No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,
v.
NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CITY OF SAN JOSE AND THE BLACK ALLIANCE FOR JUST IMMIGRATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JOHN F. LIBBY
Counsel of Record
BARRY S. LANDSBERG
RONALD B. TUROVSKY
ANDREW C. CASE
ANA G. GUARDADO
MANATT, PHELPS & PHILLIPS, LLP
11355 W. Olympic Boulevard,
Los Angeles, CA 90064
JLibby@Manatt.com
(310) 312-4000

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
DORIAN L. SPENCE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600

DAVID L. SHAPIRO
OF COUNSEL TO MANATT, PHELPS & PHILLIPS, LLP
1563 Mass. Avenue
Cambridge, MA 02138
(617) 491-2758

MARK ROSENBAUM
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, CA 90005
(213) 385-2977

CITY OF SAN JOSE
RICHARD DOYLE
NORA FRIMANN
OFFICE OF THE CITY ATTORNEY
200 East Santa Clara Street, 16th Floor
San Jose, CA 95113
(408) 535-1900

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INTEREST OF AMICI CURIAE[1]

Amici the City of San Jose ("San Jose") and the Black Alliance for Just Immigration ("BAJI") (collectively, "San Jose Parties") have a clear and direct interest in this matter: They are respondents in *Wilbur Ross, Secretary of Commerce et al. v. California et al.*, 18-1214, and, like respondents here, they successfully challenged Secretary Wilbur Ross's decision to add a citizenship question to the 2020 Decennial Census. The San Jose Parties have prevailed on an additional ground that respondents here did not.

The San Jose Parties filed their complaint in April 2018, alleging violations of the Administrative Procedure Act ("APA") and the Enumeration and Apportionment Clauses of the U.S. Constitution. The district court denied the motions of the federal defendants (petitioners here) to dismiss and for summary judgment, and held a six-day bench trial on all claims in January 2019. On March 6, 2019, the district court issued a 126-page ruling finding that 1) the evidence presented by the San Jose Parties showed that adding a citizenship question to the 2020 Decennial Census questionnaire would lead to predictable concrete

[1] The parties have consented to the filing of this brief. Written consent is on file with this Court. No counsel for a named party authored this brief in whole or in part, and no named party or counsel for a named party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

injuries to the San Jose Parties; 2) Secretary Ross violated the APA when he issued his March 26, 2018 memorandum directing the Census Bureau ("Bureau") to add the question; and 3) adding the question to the 2020 Decennial Census Questionnaire would violate the Enumeration Clause of the United States Constitution because doing so "will significantly impair the distributive accuracy of the census because it will uniquely and substantially impact specific demographic groups." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 122.[2] On March 13, 2019, the district court issued a judgment and an injunction against inclusion of the citizenship question on the 2020 Census.

On March 15, 2019 the Court directed the parties here to brief the question of whether Secretary Ross's decision to add a citizenship question to the 2020 Census violated the Enumeration Clause. The San Jose Parties have an interest in upholding the California district court's finding in their favor after trial on the Enumeration Clause claim (in addition to upholding its finding in their favor on the APA claim) and in preserving the distributive accuracy

[2] The San Jose Parties have made materials from the district court trial in *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) available on a publicly accessible website at https://bit.ly/2I2vMKD. These documents include the entire trial transcript (cited herein as "Tr."); trial exhibits (cited herein as "PTX-"); selections from the administrative record (cited herein as "AR"); and docket entries, including the district court's ruling, each cited herein by document number ("Doc.").

of the 2020 Decennial Census. If Secretary Ross's decision is upheld, San Jose will lose federal funding and receive inaccurate data upon which it bases critical decisions, including lifesaving decisions such as deploying resources during emergencies. BAJI and its members will be injured by the Secretary's action as well; they rely on services provided in cities and towns that will also lose funding.

Should the Court grant the government's petition in No. 18-1214 and consolidate that case with this one, the San Jose Parties respectfully request the opportunity to withdraw this brief, file a brief on the merits in accordance with a schedule convenient to the Court, and request time for oral argument on April 23, 2019.

INTRODUCTION

The San Jose Parties present a unique perspective on the issues before the Court. They are the only plaintiff group challenging the citizenship question that chose to try their Administrative Procedure Act claim solely limited to the administrative record. They did so because the record so strongly supported the conclusion that Secretary Ross's decision to add the citizenship question crossed into arbitrary administrative decision-making. Indeed, it is difficult to identify a comparable situation in our case-law, where the administrative record so clearly shows that a cabinet officer decided on a course of action and then post hoc orchestrated a charade of administrative regularity to make it seem as if his

decision were not preordained. The Secretary's decision is impossible to sustain under the APA because it prioritizes providing citizenship data to the Department of Justice ("DOJ") at the risk of "any" adverse effect on the census, even though the record shows that Secretary Ross had been directly informed that the importance of that data to DOJ was low and that the risks to the census were severe.

