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 United States Court of Appeals
For the Second Circuit

BRIEF OF THE NIELSEN COMPANY (US), LLC AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court correctly concluded, on the basis of well-settled principles of administrative law, that the Secretary of Commerce's decision to add a citizenship question to the decennial census questionnaire was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

2. Whether the Secretary of Commerce's decision to add a citizenship question to the decennial census violated the Enumeration Clause of the U.S. Constitution, art. I, § 2, cl. 3.

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INTEREST OF *AMICUS CURIAE* [1]

Founded in 1923 by Arthur C. Nielsen, The Nielsen Company (US), LLC ("Nielsen") is a global measurement, data, and analytics company that provides its clients with data and analytics products and services based on scientific rigor and innovation. Nielsen utilizes its own proprietary data—as well as third-party data, including data collected by the U.S. Census Bureau as part of the decennial census—to help its clients understand consumers, consumer purchasing habits, and where to invest capital and deploy resources. Nielsen continually develops new ways to serve its clients that include many of the largest retail, media, advertising, and consumer goods companies in the world. An S&P 500 company, Nielsen operates throughout the United States and has operations in over 100 countries, covering more than 90% of the world's population. Nielsen provides the most complete and trusted understanding of consumers and consumer habits in the United States and around the world.

Nielsen agrees with respondents that the district court's decision enjoining the Secretary of Commerce from adding a citizenship question to the 2020 decennial census should be affirmed. Nielsen writes separately to

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

alert the Court to the substantial adverse impact that an inaccurate census will have on businesses in multiple industries nationwide. As demonstrated at length in this brief, Nielsen has a strong interest in this case because its clients—businesses who rely heavily on the accurate reporting of consumer behavior—are highly dependent on census data. Nielsen itself uses census data both to compile its "sample" households and to extrapolate the results of its samples to local and national markets for both media and consumer purchase measurement. The addition of a question to the census that will reduce the census's accuracy will have a lasting and negative impact on the operations of the largest American consumer product manufacturers, retailers, media, and marketing businesses that rely on Nielsen-provided data to make their most critical business decisions.

SUMMARY OF ARGUMENT

The census is "the country's biggest and most complete market-research survey" rendering it "invaluable to business." *A Count that Counts*, Economist (Jan. 7, 2010). As explained in detail below, American businesses rely heavily on census data to make strategic and operational decisions, to plan for long-term growth and expansion, and to adapt to the nation's changing demography. The district court recognized that the addition of a citizenship question to the 2020 decennial census will reduce the quality and accuracy of census data. That diminution in the quality of census data will have significant and adverse consequences for American businesses.

Nielsen—the world's leading supplier of data regarding consumer behavior—reliably analyzes and predicts the media content consumed, and the consumer goods purchased, by households in America. The information Nielsen produces is used by some of the country's largest companies in the consumer products manufacturing and media industries to make their most important business decisions. The foundation upon which Nielsen's projections are based is the decennial census and annual updates keyed off the decennial census. The integrity of Nielsen's projection process—and thus the integrity of the data relied upon by Nielsen's myriad clients—depend on a baseline assumption that census data is accurate and reliable.

The data Nielsen collects is critical to both the day-to-day operations, and the long-term strategic planning, of numerous American businesses. To give but a few examples, Nielsen-generated projections are used to determine: the price paid for television and digital streaming advertising; the programming preferences of television and digital streaming audiences; the different mediums consumers use to consume content; what consumer products to stock; and where to site physical stores. That data is indispensable to companies as they decide how to manage their product lines, allocate capital, and adapt to the nation's changing demographic landscape.

Nielsen and its clients are not the only businesses that depend on reliable census data to run efficiently. Banks depend on census data to decide where and how to market new financial products. Utility companies

rely on census data to determine where to place infrastructure and how to efficiently deliver essential services. Hospitals depend on census data to determine where to build new facilities and where to develop specialty practices. In these settings and others, inaccurate census data will hamstring American businesses and consumers.

A reduction in the accuracy of the census occasioned by the addition of the citizenship question would have lasting negative consequences for American business. Particularly troubling is the possibility that a potential undercount of non-citizen or minority households will result in an underweighting of those households' preferences. As a purveyor of measurement data, Nielsen understands better than most that if those households are not accurately measured, business may unwittingly underserve them by investing less in those consumers' preferred products and services. Such mistaken business determinations will harm not only consumers in America, but the American companies that serve them.

