IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, *Defendants*.	Civil Action No. 18-2921 (JMF)

BRIEF OF CURRENT MEMBERS OF CONGRESS AND BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current members of Congress and bipartisan former members of Congress who have a strong interest in ensuring that the Census Bureau respects its constitutional duty to count all persons living in the United States, citizen and noncitizen alike. As current and former members of Congress, *amici* know that Census data is used to make critically important decisions, including regarding how representatives are apportioned in Congress; how Electoral College votes are distributed amongst the states; how state, local, and congressional districts are drawn; and how billions of dollars of federal funds to local communities are allocated. Thus, *amici* also appreciate that failing to count *all* persons in the United States—as our Constitution requires—would be enormously damaging, and the consequences of an unfair, inaccurate count would endure for at least the next ten years, and possibly much longer. *Amici* thus have a strong interest in this case.

INTRODUCTION

The Census is the cornerstone of our democracy. To ensure equal representation for all, the Constitution, through both Article I, Section 2 and the Fourteenth Amendment, explicitly requires the federal government to accurately conduct an "actual Enumeration" of the people. U.S. Const. art. I, § 2, cl. 3. This critical, all-inclusive constitutional language places a clear duty on the federal government to count the "whole number of persons in each State." U.S. Const. amend. XIV, § 2. In other words, the federal government must count *all* people living in the United States, whether they are citizens or noncitizens, whether they were born in the United States or in a distant part of the world. The total-population standard—chosen by our Constitution's Framers more than two centuries ago and reaffirmed following a bloody civil

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

war—was considered the "natural & precise measure of Representation," 1 *The Records of the Federal Convention of 1787*, at 605 (Max Farrand ed., 1911), and "the only true, practical and safe republican principle," Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). "Numbers, not voters; numbers, not property; this is the theory of the Constitution." *Id.* "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents." *Evenwel v. Abbot*, 136 S. Ct. 1120, 1132 (2016). The Constitution draws no distinction between citizens and noncitizens, but rather requires that the "whole immigrant population should be numbered with the people and counted as part of them." Cong. Globe, 39th Cong., 1st Sess. 432. It imposes a constitutional duty on the federal government to conduct a complete and accurate count of everyone in order to realize 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).

The Constitution's mandate that the federal government count the population of the entire nation to ensure equal representation for all persons creates a "strong constitutional interest in accuracy." *Utah v. Evans*, 536 U.S. 452, 478 (2002). The Framers knew that "those who have power in their hands will . . . always when they can . . . increase it," 1 *The Records of the Federal Convention* at 578, and they enshrined the requirement that all persons be counted directly into the Constitution to "shut[] the door to partiality or oppression," *The Federalist No. 36*, at 188 (Hamilton) (Clinton Rossiter rev. ed., 1999), and prevent the government from using "a mode" of taking the census "as will defeat the object[] and perpetuate the inequality," 1 *The Records of the Federal Convention* at 571. The federal government may not manipulate the Census in order to make an end run around the Constitution's requirement to count all persons, citizen and noncitizen alike. Yet that is what is happening in this case.

On March 26, 2018—many years into preparation and testing for the 2020 Census—the Secretary of the U.S. Department of Commerce ordered the Census Bureau to add a citizenship question to the Census, turning a blind eye to the overwhelming evidence that this question will deter participation by immigrants across the country, who do not want an official record of their immigration status and fear that their responses will be used by the government to harm them and their families. *See* Am. Compl. ¶¶ 36-54.

The Census Bureau has long recognized that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count." *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (three-judge court). This is particularly true today, given threats by the Trump Administration that every undocumented immigrant in the country "should be uncomfortable," "should look over [their] shoulder," and "need[s] to be worried." *Immigration and Customs Enf't and Customs and Border Protection Fiscal Year 2018 Budget Request: Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 115th Cong. 279 (2017) (statement of Thomas D. Homan, Acting Dir., Immigration and Customs Enf't). Indeed, the Census Bureau's own evidence demonstrated "an unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants." Mikelyn Meyers, Ctr. For Survey Mgmt., U.S. Census Bureau, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census* 15 (Nov. 2, 2017), https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf. But the Secretary added the citizenship question to the 2020 Census anyway, ignoring the overwhelming evidence that it would undermine the constitutionally required count of all persons.