The San Jose Parties also bring a different perspective on the constitutional issue. This constitutional issue was not tried in the New York case. It *was* tried in the California case. And this issue goes to the heart of the taking of the census, one of the most important functions of our national government. The Secretary's decision is as impossible to sustain from a constitutional perspective as it is under the APA because it bears no reasonable relationship to achieving the essential goal of the Enumeration Clause: that of equal representation. To the contrary, as was proven at trial by the San Jose Parties, adding the citizenship question will detract from that goal, as the question will undercut distributive accuracy, the prime mechanism of ensuring that equality.

The evidence in the California trial from the testimony of the government's own witnesses and from the express language of the government's documents pointed in one direction only: Despite the best efforts of the Bureau, in today's social environment, asking the citizenship question in the census ***will*** lead to an undercount of Latinos and

noncitizens. There is no legitimate justification for imperiling the accuracy of the census by depriving communities with concentrations of those populations of their right to equal representation and of their proportionate share in the substantial federal funding that is based on the census. The Court should rule that the Enumeration Clause is an alternate ground for relief here, and should issue a ruling that will ultimately affirm the California district court's finding and its permanent injunction against adding the citizenship question.

SUMMARY OF ARGUMENT

Adding the citizenship question Secretary Ross proposed to the 2020 Decennial Census questionnaire violates the Enumeration Clause of the United States Constitution. Distributive accuracy is the primary means of achieving the overriding purpose of the Enumeration Clause—*i.e.*, to achieve equal representation. This is clear not only from the Court's precedent but also from the history of the Enumeration Clause. The constitutional purpose of the Enumeration Clause is to count people fairly across states so that political representation is equitable. If the populations of some states are undercounted relative to others, the undercounted states will suffer a loss of representation, and their populations' political rights will be diluted. As the unanimous Court wrote in *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996), the manner in which the Secretary of Commerce conducts the census must bear a "reasonable relationship to the accomplishment of an actual enumeration of the

population, keeping in mind the constitutional purpose of the census."

Whether a change to the census bears a "reasonable relationship" to distributive accuracy is a context-specific question that depends upon the particulars of the question itself—who is being asked and how they are being asked. *Wisconsin*, 517 U.S. at 20. That questions regarding naturalization were asked by census enumerators more than 60 years ago does not mean that the question proposed for 2020 must be constitutional. Rather, social conditions at the time the precise question will be asked of these precise populations inform the constitutional inquiry.

The findings of the district court in *City of San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal), along with those in the companion case of *California et al. v. Ross et al.*, 18-cv-1865 (N.D. Cal.) (together, the "California Matters"), based on substantial record evidence, demonstrate that by adding the citizenship question, Secretary Ross made a decision that will undermine distributive accuracy and is therefore inconsistent with the goal of equal representation. The California district court found that in the present political and social macro-environment, adding the question will increase the nonresponse rates of Latinos and noncitizens, and that the follow-up procedures of the Bureau will not make up for the undercount. In fact, the Bureau's follow-up procedures will be less effective with these groups than with other groups. As a result, states where Latinos and noncitizens are concentrated, including New York and

California, will be undercounted by a greater degree than other states. Their voters will see their votes diluted and their political representation and share of federal funding diminished. The Secretary's decision violates the Enumeration Clause and was properly enjoined by the California district court. It should be enjoined on that same basis in this case.

In addition, the administrative record alone demonstrates that Secretary Ross's decision was arbitrary and capricious under the APA and therefore supports no legitimate government purpose justifying the inevitable inaccuracies in the count.

The arbitrary nature of Secretary Ross's decision is crystallized in one line of his March 26, 2018 memorandum (the "Decisional Memo"): the claim that providing citizenship data from a citizenship question to the Department of Justice "is of greater importance than any adverse effect" of adding the question. Pet. App. 562a. The administrative record shows that the Secretary was warned that the "adverse effects" could include an increased nonresponse rate of minority and immigrant populations, increased costs, and decreased accuracy of the data resulting from the census.

But the administrative record shows that Secretary Ross had been informed that DOJ's need for the citizenship information was not a high priority within the agency. The administrative record shows that until December 2017, DOJ had

not in the entire life of the Voting Rights Act asked that the question be added to the census, and that DOJ also did not ask for the question to be added when it submitted requests to the Bureau earlier in 2017. More important, the administrative record shows that well before the DOJ's request for the citizenship question, Secretary Ross had told his staff that he wanted the question added to the census. It shows that that at his bidding the staff had spent months trying to convince DOJ to ask the Bureau for the question. It took Secretary Ross's personal intervention with the Attorney General to get DOJ to request that the Bureau add the question. In light of this record, the Secretary's overall conclusion that DOJ's need for the citizenship information outweighed "any adverse effects" on the census was implausible and therefore arbitrary and capricious under the APA.

