

GIBSON, DUNN & CRUTCHER LLP

Alexander H. Southwell (*pro hac vice* pending)
asouthwell@gibsondunn.com
200 Park Avenue
New York, New York 10166
Tel.: 212-351-3981
Fax: 212-351-6281

Julian W. Kleinbrodt (CA Bar # 302085)
jkleinbrodt@gibsondunn.com
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Tel.: 415-393-8382
Fax: 415-374-8470

Attorneys for Amici Curiae

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS; and ADRIAN GARCIA,

Plaintiffs,

v.

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

Defendants.

Case No. 5:20-cv-05799-LHK

BRIEF OF AMICI CURIAE 12 BUSINESSES AND BUSINESS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS

Date: September 17, 2020

Time: 1:30 p.m.

Place Courtroom 8, 4th Floor, San Jose

Judge: Honorable Lucy H. Koh

TABLE OF CONTENTS

Page

I. INTERESTS OF *AMICI CURIAE* 1

II. INTRODUCTION 2

III. ARGUMENT 3

 A. Inaccurate Census Data Will Harm Businesses That Rely On The Census For
 Marketing, Product Development, Operations, And Other Purposes 5

 1. Inaccurate Census Data Will Harm Businesses That Use Census
 Data In Deciding Where To Open New Locations 6

 2. Inaccurate Census Data Will Harm Businesses That Use Census
 Data In Product Development, Marketing, And Placement..... 8

 3. Inaccurate Census Data Will Impair The Accurate And
 Equitable Allocation Of Federal Support..... 9

 B. Inaccurate Census Data Will Impact Businesses More Substantially As
 Businesses Become Increasingly Data-Driven 12

IV. CONCLUSION 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Bode v. Nat’l Democratic Party,*
452 F.2d 1302 (D.C. Cir. 1971) 4

5 *Dep’t of Commerce v. New York,*
139 S. Ct. 2551 (2019) 2

6

7 *New York v. U.S. Dep’t of Commerce,*
351 F. Supp. 3d 502 (S.D.N.Y.), *aff’d in part* 139 S. Ct. 2251 (2019) 2

8

9 *Utah v. Evans,*
536 U.S. 452 (2002) 4

10 *Wesberry v. Sanders,*
376 U.S. 1 (1964) 4

11

12 *Wisconsin v. City of New York,*
517 U.S. 1 (1996) 4, 10

Statutes

13

14 13 U.S.C. § 9(a) 3

15 15 U.S.C. § 1512 5

16 26 U.S.C. § 45D(e) 9

17 29 U.S.C. § 3162 11

18 29 U.S.C. § 3172 11

19 29 U.S.C. § 3242(a) 11

20 Permanent Census Act, Pub. L. No. 27 (1902) 4

21

Other Authorities

22

23 154 Cong. Rec. H4890 (June 4, 2008) 4

24 AJ Agrawal, *Why Data Is Important for Companies and Why Innovation Is On the*
Way, Inc. (Mar. 24, 2016), <https://bit.ly/2qY77iM> 13

25

26 Syed Riaz Ahmed, *Applications of Data Mining in Retail Business*, Proceedings of the
Int’l Conference on Info. Tech.: Coding and Computing (2004) 13

27 *Alteryx Powers U.S. Census Data Analysis* (Aug. 27, 2012), <https://bit.ly/2JPFxy8> 13

28

TABLE OF AUTHORITIES

(continued)

Page(s)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ass’n of Nat’l Advertisers, *ANA Members Oppose Addition of Citizenship Question for 2020 Census* (June 12, 2018), <https://perma.cc/N9NR-9LED> 8

Rhett Buttle & Katie Vlietstra Wonnenberg, *Why All Businesses Should Care About the 2020 Census*, The Hill (Mar. 4, 2020) 5

Claritas Demographic Update Methodology, Claritas (Sept. 2006), <https://bit.ly/2E8u4qM> 13

Cmty. Dev. Fin. Insts. Fund, *New Markets Tax Credit Program*, <https://bit.ly/1H54VZx> 9

Comm. for Econ. Dev., *The 2020 Census: The Importance of an Accurate and Robust Accounting of our Nation’s Population* (Apr. 15, 2019), <https://perma.cc/AHY8-JTQY> 6

Consortium of Soc. Sci. Ass’ns, *COSSA Statement on the Impact of a Citizenship Question in the 2020 Decennial Census* (Mar. 27, 2018), <https://bit.ly/3fWyMWa> 3

Jenny Dinnen, *3 Ways You Can Use Census Data*, MacKenzie Corp. (Oct. 23, 2013), <https://bit.ly/2NWy5Q5> 7

The Economic Impacts of the 2020 Census and Business Uses of Federal Data: Hearing Before the Joint Economic Comm., 116th Cong. 33 (2019) 6, 7, 9

EPA, *Learn About the Water Pollution Control (Section 106) Grant Program* (Jan. 19, 2018), <https://bit.ly/2EUinRj> 11

Paul Farhi, *For Business, Census Is a Marketing Data Motherlode*, Wash. Post (Mar. 17, 1990) 2

Howard Fienberg, *Remove the Citizenship Question from 2020 Census, Says Marketing Research & Data Analytics Industry*, Insights Ass’n (Aug. 7, 2018), <https://bit.ly/2OVzhDi> 14

Tom Foster, *Warby Parker Grew to \$250 Million in Sales Through Disciplined Growth. Now It’s Time to Get Aggressive*, Inc. (June 2017), <https://bit.ly/2rZ2HEX> 7

Harv. Bus. Sch., *Zillow: Ahead of Its Time or Falling Behind* (Nov. 18, 2016), <https://bit.ly/2VSEkr2> 15

John H. Heinrichs & Jeen-Su Lim, *Integrating Web-Based Data Mining Tools with Business Models for Knowledge Management*, 35 Decision Support Sys. 103 (2003) 13

