No. 18-966

In The Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

V.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari before Judgment to the U.S. Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE THE REPUBLICAN NATIONAL COMMITTEE AND THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are political committees whose purpose is to*, inter alia*, assist their Republican members achieve electoral victories. The Republican National Committee ("RNC") manages the Republican party's business at the national level, supports Republican candidates and state parties, coordinates fundraising and election strategy, and develops and promotes the national Republican platform. The National Republican Congressional Committee ("NRCC") supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns. The NRCC also undertakes voter education, registration, and turnout programs, as well as other party-building activities.

Amici curiae have a vital interest in the law regarding redistricting because congressional districts and legislative redistricting directly impact their members, members' constituents, campaigns, elections, and their successors in office. Accordingly, the district court's ruling has widespread implications for *Amici curiae* and their members.

Amici curiae are interested in the lawful administration of the Voting Rights Act of 1965, 52

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[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

U.S.C. § 10301, *et seq*., formerly 42 U.S.C. § 1973 ("VRA") and the challenges state legislators and other redistricting authorities face in creating legally compliant districts. Because Citizen Voting Age Population ("CVAP") is widely accepted as the best measure of minority voting power, the Government must be able to gather and disseminate the best available data regarding citizenship. The only reliable, accurate, and consistent method to collect citizenship data useable for redistricting purposes is through the inclusion of the Citizenship question on the short-form Census questionnaire. The previously-used short-form Census questionnaire is insufficient to determine CVAP as necessary for redistricting purposes. All other basic demographic information necessary to construct VRA-compliant districts – total numbers, age, race, and ethnicity – is supplied by short-form Census data. Unless this Court approves the decision of the Secretary of Commerce ("The Secretary") to place a citizenship question on the 2020 Census, CVAP will be the only critical piece of redistricting information that will need to be derived from sampled data and released with an estimated value suffering from a substantial margin of error.

INTRODUCTION

The district court's opinion finding The Secretary's decision to include the citizenship question on the Census arbitrary and capricious and therefore unlawful is premised on the court discounting The Secretary's determination that citizenship data is necessary for the Department of Justice's ("DOJ") VRA enforcement efforts. Pet. App. 295a. *New York v. U.S. Dep't of Commerce*, 18-CV-2921 (JMF); 18-CV-5025 (JMF), 2019 U.S. Dist. LEXIS 6954 at * 386-88 (S.D.N.Y. 2018) (op. at 6, 98-100, 228-236, 252, et seq.) 386-88. In doing so, the district court improperly substituted its judgment for that of an agency. Even worse, that judgment was entirely incorrect – as demonstrated by past voting rights litigation and the recent experiences of federal courts and redistricting authorities with estimates derived from sampled citizenship data.

Contrary to the district court's judgment, the inclusion of the question of citizenship in the Census is vitally important, and indeed necessary, to the *proper* evaluation of minority voting strength as required under federal law. Voting rights issues including VRA compliance and one-person, one-vote claims require accurate counts not only of total population but also of potential voters. Nearly all of these issues involve vote dilution—the unequal weight or power of votes between or within districts. Noncitizens are prohibited from voting in federal elections, *See* 18 U.S.C. § 611, and no state allows noncitizens to vote in state elections, although some localities do permit noncitizens to vote in local elections. Joshua A. Douglas, *The Right To Vote Under Local Law*, 85 Geo. Wash. L. Rev. 1039, 1062-

66 (2017). Therefore CVAP is the appropriate metric to use when determining the number of voters in a given political district and the weight of their votes.

Courts and redistricting authorities have struggled with the lack of accessibility to reliable, sufficiently granular CVAP data since the "long-form" Census questionnaire was eliminated in 2010. The Census has not included a citizenship question since eliminating the long-form questionnaire despite courts and redistricting authorities almost universally agreeing that CVAP is the critical measure in litigation involving Section 2 of the VRA.

Also contrary to the district court's judgement, *see, e.g.*, *New York v. U.S. Dep't of Commerce*, 2019 U.S. Dist. LEXIS 6954 at *32, 282-96, 353-62, 386-88, inclusion of the citizenship question on the short-form questionnaire is the most accurate way to determine citizenship data. Because there is little reliable publicly available data on the subject available at small geographic levels, redistricting authorities are forced to rely on estimates drawn from sampling data that are either inconsistent or suffer from incredibly high error rates when broken down to the small segments of geography necessary for districting. Citizenship is difficult to estimate based on representative samples due to the lack of geographic uniformity with which non-citizenship occurs throughout the country or throughout political subdivisions.[2] The issue is

[2] For example, one study of Monterey County, California found that estimated Hispanic citizenship rates varied as much as 45 percent just between regions within that county. The Hispanic citizenship rate of the Monterey Peninsula region was estimated to be 74 percent, but the Hispanic citizenship rate of

compounded due to the magnification of sampling error that arises when trying to use ACS data to analyze small units of geography such as census blocks or block groups.