Ultimately, the district courts in both the Southern District of New York and the Northern District of California agreed that the administrative record alone sufficed to support the conclusion that the Secretary violated the APA on numerous grounds, and this Court should affirm that ruling.

ARGUMENT

I. Adding This Citizenship Question Would Violate The Enumeration Clause

Distributive accuracy is the primary means of achieving the overriding purpose of the Enumeration Clause—*i.e.*, to achieve equal

representation. This purpose is clear not only from this Court's precedent, but also from the history of the Enumeration Clause. The California district court, based on substantial record evidence, found that by adding the citizenship question, Secretary Ross made a decision that will imperil distributive accuracy and will therefore be inconsistent with the goal of equal representation. The Secretary's decision violates the Enumeration Clause and was properly enjoined by the district court in the California Matters. It should be enjoined on that same basis in this case.

A. The Enumeration Clause Requires The Method Of The Census To Bear A "Reasonable Relationship" To Distributive Accuracy

The Enumeration Clause protects one of America's core rights—the right to a representative government. The Court has consistently held that the Enumeration and Apportionment Clauses are designed to enforce the "Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). In the seminal Enumeration Clause case of *Wisconsin*, 517 U.S. at 20, the Court unanimously held that although the Constitution grants Congress broad authority to conduct the census and Congress has in turn granted that authority to the Secretary of Commerce, the Secretary's execution of the census must nevertheless bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional

purpose of the census." The Court found that a focus on "distributive accuracy" is consistent with the Constitution. *Id.* at 20. "Indeed, a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census: to determine the apportionment of the Representatives among the States." *Id.*[3]

Distributive accuracy has been essential to the purpose of the census since the genesis of the Enumeration Clause. How to apportion representation in a national congress, and the related question of how to tax the states, were among the most contested issues of the Constitutional Convention of 1787. There, Edmund Randolph moved that the new government conduct a census to determine the "population & wealth" of the states so they could be represented by population and taxed according to wealth.[4] Madison proposed that rather than representation being tied to population and taxation to wealth, "[r]epresentation & taxation were to go together."[5] Madison's proposal carried the day, and the final text provided that "Representatives and direct Taxes shall be apportioned among the several

[3] The original constitutional purpose of the census to ensure equal representation was ratified in the enactment of the Fourteenth Amendment, which requires that congressional apportionment consider "the whole number of persons in each State." U.S. Const. amend. XIV § 2.

[4] 1 Records of the Federal Convention of 1787, pp. 570–71 (Max Farrand ed. 1911).

[5] 1 Records of the Federal Convention of 1787, pp. 585 (Max Farrand ed. 1911).

States which may be included within this Union, according to their respective Numbers," which were to be determined by an "actual Enumeration." U.S. Const. art. I § 2 Cl. 3. While the Sixteenth Amendment subsequently removed the taxation issue from the apportionment equation, by then the Fourteenth Amendment had reconfirmed that congressional apportionment consider "the whole number of persons in each State." U.S. Const. amend. XIV § 2.

Moreover, without distributive accuracy among the states in the census count itself, the constitutional mandate that states "make a good-faith effort to achieve precise mathematical equality" among districts in intrastate districting plans is impossible. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). Thus, concern with distributive accuracy—and with preventing partisan meddling with the census counts—pervades the Court's census cases. In *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 464 (1992), for example, the Court noted that even Congress's apportionment decisions, which can never result in a totally equitable distribution because the population is unevenly divided and each state must have at least one representative, must nevertheless proceed with "good-faith."

Ensuring that the census count proceed with distributive accuracy to achieve these ends has been a hallmark of the Court's jurisprudence in this area. For example, in holding that the Bureau may use imputation to count households that have not responded to the questionnaire, the Court

determined that the history of the Enumeration Clause and early practice "all suggest a strong constitutional interest in accuracy," and noted that in the imputation context, "an interest in accuracy here favors the Bureau." *Utah v. Evans*, 536 U.S. 452, 478 (2002). *See also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348–49 (1999) (Scalia, J., concurring in part) (suggesting that the Founders' "genuine enumeration" was the "most accurate way of determining population with minimal possibility of partisan manipulation").

