

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NEW YORK IMMIGRATION COALITION,
CASA DE MARYLAND, AMERICAN-
ARAB ANTI-DISCRIMINATION
COMMITTEE, ADC RESEARCH
INSTITUTE, and MAKE THE ROAD NEW
YORK,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE; and WILBUR L. ROSS, JR., in
his official capacity as Secretary of Commerce,
and

BUREAU OF THE CENSUS, an agency
within the United States Department of
Commerce; and RON S. JARMIN, in his
capacity as performing the non-exclusive
functions and duties of the Director of the U.S.
Census Bureau,

Defendants.

Civ. Action No. 18-05025 (JMF)

**PROPOSED BRIEF OF AMICI CURIAE NORMAN Y. MINETA, THE SAKAMOTO
SISTERS, THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS, NEW YORK, INC.,
AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT
OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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INTERESTS OF AMICI CURIAE

Norman Y. Mineta served as Secretary of Transportation under President George W. Bush, as Secretary of Commerce under President Clinton, as a member of the U.S. House of Representatives from 1975 to 1995, and as mayor of San Jose, California, from 1971 to 1975. He was 10 years old when the federal government removed him and his family from their home and incarcerated them with thousands of other Japanese Americans first at the Santa Anita racetrack in Southern California and then at the Heart Mountain camp in Wyoming. Norm's parents had to respond as non-citizens to the 1920, 1930, and 1940 Decennial Censuses because the United States Supreme Court made clear in *Ozawa v. United States*, 260 U.S. 178 (1922), that his parents — who emigrated from Japan — were not eligible for naturalized citizenship due to their Japanese ethnicity. Norm's parents were, however, able to respond to the 1940 Decennial Census that Norm — born in San Jose, California in 1931 — was a U.S. citizen. Citizenship, though, did not protect Norm and tens of thousands of other Japanese Americans from incarceration during World War II. Even though he was a young boy at the time, Norm clearly recalls being surprised that the federal government was able to so quickly round up many Japanese Americans from his community on the day of the bombing of Pearl Harbor and in the weeks that followed. Years later, he learned that the Census Bureau had provided critical information that facilitated the surveillance of Japanese American communities, as well as their eventual exclusion and incarceration.

Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker are three sisters who spent World War II incarcerated at the Minidoka concentration camp in Idaho. Their parents, Roy and Josephine Sakamoto, were American citizens born and raised in Washington State. Eileen was five years old and Joy was six months old when the federal government

removed them, their parents, and two brothers from their Seattle home and sent them all to live in a converted horse stall at the Puyallup Fairgrounds south of Seattle. The federal government then moved them to Minidoka, where Sharon was born. Like Norm and his family, the Sakamoto family was unaware that the Census Bureau cooperated with military authorities in identifying where Japanese Americans lived. Sharon, Eileen, and Joy join as amici because they are deeply concerned that the proposed citizenship question on the 2020 Decennial Census will cause immigrants and other persons of color to avoid responding for fear that the information will be used to harm them, just as the federal government harmed Japanese Americans during World War II.

The Council on American-Islamic Relations, New York, Inc., (CAIR-NY) is the New York State affiliate of the nation's largest Muslim American civil rights and advocacy organization. Following the tragic attacks of 9/11, CAIR-NY aided Muslim New Yorkers impacted by the perceived misuse of census data. Shortly after 9/11, at the request of what is now U.S. Customs and Border Protection, the Census Bureau provided a list of U.S. cities that had more than 1,000 Arab American residents. Over a year later, it provided a zip-code-level breakdown of Arab American populations by country of origin. Government officials subsequently insisted that the Census Bureau disclosed this data to help notify travelers about currency reporting requirements and to improve airport signage. Muslim Americans, however, viewed these post-9/11 disclosures as pretextual and infected with animus, which reduced their trust and participation in the 2010 Decennial Census. CAIR-NY joins as amicus out of concern that the inclusion of a citizenship question in the 2020 Decennial Census will further erode Muslim Americans' trust and participation.