Historically, the CVAP of a proposed political district was calculated using data collected by the decennial Census questionnaire. *See, e.g., Valdespino*, 168 F.3d at 853-54. Until recently, the Census consisted of a short-form questionnaire, which was received by every household in the United States, and a long-form questionnaire sent to approximately one in every six households. The short-form questionnaire collected basic information, such as age, sex, race, and Hispanic origin, while the long-form questionnaire asked more detailed questions on topics such as citizenship and socioeconomic status. In 2010, the U.S. Census Bureau ceased using the long-form questionnaire. *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 454 (N.D. Tex. 2010).

In the place of the long-form questionnaire, the Census Bureau developed the ACS to estimate the demographic and socioeconomic composition of the United States. The ACS, like the long-form questionnaire, is not an actual population count; instead, the ACS is an annual nationwide survey conducted by the Census Bureau wherein the Bureau randomly samples portions of the total population. Those individuals sampled are asked a series of questions designed to capture demographic information, including socio-economic background, citizenship, educational attainment, and other information, much of which was formerly included

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the East Salinas region was estimated to be as low as 29 percent. https://paa2012.princeton.edu/papers/122580.

on the long-form questionnaire. Thus, the ACS data is used to calculate an estimate of a community's CVAP based on population samples, rather than an actual enumeration.[3] *Benavidez*, 690 F. Supp. 2d at 454. The ACS is now the only nationwide public source for citizen voting age population data.

Although ACS data are released annually, the Census Bureau recommends using the three-year or five-year aggregations of ACS data to obtain "more reliable data" when working with smaller populations or geographic areas because the relatively small number of households surveyed results in higher and higher error rates as one reduces the studied sample size. *See generally* U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know (July 2018), https://www.census.gov/programs-surveys/acs/guidance/handbooks/general.html.

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[3] Census "short-forms questionnaires" are sent to each of the approximately 127 million households in the United States. Census "long-forms questionnaires" were sent to approximately 1 in 6 households, or about 16 percent of all households in 2000. ACS data is derived from approximately 3 million surveys conducted at a rate of about 250,000 households per month with a sample size reflecting approximately 4 percent of all households. The major issue for redistricting is that as the sample size becomes smaller the margin of error becomes magnified, distorting results at the granular levels of geography used for redistricting. Because the long-form questionnaire has been effectively replaced by the ACS, the only way to acquire accurate data at the necessarily granular geographic level—the census block and block group level—is now the short-form questionnaire.

In short, DOJ and The Secretary are correct in their assessment that accurate citizenship information is indispensable to properly examine voting rights issues and that the most accurate data is not available without the inclusion of the citizenship question on the Census. The district court was wrong to supplant the judgment of The Secretary with its own, and this Court should permit The Secretary to add the citizenship question to the short-form Census questionnaire.

ARGUMENT

The district court improperly discredited The Secretary's rationale that the Census could be the best source for citizenship data and that CVAP data is necessary to the proper examination of voting rights issues. The district court relied on its own policy judgment to opine that the inclusion of the citizenship question on the Census was arbitrary and capricious. Not only did the district court substitute its policy preferences for that of the agency charged by Congress with administration of the Census, but it did so on the basis of an incorrect understanding of the relevant facts and legal framework.

I. NO RELIABLY ACCURATE CITIZENSHIP DATA IS AVAILABLE WITHOUT CITIZENSHIP'S INCLUSION ON THE SHORT-FORM CENSUS QUESTIONNAIRE

A. CVAP Is The Best Measure By Which To Measure Political Power

The best measures by which to assess the political power of a given voter demographic is through data accounting for CVAP—*i.e.* the eligible voter population. Other methods for indicating groups' potential political influence either suffer from high error rates (are vastly underinclusive or overinclusive), or are not consistent election-to-election or district-to-district.

Total population, as enumerated by the decennial Census, is readily available and reliable. However, as it fails to account for age or distinguish between citizens, who are generally able to vote, and non-citizens, who are not, it is not a useful data-point for measuring political power. Accordingly, total population is not a reliable measure of political power because it is overinclusive. These concerns become especially pronounced in Section 2 circumstances where communities may have higher concentrations of non-citizens or may have a younger population. *See Ketchum v. Byrne*, 740 F.2d 1398, 1412 (7th Cir. 1984); https://paa2012.princeton.edu/papers/122580. Because both citizenship and age of 18 are generally prerequisites for voting in federal and state elections, using total population to estimate political power would create wildly skewed results in areas with high concentrations of non-citizens or residents under the age of 18.

