No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT
OF COMMERCE, *et al.*,

Petitioners,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA LEGISLATURE IN SUPPORT OF RESPONDENTS

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As one of three coequal branches of California government, the Legislature of the State of California offers this brief amicus curiae in support of the state and local plaintiffs in this case.[1]

INTEREST OF *AMICUS CURIAE*

Like all other state legislatures, the California Legislature is a representative body. And like all other state legislatures, the California Legislature is divided into districts that, every ten years, are redrawn to be as nearly equal in population as is practicable. The population count on which redistricting is based, in California and the other 49 states, is the decennial census required by article I, section 2 and the Fourteenth Amendment of the United States Constitution. In California, those census data form the core of the statewide population database, which the California Legislature is tasked with maintaining and which is used for a myriad of other purposes at the state and local level. The accuracy of that database will have profound effects on the representative quality not only of the state Legislature, but of every district-based city council and board of supervisors throughout the State.

The California Legislature is also tasked with passing a balanced state budget every year. The 2018-19 state budget calls for $138.6 billion in state General

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. The parties have consented to the filing of this brief.

Fund expenditures, but it also depends upon more than $107.4 billion in federal funds, much of which is determined by formulas based on the census count. As demonstrated below, to the degree that California's population is undercounted, the California Legislature will either be required to substitute state funds for the federal revenue to which it would otherwise be entitled or be unable to provide the services that would otherwise be funded by that revenue. In addition, adding a citizenship question to the 2020 census will materially decrease response rates in California, and the Legislature will be forced to divert scarce public resources to attempt to mitigate that effect.

Finally, the California Legislature depends upon and works closely with California's Congressional delegation to represent the interests of the State and its inhabitants. If the size of that delegation is decreased due to a census undercount, the State's voice in Congress and its representational interests are diminished in violation of the Fourteenth Amendment.

Thus, for California, the validity of the census enumeration in this state is critically important both to its representative form of government and to its fiscal health. The outcome of this case will determine whether the 2020 census is valid or not.

SUMMARY OF ARGUMENT

The federal Constitution requires a census that is an "actual Enumeration" that counts "the whole number of persons in each State, excluding Indians not taxed." U.S. Const., art. I, § 2, cl. 3 & amend. XIV, § 2. That command cannot be met if Secretary of Commerce Wilbur Ross

is allowed to include a question that two well-respected district court judges have held will materially decrease response rates.[2]

The lower courts' rulings are based on lengthy trials, with fully developed records. Based on substantial evidence, both courts properly held that the citizenship question will cause significantly lower response rates that cannot be cured by follow-up operations. Therefore, the lower courts held, the plaintiff jurisdictions have standing, because the resulting undercount will harm them in congressional apportionment, in federal funding, in the plaintiff jurisdictions' own use of census data for redistricting and budgeting purposes, and in the additional cost of their own census outreach efforts to compensate for the effect of the question on their residents.

Both lower courts also held that the purported rationale for the Secretary's decision to include a citizenship question – that the Department of Justice requested it in order to facilitate enforcement of voting rights – was a pretext orchestrated by the Secretary himself. The New York court concluded that when the Secretary testified about the issue before Congress, he intended to convey the impression that his decision was prompted only by the Justice Department request, that neither he nor anyone else at the Commerce Department prompted the request, and that he had not discussed the

2. In *Ross v. California*, No. 18-1214, the Northern District of California enjoined the Secretary of Commerce and others from including a citizenship question on the 2020 census. Although the California Legislature submits this brief in support of respondents in *Department of Commerce v. New York,* No. 18-966, the brief will address the district courts' findings and conclusions in both cases.

matter with White House officials before 2018. N.Y. Pet. App. 74a. As the court's other findings reveal, none of this was true.

The plaintiffs in both cases argued that the evidence of pretext and the impact of the question on the overall accuracy of the census demonstrates a constitutional violation of the Enumeration Clause. Based on much the same evidence produced in the New York case, the trial court in the Northern District of California held that the Secretary's decision violated the Enumeration Clause. The trial court in the Southern District of New York, however, had dismissed the Enumeration Clause claim prior to trial, based on its reading of this Court's opinions in earlier cases involving challenges to the census. As demonstrated below, that decision was wrong as a matter of law. None of the cases upon which the New York court relied involved the kind of political manipulation of the census attempted here, a level of behavior that is outside the boundaries of the discretion afforded to Congress and the Secretary by the Enumeration Clause.

ARGUMENT

I.

PLAINTIFFS IN BOTH THE NEW YORK AND CALIFORNIA CASES HAVE STANDING TO CHALLENGE INCLUSION OF A CITIZENSHIP QUESTION ON THE CENSUS

Both the New York and California courts held that the plaintiff jurisdictions had standing to challenge inclusion of a citizenship question on the 2020 census. The State of

California was the lead plaintiff in the California case, which included other California jurisdictions, and the City and County of San Francisco was a plaintiff in both the New York and California cases.[3] The evidence in both cases established three kinds of harm to California that is directly traceable to the Secretary's decision:

- California and other state and local jurisdictions will divert scarce public resources to try to counteract the effect of the citizenship question on response rates among their residents. Cal. Pet. App. 72a-76a; N.Y. Pet. App. 187a-190a, 194a.