ARGUMENT

As the district court recognized in enjoining the government from adding a citizenship question to the 2020 decennial census, "hundreds of thousands—if not millions—of people will go uncounted in the census if the citizenship question is included." Pet. App. 9a. The district court noted the government "conceded at oral argument that there is 'credible quantifiable evidence' that 'the citizenship question could be expected to cause a decline in self-response[]'" to the census. *Id.* at

150a. And it was "undisputed" that "regardless of how successful [non-response follow up] operations are in remedying a net differential undercount due to a differential decline in self-response rates, *the additional of the citizenship question will result in harm to the quality of census data*." *Id.* at 208a-209a (emphasis added).

Before this Court, the government does not seriously dispute the points it conceded below. Instead, it points to the supposed lack of "definitive, empirical support" for the proposition that adding a citizenship question could reduce response rates. SG Br. at 4 (quoting Pet. App. 554a). More important for the government, however, is that "even if there is some impact on responses [as a result of adding the citizenship question], the value of more complete and accurate data derived from surveying the entire population outweighs such concerns." *Id.* (quoting Pet. App. 562a; alteration omitted). Specifically, the government claims "[t]he citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond." *Id.* (quoting Pet. App. 562a).

The government's failure to adequately address the conceded decline in response rates formed a key component of the district court's determination that the government's actions were arbitrary and capricious. Nielsen believes that conclusion to be correct, and the parties discuss it at length in their merits briefs. From the perspective of commerce in America, however, the

critical point is that the government's conclusion that more accurate citizenship information is of "greater importance than any adverse effect" of lower census response rates fails to take into account the enormous significance of census data for the functioning of American businesses today. As explained in greater detail below, any modifications that will indisputably reduce the overall accuracy of the census as a means of counting the number of individuals within the country will have severe and lasting negative effects on commerce nationwide. These concerns should be given weighty consideration when determining whether to change the way the census has been operating for nearly seven decades.

I. Accurate Population Data Derived From The Census Is Critical For American Commerce.

A. This Court and others have repeatedly recognized the significance of the census for American businesses.

The census's original purpose, grounded in the Constitution, is to count "the total resident population (citizens and non-citizens) of the 50 states" for the purpose of apportioning seats in the House of Representatives. *See* U.S. Census Bureau, Congressional Apportionment: Frequently Asked Questions, https://www.census.gov/population/apportionment/about/faq.html (last visited Mar. 26, 2019); U.S. Const. art. 1, § 2, cl. 3. But this Court has recognized that, notwithstanding its original intended use, the census "now serves as a 'linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing

units throughout the country.'" *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (citation omitted); *see also Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982) (noting that the census "provides important data . . . for the private sector").

This evolution in the census's significance was foretold at the Founding, when James Madison recognized that the census would eventually serve to "mark[] the progress of the society, and distinguish the growth of every interest." *Baldrige*, 455 U.S. at 353 n.9 (quotation marks omitted). And today, the census captures a wealth of information about hundreds of millions of individuals living in America—308,745,538 in the last decennial census in 2010. Jennifer D. Williams, Cong. Research Serv., R40551, *The 2010 Decennial Census: Background and Issues* 2 & n.9 (Feb 3, 2011). That information is used for myriad purposes such as "computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige*, 455 U.S. at 353 n.9.

Accurate information about the number and location of potential consumers is the coin of the realm for American commerce. Presidents from both political parties have recognized that the private sector—like the government—uses the wealth of information generated by the census to make critical business decisions. For example, in 1990, President George H.W. Bush recognized that "business planners employ census numbers to devise strategies for the Nation's economic development" and that "[l]eaders in . . . the private sector will use the information [the census]

provides in making critical decisions as we prepare to enter the 21st century." Proclamation No. 6105, 55 Fed. Reg. 8897 (Mar. 6, 1990), 1990 WL 10088573. Almost a decade later, on the eve of the 2000 census, President Clinton similarly noted that the census constitutes "the [c]ornerstone of [k]nowledge about the American people" and that "[b]usinesses rely on census data for marketing, hiring, and expansion plans." White House Press Release, *Importance of Fair and Accurate Census* (June 2, 1998), 1998 WL 285144; *see also* White House, Press Release, *Statement by the President on Census Amendment*, (Aug. 5, 1998), 1998 WL 452248 (describing the census as "the single most importance source of information about the American people").