Like total population, Voting Age Population ("VAP") is measured by the decennial Census and is also readily available down to the block level. VAP is a slightly more reliable indication of political power than total population, in that it accounts for the variable of voting age. However, VAP does not account for citizenship, which has significant Section

2 implications for voting power in parts of the country with high non-citizen populations.

Estimating the number of registered voters and actual voters by ethnicity has also been proposed as a means by which to measure voting power. These measures may be the most meaningful indicators of political power, they also have significant drawbacks. First, these numbers rely on small jurisdictions reporting accurate data. This makes the data much more difficult to obtain and can lead to inaccuracy and inconsistency across districts. These numbers also change every day and every election. People register to vote and move in and out of jurisdictions on practically a daily basis. Different shares of voters from different areas turn out to vote at different rates in different elections. Further, these measures rely on Spanish-surname Registered Voters ("SSRVs") or other subjective indicators of ethnicity. Some of these subjective indicators may be more meaningful for some geographic areas while not for others. All of these variables lead to inconsistency and further Section 2 implications.

CVAP, especially when gleaned through the inclusion of a citizenship question on the Census, is the most accurate, useful data-point to use when estimating potential political power. CVAP measures the total potential for a group to affect political outcomes and it will not change based on voter turnout or registration figures. CVAP is especially useful in measuring the political power in certain geographic areas, because it accounts for the vast majority of eligible voters, unlike total population or VAP.

It is for these reasons that "[t]he Ninth Circuit, along with every other circuit to consider the issue,

has held that CVAP is the appropriate measure to use in determining whether an additional effective majority-minority district can be created." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002) aff'd, 537 U.S. 1100 (2003) (citing *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989)). *See also*, *e.g., Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir. 1998) (citing *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Campos v. City of Houston*, 113 F.3d 544, 547-48 (5th Cir. 1997). This court has been no exception. *See LULAC*, 548 U.S. at 436 (relying on citizen voting-age population when determining proportionality); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (relying on CVAP to evaluate the first Section 2 element pursuant to *Gingles*).

The DOJ likewise has relied on CVAP when bringing Section 2 enforcement actions. *E.g.*, Complaint ¶ 10, *United States v. Sch. Bd. of Osceola Cty.*, No. 6:08-cv-00582-GKS- DAB (M.D. Fla. Apr. 16, 2008) ("The Hispanic population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the School Board can be drawn in which Hispanic persons would constitute a majority of the citizen voting-age population in one out of five districts."); Complaint ¶ 8, *United States v. Town of Lake Park, Fla.*, No. 09-cv-80507-KAM (S.D. Fla. Mar. 31, 2009); Complaint ¶ 8, *United States v. Village of Port Chester*, No. 06-civ-15173 (S.D.N.Y. Dec. 15, 2006); *Village of Port Chester*, 704 F. Supp. 2d 411.

Redistricting commissions also rely on CVAP data when redistricting. For example, California's independent redistricting commission relied on

CVAP data, albeit gathered from the ACS, to assure that its final maps met the requirements of Section 2. State of California Citizens Redistricting Commission, Final Report On 2011 Redistricting 15 & n.3 (Aug. 15, 2011) (explaining reliance on ACS and CVAP data); see also id. at 17-19 (discussing Section 2 compliance). Texas did so in constructing and defending its state legislative boundaries during the previous redistricting cycle. Texas Legis. Council, *Estimating Citizenship Voting Age Population Data (CVAP), Addendum to Data for 2011 Redistricting in Texas (March 2013);* Michael Li, *Updated demographic data for Texas legislative & congressional maps*, Texas Redistricting & Election Law, http://txredistricting.org/post/78929777903/updated-demographic-data-for-texas-legislative (Mar. 8, 2014).

In sum, CVAP is not only the preferred method by which the federal judiciary, state governments, DOJ, and independent redistricting commissions account for potential voting power under the VRA, but it is the best method by which to do so. It is consistent across all jurisdictions, does not rely on subjective methodologies, and is most probative of electoral power.

B. There Is No Other Accurate, Consistent, or Reliable Method That May Be Used To Find CVAP Without The Inclusion of a Citizenship Question on the Census

As discussed *supra*, the ACS has been the sole source of nationwide citizenship data since the discontinuation of the long-form questionnaire. Courts and redistricting authorities have relied on

the ACS to derive rough estimates of CVAP subject to a substantial margin of error, particularly on the small geographic scale.