Marisa Hotchkiss & Jessica Phelan, *Uses of Census Bureau Data in Federal Funds Distribution: A New Design for the 21st Century* (Sept. 2017), <https://bit.ly/3fX2gmJ> 10

TABLE OF AUTHORITIES

(continued)

Page(s)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

HUD Exchange, *CDBG: Community Development Block Grant Programs*,
<https://bit.ly/2VSnCb1> 12

Geolytics, *Estimates/Projections*, <https://bit.ly/3iFQNtj> 13

Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of
 Consumer Culture*, 87 Cornell L. Rev. 853 (2002) 4, 5, 9, 14

Letter from Nat’l Ass’n of Realtors to Sen. Claire McCaskill (Feb. 25, 2018),
<https://bit.ly/2HQ1dHF> 14

Melissa Martin, *Costs of Starting a Business: Bricks & Mortar Retail Startup*,
 StartupNation (June 8, 2006), <https://bit.ly/2Cf4vRr>..... 6

Scott McDonald, *A 2020 Census Flop Would Pose a Danger to U.S. Businesses*,
 Forbes (Dec. 6, 2017), <https://bit.ly/2Uv6ckz>..... 14

Amy Merrick, *Population Data Will Help Marketers Pitch Their Products*, Wall St. J.
 (Feb. 14, 2001), <https://on.wsj.com/2V0hFck> 7

National Research Council, *Modernizing the U.S. Census* (1995) 7, 9, 10

William P. O’Hare, *The Importance of Census Accuracy: Uses of Census Data, in
 Differential Undercounts in the U.S. Census 19* (2019) 6

Office of the Chief Economist, Dep’t of Commerce, *The Value of the American
 Community Survey: Smart Government, Competitive Businesses, and Informed
 Citizens* (Apr. 2015), <https://bit.ly/3fLJ18H>..... 14

Kenneth Prewitt, *The American People Census 2000: Politics and Science in Census
 Taking* (Russell Sage Foundation 2003), <https://wapo.st/2NWwjyp>..... 4

Public Comment – Coalition of Philanthropic Organizations (Mar. 21, 2018),
<https://perma.cc/MB9X-ZRHG>..... 10

Ready Nation, *Data for a Strong Economy*, <https://bit.ly/2PJ17a2> 2

Report, Council of Econ. Advisers, *The Use of Census Data: An Analytical Review
 (Apr. 1, 2000)*, <https://bit.ly/2Tv1PJP> 3, 8

Andrew D. Reamer, *Counting for Dollars: The Role of the Decennial Census in the
 Geographic Distribution of Federal Funds*, Brookings Inst. (Mar. 9, 2010),
<https://brook.gs/2Tz7Bdt>..... 10, 11

Andrew Reamer, Geo. Wash. Inst. of Pub. Policy, *Counting for Dollars: A Study of
 Census-guided Financial Assistance to Rural America* (Oct. 11, 2018),
<https://bit.ly/2Onk0LO> 14

TABLE OF AUTHORITIES

(continued)

Page(s)

1

2 Chris Rygielski et al., *Data Mining Techniques for Customer Relationship*

3 *Management*, 24 Tech. in Soc’y 483 (2002)..... 13

4 SBA, *Market Research and Competitive Analysis*, <https://perma.cc/9CAA-9T85>..... 6

5 SBA, *Office of Small Business Development Centers*, <https://perma.cc/FK4V-D3T6>..... 11

6 Diane W. Schanzenbach & Michael R. Strain, *Act Now to Save the 2020 Census*,

7 Bloomberg Opinion (Aug. 11, 2017), <https://perma.cc/HP9M-845Z> 8

8 Robert Shapiro, *The 2020 Census May Be Wildly Inaccurate—And It Matters More*

9 *Than You Think*, Brookings Inst. (Aug. 31, 2017), <https://perma.cc/6T77-KJFU>..... 9

10 Greg Sterling, *Chipotle Customers Are Smarter Than McDonald’s And Other Insights*

11 *From Smartphone Data*, Mktg. Land (June 24, 2014), <https://mklnd.com/2ESReye> 15

12 Richard K. Thomas, *Using Demographic Analysis in Health Services Planning: A*

13 *Case Study in Obstetrical Services*, in *Demographics: A Casebook for Business*

14 *and Government* (RAND Corp. 1997)..... 10

15 U.S. Census Bureau, *Census Business Builder* (Dec. 13, 2018),

16 <https://perma.cc/8HRY-88TH>..... 6

17 U.S. Census Bureau, *Directors 1790 – 1810* (last revised Dec. 17, 2019),

18 <https://bit.ly/2VKtnrs> 4

19 U.S. Dep’t of Educ., *Improving Basic Programs Operated by Local Educational*

20 *Agencies (Title I, Part A)*, (Oct. 24, 2018), <https://bit.ly/2lQzI5X> 12

21 U.S. Fish & Wildlife Serv., *State Wildlife Grant Program – Overview* (May 15, 2019),

22 <https://perma.cc/EQC4-AMZM> 11

23 U.S. Fish & Wildlife Serv., *Wildlife Restoration Program – Overview* (Feb. 2, 2018),

24 <https://perma.cc/9JWJ-DWM9> 11

25 Paul R. Voss, *Targeting Wealthy Ex-Wisconsinites in Florida: A Case Study in*

26 *Applied Demography*, in *Demographics: A Casebook for Business and*

27 *Government* (Hallie J. Kintner et al. eds., 1997)..... 7

28 Hansi Lo Wang, *Census Cuts All Counting Efforts Short by a Month*, NPR (Aug. 3,

2020), <https://n.pr/2DSGB1A> 3

Jonathan Weber, *Census Data Assists Business Where It Counts: Accurate*

Demographics, L.A. Times (Jan. 2, 1990), <https://perma.cc/P3NV-84YU> 7, 13

Constitutional Provisions

U.S. Const. art. I, § 2, cl. 3..... 4

1 **I. INTERESTS OF *AMICI CURIAE***

2 *Amici* submit this brief to provide important context regarding how *amici* and others in the
3 business community rely on Census data, and how inaccurate Census data harms businesses and
4 consumers.