The Fred T. Korematsu Center for Law and Equality is a non-profit organization based at the Seattle University School of Law. It works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu — who defied military orders during World War II that ultimately led to the unlawful incarceration of 120,000 Japanese Americans — the Korematsu Center works to advance social justice for all. It has a special interest in addressing government action that harms classes of persons based on race or nationality.¹

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The decennial census depends on self-reporting and can only achieve its goal of enumeration when the public trusts that the Census Bureau will not misuse information. Since 1910, U.S. Presidents have issued decennial census proclamations that seek to reassure individuals and their communities that the Census Bureau will not harm them through the use or misuse of collected information.

Despite these assurances, there have been several notable breaches of trust during World War I, World War II, and after 9/11, which provide important context for why individuals and communities are suspicious of Defendants' inclusion of a citizenship question on the 2020 Decennial Census. The prior breaches of trust add plausibility to Plaintiffs' claims that this Court should scrutinize Defendants' deviation from ordinary procedures and timelines for adding questions to the decennial census, including Defendants' changing narrative about how they decided to add the new question.

The most notable breach was the Census Bureau's 1942 disclosure of data on the whereabouts of Japanese Americans in order to effectuate their mass removal and incarceration. The historical record is clear — and, indeed, the Census Bureau now admits — that it provided

¹ The Korematsu Center does not represent the official views of Seattle University.

the data that powered the machinery of mass removal and incarceration of Japanese Americans. After 9/11, the Census Bureau again provided to what is now U.S. Customs and Border Protection a list of cities having more than 1,000 Arab American residents and a zip-code-level breakdown of Arab Americans by country of origin.

The federal judiciary plays a vital role in ensuring that improper reasons such as racial animus do not infect the manner in which the Census Bureau conducts the decennial census. The political question doctrine does not insulate the federal government from judicial scrutiny of its actions because courts have manageable standards for applying the Constitution's Equal Protection Clause. Federal courts help maintain public trust and confidence in the decennial census when they police animus and enforce the boundaries of the Equal Protection Clause.

The Court should deny Defendants' Motion to Dismiss because the Census Bureau's prior breaches of public trust demonstrate that Plaintiffs' claims are plausible as pled.

ARGUMENT

I. PUBLIC TRUST IN THE CENSUS DERIVES FROM THE FEDERAL GOVERNMENT'S ASSURANCE THAT IT WILL NOT USE THE INFORMATION PERSONS PROVIDE IN A WAY THAT HARMS THEM OR THEIR COMMUNITIES.

The promise of data confidentiality is the primary mechanism by which the modern Census Bureau seeks to achieve a complete enumeration. It was not always so. As a means of achieving an accurate enumeration in the 1790 Decennial Census, the federal government posted draft census data in public places to shame noncompliant persons and levy community pressure on them. *See* Jason G. Gauthier, *Measuring America: The Decennial Census From 1790 to 2000*, at 102 (2002), available at <https://www.census.gov/prod/2002pubs/pol02-ma.pdf>.

By the twentieth century, however, the Census Bureau (created in 1902) had adopted a conciliatory approach to incentivize public compliance with the decennial census through data

confidentiality. See William Seltzer & Margo Anderson, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 JOURNAL OF OFFICIAL STATISTICS 1, 5 (2007), available at <https://tinyurl.com/ycdx7jkc>. In addition, President William Howard Taft sought to remove politics from the execution of the census by ordering the Secretary of Commerce and Labor to promulgate regulations to ensure that “the census shall not be made to serve the political purposes of any one.” *The Census and Politics*, N.Y. TIMES, at 8 (Aug. 18, 1909), <https://tinyurl.com/ydhcpl7k> (quoting President Taft’s letter). President Taft also issued a proclamation to assure the public about participating in the census, which declared:

The sole purpose of the census is to secure general statistical information . . . , and replies are required from individuals only to enable the compilation of such general statistics. The census has nothing to do with . . . army . . . service . . . , with the regulation of immigration, or with the enforcement of any national, State, or local law, or ordinance, nor can any person be harmed in any way by furnishing the information required. There need not be any fear that any disclosure will be made regarding any individual person or his affairs.

1910 Census Proclamation, U.S. CENSUS BUREAU, <https://tinyurl.com/y88tzaph> (last visited July 10, 2018). The sitting U.S. President has delivered an almost identical proclamation for every decennial census since President Taft. Seltzer & Anderson, *Challenges* at 5.