Census short-form questionnaires are sent to every household in the United States. In the 2000 Census, Census long-form questionnaires were sent to approximately 16 percent of all households. ACS data is gleaned from approximately 4 percent of all households. U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know (July 2018), https://www.census.gov/programs-surveys/acs/guidance/handbooks/general.html.

As noted repeatedly by courts, estimates derived from ACS data are representative, and therefore suffer from errors. "Because the ACS is based on a sample, rather than all housing units and people, ACS estimates have a degree of uncertainty associated with them, referred to as "sampling error." U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know (July 2018), https://www.census.gov/programs-surveys/acs/guidance/handbooks/general.html. Generally, the smaller the sample, the larger the level of sampling error and therefore margin of error. See Joseph J. Salvo & Arun Peter Lobo, *The Federal Statistical System: Its Vulnerability Matter More Than Your Think: Section Two: Who Uses Federal Statistics?: The Federal Statistical System: The Local Government Perspective*, 631 Annals 75, 83-87 (2010). An attempt to measure the CVAP of New York based on ACS data would suffer from a much smaller sampling error than an attempt to measure

the CVAP of New Haven, Connecticut Census Tract 3614.02. *See id.*

In order to fully appreciate the potential inaccuracy of CVAP estimates based on ACS data, it is necessary to discuss the Census' geographic units. Census blocks are the smallest geographic area for which the Bureau of the Census collects and tabulates decennial census data. https://www2.census.gov/geo/pdfs/reference/GARM/Ch11GARM.pdf. Census blocks are formed by streets, roads, railroads, streams and other bodies of water, other visible physical and cultural features, and the legal boundaries shown on Census Bureau maps. *Id.* Block groups are the next smallest geographic area for which data is calculated by the Census Bureau. *Id.* Block groups are combinations of census blocks that are subdivisions of census tracts or block numbering areas. *Id.* The Block group is the smallest geographic entity for which the Census Bureau tabulates and publishes the "special tabulation" or 5 year ACS citizenship sample data. *Id.*

CVAP estimates calculated using ACS data for block groups come from smaller samples than CVAP block group estimates previously calculated using the data collected using the long-form questionnaire because the long-form questionnaire data provided a substantially larger sample size – approximately 16 percent of households within a given block group.[4]

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[4] 1 in every 6 households received the long-form questionnaire in the 2000 Census, resulting in a sample size of 16 percent. U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know (July 2018), https://www.census.gov/programs-surveys/acs/guidance/handbooks/general.html.

Accordingly, 2010 CVAP estimates at the block group level suffer from larger margins of error than the 2000 CVAP estimates derived from data collected using the long-form questionnaire.[5] U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know (July 2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018.pdf. Further, in some instances where the population samples are very small and specific, the Census Bureau may actually suppress the data and not release it in order to protect individual privacy interests. *Id.* This data suppression can make block groups appear to have no population in estimates derived from ACS data when they may in fact contain eligible voters. In some areas, this could lead to distortion of the VRA by underestimating the CVAP of various racial/ethnic groups, causing them to fall below the threshold for triggering the redistricting protections of the VRA.

Moreover, the ACS takes no steps to update old or outdated information. Notably, the ACS does not account for aging of the sampled population but only reports the individuals' age at the time the data were collected. *Id*. Therefore, a citizen who was 13 years-old in 2013 when the ACS collected information appears today as a 13 year old even

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[5] While long-form tabulations were typically released 2 years or more after the release of the Census data, *see* National Academies of Sciences Engineering Medicine, *Using the American Community Survey: Benefits and Challenges* at 2-B.1 (2007) (accessed at https://www.nap.edu/read/11901/chapter/4), it was available for litigation and law enforcement for the majority of each decade.

though she is now of voting age. This leads to underestimation of VAP, and, in turn, CVAP. For example, the ACS (2005-2009) estimate for Latino VAP in California was approximately 8,490,040, while the 2010 Census enumerated count determined that the number was 9,257,499. U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity 2006-2010*, Decennial Census of Population and Housing (Feb. 1, 2018) https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2011.html (Hereinafter "CVAP by Race & Ethnicity 2006-10"); Jorge Chapa, *et al.*, *Redistricting: Estimating Citizen Voting Age Population*, The Chief Justice Earl Warren Institute on Law and Social Policy Research Brief (Sept. 2011), https://www.law.berkeley.edu/files/Redistricting_PolicyBrief4_forWeb.pdf. This represents a nearly 10-percent underestimate of Latino VAP by the ACS. Even worse from a Section 2 standpoint, this ACS failure to address aging leads to computational errors that are magnified when ACS data are used to estimate the CVAP of minority groups that have higher rates of citizenship among children than adults, such as Latinos and Asian Americans.

