amendment's requirement to apportion based on 'the whole number of persons in each State,' *id*.

amend. XIV, §2, to encompass all individuals who usually reside here for both the decennial enumeration of total population and the corresponding apportionment base." (Citations omitted.) Government appellees also assert a constitutional argument: "The Framers of the original Article I purposefully made a person's residence the constitutional lodestar for apportionment." And "[w]hen drafting the Fourteenth Amendment, Congress reaffirmed that apportionment must be based on *all persons living* in each State—regardless of immigration status."

● *Trump v. Sierra Club*, 20-138. At issue (in the words of one of the briefs in opposition) is "[w]hether the court of appeals correctly held that the Defendants-Petitioners may not divert $2.5 billion through Defense Department accounts for the purpose of widespread wall construction across the length of the U.S.-Mexico border, in contravention of Congress's decision to appropriate only $1.375 billion for more limited wall construction projects limited to the Border Patrol's Rio Grande Valley sector." The Court will also address whether the plaintiffs have a cognizable cause of action to obtain review of that transfer of funds.

In December 2018, the President and Congress attempted to negotiate an appropriations bill to fund various departments for the remainder of the fiscal year. The President requested $5.7 billion to fund wall construction in Arizona, California, New Mexico, and Texas. Following a 35-day government shut-down due to Congress's refusal to agree to that level of spending on the wall, and three weeks of stop-gap funding, Congress passed the Consolidated Appropriations Act of 2019 (CAA). The CAA provided $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector" in Texas alone. The President signed the CAA, but that same day announced plans to finance up to $6.7 billion dollars of additional construction on other parts of the border by transferring funds that Congress had appropriated for different purposes. As relevant here, the President identified "'[u]p to $2.5 billion [of] Department of Defense funds transferred'" for use under 10 U.S.C. §284, which permits the Secretary of Defense to provide support for the counter-drug activities of other federal departments and agencies. DoD's counter-narcotics support account, however, contained less than 10 percent of the $2.5 billion that the proposed border barrier projects would cost. To fill that gap, the Acting Secretary of Defense announced that he would transfer funds from other accounts into the Section 284 account, claiming authority to do so under Section 8005 of the 2019 Defense Appropriations Act. That provision allows the Secretary of Defense to transfer up to $4 billion of funds, "[*P*]*rovided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress[.]" Another $2 billion can be transferred under Section 9002 if they meet those same conditions. The Acting Secretary of Homeland Security, invoking authority under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, thereafter waived various environmental requirements that otherwise would have applied to the border wall projects funded by the DoD transfer of funds under Sections 284, 8005, and 9002.

Two sets of plaintiffs—the Sierra Club and the Southern Border Communities Coalition (collectively, Sierra Club) and a group of states—challenged the transfer of funds. The cases were heard by the same district court judge and were consolidated for briefing and argument in the court of appeals.

The district court decided the *Sierra Club* case first, holding initially that it had "authority to review" challenges to the transfers under its equitable power to enjoin government officials from violating federal law. It then ruled for the Sierra Club on the merits, holding that the transfers did not meet Section 8005's preconditions. The court issued a permanent injunction. After a Ninth Circuit motions panel declined to stay the injunction, the Supreme Court issued a stay. The Court stated that "[a]mong the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." Through two opinions, a divided Ninth Circuit merits panel then affirmed the district court, which had in the meantime ruled in the states' favor. First, the Ninth Circuit held that that Sierra Club "has both a constitutional and an *ultra vires* cause of action" to claim that the Acting Secretary exceeded his authority in transferring the funds. On the former, the majority ruled that the Appropriations Clause itself confers an implied cause of action to challenge allegedly unlawful spending. The court also held that California and New Mexico have a cause of action under the APA to challenge the Acting Secretary's compliance with Section 8005 because their asserted interests in enforcing state environmental laws are within the zone of interests protected by Section 8005. On the merits, the Ninth Circuit held that the transfers at issue did not meet Section 8005's proviso's requirements. Specifically, it found, DoD's need to provide support to DHS was not "unforeseen" in light of the "history of the President's efforts to build a border wall"; Congress had "denied" the relevant "item" when it declined to appropriate the full amount of funds the President had requested for the 2019 fiscal year for DHS to construct border barriers; and providing counterdrug support to DHS did not qualify as a "military requirement" within the meaning of the proviso. [Note: Some of the language in this paragraph and the prior one was borrowed from the parties' cert-stage briefs.]

