No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, *et al.*,

Petitioners,

v.

NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PROJECT ON FAIR REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

WILLIAM S. CONSOVOY
Counsel of Record
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Amicus Curiae

February 12, 2019

286713

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Project on Fair Representation (the "Project") is a public interest organization dedicated to the promotion of equal opportunity and racial harmony. The Project works to advance race-neutral principles in voting, education, public contracting, and public employment. Through its resident and visiting academics and fellows, the Project conducts seminars and releases publications relating to redistricting and the Voting Rights Act. The Project also has been involved in cases involving these important federal issues, *see, e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013), and has filed *amicus* briefs as well, *see, e.g.*, *Perry v. Perez*, 565 U.S. 388 (2012); *Riley v. Kennedy*, 553 U.S. 406 (2008).

The Project has a direct interest in this case. The Project has supported litigation where the question and availability of data on eligible voters has been at the center of the controversy. *See Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). And the Project has been involved in litigation under Section 2 of the Voting Rights Act, where such data are regularly utilized. *See Bartlett v. Strickland*, 556 U.S. 1 (2009). This case squarely implicates whether States and localities will have the most accurate voter data available when they are drawing districts, and, similarly, whether litigants will have a complete dataset when redistricting

1. Pursuant to this Court's Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, their members, and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus*'s intent to file and have consented to the filing of this brief.

plans are challenged. Accordingly, the Project respectfully submits this brief in support of certiorari and urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Article I of the Constitution requires the federal government to conduct a census every ten years to decide how the House of Representatives is apportioned among the States. The decennial census's importance is evident for that reason alone. Over time, however, the data that the Census Bureau provides have proven to be essential not just to apportionment of House seats. States and localities rely heavily on census data to apportion legislative seats and draw districts for congressional and non-federal elections. Whether they will have the best possible data to do so turns on the outcome of this case.

The Equal Protection Clause's "one person, one vote" rule requires States and localities to equalize districts on a population basis. But they may comply with this command by equalizing the total population or by equalizing eligible voters. *See Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). The decennial census provides States and localities with total population data but not data on eligible voters. Adding the citizenship question would give States and localities the most complete dataset possible should they choose—as is their right under the Constitution—to draw districts based on eligible voters.

The citizenship data also is needed to comply with and enforce Section 2 of the Voting Rights Act ("VRA"). The Court has interpreted Section 2 to prohibit States and localities from drawing their legislative districts to dilute the voting power of minorities. To prevail on such

a claim, the minority group must prove that it "has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40 (1993). The Department of Justice and other litigants, accordingly, need data that can prove that the State or locality could have drawn a district where the minority group comprised a majority of eligible voters.

The primary source for eligible voter data used in Section 2 litigation—the American Community Survey ("ACS")—has been subject to broad criticism. Unlike the decennial census, for example, critics highlight that the ACS does not count every single person. It instead samples a subset of the population and estimates the total number with a margin of error. Critics also note that ACS does not regularly collect data from all jurisdictions; it polls cities differently based on their size. And the data are collected on a rolling basis, which means contemporaneous data are not available when States and localities redistrict every ten years.

The Secretary recognized that adding a citizenship question to the census could address these concerns. It would vastly improve the quality of the eligible voter data relied upon by States and the Department of Justice for redistricting and VRA compliance. By increasing the granularity of eligible voter data, it could provide more accurate data than that provided by the high-level ACS. Unlike the ACS, the accuracy of the eligible voter data acquired by the citizenship question would not vary based on the population of the surveyed city. And the citizenship data could be transmitted to the States at the same time they are drawing districts. Thus, the Secretary's decision to add the citizenship question to the decennial census was rational.

The district court's contrary decision is untenable. In holding that the decision to reinstate the question was "arbitrary and capricious," the district court discounted the benefits the Secretary had identified and emphasized the perceived negative effects of adding the question. But that is not how arbitrary-and-capricious review works. The APA did not empower the district court to substitute its own judgment for that of the Secretary. Yet that is precisely what it did.