All of this contributes to high margins of error for CVAP estimates calculated using ACS's CVAP data. Using ACS data, 93,276 Block groups (or over 42 percent of all Block groups in the country including Puerto Rico and the Island Areas) have a CVAP margin of error equal to or greater than 25 percent. *See, generally*, CVAP by Race & Ethnicity 2006-10. Even worse, ACS data yields 6,674 Block Groups (or over 3 percent of all Block groups) with a margin of error of over 50 percent. *Id*. Some 1,198

Block groups have no population at all (likely because they encompass water, mountains, desert or other uninhabited areas) and some 1,202 block groups with human population do not contain any CVAP estimates at all (likely because of individual privacy concerns and statutory requirements applicable to the public release of Census data that would allow identification of specific individuals). For a sense of the scale of this problem, the District of Columbia contains 179 census tracts, 450 block groups, and 6,507 census blocks in just 61 square miles. U.S. Census Bureau, Guide to State and Local Census Geography, District of Columbia, https://www2.census.gov/geo/pdfs/reference/guidestloc/dc_gslcg.pdf. These high margins of error severely impair the usefulness of estimates based on ACS sample data in the context of redistricting and VRA compliance, where small margins may have significant legal impact.

Aside from high margins of error, the ACS data simply has not provided accurate counts for populations. One such example are counts of Hispanic or Latino populations. When one compares the 2010 Census tabulations and the 2006-2010 ACS estimates of total Hispanic or Latino populations in a number of states, there are large discrepancies. Some of these inconsistencies are even larger than, or a significant portion of, the ideal population of those states' legislative districts.

State	2010 Census Hispanic or Latino Total Population	2006-2010 ACS Estimate Hispanic or Latino Total Population	Census/ACS Disparity	Ideal State Senate District Population	Ideal State House District Population
Cal.	14,013,719	13,456,157	557,562	931,349	465,675
Tex.	9,460,921	8,917,477	543,444	811,148	167,638
Fla.	4,223,806	3,995,324	228,482	470,032	156,678
N.Y.	3,416,922	3,288,880	128,042	307,589	129,188

U.S. Census Bureau, American FactFinder http://factfinder.census.gov (visited March 4, 2019).

As this table demonstrates, the disparity between Census and ACS data, even when dealing with one small measurement such as Hispanic or Latino total population, can be massive. The disparity between the Census and ACS data for Hispanic or Latino Total Population in each of California, Texas, Florida, and New York is larger, or essentially equal to, the ideal population of an entire state house district in those states. Accordingly, these kinds of irregularities can have real impacts in redistricting, where population equality, geographic distribution, and electoral power have real constitutional ramifications.

Accordingly, the inclusion of a citizenship question on the Census short-form questionnaire is the most accurate, consistent, and reliable publicly available method to measure CVAP.

II. ACCURATE CITIZENSHIP DATA IS CRITICAL TO THE PROPER EXAMINATION OF VOTING RIGHTS ISSUES

Section 2 of the VRA provides legal criteria for designing or adjusting election district boundaries to protect and preserve the political power of members of minority groups. 52 U.S.C. § 10301, *et seq*. Under certain circumstances, Section 2 mandates that political districts must be constructed to empower protected minority groups within districts to elect their favored representatives. This requirement can be satisfied through the creation of majority-minority districts, where the majority of citizens in a given district are members of the minority group in question, *See, e.g., Bartlett v. Strickland*, 556 U.S. 1 (2009). Additionally, the United States Constitution prohibits intentional racial gerrymandering. *See, e.g., Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

Maintaining this balance between protecting against the distillation of minority representation within districts while ensuring minority representation across districts requires thorough analysis of each district or potential district to determine whether a particular minority group has sufficient political power to fall under the VRA's protection. If so, the analysis next must determine whether that district strikes the proper balance

between empowering that group's political power within a district and ensuring such power is not reduced across districts by packing. In order to perform this analysis, policymakers responsible for creating political districts and law enforcement officials responsible for enforcing the VRA must have sufficient data regarding the demographics of potentially eligible voters within districts. Nearly every court to address this question has determined that CVAP is the proper measure to use when measuring voting population in order to assess minority voting strength. *See, e.g., Campos v. City of Houston*, 113 F.3d 544, 547-48 (5th Cir. 1997); *Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir. 1998) (citing *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989)).