The President and various cabinet members (collectively, the President) argue in the petition that the Ninth Circuit erred both in finding a cognizable cause of action and on the merits. With respect to the former, the President maintains that "[t]he APA does not permit such a suit because respondents' asserted recreational, aesthetic, environmental, or sovereign interests are not even arguably within the zone of interests protected by Section 8005's proviso, which concerns the intergovernmental budgetary process between DoD and Congress. Nor can respondents evade the zone-of-interests limitation by 'dress[ing] up' their statutory claims 'in constitutional garb.'" That is because "[r]espondents have no constitutional claim distinct from their challenge to whether the Acting Secretary exceeded the statutory authority conferred in Section 8005." On the merits, the President argues that: (1) "For purposes of the proviso, Congress has not previously 'denied' the 'item' for which funds are requested. DoD never requested appropriations for the item of providing this counterdrug assistance to DHS, and Congress never denied any request for that item of expenditure." (2) "DoD's need to provide counterdrug support to DHS was an 'unforeseen' military requirement within the meaning of the proviso because, when DoD made its budget requests to Congress for the 2019 fiscal year, DoD did not know and could not have anticipated that DHS would later request its support under Section 284 for these projects." (3) "Providing counterdrug assistance under Section 284 is a 'military' undertaking because Congress expressly assigned the task to the military."

● *Lange v. California*, 20-18. The question presented is whether "pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualif[ies] as an exigent circumstance sufficient to allow the officer to enter a home without a warrant." As a general matter, the police must obtain a warrant before entering a home except in "exigent circumstances." *Payton v. New York*, 445 U.S. 573, 590 (1980). But the Court has twice upheld warrantless entries by officers pursuing felons, in *Warden v. Hayden*, 387 U.S. 294 (1967) (pursuit of an armed robber), and in *United States v. Santana*, 427 U.S. 38 (1976) (pursuit of a drug dealer). On the other hand, in a case involving a "nonjailable" traffic violation, the Court stated that the "application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned." *Welsh v. Wisconsin*, 466 U.S. 740 (1984). This case involves an in-between situation: hot pursuit of a person suspected of committing a jailable misdemeanor.

Petitioner Arthur Lange was driving home listening to loud music and honking his horn to the music. A California highway patrol officer, Aaron Weikert, began following Lange, "intending to conduct a traffic stop" based on his belief that the music and honking violated two sections of the California Vehicle Code. As Lange approached his house, Officer Weikert turned on his overhead lights. Lange continued driving, turned into his driveway, and parked in his garage. Officer Weikert parked in the driveway, left his squad car, stuck his foot under the garage door to stop it from closing, and entered the garage. Inside the garage, Officer Weikert began questioning Lange about their encounter when he smelled alcohol on Lange's breath; he ordered Lange out of the garage for a DUI investigation. Lange was charged with driving under the influence and "the infraction of operating a vehicle's sound system at excessive levels." Lange moved to suppress the evidence Officer Weikert obtained after entering his garage, arguing that the officer's "warrantless entry into his home violated the Fourth Amendment." The state asserted that Lange's "fail[ure] to stop after the officer activated his overhead lights" created "probable cause to arrest" for the separate, uncharged misdemeanors of failing to obey a lawful order and obstructing a peace officer. The state contended that because Officer Weikert had probable cause to arrest for those misdemeanors, his pursuit from the street to Lange's driveway created an exigency sufficient to justify a warrantless entry. The trial court agreed with the state and denied the motion to suppress. The case eventually made its way to the California Court of Appeal, which affirmed. The court applied a categorical rule: "Because the officer was in hot pursuit of a suspect whom he had probable cause to arrest for [a jailable misdemeanor], the officer's warrantless entry into Lange's driveway and garage were lawful."