Respondents' attempt to override the Secretary's judgment is even less defensible given that they previously recognized the apparent limitations of ACS data only a few years ago. New York—joined by 11 other plaintiffs in this case—filed an amicus brief in *Evenwel* that levied the same criticisms at the ACS data that the Secretary responded to by adding the citizenship question to the census. In other words, after *agreeing* with the Secretary's concerns about a potential gap in the eligible-voter data, they brought this lawsuit challenging the Secretary's decision to remedy that problem as arbitrary and capricious. Respondents' position is hypocritical. The Court should grant the petition for writ of certiorari and reverse the district court's decision.

ARGUMENT

I. Whether citizenship data can be collected through the census is an important issue of federal law.

Article I of the Constitution commands that an "actual Enumeration shall be made … every … ten Years." "The Framers constitutionalized the requirement that a census be conducted every decade," *Utah v. Evans*, 536

U.S. 452, 491 (2002) (Kennedy, J., concurring in part and dissenting in part), because the enumeration dictates how "'Representatives … shall be apportioned among the several States,'" *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 321 (1999) (quoting U.S. Const. art. I, sec. 2, cl. 3)); *see* The Federalist No. 54 (James Madison). For that reason alone, how the census is conducted is an important federal issue that warrants this Court's review.

But Census Bureau data shapes federal, state and local elections in other ways that are nearly as important. All levels of governments depend on the Census Bureau for voter data they need "to define legislature districts." U.S. Census Bureau, *About the Bureau*, https://bit.ly/2IXTWUP. While the enumeration determines how many seats each State will have in the House of Representatives, it does not dictate how those seats are apportioned within each State. Likewise, it does not dictate how legislative power will be divided for state and local elections. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1144-45 (2016) (Alito, J., concurring in the judgment); *Karcher v. Daggett*, 462 U.S. 725, 745 (1983) (Stevens, J., concurring). Any federal restrictions on how legislative power is allocated within States instead derives from the Equal Protection Clause and the Voting Rights Act of 1965. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Thornburg v. Gingles*, 478 U.S. 30 (1982).

When States and localities draw districts, the Equal Protection Clause requires them to equalize each district "on a population basis" to comply with the "one person, one vote" requirement. *See Evenwel*, 136 S. Ct. at 1134. But States and localities may equalize those districts based

on total population or eligible voters because either is a "neutral, nondiscriminatory population baseline." *Id.* at 1126; *id.* at 1133 (Thomas, J., concurring in the judgment) (explaining that the Constitution "leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government"); *e.g.*, *Burns v. Richardson*, 384 U.S. 73, 92-94 (1966) (approving the use of registered voters as the relevant population in order to allow Hawaii to exclude "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime [from] the apportionment base").

Evenwel "reinforced the principle … that courts should give wide latitude to political decisions related to apportionment that work no invidious discrimination." *Davidson v. City of Cranston*, 837 F.3d 135, 143 (1st Cir. 2016). Yet States and localities can exercise the option to equalize districts based on eligible voters only if they have that information.

Citizenship data also is essential to compliance with (and vigorous enforcement of) Section 2 of the Voting Rights Act. Section 2 prohibits "diluting" the strength of the votes of minorities by "submerging [minority] voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11. One of the "necessary preconditions" for proving a Section 2 vote-dilution claim, importantly, is showing that the minority group is "sufficiently large and geographically compact to constitute a majority" in a district. *Id.* This "compactness" requirement ensures that "the minority has the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40.

To prove the "compactness" element, the plaintiff (which is often the Department of Justice) must establish that a minority group can make up at least 50.1% of *eligible* voters in a hypothetical district. *Bartlett*, 556 U.S. at 12-20. Courts use Citizen Voting Age Population, or CVAP, as the relevant metric in making this determination because "only eligible voters affect a group's opportunity to elect candidates." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) (opinion of Kennedy, J.); *see also id.* at 494-95 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part and joined by Alito, J.) (relying on eligible voters as the relevant metric); *Bartlett*, 556 U.S. at 26-27 (Souter, J., dissenting and joined by Stevens, Ginsburg, and Breyer, JJ.) (same).