To make matters worse, the Secretary of Commerce announced that the government would use administrative records to double-check the accuracy of responses to the citizenship question, *see* Paul Overberg & Janet Adamy, *Trump Administration Plans To Check Your Answer on Census Citizenship Question*, Wall St. J. (Apr. 3, 2018), https://www.wsj.com/articles/trump-administration-plans-to-check-your-answer-on-new-census-citizenship-question-1522781033, exponentially increasing the chilling effect of the citizenship inquiry, and refused to subject the citizenship question to the careful testing the Census Bureau routinely uses to ensure that the questions on the Census accurately count all persons, *see* Am. Compl. ¶¶ 55-77. In the past, the Census Bureau has rigorously tested Census questions, recognizing that there are no do-overs when it comes to the Census, but inexplicably the Secretary refused to test the citizenship question at all. These actions, absent this Court's intervention, threaten to undermine the constitutional requirement that there be an "actual Enumeration" of all persons in the country.

Urging this Court to dismiss this case at the outset, the Department of Justice offers an extremely cramped interpretation of the Census Clause. According to the Department of Justice, the Constitution does not require the government to produce an accurate count of all persons at all, but simply requires it to "put in place procedures to count the population," Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 2; *id.* at 30-31, even if those procedures skew the count and bias the results, as the citizenship question certainly would. This view is at odds with the constitutional commitment to count all persons, which reflects a "strong constitutional interest in accuracy," *Evans*, 536 U.S. at 478, and it would license the kind of political manipulation of our Constitution's promise of equal representation that the Framers wrote the Census Clause to

prevent. The government may not rig the constitutionally required count to produce a disproportionate undercount of disfavored segments of the population.

The Secretary, of course, has broad powers, delegated by Congress, to conduct the Census, and "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation,' it is within the limits of the Constitution." *Wisconsin v. City of New York*, 517 U.S. 1, 19-20 (1996) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992)). But the addition of the citizenship question bears no "relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 20. It is inconsistent with the text of the Constitution, which requires counting all persons, citizens and noncitizens alike, and would undermine the constitutional goal of equal representation, producing a disproportionate undercount of hard-to-count immigrant communities. Indeed, the Secretary has offered no Census-related purpose for asking all persons to divulge their citizenship status. The citizenship question will undermine—not realize—the "actual Enumeration" the Constitution mandates.

The Secretary justified the decision to add the citizenship question to the 2020 Census solely on the ground that it was necessary to enforce the Voting Rights Act, but the Secretary has no expertise or authority to enforce the Act, and his reasoning is manifestly false. A citizenship question has never been viewed as necessary to ensure robust protection of the right to vote free from racial discrimination. Indeed, since the passage of the Voting Rights Act in 1965, the Census has never asked all persons to report their citizenship status. This is a specious justification for undercutting what the Constitution mandates: a count of *all* the people, regardless of their citizenship status.

The motion to dismiss should be denied.

ARGUMENT

I. The Text and History of the Census Clause Require the Federal Government To Count All Persons To Ensure Equal Representation for All Persons.

In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 21 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter "*Elliot's Debates*"], Article I, Section 2 provides that "Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3. To ensure a proper count of the nation's total population, Article I, Section 2 requires that an "actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Id.*

In choosing the total-population standard, the Framers decreed "that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives." 1 *The Records of the Federal Convention* at 179. Determining representation in Congress based on a count of all persons reflected that "every individual of the community at large has an equal right to the protection of government." *Id.* at 473; *id.* at 477 ("[T]he people shd. be repre[se]nted in proportion to [their] numbers, the people then will be free."); *Evenwel*, 136 S. Ct. at 1129 (explaining that "the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters"). The idea that all persons should enjoy equal representation had deep roots in America's bid for independence from England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Records of the Federal Convention* at 464, in which "so many members were elected by a handful of easily

managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all," Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). The Declaration of Independence charged that King George III had forced the colonists to "relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (1776). Having seen the political system manipulated for partisan ends in England, the Framers strove to design a system that would reflect the principle that a "free and equal representation is the best, if not the only foundation upon which a free government can be built." 2 *Elliot's Debates* at 25. Of all "the electoral safeguards for the representational system," none "was as important to Americans as equality of representation." Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 170 (2d ed. 1998).