5 *Amici* include the following companies and business organizations from a variety of sectors:

- 6 • Cummins Inc.
- 7 • General Assembly Space, Inc.
- 8 • Knotel, Inc.
- 9 • Levi Strauss & Co.
- 10 • LivHOME, Inc.
- 11 • Lush Cosmetics LLC
- 12 • Mara Hoffman Inc.
- 13 • Minneapolis Regional Chamber of Commerce
- 14 • Postmates Inc.
- 15 • Univision Communications Inc.
- 16 • Workplace Options, LLC
- 17 • Zendesk Inc.

18 *Amici's* interests in this case are strong. *First, amici*, like many businesses, rely on Census data
19 to make a variety of decisions, including where to put new brick-and-mortar locations, how to market
20 their products, and how to predict which products will be successful in a given market. Businesses
21 also have a broader interest in ensuring that the communities they serve receive needed federal
22 support—in terms of education, infrastructure, and other support—in order to provide an environment
23 ripe for new development and innovation. All of these things depend on the availability of accurate
24 Census data, and an inadequate or compressed plan for collecting, verifying, and analyzing Census
25 information threatens to compromise the accuracy of that data.

26 *Second, amici* have a broader interest in protecting their employees, customers, and business
27 partners from the negative effects of an inaccurate Census count. Immigrant and minority communities
28 are most vulnerable to inaccuracies in Census data, and are therefore most at risk of losing access to

1 federal funding or even of losing congressional representation. An inaccurate Census count will harm
2 businesses and the communities in which they serve.

3 For the above reasons, *amici* have a substantial interest in this litigation.¹

4 II. INTRODUCTION

5 Accurate Census data is important to businesses. Companies use that data to plan new locations
6 and future projects, and they and their communities rely on federal funding allocated based on Census
7 data. While businesses have a number of resources at their disposal to help them understand the
8 characteristics, preferences, and geographic distribution of their customers, the Census is a particularly
9 important business tool. *See* Paul Farhi, *For Business, Census Is a Marketing Data Motherlode*, Wash.
10 Post (Mar. 17, 1990), <https://wapo.st/2JOPI67>. The Census provides critical data that informs decision-
11 making in both the private and public sectors. Businesses regularly use that data to determine where
12 to locate stores and facilities, find qualified workers, and market products and services. *See generally*
13 Ready Nation, *Data for a Strong Economy*, <https://bit.ly/2PJ17a2>. Consequently, government action
14 that threatens the accuracy of Census data directly harms the businesses nationwide that rely on that
15 data.

16 Defendants have multiple times attempted to revise Census policy and procedure in ways that
17 could impair the reliability and accuracy of Census data. In 2018, the Department of Commerce
18 announced its intent to add a question to the Census asking about citizenship, despite longstanding
19 recommendations by the Census Bureau itself that such a question would reduce response rates and
20 impair Census data. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 530 (S.D.N.Y.), *aff'd*
21 *in part* 139 S. Ct. 2251 (2019). Last year the Supreme Court held that that effort was based on a
22 “contrived” and pretextual rationale. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

23 This year, on July 21, 2020, President Trump issued a memorandum declaring that it is the
24 policy of the United States to exclude undocumented immigrants from the apportionment base—the
25 number of individuals used to determine allocation of congressional seats and electoral votes—despite
26

27
28 ¹ No party’s counsel authored the brief in whole or in part; and no party, party’s counsel, or
person other than the *amici curiae*, their members, or their counsel contributed money that was
intended to fund preparing or submitting the brief.

1 decades if not centuries of practice doing just that. As plaintiffs challenging that declaration have
2 pointed out, Defendants’ actions threaten to suppress response rates to the Census, particularly from
3 naturalized citizens and immigrants.

4 Now, the Department of Commerce has taken another step that threatens to impair the accuracy
5 of the 2020 Census. In the midst of the COVID-19 pandemic, the Department of Commerce announced
6 earlier this year that it would be extending the deadline for completion of the Census to October 31,
7 2020 (among other Census-related deadlines), owing to the delayed start of the Department’s outreach
8 to individuals who did not respond to mail-in Census forms. In early August, though, the Department
9 reversed course, imposing a September 30 deadline for completion of the Census, potentially resulting
10 in vast undercounting. *See* Hansi Lo Wang, *Census Cuts All Counting Efforts Short by a Month*, NPR
11 (Aug. 3, 2020), <https://n.pr/2DSGB1A>.

12 The United States Constitution requires an “actual Enumeration” of the people to allow the
13 “Representatives” to “be apportioned among the several States which may be included within this
14 Union, according to their respective Numbers.” U.S. Const. art. I, § 2, cl. 3. But the importance of
15 accurate Census data extends well beyond its constitutional purpose of apportioning congressional
16 representation. Census data is made public, *see* 13 U.S.C. § 9(a), and social scientists have called
17 Census responses “an irreplaceable source of data for researchers,” Consortium of Soc. Sci. Ass’ns,
18 *COSSA Statement on the Impact of a Citizenship Question in the 2020 Decennial Census* (Mar. 27,
19 2018), <https://bit.ly/3fWyMWa>. “Today, policy makers at all levels of government, as well as private
20 businesses, households, researchers, and nonprofit organizations, rely on an accurate census in myriad
21 ways that range far beyond the single fact of how many people live in each state.” Report, Council of
22 Econ. Advisers, *The Use of Census Data: An Analytical Review* (Apr. 1, 2000), <https://bit.ly/2Tv1PJP>.
23 *Amici* respectfully ask this Court to protect the Census, the invaluable data it provides, and ensure that
24 businesses around the country have access to this vital tool.