"Linedrawers seeking to comply with the VRA," therefore, "are mostly interested … in the share of citizens at the neighborhood level that is [minority] and of voting age." 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, 776 (2011). Without the most accurate data on eligible voters, however, those who draw the lines are handicapped in their efforts to comply with Section 2, as are plaintiffs in their efforts to enforce Section 2 through litigation.

Whether and how the Census Bureau collects this citizenship data is an enormously important federal issue that is essential for voting-rights litigation, enforcement of Section 2 of the VRA, and apportionment of electoral districts. The questions presented warrant this Court's immediate review.

II. It is not arbitrary and capricious to include a citizenship question in the census.

A. The Secretary rationally concluded that asking about citizenship would provide federal, state, and local election officials with valuable information.

The Secretary's decision to reinstate the citizenship question was not arbitrary and capricious because it was a routine exercise of the Secretary's "broad authority" over the administration of the decennial census. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996); *see also* 13 U.S.C. § 141(a). The Secretary reached his decision after a careful review of the pertinent facts and his reasonable judgment that the benefits of including the citizenship question far outweigh any perceived problems with doing so. Pet. 3-5; Pet. App. 548a-562a.

There can be no dispute that collecting citizenship information is a legitimate basis for adding the question to the census. Accurate citizenship data is indispensable for States and localities in drawing legislative districts, and election officials at all levels of government need the data to ensure compliance with the Voting Rights Act. *See supra* Section I. Indeed, the Census Bureau already collects this data through its American Community Survey ("ACS"), which is distributed by the Bureau to 3.5 million households each year. U.S. Census Bureau, *Understanding and Using American Community Survey Data* 1-2 (July 2018), https://bit.ly/2E5Bj0r.

But the ACS has been the subject of withering criticism. First, critics believe that the ACS is flawed

because it samples only one in every 38 households. *See* U.S. Census Bureau, *American Community Survey Information Guide* 3 (Oct. 2017), https://bit.ly/2oNmhCo. It "does not provide 'counts' of the population; it provides estimates of the population." Ana Henderson, *Citizenship, Voting, and Asian American Political Engagement*, 3 U.C. Irvine L. Rev. 1077, 1100 (2013). "Unlike the redistricting data the census makes available," then, "ACS estimates come with a margin of error." Persily, *supra*, at 776. That margin, according to the critics, could be the difference in determining whether a minority-majority district is even possible. *See id.* ("The errors inherent in such estimates are necessarily greater for the populations of interest for voting rights law.").

Second, the ACS does not collect data from all jurisdictions. The yearly report covers only those cities with over 65,000 people, and the three-year report covers only those cities with over 20,000 people. *See* U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data* 9 (Oct. 2008), https://bit.ly/2kBTuQH. The ACS must therefore "combine population or housing data from multiple years to produce reliable numbers for small counties, neighborhoods, and other local areas." *Id.* at 3. Justice Sotomayor raised this concern during the *Evenwel* oral argument. In her view, the ACS voter data have "almost decisively been proven as inadequate," partly because the yearly data "only measures cities with populations or places with populations over 65,000." Tr. Oral Arg. at 15:11-14, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940). However, "even aggregating five years of answers, the data are still not available at the census block level." Henderson, *supra*, at 1100. "This is problematic," ACS

critics argue, "because district drawing often requires precise population calculations which can even go down to the census block level." *Id.*

Finally, because ACS data is collected on a rolling basis, critics note that it is not available on the timeline for redistricting. "When the decennial census numbers are released, States must redistrict [for federal elections] to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). And States typically choose to redistrict their state legislative districts at the same time as their congressional districts using the decennial census data. *See, e.g.*, *Reynolds*, 377 U.S. at 583; Ga. Const. art. 3, § 2 ("The apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census."). But ACS data never provide a complete snapshot for all jurisdictions in the same way as census data. *Persily*, *supra*, at 777. Because the ACS data "reflect a different time than that represented by the decennial census that typically provides the data for actually drawing districts, it is not as helpful as one would like." C. Robert Heath, *Applying the Voting Rights Act in an Ethnically Diverse Nation*, 85 Miss. L.J. 1305, 1330 (2017). And using such rolling data could lead to "constant redistricting, with accompanying costs and instability." *LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.). That is why this Court has long understood that "the census count represents the best population data available." *Karcher*, 462 U.S. at 738.