To achieve these goals, the Framers imposed on the federal government a duty to conduct a complete and accurate count of all people residing in the nation, creating a structural protection for equal representation. This was a revolutionary undertaking. "While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document." *Evans*, 536 U.S. at 510 (Thomas, J., concurring in part and dissenting in part); Margo Anderson, *The Census and the Federal Statistical System: Historical Perspectives*, 631 Annals of Am. Acad. of Poli. & Soc. Sci. 152, 154 (2010) ("With th[e Census Clause's] words, the United States became the first nation in the history of the world to take a population census and use it to allocate seats in a national assembly according to population."). Thus, at a time when "democratic self-government existed almost nowhere on earth," Akhil Reed Amar, *America's Constitution: A Biography* 8 (2005), the Framers made the Census the cornerstone of the democratic system of government they created.

The text of Article I, Section 2 provided a "conjectural ratio" for the apportionment of representatives "to prevail in the outset," but the Framers refused to permit guesswork to be used going forward. 1 *Records of the Federal Convention* at 578; *Evans*, 536 U.S. at 475 ("[T]he original allocation of seats in the House was based on a kind of 'conjectur[e],' in contrast to the deliberately taken count that was ordered for the future." (quoting 1 *Records of the Federal Convention* at 578-79)). As George Mason argued, "a Revision from time to time according to some permanent & precise standard" was "essential to [the] fair representation required in the 1st. branch." 1 *Records of the Federal Convention* at 578. While the Framers did not prescribe a "detailed census methodology," *Evans*, 536 U.S. at 479, they established a firm rule that the political branches cannot vary: all persons must be counted, regardless of where they are from.

Wary that those in power might try to undermine the promise of equal representation for all, the Framers insisted on an "actual Enumeration"—a national count of all inhabitants—once every ten years. As Founding-era dictionaries make clear, "an 'enumeration' requires an actual counting." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (1999) (Scalia, J., concurring in part) (collecting dictionary definitions); *Evans*, 536 U.S. at 475 ("Late-18th-century dictionaries define the word simply as an 'act of numbering or counting over[.]'" (quoting 1 Samuel Johnson, *A Dictionary of the English Language* 658 (4th rev. ed. 1773))). As James Madison observed during debates over the First Census Act, while "there will be more difficulty attendant on taking the census, in the way required by the [C]onstitution," a count of all persons would provide "an exact number" rather than "assertions and conjectures." James Madison, *Census* (Feb. 2, 1790), *in* 13 *The Papers of James Madison* 15-16 (Charles F. Hobson & Robert A. Rutland eds., 1981). The constitutional requirement of an "actual Enumeration" would help ensure that "every individual of the community at large has an equal right to the protection of

government," 1 *Records of the Federal Convention* at 473, and prevent political manipulation of our democratic system of government.

As the debates in the Constitutional Convention over the Census Clause reflect, the Framers understood that "those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." *Id.* at 578; *Evans*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part) (observing that "[d]ebate about apportionment and the census . . . focused for the most part on creating a standard that would limit political chicanery"). The Framers' decision to mandate a national count of all inhabitants every ten years to ensure equal representation for all persons "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised." 2 Joseph Story, *Commentaries on the Constitution* § 633, at 141 (1833). As Alexander Hamilton emphasized, "[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectively shuts the door to partiality or oppression." *The Federalist No. 36*, *supra*, at 188 (Hamilton).

During the debate on the Census Clause in the Constitutional Convention, both supporters and opponents recognized that a fixed constitutional standard would limit opportunities for manipulation of our representative democracy. Gouverneur Morris opposed the Census Clause as "fettering the Legislature too much," but he recognized that if the mode for taking the Census was "unfixt the Legislature may use such a mode as will defeat the object[] and perpetuate the inequality." 1 *Records of the Federal Convention* at 571. In response, Edmund Randolph pointed out that "if the danger suggested by Mr. Govr. Morris be real, of advantage being taken of the Legislature in pressing moments, it was an additional reason for tying their hands in such a manner

that they could not sacrifice their trust to momentary considerations." *Id.* at 580. This argument carried the day, and the Framers concluded that "the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." *Id.* at 582.

