UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,	)	
Plaintiffs,	)	Case No. 1:18-cv-02921 (JMF)
v.	)	
UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,	)	
Defendants.	)	

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AMICUS BRIEF

PLEASE TAKE NOTICE that The Leadership Conference on Civil and Human Rights, The Leadership Conference Education Fund, Muslim Advocates, National Coalition on Black Civic Participation, National Association of Latino Elected and Appointed Officials, and other organizations committed to the advancement of civil and human rights (all listed in the Appendix to this motion), request leave to file the accompanying amicus brief in support of plaintiffs and in opposition to defendants' motion to dismiss. In support of their motion, amici state as follows:

1. Amici curiae are grassroots, advocacy, labor, legal services, and other organizations committed to the protection and advancement of civil and human rights in the United States. What unites this coalition is an interest in ensuring that all communities—particularly young children, women, immigrants, low-income communities, and communities of color—continue to enjoy the recognition, freedom, and economic and political power to which they are entitled under the U.S. Constitution.

2. Amici have spent decades advocating, educating the public, and litigating around 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 put—including, as relevant here, allocation of federal programmatic funding, determining equitable political representation, and enforcing voting rights. The proposed amicus brief addresses issues on which defendants and their amici have staked their defense of the citizenship question and as to which amici are uniquely equipped to provide guidance to this Court.

3. "District courts have broad discretion to permit or deny the appearance of amici curiae in a given case." *United States v. Ahmed*, 788 F. Supp. 196, 198 (S.D.N.Y.1992). The proposed amicus brief will assist the Court in addressing the issues raised in defendants' motion to dismiss because they offer expertise and fresh perspective on certain factual premises and legal arguments advanced by defendants and their amici.

4. All plaintiffs and all defendants have consented to the filing of this brief.

For the foregoing reasons, amici request that the Court grant leave to file the attached amicus brief.

Dated June 18, 2018

Respectfully submitted,

/s/ Alan E. Schoenfeld

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APPENDIX: LIST OF AMICI

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National Association of Latino Elected and Appointed Officials Educational Fund

National Coalition on Black Civic Participation

4CS of Passaic County

AgeOptions

American Anthropological Association

American Federation of State, County & 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

Arizona Asian American Pacific Islander Democratic Party Caucus

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

Association of Asian Pacific Community Health Organizations

Bend the Arc: A Jewish Partnership for Justice

Bhutanese Community Association of Pittsburgh

California Pan-Ethnic Health Network

Center for Law and Social Policy (CLASP)

Center for Native American Youth at the Aspen Institute

Center for Popular Democracy

Center for the Study of Hate & Extremism – California State University, San Bernardino

Children's Defense Fund

Chinese-American Planning Council

Christian Methodist Episcopal Church – Washington-Virginia District

Citizen Action of New York

Citizens Union of the City of New York

Civil Rights Project/Proyecto Derechos Civiles – University of California, Los Angeles

Clearinghouse on Women's Issues

Clergy & Laity United For Economic Justice (CLUE)

Coalition on Human Needs

Colorado Center on Law and Policy

Colorado Children's Campaign

Colorado Immigrant Rights Coalition

Common Cause

Community Catalyst

Community Resource Exchange, Inc. (CRE)

Community Service Society of New York

Crescent City Media Group

D & R Accounting & Tax Solutions, Inc.

Defending Rights & Dissent

Delaware Ecumenical Council on Children and Families

Democracy Forward Foundation

Dēmos

Disability Rights Education and Defense Fund (DREDF)

The Economic Progress Institute (Rhode Island)

Empower Missouri

The Enrichment Center for Women, Children and Families

Equal Justice Society

Equality California

Faith in Public Life

Family Equality Council

FISH Hospitality Program, Inc.

Forefront

Good Neighbor Society

Government Information Watch

Greater New York Labor-Religion Coalition Inc.

Hindu American Foundation

Hispanic Federation

Hispanic Organization for Leadership and Action (HOLA)

Holy Spirit Missionary Sisters, USA-JPIC

Illinois Coalition for Immigrant and Refugee Rights

Illinois Partners for Human Service

Immigrant Legal Resource Center

Immigration Committee at First Unitarian Society Denver

Impact Fund

In Our Own Voice: National Black Women's Reproductive Justice Agenda

In the Public Interest

Indivisible Baltimore

Japanese American Citizens League

Japanese American Citizens League – Northern California, Western Nevada, Pacific District

Jewish Council for Public Affairs

Justice in Aging

LatinoJustice PRLDEF (Puerto Rican Legal Defense and Education Fund)

League of Women Voters of New York State

Legal Aid Justice Center

Legal Aid Society of the District of Columbia

Let America Vote

Main Street Alliance

MinKwon Center for Community Action

Minnesota Census Mobilization Partnership

Minnesota Council on Foundations

Missouri Immigrant and Refugee Advocates

National Association for the Advancement of Colored People (NAACP)

NAACP Legal Defense & Educational Fund, Inc.