The purpose of these declarations has been to assure the American public that they could place their trust in the decennial census. Indeed, trust in the census was an avatar for trust in American civic institutions writ large. See Seltzer & Anderson, *Challenges* at 29. The presidential census proclamations align with the Census Bureau’s position that an accurate enumeration of the American populations demands public trust: there will not be an accurate count if the persons to be counted distrust the counter. See, e.g., Vincent P. Barabba & D.L. Kaplan, U.S. CENSUS BUREAU, *Statistical Techniques to Prevent Disclosure--The Right of Privacy vs. the Need to Know* (1975) (“Should the public’s confidence in the Bureau’s pledge of

confidentiality for their census returns erode, goodwill and cooperation will erode.”), *quoted in* U.S. DEPT. OF COMMERCE, *Report on Statistical Disclosure and Disclosure-Avoidance Techniques*, at 32 (1978), *available at* <https://tinyurl.com/y85zu8sz>.

Yet the Census Bureau almost immediately found it difficult to maintain the confidentiality it promised. In 1917, it disclosed “to courts, draft boards, and the Justice Department” the names of thousands of draft-age men who failed to register for the Selective Service during World War I. Seltzer & Anderson, *Challenges* at 7. In doing so, the Census Bureau’s Director concluded that “statistical confidentiality should be conditioned and compromised by more apparently pressing government needs.” *Id.* This disclosure opened the floodgates: “[O]nce census officials supported the initial release of information to draft boards in 1917, officials in other agencies, for example in the Justice Department, asked for further releases.” *Id.* at 9. “[I]n early 1920, while the enumerators were in the field, the Justice Department, on behalf of the Department of Labor, asked if the local enumerators in Toledo, Ohio, could provide information about individuals’ citizenship from the 1920 Census of Population . . . for use in deportation cases.” *Id.* at 8.

After World War I, Census Bureau Directors William Mott Steuart (1921-1933) and William Lane Austin (1933-1941) viewed regaining public trust through data confidentiality as a paramount duty. *See* Seltzer & Anderson, *Challenges* at 9-10, 16. Yet by 1941, as the United States faced the prospect of World War II, President Franklin D. Roosevelt “sought a mechanism to permit the administrative and intelligence agencies access to individual level information collected by the U.S. Census Bureau.” *Id.* at 16. President Roosevelt “involuntarily retired” Director Austin and nominated a more compliant Director, J.C. Capt. *Id.* at 17. Director Capt immediately “authorized the Commerce Secretary to provide officials in other government

agencies access to confidential census data for the national defense program.” *Id.* Within a year, Congress passed the Second War Powers Act of 1942, Pub. L. No. 77–507, 56 Stat 176 (Mar. 27, 1942), which stated “[t]hat notwithstanding any other provision of law, . . . data . . . in the possession of the Department of Commerce or any bureau or division thereof, may be made available . . . to any branch or agency of the Government . . . for use in connection with the conduct of the war.” *Id.* § 1402. This statute temporarily obviated the existing statutory confidentiality protection for census data, 13 U.S.C. §§ 8-9 (1940).

II. THE UNITED STATES USED THE DECENNIAL CENSUS AS A TOOL IN FURTHERANCE OF WORLD WAR II JAPANESE AMERICAN INCARCERATION.

The most glaring and heinous example of how the Census Bureau violated public trust is the primary role it played in the mass removal and incarceration over 120,000 Japanese Americans during the spring of 1942.

“The historical record is clear that senior Census Bureau staff proactively cooperated with the internment, and that census tabulations were directly implicated[.]” U.S. CENSUS BUREAU POLICY OFFICE, A MONOGRAPH OF CONFIDENTIALITY AND PRIVACY IN THE U.S. CENSUS, at 16 (July 2001), *available at* <https://tinyurl.com/yda5rur3>. The Census Bureau now admits to “providing 1940 census data on Japanese Americans” to the War Department, specifically the Western Defense Command, “for small geographic areas down to the census tract and block level.” *Id.* at 15. Scholars refer to this tract and block level information as “mesodata, that is, the use of census results for very small geographic units.” William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War*, at 5 (Mar. 28, 2000) (unpublished draft), *available at* <http://perma.cc/NJH3-RADN>.