These concerns are not theoretical—they have been consequential in Section 2 litigation. *See, e.g.*, *Rios-Andino v. Orange Cty.*, 51 F. Supp. 3d 1215, 1225 (M.D. Fla. 2014)

(dismissing complaint because of differences in population estimate of Latino population caused by lack of definitive voter data). In fact, this dispute over the validity of ACS data has caused the Department of Justice to lose Section 2 enforcement cases. In one case, for example, the district court did not accept ACS data and ruled that Hispanic members of a community could not definitively prove they accounted for more than 50% of the population. *Benavidez v. Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451, 454 (N.D. Tex. 2010) ("To meet this burden of proof, Benavidez relies on the 2007 one-year American Community Survey data ... . Benavidez has failed to prove that his alternate population figures are thoroughly documented, have a high degree of accuracy, and are clear, cogent, and convincing."). In short, this is not a new issue.

The CVAP data created from a citizenship question on the census would cure, or at least alleviate, some of the deficiencies that critics have pointed to in the ACS. It would provide census block-level data as opposed to block group data.[2] The margin of error would decrease substantially, especially for those communities that are not currently surveyed on a yearly basis. And, including the question would obviously provide CVAP data every ten years. That means the census would send the data to States and localities at the same time the overall census data are sent; when those legislatures redistrict in light of the updated census data, current CVAP data would be readily available for their reference.

---

2. In the 2010 census, there were about 220,000 census block groups and about 11,000,000 census blocks, equating to an average of 50 census blocks per census block group. *See* U.S. Census Bureau, *2010 Census Tallies of Census Tracts, Block Groups and Blocks*, https:// bit.ly/2HZSyo0.

In sum, it is unsurprising that the Census Bureau advises against using ACS data for drawing districts given the criticism it has received. *See Understanding and Using American Community Survey Data*, *supra*, at 2 ("The ACS was designed to provide estimates of the *characteristics* of the population, not to provide counts of the population in different geographic areas or population subgroups."). Nor is it a surprise that sixteen States joined the Department of Justice in requesting that the citizenship question be included in the census. *See* Administrative Record 1079-80, 1155-57, 1161-62, 1210-12. Adding the citizenship question to the census would create valuable information for States, localities, and the Department of Justice.

The district court's holding that the decision to add the citizenship question was "arbitrary and capricious" is untenable. Despite issuing a lengthy opinion, the district court barely addressed the legitimate reasons for wanting better citizenship data, stating that it is not "necessary" to have this data to enforce the Voting Rights Act because it "was enacted in 1965—*fifteen years after* a citizenship question last appeared on a census questionnaire sent to every household in the country." Pet. App. 296a.

That position is unpersuasive. It is true that after 1950, the citizenship question was not included on the census distributed to *every* household. The district court failed to mention, however, that the post-VRA census nonetheless compiled citizenship data in a far more comprehensive way than the ACS does today. In 2000, for example, the long-form questionnaire, which included a citizenship question, *see* 2000 Census Long Form, https://bit.ly/2O1wsDc, was distributed to one in *six* households,

see Barry Edmonston, *Using U.S. Census Data to Study Population Composition*, 77 N.D. L. Rev. 711, 717 (2001). When the question was eliminated from the census in 2010, VRA litigants were forced to rely on the ACS's sample of only one out of *38* households. *See supra* 8-9.

More fundamentally, the court's disagreement with the Secretary is not a basis for enjoining the addition of this question on the census. Arbitrary-and-capricious review under the APA is narrow; the district court has no power "to substitute its judgment for that of the agency." *Motor Vehicle Mfr.'s Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Yet that is precisely what it did. The district court clearly believed that adding the citizenship question would be harmful. But the Secretary had considered the issues closely and reached a different conclusion. Providing States and localities with the voter information they need to fulfill their redistricting responsibilities is rational. In overriding the Secretary's judgment, the court substituted its own view and usurped Congress's delegation of authority over the census to him. The Secretary—not the district court—is empowered to determine whether adding a citizenship question is "necessary."