From the earliest days of the census, an "actual enumeration" meant not only a person-by-person count, but also one that aspired to "the greatest precision possible under the circumstances."[6] Thus, the first Census Act required the marshals who conducted the census to swear to make "a just and perfect enumeration," and obligated them to transmit "accurate returns" under penalty of a two-hundred-dollar fine. Act of Mar. 1, 1790, §§ 1–2 1 Stat. 101–102. In 1991, Congress required the Secretary to conduct a study to determine the "means by which the Government could achieve the most accurate count possible." Pub. L. 102-135 § 2(a)(2), 105 Stat. 635. This philosophy pervades the government's approach to the count through more modern times. Thus, in 1997, Congress issued findings that "it is essential that the decennial enumeration of the population be as accurate as

[6] Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an Actual Enumeration*, 77 Wash. L. Rev. 77:1 at 52 (2002).

possible, consistent with the Constitution and laws of the United States." Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2481 (1997).

In light of this jurisprudence and history, it is unsurprising that even when holding that the Secretary acted within his discretion—for example, by allocating employees temporarily stationed overseas to their home states—the Court has considered "whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

This is the standard the California district court applied and under which it found, based on the evidence presented at trial, that adding the question on the 2020 Census violates the Enumeration Clause. As the district court stated, adding the citizenship question will "significantly impair the distributive accuracy of the census because it will uniquely and substantially impact specific demographic groups." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 122. Because adding the question will cause a disproportionate undercount in states where noncitizens are concentrated, those states will be underrepresented in Congress, eroding the very principle of representative democracy. It will also affect San Jose and BAJI's members, because, as the *Wisconsin* Court held, "[t]oday, census data also have important consequences not delineated in the Constitution, [including] dispensing funds through

federal programs to the States." *Wisconsin*, 517 U.S. at 6.

B. The Constitutionality Of The Secretary's Decision To Add A Citizenship Question Must Be Determined On A Fact-Intensive Examination As Occurred In The California District Court

The *Wisconsin* test requires that the Secretary's conduct bear a "reasonable relationship" to distributive accuracy, and constitutional tests regarding reasonableness are traditionally fact-intensive examinations. Thus, in *Wisconsin* itself, the Court considered factual evidence, including testimony, to hold that the Secretary had "made a reasonable choice in an area where technical experts disagree" by declining to use a postenumeration survey ("PES") statistical adjustment on the census. *Wisconsin*, 517 U.S. at 23.

Importantly, the examination is context-specific. The government contends that the existence on prior censuses of questions relating in some way to citizenship status ends the inquiry. *See* Brief for Petitioners at 54. But the issue here is whether the ***specific*** question that Secretary Ross ordered to be placed on the ***specific*** return-mail questionnaire to be used for the 2020 Decennial Census bears "a reasonable relationship to the accomplishment of an actual enumeration of the population," keeping in mind the "strong constitutional interest in accuracy" and in particular distributive accuracy among the states. *Wisconsin*, 517 U.S. at 20; *Evans*,

536 U.S. at 478. As the California district court put it, "[t]he 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." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 124.[7]

The constitutionality of the effect of posing ***this*** question to ***these*** populations can be assessed only in the context of ***these*** times. This is consistent with the Court's approach to issues whose constitutional import may be affected by the social context of their era. The Court has considered this context in a number of constitutional settings.

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[7] Although the New York district court referred to a "nearly unbroken practice" over "two centuries" of "including a question concerning citizenship on the census" in dismissing respondents' Enumeration Clause claims, *State of New York v. United States Department of Commerce*, 315 F. Supp. 3d 766, 803 (S.D.N.Y. 2018), that court's description was not fully accurate. Leading census historian Professor Margo Anderson, who testified at the California trial, explained that no citizenship question has ever been placed on a return-mail questionnaire sent to every household. *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 177-1 ¶¶ 11–13. Indeed, according to Professor Anderson, "Posing a question on citizenship to the respondents of the 2020 Decennial Census, as Secretary Ross directed in his March 26, 2018 memorandum, would break from historical census practice." *Id.* ¶ 14. Even had there been precisely the same question asked in precisely the same form in 1950, methods of testing the effect of that question on the accuracy of the census have improved in the past 70 years.

For example, in determining whether a "duly convened and elected legislative body" had violated the Constitution by redrawing municipal boundaries, the Court "freely recognize[d] the breadth and importance of this aspect of the State's political power." *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960). But after considering the "concrete situation" posed by redrawing the boundaries of Tuskegee, Alabama, to remove nearly all of its black voters from the city, the Court held that the city had "exploit[ed] a power acknowledged to be absolute in an isolated context to justify the imposition of an unconstitutional condition." *Id.* at 347.

Just a few years ago, the Court found that the formula determining coverage under Section 5 of the Voting Rights Act was constitutional when it was passed in 1965 and when it was included in subsequent legislation in 1973, 1980, and 1999, but not in 2013, in part because the constitutional analysis depends upon "current conditions." *Shelby County, Ala. v. Holder*, 570 U.S. 529, 557 (2013).