The Constitution's rule that representatives would be apportioned based on an "actual Enumeration" of the people, however, was undercut by the Three-Fifths Clause, which provided that, for the purpose of determining representation in Congress, enslaved persons would be counted as three-fifths of a person. "The more slaves the Deep South could import from the African continent—innocents born in freedom and kidnapped across an ocean to be sold on auction blocks—the more seats it would earn in the American Congress." Amar, *supra*, at 90. During the debates in the Convention, Gouverneur Morris and others argued strenuously against the adoption of the Three-Fifths Clause, pointedly asking "[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?" 2 *The Records of the Federal Convention* at 222. The upshot of the Clause was that "the inhabitant of Georgia and S. C. who goes to the coast of Africa, and . . . tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind." *Id.* Despite these arguments, the Convention approved the Three-Fifths Clause, which it deemed a compromise necessary to ensure the Constitution's ratification. Nearly 80 years later, following a bloody civil war fought over our nation's original sin of slavery, the Framers of the Fourteenth Amendment would revisit the Constitution's system of representation in the wake of emancipation and abolition, as the next Section discusses.

II. The Fourteenth Amendment Reaffirmed the Constitutional Obligation To Count All Persons, Citizens and Noncitizens Alike.

With the adoption of Section 2 of the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," U.S. Const. amend XIV, § 2, the Founding generation's commitment to equal representation for all as determined by a national count of all persons was finally realized. Yet it took seven months of heated debate for this guarantee of equal representation for all persons to emerge. During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. The Framers of the Fourteenth Amendment decisively rejected those arguments and reaffirmed total population as the Constitution's basis for representation. *Evenwel*, 136 S. Ct. at 1128. As Jacob Howard explained in introducing the Fourteenth Amendment, "numbers," i.e., total population, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767.

When the Thirty-Ninth Congress met in December 1865, questions of representation were front and center. With the Three-Fifths Clause a nullity and the full personhood of formerly enslaved African Americans recognized for the purpose of representation, the Framers of the Fourteenth Amendment were concerned that the Southern states would gain an ill-gotten windfall: far more representation in Congress and in the Electoral College than they had before they had seceded from the Union. *See, e.g.*, *id.* at 357 ("Shall the death of slavery add two fifths to the

entire power which slavery had when slavery was living?"). As the Joint Committee on Reconstruction, which was tasked with writing the Fourteenth Amendment, explained, "[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative." *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xiii (1866).

During debates over the Fourteenth Amendment, many urged a fundamental change in constitutional principles of equal representation, insisting that "representation shall be based on citizens of the United States who may be male adult voters" so that "every voter should be equal in political power all over the Union." Cong. Globe, 39th Cong., 1st Sess. 404. Some even called for overhauling the Census Clause and putting in its place a "true census of the legal voters." *Id.* at 10. But, as the Supreme Court has recognized, "[v]oter-based apportionment proponents encountered fierce resistance . . . . Much of the opposition was grounded in the principle of representational equality." *Evenwel*, 136 S. Ct. at 1128. Supporters of the Fourteenth Amendment argued that such a change in our Constitution's system of representation would be "an abandonment of one of the oldest and safest landmarks of the Constitution" and would "introduce[] a new principle in our Government, whose evil tendancy and results no man can measure to-day." Cong. Globe, 39th Cong., 1st Sess. 377. Instead, the Reconstruction Framers insisted on "leav[ing] the primary basis of representation where it was placed by our fathers, the whole body of the people." *Id.* at 385.

Particularly relevant here, Rep. John Bingham argued that it would be unwise to "strike from the basis of representation the entire immigrant population not naturalized," observing that "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population

of this country is included in the basis of representation." *Id.* at 432. In his view, the "whole immigrant population should be numbered with the people and counted as part of them." *Id.*; *id.* at 411 (arguing that representation based on number of voters "takes from the basis of representation all unnaturalized foreigners"). Others made similar arguments, insisting that representation should be based "on the largest basis of population, counting every man, woman, and child," *id.* at 1280, and that "the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution," *id.* at 705. The Fourteenth Amendment proponents refused to "throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women," insisting that "[a] community may be represented, every man in the community may be represented, and every woman and child in the community may be represented, and yet not every man twenty-one years of age be a voter." *Id.* at 1256, 1279-80. "All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." *Id.* at 2962.

These proponents of equal representation ultimately carried the day, and Congress adopted the Fourteenth Amendment, insisting that total population, not citizen or voter population, was the basis for our Constitution's system of representation. The Fourteenth Amendment, which was approved by the people and became a part of the Constitution in 1868, reaffirmed that our Constitution's system of equal representation for all depends on a count of the nation's entire population, including noncitizens. As this history shows, the purpose of the Census required by the Constitution has never been to count just citizens, but rather to count "the whole body of the people." *Id.* at 385.