- Because many federal programs are based on population, California and its local jurisdictions will lose significant federal funding. Cal. Pet. App. 47a-57a; N.Y. Pet. App. 180a (¶ 251), 182a (¶ 255).

- California is expected to lose at least one seat in the House of Representatives and possibly more. N.Y. Pet. App. 201a; Cal. Pet. App. 57a (¶ 145).

These findings do not begin to describe the scope of the harm to states like California and New York that is directly traceable to the Secretary's decision. That injury is clear from the record adduced in the California case, which is described below.

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3. Throughout this brief, the Legislature will refer to *Ross v. State of California*, No. 18-1214, as "the California case" and to *Department of Commerce v. State of New York*, No. 18-966, as "the New York case." Citations will be to the petitioners' appendices in each case or to the docket numbers in the district courts below.

A. California Will Divert Scarce Public Resources to Counteract the Effect of the Secretary's Decision

History has shown time and again that the decennial census undercounts certain categories of people, including low-income individuals, minorities, renters, foreign-born individuals and individuals living in crowded households. Because half of California's residents are nonwhite, over a quarter are foreign born, close to half live in rental housing and 14% have incomes at or below the poverty line, many of California's residents fall into at least one of these categories. 18-cv-1865 N.D. Cal. Doc. 93-2 at 16 (Nov. 20, 2018). This not only places California at great risk of being undercounted during the Census, but, because California has disproportionately more people that fall into the hard-to-count categories than other states,[4] California is at a substantially greater risk of being undercounted than any other state in the union.

These facts mean that California must already devote significant resources to census outreach. In 2017, the State decided to commit substantial resources to obtaining a complete count of California residents during the

4. For example, California has nearly 5.3 million non-citizen residents, which is more than any other state in the union. The next closest state is Texas, with 2.9 million. Similarly, California has the highest number of foreign-born residents. It has 10.4 million, whereas the next closest state of Texas has nearly 4.5 million. *See Selected Characteristics of the Native and Foreign-Born Populations, 2012-2016 American Community Survey 5-Year Estimates, All States Within United States and Puerto Rico,* U.S. CENSUS BUREAU, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_5YR/S0501/0100000US|0100000US.04000 (last visited Mar. 26, 2019).

2020 census. On January 10, 2018, Governor Edmund G. Brown Jr. proposed as part of his 2018-19 Budget that the State dedicate an additional $40.3 million for efforts to improve the State's response rate. 18-cv-1865 N.D. Cal. Doc. 198 at 122 (¶ 835) (Feb. 1, 2019).

Early in the budget process, the state's Legislative Analyst Office observed that the potential introduction of a citizenship question to the 2020 census could cause an additional undercount. *Id.*, ¶ 838. The concern came up repeatedly in legislative committee materials and hearings. *Id.*, ¶ 839, citing 11 separate plaintiffs' exhibits.

On April 24, 2018, the California Assembly Budget Committee held hearings on the Governor's proposal to dedicate $40.3 million to increase the response rate for the 2020 census. In the agenda for that hearing, Committee staff advocated for providing "additional resources" over and above that amount because "in only the last three months, the politics, funding, and federal approach has changed in significant ways." *Id.,* PTX-510 at 41-44. The agenda materials described various challenges to an accurate 2020 census, including the decision to add the citizenship question. *Id.* In justifying the need for more funding, Committee staff cautioned that the census now appeared designed to harm Californians "by instilling fear in our residents" and "deliberately undercounting our true population." *Id.*, Doc. 93-2, at 19 (Nov. 20, 2018). On June 8, 2018, the Assembly and Senate Budget Committees met in conference and agreed to add $50 million to the Governor's proposal for a total appropriation of $90.3 million, along with legislative language requiring reporting on the progress of the outreach plan.[5] When the State enacted

5. *Id.* Doc. 93-2 at 138.

its final 2018-19 State Budget on June 27, 2018, it included $90.3 million for the state census, a $50 million increase over the amount originally proposed by the Governor before the Bureau announced its decision to add the citizenship question. *Id.*, Doc. 198 (¶ 839), citing PTX-504 at 140 (Feb. 1, 2019). Governor Newsom's January proposal for the 2019-20 FY budget included another $54 million in additional funding for state census operations.[6]

In this way, California has already been injured in a concrete and particularized manner sufficient to confer standing on the State: It has felt compelled to divert at least $50 million in state revenues from other priorities to additional census outreach efforts over a three-year period in an effort to avoid future representational and economic injuries of a far greater magnitude. If not for the Census Bureau's announcement that it will include the citizenship question on the 2020 census, the State could have spent those funds in 2018-19 on initiatives that would have moved the State forward, like health care programs, investments in higher education, or the construction of new housing. Alternatively, the State could have directed some or all of those funds to additional outreach efforts to reduce the State's historic undercount, rather than having to fight to prevent the citizenship question from making that undercount far worse than it otherwise would have been. This kind of economic injury fully qualifies as an "injury in fact." *See*, *e.g.*, *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1172 (9th Cir. 2002) (the loss of money "easily meet[s]" the standing test); *see also City of Oakland v. Lynch*,

6. *See* Governor Gavin Newsom's Budget Summary, 2019-20 at 137, available at http://ebudget.ca.gov/2019-20/pdf/BudgetSummary/FullBudgetSummary.pdf.

