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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF SAN JOSE, a municipal corporation; and BLACK ALLIANCE FOR JUST IMMIGRATION, a California nonprofit corporation

Plaintiffs,

v.

WILBUR L. ROSS, JR., in his official capacity as Secretary of the U.S. Department of Commerce; U.S. DEPARTMENT OF COMMERCE; RON JARMIN, in his official capacity as Acting Director of the U.S. Census Bureau; U.S. CENSUS BUREAU

Defendants.

Case No. 3:18-cv-02279-RS

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE LEADERSHIP CONFERENCE EDUCATION FUND, MUSLIM ADVOCATES, THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW, NATIONAL COALITION ON BLACK CIVIC PARTICIPATION, NALEO EDUCATIONAL FUND, ET AL., AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

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INTERESTS OF AMICI

Amici are organizations committed to the protection of civil and human rights in the United States.[1] What unites this coalition is an interest in ensuring that all communities—particularly the young children, women, immigrants, low-income communities, and communities of color whom amici represent—continue to enjoy the recognition, freedom, and economic and political power to which they are entitled under the U.S. Constitution. The government's addition of a citizenship question to the 2020 census gravely threatens to undermine that goal. What is more, the government cynically invokes *our* communities' purported interests as its justification for a policy that jeopardizes those interests.

Amici know very well: A fair and accurate 2020 census is a critical civil rights issue. The constitutionally-mandated census is central not only to apportioning political power at every level of government, but also to shaping the annual allocation of more than $800 billion in federal funding, along with countless policy and investment decisions by government agencies, nonprofit organizations, and private enterprise. Given its foundational importance to American government and society, the census must be above partisan politics. The misguided decision to reverse 70 years of consistent census practice and insert an untested citizenship question damages our communities, undermines the integrity of the count, and violates the Census Bureau's constitutional and statutory duties to conduct a full enumeration of the U.S. population.

SUMMARY OF ARGUMENT

Amici have spent decades advocating, educating the public, and litigating about issues concerning full and equal participation in the American political process, and so have vast knowledge and experience concerning the census and the uses to which it has been—and should be—put. This brief addresses several issues on which defendants have staked their defense of the citizenship question and as to which amici are uniquely equipped to provide guidance to this Court.

First, defendants contend that plaintiffs lack standing because inclusion of the citizenship question will not suppress response rates or lead to an undercount, and that in any event the deleterious effects plaintiffs allege will follow from an undercount are all speculative and contingent.

[1] This brief does not purport to convey the position of the New York University School of Law.

Amici and our constituencies have spent decades in the field, working with communities to ensure full participation in the census. Our experience and the findings of social scientists and other census experts all confirm that including the citizenship question will lead to depressed participation, particularly among families that include immigrants, young children, and people of color. Indeed, the current reactions in our communities to the prospect of a citizenship question that amici are witnessing first-hand fully support plaintiffs' standing. Moreover, contrary to the government's claims, the history of the census does not disprove the inevitably damaging effects of including a citizenship question on the 2020 census. In truth, the last census to have asked all respondents to indicate their citizenship was in 1950, prior to the enactment of the Voting Rights Act and path-marking Supreme Court decisions confirming core constitutional protections for equal voting rights and political representation.

Second, defendants contend—cynically and incorrectly—that inclusion of the citizenship question is necessary to ensure proper enforcement of the Voting Rights Act. That claim should be rejected. As we know from our own experience, the Voting Rights Act has been enforced effectively throughout its history notwithstanding the absence of a citizenship question on the census. Including the question now for the first time would only hinder, not assist, Voting Rights Act enforcement.

ARGUMENT

I. Plaintiffs Have Standing To Challenge The Citizenship Question On The Basis Of Injuries That The Question Is Inflicting—And Will Continue To Inflict—On The Communities Amici Represent

Plaintiffs have standing to challenge defendants' decision to include a citizenship question on the 2020 census because that decision exposes plaintiffs to present and "certainly impending" harms. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). The injuries of which Plaintiffs complain—including a differential undercount resulting in under-allocations of federal funding—are the direct product of injuries that the citizenship question is imposing and will continue to impose on the historically under-represented minorities, young children, and other vulnerable populations that amici represent and on whose behalf amici advocate.