B. Respondents' newly minted opposition to asking about citizenship in the census is hypocritical.

The Court does not need to take the Secretary's word that collecting this data serves important federal interests. Respondents *themselves* have argued (before they filed this action, of course) that ACS is inadequate and pointed to the decennial census as the answer to that problem. *See* Br.

of New York et al. as *Amici Curiae*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (joined by Plaintiffs Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Oregon, Rhode Island, Vermont, Virginia, and Washington) ("New York Am. Br."). In *Evenwel*, two Texas voters challenged the constitutionality of their legislative districts under the "one-person, one-vote" principle because while their districts had roughly the same total population as other districts, a much larger percentage in their districts were eligible voters. *See Evenwel*, 136 S. Ct. at 1125. That disparity diminished the weight of their votes. *See id.* The voters therefore argued that States and localities were required to draw their districts based on eligible voters rather than total population, and they pointed to the CVAP data as making that request feasible.

Their position encountered strong opposition. In its *amicus* brief, New York argued, *inter alia*, that requiring States and localities to draw maps based on CVAP was not feasible because "States lack any reliable, administrable method to equalize districts based on eligible voter population." New York Am. Br. 14. "No existing source of data," they contended, "provides information about the population of potential voters as robust, detailed, or useful as the total-population enumeration provided by the Census to the States." *Id.* at 16.

Joining a chorus of critics, they relentlessly attacked ACS data as deficient. They complained that the "Survey estimate of CVAP is not an actual count of voting-age citizens … , but rather an extrapolation from a small sample (2.5%) of households." *Id.* at 18. They claimed that the margin of error thus did not allow "the same level of confidence as an actual enumeration." *Id.* at 19. The data

were also lacking, they argued, because the ACS could not "generate CVAP data with sufficient accuracy at the level of census blocks—the basic units of legislative map-making," which meant that it did not provide eligible-voter data "at the level of granularity that the States require for purposes of drawing state legislative districts." *Id.* at 19. And, they noted that "[a]dditional uncertainty comes from the fact that there is no single CVAP data set that is the authoritative estimate of the population of voting-age citizens." *Id.* The ACS instead "produces CVAP figures in three separate data sets encompassing survey responses from the one, three, or five years, each of which provides different CVAP estimates." *Id.* Now that the Secretary is addressing New York's concerns, it hypocritically seeks to prevent him from doing so.

New York and its co-plaintiffs in this action are not alone. Others who have publicly opposed the Secretary's decision also lack credibility. The Democratic National Committee ("DNC") has labeled the decision "[a] craven attack on our democracy." *Impacts in Florida From Census Question About Citizenship*, DNC (Mar. 27, 2018), https://bit.ly/2xyP86a. Yet the DNC previously critiqued ACS data as insufficient and noted that the alleged problem existed because "[t]he United States Census does not ask questions about citizenship." Br. of DNC as *Amicus Curiae* 15, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). Former Census Directors are in the same boat. *Compare* Samantha Schmidt, *California, NY sue Trump administration over addition of citizenship question to census*, Wash. Post, Mar. 27, 2018 (Former Census Bureau director Kenneth Prewitt noting that the Secretary's decision "makes for a stormy situation"), *with* Br. of Former Census Bureau Directors as *Amicus*

Curiae 13-22, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (joining brief criticizing the use of ACS data for drawing legislative districts at the state and local level).

In sum, Respondents and their supporters were on record lamenting that the "Census Bureau does not collect information about potential voters as part of its decennial count" and that it "has expressly declined to do so in the past." New York Am. Br. 16-17. Now that the Census Bureau has decided to collect that information, they object. Their objections should carry no weight with the Court. Their prior position confirms that the Secretary's decision was not arbitrary and capricious.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for certiorari and reverse the judgment of the Southern District of New York.

Respectfully submitted,

William S. Consovoy
Counsel of Record
Bryan K. Weir
Consovoy McCarthy Park PLLC
Antonin Scalia Law School
Supreme Court Clinic
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Amicus Curiae