National Action Network

National Asian Pacific American Women's Forum

National Black Justice Coalition

National Center for Law and Economic Justice

The National Coalition for Literacy

National Consumer Law Center

National Consumers League

National Council of Jewish Women

National Education Association

National Employment Law Project

National Health Law Program

National Human Services Assembly

National Immigration Law Center

National Institute for Reproductive Health

National LGBTQ Task Force

National Organization for Women Foundation

National Partnership for Women & Families

The National Urban League

National Women's Law Center

N.C. Counts Coalition

New America – Public Interest Technology Program

The New Florida Majority

New Jersey Institute for Social Justice

New Mexico Voices for Children

New York Counts 2020

New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus

North Carolina Asian Americans Together (NCAAT)

Partnership for America's Children

Paterson Alliance

Paterson Education Fund

People for the American Way

PFLAG

PolicyLink

Research Advisory Services, Inc.

Rock the Vote

Sargent Shriver National Center on Poverty Law

Service Employees International Union

Services, Immigrant Rights, and Education Network (SIREN)

The Sikh Coalition

Sisters of the Presentation of the Blessed Virgin Mary (New Windsor, NY)

SOME, Inc. (So Others Might Eat)

South Asian Americans Leading Together (SAALT)

South Asian Network Inc.

Southeast Michigan Census Council

The Southern Coalition for Social Justice

Southern Poverty Law Center

Texas Civil Rights Project

UnidosUS

Union for Reform Judaism

United Chinese Association of Brooklyn

Unitarian Universalist Fellowship of Hidalgo County

The Virginia Civic Engagement Table

The Voting Rights Institute

Wind of the Spirit, Immigrant Resource Center

Wisconsin Faith Voices for Justice

Women Employed

Women of Reform Judaism

Woodhull Freedom Foundation

The Women's Law Center of Maryland

YWCA USA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, *Defendants*.	)	Case No. 1:18-cv-02921 (JMF)

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE LEADERSHIP CONFERENCE EDUCATION FUND, MUSLIM ADVOCATES, NATIONAL COALITION ON BLACK CIVIC PARTICIPATION, AND NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS, ET AL., AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

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INTEREST OF AMICI

Amici (listed in the Appendix) are grassroots, advocacy, labor, legal services, and other organizations committed to the protection of civil and human rights in the United States. What unites this coalition is an interest in ensuring that all communities—particularly young children, women, immigrants, low-income communities, and communities of color—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.

A fair and accurate 2020 census is a critical civil rights issue. Not only is the constitutionally mandated census central to apportioning political power at every level of government, but the data collected also influence the annual allocation of more than $800 billion in federal money, 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 seventy years of consistent census practice and insert an untested citizenship question undermines the integrity of the count, damages our communities, 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 around 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 put—including, as relevant here, allocating federal programmatic funding, determining equitable political representation, and enforcing voting rights. This brief addresses three issues on which

defendants and their amici have staked their defense of the citizenship question and as to which amici are uniquely equipped to provide guidance to this Court.

First, defendants' motion to dismiss and their amici's briefs in support proceed from the same overstated premise that the census has long posed a citizenship question like the one slated for inclusion in 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 (VRA) and path-marking Supreme Court decisions confirming core constitutional protections for equal voting rights and political representation.

Second, defendants and their amici contend that plaintiffs lack standing because the 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. Amici and their constituencies have spent decades in the field, working with communities to ensure full participation in the census. Their experience, and the findings of social scientists, all confirm that including the citizenship question will lead—indeed, already has led—to depressed participation, particularly among families that include immigrants, young children, and people of color.

Third, 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; the Voting Rights Act has been enforced throughout its history notwithstanding the absence of a citizenship question on the census, and including the question now for the first time would have disastrous results.