It is no wonder courts have flocked to CVAP as their preferred measure of total population for measuring political power under the VRA; it is the best measure by which to do so. *See supra* I(A). This is because the other methods advanced by various experts—in many instances retained by parties to litigation—for indicating groups' potential political influence are either vastly underinclusive, vastly overinclusive, or are not consistent election-to-election or district-to-district. *See supra* I.

Since the discontinuation of the Census long-form questionnaire in 2010, redistricting authorities, enforcement officials, and courts have been forced to utilize less accurate data gathered through rolling ACS surveys compiled in a "Special Tabulation." Special tabulation data, as determined by the Census Bureau in 2011, becomes dramatically less accurate as information surveyed from people in

various geographic areas are split into smaller subsets of geographic areas. As detailed *supra*, at the block group level (the lowest level for which the Census Bureau releases "special tabulation" data with the accompanying margins of error), more than 42 percent of the block groups in the United States have error margins *in excess* of 25 percent. Legislators, other redistricting authorities, courts, and parties to VRA actions continue to struggle with this lack of accurate data regarding CVAP in VRA matters.

Contrary to the district court's rationale in the case below, citizenship data on a granular geographic level is required to facilitate the accurate creation of legislative districts in proper compliance with the VRA. A cursory reading of district court opinions published after the removal of the citizenship question from the 2010 Census demonstrates that courts which have thoughtfully examined the issue acknowledge the accuracy issues presented by using extra-Census data, such as data from the ACS, to estimate CVAP for purposes of VRA analyses. Those courts have been forced to accept estimates based on ACS data—often as modified or adjusted by expert witnesses—because no other, more reliable data, such as data gathered using the long-form or short-form questionnaires, existed after the question was removed from the decennial Census. "Although absolute perfection on the base statistical data is not to be expected, a trial court should not ignore the imperfections of the data used nor the limitations of statistical analysis." *Luna v. Cty. of Kern*, 291 F. Supp. 3d 1088 (E.D. Cal. 2018) (citing *Overton v. City of Austin*, 871 F.2d 529, 539 (5th Cir. 1989)) (internal quotation marks omitted).

Often a court's hands seem to be tied, as they acknowledge that survey information with disconcertingly high statistical margins of error—rather than decennial Census citizenship data—is the best (*i.e.* only) data currently available on citizenship rates and numbers despite its flaws.

In *Benavidez v. Irving Indep. Sch. Dist.*, a Hispanic resident brought an action against a school district and its members, alleging that the school district's at-large system of electing members of the board of trustees violated Section 2 by denying Hispanic voters the opportunity to meaningfully participate in the electoral process. 690 F. Supp. 2d 451 (N.D. Tex. 2010). Attempting to prove the first essential element of a Section 2 claim—that the Hispanic minority voting group in the challenged district was sufficiently large and geographically compact to constitute a majority of voters in a single member district—the plaintiff relied on citizenship data from the 2007 one-year ACS to make projections of the Hispanic CVAP in his illustrative districts, instead of relying on nine-year-old data from the previous Census. *Id.* at 454, 456-57.[6] The United States District Court for the Northern District of Texas concluded that the plaintiff failed to prove the first Section 2 *Gingles* precondition because the margin of error for ACS estimates released by the Census Bureau were too high for plaintiff's estimated growth rates to be considered reliable when applied to population groups as small as the district that the plaintiff was challenging. *Id.* at 459.

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[6] This case was adjudicated before the Census Bureau released its 2011 "special tabulation" of 5-year ACS survey data.

In *Fabela v. City of Farmers Branch*, a group of Hispanic residents challenged their city's at-large system of electing members of the City Council under Section 2. No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086 at *1-2 (N.D. Tex. Aug. 2, 2012). Because the 2010 Census did not contain a citizenship question, the plaintiffs utilized Census data to calculate total population and VAP but utilized five-year ACS data to calculate CVAP. *Id.* at *3. While recognizing the reliability problems inherent in ACS data, the district court found that the plaintiffs satisfied the first prong of a Section 2 claim, and were ultimately successful in that claim, because plaintiffs "used the most accurate data readily available to calculate the Hispanic CVAP point estimates." *Id.* at 25-26, 30. In doing so, the trial court, citing *Benavidez,* essentially acknowledged that if better data had existed, such as citizenship data gathered through the Census' long-form questionnaire or the short-form questionnaire, that would be the proper data to utilize. *Id.*; *Id.* at 14 n. 12. *See also Rios-Andino v. Orange Cty.*, 51 F. Supp. 3d 1215, 1224 (M.D. Fla. 2014) (accepting aggregated ACS citizenship data as merely "usable" for VRA analyses in small communities and that researchers are therefore forced to "choose between currency and accuracy when studying the demographics of a small population."); *Id.* at 1101-1102 (discussing difficulties of mapdrawers in incorporating ACS citizenship data into more detailed and accurate Census data).