Inclusion of a citizenship question will inevitably lead to a differential undercount of historically under-represented communities. The injury plaintiffs allege is neither hypothetical nor strictly prospective: pre-testing shows that the mere possibility of a citizenship question has already diminished response rates and increased anxiety over participation in the census among large segments of the communities we represent. This inevitable undercount will lead to a loss of federal funding for the Plaintiff City of San Jose (San Jose) and other jurisdictions where historically under-represented communities reside. Plaintiff Black Alliance for Just Immigration (BAJI) will be forced to allocate funding in order to combat the detrimental effects of adding a citizenship question, significantly limiting its other necessary initiatives. These harms are directly traceable to defendants' default of their constitutional duty to perform an "actual Enumeration" of the population in the United States and the resultant violation of the Equal Protection Clause.

A. Inclusion Of A Citizenship Question Will Result In An Undercount Of The Communities Amici Represent

Inclusion of a citizenship question on the 2020 census will result in a differential undercount of the communities we represent. This is an intolerably anti-democratic result, which is entirely avoidable.

The Census Bureau has long opposed adding a citizenship question to the census to avoid a systematic undercount of immigrant communities. For example, in 1980, the Bureau opined that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count. … Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *Fed'n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (describing Bureau's litigation position). The Director of the Census Bureau confirmed that judgment in congressional testimony in 1990, explaining that census questions about citizenship status would lead to the Census Bureau's being "perceived as an enforcement agency," and that such a perception would have "a major effect on census coverage."[2]

The Bureau's longstanding opposition to the inclusion of a citizenship question is well-founded, as information recently disclosed by the Bureau confirms. As reflected in the administrative record filed in this case, career Census Bureau personnel have recently highlighted differential response rates to past American Community Survey (ACS) and long-form census questionnaires for households with noncitizens versus households with citizens (AR 1280-1281), and they have emphasized the additional nonresponse expected in 2020 in light of the inclusion of a citizenship question (AR 1282, 1305, 1312). The Census Bureau's own data from its Center for Survey Measurement (CSM) further demonstrate that if a citizenship question is added to the census, formerly willing respondents will go to extraordinary lengths to avoid participating in it.[3]

Prior to the addition of the citizenship question, the Bureau had compiled substantial information showing the problems it was having with non-citizen response. CSM conducted pre-testing after the Census Scientific Advisory Committee expressed concerns "about the possibility that 2020 could be politicized" and about the privacy of the information collected by the decennial

[2] *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm., on Energy, Nuclear Proliferation, & Gov't Processes of the S. Comm. on Governmental Affairs*, 99th Cong. 16, 23, 32 (1985) (statement of John Keane, Dir., Bureau of the Census).

[3] Memorandum from Center for Survey Measurement, U.S. Census Bureau, to Associate Directorate for Research and Methodology ("ARDM"): *Respondent Confidentiality Concerns* (Sept. 20, 2017) ("CSM Memo").

census.[4] Through multiple methods, including Internet self-response, cognitive inquiry via the Census Barriers, Attitudes and Motivators Survey, doorstep messages, and field representatives and supervisors interacting with focus groups, CSM concluded that an unprecedented number of respondents raised issues concerning confidentiality and immigration status while participating.[5] Respondents also largely refused to share their own information with Bureau employees after expressing these privacy and safety concerns, and CSM saw extremely high levels of "deliberate falsification" of information on the Internet self-response instruments due specifically to respondents' express concerns regarding revealing immigration status to the Census Bureau.[6] CSM declared that its findings are "particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse."[7]

CSM's recent memorandum also included vivid examples that highlight the lengths to which members of under-represented communities will go to avoid responding to the census if a citizenship question is included. One Spanish-speaking field representative, for example, "observed Hispanic members of a household move out of a mobile home after she tried to interview them. She said, 'There was a cluster of mobile homes, all Hispanic. I went to one and I left the information on the door. I could hear them inside. I did two more interviews, and when I came back, they were moving … . It's because they were afraid of being deported.'"[8] Another field representative was left alone in an apartment when a respondent eventually walked out of an interview after shutting down and refusing to answer questions concerning his citizenship status.[9] And in one instance, an English-speaking respondent declared, "The immigrant is not going to trust the Census employee when they are continuously hearing a contradicting message from the media everyday threatening to deport immigrants."[10]

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[4] Memorandum from Ron S. Jarmin, Director, U.S. Census Bureau, to Barbara Anderson, Chair, Census Scientific Advisory Comm.: *U.S. Census Bureau Responses to Census Scientific Advisory Committee Fall 2017 Recommendations* (Jan. 26, 2018).