The Census Bureau's 2001 admission that it provided such data confirmed the Western Defense Command's contemporaneous report during the incarceration. U.S. General John L. DeWitt, Commander of the Western Defense, authored what the government offered as the military's official account of the wartime removal and incarceration in 1943. J.L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (June 5, 1943), available at <https://tinyurl.com/ybxwqwc2>. The report detailed how the Census Bureau performed a "special tabulation" of the 1940 Decennial Census data for the Western Defense Command, which "plotted on maps . . . the total number of Japanese individuals and families . . . for each census tract." *Id.* at 86. Specifically, the census provided "tables" showing "various city blocks where the Japanese lived and . . . how many were living in each block." REPORT OF THE COMMISSION OF WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (CWRIC), PERSONAL JUSTICE DENIED, at 105 n.* (1982), available at <https://tinyurl.com/ycnhbckk>. This information allowed the Western Defense Command to round-up of Japanese Americans — what General DeWitt referred to as the "logistics of evacuation" — with swift and surgical precision. DeWitt, *Final Report* at 356. Indeed, General DeWitt concluded that the "[t]he most important single source of information prior to the evacuation was the 1940 Census of Population," which "became the basis for the general evacuation and relocation plan." DeWitt, *Final Report* at 352; *see also id.* at 79 (census data that was "[o]f prime importance in shaping the evacuation procedure").

Other available history confirms that the Census Bureau's assistance was central to the mass removal and incarceration of Japanese Americans. In February 1942, the Census Bureau deployed the head of its statistical research division, Calvert Dedrick, "to the Western Defense Command to assist in the implementation of the evacuations." Margo Anderson, *Public Management of Big Data: Historical Lessons from the 1940s*, FEDERAL HISTORY, at 22 (2015),

available at <https://tinyurl.com/ycnml58o>. Dedrick later testified the Western Defense Command asked him for “a detailed cross-tabulation for even the most minute areas” such as “cities by block.” Seltzer & Anderson, *After Pearl Harbor* at 7. Dedrick agreed and provided the Western Defense Command unpublished data from the 1940 Decennial Census “to find where the citizens of Japanese descent lived” and to identify for the Western Defense Command “exactly the city blocks where the people of Japanese descent lived.” *Id.* at 29-30 (quoting Jerry N. Hess, *Oral History Interview with Tom C. Clark*, HARRY S. TRUMAN LIBRARY, at 58-59 (Oct. 17, 1972, and Feb. 8, 1973), available at <https://tinyurl.com/y8j7bkrm>). One member of the Western Defense Command who worked with Dedrick recalls that the 1940 census data was “amazing” and accurate “within 1/2 of 1 percent of the actual figures.” *Id.* at 30.

The Census Bureau also disclosed information about individual Japanese Americans to other federal agencies during the incarceration. William Seltzer & Margo Anderson, *Census Confidentiality under the Second War Powers Act (1942-1947)*, at 5 (Mar. 12, 2007) (unpublished draft), available at <https://tinyurl.com/ydxat2sy>. In 1943 — pursuant to the Second War Powers Act — the U.S. Treasury Department requested from the Commerce Department “a list of the Japanese residing in the Metropolitan Area of Washington, D.C., as reported in the 1940 Census, including information as to addresses[.]” *Id.* at 16 & Fig. 1. The Commerce Department complied within seven days by creating a spreadsheet that listed the “name, address, sex, age, marital status, citizenship status, status in employment, and occupation and industry” of 79 Japanese Americans in Washington, D.C. *Id.* at 21-22 & Figures 5a-b. The rapidity of the disclosure demonstrates that “the Bureau not only provided identifiable micro-data on Japanese Americans to other federal agencies but also had well-developed procedures to do so expeditiously.” *Id.* at 24. At the very least, the 1943 Washington, D.C. disclosure is strong

evidence that “lists of Japanese Americans from the 1940 Census were provided to assist in the mopping up stages of the round-up of Japanese Americans on the West Coast.” *Id.* at 40.