798 F.3d 1159, 1163 (9th Cir. 2015) (loss of "substantial portion" of expected $1.4 million in tax revenues for City of Oakland was sufficient to confer standing); *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980 (9th Cir. 2013) (economic costs of complying with challenged regulation sufficient to confer standing).

B. California Will Lose Significant Amounts of Federal Funding Due to the Secretary's Decision

The amount of money the federal government returns to a particular state turns in significant part on how many people the U.S. Census Bureau counts as living in that state. Indeed, the Census Bureau recently determined that 132 federal programs used Census Bureau data to distribute more than $675 billion in funds to states during fiscal year 2015.[7] These programs include everything from critical health care services like Medicaid, to food assistance like the National School Lunch Program, education programs like Title I and Head Start, housing assistance like Section 8 Vouchers, and transportation funding like the Highway Planning and Construction program. *Id.* at 3-7. The importance to California of receiving its share of these funds cannot be overstated.

As plaintiffs' evidence in the California case establishes, an undercount of any size would lead to a decline of federal revenue flowing to California during the decade that follows. 18-cv-1865 N.D. Cal. Doc. 91-7

7. *See* Hotchkiss and Phelan, Uses of Census Bureau Data in Federal Funds Distribution, A New Design for the 21st Century, https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf.

at 26-29 (Nov. 16, 2018). Defendants quibble with the magnitude of that decline, but they do not deny that a decline would occur. Far from it, defendants argue that if there is an undercount, it would be reduced by follow-up efforts that defendants assume will "have the same success rate as it had in the 2010 Census: 98.58 percent." *Id.*, Doc. 89-2 (¶¶ 54, 68-69) (Nov. 2, 2018). Under this optimistic scenario, defendants' expert predicts that "the distribution of federal funds to the State of California is estimated to decline by 0.01 percent' for Title I LEA Grants, WIC Supplemental Foods Grants, and Social Services Block Grants." *Id.*, Doc. 89 at 14, quoting Doc. 89-2 (¶ 11) (Nov. 2, 2018). Defendants insist that this amount – 0.01 percent – is "negligible" and not "material," thereby precluding plaintiffs from establishing an injury sufficient to confer standing. *Id.* at 13-14.

The problems for defendants with this line of argument are three-fold. First, as a matter of law, there is no requirement that an injury in fact be of a particular magnitude. This Court has flatly rejected the notion that an injury must be "substantial" to clear the standing hurdle. To the contrary, an "identifiable trifle" of economic harm may be enough. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (citing cases where a $5 fine plus costs or a $1.50 poll tax were sufficient to establish standing); *see also Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (rejecting argument that plaintiff did not have standing because her injury was only "minor"; plaintiff had standing when the injury was "concrete" and "actual"); *Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376, 1380 (9th Cir. 1979) (declaring that a person may have standing when he or she has "a direct stake in the actual outcome of the particular litigation, *however small* . . . .") (emphasis added).

Second, as a factual matter, California would suffer substantial harm even if the loss of federal funds did not exceed 0.01 percent for Title I LEA Grants, WIC Supplemental Foods Grants, and Social Services Block Grants. Although such a small percentage may suggest otherwise, the dollars at stake are substantial. Defendants' expert estimates that in a single year California could lose $215, 226 in Title 1 funding, $90,263 in WIC grants, and $23,709 in Social Service Block Grant funds. 18-cv-1865 N.D. Cal. Doc. 89-2 (¶ 70) & 28-30 (Nov. 2, 2018). Considered together and multiplied by ten to account for the decade that such an undercount would remain in place, California stands to lose $3,292,980 from these three federal programs, even under defendants' predictions about how effective the Bureau's follow-up operations will be in countering the effect of the citizenship question.

Under a more realistic view of the impact of the Bureau's follow-up efforts, plaintiffs' expert, Dr. Reamer, concluded that California could lose $2 million in Title 1 funding, $850,759 in WIC grants, and $223,450 in Social Service Block Grant funds in a single year. *Id.*, Doc. 91-7 at 26-28 (Nov. 16, 2018). Over the course of a decade, California can be expected to lose over *$31 million* from these three federal programs alone.

Third, these numbers are only the beginning of the story because they predict outcomes in just three of the federal programs that rely on census data. As noted above, the census Bureau has identified 129 additional federal programs that use census data to distribute billions in federal funding to the states. With so much funding at stake, even an exceptionally small undercount could deprive California of many millions – or even billions – of dollars.