[5] CSM Memo at 1-2.

[6] *Id*. at 3.

[7] *Id*. at 7.

[8] *Id*. at 5.

[9] *Id*.

[10] *Id*. at 4.

These anecdotes are illustrative. Amici's experience confirms that the prospect of a citizenship question on the census has raised already high levels of anxiety in the immigrant communities and communities of color that we represent and will undoubtedly lead to an undercount of members of these same communities. Arturo Vargas, the Executive Director of the NALEO Education Fund, and a long-time member of the U.S. Census Bureau's National Advisory Committee on Racial, Ethnic, and Other Populations, has seen firsthand the mounting anxiety in these under-represented communities. In a focus group organized by NALEO, one participant stated explicitly that the current Administration is "using the census as part of a strategy. They want to know people's status and their names. The government will make you fill out a form to tell them if you are not legal. They want to clear the U.S. of people without papers. That's why they are asking about citizenship."[11]

The prospect of a citizenship question is already altering the behavior of potential respondents in our communities. A May 2018 Census Bureau presentation observed that participants in various language focus groups had expressed concerns about the citizenship question, which "may have a disproportionate impact on an already 'hard to count' population: immigrants."[12] The presentation confirmed that these concerns were not merely speculative. Rather, the presentation recounted specific statements and incidents attesting to the "unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants," which were likely to "present a barrier to participation in the 2020 census," could "impact data quality and coverage for the 2020 census," and are "[p]articularly troubling due to the disproportionate impact on hard-to-count populations."

The fears that members of the communities amici represent are feeling over giving the government information about their citizenship arise amidst an all-out assault on immigrants by the

[11] Vargas Decl. ¶ 9, June 7, 2018 (attached as Exhibit A). *See also* Meyers, U.S. Census Bureau, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census* at 9, 10, 12 (Nov. 2, 2017) (presentation at National Advisory Committee on Racial, Ethnic, and Other Populations Fall Meeting) (reporting results of pre-testing focus groups including that, for example, "[t]he immigrant is not going to trust the Census employee when they are continuously hearing a contradicting message from the media every day threatening to deport immigrants").

[12] Meyers & Goerman, U.S. Census Bureau, *Respondent Confidentiality Concerns in Multilingual Pretesting Studies and Possible Effects on Response Rates and Data Quality for the 2020 Census* 25, (May 2018) (presentation at 73rd Annual Conference of the American Association for Public Opinion Research (AAPOR)).

United States government that has placed undocumented persons and their (often citizen) families at risk. In recent weeks, the Trump Administration has doubled down on its "zero tolerance" policy towards undocumented immigrants. President Trump has explicitly advocated for deporting undocumented persons without due process of law.[13] These concerns about the government's hostility to immigrants will directly affect both citizens' and noncitizens' response rates, as more than 5.9 million U.S. citizen children reside with at least one undocumented immigrant,[14] leading to fears that parents or other family members will be deported or detained if they fill out the census. These recent episodes come after reports of domestic abuse victims not appearing in court for fear that they might be deported[15] and Hispanics and Latinos reporting fewer crimes since President Trump took office.[16] The results of the Census Bureau's research therefore reinforce a disconcerting pattern of behavior among immigrant and minority groups: the communities we represent fear the federal government, and their response is to recoil from any interaction with public officials. In the case of the 2020 census with a citizenship question, this will mean not responding at all.