ARGUMENT

I. THE CITIZENSHIP QUESTION HAS NEVER BEEN PART OF THE MODERN CENSUS

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). Claiming that "many" decennial censuses as far back as 1820 have requested citizenship information (MTD 3), and that "[m]ost censuses conducted since 1820 have included questions concerning citizenship" (ACLJ Br. 2; *see* States Br. 4), defendants and their amici contend that this history rebuts any inference that the citizenship question is now being introduced for any political or nefarious purposes.

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 that did not include any question about citizenship. A small portion 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 the mode of entry into the house to the extent of its kitchen facilities.[1] 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

[1] *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").

exercise to collect continuous, consistent nationwide demographic data.[2] As a result, the 2010 census was a "short form only" census, and the same is expected for the 2020 census. *Id.*

Defendants and their amici attempt to leverage the ACS's citizenship question to demonstrate a "nearly unbroken history of asking about citizenship." States Br. 5. That argument is deceptive. The inclusion of a citizenship question in a lengthy survey sent only to a representative sample of households is not comparable to its inclusion 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 accurately 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, to maximize response rates" to conduct an "actual Enumeration." *Id.* The purpose of the ACS in comparison to the purpose of the census is fundamentally distinct, so response rates or reactions to questions featured on one questionnaire are not indicative of how respondents would react to questions on a different questionnaire. The comparison on which defendants and their amici rely does not withstand scrutiny.[3]

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

[3] 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. That is, the consequences of nonresponse are more serious, and less remediable, on the decennial census than on the ACS. Levitt Testimony 16.

II. PLAINTIFFS HAVE STANDING TO CHALLENGE DEFENDANTS' INCLUSION OF A CITIZENSHIP QUESTION ON THE 2020 CENSUS

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). First, the 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: Pretesting shows that the mere possibility of a citizenship question has already diminished response rates and increased anxiety over participation in the census. Second, the inevitable undercount will lead to a direct loss of federal funding for plaintiffs and the jurisdictions they encompass. Those 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. The Inclusion Of A Citizenship Question Will Result In An Undercount

The inclusion of a citizenship question on the 2020 census will result in a differential undercount of historically under-represented minorities, young children, and other vulnerable populations—the very communities that amici represent and on whose behalf amici advocate. This is an intolerably anti-democratic, and entirely avoidable, result.

Historically, 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 intuition in congressional testimony in 1990, explaining that census questions about citizenship status would lead to the Census Bureau being "perceived as an enforcement agency," and that such a perception would have "a major effect on census coverage."[4]

That opposition is well-founded, as information recently disclosed by the Census Bureau confirms. As reflected in the administrative record filed in this case, career Census Bureau personnel have recently highlighted differential response rates to past ACS surveys and long-form census for households with noncitizens (versus households with citizens) (AR 1280-1281), and 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.[5]

Immediately 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 pretesting after the Census Scientific Advisory Committee expressed concerns "about the possibility that 2020 could be politicized" regarding privacy of the information collected by the decennial census.[6] 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, the CSM concluded that an

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[4] *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).

[5] 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*").

[6] 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).

unprecedented number of respondents raised issues concerning confidentiality and immigration status while participating. *CSM Memo.* Respondents also largely refused to share their own information with Bureau employees after expressing these privacy and safety concerns, and the CSM saw extremely high levels of "deliberate falsification" of information on the Internet self-response instruments due specifically to respondents' expressed concerns regarding revealing immigration status to the Census Bureau. *Id.* The 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." *Id*.

The Census Bureau's report also included vivid examples that highlight the lengths to which members of under-represented communities will go to avoid a citizenship question. For example, one Spanish-speaking field representative "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.'" *Id.* Another field representative was left alone in an apartment when a respondent eventually walked out of an interview after first shutting down and refusing to answer questions concerning his citizenship status. *Id.* 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." *Id.*

These anecdotes are merely illustrative: Amici's experience confirms that the prospect of a citizenship question on the census has raised already high levels of anxiety in immigrant communities and communities of color and will undoubtedly lead to an undercount of members

of these 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 first-hand 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." Vargas Decl. ¶¶ 1, 3, 9.[7]

The prospect of a citizenship question is already altering respondents' behavior. 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."[8] 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."

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[7] *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").

[8] 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)).