C. Californians Will Suffer Representational Harms Because of the Secretary's Decision

Like the New York court, the California court concluded that "[a]dding a citizenship question to the 2020 Census significantly increases the likelihood that California will lose at least one congressional seat." Cal. Pet. App. 57a (¶ 145); N.Y. Pet. App. at 201a. Depending on the experts' estimated undercount attributable to the additional question, that number could be as high as a loss of three seats. Cal. Pet. App. 58a (¶ 149).

The potential loss of seats will cause real harm to the State. One need only look at the impact of the wildfires that have devastated parts of California over the last two years to understand the importance of congressional representation. In times of natural disaster, the Governor and the Legislature need to be able to count on a strong voice in Washington to help obtain federal funding and aid for disaster victims. To the degree that California's congressional delegation is reduced, the State's voice is not as strong, and its representation is weakened in relation to the other states.

Loss of a congressional seat is not the only kind of representational harm that Californians will suffer due to the Secretary's decision. As is true in every other state, every California resident, regardless of citizenship or ability to vote, is counted for purposes of representation in the state Legislature and in Congress. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016); Cal. Const. art. XXI, §§ 1, 2(d)(1). Since at least 1879, the population count on which legislative and Congressional districts are based has been the federal census. *Legislature v. Deukmejian*, 34 Cal. 3d

658, 668 (1983).[8] Indeed, in *Legislature v. Deukmejian*, the California Supreme Court reaffirmed existing case law that legislative and Congressional redistricting may *only* occur once a decade, after the federal decennial census. *Id.* at 680.[9] Thus, for the people of California, equality of representation turns on the validity of the federal census.

Long before this Court addressed whether districting should be based on total population or the number of those eligible to vote in *Evenwel v. Abbott*, the California Supreme Court held that representation in California's legislative bodies must be based on total population, not registered voters. The case was *Calderon v. Los Angeles*, 4 Cal. 3d 251 (1971), in which the court held that the federal equal protection clause prohibited the City of Los Angeles from drawing its City Council districts based on registered voters. In doing so, the court said:

> Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government. Thus a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area.

Id. at 258-59.

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8. The California Supreme Court quoted article IV, section 6 of the State Constitution of 1879: "'[the] census taken under the direction of the Congress of the United States . . . shall be the basis of fixing and adjusting the legislative districts . . .'" *Id.*

9. The court cited cases from other states in which courts had held the same thing. *Id.* at 669-70.

The court went on to note that "much of a legislator's time is devoted to providing services and information to his constituents" and that a district with a large population but few registered voters "would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens." *Id.*

In *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), the Ninth Circuit reached much the same conclusion, noting that county supervisorial districts drawn using eligible voters rather than total population "result[ ] in serious population inequalities across districts" and that "[r]esidents of the more populous districts thus have less access to their elected representative." *Id.* at 774. Such districts, the Ninth Circuit concluded, would "constitute a denial of equal protection to these Hispanic plaintiffs and rejection of a valued heritage." *Id.* at 776.

Californians who live in areas where there is a large undercount experience the same kind of harm to their representational rights as did those in *Calderon* and *Garza*, where districts were drawn on the basis of registered or eligible voters. As noted earlier, the undercount in California is already greater than in most other states, because of California's greater share of hard-to-count populations. In a district with significantly more people than are recorded on the census, a constituent's voice will have less impact than in a district that more nearly reflects the actual number of inhabitants. Thus, the constituent who wants to communicate with his or her legislator or to organize fellow constituents to do so must work harder in order to be heard. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (representation based on equal numbers of people is designed to prevent both "debasement of voting power *and* diminution of access to

elected representatives") (emphasis added). People who live in districts with a high number of uncounted residents have less access to their representatives than those who do not, and areas with a high undercount have a lower share of representatives in the Legislature and in Congress than they would otherwise be entitled to.

D. The Harms to California and New York Are Directly Traceable to the Secretary's Decision

Despite these strong interests, Secretary Ross and the other defendants argue that states like New York and California lack standing to challenge the Secretary's decision because their injuries "would be 'fairly attributable' only to the actions of individuals who unlawfully refuse to truthfully and completely fill out and return the census form . . . and who then are able to evade the government's extensive follow-up efforts." Pet. Br. at 17. As a result, defendants argue, the states' "alleged injuries would thus be 'the result of the independent action of some third party not before the court' and therefore insufficient to support standing." *Id.*

The California court's standing analysis effectively rebuts defendants' claims, because it relied on this Court's statement that although an injury is not fairly traceable if it results from the independent action of some third party not before the court, " 'that does not exclude injury produced by determinative or coercive effect upon the action of someone else.'" Cal. Pet. App. 75a (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

Based on the extensive evidence produced at trial, including the Census Bureau's own research, the California court found such a determinative effect:

> Plaintiffs have established that there will be a drop in self-response to the 2020 Census caused by the addition of the citizenship question. That nonrespondents have a legal duty to respond to the census does not alter this conclusion because the citizenship question is a "substantial factor" contributing to the nonresponse. [citation omitted] The Bureau and its top officials have concretely affirmed the predictable impact of adding a citizenship question to the 2020 Census on self-response rates.