The Supreme Court held in *Clapper* that a plaintiff lacks standing when his injury rests on "a highly attenuated chain of possibilities[.]" 568 U.S. at 410. There is no attenuation here. As the Census Bureau has recognized for decades, and as recent, concrete evidence confirms, inclusion of a citizenship question will have the inevitable—indeed, intended—effect of diminishing the response rates not only of undocumented persons, but also of U.S. citizens and lawful permanent residents who nonetheless fear the implications for their families and communities of furnishing information concerning citizenship. The concrete harms plaintiffs identify—which flow directly from that predictable undercount—amply satisfy Article III's requirements of a certain or impending injury.

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[13] *See* Rucker & Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights*, Washington Post (June 25, 2018).

[14] *See* Mathema, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants*, Center for American Progress (Mar. 16, 2017).

[15] *See* Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, NPR (Mar. 21, 2017); *see also Matter of A-B-*, 27 I. & N. Dec. 316.

[16] *See, e.g.*, Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight (May 18, 2017); Lewis, *HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year*, Houston Chronicle (Apr. 6, 2017).

B. The Systematic Undercount Of The Communities Amici Represent Will Result in Plaintiffs' Districts Suffering A Direct Loss of Federal Funding

It is not speculation that the undercount of the communities we represent will result in a loss of federal funding for San Jose and other jurisdictions in California, depriving them of access to federal programs upon which they rely. At least 300 financial assistance programs created by Congress rely on census-specific data to apportion hundreds of billions of dollars to state and local governments.[17] Although not all of these programs use headcount data derived from the decennial census, they often rely on surveys calibrated based on the decennial census, or other data collected in the census, such as age.[18] Any undercounting of the population will thus skew the collection of demographic data used in federal funding determinations and affect the distribution of funds to jurisdictions in which plaintiffs' community members reside, harming the federal programs upon which they rely.

A study of the impact of a census undercount on the federal funding formula for several of the largest programs confirms this point. The Federal Medical Assistance Percentage (FMAP) is used to determine the federal share of the costs of Medicaid, the State's Children's Health Insurance Program (CHIP), the Child Care and Development Fund Matching Funds, and the Title IV-E Foster Care and Adoption Assistance programs. *Reamer Report* 2. In Fiscal Year 2015, FMAP controlled the allocation of 48% of the federal grants given to States by the federal government. *Id.* That year, the average amount lost by a State was $1,091 *per person* missed in the 2010 census; the highest loss was in Vermont, where the state forfeited $2,309 per person missed in the decennial census. *Id.* at 1.

[17] Reamer, GW Institute of Public Policy, Counting For Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds, Report # 2: *Estimating Fiscal Costs of a Census Undercount to States* 2 (2018) ("*Reamer Report*").

[18] *Id*.

According to the study, even a 1% increase in an undercount can have a dramatic effect on States' receipt of federal grants for these FMAP-guided programs. *Id.*[19]

That a differential undercount will affect the distribution of federal funding is indisputable. It is also demonstrable that the deleterious funding effects of an undercount will fall most heavily on those jurisdictions that have above-average shares of low-income individuals, including California, where plaintiffs' community members reside.[20] Thus, as the data confirm, any undercount resulting from inclusion of a citizenship question will itself cause tangible harms, including loss of access to federal programs for plaintiffs' community members, due to a lack of federal funding.

C. The History Of The Citizenship Question Does Not Undermine Plaintiffs' Claim of Injury

Defendants attempt to sidestep plaintiffs' allegations of injury by arguing that including a citizenship question on the 2020 Census represents no material break from the Census Bureau's past practice. Defendants' argument is meritless.

The last time all census respondents were asked to provide their citizenship information was in 1950—before the passage of the Voting Rights Act, when communities of color were systematically undercounted and underrepresented, and before the Supreme Court recognized, among other things, the "one person, one vote" principle that undergirds contemporary voting rights jurisprudence. *See Gray v. Sanders*, 372 U.S. 368 (1963).