In *Cisneros v. Pasadena Indep. Sch. Dist.*, a group of voters challenged their school district's at-large electoral system used to elect members of its board of trustees as violative of Section 2. No. 4:12-

CV-2579, 2014 U.S. Dist. LEXIS 58278 (S.D. Tex. 2014). In attempting to establish the first element of their Section 2 claim, the plaintiffs relied entirely on a tally of SSRVs rather than ACS CVAP data. *Id.* at *13. SSRV attempts to approximate the number of Hispanics who do register in a particular area by comparing the list of registered voters to a list of Spanish surnames developed by the United States Census Bureau. *Id.* SSRV data suffers from both underinclusivity and overinclusivity, resulting in a high margin of error and no reasonable accounting for citizenship whatsoever. *Id.* Experts testified that ACS CVAP data was very unreliable given the small size of the district. Ultimately the court found the ACS data merely "sufficiently reliable" when pooling together five years of data and declined to allow the Plaintiff to resort to "highly problematic" SSRV data. *Id.* at *19-20.

In *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, a group of plaintiffs challenged Illinois' 2011 congressional redistricting plan as violative of Section 2, the Equal Protection Clause, and the Fifteenth Amendment because they alleged, *inter alia*, that some districts were drawn to dilute the Latino vote. 835 F. Supp. 2d 563, 567 (N.D. Ill. 2011). In exploring plaintiffs' Section 2 claims, the United States District Court for the Northern District of Illinois acknowledged that "the more appropriate inquiry in this case for the proportionality factor, which is analyzed on a statewide basis, is citizen voting-age population." *Id.* at 586 (citing *Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir. 1998) and *LULAC*, 548 U.S. at 436) (internal citations and quotation marks omitted). The district court bemoaned the lack of

reliable CVAP data and acknowledged that the parties would have to make do with expert testimony and ACS data because "the 2010 Census does not include citizenship . . . ." *Id.* at 586.

In *Baldus v. Members of the Wis. Gov't Accountability Bd.*, the United States District Court for the Eastern District of Wisconsin found that plaintiffs were entitled to relief on their claim that two remedial state legislative districts violated Section 2 because the legislature failed to create a necessary majority-minority district. 849 F. Supp. 2d 840, 856, 858-60 (E.D. Wis. 2012). The defendants argued that based on VAP, Latinos made up a majority in two of the initial remedial districts. *Id.* at 854. However, the district court determined that the remedial districts that were drawn were in fact not majority-minority, because "the relevant measure is *citizen* voting age population, at least for an ethnic group with as high a proportion of lawful non-citizen residents as the Latinos. . . . For the obvious reason that non-citizens are not entitled to vote, we cannot ignore citizenship status . . . ." *Id.* (emphasis in original) (citing *LULAC*, 548 U.S. at 429). Because the 2010 Census did not include a citizenship question, the court was forced to rely on after-the-fact *estimates* by the parties' experts in order to strike down a duly enacted state redistricting statute. *Id.* at 856.

In *Rodriguez v. Harris Cty.*, a group of voters challenged the legality of their county commissioner precincts as dilutionary of Latinos' voting strength and therefore a violation of Section 2. 964 F. Supp. 2d 686, 697 (S.D. Tex. 2013). In its analysis of the first Section 2 element, the United States District Court for the Southern District of Texas, while

acknowledging that the Fifth Circuit had not yet "decided whether the five-year aggregation of ACS data is always sufficient to establish the citizenship voting age requirement", found the ACS data sufficiently probative on the issue of CVAP. *Id.* at 727. While the court admitted that the ACS suffers from some accuracy concerns, it concluded that it was nonetheless forced to use it because it was the only "reliable measure" of citizenship data "currently available". *Id.* at 727-29.

In *Montes v. City of Yakima*, the United States District Court for the Eastern District of Washington granted plaintiffs' motion for summary judgment in their action to invalidate the City of Yakima's at-large voting system for City Council as violative of Section 2. 40 F. Supp. 3d 1377, 1385 (E.D. Wash. 2014). To establish the first element of Section 2, the plaintiffs utilized five-year ACS CVAP data to demonstrate that hypothetical districts could be drawn where minorities constituted a majority. *Id.* at 1392-93. Over the objections of the defendants' experts, the court accepted the ACS data while noting it was not "perfectly accurate" because defendants failed to identify a more reliable data set. *Id.* at 1393. Without more information from the Census Bureau, state or local governments are forced to rely on rough estimates of CVAP based on ACS data when drawing their districts—estimates that will inevitably be second-guessed by opposing experts at trial.

