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 of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners

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QUESTIONS PRESENTED

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq*.

2. Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

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INTEREST OF AMICUS CURIAE[1]

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation's mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. The Foundation also seeks to ensure that voter qualification laws and election administration procedures are followed. Specifically, the Foundation seeks to ensure that the nation's voter rolls are accurate and current, working with election administrators nationwide and educating the public about the same. The Foundation's President and General Counsel, J. Christian Adams, served as an attorney in the Voting Section at the Department of Justice. Mr. Adams has been involved in multiple enforcement actions under the Voting Rights Act and has brought numerous election cases relying on Census population data. Additionally, one of the members of the Foundation's Board of Directors, Hans von Spakovsky, served as counsel to the assistant attorney general for civil rights at the Department of Justice, where he provided expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002. The Foundation believes that this brief—drawing from the expertise of the Foundation's counsel and the Foundation's experience itself—will aid in the Court's consideration of

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

whether the lower court erred in enjoining the Secretary of Commerce from reinstating the citizenship to the 2020 decennial census.

SUMMARY OF ARGUMENT

As the lower court acknowledged (Pet. App. 40a), the U.S. Department of Justice ("DOJ") requested that the Census Bureau resume its practice of gathering citizenship data, stating that such "data is critical to the Department [of Justice]'s enforcement of Section 2 of the Voting Rights Act." Pet. App. 564a. The DOJ, as a statutorily designated enforcer of the Voting Rights Act, understands the importance of "a reliable calculation of the citizen voting age population in localities where voting rights violations are alleged or suspected." Pet. App. 564a-565a.

Yet, when evaluating the Secretary of Commerce's decision, the lower court stated that "there is reason to doubt that *DOJ itself* believed the VRA rationale" found in its request. Pet. App. 124a (emphasis in original). In other words, the lower court believed that the federal executive department entrusted "[t]o enforce the law and defend the interests of the United States according to the law,"[2] would issue a request on false pretenses. The lower court's foundation for this statement?

> DOJ had never before cited a VRA-related need for citizenship data from the decennial census; never before asserted that it had failed to bring or win a VRA case because of the absence of such data; and never before

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[2] About DOJ, U.S. Department of Justice, https://www.justice.gov/about.

> claimed that it had been hampered in any way by relying on citizenship estimates obtained from sample surveys.

Pet. App. 125a.

The Foundation seeks to bring to the Court's attention two serious flaws with the lower court's premise. First, it avoided the empirical use of citizenship related data in the enforcement of federal law. A recent case where relevant citizenship data from a decennial census *was* available, illustrates the utility of such data. In *Davis v. Guam*, the district court relied heavily on Census data showing which inhabitants of the territory were U.S. citizens and which ones were non-U.S. citizens, data that, fortunately, was collected by the 1950 Census. *Davis v. Guam*, No. 11-00035, 2017 U.S. Dist. LEXIS 34240, at *15 (D. Guam Mar. 8, 2017). Because citizenship data was available for analysis, the court was able to ascertain that a Guam law restricting the right to vote in a particular election to only "Native Inhabitants of Guam" was a race-based restriction in violation of the Fifteenth Amendment to the Constitution. *Id.* at *37.

Second, the lower court focuses on the DOJ's past and current reliance on available citizenship data as evidence that more robust data is not needed and, because the Secretary failed to consider this, his action was arbitrary and capricious. Pet. App. 295a-297a.

Rather, the DOJ's past reliance demonstrates that it is familiar with the citizenship data presently available and therefore is in a position to request additional data for its enforcement efforts. The DOJ has determined that obtaining more robust citizenship data will allow those officials charged with enforcing

the Voting Rights Act to enjoy more precise citizen population data, particularly in small jurisdictions, and thus enhance enforcement of civil rights laws. Such progress should be championed, not condemned.

ARGUMENT

In casting doubt regarding the DOJ's stated purpose for the reinstatement of the citizenship question, the district court stated that "during the entire fifty-four-year existence of the VRA, DOJ has never had 'hard count' CVAP data from the decennial census." Pet. App. 296a-297a. However, the fact that the DOJ has not had the data in the past does not mean that it is not needed now.

I. The Citizenship Data from the 1950 Census Helped a Court Find Violation of the Right to Vote.

As the lower court acknowledged, "the government collected data about people's citizenship status from all households in the country in every census between 1820 and 1950 (with the exception of 1840)." Pet. App. 6a-7a. As noted above, such data from the 1950 Census was essential to the decision of the United States District Court for the District of Guam in *Davis v. Guam* (hereinafter, "*Davis*").

In *Davis*, the court confronted a Guam law establishing a "Political Status Plebiscite" that would allow those on the island to vote in a referendum regarding the territory's future status with the United States only if they were "native inhabitant[s] of Guam." *Davis*, 2017 U.S. Dist. LEXIS 34240, at *3. The plaintiff was denied the right to register to vote in the plebiscite because he did not satisfy this condition to register to vote. *Id.* Eligibility to vote was anchored to

1950. An eligible "Native Inhabitant of Guam" means "'those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Guam Organic Act and descendants of those persons.'" *Id.* (quoting 3 Guam Code Ann. § 21001(e)). Those who were on Guam in 1950 and became citizens by virtue of the 1950 Organic Act, and their blood descendants, were eligible to vote in the status plebiscite. Thus, the composition of citizens as compared to non-citizens on Guam in 1950 became highly relevant. Thankfully, the 1950 Census included a citizenship question.