The Census Bureau's "dry run" for the 2020 census in Providence County, Rhode Island, has provided the most concrete evidence that the citizenship question would depress response rates. Although the dry run does not include a citizenship question, the looming prospect of such a question has been sufficient to suppress participation. Consequently, it has been reported in the national press that "[f]ear of the census among undocumented immigrants is rippling out to their relatives who have green cards or U.S. Citizenship … [M]any are afraid of giving their information to the federal government."[9] One test participant explained his refusal to participate: "What if our information is misused and lands in the hands of immigration? … [Y]ou never know if it's ICE or police knocking. No one wants to open the door." *Id.*

Respondents' fears over giving the government information about their citizenship arise amidst an all-out assault on immigrants by the United States government that has placed undocumented persons and their (often citizen) families at risk. In recent weeks, the Trump Administration's stance on immigration has resulted in immigrant families being split apart at the border and being subjected to disturbing detention conditions at Border Patrol facilities.[10] These concerns about the government's hostility to immigrants and their children will directly affect response rates, as more than 5.9 million U.S. citizen children reside with at least one undocumented immigrant,[11] leading to fears that parents or other family members will be permanently separated from their children 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

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[9] Wang & Penaloza, *Many Noncitizens Plan To Avoid The 2020 Census, Test Run Indicates*, NPR (May 11, 2018).

[10] *See* Wang, *'Mothers Could Not Stop Crying': Lawmaker Blasts Trump Policy After Visiting Detained Immigrants*, Washington Post (June 10, 2018).

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

deported[12] and Hispanics and Latinos reporting fewer crimes since President Trump took office.[13] The results of the Census Bureau's research and the pretest in Providence therefore reinforce a disconcerting pattern of behavior towards immigrant and minority groups: These communities 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, the inclusion of a citizenship question has the inevitable—indeed, intended—effect of diminishing the response rates not only of undocumented persons, but also U.S. citizens and lawful permanent residents who nonetheless fear the implications for their families and communities from furnishing information concerning citizenship.[14] That more than amply satisfies Article III's requirements of a certain or impending injury.

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[12] *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.

[13] *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).

[14] Defendants' amici claim that existing Census Bureau statistical methodologies will be sufficient to identify and adjust possible undercounts. *See* FAIR Br. 2-3. Amici refer to the recapture method as a means of identifying and adjusting undercounts. *Id.* at 3; *see also City of Los Angeles v. Evans*, No. 01-1671, 2001 U.S. Dist. LEXIS 25977, at *12-13 (C.D. Cal. Apr. 25, 2001), *aff'd sub nom. City of Los Angeles v. United States Dep't of Commerce,* 307 F.3d 859 (9th Cir. 2002). However, amici distort the utility of this method since the Census Bureau has the ultimate power to decide whether the adjusted population figure will be released as the official census or the headcount. *Id.* at *15. This decision has serious consequences since the headcount and the adjusted population figure differ "both as to the actual population and the geographic location of the population." *Id.* Furthermore, amici also misrepresent the utility of another method called "demographic analysis" (DA), which calculates the national population based on the net sum of all records of births, deaths, legal immigration, Medicare enrollments, estimates of emigration, and net undocumented immigration. FAIR Br. 3. As the court in *Evans* noted, an important shortcoming of DA is that "it can only provide population totals for the nation as a whole, since it is derived from records that do not reveal where the new immigrants or newborns currently live." 2001 U.S. Dist. LEXIS 25977, at *13-14. Thus, even after a comparison and adjustment of the DA and Census data, the end result will be inaccurate.

B. Plaintiffs Will Suffer A Direct Loss of Federal Funding As The Result Of An Undercount

Nor is it speculation to conclude that the undercount just described will result in a loss of federal funding for plaintiffs. 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.[15] Although not all 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. *Id.* Any undercounting of the population will thus skew the collection of demographic data used in federal funding determinations and thus affect the distribution of funds to plaintiffs. *See, e.g.*, *City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48, 50 (E.D.N.Y. 1989) (in prospective challenge to methodology for 1990 census, finding "State and municipal plaintiffs have established an injury in the form of loss of federal funding").

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 FY2015, FMAP represented 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—a plaintiff here—forfeited $2,309 per person missed in the decennial census. *Id.* at 1. Indeed, 37 out of 50 states forfeited FMAP federal

[15] 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*").

funding opportunities for each person not counted in the 2010 decennial census. This translates to 74% of States missing out on funding due to undercounting. *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.* For example, Pennsylvania stood to lose $221,762,564 in FY2015 had there been a mere 1% increase in missed persons in the 2010 decennial census. *Id.*[16]

That a differential undercount will affect the distribution of federal funding is a foregone conclusion. It is also not controversial or speculative that the deleterious funding effects of an undercount fall most heavily on those jurisdictions that have above-average shares of low-income individuals, including plaintiffs New Jersey and the District of Columbia.[17] Thus, as the data confirm, any undercount resulting from the inclusion of a citizenship question will itself cause tangible harms, including the potential loss of hundreds of millions of dollars of federal funding.