Since the passage of the Voting Rights Act—the very statute on which defendants base their rationale for adding a citizenship question—most respondents to the census have not been asked to provide *any* citizenship information. From 1960 until 2010, most census respondents received a short-form census questionnaire that did not include any question about citizenship. A small portion

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[19] The consequences for children living in plaintiffs' states are particularly severe. States with significant undercounts will also suffer reductions in funding for programs such as CHIP, the Children's Health Insurance Program, which is funded based on census data, depriving many children in their states of essential health care or other services. *See* Urahn, *et al.*, The Pew Charitable Trusts, *The Children's Health Insurance Program: A 50-state examination of CHIP spending and enrollment* (2014); *see also* Artiga & Damico, Kaiser Family Foundation, *Nearly 20 Million Children Live in Immigrant Families that Could Be Affected by Evolving Immigration Policies* 2 (2018) ("Over 8 million citizen children with an immigrant parent have Medicaid/CHIP coverage. … Recent findings indicate that growing fear and uncertainty among immigrant families is leading to decreased participation in Medicaid and CHIP.").

[20] Shapiro, *Trump's Census Policy Could Boomerang and Hurt Red States as Well as Blue States*, Brookings (Mar. 30, 2018).

of respondents—approximately one in six households—received a long-form questionnaire, which included a citizenship question mixed in with a battery of other personal questions, ranging from questions about mode of entry into the house to the extent of its kitchen facilities.[21] In 2005, the long-form census questionnaire was largely displaced by the American Community Survey (ACS), which the Census Bureau launched as a monthly data-gathering exercise to collect continuous, consistent nationwide demographic data.[22] As a result, the 2010 census was a "short-form only" census, and the same is expected for the 2020 census.

Defendants also attempt to leverage the ACS's citizenship question to demonstrate (MTD 29) that "citizenship questions have a long and established history in the census." That argument is deceptive. Including a citizenship question in a lengthy survey sent only to a representative sample of households is not comparable to including a citizenship question in the short list of questions asked of every individual in the country. As Professor Justin Levitt explained in recent testimony before Congress, "[i]n the context of a lengthy and detailed survey like [the ACS], with questions that many view as quite personal (and hence asked only of a sample of the population at any one time), a question about citizenship does not tend to stand out overmuch." Levitt Testimony 5. The purpose of the 28-page ACS is not to count the population, but to "understand[] who and where Americans are, what we do, and how we live." *Id.* In contrast, the census is designed to "be short, simple, and minimally intrusive, in order to maximize response rates" and thus conduct an "actual Enumeration." *Id.* Response rates or reactions to questions featured on one questionnaire are therefore not indicative of how respondents would react to questions on a different questionnaire.[23] The comparison on which defendants rely does not withstand scrutiny.

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[21] *See Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't Reform,* 115th Cong. 3, 4 (2018) (testimony of Justin Levitt, Professor, Loyola Law School) ("Levitt Testimony").

[22] *See* U.S. Census Bureau, *Decennial Census and the American Community Survey (ACS).*

[23] Moreover, as explained further below, if an individual receiving the ACS does not answer the question (or the survey as a whole), there are a number of common statistical techniques that can and do compensate. *See infra* Section III.B. In other words, suppressed response rates on the ACS do not cause any systemic data problem. That is simply not true with the census: Statistical imputation is permitted in some limited circumstances, but there are precious few ways to compensate for nonresponse in an enumeration. Thus, the consequences of nonresponse are more serious, and less remediable, on the decennial census than on the ACS. Levitt Testimony 16.

II. A Citizenship Question On The Decennial Census Will Undermine, Not Aid, Our Communities' Ability To Vindicate Their Rights Under The Voting Rights Act

Notwithstanding the differential undercount that including a citizenship question will predictably cause and its disparate effect on the minority communities that amici represent, defendants cynically seek to justify inclusion of a citizenship question as "critical to the [Justice] Department's enforcement of Section 2 of the Voting Rights Act."[24] Defendants' sudden interest in enforcement of the Voting Rights Act is not credible. The current Administration's Justice Department has not brought a single enforcement action under the Voting Rights Act. Indeed, Attorney General Jeff Sessions has gone so far as to express the belief that the Voting Rights Act is "intrusive."[25] A recently released memorandum from Commerce Secretary Wilbur Ross further confirms that the stated rationale of enforcing the Voting Rights Act is pretextual. The memorandum demonstrates that the Commerce Department was considering the addition of a citizenship question before receiving a request from the Department of Justice. In fact, Secretary Ross asked the Justice Department to consider requesting such a question.[26]