Political and business commentators have also recognized the enormous significance of the census in providing a statistically rigorous basis upon which businesses can make strategic and operational decisions. The census is commonly regarded as the source for "the highest-quality and most consistent information" "[regarding] potential customers and how much money they might have to spend." Jim Tankersley & Emily Baumgaertner, *Here's Why an Accurate Census Count is So Important*, N.Y. Times Mar. 27, 2018; *see also* Michael R. Strain (American Enterprise Institute Fellow), *The Census Is a Valuable Economic Tool*, RealClear Markets (June 15, 2012), http://www.aei.org/publication/the-census-is-a-valu able-economic-tool/ ("Businesses and non-profits also rely heavily on the [American Community Survey ('ACS')] . . . . That the ACS is one of the most helpful

products of government is beyond dispute."); Nick Hart, *Making It Count: Businesses Have an Essential Role for Supporting 2020 Census*, Bipartisan Policy Ctr. (Mar. 8, 2019), https://bipartisanpolicy.org/blog/making-it-count-businesses-have-an-essential-role-for-supporting-2020census/ ("Businesses rely on quality census data because the information provides insights about population dynamics and available markets.").

This universal recognition of the importance of the census to American companies in not merely a matter of theory. To the contrary, numerous on-the-ground examples make clear that the practical importance of the census to American industry is difficult to overstate.

B. Accurate population data derived directly from the decennial census is integral to the business of both Nielsen and its clients.

Nielsen provides its clients—the nation's largest media companies, manufacturers, marketers, and retailers—with critical information about consumer behavior that in turn drives these clients' most important business decisions. Nielsen's business is comprised of two components—the "media audience measurement and analytics"-side operations (the "Media" business) and the "consumer goods sales measurement and analytics"-side operations (the "Consumer" business). A detailed description of these two parts of Nielsen's business demonstrates just how crucial accurate and complete census information is for American commerce.

Nielsen is perhaps best known for its Media business—the "Nielsen ratings"—that tracks both the media content households in America consume and the means through which they consume it. The basis for this information is the "Nielsen sample"—a selection of approximately 46,000 households nationwide that Nielsen compiles and refreshes every two to five years. The purpose of this sample is to create a statistically rigorous proxy for media consumption both in 208 local "designated market areas" ("DMAs") that Nielsen tracks and in the national market as a whole. The bases upon which Nielsen selects households to approach for their participation in the sample are the decennial census and annual updates based upon the census.

Specifically, Nielsen uses the most granular level of census data, the "census block" level, to compile population and demographic information for local market areas. Once Nielsen knows who lives within each DMA, it then—again at the block level—randomly selects households to approach for participation within the sample. In selecting the blocks from which to compose its sample, Nielsen takes numerous steps to ensure that the households that participate will be representative of the overall population within each DMA based on the census. A representative example demonstrates how this works.

Washington D.C. and surrounding areas constitute a single DMA in which Nielsen tracks the media consumption of approximately 850 households containing approximately 2,300 people over the age of two. In the 2010 census, Washington, D.C. was made up of 6,507 census blocks. In order to determine which

city blocks within Washington the 850 households should come from, Nielsen uses census data to determine which areas are more highly populated, and which are less so. Thus, if twice as many people live west of Wisconsin Avenue in Georgetown as those that live east of Wisconsin Avenue, Nielsen will select twice as many households from the west side as from the east. In addition, Nielsen also ensures that its sample is statistically representative of the other household characteristics recorded by the census, namely age, sex, ethnicity, household size, and race. In 2018, the census estimated that 11% of households in Washington were Hispanic or Latino. Thus, of the 850 households in Washington that are part of the Nielsen sample, Nielsen will ensure that approximately 94 are Hispanic.[2]

Once Nielsen has constructed its sample, it then measures the media consumed by participating households. This measuring includes not only network television and cable, but also streaming services and digital content. And Nielsen deploys various technologies and modeling tools that determine the media consumption of each individual within a

[2] As noted above, once Nielsen selects a block from which to approach households for participation in the survey, it uses a random number generator to select which houses to approach. Thus, in order to ensure a representative sample across the various characteristics measured by the census, Nielsen uses census data to determine which city blocks are most likely to contain populations with the relevant demographic characteristics and then selects households from those blocks.