III. A CITIZENSHIP QUESTION ON THE DECENNIAL CENSUS WILL UNDERMINE, NOT AID, ENFORCEMENT OF THE VOTING RIGHTS ACT

Notwithstanding the inevitably differential undercount and its disparate effect on minority communities, defendants cynically seek to justify the inclusion of a citizenship question

[16] The consequences for children living in plaintiffs' states are particularly severe. States with significant undercounts will 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.").

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

as "critical to the [Justice] Department's enforcement of Section 2 of the Voting Rights Act."[18] Defendants' sudden interest in enforcement of the VRA is not credible. The current administration's Justice Department has not brought a single enforcement action under the VRA. Indeed, Attorney General Jeff Sessions has expressed the belief that the VRA is "intrusive."[19] But Defendants' invocation of the VRA to justify including a citizenship question is obviously meritless and pretextual for at least two additional reasons. First, the Justice Department and private plaintiffs have successfully litigated claims under the VRA using available citizenship data for the past 53 years. Since the enactment of the VRA in 1965, neither litigants nor courts have ever required citizenship data obtained from the decennial census. Second, such a question will in fact undermine enforcement of the VRA by causing the decennial census to undercount precisely those minority communities who rely upon accurate data to bring VRA claims.[20]

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

In order to proceed with a claim that minority voting power has 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

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

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

[20] 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 on the direction 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*, N.Y. Times (June 9, 2018).

preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Because 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) can 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 where plaintiffs are successful in proving discriminatory vote dilution, courts may make use of CVAP data to fashion an effective remedy. Levitt Testimony 16.[21]

While CVAP data may be useful in vote dilution cases, in the 53 years that the Department of Justice (DOJ) and private plaintiffs have enforced § 2 of the VRA, they have never tried 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, described above. In particular, from 1970 to 2005, litigants bringing § 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 VRA enforcement without running the risk of suppressing census response rates from under-represented communities.

[21] 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)). The Second Circuit has recognized that whether § 2 claims require CVAP data remains an open question. *See Pope v. County of Albany*, 687 F.3d 565, 573 n.6 (2d Cir. 2012) (declining to reach the issue of whether plaintiffs must present CVAP data in a § 2 case).

Defendants and their amici argue that collecting citizenship data in the decennial census would benefit VRA 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." *See* MTD 6-7. As an initial matter, this claim ignores the fact that experts can still translate that data to the block level using statistical imputation where necessary. *See* Levitt Testimony 16. More importantly, however, such granular CVAP data is unnecessary in most § 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.[22] It is therefore irrelevant to VRA 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.

The pretextual nature of the defendants' argument is underscored by the fact that in all of the § 2 cases brought by the DOJ over the past eighteen 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 Testimony18 & 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 DOJ enforcement action that was hampered by currently available citizenship data.[23] In short,

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

[23] *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).

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

B. Collecting Citizenship Data Would Affirmatively Undermine Section 2 Litigation

Even setting aside the adequacy of current citizenship data for § 2 enforcement, the addition of a citizenship question would have precisely the opposite effect from what defendants and their amici claim. 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 the addition of a citizenship question could lead to more *precise* citizenship data, it will inevitably lead to less *accurate* citizenship data that differentially undercounts the minority populations who rely on that data to bring VRA claims.

Including a citizenship question on the 2020 census would therefore hobble, not bolster, the ability of minority groups to prove vote dilution under § 2 of the VRA. Opposing amici argue that in borderline cases—where minority groups stand just above the 50% margin required to establish the first *Gingles* precondition—more granular citizenship data from the decennial census would be necessary to prove their § 2 claims. *See* States Br. 16. Rather than helping these borderline plaintiffs, however, a citizenship question on the decennial census would undercount 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 VRA plaintiffs because it will come at the cost of missing information and an inaccurate 2020 census.[24]

CONCLUSION

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

Dated June 18, 2018

Respectfully submitted,

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[24] *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

AgeOptions

American Anthropological Association

American Federation of State, County & 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

Arizona Asian American Pacific Islander Democratic Party Caucus

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

Association of Asian Pacific Community Health Organizations

Bend the Arc: A Jewish Partnership for Justice

Bhutanese Community Association of Pittsburgh

California Pan-Ethnic Health Network

Center for Law and Social Policy (CLASP)