25 III. ARGUMENT

26 An accurate Census is a cornerstone of our democracy. Knowing that the “calculation of
27 populations could be and often were skewed for political or financial purposes,” the Framers “chose to
28 make an ‘actual Enumeration’ part of our constitutional structure” in order “to preclude the availability

1 of methods that permit political manipulation.” *Utah v. Evans*, 536 U.S. 452, 500, 507, 510 (2002)
2 (Thomas, J., concurring in part and dissenting in part); *see also Wisconsin v. City of New York*, 517
3 U.S. 1, 6 (1996) (“[E]ach [decennial Census] was designed with the goal of accomplishing an ‘actual
4 Enumeration’ of the population.”). The Census was an integral part of the design of the new
5 government at the Founding—an attempt to ensure that the House of Representatives would be based
6 on proportional representation of the people (not just the voters or even the citizens), itself essential to
7 the “Great Compromise” that yielded our bicameral legislature. *See Wesberry v. Sanders*, 376 U.S. 1,
8 12–14 (1964); *Bode v. Nat’l Democratic Party*, 452 F.2d 1302, 1307 (D.C. Cir. 1971).

9 Indeed, our nation’s earliest leaders recognized the importance of Census accuracy. For
10 instance, when Thomas Jefferson supervised the nation’s first Census as Secretary of State in 1790, he
11 expected a population count of at least 4 million people. Yet the Census ultimately revealed a nation
12 of just 3.9 million people, much to the surprise and concern of Jefferson and President George
13 Washington. Jefferson thought that the Census had significantly undercounted the population, perhaps
14 by several hundred thousand residents. U.S. Census Bureau, *Directors 1790 – 1810* (last revised Dec.
15 17, 2019), <https://bit.ly/2VKtnrs>. And Washington, who had expected a population count about five
16 percent higher, was similarly chagrined, blaming the “‘inaccuracy’ on avoidance by some residents as
17 well as on negligence by those responsible for taking the census.” Kenneth Prewitt, *The American
18 People Census 2000: Politics and Science in Census Taking* 6 (Russell Sage Foundation 2003),
19 <https://wapo.st/2NWwjyp>. By making these concerns about the Census public, then-Secretary
20 Jefferson “helped alert the Nation to the importance of accuracy in the numbers used to describe the
21 society.” 154 Cong. Rec. H4890 (June 4, 2008) (statement of Rep. Johnson).

22 In the 1850s, Congress expanded the Census’s traditional role and included a number of
23 questions on the Census aimed at learning more about the characteristics of the U.S. population. *See*
24 Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87
25 Cornell L. Rev. 853, 862 (2002). At the turn of the twentieth century, as the Census grew more
26 complex, Congress created the Census Bureau, which opened its doors in 1902. *See* Permanent Census
27 Act, Pub. L. No. 27 (1902). By that time, the Census’s mission to “foster, promote, and develop the
28 foreign and domestic commerce” was codified, 15 U.S.C. § 1512, and the Census Bureau’s energies

1 “were directed toward the improvement of business statistics, . . . and toward the collection of data that
2 might foster improvements in the national economy without the heavy hand of government ‘planning,’”
3 Kysar, *supra*, at 862–63 (some internal quotation marks omitted).

4 The Census Bureau’s decision to reverse the extended deadlines for completion of the Census,
5 however, threatens to undermine that core mission by compromising the completeness and accuracy of
6 the Census account. Four former Census Bureau Directors have publicly stated their “expert opinion”
7 that “failing to extend the deadlines . . . will result in seriously incomplete enumerations in many areas
8 across our country.” Press Release, Former Census Bureau Directors, *On the Importance of Extending*
9 *the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States*
10 (Aug. 4, 2020), <https://perma.cc/NX36-YFFE>. The American Statistical Association agrees. *See* Decl.
11 of Sadik Huseny, Ex. 10, ECF No. 37-10. Plaintiffs here have also submitted expert testimony from a
12 former Census Bureau Director and former Bureau Chief Scientist that failing to reinstate the extended
13 deadlines will ‘severely compromise the quality, accuracy, reliability, and indeed the legitimacy of the
14 2020 Census numbers.’ Decl. of Dr. Thomas A. Louis ¶ 1, ECF No. 36-4; *see also* Decl. of John
15 Thompson ¶¶ 5, 21–27, ECF No. 36-2; Decl. of D. Sunshine Hillygus Ph.D. ¶¶ 5, 39–42, ECF No.
16 36-3]. The numbers available so far already indicate a lower response rate than in years past. *See* Mot.
17 for Stay and Prelim. Inj. 26, ECF No. 36.

18 Lower response rates mean less accurate Census data, which will have negative effects on *amici*
19 and other businesses that use Census data in a variety of ways to plan their operations and products.

20 **A. Inaccurate Census Data Will Harm Businesses That Rely On The Census For Marketing,**
21 **Product Development, Operations, And Other Purposes**

22 Businesses have long used Census data in a variety of strategic ways to plan their operations,
23 enhance their understanding of their customer base, and develop products that meet consumer needs.
24 *See* Kysar, *supra*, at 854–56; *see also* Rhett Buttle & Katie Vlietstra Wonnemberg, *Why All Businesses*
25 *Should Care About the 2020 Census*, The Hill (Mar. 4, 2020), <https://perma.cc/J3FC-KFVY> (“Census
26 data have been invaluable in guiding business decisions for more than 200 years.”). The Census Bureau
27 itself recognizes the value businesses derive from the types of data the Census provides; it even
28 provides companies with a “Census Business Builder,” which is “a suite of services that provide