household. On a daily basis, Nielsen compiles this information and then, using census data regarding the total population within each DMA and nationwide, estimates the overall consumption of different types of media on a local and national level. Thus, if the census reports that there are approximately 126,000 individuals 18-years old or younger in Washington, D.C., and Nielsen's sample demonstrates that 20% of individuals within that age group watched a Nationals baseball game on Fox, Nielsen can estimate that approximately 25,000 individuals under 18 watched the game in the Washington DMA. In the same way, Nielsen can estimate how many African-American women watched Game of Thrones on HBO through an Apple TV device, how many families with two children watched a Disney movie, and so forth. Nielsen calculates these estimates for the country as a whole as well as for local markets.

Nielsen's Consumer business uses almost exactly the same methodology and techniques to understand what households in America buy, and from where. Working with third parties, Nielsen creates a sample of approximately 100,000 households nationwide that fall within 50 designated markets. Exactly as with its creation of the media sample described above, Nielsen uses census data to ensure that the selected households are representative of each individual market and the nation as a whole based on the various demographic characteristics captured by the census. Participating households agree to log—whether through a barcode scanner or a phone application—every purchase made by an individual in a household including from where

the product was purchased and, where necessary, how much it cost. As with the information Nielsen collects through its Media business, with the household consumption data collected through its sample, Nielsen estimates both local and national consumption activity at an extremely granular level. Thus, Nielsen can and does calculate how many families with two children are buying a particular brand of cheddar cheese from a supermarket, or how many Hispanic families are buying a particular brand of diapers from a pharmacy.

C. Nielsen's reliance on, and use of, census data is critical to its clients.

The data Nielsen collects, and the local and national projections it makes, are vital to the nation's largest manufacturing, retail, marketing, consumer goods, and media companies. These companies use Nielsen-produced projections—all of which are based upon data collected through the census—in both their day-to-day operations and in longer-term strategic planning.

On the Media side, for example, information about how many people are watching a particular show directly determines the price of the advertising displayed during the broadcast. Based on the historical performance of a program as measured by the Nielsen ratings, advertisers contract for ad slots and then, once the program has run, use the ratings in order to ensure that the advertisers received the viewership they paid for. Moreover, not only are the raw population numbers important, but advertisers rely on the more granular demographic information—including gender, age, race, and ethnicity—in order to determine which types of products to advertise during particular shows.

The information that Nielsen provides to its media-related clients is also critical for longer-term planning and development. For example, when planning at what time to broadcast a particular show, it is vital to understand what audience the show is meant to attract and when that audience generally consumes content. Nielsen's analyses facilitate this type of planning. Moreover, there is an increasing recognition that content is far more commercially successful when characters reflect the viewing audience. As such, statistically-driven demographic information about the growth in minority consumption of media, and specifically the tastes and preferences of minority audiences, drive content creation and new show development. The same dynamic exists for television streaming services, whose success depends not only on advertising revenue but also on increased subscriptions. Understanding which underserved populations exist, and what types of media they wish to consume, is critical to the growth of these digital media companies.

Technological innovation within media is also dependent on accurate viewership information derived ultimately from census data. Over the past decade, the medium through which consumers have received content has undergone a revolution, from movie theatres and television sets to smartphones, computers, tablets, and "smart" televisions, to name but a few. Moreover, whereas in decades past content was delivered to televisions via broadcast and then cable networks, today an increasing number of consumers are "cutting the cord" and using internet-connected

devices such as Apple TV and Roku boxes to stream digital content from their preferred viewing platform. These developments have brought an ever-widening array of content to an ever-expanding audience, but they have also required media companies to make new choices about how to deliver content to viewers. The data collected and generated by Nielsen is integral to media-related companies' long-term strategic plans, as they decide whether to release new content on one versus another platform or to create content that can maximize viewership potential on the devices that are gaining in popularity at a particular moment.

As with its Media clients, the manufacturers and retailers that purchase Nielsen's Consumer services use that information to run their businesses and stay agile and responsive in constantly-changing markets. Nielsen data is in turn used to help manage resource and capital allocation in highly dynamic marketplaces. Examples of how these clients are dependent on census data are numerous and varied. At a basic level, information regarding which customers are buying which products is necessary to diagnose and address changes in sales performance. Brand managers use this data to watch, essentially real-time, as products rise and fall. Nielsen data also allows businesses to see those trends broken down by a variety of demographic characteristics. Using this information, companies can course-correct when a product fails to attract a targeted demographic, ramp up production of products that are popular with key constituencies, and determine where research and development resources

are merited in response to opportunities for new growth.