Id.

Specifically, both the California and New York courts found that "the Census Bureau's best conservative estimate of the differential effect of the citizenship question on noncitizen household self-response" was to reduce noncitizen response rates by 5.8 percent. *Id.*, 15a; N.Y. Pet. App.139a-149a. However, that number is likely to be much higher, as both courts also found. Cal. Pet. App. 17a; N.Y. Pet. App. 150a-151a.

A March, 2019 study by researchers at Harvard University confirms the trial courts' assessment and demonstrates that the effect of the citizenship question will be much greater. Baum, et al., *Estimating the Effect of Asking About Citizenship on the U.S. Census* (Mar. 21, 2019).[10] The researchers conducted a randomized control trial involving more than 9,000 respondents using census questionnaires with and without the citizenship question.

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10. Available at https://shorensteincenter.org/estimating-effect-asking-citizenship-u-s-census/.

They concluded that asking about citizenship would reduce the share of the Hispanic population alone by 8.4 percent, or approximately 4.2 million people. *Id.* at 3. They further concluded that "we likely underestimate the effect of asking about citizenship status on the 2020 census," because, among other things, their survey respondents knew that they were answering questions posed by university-affiliated academic researchers and not the government. *Id.* at 10.

Thus, defendants have not and cannot refute the fact that the Secretary's decision will have a determinative effect on census respondents within the meaning of *Bennett v. Spear.* The record in both cases demonstrates that the plaintiffs' injuries are fairly traceable to the Secretary's decision.

II.

DEFENDANTS' DECISION TO ASK ABOUT CITIZENSHIP VIOLATES THE ENUMERATION CLAUSE OF THE FEDERAL CONSTITUTION

The plaintiffs in both the New York and California cases alleged that Secretary Ross's decision to ask about citizenship on the 2020 census violated the Enumeration Clause of the federal Constitution. U.S. Const. art. I, § 2, cl. 3. The District Court in the New York case dismissed plaintiffs' Enumeration Clause claim prior to trial; the District Court in the California case heard the claim and ruled on it in favor of plaintiffs. The California court's decision proved to be correct.

A. The New York Court's Decision to Dismiss Respondents' Enumeration Clause Claim Was Based on Errors of Law

The New York court dismissed respondents' Enumeration Clause claim based on what it called "three background considerations." N.Y. Pet. App. 409a. The first consideration was that the Enumeration Clause gives Congress " 'virtually unlimited discretion'" in conducting the decennial census, which Congress has delegated to the Secretary of Commerce through the Census Act. *Id.* (citing *Wisconsin v. City of New York*, 517 U.S. 1 (1996) and *Utah v. Evans*, 536 U.S. 452 (2002)). The second consideration was that "the inquiry with respect to the Enumeration Clause is an 'objective one'" in that the Clause calls for an 'actual Enumeration,' and the census either satisfies that standard or it does not; whether Congress or the Secretary intended to satisfy it is of no moment." *Id.* at 410a. The third consideration was that in interpreting the Enumeration Clause, this Court "'put[s] significant weight upon historical practice,'" which the District Court found included inquiries into citizenship in earlier censuses and in the sampling done between censuses known as the American Community Survey. *Id.* at 411a-419a (citing *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted)).

1. The Secretary of Commerce's discretion over the census does not extend to political manipulation

The New York Court misread this Court's statement in *Wisconsin, supra,* that the Enumeration Clause "vests Congress with virtually unlimited discretion in

conducting the decennial 'actual Enumeration.'" 517 U.S. at 19. "Virtually unlimited discretion" is not the same as unlimited discretion. The discretion granted to Congress, and by Congress to the Secretary, does in fact have boundaries: At a minimum, the Secretary's discretion ends when the census is altered for political purposes.

The contours of that boundary are described in the dissent of Justices Thomas and Kennedy in *Utah v. Evans, supra.* The issue before the Court in *Utah* was whether the Census Bureau's use of "hot-deck imputation," a statistical method used only after other attempts to gain information about an address had failed, violated the Census Act or the Enumeration Clause. 536 U.S. 452. The Court held that the Bureau's use of the method did not violate either the Act or the Clause, but it was careful to say that "we need not decide here the precise methodological limits foreseen by the Census Clause." *Id.* at 479. Instead, the Court wrote:

> We need only say that in this instance, where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely, those limits are not exceeded.

Id.

Justice Thomas and Justice Kennedy concluded that the Bureau's use of hot-deck imputation violated the constitutional mandate of an "actual enumeration"

contained in article I, section 2, clause 3. Although the dissent's arguments did not command a majority of the Court, they did lay out the roadmap for a case where, as here, there is clear evidence of the sort of "manipulation of the method" to which the majority referred. *Id.*

Carefully reviewing the historical context in which the Clause was drafted, Justice Thomas quoted one nineteenth century historian who wrote there was "'reason to suspect, [that the [colonial] censuses were] often intentionally misleading, when officials, on the one hand of the boastful, or on the other hand of the timid type, thought to serve some interest by exaggeration or by understatement.'"[11]

Justice Thomas went on to review the constitutional debates and Federalist papers and concluded:

> The Framers knew that the calculation of populations could be and often were skewed for political or financial purposes. Debate about apportionment and the census consequently focused for the most part *on creating a standard that would limit political chicanery*. While the Framers did not extensively discuss the method of census taking, many expressed the desire to bind or "shackle" the legislature so that neither future Congresses nor the States would be able to let their biases influence the manner of apportionment.