Lange argues that "[t]he question in a hot pursuit case is [ ] the same as in any other exigent-circumstances inquiry: Whether there was 'compelling need for official action and no time to secure a warrant.' Rather than asking that governing question, courts that apply the categorical rule hold that 'hot pursuit, in and of itself, is sufficient to justify a warrantless entry'—regardless of the surrounding circumstances. That approach flouts this Court's repeated instruction that the exigent-circumstances exception 'always requires case-by-case determinations.'" (Citations omitted.) And, Lange continues, "Even if the Court were willing to condone some categorical exigency rules, the misdemeanor-pursuit rule would be a particularly poor candidate because of its 'considerable overgeneralization[.]' As this case illustrates, many misdemeanor pursuits involve no plausible claim of exigency." (Citation omitted.) Lange notes that some courts "have largely assumed that *United States*

v. Santana, 427 U.S. 38 (1976), and *Warden v. Hayden*, 387 U.S. 294 (1967), dictate a special categorical approach for hot pursuit." But, says Lange, "*Santana* and *Hayden* involved felonies, not misdemeanors. And even then, the Court made case-specific assessments of exigency." Lange adds that his position is consistent with the common law as it existed at the time of the Founding.

California, in its brief in opposition, states that if the Court were to grant certiorari it "would agree with Lange that the Court should reject a categorical rule that probable cause to arrest a fleeing suspect for a misdemeanor always authorizes a warrantless entry into a home. While there are valid arguments on both sides of the question, on balance, a case-specific exigency analysis is more appropriate than a categorical rule in this context." The Court will therefore presumably appoint amicus counsel to defend the categorical rule applied by the lower court.

● *Wolf v. Innovation Law Lab*, 19-1212. This case concerns the legality of a Department of Homeland Security policy, known as the Migrant Protection Protocols (MPP), which requires aliens who departed from a third country and transited through Mexico to reach the United States to return to Mexico during the pendency of their removal proceedings. The statutory background is complex. To begin: Section 1225 of Title 8 of the U.S. Code establishes procedures for DHS to process aliens who are "applicant[s] for admission" to the United States, whether they arrive at a port of entry or cross the border unlawfully. Section 1225(b)(1) is designed to remove certain aliens quickly using specialized procedures. An alien is generally eligible for expedited removal when an officer "determines" that he engaged in fraud, made a willful misrepresentation in an attempt to gain admission or another immigration benefit, or lacks any valid entry documents. Section 1225(b)(2), titled "Inspection of other aliens," applies to all "other" applicants for admission inadmissible on grounds "not covered by §1225(b)(1)." Section 1225(b)(2) applicants are entitled to full removal proceedings under §1229a. See 8 U.S.C. §1225(b)(2)(A). Subparagraph (B) provides that §1225(b)(2)(A) "shall not apply" to a noncitizen "to whom subparagraph [b](1) applies." *Id*. §1225(b)(2)(B).

Next: Section 1225(b)(2) authorizes DHS to return certain §(b)(2) applicants to Mexico or Canada pending the outcome of their §1229a removal proceedings: "In the case of an alien described in subparagraph [1225(b)(2)](A) who is arriving on land . . . from a foreign territory contiguous to the United States, [DHS] may return the alien to that territory pending a proceeding under section 1229a[.]" 8 U.S.C. §1225(b)(2)(C). The Secretary of Homeland Security exercised his authority under this provision when he announced MPP in December 2018 in the wake of a surge of hundreds of thousands of migrants, many from the Northern Triangle countries of Central America (Honduras, El Salvador, and Guatemala), attempting to cross through Mexico to enter the United States despite having no lawful basis for admission. Under the MPP, DHS would "return[] to Mexico" certain aliens "arriving in or entering the United States from Mexico" "illegally or without proper documentation," "for the duration of their immigration proceedings." The Secretary also directed that MPP would be implemented consistent with non-refoulement principles—*i.e.*, DHS would avoid sending an alien to a country where he will more likely than not be persecuted on account of a protected ground (race, religion, nationality, membership in a particular social group, or political opinion) or tortured.