Manufacturers not only use this information in designing and managing their product line, but also in their interactions with retailers. Understanding that a particular demographic shops in particular stores, and that certain products appeal to that demographic, is an important means of persuading retailers to give shelf space to particular items. Similarly, when one brand is competing with another for inclusion within a store, data that shows that purchasers of its product tend to have a larger overall spend than purchasers of a rival product can be a vital selling point. These types of negotiations between manufacturers and retailers occur every day throughout the country, and accurate data regarding consumer purchases is critical to ensuring that stores are successful in carrying the right products and that consumers are able to buy what they wish.

Detailed information about consumer characteristics and preferences is also integral to businesses' attempts to adapt to changing demographic landscapes. Population centers are not static, and in response to economic and social considerations, populations (and subsections within them) move inter- and intrastate, within a city, and even within neighborhoods. These migrations can happen gradually or suddenly, and Nielsen's clients are dependent on Nielsen's sophisticated census-derived data to ensure that they are building (and closing) stores and housing developments in the right locations and adapting planning logistics to ensure the right products get to

the right places. Although Nielsen can deploy certain methodologies to estimate population changes between decennial censuses (for example, by using birth records or housing permits), any estimated changes are still keyed to the data produced by the census; thus, if the census itself is inaccurate, any attempted refinements of that data will reflect the same inaccuracies.

These decisions—from small-scale issues of which product to stock on a shelf to the large-scale questions of where to develop new stores in response to population shifts—are what distinguishes successful companies from those less so. And, as described in Part II, a change in the census that will indisputably result in a less accurate count of the nation's population, and in particular an undercount of certain minority groups, will deprive businesses of the key data source upon which they base these decisions.

D. Census data is integral to the operations of countless other American industries.

As the foregoing demonstrates, Nielsen and its clients are highly dependent on census data in order to run their businesses. These are hardly atypical or isolated examples. To the contrary, historical instances abound of companies nationwide using the census as a basis for their operations and short- and long-term planning.

Retail, as discussed above, is perhaps the most obvious example of an industry dependent on census data. Indeed, in 1997 the director of research and planning for Target testified before Congress that "[a]ll marketing and strategic plans are based on census

data." *Census 2000: Hearings Before the S. Comm. on Governmental Affairs*, 105th Cong. 77 (1997) (statement of Joan Gentil Naymark). As a tangible example of Target's use of census data in practice, the results of the 2000 census reportedly prompted the company to offer more hair products for African-Americans and children's books in Spanish in its stores in Washington, DC. *See A Count that Counts*, *supra*. Likewise, after the 2000 decennial census, large retailers like Starbucks and Walmart used census data in order to plan out future store expansion. *See* Amy Merrick, *The 2000 Count: Counting on the Census --- New Data Will Let Starbucks Plan Store Openings, Help Blockbuster Stock Its Videos*, Wall St. J., Feb. 14, 2001, at B1. Moreover, in choosing where to develop stores, retailers rely on census data not merely to discover new customers but also to ensure that an adequate employee pool exists. *See* Office of the Chief Economist, Economics and Statistics Admin., U.S. Dep't of Commerce, *The Value of the American Community Survey: Smart Government, Competitive Businesses, and Informed Citizens* 33-34 (2015).

Banks and financial institutions are also dependent on census data, particularly as regards the marketing and sale of new financial products. For example, a bank can evaluate the potential success of a new service by looking at the demographic profiles of particular areas (including metrics like age, home ownership, and number of children within a household) and then marketing certain financial products that might be appropriate for individuals within that area. *See Modernizing the U.S. Census* 295 (Barry Edmonston & Charles Schultze eds. 1995). For example, 529 college

savings plans can be marketed to areas with many families who have young children, and Spanish-language products can be marketed in communities with a large Hispanic population. Likewise, high-income areas may be more attracted to higher-risk/return financial products whereas lower-income areas might seek more stable investment opportunities such as certificates of deposit. Although financial institutions have a number of sources upon which they rely when determining the suitability of products for different customer segments, census data is a critical source. Moreover, census data helps banks and credit unions understand where to site their branches, which in turn makes financial services available to more citizens and makes banks more profitable and efficient. *See As Community Charters Grow, So Do Applications For Finding Branch Sites*, Credit Union J., Dec. 5, 2005; *see also Demographic Data Come in All Shapes and Sizes*, Central Banker (Winter 2001), https://www.stlouisfed.org/publications/central-banker/winter-2001/demographic-data-come-in-all-shapes-and-sizes ("Like any business, a financial institution must know its customers to profit in business. . . . With empirical data like the census in hand, bankers are well-positioned to form profitable partnerships.").