Defendants' invocation of the Voting Rights Act to justify including a citizenship question is not only pretextual, but also meritless, for at least two reasons. First, the Justice Department and private plaintiffs—including amici—have successfully litigated claims under the Voting Rights Act using available citizenship data ever since enactment of the Voting Rights Act in 1965. During that more than half century, courts have not required citizenship data obtained from the decennial census in Voting Rights Act cases. Second, as plaintiffs have alleged (Compl. ¶¶ 63, 114), such a question will in fact run directly counter to the purposes of the Voting Rights Act by diluting their votes and causing the decennial census to undercount the very minority communities—*our* communities—who

[24] Letter from Arthur E. Gary, General Counsel, DOJ, to Ron Jarmin, U.S. Census Bureau, at 1 (Dec. 12, 2017) (cited at MTD 7).

[25] *Attorney General Nomination: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 10, 2017) (statement of Sen. Jeff Sessions).

[26] Supplemental Memorandum by Secretary of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation (June 21, 2018).

are supposed to be among the primary beneficiaries of the Voting Rights Act and who rely upon the Voting Rights Act to vindicate their rights.[27]

A. The United States And Private Plaintiffs Have Effectively Enforced The Voting Rights Act Without Census Citizenship Data For Over 50 Years

Based on decades of experience, amici can authoritatively say: Citizenship data from the decennial census has never been necessary to enforce the Voting Rights Act and is not necessary now.

In order to proceed with a claim that minority voters' votes have been diluted, a plaintiff must demonstrate, among other things, that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member [voting] district" if the districts were drawn differently; that the minority group is "politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Because Voting Rights Act plaintiffs bear the burden of establishing these preconditions, data about citizenship status may be used in vote dilution litigation for a variety of purposes. For example, data about the "citizen voting-age population" (CVAP) may be used to generate a picture of the local electorate to show that members of the minority group vote together as a bloc, that they are regularly defeated in the current electoral configuration, or that they would be numerous enough to elect candidates of choice if the districts were drawn differently. And, in cases in which plaintiffs are successful in proving discriminatory vote dilution, courts may use CVAP data to fashion an effective remedy. Levitt Testimony 16.[28]

While CVAP data may be useful in vote dilution cases, in the 53 years that the Department of Justice and private plaintiffs have enforced Section 2 of the Voting Rights Act, they have never tried

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[27] The administrative record makes clear that this was in fact the primary objective behind adding the citizenship question. The record reveals that Kansas Secretary of State Kris Kobach, a sponsor of numerous forms of anti-immigration legislation, lobbied to add the citizenship question to the 2020 census at the suggestion of Steve Bannon, former White House Chief Strategist, for the very purpose of ensuring that "aliens" are not "counted for congressional apportionment purposes." *See* Robbins & Benner, *Documents Show Political Lobbying in Census Question About Citizenship*, NY Times (June 9, 2018).

[28] Notably, the Supreme Court has never held that CVAP data is required to establish a vote dilution claim under § 2. To the contrary, the Court has suggested that mere "voting-age population" data may be sufficient. *See Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (holding that the first *Gingles* precondition requires courts to ask: "Do minorities make up more than 50 percent of the *voting-age population* in the relevant geographic area?" (emphasis added)).

to obtain CVAP data from the decennial census. That is because such data can be reliably obtained from other sources—without the negative effects of including a citizenship question in the census. From 1970 to 2005, litigants bringing Section 2 claims could obtain CVAP data from the "long form" census, and from 2005 to the present, CVAP data has been obtainable from the ACS. *See* Levitt Testimony 16. That data has amply sufficed to facilitate Voting Rights Act enforcement without running the risk of suppressing census response rates from under-represented communities.