This history lays bare how the United States used the 1940 Decennial Census for the purpose of rounding-up and incarcerating Japanese Americans. This occurred despite President Roosevelt’s 1940 proclamation promising that “[t]here need be no fear that any disclosure will be made regarding any individual person or his affairs,” and that “[n]o person can be harmed in any way by furnishing the information required.” *Proclamation 2385: Sixteenth Decennial Census* (Feb. 9, 1940), in 1940 SUPPLEMENT TO THE CODE OF FEDERAL REGULATIONS 26-27 (1941), available at <https://tinyurl.com/ya9jywnl>. The example of Japanese Americans renders plausible Plaintiffs’ concern that the federal government may use citizenship data for improper political purposes or in ways that will harm them or their communities.

III. JUDICIALLY MANAGEABLE STANDARDS EXIST TO DETERMINE IF THE DECISION TO INCLUDE DEFENDANTS’ PROPOSED CITIZENSHIP QUESTION IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE.

Since the founding, Article III federal courts have served as a counter-majoritarian bulwark against encroachment on constitutional rights by the coordinate, elected branches of the federal government. *See Marbury v. Madison*, 1 Cranch 137, 176 (1803) (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”). “[O]ne aspect of the judiciary’s role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ from majoritarian prejudice or indifference[.]” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938)). “[I]t has long been generally accepted that the courts have a special role to play in defending the liberties enshrined in the Constitution against

encroachment even by the people’s elected representatives.” *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 164 (2d Cir. 2018) (en banc) (Lohier, J., concurring) (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

Article III federal courts exercise this role by resolving constitutional cases and controversies where there are manageable standards to do so. A court evaluating “the right to equal protection . . . is not called upon to ‘enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar[.]’” *City of New York v. U.S. Dep’t of Commerce*, 34 F.3d 1114, 1128 (2d Cir. 1994) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)), *rev’d sub nom. on other grounds Wisconsin v. City of New York*, 517 U.S. 1 (1996). “Equal protection doctrine exemplifies the pervasiveness of judicially developed and manageable standards in constitutional law.” Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1297 (2006).

This Court should reject Defendants’ contrary notion that adding a citizenship question to the 2020 Decennial Census is a nonjusticiable political question and scrutinize the “manner” in which Congress “direct[s]” the Commerce Department to conduct the 2020 Decennial Census, U.S. CONST. art. I, § 2, cl. 3, under the Equal Protection Clause. *Id.* at amend V. The key information that the Census Bureau disclosed during World War II was not just where Japanese Americans resided, but also how many were non-citizens, which the government used to bolster its rationale about their supposed lack of loyalty to the United States. *See Seltzer & Anderson, Census Confidentiality* at 16. This use of information about citizenship provides historical precedent that should lead this Court to scrutinize why, after decades of not collecting it, the government now seeks this information in the 2020 Decennial Census. Probing scrutiny is

especially warranted here because Defendants' stated reason for seeking citizenship information — enforcement of the Voting Rights Act — may be pretext for animus that violates the Constitution's Equal Protection Clause.

Consider, for example, if Defendants had stated, when introducing the new citizenship question, their "hope this change results in the Census Bureau counting fewer Latinos." It strains credulity to suggest, as Defendants do, that no Latino could access Article III courts on those facts. *See* Opposition at 23 [Dkt. 155, SDNY No. 1:18-cv-02921-JMF]. To force disfavored minorities out of the courthouse and into the political headwinds in Congress would abdicate this Court's essential role in the constitutional structure that entrusts the Judiciary with the protection of fundamental rights.

The Executive Branch's prior use of census data to achieve obviously unconstitutional ends is a reminder of the constitutional costs and human suffering that flow from the Judiciary's failure to rein in sweeping Executive Branch action against disfavored minorities. This Court should evaluate the implications of Defendants' conduct under the Equal Protection Clause and affirm the Founders' visionary principle that an independent and vigilant judiciary is a foundational element of a healthy democracy.

CONCLUSION

For the reasons set forth above, the public's trust that data provided for the decennial census will remain confidential is the foundation of an accurate and complete enumeration. The historical misuse of confidential data during World War I and World War II, and after 9/11, provide important context for why individuals and communities are suspicious of the inclusion of a citizenship question on the 2020 Decennial Census. The Court should deny Defendants' motion to dismiss Plaintiffs' complaint.

DATED: July 10, 2018

Respectfully submitted,

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