Utilities are yet another example of an industry that uses census data in both its daily operations and longer-term planning. Most utility companies have special low rates for customers who are elderly or disabled. *See Modernizing the U.S. Census*, *supra*, at 297. Particularly with respect to elderly customers, census data helps determine when and where these

rates are likely to be prevalent. Moreover, because the decennial census and the annual updates that are based upon it track population growth and movement, utility companies use census data to plot the location of the new lines that will be necessary to serve expanding communities. *See id.* So too do telephone companies use census data to determine "the number of cellphone towers needed [to ensure] that people's phones have a connection." Isaac Mizrahi, *The 2020 Census – Can We Count On It Or Not?*, Forbes (Aug. 2, 2018).

Although certain types of healthcare needs are uniform across the national population, others differ based upon various census-recorded demographic characteristics such as age, household size, and income. When healthcare providers are determining where to build new hospitals or in which neighborhoods of a city to develop specialty practices, census data provides an important indicator of patient needs. *See Modernizing the U.S. Census*, *supra*, at 297-98. To give but one example, neighborhoods in which young families are prevalent are good sites for pediatric and obstetrical services and low-income areas in which insurance coverage is poor may need urgent care clinics that the community uses in lieu of regular doctors' visits.

In short, census data is critical to the profitable and efficient operation of American industry. As some 19 business groups recently explained in a letter to Congress, "[t]he population and demographic data from these surveys are vital to businesses across America to promote economic development, identify potential customers and create jobs. . . . The combined data are an irreplaceable tool for business and industry, allowing

us to analyze current and trending demographic and economic shifts, and give us the certainty necessary to plan and execute future investments." Letter from ACT et al. to Senators and Representatives (May 15, 2018), https://censusproject.files.wordpress.com/2018/05/final-census-biz-groups-fy19.pdf. Thus, "[w]ithout accurate Census data on the U.S. population, our economy would suffer." *Id.*

II. A Reduction In The Accuracy Of The Census Will Have Damaging And Lasting Consequences For American Business.

The district court found that adding a citizenship question to the census would result in less accurate census data. Its basis for this finding was straightforward: The addition of a citizenship question will result in a reduced self-response rate to the census from non-citizen households of at least 5.8% although in reality "the net differential decline could be much higher." Pet. App. 150a. And all parties agreed that the census's non-response follow-up procedures would yield less accurate demographic results *even if* the net result of the differential decline in response rates was not actually an undercount overall. *See id.* 208a-209a, 119a. That is, even if the census's follow-up procedures managed to reach every single household that did not initially respond to the census, the resulting data collected through those follow ups on characteristics such as age, gender, number of individuals in the household, ethnicity, and race would be less accurate. The problems arising for American businesses from these inaccuracies are three-fold.

First, as described above, businesses rely heavily on the wealth of data provided by the decennial census—whether it relates to age, to ethnicity, or to household size—in structuring business decisions. Nielsen's sample is predicated on the notion that the census accurately captures, down to a block level, the inhabitants of the United States and their basic demographic characteristics. *See* David Zarefsky et al., *Government Statistics: The Case for Independent Regulation-A New Legislative Proposal*, 59 Tex. L. Rev. 1223, 1226 (1981) ("[B]usiness, labor, and policy planners would be crippled in their decision making if they were not confident of the accuracy of statistical studies.").

The consequences to Nielsen's clients, and business more generally, will be significant. For example, a decline in the accuracy of information regarding where elderly residents live within a state or a city will adversely impact the decisions made by retailers, healthcare providers, and manufacturers when they forecast what products to produce for the elderly and where to sell them. Likewise, if less accurate information is collected about the behavior of those who are 18 years old and younger, companies will lose vital information about developing tastes in new technology, products, and digital content. Particularly in the era of "big data," it is impossible to overstate the uses to which companies put the information they receive about actual and potential consumers, and the census underlies much of that information and improves its accuracy.