536 U.S. at 500-01 (emphasis added).

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11. 536 U.S. at 497 (quoting F. Dexter, Estimates of Population in the American Colonies, in Proceedings of the American Antiquarian Society 22 (1887)).

In particular, Justice Thomas quoted George Mason's argument at the constitutional convention that a periodic census was "essential to . . . fair representation," because "[f]rom the nature of man, . . . we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it." *Id.* at 502.

From this review, the dissent concluded that although the majority in *Utah v. Evans* emphasized the "strong constitutional interest in accuracy," there is even a stronger suggestion "that the Framers placed a higher value on preventing political manipulation." *Id.* at 506.

There was no evidence of political manipulation in *Utah* or *Wisconsin,* a fact that was key to the majority's decision in both cases. As noted above, the *Utah* majority held that in that case "all efforts have been made to reach every household" and "manipulation of the method is highly unlikely . . . ." 536 U.S. at 479. The same was true in *Wisconsin,* where this Court said that "the Census Bureau made an extraordinary effort to conduct an accurate enumeration" for the 1990 census and found that the Secretary's decision not to adjust the census was both reasonable and "well within the bounds of the Secretary's constitutional discretion." 517 U.S. at 20, 24.

Here, however, there is more than ample evidence of political manipulation. The New York court held that "the real reason for [the Secretary's] decision was something other than the sole reason he put forward in this Memorandum, namely enhancement of DOJ's VRA enforcement efforts." N.Y. Pet. App. 311a. The California court put it this way:

> Together, this evidence establishes that Defendants intended to use the VRA enforcement as a pretext for adding the citizenship question when VRA enforcement was not, in fact, their true purpose. In sum, Plaintiffs have made a clear showing that (1) Secretary Ross acted in bad faith in disclosing the basis of his decision, and (2) Defendants acted in bad faith in compiling the Administrative Record.

Cal. Pet. App. at 118a.

The New York court's other findings of fact point toward a political motive behind the Secretary's decision. The court found that Secretary Ross spoke with White House advisor Steve Bannon about adding the citizenship question and that Mr. Bannon asked the Secretary to speak with Kansas Secretary of State Kris Kobach about the issue. N.Y. Pet. App. 79a. "During that discussion," the New York court found, "Secretary Ross and Kobach discussed the potential effect on 'congressional apportionment' of adding 'one simple question' to the census." *Id.* at 80a. Mr. Kobach later sent an email to the Secretary saying that the lack of a citizenship question "also leads to the problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." *Id.* at 85a.

The New York court held that the Secretary's desire to add the "one simple question" caused him to "pursue[] that goal vigorously for almost a year, with no apparent interest in promoting more robust enforcement of the VRA," but that, "believing they needed another agency to request and justify a need for the question Secretary

Ross and his aides worked hard to generate such a request for the citizenship question from DOJ . . . .” *Id.* at 77a. The court also noted that Earl Comstock, the Secretary’s chief of staff, “testified that he viewed it as his job to ‘help [the Secretary] find the best rationale’ for adding the question” and that “he did not ‘need to know what’ the Secretary’s actual rationale might be, because it may or may not be one that was . . . legally-valid.’” *Id.* at 82a.

The Secretary’s efforts ultimately required him to speak directly with Attorney General Jeff Sessions and ask him to have his staff request that the question be added in order to aid the Department of Justice in enforcing the Voting Rights Act. *Id.* at 89a-90a, 93a. Once the request was made, Census Bureau staff “sought to meet with DOJ officials to better understand their request and to discuss other ways to satisfy DOJ’s interest,” but the Attorney General “decided ‘not to pursue the Census Bureau’s alternative proposal’” for obtaining the data without the citizenship question, and DOJ officials were told not to meet with the Census Bureau. *Id.* at 95a-97a (¶¶ 115-120).

Defendants’ own expert and the Census Bureau’s Chief Scientist, Dr. John Abowd, testified “that he was unaware of any other circumstance in which a Cabinet Secretary personally directed agency staff not to meet with the Census Bureau and that DOJ’s refusal in this case was thus ‘unusual.’” *Id.* at 99a (¶ 123). In Dr. Abowd’s view, “Attorney General Sessions’s decision constituted improper ‘political influence’ on the decision-making process.” *Id.*

That was not all. The New York Court went on to catalog what it described as defendants' "efforts to downplay deviations from the Census Bureau's standard processes" for testing new questions to be added to the census and to note that although the Secretary described the question as "well-tested," he never "described that testing or even define[d] what he meant by 'well-tested.'" *Id.* at 99a, 102a (¶ 130). The court concluded that "the record supports the conclusion of experts in the field that the question was not well – or even adequately – tested for purposes of the decennial questionnaire," a view that the court found was shared by six former Census Bureau Directors in both Republican and Democratic administrations, numerous experts in the field, and even defendants' own expert, Dr. Abowd, who agreed that "'[i]t would not be appropriate to describe it as well-tested in the context of the 2020 questionnaire'" and said that "'[i]t hasn't ever been tested in that context.'" *Id.* at 103a-104a.