Not long before, in *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003), the Court held that consideration of race in college admissions was constitutionally acceptable in 2003 because it was necessary in order to achieve student body diversity under the societal conditions negatively affecting minority applicants at the time. But the Court suggested that such policies might no longer be constitutional in 2028 because these conditions might no longer be present. *Id.* As Justice O'Connor emphasized in *Grutter*, in some constitutional analyses, "[c]ontext

matters." *Id.* at 327. As in *Shelby County*, the Court in *Grutter* considered evidence of social context, including evidence relating to the role of law schools in America, the law schools attended by senators, and the "number of minority applicants with high grades and test scores." *Id.* at 332, 343.

In its Eighth Amendment jurisprudence, the Court has long recognized that it must consider "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Court has considered the practices of various states or foreign countries in finding that the Eighth Amendment bars the execution of the mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002), or those who were under eighteen at the time they committed a crime. *See Roper v. Simmons*, 543 U.S. 551, 564 (2005). Neither *Atkins* nor *Roper* suggests that earlier decisions holding that such executions were constitutional had been made in error. Rather, the Court considered evidence showing a "trend toward abolition of the practice" of executing juvenile offenders as "sufficient evidence that ***today*** our society" considers juveniles less culpable, and ruled that what society considers today is decisive. *Roper*, 543 U.S. at 567 (emphasis added).

A publication may be barred as obscene in one jurisdiction and protected by the First Amendment in another because in the latter it comports with the "contemporary community standards of decency." *Miller v. California*, 413 U.S. 15, 31 (1973). Such "contemporary" standards may by definition change over time, and the *Miller* court

recognized that they may change from one state to the next. *Id.* at 33 ("People in different States vary in their tastes and attitudes"). And changing social conditions, such as "the increasing professionalism of police forces, including a new emphasis on internal police discipline," *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006), can lead the Court to reconsider the proper remedies for constitutional violations.

Context matters most in tests—including the *Wisconsin* test—that involve "reasonableness." While the Fourth Amendment commands "that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). And "the purpose that reasonable participants would have had" in talking to the police during an emergency can determine whether those statements are ultimately admissible over a Confrontation Clause objection. *Michigan v. Bryant*, 562 U.S. 344, 360 (2011).

C. The Evidence Showed That Adding A Question In The Current Macro-Environment Will Diminish Distributive Accuracy

At trial in the California Matters, the San Jose Parties introduced evidence that in today's macro-environment, the question will cause an undercount of Latinos and noncitizens, which will disproportionately affect California and New York. A good part of this evidence came from the testimony and documents of the Bureau itself, which acknowledged the effect that the current

macro-environment would have if the citizenship question were added to the 2020 census.

In 2017, the Bureau's Center for Survey Management ("CSM") reported that during field studies unrelated to confidentiality, respondents "spontaneously" brought up confidentiality concerns "at a much higher rate than CSM researchers had seen in previous pretesting projects." (PTX-157 at 1). The CSM report found "deliberate falsification of the household roster, and spontaneous mention of concerns regarding negative attitudes towards immigrants" at levels that were "largely unprecedented." (PTX-157 at 3). And the Census Barriers, Attitudes, and Motivators Study ("CBAMS"), which comprises dozens of focus groups, concluded that the citizenship question would be a major barrier to participation. Moreover, Latino respondents in nearly all locations mentioned the citizenship question before the moderator even asked about it. (PTX 153 at 22).

Indeed, by the time the California Matters were tried, the Bureau's conclusion that adding a citizenship question would lead to an initial drop in nonresponse rates had been published in a peer-reviewed journal (the "Brown Study"). (PTX-160). *See* J. David Brown et al., *Estimating the Potential Effects of Adding a Citizenship Question to the 2020 Census*, IZA Institute of Labor Economics, IZA DP No. 12087 (January 2019). The Brown Study analyzed a natural experiment based on the responses to the 2010 American Community Survey ("ACS") (which contained a citizenship

question) and the 2010 Decennial Census (which did not). The study concluded that "adding a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens, resulting in more nonresponse follow-up ("NRFU") fieldwork, more proxy responses, and a lower-quality population count." (PTX-160 at 54). The Brown Study concluded that if the citizenship question were added to the 2020 questionnaire, noncitizens would fail to respond at a rate 5.8% higher than if it were not. (PTX-160 at 39). At trial, the government's expert, Dr. John Abowd, acknowledged that this conclusion is "conservative" and that the true nonresponse rate is "likely to be higher." (Tr. at 932:22–933:4).