Second, as the district court found, the primary constituency whose responses to the census would decline as a result of the citizenship question were non-citizen households. And while the district court did not *need* to rely on the certainty that these households would be undercounted in order to find a reduction in census accuracy, a household that is unwilling to respond initially to the census may likewise be reluctant to respond when contacted through a follow up. The net result will thus likely be an undercount of non-citizen and minority populations in particular. Leaving aside the social and political consequences of that undercount, this is untenable from a business perspective.

In 2014, the Census Bureau projected that America will become a majority non-white nation in 2044. At that time, Hispanics will constitute 25% of the population, African-Americans will constitute 12.7%, Asians will constitute 7.9%, and multi-racial individuals will constitute 3.7%. *See* William H. Frey, *New Projects Point to a Majority Minority Nation in 2044*, Brookings Inst. (Dec. 12, 2014), https://www.brookings.edu/blog/the-avenue/2014/12/12/new-projections-point-to-a-majority-minority-nation-in-2044/. For this reason, among many others, American corporations have become increasingly focused on ensuring that they are adequately serving minority populations and catering to their consumer preferences over the past two decades. Those efforts will be substantially hampered by a modification in the census that will almost inevitably result in an underestimation of minority populations throughout the country. Nielsen's

sample, both for its Media and Consumer sides, will not accurately capture the number of minority households and thus will underweight their preferences and prominence when calculating consumer trends. As a result, retailers will stock fewer products for minorities, media companies will produce less content directed at minorities, and manufacturers will spend less time and money than they otherwise would in developing products for minority markets. Indeed, "[w]hether it's programmers seeking to uncover the composition of their true audience diversity, to make scheduling decisions, advertisers looking to reach specific segments with pinpointed messages or media owners making more of an effort for on-screen inclusion by casting with diversity in mind, all operators in the industry have a business imperative for knowing what the true audience makeup is." *Return to Sender: How Big Data Alone Can Be Biased and Unrepresentative*, Nielsen (Mar. 13, 2019), https://www.nielsen.com/us/en/insights/news/2019/return-to-sender-how-big-data-alone-can-be-biased-and-unrepresentative.html. For that reason, "it's essential that any measurement insights they are relying on be fully representative of the rich pastiche of the U.S. population. No group or groups should be knowingly or unknowingly excluded or underrepresented." *Id.*

In short, minority communities will be underserved and gravely harmed if their prominence in the country is not accurately registered by the census. But so too would an inaccurate count of minority communities harm American businesses who will miss out on the opportunity to sell products and content to an ever-

increasing portion of the U.S. population. This mismatch between a community that wants to be served and corporations that want to serve it will cost American businesses billions of dollars in lost revenues. And as the prevalence of minority households grows, the harms from the undercount of minority households in the census will only increase.

Third, and finally, businesses rely heavily on the government conducting itself in a predictable and consistent manner. *Cf.* Jon Connolly, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 Colum. L. Rev. 155, 156 (2001) (noting that "the public has the right to expect consistency and predictability from the government."). Since 1950, the census has not had a citizenship question asked to all respondents, and businesses have thus compiled both historic data and future forecasts in reliance on the expectation that the census captures all of the population, not that it undercounts, or inaccurately counts, certain population segments. A change this significant in the manner in which the census is conducted will result in a "trend break"—the modification of a methodology in a manner that makes it impossible to compare data from one period to another. Even were the change in the census *not* anticipated to result in inaccurate census data, the modification in methodology would require businesses to carefully assess the new census to ensure its continued applicability and relevance in their business decisions. But as the district court found, the census *will* be more inaccurate. Businesses that have built up a wealth of historical data, and have projected

consumer behavior out into the future, will be severely disrupted by these modifications.

* * *

From the census's original purpose of creating a basis for the apportionment of seats in the House of Representatives to its numerous and varied uses today, the census has retained its significance as the premier statistical source of information about the country since its founding. For this reason, this Court has recognized "a strong constitutional interest" in the accuracy of the census. *Utah v. Evans*, 536 U.S. 452, 478 (2002). That interest in accuracy—for the federal and state governments, businesses, and citizens—is as vital today as it was in 1789. This Court should reject any action by the government that will reduce the accuracy of census data, and especially an action that, as the district court found, was not in accordance with law.

CONCLUSION

The judgment of the United States District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

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