Defendants argue (MTD 6) that collecting citizenship data in the decennial census would benefit Voting Rights Act plaintiffs because it would generate CVAP data at a more granular level than the ACS—at the "block level" rather than the "block group level." It is irrelevant to Voting Rights Act plaintiffs that the decennial census could generate CVAP data at the block level because they are already able to make their cases with existing data. Defendants' claim ignores the fact that experts can still translate that data to the block level using statistical imputation. *See* Levitt Testimony 16. More importantly, such granular CVAP data is unnecessary in most Section 2 cases because courts primarily use that data to determine whether minority groups can effectively mobilize in a district. That end determination is necessarily an estimate that depends on a variety of data in addition to CVAP, including rates of voter eligibility, registration, and turnout—all of which have corresponding margins of error.[29]

The meritless nature of defendants' argument is underscored by the fact that in all of the Section 2 cases brought by the Justice Department over the past 18 years—across both Republican and Democratic administrations—"there is not one of these cases in which a decennial enumeration would have enabled enforcement that the existing survey data on citizenship did not permit. Indeed, not one of these cases has realistically been close to the line." Levitt Testimony 18 & n.77 (gathering cases). Acting Assistant Attorney General John Gore confirmed this assessment during his testimony before Congress, in which he was unable to identify a single Justice Department enforcement action that was hampered by currently available citizenship data.[30] In short, existing

[29] *See* Fishkin, *The Administration is Lying About the Census*, Balkinization (Mar. 27, 2018).

[30] *See Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't Reform,* 115th Cong. (2018) (statement of John M. Gore, Acting Assistant Att'y Gen., U.S. Dep't of Justice).

citizenship data available from the ACS has proven more than adequate for enforcement of Section 2 of the VRA.

B. Collecting Citizenship Data Would Hinder The Communities Amici Represent—Primary Beneficiaries Of The Voting Rights Act—In Vindicating Their Rights

Even setting aside the adequacy of current citizenship data for Section 2 enforcement, adding a citizenship question would not help the communities that amici represent vindicate their rights under the Voting Rights Act. Indeed, it would have precisely the opposite effect. As described above, any greater precision in citizenship data obtained through the decennial census would come at the expense of significantly undercounting minority populations who are reluctant to answer the 2020 census. Because the ACS is administered as a survey, experts can use sampling and other statistical techniques to compensate for nonresponse rates. *See* Levitt Testimony 6-7. By contrast, federal law and Supreme Court precedent significantly limit the techniques that can be used to compensate for undercounting on the decennial census. *Id.* at 20; *see also* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 759 (2011). In short, even if addition of a citizenship question could lead to more *precise* citizenship data for those who respond, it will inevitably lead to less *accurate* citizenship data that differentially undercounts the very minority populations who rely on that data to bring Voting Rights Act claims.

Including a citizenship question on the 2020 census would therefore hobble, not bolster, the ability of minority groups to prove vote dilution under Section 2 of the Voting Rights Act. Rather than helping minority groups prove their Section 2 claims, a citizenship question on the decennial census would lead to undercounting precisely those individuals needed to show cohesive minority populations. *See* Levitt Testimony at 20. Defendants' justification for the citizenship question is

therefore a red herring. Any greater precision in citizenship data will hurt Voting Rights Act plaintiffs because it will come at the cost of missing information and an inaccurate 2020 census.[31]

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be denied.

DATED: July 24, 2018

Respectfully submitted,

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[31] *See Progress Report on the 2020 Census: Hearing Before H. Comm. on Oversight & Gov't Reform,* 115th Cong. 4-5 (2018) (statement of Vanita Gupta, President & CEO, The Leadership Conference on Civil and Human Rights) ("This decision would affect everyone, with communities that are already at greater risk of being undercounted—including people of color, young children, and low-income rural and urban residents—suffering the most … . During the final years of the Obama administration, I was the Justice Department official responsible for overseeing voting rights enforcement. I know firsthand that data from the ongoing American Community Survey were sufficient for us to do our work. Rigorous enforcement of the Voting Rights Act has never required the addition of a citizenship question on the census form sent to all households.").