This record of manipulation and the New York court's findings contrast sharply with the record and the findings in the *Wisconsin* and *Utah* cases on which the district court relied. No matter where the Court draws the line on the Secretary's discretion, this behavior crosses it. The New York court's failure to recognize the key differences between this case and the cases on which it relied led it to err as a matter of law.

2. The District Court erred in holding that the Enumeration Clause inquiry was an "objective" one that could be made before trial

The second consideration on which the New York court relied was closely related to the first: that the Enumeration Clause inquiry was an "objective one" and "there is nothing in either the text of the Enumeration Clause itself or judicial precedent construing the Clause to suggest that the relevant analysis turns on the subjective intent of either Congress or the Secretary." *Id.* at 410a. The court went on to say that "[t]he Clause calls for an 'actual Enumeration,' and the census either satisfies that standard or it does not . . . ." *Id.* On a motion to dismiss, however, without the benefit of any evidence, the District Court had no way of knowing whether a census that included a citizenship question would satisfy the "actual Enumeration" standard or not.

As it was, based on the evidence at trial the District Court found that addition of a citizenship question will mean that the census will *not* satisfy the standard of an actual Enumeration. Specifically, the court found that addition of a citizenship question "will cause an incremental net decline in self-response rates of at least 5.8% among noncitizen households, and a significant but unquantified net decline in self-response rates among Hispanic households." *Id.* at 16a. The court further concluded that the Census Bureau's follow-up operations "will not remedy these declines, which means that they will translate into an incremental net differential undercount of people who live in such households in the 2020 census." *Id.*

Thus, in this case, the Secretary's decision to add the citizenship question will directly interfere with the "strong constitutional interest in accuracy" that this Court has held formed the basis for the Clause's command that Congress conduct an "actual enumeration." *Utah,* 536 U.S. at 478.

Once again, the New York court failed to read this Court's opinion in *Utah* accurately. There, the Court held that "an interest in accuracy . . . favors the Bureau," because the Bureau was using imputation "only as a last resort" and its "only choice is to disregard the information it has, using a figure of zero, or to use imputation in an effort to achieve greater accuracy." *Id*. Here, however, the Secretary clearly had a choice, but he knowingly chose the option that would materially *decrease* the accuracy of the census. Not only that, he set up an elaborate pretext in order to justify it, and even told Congress, under oath, that his decision "began with the Gary letter [from the Department of Justice] and denied White House involvement in the decision and discussions leading to the decision." *Id.* at 71a-72a.

In hindsight, the New York court's statement that the "Clause calls for an 'actual Enumeration,' and the census either satisfies that standard or it does not" should have read instead: "This case will determine whether the census will satisfy that standard or not." The District Court was not in a position to resolve that issue prior to trial.

3. The New York court should not have assessed the weight to be given historical practice prior to trial

The New York court's third consideration was that in interpreting the Enumeration Clause, this Court "put[s] significant weight upon historical practice." N.Y. Pet. App. 411a (¶ 49) (citing *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014)).

Once again, the District Court should have waited for trial to determine what lessons should be taken from the historical practice of the Census Bureau. Had it done so, it would have had the benefit of knowing that the citizenship question had not performed adequately on the American Community Survey.[12] It would also have had the benefit of knowing that "the failure to conduct any pretesting of the proposed citizenship question on the decennial census questionnaire was a 'significant deviation' from the Census Bureau's historical practices, and it would have heard from the Bureau's own Chief Scientist and defendants' expert that he knew of no other circumstance in which a Cabinet secretary had instructed an agency not to meet with Bureau staff to determine whether there was a better way to obtain the data that the agency had requested. *Id.* at 98a-99a (¶ 123), 101a (¶ 128).

Moreover, had the New York court allowed the Enumeration Clause claim to go to trial, it would have been

12. *Id.* at 101a (citing Defendants' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Plaintiffs' Claims, Doc. 546 at 62, ¶ 420 (conceding that "the citizenship question does not appear to be performing adequately on the ACS").

able to assess the importance of historical practice in the context of the current "macroenvironment" surrounding the citizenship question. As it was, the court concluded *after* trial that even relatively recent use of the citizenship question on the American Community Survey was not indicative of how the question would affect response rates in 2020:

> Finally, the ACS was last tested in 2006, and the macroenvironment has changed in important ways since then. See Tr. 737, 1252, 1258-59. In particular, the undisputed evidence – including the Census Bureau's own research – indicates that respondents are likely to react differently to a citizenship question in 2020 than they would have reacted only three years ago, let alone thirteen years ago. See id. at 616, 619-20, 737, 1258-59. Thus, testing conducted thirteen years ago has only limited relevance to how the question will perform on the 2020 census.