Patino v. City of Pasadena involved a successful Section 2 challenge to Pasadena's redistricting plan for electing its city council as dilutionary of the votes of Latino citizens. 230 F. Supp. 3d 667, 674 (S.D. Tex. 2017). The court relied on citizenship data from

the five-year ACS to establish the first Section 2 element because it is the "sole source of citizenship data published by the Census Bureau." *Id.* at 687 (internal citations and quotation marks omitted).

By way of contrast, in a case brought before the 2010 Census, *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), the Court relied on data gathered during the 2000 Census using the long-form questionnaire. In that case, data was available down to the census block level. In fact, the court noted specifically, "Various exhibits . . . show the 2000 Census data broken down by the block level, indicating the number of individuals counted for all of the blocks of the Village that appear on that particular map." *Id.* at 424. No legislator, redistricting authority, plaintiff, defendant, nor court since the 2010 Census has had such granular, block level data available. Since the 2010 Census, only the 5-year ACS special tabulation derived from survey data has been available.

Each of these VRA cases since the 2010 Census leads to the conclusion that more accurate citizenship data would benefit both lawmakers and courts. For the last nine years the federal courts have been seeking more accurate and reliable citizenship data in order to adjudicate VRA claims *properly*.

Despite DOJ and The Secretary clearly recognizing these concerns, the district court below ignored them and substituted its incorrect policy judgment for that of The Secretary.

Apparently ignoring the findings of many of its sister courts, *see, e.g., supra*, the district court below found that:

> [T]here is no evidence in the Administrative Record that would support a finding that more granular CVAP data is "necessary" for enforcement of the VRA and plenty of evidence to the contrary. . . .[Defendants do not] identify a single VRA case that DOJ failed to bring or lost because of inadequate block-level CVAP data. . . That omission is hardly surprising. After all, the VRA was enacted in 1965 — *fifteen* years after a citizenship question last appeared on a census questionnaire sent to every household in the country. In other words, during the entire fifty-four-year existence of the VRA, DOJ has never had "hard count" CVAP data from the decennial census. It did not have such data in 1965, when the VRA was first enacted; it did not have such data in 1982, when the VRA was amended to clarify the vote-dilution standard, *see* Pub. L. No. 97-205, 96 Stat. 131; and it did not have such data in 1986, when the Supreme Court articulated the still-operative vote-dilution test in *Gingles*, a case cited in the Gary Letter.

New York v. U.S. Dep't of Commerce, No. 18-CV-2921, No. 18-CV-5025, 2019 U.S. Dist. LEXIS 6954 at * 386-88 (S.D.N.Y.) (emphasis in original) (internal citations omitted). While the district court is technically correct that VRA claims have been brought and adjudicated without accurate decennial Census CVAP data, the court fails to distinguish between cases decided in the period during which data collected using the long-form questionnaire was

available and cases decided after 2010, when courts were forced to rely on less accurate ACS data. The district court also fails to note the repeated calls by its sister courts for more accurate and granular data to assist the proper adjudication of VRA cases and compliance with VRA concerns. *See supra.*

Forced to resort to CVAP estimates derived from ACS data, courts have been forced into the role of a physician treating patients with a faulty thermometer—*i.e.*, one with a 25 percent or greater error rate in 42 percent of cases. While that physician would technically be treating her patients, she would be severely handicapped in her ability to treat them *properly* because of her forced reliance on inaccurate and unreliable data. Presumably no state medical board would permit a physician to continue practicing medicine in this manner, nor would the Food and Drug Administration permit the thermometer manufacturer to continue producing such an unreliable thermometer. Yet, the district court below has done precisely that by preventing the collection of accurate CVAP data through the inclusion of a citizenship question.

The district court has essentially mandated the use of inaccurate or unreliable CVAP estimates despite *known* high error rates when addressing questions of civil rights, where the most accurate, granular, and reliable data is *necessary* to the proper analysis of issues. This Court should reverse that error, permit The Secretary's proposed addition of a citizenship question to the Census, and give redistricting authorities, enforcement officials, and courts a full arsenal in ensuring compliance with the VRA.

CONCLUSION

For the foregoing reasons, *Amicus curiae* respectfully requests that the Court reverse the decision below.

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