1 selected demographic and economic data from the Census Bureau tailored to specific types of users in
2 a simple to access and use format.” U.S. Census Bureau, *Census Business Builder* (Dec. 13, 2018),
3 <https://perma.cc/8HRY-88TH>. The Bureau notes that this data can “help you start or grow a business
4 or understand the business landscape for a region.” *Id.*; see also SBA, *Market Research and*
5 *Competitive Analysis*, <https://perma.cc/9CAA-9T85>. Thus, “[t]he vitality of the nation’s economy and
6 the 6 million businesses inside that economy are greatly affected by decisions made using
7 census-derived data.” *The Economic Impacts of the 2020 Census and Business Uses of Federal Data:*
8 *Hearing Before the Joint Economic Comm.* 3, 116th Cong. 33 (2019) (statement of Andrew Reamer)
9 (“Reamer Testimony”); see also William P. O’Hare, *The Importance of Census Accuracy: Uses of*
10 *Census Data, in* Differential Undercounts in the U.S. Census 19 (2019); Comm. for Econ. Dev., *The*
11 *2020 Census: The Importance of an Accurate and Robust Accounting of our Nation’s Population* 3–4
12 (Apr. 15, 2019), <https://perma.cc/AHY8-JTQY>.

13 Crediting Plaintiff’s evidence, the Census Bureau’s revised and rushed deadlines would result
14 in significantly flawed data, undercounting millions of people. For businesses, undercounting hundreds
15 of thousands or even millions of people matters, particularly in the context of low-margin industries
16 where even slight adjustments of data could materially affect the accuracy of projected revenue and
17 costs. If this exclusion is adopted—rendering Census data less accurate—each business that uses
18 Census data for these purposes will be harmed.

19 **1. Inaccurate Census Data Will Harm Businesses That Use Census Data In Deciding**
20 **Where To Open New Locations**

21 Businesses rely on Census data when they plan the placement and construction of new locations
22 or markets. That data lets businesses maximize the effectiveness of a location and capitalize on a
23 particular region’s needs or preferences. Building a new location is a significant undertaking, requiring
24 major capital investments. See Melissa Martin, *Costs of Starting a Business: Bricks & Mortar Retail*
25 *Startup*, StartupNation (June 8, 2006), <https://perma.cc/54QP-KGHW>. Mistakes about where to place
26 a store, warehouse, or other facility can harm not only a business’s overall outlook, but also the
27 communities that need (or don’t need) such a facility.

28

1 Many retail merchants use Census data to strategically place their stores and other facilities.
2 See Amy Merrick, *New Population Data Will Help Marketers Pitch Their Products*, Wall St. J. (Feb.
3 14, 2001), <https://on.wsj.com/2V0hFck>. Some businesses rely on Census data to evaluate what makes
4 a market desirable and where to place stores within a market. See Tom Foster, *Warby Parker Grew to*
5 *\$250 Million in Sales Through Disciplined Growth. Now It's Time to Get Aggressive*, Inc. (June 2017),
6 <https://perma.cc/73B7-4W9U>; see also Reamer Testimony at 33. Others look at the Census profile for
7 a new area to see how it compares with an existing market and to determine whether a new location is
8 likely to generate more, less, or the same business. See Jonathan Weber, *Census Data Assists Business*
9 *Where It Counts: Accurate Demographics*, L.A. Times (Jan. 2, 1990), <https://perma.cc/P3NV-84YU>.

10 A business might use Census data to target a small location in a state where its customers are
11 most likely to reside and where a new location could be profitable. See Paul R. Voss, *Targeting*
12 *Wealthy Ex-Wisconsinites in Florida: A Case Study in Applied Demography*, in *Demographics: A*
13 *Casebook for Business and Government* 109 (Hallie J. Kintner et al. eds., 1997). The Census Bureau
14 even provides an interactive population map that businesses can use to examine population data “at the
15 most granular level,” including “age, race, ethnicity and housing status.” Jenny Dinnen, *3 Ways You*
16 *Can Use Census Data*, MacKenzie Corp. (Oct. 23, 2013), <https://perma.cc/5CQM-XUYN>. Without
17 accurate Census data on which to base location decisions, businesses would lose a tool that has become
18 crucial to their survival and growth.

19 The effects of inaccurate Census data on a company’s decision of where to place a new location
20 would harm not only that business, but also its surrounding community. Accurate data helps businesses
21 take risks on changing and developing neighborhoods. Unreliable data might mean businesses will
22 open fewer locations in new communities, depriving businesses of new markets and communities of
23 new stores or services.

24 Healthcare providers are a good example of this effect because they use Census data to
25 understand community needs. See National Research Council, *Modernizing the U.S. Census* 297
26 (1995). A hospital can use Census data regarding residents in the area of a new location to determine
27 how many and what kind of doctors will likely be needed at that location. See *id.* This same analysis
28 can be performed to determine the need for certain health services in a given area—for example, a

1 region densely populated with young families will be more in need of obstetrical or family practice
2 services than a region populated primarily with retirees. *See id.* at 298; *see also* Richard K. Thomas,
3 *Using Demographic Analysis in Health Services Planning: A Case Study in Obstetrical Services, in*
4 *Demographics: A Casebook for Business and Government* 159, 167–68 (RAND Corp. 1997)
5 (examining the age of women in an area to determine the need for a new obstetrical facility). Inaccurate
6 Census data thus may lead to some communities having inadequate healthcare in light of business
7 decisions driven by this data, just as other communities may face an inefficient influx of healthcare
8 resources beyond what is actually needed.