III. Congress's Power To Determine the "Manner" of Taking the Census Does Not Permit an End Run Around the Constitutional Duty To Count All Persons.

As the Complaint alleges, the Secretary's eleventh-hour decision to add an untested citizenship question to the 2020 Census and to double-check individual responses, which will deter participation by citizens and noncitizens in immigrant communities, cannot be squared with the constitutional requirement to count all persons. Am. Compl. ¶¶ 5, 178. This decision will undermine the constitutionally required count, create a disproportionate undercount of disfavored groups, and skew the data used to ensure equal representation for all persons. The federal government, however, contends that it may ask all persons to divulge their citizenship because "the Constitution commits the '[m]anner' of conducting the census to Congress, and Congress has delegated that authority to the Secretary in . . . broad terms," Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 12; *id.* at 34. But the Secretary's authority to prescribe the "[m]anner" for taking the constitutionally required count of all persons is not a blank check. The Secretary's discretion, though undeniably broad, does not permit him to make an end run around the Constitution's mandate to count all persons, citizens and noncitizens alike. The Secretary cannot rig the Census to disproportionately undercount disfavored groups of persons. As the Supreme Court's cases make clear, the principle of equal representation for all persons remains the touchstone. *See Wisconsin*, 517 U.S. at 19-20 ("[S]o long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation,' it is within the limits of the Constitution." (quoting *Franklin*, 505 U.S. at 804)).

Curbing manipulation of the Census by the political branches was one of the main reasons for writing the Census directly into the Constitution. The Framers knew that "those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." 1 *The Records of the Federal Convention* at

578. Aware that population counts could be skewed, the Framers wrote the requirement for a count of all persons directly into the Constitution to "shut[] the door to partiality or oppression," *The Federalist No. 36*, *supra*, at 188 (Hamilton), and prevent the government from using "a mode" of taking the Census "as will defeat the object[] and perpetuate the inequality," 1 *The Records of the Federal Convention* at 571. The Framers "t[ied] their hands" and prevented the political branches from "sacrific[ing] their trust to momentary considerations." *Id.* at 580. If the federal government had the unfettered power to manipulate the rule of the Census to undercount disproportionately a disfavored group of persons, it could undo "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry*, 376 U.S. at 18; *Dep't of Commerce*, 525 U.S. at 348 (Scalia, J., concurring in part) (rejecting construction of the "Manner" clause that would give "the party controlling Congress" the power "to distort representation in its own favor"). "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

Recognizing that the federal government may not use its authority to determine the "manner" of conducting the Census to make an end run around its duty to count all persons is consistent with limits on similar grants of power in the Constitution. For example, the Elections Clause, which allows states to regulate the "manner" of holding federal elections, *see* U.S. Const. art. I, § 4, cl. 1, "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001), but does not permit a state to "evade important constitutional restraints," *U.S. Term Limits*, 514 U.S. at 834; *see Wesberry*, 376 U.S. at 6 ("[N]othing in the language of [the Elections Clause] gives support to a

construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." (internal citation omitted)); *Tashijian v. Republican Party of Conn*., 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or . . . the freedom of political association."). Likewise, the Full Faith and Credit Clause, which establishes a constitutional command of full faith and credit, *see V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016) (per curiam), and then grants Congress the power to "prescribe the manner" in which certain laws and proceedings "shall be proved, and the effect thereof," U.S. Const. art. IV, § 1, does not permit Congress "to repeal, or vary the full faith and credit" required by the Clause, 3 Joseph Story, *Commentaries on the Constitution* § 1306, at 182 (1833); *see* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 Iowa L. Rev. 1, 20-21 (1997) ("The Effects Clause is immediately preceded by a clear, self-executing command, in the first sentence of the Full Faith and Credit Clause, that full faith and credit 'shall be given' to each state's laws. The second sentence should not be read in a way that contradicts the first. . . . Congress may not exercise its Effects Clause powers in a way that contradicts the self-executing command."); Douglas Laycock, *Equal Citizens of Equal Territorial States: The Constitutional Foundation of Choice of Law*, 92 Colum. L. Rev. 249, 292 (1992) (discussing the Framers' conscious choice to "make the clause self-executing, commanding full faith and credit in the constitutional text and making congressional action discretionary," instead of "leaving . . . implementation of the command to Congress"). Thus, the Secretary's delegated power to determine the manner of conducting the Census, although broad, must be exercised consistent with the Census Clause's requirement that there be an "actual Enumeration" of all persons

residing in the United States, citizen and noncitizen alike.