Using citizenship data derived from the 1950 Census, the district court found that Guam's law violated the Fifteenth Amendment to the U.S. Constitution, because "Native Inhabitants of Guam" was a race-based classification. *Id.* at *12-28. Of the 26,142 non-U.S. citizens in Guam in 1950, the vast majority, or 25,788, were of Chamorro descent. *Id.* at *15. As a result of the court's analysis of the 1950 Census citizenship data, it determined that "the use of 'Native Inhabitants of Guam' as a requirement to register and vote in the Plebiscite is race-based and that the Guam Legislature has used ancestry as a racial definition and for a racial purpose." *Id.* at *18-19. Put simply, almost everyone who became a citizen by virtue of the 1950 Organic Act was of the Chamorro race, and therefore a law which anchors voting eligibility to that event violated the Constitution.

An appeal of the summary judgment finding in the plaintiff's favor is pending in the Ninth Circuit. No. 17-15719. On appeal, the United States filed an *amicus curiae* brief supporting the plaintiff-appellee and requesting that the district court decision be affirmed.

The United States relies on the citizenship data collected in the 1950 Census to support its position. Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellee and Urging Affirmance, No. 17-15719 at 4, 12-13, 18 (9th Cir., filed Nov. 28, 2017), *available at* https://www.cir-usa.org/legal_docs/davis_v_guam_doj_amicus.pdf.

The citizenship data collected during the 1950 Census was essential to the determination that Guam's plebiscite law unconstitutionally imposed a race-based restriction in violation of the Fifteenth Amendment. The *Davis* case undermines a core assumption of the district court and supports the DOJ's determination that the collection of citizenship data is critical to the enforcement of federal law.

II. Enforcement of Section 2 of the Voting Rights Act Requires Citizenship Data.

The DOJ correctly noted that more robust citizenship data will allow it to better enforce the Voting Rights Act. Pet. App. 564a-569a. The lower court called these statements into question, in part, because it "never before claimed that it had been hampered in any way by relying on citizenship estimates obtained from sample surveys." Pet. App. 125a.

As the DOJ stated in its request to the Secretary, it "believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than ACS citizenship estimates." Pet. App. 568a. Indeed, at present, citizenship data is not captured for smaller jurisdictions in the same way it is for larger jurisdictions. A rare Voting Rights Act case brought against a smaller jurisdiction was against

Lake Park, a small town in Palm Beach County, Florida. Complaint, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009). In the 2000 Census, 48 percent of Lake Park residents were black, but in 2009 not a single black candidate for town council had ever won a seat in the at-large voting plan. A large non-citizen Haitian population, however, made it less than clear what the precise black citizenship population was in Lake Park. The DOJ could not turn to the decennial census for precise citizenship data because precise citizenship data were not collected in the 2000 Census. While it is true that the United States alleged a sufficiently large black citizenship population to justify bringing the case, the extraordinarily large black population (more than 40%) made that an easier assertion to make. *See* Complaint at ¶ 8, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009).

In larger jurisdictions, the DOJ has consistently relied on CVAP data to enforce the Voting Rights Act. *See* Complaint at ¶ 6, *United States v. Euclid City School District Board of Education, OH*, No. 1:08-cv-02832 (N.D. Ohio 2008); Complaint at ¶ 12, *United States v. The School Board of Osceola County*, No. 6:08-cv-00582 (M.D. Fla. 2008); Complaint at ¶ 12, *United States v. Georgetown County School District, et. al.*, No. 2:08-cv-00889 (D.S.C. 2008); Complaint at ¶ 21, *United States v. City of Boston, MA*, No. 05-11598 (D. Mass. 2005); Complaint at ¶ 17, *United States v. Osceola County*, No. 6:05-cv-1053 (M.D. Fla. 2005); Complaint at ¶ 16, *United States v. Alamosa County*, No. 01-B-2275 (D. Colo. 2001); and Complaint ¶ 15, *United States v. Charleston County*, No. 2-01-0155 (D.S.C. 2001).

While in the past the DOJ used the American Community Survey to estimate the citizen population, seeking more precise data would aid enforcement of the law by protecting conclusions about citizenship population from impeachment by a defendant in a Voting Rights Act case. While American Community Survey estimates may be helpful, they are more liable to differences in expert opinion, and thus harder to defend in an enforcement action. That the DOJ did not emphasize that the current means of enforcement has a flaw should not be surprising. It is also obvious that better data means better enforcement of the Voting Rights Act. Better data means fewer ambiguities and a less contentious battle of demographer experts, a battle that may be avoided in the future if this Court reverses.

CONCLUSION

Robust citizenship data from a decennial census has aided in the enforcement of federal law in the past and will do so again. The determination to gather such data during the 2020 Census is logical, appropriate, and in accordance with law. For these reasons, the citizenship question should be reinstated on the 2020 Census.

Respectfully submitted,

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