Further, Dr. Abowd admitted that adding the question will increase the nonresponse rate, will degrade data quality, and will not provide more accurate citizenship data. (Tr. at 929:23–931:12). Dr. Abowd conceded that it is "highly unlikely" that NRFU operations or any other Bureau programs can eliminate the differential undercount of noncitizens and Latinos that the question will generate. (Tr. at 1008:13–1009:4).

Dr. Abowd further testified that the Bureau's own research "suggests negative implications for the current macro-environment on the effectiveness of NRFU if the census questionnaire were to include a citizenship question." (Tr. at 977:16–25). He agreed that it is "highly unlikely that the Census Bureau can adjust NRFU to eliminate the effects of adding the citizenship question on

response rates" and that the effects will carry all the way through "to the imputation stage" of NRFU. (Tr. at 980:22–981:13).

The San Jose Parties' expert witness, Dr. Colm O'Muircheartaigh, a professor in the Harris School of Public Policy and a senior fellow at the National Opinion Research Center at the University of Chicago, further amplified how and why the addition of the citizenship question would exacerbate the differential undercount of noncitizens and Latinos. (Tr. at 40:2–4; 114:6–15). As Dr. O'Muircheartaigh put it, the conclusion that the "citizenship question will, one, depress self-response rates, particularly among Latinos and households containing non-citizens, and, two, harm the quality of the census data" is "the consensus among scientists within and outside the Census Bureau." (Tr. at 114:11–15).

According to Dr. O'Muircheartaigh, 1) adding the citizenship question will increase the nonresponse rate to the questionnaire for noncitizens and Latinos; 2) the current macro-environment will negatively impact the Bureau's NRFU operations; and 3) the Bureau's follow-up exercises—including the use of administrative records, proxy respondents, and various forms of imputation—will not remediate the undercount caused by the introduction of a citizenship question. (Tr. at 40:21–41:17). The district court credited this testimony in its findings of fact. *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 17.

Dr. O'Muircheartaigh explained that the initial nonresponse will be fueled by inaccurate "rostering," meaning that respondents will return the questionnaire but leave off household members for fear of revealing their citizenship status, and "the census protocol has no mechanism for remediating such a response." (Tr. at 147:10–149:9). Dr. O'Muircheartaigh stated that the question will have more "leverage" on noncitizens than on citizens and therefore will impact noncitizens' responses at a greater rate. (Tr. at 127:9–128:9). A citizenship question on the Decennial Census will have more "salience," or impact, relative to other questions than it did on the ACS, because the Decennial Census has fewer questions than the ACS. (Tr. at 144:23–145:11).

Dr. O'Muircheartaigh testified that the NRFU process will not successfully remediate the undercount. Analyzing the ACS's in-person follow-up efforts, which are recorded through the "Computer-Assisted Personal Interviewing" or CAPI process, Dr. O'Muircheartaigh testified that 1) in-person follow-up enumeration has decreased in effectiveness over time in all census tracts, 2) in-person follow-up enumeration has been differentially less effective in census tracts with a higher proportion of households containing a noncitizen than others, and 3) the difference in effectiveness between census tracts with lower proportions of noncitizen households and those with higher proportions of noncitizens households has grown over time. (Tr. at 180:12–181:3). Moreover, according to Dr. O'Muircheartaigh, a recent study by the General Accounting Office

found that the Bureau's NRFU enumerators were "not properly prepared for the challenges that the enumerators faced in the field," and suggested that the Bureau's NRFU protocols will not be "at least as good as they were in the past." (Tr. at 99:14–20; 101:20–102:4).

Finally, Dr. O'Muircheartaigh testified that imputation will not solve the problems created by adding the citizenship question because imputation is "never neutral." (Tr. at 210:16–25). Imputation relies on the data that has been collected to fill in for the data that has not been collected, and the collected data will have "influence proportional to their presence in the data that you have." (Tr. at 210:16–25). Thus, if a citizenship question is added to the 2020 Census, imputation will fail to mitigate the underrepresentation of Latinos because it will rely on the collected data that already underrepresents them. (Tr. at 211:10–212:6).

In sum, Dr. O'Muircheartaigh testified that all available evidence indicates that at every NRFU stage, including the imputation phase, the Bureau will be differentially less effective at counting noncitizens and Latinos—the very subpopulations most likely not to respond to the 2020 Census because of the citizenship question. (Tr. at 217:6–218:5).

There was substantial, uncontradicted testimony at the California trial regarding how the differential undercount resulting from the citizenship question will adversely impact communities with large Latino and immigrant

populations, as to both representation and federal funding. Dr. Bernard Fraga, a professor of political science at Indiana University Bloomington who writes on the relationship between representation and demographics, frequently relying on data from the Bureau, testified as to these harms at trial in the California Matters. He testified that because California has a higher percentage of noncitizens than any other state, under any scenario in which NRFU is less than 100% successful, "California will always have the largest undercount of all of the states due to the citizenship question." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 129 ¶ 64. The district court credited Dr. Fraga's testimony and found as a factual matter that California "faces a substantial risk of losing at least one seat as a result of the citizenship question." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 53.