IV. Addition of the Untested Citizenship Question Does Not Advance Any Legitimate Governmental Interest.

The Secretary's decision to add a citizenship question to the 2020 Census and double-check individual responses bears no "relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin*, 517 U.S. at 20. The citizenship question does not help fulfill the constitutionally mandated "actual Enumeration," and the Secretary did not claim that any Census-related, informational purpose would be served by asking all persons to divulge their citizenship status. Instead, the Secretary justified his decision to add the citizenship question to the 2020 Census solely on the ground that it is necessary to enforce the Voting Rights Act, a statute that the Secretary does not administer. This flimsy rationale cannot survive even the most cursory review. The Secretary should not have "bootstrap[ped] [him]self into an area in which [he] has no jurisdiction." *Epic Sys. Corp. v. Lewis*, Nos. 16–285, 16–300, 16–307, 2018 WL 2292444, at *14 (U.S. May 21, 2018) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)); *id.* ("courts must exercise independent interpretative judgment" when the statute at issue is one the relevant agency does not administer).[2]

First, since the passage of the Voting Rights Act in 1965, the Census has never asked all persons to report their citizenship status. Such data is not necessary to enforce the Voting Rights

[2] The federal government makes much of the fact that previous Censuses included questions relating to citizenship. Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 3-6, 32. But the decision to add the citizenship question now is unlike any other past decision to include the question: the Secretary plans to add a citizenship question in the face of reams of evidence that the addition of such a question will vitiate the constitutionally mandated count of all persons, without any Census-related purpose, and based on an entirely novel, unsupported voting rights justification outside the Secretary's ken. Past practice offers no support for this decision.

Act. For the last 53 years—until this eleventh-hour proposal to add a citizenship question to the 2020 Census—no one has ever suggested that enforcement of the Voting Rights Act was hampered by the failure of the Census Bureau to ask all persons residing in the United States to divulge their citizenship status. Neither members of Congress, nor civil rights lawyers who bring lawsuits to enforce the Voting Rights Act, nor the U.S. Department of Justice, nor state and local governmental entities that defend their electoral practices, have claimed that citizenship should be asked of all persons on the Census to ensure proper enforcement of the Act. *See, e.g.*, *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 14 (2018) (testimony of Professor Justin Levitt) ("Despite a deep commitment to enforcing the Voting Rights Act . . . we never requested that the decennial enumeration include a question relating to citizenship. Nor had the Civil Rights Division of any Justice Department, under any Administration, for the previous 53 years."). The citizenship question is a solution in search of a problem.

Second, citizenship data—which is just one of many pieces of evidence currently used to prove a violation of the Voting Rights Act—is already available through the American Community Survey, and litigants and courts have been using this data to evaluate Voting Rights Act claims for years. "Although U.S. Census data may not be perfectly accurate, it is routinely relied upon in § 2 cases." *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1393 (E.D. Wash. 2014). The Secretary has offered no reasoned explanation that could justify turning a blind eye to more than a half-century of judicial enforcement of the Voting Rights Act without a citizenship question on the Census.

Third, although the American Community Survey data is far from perfect, the data that will result from the addition of this citizenship question will almost certainly be even worse.

Because the citizenship question will chill participation by citizens and noncitizens in immigrant communities, it will produce inaccurate data, which will skew how courts evaluate voting rights claims. This will fall hardest on the very communities the Act protects. Rather than helping to enforce the Voting Rights Act, the citizenship question will produce a disproportionate undercount of minority communities, which will make it harder for them to claim the Voting Rights Act's protection. Thus, contrary to the Secretary's claim, adding an untested citizenship question to the Census will actually disserve the goal of enhanced voting rights enforcement, undermining the data that courts currently use to enforce the Act.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Dated: June 15, 2018

/s/ David H. Gans
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APPENDIX – LIST OF *AMICI*