APPENDIX: LIST OF AMICI

The Leadership Conference on Civil and Human Rights

The Leadership Conference Education Fund

Muslim Advocates

National Association of Latino Elected and Appointed Officials Educational Fund

National Coalition on Black Civic Participation

4CS of Passaic County

Advocates for Children of New Jersey

AgeOptions

American Anthropology Association

American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME)

American Federation of Teachers

American Muslim Health Professionals

American Society on Aging

Andrew Goodman Foundation

Anti-Defamation League

Arab American Institute

Arkansas Advocates for Children and Families

Asian & Pacific Islander American Health Forum

Asian American Legal Defense and Education Fund (AALDEF)

Asian Americans for Community Involvement

Asian Law Alliance

Asian Pacific American Labor Alliance

Asian Pacific Islander Americans for Civic Empowerment (APACE) – Washington

Bend the Arc: A Jewish Partnership for Justice

Bhutanese Community Association of Pittsburgh (BCAP)

California Pan-Ethnic Health Network

Center for Law and Social Policy (CLASP)

Center for Popular Democracy
Central Conference of American Rabbis
Chinese-American Planning Council
Christian Methodist Episcopal Church – Washington-Virginia District
Citizen Action of New York
Civil Rights Project at the University of California – Los Angeles
Clearinghouse on Women's Issues
Clergy and Laity United for Economic Justice (CLUE)
Coalition on Human Needs
Colorado Center on Law and Policy
Colorado Children's Campaign
Common Cause
Community Service Society of New York
Crescent City Media Group
D & R Accounting & Tax Solutions, Inc.
Delaware Ecumenical Council on Children and Families
Democracy Forward Foundation
Dēmos
Disability Rights Education & Defense Fund (DREDF)
Empower Missouri
Equal Justice Society
Equality California
Faith in Public Life
Family Equality Council
FISH Hospitality Program, Inc.
Gilmore Memorial Preschool, Inc.
Hindu American Foundation
Hispanic Federation

Hispanic Organization for Leadership & Action (HOLA)

Holy Spirit Missionary Sisters, USA-JPIC

Illinois Association of Area Agencies on Aging

Illinois Coalition for Immigrant and Refugee Rights

Immigrant Justice Group First Unitarian Denver

Impact Fund

In the Public Interest

Japanese American Citizens League

Jewish Council for Public Affairs

Justice in Aging

Laotian American National Alliance

Latino Coalition for a Healthy California

LatinoJustice PRLDEF (Puerto Rican Legal Defense and Education Fund)

League of Women Voters US

Legal Aid Justice Center

Legal Aid Society of the District of Columbia

Let America Vote

MinKwon Center for Community Action

Muslim Public Affairs Council

NAACP Legal Defense and Educational Fund, Inc.

National Action Network

National Asian Pacific American Women's Forum

National Association for the Advancement of Colored People, Inc.

National Black Justice Coalition

National Center for Law and Economic Justice

National Coalition for Literacy

National Consumers League

National Council of Jewish Women

National Employment Law Project
National Health Law Program
National Human Services Assembly
National Immigration Law Center
National Institute for Reproductive Health (NIRH)
National LGBTQ Task Force
National Organization for Women Foundation
National Partnership for Women & Families
National Women's Law Center
N.C. Counts Coalition
New Jersey Institute for Social Justice
New York Counts 2020
New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus
North Carolina Asian Americans Together (NCAAT)
Oasis - A Haven for Women and Children
Partnership For America's Children
Paterson Alliance
Paterson Education Fund
Paterson Habitat for Humanity
Passaic County Community College Child Development Center
People for the American Way Foundation
PolicyLink
Protect Democracy
Public Justice Center
Research Advisory Services, Inc.
Rock the Vote
Service Employees International Union
SOME, Inc. (So Others Might Eat)

South Asian Americans Leading Together
Southeast Michigan Census Council
Southern Poverty Law Center
Texas Civil Rights Project
The Enrichment Center
The National Urban League
The Sikh Coalition
The Southern Coalition for Social Justice
The Women's Law Center of Maryland
Theta Delta Sigma Society, Inc.
Tikkun Olam Chavurah
UnidosUS
Union for Reform Judaism
Unitarian Universalist Fellowship of Hidalgo County
Virginia Civic Engagement Table
Wisconsin Faith Voices for Justice
Women Employed
Women of Reform Judaism
Women's Bar Association of the District of Columbia
YWCA USA