In February 2019, respondents—11 aliens who were returned to Mexico under MPP, and six organizations that provide legal services to migrants—filed suit in federal district court challenging MPP on various grounds and seeking a preliminary injunction. The district court issued a universal preliminary injunction barring DHS from "continuing to implement or expand" MPP. The court found it likely that MPP is not authorized by the INA; that MPP uses inadequate nonrefoulement procedures; and that those procedures should have been adopted through notice-and-comment rulemaking under the Administrative Procedure Act. A stay panel of the Ninth Circuit stayed the injunction. A later merits panel of the Ninth Circuit, however, affirmed the district court's injunction. 951 F.3d 1073. The panel majority construed Section 1225 to divide "'applicants for admission'" into "separate" categories of "§(b)(1) applicants" and "§(b)(2) applicants." The panel then reasoned that, if any alien was eligible to be placed into the expedited removal process under Section 1225(b)(1)—even if that alien was never placed into expedited removal (as the individual respondents here were not)—then he is exclusively a "§(b)(1) applicant" who may not "be subjected to a procedure specified for a §(b)(2) applicant," including contiguous-territory return. The panel majority additionally held that MPP "does not comply with [the United States'] treaty-based nonrefoulement obligations codified at 8 U.S.C. §1231(b)." Among other things, it objected to DHS's policy decision not to ask every alien considered for MPP whether they fear return to Mexico, reasoning that migrants are unlikely to "volunteer" that fear to an immigration officer. The panel majority noted the district court's conclusion that MPP's non-refoulement procedures should likely have been adopted through notice-and-comment rulemaking, but it declined to reach that question. [Note: Some of the language in this paragraph and the prior ones was borrowed from the parties' cert-stage briefs.]

The Acting Secretary of Homeland Security and other petitioners (collectively, Acting Secretary) argue in the petition that the Ninth Circuit merits panel erred in every respect. The Acting Secretary first asserts that "the panel majority fundamentally misunderstood the structure of this section of the [Immigration and Nationality Act], which is not based on differentiating '§(b)(1) applicants'" from '§(b)(2) applicants.' Aliens do not separately apply for admission (or anything else) under either Section 1225(b)(1) or 1225(b)(2). Rather, those subsections describe different procedures that DHS can use to process and remove aliens who are not entitled to be admitted to the United States." (Citation omitted.) Says the Acting Secretary, "contiguous-territory return is discussed only in Section 1225(b)(2) because, if DHS expeditiously removes an alien using the Section 1225(b)(1) procedure, then DHS has no need to return him to the foreign territory from which he arrived pending removal proceedings. Contiguous-territory return enables DHS to avoid detaining aliens like respondents, who are placed in full removal proceedings, during those proceedings." (Citation omitted.) As to non-refoulement, the Acting Secretary initially maintains that the federal statute implementing our treaty obligations "pertains only to the permanent removal of an alien, not temporary return to the contiguous foreign territory from which the alien just arrived pending proceedings to determine whether he will be removed permanently." Beyond that, the Acting Secretary insists that "MPP is fully consistent with non-refoulement principles. Under MPP, aliens amenable to return to Mexico may raise a fear of return to that country at any time they are in the United States and have that fear evaluated by an asylum officer." Next, the Acting Secretary asserts that the district court erred in holding that MPP's non-refoulement procedures should have been adopted through notice-and-comment rulemaking. In his view, "MPP qualifies as a 'general statement[] of policy' that is exempt from the APA's notice-and-

comment requirement. . . .: it does not 'purport[] to impose legally binding obligations or prohibitions on regulated parties,' but explains how the Secretary 'will exercise [his] broad enforcement discretion' under Section 1225(b)(2)(C)." Finally, the Acting Secretary argues that if the "Court were to uphold the substance of the decision below, it should nevertheless hold that both Article III of the Constitution and traditional limitations on the equitable jurisdiction of the federal courts generally bar a district court from enjoining enforcement of a governmental policy against all persons, rather than limiting relief to the plaintiffs before it."

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