9 **2. Inaccurate Census Data Will Harm Businesses That Use Census Data In Product** 10 **Development, Marketing, And Placement**

11 Inaccurate Census data will also affect the development and marketing of numerous products
12 around the country. Businesses use Census data to inform decisions about product development and
13 placement. A retail business may, for instance, rely on demographic data to determine which products
14 are going to sell best in which regions, and calibrate each store’s stock accordingly. *See* Diane W.
15 Schanzenbach & Michael R. Strain, *Act Now to Save the 2020 Census*, Bloomberg Opinion (Aug. 11,
16 2017), <https://perma.cc/HP9M-845Z> (“If you walk into a Target store in suburban Florida, the items
17 on the shelves are different from what is in a Target store in downtown Washington D.C. Target makes
18 these decisions in large part using government data.”). As the Association of National Advertisers has
19 explained, “[m]arketing decisions/investments are often made based on population counts,” and
20 inaccurate data would affect the data that businesses “rely on to quantify the marketplace, and thereby
21 undersize the business opportunity.” Ass’n of Nat’l Advertisers, *ANA Members Oppose Addition of*
22 *Citizenship Question for 2020 Census 2* (June 12, 2018), <https://perma.cc/N9NR-9LED> (quotation
23 marks omitted).

24 Entire product lines may even be developed based on data culled from the Census. *See, e.g.,*
25 *The Use of Census Data: An Analytical Review, supra* (noting that accurate Census data helps
26 “[m]anufacturers of baby products such as baby food, clothes, diapers, and toys, and manufacturers of
27 maternity clothes and greeting cards . . . develop . . . their product lines”). And even independent
28 market research can be aided by the Census—market researchers can use Census data to make accurate

1 inferences about survey answers based on their geographic location or their other survey responses.
2 *See* Reamer Testimony at 33.

3 Flawed Census data can also impact customer outreach. For example, because utility
4 companies often offer lower rates for poorer, elderly, or disabled customers, utility companies use
5 Census data to determine which areas are most likely to need those special rates and reach out to
6 customers in those areas to evaluate eligibility. *See Modernizing the U.S. Census, supra*, at 297. Cable
7 television companies may use Census data to target advertising for pay-per-view events to those areas
8 whose residents are most likely to purchase the event. *See id.* at 296. And when a car manufacturer
9 learned through customer research that its vehicles were popular with people in the nursing profession,
10 it used data from the Census to tailor its regional advertising to that demographic. *See Kysar, supra*,
11 at 885. Inaccurate Census data would weaken the ability of businesses to adapt their marketing and
12 outreach strategies to a changing population, resulting in wasted dollars for businesses and unwanted
13 advertising for customers.

14 **3. Inaccurate Census Data Will Impair The Accurate And Equitable Allocation Of** 15 **Federal Support**

16 The federal government relies on Census data to allocate and distribute federal support and
17 funding, and inaccurate Census data threatens to harm businesses and their communities who rely on
18 that support. For example, under the New Market Tax Credit (“NMTC”)—a federal program designed
19 to stimulate investment in distressed communities—a business investment may qualify for special tax
20 treatment if it occurs in an area with certain concentrations of low- or moderate-income households.
21 *See* Cmty. Dev. Fin. Insts., *New Markets Tax Credit Program*, <https://perma.cc/LS87-P5PD>; Robert
22 Shapiro, *The 2020 Census May Be Wildly Inaccurate—And It Matters More Than You Think*,
23 Brookings Inst. (Aug. 31, 2017), <https://perma.cc/6T77-KJFU>.² Or a nonprofit organization, such as a
24 rural health clinic, may use Census data for a special federal designation based on location and
25 population served. *See Modernizing the U.S. Census, supra*, at 298. Businesses rely on Census data

26
27 ² An NMTC-eligible investment must be located in a designated “low-income community,”
28 defined by U.S. Census data as a Census tract with a poverty rate of at least 20 percent or with
a median family income that does not exceed 80 percent of the statewide median family income.
26 U.S.C. § 45D(e).

1 to know whether they will be entitled to federal support, and inaccurate Census data risks depriving
2 businesses of that needed support.

3 More broadly, the federal government relies on Census data to allocate and distribute federal
4 funding—to the tune of about \$700 billion—and inaccurate Census data can therefore affect businesses
5 that rely directly or indirectly on those funds. *See* Public Comment – Coalition of Philanthropic
6 Organizations (Mar. 21, 2018), <https://perma.cc/MB9X-ZRHG> (“[R]ecent decennial censuses have
7 resulted in net undercounts of many communities, with consequences for . . . disbursing roughly \$700
8 billion in federal funds.”). In 2015 alone, the federal government used Census data to distribute over
9 \$675 billion in federal funding to a variety of programs. *See* Marisa Hotchkiss & Jessica Phelan, *Uses*
10 *of Census Bureau Data in Federal Funds Distribution: A New Design for the 21st Century* 3 (Sept.
11 2017), <https://perma.cc/LNF6-WYAU>; *see also* *Wisconsin*, 517 U.S. at 5–6 (“Today, census data also
12 have important consequences not delineated in the Constitution: The Federal Government considers
13 census data in dispensing funds through federal programs to the States . . .”). Those billions of dollars
14 were funneled through 132 different programs, ranging from subsidies for school lunches to historic
15 preservation. *See* Hotchkiss & Phelan, *supra*, at 16–17.

16 The bulk of Census-guided federal assistance goes to state governments through a handful of
17 grant programs that aid low-income households and support highway infrastructure. *See* Andrew D.
18 Reamer, *Counting for Dollars: The Role of the Decennial Census in the Geographic Distribution of*
19 *Federal Funds* 10, Brookings Inst. (Mar. 9, 2010), <https://perma.cc/3WBG-JCDK>.³ In 2008, using
20 Census data, the federal government distributed over \$36 billion in federal funds via the Federal-Aid
21 Highway Program, and distributed an additional \$10 billion to fund other transportation needs. *See id.*
22 at 11–12. Businesses have an interest in ensuring that the basic infrastructure of their communities—
23 including the availability of accessible and well-kept highways—is supported by federal funding. That
24 is especially true for businesses that depend on federally supported highways for the transportation of
25 goods. And an inaccurate Census threatens the proper allocation of that funding.