Because the Latino percentage of San Jose's population is nearly double that for the United States as a whole, and the noncitizen percentage of San Jose's population is more than double that for the United States as a whole, the differential undercount of noncitizens and Latinos will affect the city disproportionately. *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 159 ¶¶ 1, 5, 11; Doc. 176 at 2. Dr. Andrew Reamer, a research professor at the George Washington Institute of Public Policy at The George Washington University, testified about the funding harms that adding the citizenship question will cause for the San Jose Parties. Dr. Reamer examined the funding formulas for twenty-four programs,

concluding that eighteen used population data regarding a state or locality. *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 179-1 ¶ 11. As he testified, "states in this case and local areas . . . that are undercounted at a greater level than the nation will see a loss in funding." (Tr. 678:7–10).

The evidence introduced at trial in the California Matters, and adopted by the district court in its findings of fact, showed that a "significant differential undercount, particularly impacting noncitizen and Latino communities, will result from the inclusion of a citizenship question on the 2020 Census, compounded by macro-environmental factors arising out of the national immigration debate." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 5.

Based on these findings, the California district court held that adding a citizenship question to the 2020 Decennial Census questionnaire would result in an undercount of certain states' populations, denying their residents equal representation, and that therefore "the inclusion of the citizenship question on the 2020 Census threatens the very foundation of our democratic system." *San Jose et al. v. Ross et al.*, 18-cv-2279 (N.D. Cal.) Doc. 196 at 126. Because adding the citizenship question undermines distributive accuracy, doing so violates the Enumeration Clause.

II. The Administrative Record Alone Supports The District Court's Finding That Secretary Ross Violated The APA

The San Jose Parties were the only plaintiff group among the six challenging the citizenship question to try their APA case solely upon the administrative record. While the San Jose Parties contend that the district court was fully justified in ordering extra-record discovery, they proceeded on the administrative record alone because that record itself presented a clear violation of the APA. The New York and the California district court each ruled that the administrative record alone established an APA violation. The Court need not go beyond the administrative record to find that:

- Secretary Ross demanded in early 2017, long before DOJ requested the citizenship question in its December 12, 2017 letter (the "DOJ Letter"), that the question be placed on the questionnaire, and then proceeded to create a post hoc, pretextual justification for his decision;

- In the March 26, 2018 Decisional Memo and the June 21, 2018 memorandum supplementing the administrative record, Secretary Ross did not fully describe the administrative process that had led to his decision or the real reasons behind it; and

- The Secretary's statements that 1) citizenship data would be most accurately provided to the Department of Justice through the combined use of a citizenship question on the census and

> administrative records and that 2) a citizenship question would not affect the quality of the census data were counter to all the evidence in the administrative record.

One unsupported statement in the Decisional Memo encapsulates the arbitrary and capricious process and decision here, namely that "[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." Pet. App. 562a. (Emphasis added).

The administrative record shows beyond dispute that the Secretary and his staff had spent months getting DOJ to recommend the question, and that until they did, DOJ itself had not considered obtaining block-level citizen voting age population ("CVAP") data to be of particular importance. And experts from the Bureau and elsewhere had spelled out to Secretary Ross the risks of adding the question. In light of the fact that DOJ had no great need for the data and the fact that the adverse effects were considerable, Secretary Ross's statement is simply implausible.

An "implausible" decision is arbitrary and capricious under the APA. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an administrative decision is arbitrary and capricious if it is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Dictionaries

define "implausible" as "not seeming reasonable or probable,"[8] "difficult to accept as true,"[9] or "provoking disbelief."[10] In assessing pleadings against a motion to dismiss, the Court applies the converse standard of "plausibility" as meaning something more than mere possibility, thus implying that implausibility is something short of utter inconceivability. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009), *citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Secretary's conclusion that "any adverse effects" to the census were not as important as providing DOJ with citizenship data—data that all the evidence shows will be less accurate with the question than without it—meets all of these definitions of implausible.

First, while Secretary Ross wrote in June 2018 that he "began considering" the citizenship question, among various census issues, in 2017, the record shows otherwise. Pet. App. 546a. In May 2017, the Secretary wrote that he was "mystified why nothing [has] been done in response to my months' old request to include the citizenship question. Why not?" (AR003710). This language does not suggest that the Secretary asked that the issue be analyzed, or that he requested an update of any analysis. Earl Comstock, Commerce's Director of Policy and Strategic Planning, had no doubt as to what the Secretary meant, responding,

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[8] Oxford English Dictionary 878 (3d ed. 2010).