U.S. Senators

Schatz, Brian
Senator of Hawai‘i

Bennet, Michael F.
Senator of Colorado

Blumenthal, Richard
Senator of Connecticut

Booker, Cory A.
Senator of New Jersey

Duckworth, Tammy
Senator of Illinois

Durbin, Richard
Senator of Illinois

Harris, Kamala D.
Senator of California

Hirono, Mazie
Senator of Hawai‘i

Nelson, Bill
Senator of Florida

Wyden, Ron
Senator of Oregon

U.S. House of Representatives

Maloney, Carolyn
Representative of New York

Barragán, Nanette Diaz
Representative of California

Berman, Howard
Former Representative of California

LIST OF *AMICI* – cont'd

Beyer Jr., Donald S.
Representative of Virginia

Blumenauer, Earl
Representative of Oregon

Brown, Anthony G.
Representative of Maryland

Capuano, Michael
Representative of Massachusetts

Carbajal, Salud O.
Representative of California

Cárdenas, Tony
Representative of California

Carson, André
Representative of Indiana

Chu, Judy
Representative of California

Cicilline, David N.
Representative of Rhode Island

Clarke, Yvette D.
Representative of New York

Clay, Wm. Lacy
Representative of Missouri

Cleaver, II, Emanuel
Representative of Missouri

Clyburn, James
Representative of South Carolina

Cohen, Steve
Representative of Tennessee

Connolly, Gerrold
Representative of Virginia

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Correa, J. Luis
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Courtney, Joe
Representative of Connecticut

Crowley, Joe
Representative of New York

Cuellar, Henry
Representative of Texas

Cummings, Elijah E.
Representative of Maryland

Davis, Danny K.
Representative of Illinois

DeGette, Diana
Representative of Colorado

Delaney, John K.
Representative of Maryland

DeLauro, Rosa L.
Representative of Connecticut

DeSaulnier, Mark
Representative of California

Deutch, Ted
Representative of Florida

Dingell, Debbie
Representative of Michigan

Ellison, Keith
Representative of Minnesota

Engel, Eliot L.
Representative of New York

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Representative of Connecticut

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Representative of Florida

Fudge, Marcia L.
Representative of Ohio

Gallego, Ruben
Representative of Arizona

Gomez, Jimmy
Representative of California

Green, Gene
Representative of Texas

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Representative of Arizona

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Representative of Illinois

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Representative of Hawai'i

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Representative of Florida

Hoyer, Steny
Representative of Maryland

Jackson Lee, Sheila
Representative of Texas

Jayapal, Pramila
Representative of Washington

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Representative of Michigan

Larson, John B.
Representative of Connecticut

Lawrence, Brenda L.
Representative of Michigan

Lee, Barbara
Representative of California

Lewis, John
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Lofgren, Zoe
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Lowenthal, Alan
Representative of California

Lowey, Nita
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Representative of Massachusetts

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McCollum, Betty
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McEachin, A. Donald
Representative of Virginia

McGovern, James P.
Representative of Massachusetts

McNerney, Jerry
Representative of California

Meeks, Gregory W.
Representative of New York

Meng, Grace
Representative of New York

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Representative of Wisconsin

Morella, Constance
Former Representative of Maryland

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Napolitano, Grace F.
Representative of California

Nolan, Rick
Representative of Minnesota

Norcross, Donald
Representative of New Jersey

Norton, Eleanor Holmes
Representative of District of Columbia

Pallone, Frank Jr.
Representative of New Jersey

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Panetta, Jimmy
Representative of California

Pascrell, Bill Jr.
Representative of New Jersey

Pelosi, Nancy
Representative of California

Perlmutter, Ed
Representative of Colorado

Pingree, Chellie
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Representative of Colorado

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Representative of Illinois

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Representative of Nevada

Roybal-Allard, Lucille
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LIST OF *AMICI* – cont'd

Rush, Bobby L.
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Sánchez, Linda T.
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Sherman, Brad
Representative of California

Sires, Albio
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Representative of Washington

Smith, Peter
Former Representative of Vermont

Soto, Darren
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Speier, Jackie
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Takano, Mark
Representative of California

Thompson, Bennie G.
Representative of Mississippi

Thompson, Mike
Representative of California

LIST OF *AMICI* – cont'd

Titus, Dina
Representative of Nevada

Torres, Norma J.
Representative of California

Vargas, Juan
Representative of California

Vela, Filemon
Representative of Texas

Velázquez, Nydia M.
Representative of New York

Walz, Tim
Representative of Minnesota

Wasserman Schultz, Debbie
Representative of Florida

Watson Coleman, Bonnie
Representative of New Jersey

Waxman, Henry A.
Former Representative of California

Welch, Peter
Representative of Vermont

Yarmuth, John
Representative of Kentucky

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2018, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: June 15, 2018

/s/ David H. Gans
David H. Gans