26
27
28 ³ In 2008, \$261.1 billion was distributed to states through Medicaid, the largest Census-guided
assistance program. *See* Reamer, *supra*, at 10.

1 Businesses also have an interest in the federal funding allocated to other programs. For
2 example, through the Workforce Innovation and Opportunity Act (“WIOA”), the federal government
3 subsidizes the education and workforce training of youths and adults from disadvantaged backgrounds
4 and areas. *See* 29 U.S.C. §§ 3162, 3172. The allocation of those subsidies is determined using the
5 “most recent satisfactory data from the Bureau of the Census.” 29 U.S.C. § 3242(a). And some
6 organizations, like *amicus* General Assembly, enroll students that rely on that federal funding, or offer
7 programs that are funded by WIOA. The Department of Labor allocated over \$7 billion in 2008 on the
8 basis of Census data, *see* Reamer, *supra*, at 13, some of which went to educational institutions like
9 *amicus* General Assembly to provide free training programs to underserved and overlooked talent.

10 Companies may have more specific interests depending on their size or line of business. For
11 example, many new businesses have an interest in the federal funding that goes to Small Business
12 Development Centers, which receive federal funding to provide small companies and entrepreneurs
13 with free consulting and training services. *See* SBA, *Office of Small Business Development Centers*,
14 <https://perma.cc/FK4V-D3T6>. A local outdoors-equipment retail store, for example, whose business
15 depends in part on the availability and quality of nearby outdoor activities will likely have an interest
16 in ensuring that the surrounding community is receiving adequate support from federal programs such
17 as the Wildlife Restoration Program, *see* U.S. Fish & Wildlife Serv., *Wildlife Restoration Program –*
18 *Overview* (Feb. 2, 2018), <https://perma.cc/9JWJ-DWM9> (providing funding to restore, conserve,
19 manage, and enhance wild birds and mammals and their habitat); *see also* U.S. Fish & Wildlife Serv.,
20 *State Wildlife Grant Program – Overview* (May 15, 2019), <https://perma.cc/EQC4-AMZM> (providing
21 funding to develop and implement programs that benefit wildlife and their habitats), and the Water
22 Pollution Control Grant Program, *see* EPA, *Learn About the Water Pollution Control (Section 106)*
23 *Grant Program* (Jan. 19, 2018), <https://bit.ly/2EUinRj> (providing funding to states and agencies to
24 build and sustain effective water quality programs), both of which rely on the Census to determine
25 allocation of funding.

26 Established businesses in communities may also have a more general interest in ensuring that
27 the communities they serve—and that make up their customer and employee bases—are receiving the
28 needed federal assistance to which they are entitled. The U.S. Department of Education, for instance,

1 relies on Census data to allocate funds to educational agencies and schools with high numbers or
2 percentages of children from low-income families. See U.S. Dep’t of Educ., *Improving Basic*
3 *Programs Operated by Local Educational Agencies (Title I, Part A)*, (Oct. 24, 2018),
4 <https://bit.ly/2lQzI5X>. The Department of Education allocated over \$10 billion in special education
5 grants to states in 2008, based in large part on Census data. See Reamer, *supra*, at 11. It distributed
6 over \$7 billion in Title I grants to local educational agencies during the same time period. *Id.*
7 Businesses in such a community, like all members of a community, benefit from strong educational
8 programs, particularly when that business depends on an educated local workforce to staff its facilities.
9 Federal funds are also allocated through Community Development Block Grant Programs—again on
10 the basis of Census data—to help develop urban communities and improve living and economic
11 conditions. See HUD Exchange, *CDBG: Community Development Block Grant Programs*,
12 <https://bit.ly/2VSnCb1>. Again, businesses benefit when their communities receive the infrastructure
13 support they need to thrive. But an inaccurate Census risks misallocating funds to each of these
14 programs, harming businesses and their communities.

15 * * *

16 These varied and documented uses of Census data are possible only because businesses can
17 depend on the Census to provide accurate demographic information about customers and to determine
18 how best to engage with their local communities. Divesting Census officials of the time needed to
19 collect and analyze Census data threatens to undermine the validity of this data, and therefore
20 substantially reduce its value to businesses. If businesses cannot rely on the Census to provide usable,
21 accurate data, they will be hamstrung in their ability to track and adapt to customers’ changing needs
22 and preferences. Competitive businesses must always be evolving to respond to changes in the market,
23 and inaccuracies in the Census data will impede their ability to do so.

24 **B. Inaccurate Census Data Will Impact Businesses More Substantially As Businesses**
25 **Become Increasingly Data-Driven**

26 Inaccurate Census data would be especially disruptive to businesses today. Companies
27 increasingly rely on data-driven analytics to provide products and services that meet customers’
28 specific needs and wants. While businesses in the past adopted a more product-oriented approach—

1 focusing on designing products they believed customers would want—businesses now operate on a
2 more customer-oriented basis, seeking to understand customers’ needs before they invest resources
3 into design and implementation. See Chris Rygielski et al., *Data Mining Techniques for Customer*
4 *Relationship Management*, 24 Tech. in Soc’y 483, 484 (2002). The value of accurate and complete
5 data is heightened by the need for businesses to respond quickly to changing market conditions and
6 preferences. See Syed Riaz Ahmed, *Applications of Data Mining in Retail Business*, Proceedings of
7 the Int’l Conference on Info. Tech.: Coding and Computing, at 2 (2004). Companies seeking to gain a
8 competitive edge over their competitors therefore rely on their ability “to better manage the knowledge
9 regarding the critical elements of their environment.” John H. Heinrichs & Jeen-Su Lim, *Integrating*
10 *Web-Based Data Mining Tools with Business Models for Knowledge Management*, 35 Decision
11 Support Sys. 103, 105 (2003). Census data has been, and will continue to be, integral to this modern
12 focus, rendering an accurate Census imperative to business growth and innovation. See AJ Agrawal,
13 *Why Data Is Important for Companies and Why Innovation Is On the Way*, Inc. (Mar. 24, 2016),
14 <https://bit.ly/2qY77iM> (asserting that in an era in which “[p]eople are generating more [data] than ever
15 before,” this data is becoming “essential for companies and it’s going to spell an era of innovation”).