Id. at 106a.

The Bureau's own research is consistent with the District Court's conclusion. In a 2017 study, the Bureau reported "an unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants," leading the Bureau to conclude that these concerns "may present a barrier to participation in the 2020 Census." The study noted that respondents "express[ed] new concerns about topics like the 'Muslim ban,' discomfort 'registering' other household members by reporting their demographic characteristics, the dissolution of the 'DACA' (Deferred

Action for Childhood Arrival) program, repeated references to Immigration and Customs Enforcement (ICE), etc."[13]

Much of the distrust outlined in the Bureau's study can be traced to the current President's campaign rhetoric and actions taken since he assumed office. In addition to the executive orders limiting travel to the United States from Muslim countries (the "Muslim ban") or dissolution of the Deferred Action for Childhood Arrival program mentioned in the Bureau's study, the President has issued other executive orders and proclamations on the issue of illegal immigration, and he has made clear his intent to deport undocumented immigrants.[14] The current macroenvironment is, therefore, largely one of this administration's own making, and it magnifies the harm caused by asking about citizenship.

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13. *Memorandum from Center for Survey Measurement on Respondent Confidentiality Concerns to Associate Directorate for Research and Methodology*, U.S. CENSUS BUREAU (Sept. 20, 2017), https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf. *See also Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census*, U.S. CENSUS BUREAU (Nov. 2, 2017), https://www.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf.

14. *See* Exec. Order No. 13767, 3 C.F.R. 262 (2018); Proclamation No. 9844, 84 Fed. Reg. 4949 (2019); Remarks by President Trump on Illegal Immigration Crisis and Border Security, WHITEHOUSE.ORG (Nov. 1, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/.

Given these facts and the facts adduced at trial, historical practice is entitled to considerably less deference than the District Court afforded it before trial. With the benefit of a full trial, the New York court may very well have reached the same conclusion with respect to historical practice as the California court did:

> As the Supreme Court has recognized, the constitutionality of a particular governmental action may depend on the larger social context in which that action occurs. *See Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 553-557 (2013) (striking down Section 4 of the Voting Rights Act because, inter alia, the preclearance formula set forth in that section was based on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs"); *Grutter v. Bollinger*, 539 U.S. 306, 342-43 (2003) (explaining that "race-conscious admissions policies must be limited in time" and predicting that 25 years later affirmative action would no longer be necessary or constitutionally justified). Ultimately, Secretary Ross's primary obligation under the Constitution is to ensure a reasonably accurate enumeration of the public, and to attempt to design a survey that will achieve that goal in the year 2020. The fact that the citizenship question may have been perfectly harmless in 1950, or that [it] may be harmless again in the year 2050 is of little consequence to the Secretary's constitutional obligations with respect to the accuracy of the 2020 Census.

Cal. Pet. App. at 169a.

B. This Court Can and Should Hold That the New York Court's Findings of Fact Demonstrate a Violation of The Enumeration Clause

Although the New York court's decision was wrong as a matter of law, that does not mean that the issue must be remanded for trial. The Court has before it defendants' petition for certiorari in the California case, where the issue went fully to trial and where defendants had a full opportunity to present their evidence and make their arguments in post-trial briefing. The Court can and should grant the California plaintiffs' motion for expedited consideration of the petition for certiorari filed in that case and resolve the issue based on that record.

If the Court does not expedite consideration of the California case, it can and should resolve the Enumeration Clause issue based on the findings of fact in the New York case, which point inexorably to a constitutional violation. The Court has ordered the parties to brief the Enumeration Clause issue as part of this case,[15] and defendants can argue the issue based on the record developed in the District Court. There will be no prejudice to defendants, who had ample opportunity to make their own record and respond to plaintiffs' evidence in the context of the Administrative Procedure Act claim.

15. March 15, 2019 Order.

CONCLUSION

The integrity of the federal census is critical to virtually every segment of American public life. Legislatures and local governments depend upon it for budgeting, planning, and drawing district lines. Researchers and industry alike use the data to forecast trends and check their previous forecasts. Courts rely on the numbers to decide everything from voting rights cases to claims involving discrimination in housing and municipal services. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969) (one person, one vote); *Comm. Concerning Cmty Improvement v. City of Modesto*, 583 F.3d 690, 696 (9th Cir. 2009).

Failure to check the kinds of activity demonstrated here – activity that took place at the highest level of the Commerce Department – will shake the public's faith in the neutrality and integrity of the Census Bureau. Past cases have questioned whether the decennial census should have been adjusted to reflect an undercount that everyone acknowledged existed. As the dissent in *Utah v. Evans*, *supra,* demonstrates, however, one has to go back to the early days of the Republic to find the kind of political manipulation revealed in the record below. The judgments rendered by the Southern District of New York and the Northern District of California should be affirmed.

Respectfully submitted,

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