Center for Native American Youth at the Aspen Institute

Center for Popular Democracy

Center for the Study of Hate & Extremism – California State University, San Bernardino

Children's Defense Fund

Chinese-American Planning Council

Christian Methodist Episcopal Church – Washington-Virginia District

Citizen Action of New York

Citizens Union of the City of New York

Civil Rights Project/Proyecto Derechos Civiles – University of California, Los Angeles

Clearinghouse on Women's Issues

Clergy & Laity United For Economic Justice (CLUE)

Coalition on Human Needs

Colorado Center on Law and Policy

Colorado Children's Campaign

Colorado Immigrant Rights Coalition

Common Cause

Community Catalyst

Community Resource Exchange, Inc. (CRE)

Community Service Society of New York

Crescent City Media Group

D & R Accounting & Tax Solutions, Inc.

Defending Rights & Dissent

Delaware Ecumenical Council on Children and Families

Democracy Forward Foundation

Dēmos

Disability Rights Education and Defense Fund (DREDF)

The Economic Progress Institute (Rhode Island)

Empower Missouri

The Enrichment Center for Women, Children and Families

Equal Justice Society

Equality California

Faith in Public Life

Family Equality Council

FISH Hospitality Program, Inc.

Forefront

Good Neighbor Society

Government Information Watch

Greater New York Labor-Religion Coalition Inc.

Hindu American Foundation

Hispanic Federation

Hispanic Organization for Leadership and Action (HOLA)

Holy Spirit Missionary Sisters, USA-JPIC

Illinois Coalition for Immigrant and Refugee Rights

Illinois Partners for Human Service

Immigrant Legal Resource Center

Immigration Committee at First Unitarian Society Denver

Impact Fund

In Our Own Voice: National Black Women's Reproductive Justice Agenda

In the Public Interest

Indivisible Baltimore

Japanese American Citizens League

Japanese American Citizens League – Northern California, Western Nevada, Pacific District

Jewish Council for Public Affairs

Justice in Aging

LatinoJustice PRLDEF (Puerto Rican Legal Defense and Education Fund)

League of Women Voters of New York State

Legal Aid Justice Center

Legal Aid Society of the District of Columbia

Let America Vote

Main Street Alliance

MinKwon Center for Community Action

Minnesota Census Mobilization Partnership

Minnesota Council on Foundations

Missouri Immigrant and Refugee Advocates

National Association for the Advancement of Colored People (NAACP)

NAACP Legal Defense & Educational Fund, Inc.

National Action Network

National Asian Pacific American Women's Forum

National Black Justice Coalition

National Center for Law and Economic Justice

The National Coalition for Literacy

National Consumer Law Center

National Consumers League

National Council of Jewish Women

National Education Association

National Employment Law Project

National Health Law Program

National Human Services Assembly

National Immigration Law Center

National Institute for Reproductive Health

National LGBTQ Task Force

National Organization for Women Foundation

National Partnership for Women & Families

The National Urban League

National Women's Law Center

N.C. Counts Coalition

New America – Public Interest Technology Program

The New Florida Majority

New Jersey Institute for Social Justice

New Mexico Voices for Children

New York Counts 2020

New York State Black, Puerto Rican, Hispanic & Asian Legislative Caucus

North Carolina Asian Americans Together (NCAAT)

Partnership for America's Children

Paterson Alliance

Paterson Education Fund

People for the American Way

PFLAG

PolicyLink

Research Advisory Services, Inc.

Rock the Vote

Sargent Shriver National Center on Poverty Law

Service Employees International Union

Services, Immigrant Rights, and Education Network (SIREN)

The Sikh Coalition

Sisters of the Presentation of the Blessed Virgin Mary (New Windsor, NY)

SOME, Inc. (So Others Might Eat)

South Asian Americans Leading Together (SAALT)

South Asian Network Inc.

Southeast Michigan Census Council

The Southern Coalition for Social Justice

Southern Poverty Law Center

Texas Civil Rights Project

UnidosUS

Union for Reform Judaism

United Chinese Association of Brooklyn

Unitarian Universalist Fellowship of Hidalgo County

The Virginia Civic Engagement Table

The Voting Rights Institute

Wind of the Spirit, Immigrant Resource Center

Wisconsin Faith Voices for Justice

Women Employed

Women of Reform Judaism

Woodhull Freedom Foundation

The Women's Law Center of Maryland

YWCA USA