16 The emphasis on data analytics has led to the rise of entire businesses built around processing
17 and analyzing demographic data, and advising consumers based on that data—including that provided
18 in the Census. Census data can be complicated (and costly) to organize and interpret, and some
19 businesses specialize in translating that raw data into usable information. See Weber, *supra*; see also
20 *Alteryx Powers U.S. Census Data Analysis* (Aug. 27, 2012), <https://bit.ly/2JPFxy8>. Some entities use
21 Census data to forecast demographic trends and provide those projections to businesses that are looking
22 for growth opportunities. See *Claritas Demographic Update Methodology*, Claritas (Sept. 2006),
23 <https://bit.ly/2E8u4q>; Geolytics, *Estimates/Projections*, <https://bit.ly/3iFQNtj> (offering to provide
24 Census analytics that generate “the most up-to-date information for planning and marketing). These
25 companies specialize in the provision of Census-based segmentation services—an analysis that divides
26 up the U.S. population into various segments sharing key traits and behavioral patterns that can be used
27 to predict consumer behavior. See *Kysar, supra*, at 880–81. And these businesses rely, of course, on
28 accurate Census data to provide those services.

1 Census data is also critical to understanding and making use of marketing research gathered
2 through other means. Many businesses have commercial databases that store information about their
3 customers and target audience. See Scott McDonald, *A 2020 Census Flop Would Pose a Danger to*
4 *U.S. Businesses*, Forbes (Dec. 6, 2017), <https://bit.ly/2Uv6ckz>. But marketing research gathered from
5 a sample population can be skewed or inaccurate, and so businesses rely on Census data to provide a
6 benchmark to “evaluate the quality of the dataset and provide a basis for statistical adjustments.” *Id.*

7 Census data is also critical to business because that data is used to validate other national surveys
8 key to most American businesses, including the American Community Survey (ACS)—formerly the
9 decennial census long form—and the Economic Census. The ACS is particularly important to data-
10 driven businesses. See Office of the Chief Economist, Dep’t of Commerce, *The Value of the American*
11 *Community Survey: Smart Government, Competitive Businesses, and Informed Citizens* 33 (Apr.
12 2015), <https://bit.ly/3fLJI8H> (explaining that “businesses rely on [Census data] to make site selection
13 decisions”). Realtors, for instance, use the ACS and the Census to “develop insights on market trends
14 and policy issues.” Letter from Nat’l Ass’n of Realtors to Sen. Claire McCaskill (Feb. 25, 2018),
15 <https://bit.ly/2HQ1dHF>. But the ACS itself depends on accurate Census data. See Andrew Reamer,
16 Geo. Wash. Inst. of Pub. Policy, *Counting for Dollars: A Study of Census-guided Financial Assistance*
17 *to Rural America* (Oct. 11, 2018), <https://bit.ly/2Onk0LO>. If Census data is incomplete because of
18 inadequate time to conduct follow-up inquiries, “[e]very subsequent survey and study that intends to
19 be statistically representative of the U.S. population will be built on decennial data, including the
20 American Community Survey (ACS), the Economic Census and every other federal government
21 survey, and any inaccuracies will be felt for at least a decade.” Howard Fienberg, *Remove the*
22 *Citizenship Question from 2020 Census, Says Marketing Research & Data Analytics Industry*, Insights
23 Ass’n (Aug. 7, 2018), <https://bit.ly/2OVzhDi> (quotation marks omitted).

24 Location intelligence providers repurpose Census data to provide insights to customers and to
25 help them draw better, data-driven inferences about how to run their organizations. See Greg Sterling,
26 *Chipotle Customers Are Smarter Than McDonald’s And Other Insights From Smartphone Data*, Mktg.
27 Land (June 24, 2014), <https://mklnd.com/2ESReye>. Real estate aggregators can use Census data to
28 compile their listings and real estate estimates. Harv. Bus. Sch., *Zillow: Ahead of Its Time or Falling*

1 *Behind* (Nov. 18, 2016), <https://bit.ly/2VSEkr2>. Businesses like these depend on advanced data
2 processing, and among the information these businesses process is Census data, the accuracy of which
3 is and will continue to be essential to their success.

4 * * *

5 Although it is impossible to determine how innovators and entrepreneurs will use Census data
6 in the future, one thing is clear: businesses will keep using it in important ways so long as it is accurate.
7 They will seek to leverage key data and determine new, profitable uses to draw from it. Ensuring the
8 accuracy of this data is essential, and any attempt by the federal government to diminish the Census
9 impairs the ability of businesses across the country to be effective.

10 **IV. CONCLUSION**

11 For the reasons stated above, *amici* support Plaintiffs’ motion for preliminary injunction.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 DATED: August 31, 2020

Respectfully submitted,

2 /s/ Julian W. Kleinbrodt
3 Julian W. Kleinbrodt (CA Bar # 302085)
4 jkleinbrodt@gibsondunn.com
5 GIBSON, DUNN & CRUTCHER LLP
6 555 Mission Street, Suite 3000
7 San Francisco, CA 94105-0921
8 Tel.: 415-393-8382
9 Fax: 415-374-8470

10 Alexander H. Southwell (*pro hac vice* pending)
11 asouthwell@gibsondunn.com
12 GIBSON, DUNN & CRUTCHER LLP
13 200 Park Avenue
14 New York, NY 10166-0193
15 Tel.: 212-351-3981
16 Fax: 212-351-6281

17 *Attorneys for Amici Curiae 12 Businesses and*
18 *Business Organizations*