[9] Macmillan English Dictionary For Advanced Learners 718 (2002).

[10] Miriam-Webster's Collegiate Dictionary 624 (11th ed. 2003).

"[O]n the citizenship question, we will get that in place." (AR003710).

The Secretary's efforts continued throughout the year. On November 27, 2017, he wrote, "Census is about to begin translating the questions into multiple languages and has let out the printing contract. *We are out of time*. Please set up a call for me with whoever is the responsible person at Justice. *We must have this resolved*." (AR011193). (Emphasis added). There is no evidence in the administrative record that the Secretary's firm desire to add the citizenship question was based on the DOJ Letter. After all, that letter was not issued until December 12.

Second, although the Secretary wrote that meeting DOJ's supposed need for the citizenship data outweighed any risks of harm to the census, the administrative record is clear that the Secretary had been informed through Comstock that DOJ's need was neither urgent nor a top priority. To the contrary, Secretary Ross's staff—and ultimately he personally—had to convince the DOJ to ask the Bureau to add the citizenship question. There is no evidence in the administrative record that DOJ had ever asked the Bureau to add a citizenship question to the census during the more than half-century that the Voting Rights Act had been in effect. Indeed, as recently as 2017, DOJ had communicated with the Bureau as to its needs for the 2020 Census and had not mentioned citizenship.

Moreover, Secretary Ross had personally directed his staff to find an agency to ask that the question be added, and they reported to him that they had asked DOJ to do so and had been rebuffed. Responding to the Secretary's May 2017 demand to add the citizenship question, Comstock wrote, "We need to work with Justice to get them to request that citizenship be added back as a census question." (AR003710). Then, as detailed in his September 8 memo to the Secretary, Comstock spent months bouncing from agency to agency: first DOJ's immigration section, then Homeland Security, and then back to DOJ, futilely seeking any agency's assistance in asking for the citizenship question. (AR012756).

In the end, it took Secretary Ross's own intervention with the Attorney General to get DOJ to ask for the question. On August 8, Secretary Ross wrote that "[i]f they still have not come to a conclusion . . . I will call the AG." (AR003984). Only this intervention led to a positive response from DOJ, which wrote, "it sounds like we can do whatever you all need us to do." (AR002637). Not what *you* (Commerce) can do for *our* needs, but what *we* (Justice) can do for *your* needs. The administrative record provides no support for the proposition that the need for a citizenship question was a high priority for DOJ, and in fact shows that Secretary Ross had already been informed that it was not.

Third, the Bureau had presented the serious risks of adding the citizenship question directly to Secretary Ross, and outside experts who met with

him had done the same. In December 2017, when the Bureau was first made aware of the effort to add the question, it unequivocally advised the Secretary that adding the question would be "very costly, [would harm] the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources." (PTX-22 at 1).

No evidence in the administrative record counters the Bureau's studies; no evidence suggests that adding the citizenship question will improve the collection of any census data, including citizenship data.

Indeed, the administrative record contains warnings to Secretary Ross of additional and even graver risks. Commenters (including six former directors of the Bureau, representing administrations of both political parties) explained why adding the question could lead to greater undercounts, particularly of communities of color and immigrants. *Iqbal* instructs that courts must use "judicial experience and common sense" in assessing plausibility. *Iqbal*, 556 U.S. at 679. When the plain language of the administrative record is viewed with common sense, it is simply not plausible that providing inaccurate data to an agency that had never even hinted that it needed it, and had to be coerced into requesting it, could be more important than the loss of quality of the census.

The administrative record alone—the plain language of Secretary Ross's emails and those of

his subordinates—provides all the evidence necessary to demonstrate the arbitrariness of the Secretary's decision.

CONCLUSION

For the reasons set forth above, the Court should affirm the ruling of the district court regarding the APA claim and reverse the ruling of the district court regarding the Enumeration Clause.

Respectfully submitted,

JOHN F. LIBBY
Counsel of Record
BARRY S. LANDSBERG
RONALD B. TUROVSKY
ANDREW C. CASE
ANA G. GUARDADO
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
JLibby@manatt.com
(310) 312-4000

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
DORIAN L. SPENCE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600

MARK ROSENBAUM
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977

CITY OF SAN JOSE
RICHARD DOYLE, CITY ATTORNEY
NORA FRIMANN, ASSISTANT CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY

200 East Santa Clara Street,
16th Floor
San Jose, California 95113-1905
(408) 535-1900
cao.main@sanjoseca.gov

DAVID L. SHAPIRO
OF COUNSEL TO MANATT, PHELPS &
PHILLIPS, LLP
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 491-2758

Counsel for Amici
City of San Jose and Black Alliance for
Just Immigration